STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission, On Its Own Motion vs. Commonwealth Edison Company Investigation into the compliance with the Efficiency Standard requirements of Section 8-103 of the Public Utilities Act.	))))))))))	Docket No. 11-0593

DRAFT PROPOSED ORDER SUBMITTED BY COMMONWEALTH EDISON COMPANY

Dated: June 13, 2013

TABLE OF CONTENTS

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PROPOSED ORDER

By the Commission:

I. Procedural History

On November 15, 2007, ComEd filed its 2008-2010 Energy Efficiency and Demand Response Plan ("2008-2010 Plan") pursuant to the requirements imposed by Section 8-103 of the Public Utilities Act ("Act"). For Plan Year 3 ("PY3"), ComEd was required to achieve an annual energy savings goal of 0.6% of energy delivered during the period June 1, 2010 through May 31, 2011 (220 ILCS 5/8-103(b)), and to reduce peak demand by 0.1% over the prior year for eligible retail customers. 220 ILCS 5/8-103(c). On August 23, 2011, pursuant to the schedule established by the Illinois Commerce Commission ("Commission") in ICC Docket No. 07-0540, the Commission entered its Order initiating this proceeding to investigate whether ComEd met its PY3 energy savings goal and is therefore in compliance with the Efficiency Standard requirements of Section 8-103.

On June 21, 2012, ComEd filed its Evaluation Report on Commonwealth Edison Company's Energy Efficiency/Demand Response Measures for the 2010-2011 Plan Year. ("Evaluation Report"). Direct Testimony relating to the Evaluation Report was filed by ComEd on July 25, 2012.

On August 16, 2012, the Commission's Staff ("Staff") and the Illinois Office of the Attorney General ("AG") filed Direct Testimony. In response, on September 20, 2012, ComEd filed Rebuttal Testimony and the Illinois Department of Commerce & Economic Opportunity ("DCEO") filed Direct Testimony. The AG and Staff filed Rebuttal Testimony on November 1, 2012, and ComEd filed Surrebuttal Testimony on December 5, 2012.

Pursuant to notice given as required by law and by the rules and regulations of the Commission, the evidentiary hearing in this proceeding convened at the Commission office in Chicago, Illinois on April 16, 2013, before a duly authorized Administrative Law Judge ("ALJ"). Appearances were entered by counsel on behalf of ComEd, Staff, AG and DCEO. ComEd presented the affidavit and testimony with attachments of Michael Brandt, ComEd's Manager – Energy Efficiency Planning & Measurement as well as the Evaluation Report. Staff presented the affidavit and testimony with attachments of Jennifer Hinman, an economic analyst in Staff's Policy Division. The AG presented the affidavit and testimony of Phillip Mosenthal, a partner in Optimal Energy, Inc., a consulting firm specializing in energy efficiency and utility planning. DCEO presented the testimony of Agnes Mrozowski, DCEO's Assistant Deputy Director for its Illinois Energy Office and an attachment, and on April 19, 2013 it submitted its evaluation, measurement and verification reports. At the conclusion of the hearing the record was marked heard and taken.

On May 21, 2013, Staff, AG and ComEd filed Initial Briefs, and on June 4, 2013 the same parties filed Reply Briefs. On June 13, 2013, the parties filed suggested Proposed Orders for the ALJ's consideration.

II. Background

Section 8-103 of the Act sets forth requirements for large electric utilities to develop and execute plans and programs to promote cost-effective energy efficiency and demand-response measures. 220 ILCS 5/8-103. The initial energy efficiency plans prepared by ComEd and DCEO were considered by the Commission in ICC Docket No. 07-0540. On February 6, 2008, the energy efficiency plans were approved by the Commission subject to the conditions, modifications, and requirements stated in the Commission's Final Order. *See Commonwealth Edison Co.,* ICC Docket No. 07-0540, (Order February 6, 2008) ("*2008-2010 Plan Order*").

Section 8-103 of the Act sets forth energy efficiency standards and provides for penalties if a utility does not meet these standards. 220 ILCS 5/8-103(i). Specifically, Section 8-103(b) requires that "[e]lectric utilities [] implement cost-effective energy efficiency measures to meet the following incremental annual energy savings goals: … 0.6% of energy delivered in the year commencing June 1, 2010" (220 ILCS 5/8-103(b)) and to reduce peak demand by 0.1% over the prior year for eligible retail customers (220 ILCS 5/8-103(c)). Section 8-103(e) of the Act further provides that ComEd must share the implementation of the energy efficiency measures with DCEO. It states that "[e]lectric utilities shall implement 75% of the energy efficiency measures approved by the Commission …. The remaining 25% of those energy efficiency measures approved by the Commission shall be implemented by [DCEO], and must be designed in conjunction with the utility and the filing process." 220 ILCS 5/8-103(e). According to Mr. Brandt, ComEd and DCEO calculated the split so that of the 584,077 MWh energy efficiency savings goal reflected in the 2008-2010 Plan, ComEd was responsible for 458,919 MWhs and DCEO was responsible for 125,158 MWhs. ComEd Ex. 1.0 Corr. at 3-4. ComEd agreed, however, to accept Staff witness Ms. Hinman's proposal that ComEd's PY3 energy savings goal was 458,656 MWh as reflected in DCEO's plan, rather than 458,919 MWhs, in order to narrow the issues in this docket. ComEd Ex. 2.0 at 2-3.

The Commission has also addressed and approved the “banking” methodology to be used. Banked savings are MWh savings in excess of the statutory energy savings goal that ComEd can save for use in future years. ComEd Ex. 1.0 Corr. at 6. In ICC Docket No. 07-0540, the Commission approved the banking of 10% of excess savings above goals to be applied to future year savings achievements. *See 2008-2010 Plan Order* at 41. And, in ICC Docket No. 10-0520, the Commission approved the methodology to be used in calculating banked savings. *See Commonwealth Edison Co.,* ICC Docket No. 10-0520 (Order May 16, 2012) (“*PY2 Goals Order*”). The Commission adopted Staff’s proposal and ruled that “banking” could only be achieved after the overall energy savings goal applicable to ComEd and DCEO was achieved. In other words, if DCEO fails to achieve its annual energy savings goal, ComEd’s performance must cover that shortfall sufficient to exceed the combined ComEd and DCEO energy savings goal for a given Plan year before banking is permitted. *See PY2 Goals Order* at 5.

III. Uncontested Issues

All parties agree that ComEd has achieved and exceeded its PY3 kWh energy savings goal. The exact amount of savings achieved, however, is contested and discussed in Section IV. A, *infra*. ComEd. Ex. 1.0 Corr. at 5; Staff Ex. 1.0 at 10; AG Ex. 1.0 at 6.

It is also undisputed that ComEd has achieved and exceeded its PY3 kW demand response savings goal through the implementation of the Air Conditioner Cycling Program element, which resulted in 14.7 MWs of kW savings and is 147% of the statutory goal. ComEd. Ex. 1.0 Corr. at 8; Staff Ex. 1.0 at 8; AG Ex. 1.0 at 7.

All parties agree that ComEd should be permitted to bank the maximum amount of energy savings permissible by law. The correct banking calculation methodology is contested, however, and discussed in Section IV. B, *infra*. ComEd. Ex. 1.0 Corr. at 7; Staff Ex. 1.0 at 17-19; AG Ex. 1.0 at 8-9.

Commission Analysis and Conclusions

Pursuant to Section 8-103 of the Act, for PY3, ComEd was required to achieve an annual energy savings goal of 0.6% of energy delivered during the period of June 1, 2010 through May 31, 2011 and to reduce peak demand by 0.1% over the prior year for eligible retail customers. All parties agree, and the evidence supports, that ComEd has achieved and exceeded the energy savings and demand response goals. Accordingly, based on the record herein, the Commission concludes that ComEd is in compliance with the efficiency standard requirements of Section 8-103 of the Act. Because all parties agree that ComEd met and exceeded the PY3 energy savings goal, no penalty is due. Furthermore, because the overall PY3 energy savings goal was achieved, ComEd is entitled to bank excess energy savings for use in complying with future Plan Years, as discussed in Section IV.B *infra*.

IV. Contested Issues

A. Adjustment to Appliance Recycling Program Savings

1. ComEd's Position

Mr. Brandt testified that as reflected in the Evaluation Reports, ComEd achieved 626,715 MWhs of savings, which amounts to 137% of the goal. Mr. Brandt explained that this result reflected combined savings achieved in ComEd's residential sector (386,548 MWhs) and in its commercial and industrial sector (240,166 MWhs). ComEd Ex. 1.0 Corr. at 5-6.

2. Staff's Position

3. AG's Position

4. ComEd's Response

ComEd believes that Ms. Hinman's proposed downward adjustment to the energy savings associated with the Appliance Recycling program incorrectly applies the results of the independent evaluator's PY4 *in situ* metering study of the unit energy consumption for refrigerators and freezers that were recycled during PY4 retroactively to PY3 Appliance Recycling program energy savings. According to ComEd, Staff's proposal should be rejected because it contradicts the independent evaluator's recommendation that the revised methodology, reflected in the *in situ* study, be applied beginning with PY4, not PY3, and that Staff has provided no sound basis for departing from the independent evaluator's professional and independent recommendation. ComEd Ex. 2.0 at 3; ComEd Rep. Br. at 1.

As an initial matter, ComEd observes that Staff's proposal contradicts the independent evaluator's recommendation that the revised methodology be applied prospectively rather than retroactively to prior Plan years such as this one. ComEd Init. Br. at 7. ComEd notes that the exhibits attached to Staff witness Hinman's direct testimony demonstrate this point. According to ComEd, Staff Ex. 1.3, which is the Appliance Recycling Program study, leaves no doubt regarding the date of its completion – its August 10, 2012 date confirms the study was completed in Plan Year 5. Staff Ex. 1.3 at 1. Moreover, the study concludes that "in future program years, the evaluation team believes that the preferred algorithm from this *in situ* metering study will provide more accurate estimates of savings in ComEd territory compared with estimates from the previous algorithm." Staff Ex. 1.3 at 4. ComEd further notes that the independent evaluator's recommendation that the study's results be applied prospectively is also highlighted in the independent evaluation reports themselves. *See* ComEd Ex. 5.0, PY3 Summary Report at 19-20; ComEd Ex. 5.0, PY3 Residential Appliance Recycling Report at 13, fn. 4, 48. ComEd also explains that it has worked with the Stakeholder Advisory Group to minimize the risk of retroactive application, which can subject the utility to harsh hindsight adjustments that the utility could not have anticipated or avoided. According to ComEd, Staff's proposal would do just that. ComEd Rep. Br. at 3.

While ComEd recognizes that the independent evaluator's results are not dispositive and the final determination is left to the Commission, ComEd states that these results are a very important piece of data that, in many instances, is the determining factor in the Commission's findings. ComEd Init. Br. at 7. According to ComEd, there are several reasons why the Commission should reject Staff's proposal to ignore the independent evaluator's recommendation.

First, ComEd witness Mr. Brandt testified that the retroactive application of the PY4 *in situ* study is incorrect because the *in situ* study was conducted during PY4 to review coefficients of the regression equation used to calculate gross kWh and kW savings for recycled appliances, and it was never intended for use in PY3. Also, the equipment tested was not from the PY3 customer base. He stated that because the market for old refrigerators and freezers changes over time due to the ComEd program, there is no reason to assume that savings on an individual appliance basis from PY3 would be the same as savings from a later Plan year. ComEd Ex. 2.0 at 4; ComEd Ex. 3.0 at 3-4.

Second, ComEd points out that Staff witness Ms. Hinman admitted in her rebuttal testimony that she picked and chose which variables to include in her analysis, some from PY3 and others from the PY4 *in situ* study. ComEd Init. Br. at 8; Staff Ex. 2.0 at 6-7. ComEd explains that it does not agree with Ms. Hinman's mix-and-match approach, there is no validity to it, and it is not supported by the independent evaluator or by any other evidence in this docket. *Id*.; ComEd Ex. 3.0 at 3.

Third, regarding Ms. Hinman's comments concerning ComEd endorsing use of the *in situ* study before PJM, Mr. Brandt testified that PJM's standards of precision do not address the <u>kWh</u> energy savings at issue in this docket. In other words, the fact that PJM will use the *in situ* study for <u>kW</u> impacts is irrelevant here and should not be relevant going forward. ComEd Ex. 3.0 at 4.

Finally, ComEd notes that the PY3 evaluation of the Appliance Recycling program is consistent with the approved PY2 evaluation in ICC Docket No. 10-0520 and the planning assumptions used for the program in both ICC Docket Nos. 07-0540 and 10-0570. Moreover, the status of discussions regarding savings values for future plan years is not relevant to this docket. According to ComEd, no evidence has been introduced in this proceeding that would imply that these assumptions are unreasonable. ComEd Ex. 3.0 at 5; ComEd Init. Br. at 8.

5. Commission Analysis and Conclusions

Staff proposes a downward adjustment to the PY3 energy savings associated with the Appliance Recycling program based on the results of a study completed in Plan Year 5 that focused on PY4. Because this study did not focus on PY3, we decline to adopt Staff's recommendation to apply the study's results retroactively to PY3. Notwithstanding that Staff's proposal is contrary to the independent evaluator's recommendation to apply these results prospectively, we find that Staff's approach is unsound because it mixes together variables from different studies without any explanation of why it chose to include some variables but not others. Finally, we agree with ComEd that retroactive application of evaluation studies can impose risks on utilities that they could not have anticipated or managed. In such cases, proposals for retroactive application are misguided because they reflect impermissible hindsight review. This is the case here.

For these reasons, we decline to adopt Staff's proposed adjustment. We defer to and adopt the recommendations of the independent evaluator and conclude that ComEd has achieved a savings of 626,715 MWhs during PY3, which far exceeds ComEd's PY3 energy savings goal of 458,656 MWhs. While the Appliance Recycling study will be applied prospectively, for purposes of this docket it is reasonable to rely on the same values and assumptions that were used in the PY2 docket and in the dockets to approve ComEd's energy efficiency plans. *See* ICC Docket Nos. 07-0540, 10-0520, 10-0570.

B. Banking of Energy Efficiency Savings That Exceed the PY3 Goal

1. ComEd's Position

ComEd witness Mr. Brandt testified regarding ComEd's "banked" MWhs. He explained that banked savings are MWhs in excess of the statutory energy efficiency goal that ComEd can save for use in future years. In ICC Docket No. 07-0540, the Commission approved the banking of 10% of excess savings above goals to be applied to future year savings achievements. *See 2008-2010 Plan Order* at 41. The Commission in ICC Docket No. 10-0520 further directed that "banking could only be achieved after the overall energy efficiency savings goal applicable to ComEd and DCEO was achieved." In other words, if DCEO fails to achieve its annual energy savings goal, ComEd's performance must cover that shortfall sufficient to exceed the combined ComEd and DCEO energy savings goal for a given Plan year. *See PY2 Goals Order* at 5. ComEd believes that consistent with the above Commission orders, the maximum number of MWhs that ComEd could potentially bank would be 10% of the combined ComEd and DCEO statutory goal of 584,077 MWhs or 58,408 MWhs. ComEd states that because ComEd achieved savings that exceeded the combined goal, ComEd is entitled to bank 58,408 MWhs despite the fact that DCEO did not meet its PY3 goal. ComEd calculates that after PY3, ComEd has a total of 97,777 MWhs banked. ComEd Ex. 1.0 Corr. at 6-8; ComEd Init. Br. at 9.

2. Staff's Position

3. AG's Position

4. ComEd's Response

Because it is undisputed that both Staff and ComEd have calculated banked savings in accordance with the methodology adopted by the Commission in its *PY2 Goals Order*, ComEd notes that the AG's challenge to that methodology is tantamount to an impermissible collateral attack on a prior Commission order. In other words, when the AG claims that "ComEd's method of calculating banked energy savings is wrong and should be reduced," the AG is actually arguing that the *PY2 Goals Order*'s "method of calculating banked energy savings is wrong." ComEd Rep. Br. at 4; AG Init. Br. at 7. ComEd notes that the AG is not merely proposing a tweak to the Commission-approved banking methodology that was adopted in the immediately preceding goals docket (as it suggests), but rather is asking the Commission to wholly repudiate that methodology. ComEd Rep. Br. at 4-5. In response to the AG's claims that the Commission's approval of the banking methodology was "at best an oversight" in the *PY2 Goals Order*, ComEd notes that the banking issue was the *only* contested issue in that case and thus received the full attention of the Commission. ComEd Init. Br. at 9.

ComEd specifically cites to the Commission's very recent decision in *Cbeyond Communications, LLC v. Ill. Bell Tel. Co.*, which makes clear that the Commission strongly disfavors untimely arguments regarding issues already decided in prior dockets. According to ComEd, here the AG's direct challenges to the *PY2 Goals Order's* decision to adopt Staff's proposed banking methodology represents just the sort of impermissible collateral attack that the Commission rejected in *Cbeyond*. *Cbeyond Commc'ns, LLC v. Ill. Bell Tel. Co., ICC Docket No. 11-0696 (Order March 27, 2013),* at 8-9 ("Additionally, the fact that Cbeyond now asserts the due process notion that the final Order in that docket was not sufficient regarding Cbeyond's Category 1 issue is also indicia that Cbeyond is indeed attacking that order."). ComEd further observes that the AG participated in the PY2 docket and voiced no objection to the methodology proposed by Staff that was ultimately adopted. ComEd Init. Br. at 10. ComEd explains that there are no new facts or bases upon which to revisit this recently decided issue, nor have any facts changed since that docket. *Id.* Indeed, ComEd points out that even AG witness Mosenthal concedes that his position is only tenable in the event that the Commission creates new banking rules and departs from those established in ICC Docket No. 10-0520. AG Ex. 2.0 Corr. at 6.

According to ComEd, the AG's disregard of the *PY2 Goals Order* is evident in the absence of any substantive discussion of that *Order* in the AG's briefs. While the AG criticizes Staff's and ComEd's use of the methodology adopted in that *Order* as illogical and contrary to the interests of customers, ComEd explains that neither claim is true. ComEd states that the *PY2 Goals Order* adopted Staff's proposal that banking could only be achieved after the overall savings goal applicable to ComEd and DCEO was achieved. In other words, if DCEO fails to achieve its annual energy savings goal, ComEd's performance must cover that shortfall sufficient to exceed the combined

ComEd and DCEO energy savings goal for a given Plan year. In support, ComEd states that this approach ensures that the energy savings goal for the given Plan year is achieved, while also ensuring that the full amount of banked savings is captured (*i.e.,* no more than 10% of the overall energy savings goal for the Plan year). ComEd Rep. Br. at 5-6. ComEd notes that Staff confirms this benefit: "[t]he banking approach the Commission adopted in the *Plan 1 Order* and reaffirmed in the *PY2 Savings Order* is beneficial in that it gives ComEd an incentive to fill shortfalls by DCEO, thereby helping to ensure that the goals set forth in Section 8-103(b) of the Act are achieved." Staff Init. Br. at 5.

According to ComEd, however, the AG's proposal would have the perverse effect of substantially diminishing this incentive. ComEd explains that although the AG proposal would similarly require ComEd to ensure that the overall Plan year goal is achieved (*i.e.*, ComEd would have to cover any DCEO shortfall before banking is permitted), the AG's proposal would then unfairly switch the focus back to only ComEd's goal by permitting ComEd to bank no more than 10% of its individual goal. In other words, after being called on to achieve its own goal <u>and</u> cover any DCEO shortfall, ComEd would then be limited to banking only 10% of its own goal. ComEd Rep. Br. at 6.

ComEd also notes that the AG's proposal results in discarding customer-funded energy savings. ComEd observes that no party disputes that customers fund the energy efficiency programs and the energy savings those programs achieve, and all parties also agree that the maximum amount of savings to be achieved for a given Plan year is no more than 10% in excess of that Plan year's combined energy savings goal. However, under the AG's proposal, ComEd states that even if it achieves both its own goal and makes up for DCEO's shortfall (as it did in PY3), then ComEd can only bank the 10% in excess of its own goal (and DCEO cannot bank any excess). According to ComEd, this means that a portion of the savings that could be banked would be orphaned despite customers having paid for those savings. ComEd Init. Br. at 10; ComEd Rep. Br. at 5-6. In the case of PY3, the amount of customer-funded energy savings that would be wasted under the AG's proposal is 12,516 MWhs. AG Init. Br. at 11.

5. Commission Analysis and Conclusions

While all parties agree that ComEd exceeded the PY3 energy savings goal and is entitled to the maximum banking permitted under law, the AG alone argues that the parties and this Commission should disregard the banking methodology adopted in the PY2 goals docket and instead adopt a different methodology. However, we agree with Staff and ComEd that the Commission's approval of the banking methodology in ICC Docket No. 10-0520 was neither an oversight nor requires clarification. Indeed, it was the only contested issue in that docket, and the AG participated there but raised no objection. Accordingly, we conclude that the AG's challenge to our *PY2 Goals Order* in this docket is precisely the kind of impermissible collateral attack that we rejected recently in *Cbeyond.*

We also agree with Staff and ComEd that the banking methodology we adopted in ICC Docket No. 10-0520 is the most beneficial methodology to customers because it incents ComEd to make up any DCEO shortfall and ensures that customers receive the full measure of energy savings for which they have paid.

Accordingly, we decline to adopt the AG's methodology, and conclude, consistent with the *PY2 Goals Order*, that ComEd is entitled to bank up to 10% above the combined energy savings goal for PY3, which is 58,408 MWhs for PY3 and a cumulative total of 97,777 MWhs.

C. Cost-Effectiveness of Programs

1. Staff's Position

2. AG's Position

3. ComEd's Response

According to ComEd, Staff's proposal that the Commission review the cost-effectiveness of the three-year period that comprises ComEd's first energy efficiency plan is incorrect because the issue of cost-effectiveness is not within the scope of this proceeding, which the Commission's Initiating Order limited to a review of ComEd's achievement of the PY3 energy savings goal. ComEd witness Mr. Brandt further stated that the independent evaluator is preparing a report on the issue that has not yet been completed. ComEd Ex. 2.0 at 6-7.

In response to Ms. Hinman's revised recommendation in rebuttal that the Commission direct ComEd to provide a review of the three-year cost-effectiveness analysis in a separate proceeding and direct Staff to provide a draft initiating order to the Commission to enable the review of ComEd's and DCEO's programs implemented over the last three years, Mr. Brandt testified that Staff's revised recommendation is premature because the report was not yet final and thus there was no evidentiary or statutory basis for determining that a docket should be opened. Although Mr. Brandt later testified during the evidentiary hearing on April 16, 2013 that the report had since been completed (*See* April 16, 2013 Hearing Tr. at 41:1-8), ComEd asserts that the report is not in evidence in this docket and that no statute directs that the report be considered in this proceeding. ComEd concludes that because there is neither a statutory nor evidentiary basis for now deciding whether to initiate a review of this analysis, it recommends that the Commission reject Staff's proposal. ComEd Ex. 3.0 at 8; ComEd Init. Br. at 14; ComEd Rep. Br. at 8.

4. Commission Analysis and Conclusions

Regarding Staff's proposed three-year cost effectiveness review, we agree with ComEd and the AG that because the independent evaluator's report was not entered into evidence in this docket, there is no evidentiary basis upon which to now conclude that a docket should be opened. Moreover, there is no statute mandating that a docket be opened in the absence of such evidence. We therefore conclude that the rules of evidence and administrative efficiency require that the Commission postpone making any determination on whether it is necessary to open another energy efficiency-related docket until the Commission has had the opportunity to review the independent evaluator's report. The Commission therefore declines to adopt Staff's recommendation.

D. CFL Carryover

1. ComEd's Position

With respect to the amount of Compact Fluorescent Lamp ("CFL") carryover included in the PY3 energy savings in this docket, ComEd witness Mr. Brandt testified that of the reported 626,715 MWhs of energy savings achieved in PY3, 51,201 MWhs were credited to ComEd from CFL carryover, which reflects energy savings from the installation of CFLs that were purchased in Plan Years 1 and 2 but not installed until PY3. Specifically, this carryover amount, which was calculated pursuant to the independent evaluator's methodology, includes bulbs purchased in PY1 in the commercial and industrial sector and bulbs purchased during PY1 and PY2 in the residential sector. ComEd believes that the CFL carryover credited MWhs are properly included in the energy savings achieved in PY3. ComEd Ex. 1.0 Corr. at 5-6.

2. Staff's Position

3. AG's Position

4. ComEd's Response

As an initial matter, ComEd notes that the CFL carryover methodology used to calculate the amount of savings to be included in the present docket is not disputed. ComEd Rep. Br. at 7. Rather, ComEd notes that Staff is attempting to pre-litigate how the CFL carryover methodology will be applied to future Plan years. ComEd argues that this proposal is both moot and not ripe.

With respect to Staff's proposal to decide a CFL carryover methodology in this docket, ComEd states that the issue is moot because the Commission has already decided the CFL carryover methodology in ICC Docket No. 12-0528. ComEd explains that the final methodology was included in the filing of the Technical Reference Manual ("TRM") on September 19, 2012, which was not contested by ComEd, Staff or any intervenors. *See* ICC Docket No. 12-0528, State of Illinois Energy Efficiency Technical Reference Manual (September 14, 2012) at 428, 439, attached to the Policy Division Staff Report to Initiate a Proceeding to Consider Approval of the First Illinois Statewide Technical Reference Manual for Energy Efficiency Measures; *Commonwealth Edison Co.*, ICC Docket No. 12-0528 (Order January 9, 2013) at 4-5. ComEd notes that the Commission has since issued its final order in the TRM docket. *See* April 16, 2013 Hearing Tr., 42:9-15; ICC Docket No. 12-0528 (Order January 9, 2013). ComEd observes that Staff ignored the TRM process and the related docket throughout this proceeding and requested that the Commission simultaneously litigate the CFL carryover issue in the instant docket. ComEd Init. Br. at 11-12; ComEd Rep. Br. at 7. While Staff may claim that its proposed methodology is "consistent with" the Commission's order in ICC Docket No. 12-0528, ComEd notes that it defies all logic why the Commission would again need to approve the CFL carryover methodology here. ComEd Rep. Br. at 7.

ComEd also joins the AG in its argument that Staff's proposal is not ripe for adjudication in this docket. ComEd states that Staff's CFL Carryover issue relates only to how the calculation should be performed in Plan Year 5 ("PY5"), which falls under an entirely different Plan year and three-year energy efficiency plan. There is no basis for considering the issue here. *Id.*

5. Commission Analysis and Conclusions

We agree with ComEd and the AG that Staff's proposal regarding a revised CFL carryover methodology cannot be considered in this docket. Indeed, the amount of CFL carryover included in the PY3 energy savings is undisputed. The CFL carryover methodology reflected in the TRM was developed by the independent evaluator in conjunction with Staff and ComEd. As a result, the final CFL carryover methodology that was included in the filing of the TRM was not contested by ComEd, Staff or any intervenors. The Commission subsequently approved the TRM, which specifically sets forth the CFL carryover methodology. While Staff claims its proposed methodology is consistent with that set forth in the TRM, Staff provides no basis for why the Commission should approve a separate methodology here. Finally, to the extent Staff seeks to raise issues about how the Commission-approved TRM methodology will be applied in future Plan years, Staff can raise those issues in the future proceedings relating to those Plan years. They are not ripe for adjudication in this docket. Accordingly, we decline to adopt Staff's recommendations relating to the CFL carryover issue.

E. DCEO's PY3 Performance

1. ComEd's Position

ComEd asserts that the purpose of the present docket is limited to determining whether ComEd complied with the incremental energy savings mandated by Section 8-103(b) of the Public Utilities Act, as modified by subsections (d) and (e) of that Section. Consequently, Mr. Brandt testified that his direct testimony only discusses ComEd's portion of the statutory savings goal and excludes DCEO's portion and is intended to demonstrate that ComEd achieved its goals for kWh and kW savings. He explained that under Section 8-103(k), no electric utility will be deemed to have failed to meet the energy efficiency standards to the extent that that failure is due to DCEO. ComEd Ex. 1.0 Corr. at 4; ComEd Init. Br. at 14.

2. Staff's Position

3. AG's Position

4. DCEO's Position

5. ComEd's Response

In response to Staff's and AG's concerns regarding DCEO's failure to achieve its energy savings goals, ComEd notes that it understands and shares their concerns, and explains that the Commission has already adopted in ICC Docket No. 10-0570, ComEd's 2011-2013 Energy Efficiency and Demand Response Plan ("2011-2013 Plan"), a three-pronged approach for addressing DCEO's goal compliance: (i) clarification of authority over DCEO, (ii) modification of DCEO's goals, and (iii) initiation of annual dockets to review DCEO's compliance with the modified goals. ComEd Init. Br. at 15.

Concerning the AG's arguments regarding Commission jurisdiction over DCEO, Mr. Brandt testified that the Commission has already considered the issue of its authority over DCEO in ICC Docket No. 10-0570 and concluded that there "[was] no clear statement in the statute that the Commission has jurisdiction over DCEO." *See* ComEd Ex. 2.0 at 10; *Commonwealth Edison Co.*, ICC Docket No. 10-0570, (Order on Rehearing May 4, 2011) at 3. ComEd further observes that although the Commission expressed significant doubt regarding its jurisdiction over DCEO, its *2011-2013 Plan Order* demonstrated that it would continue to review and approve DCEO's energy savings goals, and, starting with Plan Year 4, would initiate a docket to review DCEO's goal compliance with its energy savings goals. ComEd Ex. 2.0 at 9-10; ComEd Init. Br. at 19; ComEd Rep. Br. at 9-10; *Commonwealth Edison Co*., ICC Docket No. 10-0570 (Order December 21, 2010) ("*2011-2013 Plan Order")* at 2. Indeed, ComEd notes that the AG cites to the various provisions of Section 8-103 of the Act that address the Commission's jurisdiction over DCEO savings goals and the evaluation of its performance. ComEd Init. Br. at 10; AG Init. Br. at 11-19.

ComEd states, however, that the AG "goes too far" when it blames the Commission and others for not having identified the alleged problems with DECO's goals during the original proceedings to set those goals (ICC Docket Nos. 07-0540 and 10-0570), which the AG only now points out in hindsight. ComEd notes that the AG was an active participant in each docket, but in each instance the AG did not object to DCEO's proposed goals or otherwise propose different goals for the Commission's consideration. ComEd Rep. Br. at 10. To the contrary, in ICC Docket No. 10-0570, the AG entered into a settlement stipulation with ComEd, the Citizens Utility Board, the City of Chicago, the Natural Resources Defense Council, and the Environmental Law & Policy Center, which, *inter alia,* specifically addressed and set *modified* energy savings goals for ComEd <u>and</u> DCEO. *Id.* at 10-11. ComEd further observes that even the AG admits in its Initial Brief that "[t]he spending cap built into Section 8-103 [] necessitated modifications to ComEd savings goals." AG Init. Br. at 15. Finally, ComEd notes that although its and DCEO's energy savings goals were subject to the parties' and the

Commission's scrutiny and already reflect downward adjustments required by the spending cap, nothing prevented the AG from undertaking in either of those cases the sort of investigation into DCEO's goals that the AG calls for now, and nothing prevents the AG, the Commission or others from investigating DCEO's proposed goals in the upcoming three-year plan filings. According to ComEd, the AG's argument, like its banking argument, is an effort to impugn the Commission's orders approving these goals, and is therefore an impermissible collateral attack on these orders. ComEd Rep. Br. at 10-11.

With respect to proposals by Staff and the AG that ComEd and DCEO submit some sort of modified plan, ComEd responds that this modified plan filing was effected through the filing of the 2011-2013 Plan, which addresses DCEO's known shortfall to date. ComEd Init. Br. at 16. Specifically, ComEd's 2011-2013 Plan reflects substantially lower DCEO goals in response to DCEO's inability to achieve its savings goals for PY1 and PY2 under the 2008-2010 Plan. ComEd witness Mr. Brandt explained that under the 2011-2013 Plan, the level of funding remained the same, but ComEd's percentage of the goal increased from 79% to 85% and DCEO's percentage decreased from 21% to 15%, which the Commission approved. In other words, ComEd's goal increased without providing ComEd with any additional funding to achieve that higher goal. *Id.;* ComEd Ex. 2.0 at 8-9. Because the evaluation of the first year – Plan Year 4 – is not yet complete, it is not yet known whether the modification was sufficient. ComEd witness Mr. Brandt also dismissed the AG's insinuations that DCEO's goals were somehow thrust upon it and never achievable. Mr. Brandt testified that at all times ComEd worked in good faith with DCEO to set realistic goals for both parties. And, as described above, the AG fully participated in the dockets that set DCEO's goals. ComEd Init. Br. at 17.

While the AG contemplates some sort of future modified filing in a separate docket, ComEd notes that only Staff claims that ComEd and DCEO should file a modified plan now in response to DCEO's PY3 shortfall. ComEd responds, however, that Staff's proposal is entirely meaningless and contradicts Staff's own recommendation. ComEd Rep. Br. at 11-12. According to ComEd, Staff's Initial Brief expressly contemplates and authorizes exactly what ComEd and DCEO have done in response to DCEO's failure – modified DCEO's goals in the subsequent Plan years. Staff Init. Br. at 10; ComEd Rep. Br. at 11-12. Indeed, ComEd notes that it agrees with Staff's observation that it would make no sense to file modified goals regarding the 2008-2010 Plan that terminated over two years ago on May 31, 2011. Rather, the proposed modifications should be incorporated in the next plan – here, the 2011-2013 Plan – which is precisely what ComEd and DCEO did in ICC Docket No. 10-0570. *Id.* at 12. Because performance under the first year of that Plan (*i.e.*, PY4) remains to be evaluated, ComEd states that no basis exists for making any additional modifications at this time. According to ComEd, even Staff cannot explain what this proposed modified filing would be or which goals would be modified. ComEd Rep. Br. 12. Indeed, this is the only modified plan filing that could have been made to date. ComEd Init. Br. at 17-18. Nevertheless, ComEd notes that if parties wish to propose revised goal calculation methodologies, these may be considered in the filing of ComEd's next three-year plan, which will occur no later than September 1, 2013. ComEd Init. Br. at 18; DCEO Ex. 1.0 at 6, 10, 11; 220 ILCS 5/8-103(f).

ComEd further notes that Staff's disagreement with the AG's proposal regarding which future Plan years should be modified only further illustrates why there must be flexibility regarding when a modified plan is filed and to which Plan years such modifications should relate. As ComEd explains, any modifications are dependent upon when the independent evaluator completes its evaluation and the status of the current or next three-year plan cycle. Specifically, in order for ComEd to work with DCEO on a revised plan, ComEd must first know that DCEO did not achieve its annual goal. ComEd Init. Br. at 17-18. ComEd witness Mr. Brandt testified that while DCEO reports out on how well it believes it is performing throughout the year, this is only self-reporting and lacks the results of the independent evaluator, whose reports are issued at least six months into the next plan year. Further, the results are not official until the Commission rules that the savings goal has been missed. ComEd Ex. 3.0 at 9-10; ComEd Init. Br. at 17-18. Because these dates will be different for each Plan year, the Commission should have the ability to consider any proposed modifications within the unique timing of each Plan year, which can be done within the new DCEO goal evaluation dockets. ComEd Rep. Br. at 12.

Regarding Commission oversight of whether DCEO achieves the modified goals set forth in the 2011-2013 Plan, both ComEd and Staff note that in ICC Docket No. 10-0570 the Commission established the new requirement that, in addition to the utility evaluation dockets, the Commission will also initiate DCEO evaluation dockets for each of Plan Years 4, 5, and 6. ComEd Init. Br. at 19. ComEd agrees with Staff that these annual goal evaluation dockets are also the correct forum for considering whether a modified plan should be filed. ComEd Rep. Br. at 13.

Although Staff proposes that modified plans and goals be considered in the DCEO evaluation dockets (Staff Init. Br. at 11), ComEd notes that Staff contradicts this proposal when arguing that DCEO's goals should be modified in this docket (ComEd Rep. Br. at 13, fn 3.) ComEd points out that no other party supports Staff's modification, and the Initiating Order expressly limits the scope of this docket to determining whether ComEd met its goals. ComEd Init. Br. at 19-20; ComEd Rep. Br. at 13. Indeed, the Initiating Order does not make DCEO a respondent and contains no reference to DCEO or its goals. The scope of this docket thus is limited to determining whether ComEd met its goals, and the Initiating Order fails to provide notice that action relating to DCEO's goals would be a subject of this proceeding. *Id*. Also, ComEd agrees with the AG that this docket does not include some necessary parties, including other utilities whose interests may be altered by action in this docket relating to DCEO's goals. AG Ex. 1.0 at 20. ComEd and DCEO believe that the correct docket to review DCEO's energy savings goals is the upcoming three-year energy efficiency plan filings to be made by Illinois utilities. ComEd states that this will allow the Commission to uniformly address DCEO's goals across all utilities and with all interested stakeholders' participation. ComEd Init. Br. at 19-20; ComEd Rep. Br. at 13.

ComEd also states that there is virtually no evidence in the record to support Staff's proposed 50% reduction in DCEO's modified savings goals. Indeed, ComEd points out that Staff's Initial Brief all but gives up on its position, and devotes just four lines to the proposal, citing only to its own testimony. ComEd Rep. Br. at 13-14. ComEd notes that Staff could not cite to any other party's testimony because no other party, including DCEO, supports Staff's proposal. ComEd Rep. Br. at 13-14. Although Staff claims to agree with DCEO witness Ms. Mrozowski, ComEd asserts that Staff ignores the fact that Ms. Mrozowski never recommended that the PY4 through PY6 goals actually be cut in half by 50% in this docket. Instead, after acknowledging that it was not known whether DCEO achieved its modified PY4 goal, Ms. Mrozowski recommended that DCEO explore possible modifications with the utilities when developing DCEO's third three-year plan. DCEO Ex. 1.0 at 10. Moreover, Ms. Mrozowski admitted during her live testimony that she could not identify the bases for certain portions of her direct testimony. Tr. at 54:20-55:19. ComEd also agrees with the AG that there are a number of issues that must be investigated prior to modifying DCEO's goals, including how DCEO is spending the money being allocated to it. ComEd Rep. Br. at 14. In sum, ComEd notes that a hasty adoption of Staff's unsupported goal reduction would only further exacerbate the problems identified by the AG – namely, that a thorough analysis of the methodologies used to set DCEO's goals and reasons for DCEO's failure to achieve those goals needs to be completed before setting any new or modified goals. ComEd Rep. Br. at 14.

6. Commission Analysis and Conclusions

The Commission shares the parties' frustration regarding DCEO's failure to achieve its PY3 energy savings goal. To address DCEO's compliance, we established a framework in ICC Docket No. 10-0570 that would ensure we exercised oversight over DCEO's goals and evaluations to the maximum extent permitted by law. As discussed below, that process is just getting underway, and there are multiple opportunities for parties to address DCEO's goal compliance in the coming months. This docket, to which DCEO is not a respondent (and was not mentioned in the Initiating Order), is not the correct forum.

Turning first to the issue of Commission authority over DCEO, we agree with Staff and ComEd that this Commission already addressed this issue at length in ICC Docket No. 10-0570, including in the rehearing phase of that case. While the AG correctly cites to various provisions of Section 8-103 of the Act regarding our authority over ComEd's and DCEO's energy savings goals, it fails to acknowledge that the goals were explored in the prior plan dockets in which the AG participated (*i.e.*, ICC Docket Nos. 07-0540 and 10-0570), and were not contested. Indeed, this Commission approved modified, reduced goals for <u>both</u> ComEd and DCEO in ICC Docket No. 10-0570. The AG and other parties are free to investigate DCEO's goals further in DCEO's PY4 evaluation docket and the upcoming three-year plan docket to be filed on or before September 1, 2013.

With respect to Staff's and the AG's comments regarding the filing of a modified plan, we note that neither set of comments provides any specific direction regarding what sort of plan should be filed and to what plan years the plan would apply. Indeed, Staff and the AG disagree between themselves regarding these issues. Again, we note that we already approved modified goals for DCEO and ComEd in the 2011-2013 Plan, and performance under the first Plan year – PY4 – has not been evaluated. As ComEd notes, this is the only modified plan filing that could have been made to date. The 2008-2010 Plan – of which PY3 was the final Plan year – terminated over two years ago on May 31, 2011, and the next three-year plan will not be filed until September 1, 2013. Thus, ComEd and DCEO correctly modified their goals for the current three-year plan – the 2011-2013 Plan. Once the PY4 evaluation results are final for DCEO, Staff and the AG should follow Staff's own recommendation and use the PY4 evaluation docket to investigate whether a modified plan filing is necessary. Staff Init. Br. at 10-11.

Finally, concerning Staff's proposal to modify DCEO's PY4 through PY6 energy savings goals, not only is there a lack of evidence supporting Staff's proposal, but there is no notice in the Initiating Order that DCEO's goals are at issue or that a new methodology regarding DCEO's goals is at issue in this case. Indeed, even DCEO's own witness Ms. Mrozowski recommended that DCEO's goals not be modified in this docket. Moreover, the issue of whether to modify DCEO's PY4 through PY6 energy savings goals is not ripe because DCEO's performance under PY4 is not even known yet. Accordingly, the correct forum for reviewing DCEO's compliance with the PY4 energy savings goal is DCEO's PY4 goal evaluation docket. And, to the extent the parties wish to explore alternative methodologies for setting DCEO's and the utilities' energy savings goals, the fora for such investigation are the upcoming three-year plan filings to be made on or before September 1, 2013.

V. Findings and Orderings Paragraphs

The Commission, having given due consideration to the entire record 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, sale and distribution 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 jurisdiction over Commonwealth Edison Company and the subject matter of this proceeding;

(3) the statements of fact set forth in the prefatory portion of this Order are supported by the evidence and the record and are hereby adopted as findings of fact;

(4) the statutory energy savings goal for Plan Year 3 as set forth in Section 8-103(b) and the demand response reduction goal as set forth in Section 8-103(c) have been achieved in the Commonwealth Edison Company service territory;

(5) Commonwealth Edison Company, which achieved 626,715 MWhs of energy savings during PY3, exceeded its portion of the statutory energy savings goal mandated by Section 8-103(b) of the Public Utilities Act, as modified by subsections (d) and (e) of that Section, (i.e., 458,656 MWhs), and therefore no penalties will be assessed; and

(6) Commonwealth Edison Company is permitted to bank 58,408 MWhs for Plan Year 3, which results in a cumulative total of 97,777 MWh of energy savings available for use in complying with future Plan Years.

IT IS THEREFORE ORDERED that Commonwealth Edison Company is found to have achieved 626,715 MWhs of energy savings during Plan Year 3, and therefore is found to have complied with the incremental energy savings mandated by Section 8-103(b) of the Public Utilities Act, as modified by subsections (d) and (e) of that Section.

IT IS FURTHER ORDERED that Commonwealth Edison Company is permitted to bank 58,408 MWHs for Plan Year 3, which results in a cumulative total of 97,777 MWh of energy savings available for use in complying with future Plan Years.

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

By order of the Commission this _____ day of ________________, 2013.

(SIGNED) DOUGLAS P. SCOTT

Chairman