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**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

Illinois Commerce Commission	:	
On its Own Motion	:	
	:	
-vs-	:	Docket No. 11-0593
	:	
Commonwealth Edison Company	:	
	:	
Investigation into compliance with the	:	
efficiency standard requirement of Section	:	
8-103 of the Public Utilities Act.	:	

**REPLY BRIEF ON EXCEPTIONS OF THE STAFF
OF THE ILLINOIS COMMERCE COMMISSION**

The Staff of the Illinois Commerce Commission (“Staff”), by and through its undersigned counsel, pursuant to Section 200.830 of the Illinois Commerce Commission’s (“Commission” or “ICC”) Rules of Practice (83 Ill. Adm. Code 200.830), respectfully submits its Reply Brief on Exceptions to the Proposed Order (“PO”) issued by the Administrative Law Judge (“ALJ”) on July 18, 2013, in the above-captioned matter.

I. Introduction

Pursuant to the order of the ALJ, the People of the State of Illinois (“AG”), Commonwealth Edison Company (“ComEd” or the “Company”), and Staff all filed Briefs on Exceptions (“BOEs”) on July 31, 2013. Staff files this Reply Brief on Exceptions (“RBOE”) in order to respond to the arguments raised by the Company and intervenors in their

BOEs.¹ Except where specifically noted below, Staff continues to support the positions and exceptions expressed in its BOE. In the event that this RBOE does not address any position previously raised by Staff in its BOE does not constitute a waiver of that position.

II. The Parties² Agree that the Proposed Order Incorrectly Denies Cumulative Banked Energy Savings

Staff will not separately address the parties' exceptions on the matter of cumulative banking. The AG, ComEd and Staff all agree that the Commission's Order in Docket No. 10-0570 specifically allowed the Company to accumulate banked energy savings from years PY1 through PY4 for application in PY5. See, Staff BOE at 4-7; AG BOE at 9-12; ComEd BOE at 3-7. Accordingly, Staff recommends that the Commission's Final Order find that the Company be allowed to bank 97,777 MWhs and adopt language consistent with the proposals made by Staff and ComEd in their respective BOEs.

III. Reply to the Attorney General's Proposed Exceptions

A. AG's Exceptions on the Allocation of Energy Savings Goals

The AG suggests in its BOE that the Commission has the authority to enact policies over revisions of allocation of goals between ComEd and the DCEO. AG BOE at 4. The AG advocates that through utilization of the term "annual" in the statute, the General Assembly contemplated yearly revised plans when the DCEO failed to meet its savings goals. As Staff recommended in its Initial Brief ("IB"), Staff supports the Commission

¹ While the Department of Commerce and Economic Opportunity ("DCEO") intervened in this proceeding, it has not actively participated since the hearing.

² Not including the DCEO, who failed to file a Brief on Exceptions.

taking action to direct the Company to file modified energy efficiency plans if it finds that the DCEO failed to meet its portion of the savings goal, as the law requires. Staff IB at 10 (*citing* 220 ILCS 5/8-103(e); Staff Ex. 1.0 at 25). Staff agrees that the modification contemplated under Section 8-103(e) is not strictly limited to the remaining years of that three-year plan, and that it is reasonable for the Commission to approve program modifications that would adjust future plan years, regardless of whether that future plan year is a part of the same energy efficiency plan as the plan year in which the savings goal was not achieved. However, Staff does not support all of the modifications to the PO provided by the AG verbatim. If the Commission finds that a modified plan should be submitted pursuant to Section 8-103(e), Staff suggests the following revisions to the PO, on page ten:

Analysis and Conclusions

~~The Commission notes at the outset that ComEd's energy efficiency program is still nascent. The Commission acknowledges that DCEO's programs have not achieved DCEO's energy savings goals. However, a new evaluation will emerge soon and DCEO has acknowledged that it must revise its energy savings goals. While the cost-effectiveness of the DCEO-administered programs is a goal to which this Commission strongly ascribes, a better course of action at this time is to allow DCEO to revise its future expectations, and then determine, in the future, whether corrective action is warranted.~~

The Commission additionally notes that while DCEO witness Ms. Mrozowski testified, DCEO filed no posttrial briefs. The Commission encourages DCEO to actively participate in Commission proceedings in the future, so that we may further ascertain DCEO's position and the facts surrounding the programs it administers. However, at this time, the Commission declines the AG's requests above.

With regard to Staff's recommendation, ~~at this time, the Commission declines to order DCEO ComEd to revise its file a modified energy efficiency plan in the event that the evaluation results show that DCEO does not meet its PY4 energy efficiency goal. Staff provides no information establishing that its proffered future energy efficiency goals "fix~~

~~the problem.” Additionally, as ComEd notes, the DCEO goals for Plan Years 4 and 5 have already been modified. A better course of action is to wait and see if DCEO’s revised energy savings goals can be achieved, and to what extent. At some point in time, some modifications to DCEO’s energy savings goals may be necessary or even just desirable. However, at this time, the Commission shall allow at least one more year of the revised energy savings goals to run their course. In this manner, there will be more information to work with in order to establish a viable and workable course of action. This is in line with the Commission’s ruling in the *PY2 Savings Order*, which states that ComEd should file a modified plan in the event that DCEO does not meet its portion of the statutory savings goal. As noted by Staff, the DCEO and ComEd will not have to file modified EE plans with the Commission every year if realistic savings goals are approved for DCEO’s portion of the statutory goal.~~

Should the Commission decline to adopt this language, then Staff would support the AG’s proposed language for its first exception. See AG BOE at 7-9.

B. The PO Was Correct to Reject the AG’s Proposal Regarding the Calculation of Banked Savings

The AG avers that the PO should be modified to prevent ComEd from banking the full 10% of its savings goal in a given year, as allowed under Docket No. 07-0540. AG BOE at 9. The AG argues that by “combining” the Company’s allotment of energy savings with the DCEO’s allotment, ComEd is effectively banking more than the 10% allowed under 07-0540. Id. However, the methodology proposed by the AG is contrary to the approach adopted by the Commission in Docket No. 07-0540 that was subsequently reaffirmed in the *PY2 Savings Order*. Commonwealth Edison Co., ICC Final Order Docket No. 07-0540, 40-41 (February 6, 2008)(“*Plan 1 Order*”); Commonwealth Edison Co., ICC Final Order Docket No. 10-0570, 5 (December 21, 2010)(“*PY2 Savings Order*”). Accordingly, the AG’s position was correctly rejected in the PO, and its exceptions likewise should be rejected in the Commission’s Final Order in this docket.

C. Staff Supports the AG's Exceptions on Free Ridership

The AG correctly points out that the PO adopts an unusual and untenable position regarding free ridership, which is based upon a record that lacks sufficient evidence to support such a finding. Staff concurs with the AG's statement that the PO's conclusion, "which lacks any evidentiary basis in the record, would put program evaluators, the Commission Staff and intervening parties in the impossible position of having to uncover evidence that efficiency investments had been budgeted for by the purchaser before any conclusion of free ridership could be claimed." AG BOE at 16-17. Staff further agrees with the AG's position that the conclusion favors gross rather than net evaluation metrics for Section 8-103 programs, contrary to the statute, which adopts the total resource cost test ("TRC") to evaluate net, rather than gross, savings. *Id.* at 17-18 (*ref.* 220 ILCS 5/8-103(a); 20 ILCS 3855/1-10). Finally, Staff notes that the estimation of free ridership is not as simplistic as the PO indicates when it states, "with respect to a determination regarding 'free ridership,' the person or entity in question should have actual energy efficiency plans in their budgets before they are to be considered to be 'free riders[.]'" PO at 16. In particular, the evaluation approach used in Illinois considers the possibility of "partial" free riders, and incorporates such findings in the net-to-gross algorithm. See ComEd Ex 5.0, Evaluator's Measure Report #10 at 72-74, 83-97; DCEO Ex. 2.6 at 27-28, 71-73; 5.4.1:5-22. This approach that considers "partial" free riders is preferable because it does not rely on one single response to calculate net-to-gross and it is considered to be best practice in the evaluation community. *Id.* Accordingly, Staff supports the exceptions proposed by the AG regarding the issue of free ridership and endorses the revisions provided in the AG's BOE at pages 19-20.

D. Staff Supports the AG's Exceptions Regarding Pre-Trial Memorandums

The AG takes issue with language in the PO regarding points raised by the AG in its Initial Brief that Staff did not address in its own. On both issues, the PO states that the AG did not raise the matter in its pre-trial memorandum, and accordingly, it will not be considered by the Commission. The reasoning behind this matter is what the AG takes issue with in its BOE: namely, that because the AG did not address these matters in its pretrial memo, it should not have addressed them in its Initial Brief, and the Commission may not take action on the matters. PO at 21, 22. The AG correctly points out that pretrial memorandums are not required either under Commission Rules or the Public Utilities Act, nor are they requested by most ALJs. AG BOE at 21. Ultimately, the Commission need not and likely cannot make the determination that Staff would have otherwise preferred be made on these issues, in light of the fact that the three-year cost-effectiveness analysis was not addressed in this docket. This should be the given rationale for the Commission's decision to decline to entertain these issues. It is far from clear to Staff that the mere failure to include something in a pretrial memo, without more, should have the preclusive effect that the PO ascribes to it. Accordingly, Staff concurs with the proposed changes on pages 22 and 23 of the AG's BOE.

IV. Reply to Commonwealth Edison's Proposed Exceptions

A. The PO Correctly Addressed the Appliance Recycling Program Energy Savings; ComEd's Proposed Exceptions Should Be Rejected

The Company argues that the PO "does not address evidence or arguments presented by ComEd" regarding Staff's adjustments to the Appliance Recycling Program.

ComEd BOE at 7. While the PO correctly found that “ComEd provides no evidentiary law or facts establishing that its survey is more accurate than the *in situ* study” (PO at 17), the Company would like to think that the PO actually rejects the recommendation of the independent evaluator. Staff disagrees, and recommends that the Commission utilize the language from the PO in its Final Order.

The Company first argues, in a somewhat misguided fashion, that the *in situ* metering study is irrelevant to PY3, as it was the subject of PY4. ComEd BOE at 7. It is true that the *in situ* metering study was completed three months after the final PY3 evaluation reports were issued. However, this does not make the study any more irrelevant than the old California study that ComEd relied upon in its analysis. See ComEd Ex. 2.1 at 1, 13-14. ComEd states, incorrectly, that “[n]othing about the PY4 study relates to PY3 or the appliances recycled during that year” (ComEd BOE at 7); however, as the evaluator’s *in situ* metering study explicitly states, the study “compare[s] only estimates based upon PY3 characteristics. PY3 characteristics were selected because they are expected to be more similar to future program years and are more similar to the metering sample than PY1-PY2 characteristics.” See Staff Ex. 1.3 at 17. Also contrary to the Company’s argument, Staff did indeed provide evidence which shows that this study is relevant and appropriate for use, as it shows the best estimates of actual energy savings achieved in the ComEd service territory and results in more reasonable estimates of energy savings. See, Staff Exs. 1.0 at 16-17; 1.2; 1.3; 2.0 at 3-8. The Company additionally argues that Staff “picked and chose” variables from the PY3 evaluation and the PY4 study, which is “wholly unsupported by any evidence in this docket.” ComEd BOE at 8. What ComEd neglects to mention is their supported methodology is the same – it

applies variables from the PY3 evaluation to the old California lab-based model. ComEd Ex. 2.1 at 1, 13-14. While the Company argues that there is no evidence that the base or characteristics of the PY3 appliances and PY4 appliances were the same, the Company's independent evaluator states that the PY3 characteristics were used in the study exactly because they are the most similar.

The Company stretches the definition of hindsight review in an effort to attack Staff's reasonable proposal. Staff's recommendation does not constitute an impermissible hindsight review, as ComEd states, but rather is consistent with the evaluator's conclusions – the findings, including a re-estimation of the PY3 findings – were presented in the *in situ* metering study less than three months after the evaluator's PY3 evaluation report was finalized. Staff Ex. 1.3 at 4; ComEd BOE at 9. The Company alleges that because the *in situ* metering study recommended using the study results going forward, there is an implicit statement against using the study to best determine the estimates of energy savings in PY3. ComEd BOE at 7. In general, it is the evaluator's job to make recommendations that ComEd can incorporate into their programs going forward; however, the evaluator included a re-estimation of the PY3 energy savings estimates in the *in situ* metering study after the PY3 evaluation report was finalized. This contradicts ComEd's claim that the evaluator's recommendation implicitly suggested that the *in situ* metering study results should only be applied to future program years. Furthermore, PY3 is the final year where retroactive application occurs for prescriptive measures, as ComEd has the regression equation for the old California study deemed for PY4, and the IL-TRM applies for PY5, which, in fact, includes the *in situ* metering study results. *State of Illinois*

Energy Efficiency Technical Reference Manual, ICC Order Docket No. 12-0528 (January 9, 2013).

In what is perhaps the largest overstatement of the Company's BOE, ComEd states that it is subject to "harsh penalties" as a result of the adoption of Staff's adjustment. ComEd BOE at 10. ComEd fails to articulate the impact of this alleged hardship, and Staff fails to see what, if anything, regarding the "penalty" is "harsh." Even with the adoption of the adjustment, the Commission finds that the Company exceeded its savings targets and banks the maximum amount allowed. There is no type of financial penalty. As any alleged "harsh penalties" to ComEd are effectively *de minimus*, all proposed revisions related to the Company's Exception 2 should be rejected accordingly.

B. Some of ComEd Proposed Technical Exceptions Should Be Adopted

ComEd outlines a number of typographical and inadvertent technical errors, which it avers should be corrected. Referring to the Company's Appendix, under Exception 3, Staff agrees with the following modifications to the PO proposed by ComEd:

- On page one, modification to the first sentence of the third paragraph;
- On page two, modification of the second paragraph;
- On pages three to four, modification of the sentence beginning on page three and ending on page four
- On page six, modification to the second paragraph

With respect to the Company's proposed modification to the second paragraph on page 12, Staff notes that what it incorrectly assumed was a typographical error in Staff's Initial Brief was in fact a typographical error in the PO. Adoption of the language proposed

by Staff in its BOE would be incorrect; however, adoption of the language proposed by ComEd in its BOE would be nonsensical. Accordingly, Staff proposes the following changes to the second paragraph of page 12 (footnote omitted):

Staff recommends approving “the maximum 105% banking allowed,” 58,408 MWH~~hs~~ from PY3, for a cumulative total of 97,777 MWH~~hs~~ of net energy savings banked at the end of PY3 in ComEd’s service territory.^[fn] Staff Initial Brief at 6. ~~Staff, however, did not state what the “maximum 105 banking allowed” means. Nor is it obvious.~~

With respect to the two alternatives regarding the proposed adjustment to the Appliance Recycling Program, Staff agrees with the modifications proposed by ComEd under Alternative 2 regarding the typographical errors on page 22, subparagraph 5 and the penultimate paragraph.

C. ComEd’s Request for Oral Argument Should be Denied

The Company states that it is critical that the Order in this Docket reflect and give effect to the Order from Docket No. 10-0570, specifically with regards to the cumulative banking issue. ComEd BOE at 2. While Staff concurs that it is critical that the Final Order in the instant proceeding remain consistent with Commission precedent, given that all parties agree that the Commission has specifically allowed cumulative banking, Staff believes that such argument is unnecessary and recommends that the Commission deny the Company’s request for oral argument and issue a Final Order which includes the language recommended by ComEd in its Appendix under Exception 1.

V. Conclusion

The Staff recommends that the Commission enter an order consistent with the limitations and qualifications expressed by the Staff in this Reply Brief on Exceptions and as reflected in its Brief on Exceptions.

WHEREFORE Staff of the Illinois Commerce Commission respectfully requests that its recommendations be adopted in their entirety consistent with the arguments set forth herein.

Respectfully submitted,

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