

**STATE OF ILLINOIS**

**ILLINOIS COMMERCE COMMISSION**

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<b>Commonwealth Edison Company</b>	:	
	:	
<b>Annual formula rate update and revenue requirement reconciliation under Section 16-108.5 of the Public Utilities Act.</b>	:	<b>Docket No. 13-0318</b>
	:	
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**STAFF OF THE ILLINOIS COMMERCE COMMISSION**

**BRIEF ON EXCEPTIONS**

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November 22, 2013

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Table of Contents

**ARGUMENT AND EXCEPTIONS**

	<u>Page</u>
I. INTRODUCTION / STATEMENT OF THE CASE.....	2
II. OVERALL REVENUE REQUIREMENT .....	2
A. 2014 Initial Rate Year Revenue Requirement .....	2
B. 2012 Reconciliation Adjustment .....	2
C. ROE Collar .....	2
D. 2014 Net Rate Year Revenue Requirement .....	2
III. SCOPE OF PROCEEDING .....	2
IV. RATE BASE .....	3
A. Overview .....	3
1. 2012 Reconciliation Rate Base .....	3
2. 2014 Initial Rate Year Rate Base .....	3
B. Potentially Uncontested Issues.....	3
1. Plant in Service .....	3
a. Distribution Plant.....	3
b. General and Intangible Plant .....	3
c. Functionalization / Use of W&S Allocator.....	3
d. Plant Additions.....	3
2. Materials & Supplies .....	3
3. Construction Work In Progress .....	3
4. Regulatory Assets and Liabilities .....	3
5. Deferred Debits .....	3
6. Other Deferred Charges.....	3
7. Accumulated Provisions for Depreciation and Amortization.....	3
8. Accumulated Miscellaneous Operating Provisions.....	4
9. Asset Retirement Obligation.....	4
10. Customer Advances.....	4
11. Customer Deposits.....	4
C. Potentially Contested Issues .....	4

1. Accumulated Deferred Income Taxes (ADIT) Adjustment on Vacation Pay.....	4
2. Cash Working Capital .....	4
3. Other (including derivative adjustments) .....	4
V. OPERATING EXPENSES .....	4
A. Overview .....	4
B. Potentially Uncontested Issues.....	4
1. Distribution O&M Expenses .....	4
2. Customer-Related O&M Expenses .....	5
3. Administrative and General Expense .....	6
4. Charitable Contributions.....	7
5. Chicago Forward Sponsorship.....	7
6. Outside Services Employed .....	7
7. Transmission Legal Fees .....	7
8. 2012 Merger Expense.....	7
9. Uncollectibles Expenses .....	7
10. Advertising Expenses.....	7
11. Sales and Marketing Expense.....	7
12. Depreciation and Amortization Expense .....	7
13. Regulatory Asset Amortization .....	8
14. Operating Cost Management Efforts.....	9
15. Storm Damage Repair Expense.....	9
16. Interest Expense .....	9
17. Lobbying Expense.....	9
18. Gross Revenue Conversion Factor.....	9
C. Potentially Contested Issues .....	9
1. Rate Case Expenses .....	9
a. Appeal & Remand.....	9
b. Attorneys.....	17
c. Experts.....	20
d. Other.....	26
i. SFIO Consulting .....	26
ii. Westlaw/Lexis Research .....	26

iii. Attorney General Position.....	30
2. Incentive Compensation Program Expenses .....	30
a. Long-Term Performance Share Awards Program (“LTPSAP”) .....	30
b. Energy Efficiency/Rider EDA .....	31
3. Employee Stock Purchase Plan (“ESPP”).....	36
a. Stock Price Issue .....	36
b. Income Tax Issue .....	36
4. Payroll taxes.....	37
5. Pension Costs .....	38
VI. Rate of Return .....	38
A. Overview .....	38
B. Capital Structure.....	38
C. Cost of Capital Components.....	38
1. Cost of Short-term Debt .....	38
2. Cost of Long-term Debt.....	38
3. Rate of Return on Common Equity .....	38
VII. RECONCILIATION .....	38
A. Overview .....	38
B. Potential contested Issues.....	38
1. Deferred Income Taxes on Reconciliation Balance.....	38
2. WACC Gross-Up.....	38
VIII. ROE COLLAR .....	39
A. Overview .....	39
B. Potential contested Issues.....	39
1. Rate Base for ROE Collar Calculation .....	39
IX. REVENUES.....	39
A. Overview .....	39
B. Potentially Uncontested Issues.....	39
1. Allocation of PORCB LPCs to Delivery Services.....	39
2. Other Revenues .....	39
C. Potentially Contested Issues .....	39
1. Late Payment Revenues related to Transmission.....	39
2. Billing Determinants .....	39

X. COST OF SERVICE AND RATE DESIGN ..... 39

    A. Overview ..... 39

    B. Potentially Uncontested Issues..... 39

        1. Embedded Cost of Service Study ..... 39

        2. Distribution System Loss Factor Study ..... 40

        3. Rider PE – Purchased Electricity ..... 40

XI. OTHER..... 40

    A. Overview ..... 40

    B. Potentially Uncontested Issues..... 40

        1. Staff Investigation into BSC..... 40

        2. Reporting Requirements ..... 40

            a. EIMA Investments..... 40

            b. Reconciliation Year Plant Additions ..... 40

            c. Contributions to energy low-income and support programs..... 40

    C. Potentially Contested Issues ..... 40

        1. Use of Rate Formula Template / Traditional Schedules for Analysis of  
            Adjustments / Disallowances..... 40

XII. CONCLUSION..... 40

XIII. FINDINGS AND ORDERING PARAGRAPHS..... 41

**TECHNICAL CORRECTIONS**

**STATE OF ILLINOIS  
ILLINOIS COMMERCE COMMISSION**

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

Staff of the Illinois Commerce Commission (“Staff”), by and through its counsel, pursuant to the direction of the Administrative Law Judges (“ALJs”) and Section 200.800 of the Illinois Administrative Code (83 Ill. Adm. Code 200.800), respectfully submits its Brief on Exceptions (“BOE”) in the above-captioned matter.

On November 15, 2013, the ALJs issued a Proposed Order (“ALJPO”). The ALJs set November 22, 2013 and November 27, 2013 for the filing of exceptions and reply exceptions, respectively. Staff, agrees with many of the ALJPO’s findings and conclusions but does recommend certain modifications and clarifications. Staff’s BOE follows. Also, Staff has some technical corrections to the ALJPO and Schedules which follow its Argument and Exceptions discussion.

## ARGUMENT AND EXCEPTIONS

### I. INTRODUCTION / STATEMENT OF THE CASE

### II. OVERALL REVENUE REQUIREMENT

- A. 2014 Initial Rate Year Revenue Requirement
- B. 2012 Reconciliation Adjustment
- C. ROE Collar
- D. 2014 Net Rate Year Revenue Requirement

### III. SCOPE OF PROCEEDING

The first sentence of the second paragraph of this section of the ALJPO should be stricken as it is not the subject of the paragraph. Cash working capital (“CWC”) is not an issue that will be considered in the separate Section 9-201 proceeding that addresses changes to the structure or protocols of ComEd’s performance-based formula rate. Additionally, the sentence does not accurately convey Staff’s position on CWC.

Simply striking the first sentence of the second paragraph would resolve the issues discussed above. Staff proposes the following modification to the second paragraph of this section so that it more clearly defines the scope of the proceeding:

#### **Proposed Modification** (ALJPO, 4.)

~~Staff does not contest that changes to the CWC components of ComEd’s formula rate should occur outside of this proceeding. Section 16-108.5(d) of the Act clearly specifies that the Commission is not granted authority in an annual update and reconciliation proceeding to consider or order any changes to the structure or protocols of a performance-based formula rate. 220 ILCS 5/16-108.5(d). The Commission agrees that EIMA requires that any changes to the formula rate structure be made in a utility rate filing or by the~~

Commission after an investigation as set forth in Section 9-201 of the PUA. The Commission has initiated another proceeding to address these issues and there is no reason to consider them in this proceeding.

#### **IV. RATE BASE**

##### **A. Overview**

1. 2012 Reconciliation Rate Base
2. 2014 Initial Rate Year Rate Base

##### **B. Potentially Uncontested Issues**

1. Plant in Service
  - a. Distribution Plant
  - b. General and Intangible Plant
  - c. Functionalization / Use of W&S Allocator
  - d. Plant Additions
2. Materials & Supplies
3. Construction Work In Progress
4. Regulatory Assets and Liabilities
5. Deferred Debits
6. Other Deferred Charges
7. Accumulated Provisions for Depreciation and Amortization

Staff agrees with the ALJPO's conclusion on this issue but recommends that the relevant language on p. 9 addressing Accumulated Provisions for Depreciation and Amortization be amended to include reference to the Commission's conclusions on other issues set forth within this Order which also impact accumulated depreciation. Although, as the ALJPO correctly implies, ComEd's Accumulated Provisions for Depreciation and Amortization related to ComEd's rate base is not directly contested,

there remain other contested issues for which the Commission's conclusions ultimately impact accumulated depreciation. Thus, the Commission should limit its approval of this component of rate base subject to its conclusions on other issues set forth within the Order.

**Proposed Modification**  
(ALJPO, 9.)

Staff proposed an adjustment to the operating statement and rate base for depreciation expense, accumulated depreciation, and ADIT associated with ComEd's exclusion of various incentive compensation costs set forth on ComEd Sch. B-2.6. The Company agrees with this adjustment. ComEd's Accumulated Provisions for Depreciation and Amortization related to ComEd's rate base is therefore uncontested. ComEd Ex. 14.01, Sch FR B-1 "Rate Base Summary Computation," lines 7-12. The Commission approves this component of rate base, subject to its conclusions on other issues set forth within this Order.

- 8. Accumulated Miscellaneous Operating Provisions
- 9. Asset Retirement Obligation
- 10. Customer Advances
- 11. Customer Deposits
- C. Potentially Contested Issues
  - 1. Accumulated Deferred Income Taxes (ADIT) Adjustment on Vacation Pay
  - 2. Cash Working Capital
  - 3. Other (including derivative adjustments)

**V. OPERATING EXPENSES**

- A. Overview
- B. Potentially Uncontested Issues
  - 1. Distribution O&M Expenses

Staff agrees with the ALJPO's conclusion on this issue but recommends that the relevant language on p. 19 addressing Distribution O&M Expenses be amended to include reference to the Commission's conclusions on other issues set forth within this Order which also impact Distribution O&M Expenses. Although, as the ALJPO correctly implies, ComEd's Distribution O&M Expenses are not directly contested, there remain other contested issues for which the Commission's conclusions ultimately impact components of Distribution O&M Expense. Thus, the Commission should limit its approval of this expense category subject to its conclusions on other issues set forth within the Order.

**Proposed Modification**  
(ALJPO, 19.)

ComEd states that its Distribution Operating and Maintenance ("O&M") expenses were \$409,805,000 for 2012. After reflecting adjustments, a revised total of \$400,003,000 in distribution O&M expenses recorded in FERC Accounts 580-598 is included in ~~the~~ComEd's revenue requirement. With the exception of proposed adjustments to Incentive Compensation Program Expense discussed further below, No parties contest the amount of distribution O&M expenses. Therefore, the Commission approves this amount subject to its conclusions on Incentive Compensation Program Expense set forth below.

2. Customer-Related O&M Expenses

Staff agrees with the ALJPO's conclusion on this issue but recommends that the relevant language on p. 19 addressing Customer-Related O&M Expenses be amended to include reference to the Commission's conclusions on other issues set forth within this Order which also impact Customer-Related O&M Expenses. Although, as the ALJPO correctly implies, ComEd's Customer-Related O&M Expenses are not directly contested, there remain other contested issues for which the Commission's conclusions ultimately impact components of Customer-Related O&M Expense. Thus, the

Commission should limit its approval of this expense category subject to its conclusions on other issues set forth within the Order.

**Proposed Modification**  
(ALJPO, 19.)

...

ComEd states that after these adjustments, \$209,464,000 of FERC Accounts 901-910 directly related to and supporting the delivery service function are included in the ComEd's revenue requirement. With the exception of proposed adjustments to Incentive Compensation Program Expense discussed further below, No party has objected to the amount of customer related O&M expenses. Therefore, the Commission approves this amount subject to its conclusions on Incentive Compensation Program Expense set forth below.

3. Administrative and General Expense

Staff agrees with the ALJPO's conclusion on this issue but recommends that the relevant language on p. 20 addressing Administrative and General Expense be amended to include reference to the Commission's conclusions on other issues set forth within this Order which also impact Administrative and General Expense. Although, as the ALJPO correctly implies, Administrative and General Expense is not directly contested, there remain other contested issues for which the Commission's conclusions ultimately impact components of Administrative and General Expense. Thus, the Commission should limit its approval of this expense category subject to its conclusions on other issues set forth within the Order.

**Proposed Modification**  
(ALJPO, 20.)

ComEd's Administrative and General ("A&G") expenses were \$424,355,000 for 2012. ComEd explains that costs are recorded in FERC Accounts 920-935 and include corporate support and overhead costs that benefit or derive from more than one business function; costs of employee pension benefits; regulatory expenses and certain other non-operation costs. ComEd states that after subtracting

\$25,483,000 of deferred merger related costs to achieve, \$398,872,000 in A&G expense is included in the revenue requirement. With the exception of adjustments proposed for Rate Case Expense, Incentive Compensation Program Expense, Payroll Taxes (associated with excluded incentive compensation) and Pension Costs (associated with excluded incentive compensation) discussed further below, No party has objected to the amount of A&G expense. Therefore, the Commission approves this amount subject to its conclusions on Rate Case Expense, Incentive Compensation Program Expense, Payroll Taxes (associated with excluded incentive compensation) and Pension Costs (associated with excluded incentive compensation) set forth below.

4. Charitable Contributions
5. Chicago Forward Sponsorship
6. Outside Services Employed
7. Transmission Legal Fees
8. 2012 Merger Expense
9. Uncollectibles Expenses
10. Advertising Expenses
11. Sales and Marketing Expense
12. Depreciation and Amortization Expense

Staff agrees with the ALJPO's conclusion on this issue but recommends that the relevant language on p. 22 addressing Depreciation and Amortization Expense be amended to include reference to the Commission's conclusions on other issues set forth within this Order which also impact depreciation expense. Although, as the ALJPO correctly implies, ComEd's Depreciation and Amortization Expense is not directly contested, there remain other contested issues for which the Commission's conclusions ultimately impact depreciation expense. Thus, the Commission should limit its approval of this expense category subject to its conclusions on other issues set forth within the Order.

**Proposed Modification**  
(ALJPO, 22.)

ComEd states that its revenue requirement includes \$461,037,000 of depreciation and amortization expense. ComEd explains that the level of 2012 depreciation and amortization expenses included in the revenue requirement is \$436,587,000, comprised of \$340,571,000 related to Distribution Plant and \$96,016,000 related to G&I Plant. ComEd's The 2014 Initial Rate Year Revenue Requirement and 2014 Rate Year Net Revenue Requirement include \$24,450,000 of depreciation expense associated with the 2013 projected plant additions. With the exception of proposed adjustments for Pension Expense (associated with excluded incentive compensation) discussed further below, No party has objected to the amount of depreciation and amortization expense. Therefore, the Commission approves this amount subject to its conclusion on Pension Costs (associated with excluded incentive compensation) set forth below.

13. Regulatory Asset Amortization

Staff agrees with the ALJPO's conclusion on this issue but recommends that the relevant language on p. 20 addressing Regulatory Asset Amortization be amended to include reference to the Commission's conclusions on other issues set forth within this Order which also impact Regulatory Asset Amortization. Although, as the ALJPO correctly implies, Regulatory Asset Amortization is not directly contested, there remain other contested issues for which the Commission's conclusions ultimately impact components of Regulatory Asset Amortization. Thus, the Commission should limit its approval of this expense category subject to its conclusions on other issues set forth within the Order.

**Proposed Modification**  
(ALJPO, 22-23.)

ComEd's requested revenue requirement includes \$24,380,000 of regulatory asset amortization. This amount includes the effects of the Commission's order in Docket No. 10-0467, which revised the amount of amortization of several existing regulatory assets, authorized

amortization of new regulatory assets, and eliminated amortization of others. ComEd's requested regulatory asset amortization also includes \$67,000 of the \$200,000 filing fee paid in 2011 and \$699,000 of the \$2,095,000 in formula rate case expenses incurred in 2012 related to Docket No. 11-0721, the initial formula rate proceeding. Section 16-108.5(c)(4)(E) of the PUA provides that these costs be amortized over a three year period. With the exception of proposed adjustments to Rate Case Expenses discussed further below, No party has objected to the amount of regulatory asset amortization. Therefore, the Commission approves this amount subject to its conclusion on Rate Case Expenses set forth below.

14. Operating Cost Management Efforts
15. Storm Damage Repair Expense
16. Interest Expense
17. Lobbying Expense
18. Gross Revenue Conversion Factor

C. Potentially Contested Issues

1. Rate Case Expenses
  - a. Appeal & Remand

The ALJPO errs in its conclusion allowing ComEd to recover costs associated with the Company's appeal of Commission orders. The crux of the issue is simply this: Who should pay for the utility's legal costs when the utility takes the Commission to court because it does not like a Commission decision? If ratepayers are made to pay, as the ALJPO would have it, utilities will have a strong incentive to appeal every Commission decision it deems unfavorable to the utility. And since the Commission's role is to balance utility's shareholders and ratepayer's interests, there will always be Commission decisions on issues that the utility will not like, regardless of whether they are just or reasonable conclusions. If shareholders are made to pay, however, the

Commission will provide the utility with the incentive to appeal only those issues that may have a sound basis for a reversal.

Further, in making its erroneous conclusion, the ALJPO does not address the issue of who pays for costs incurred in responding to appeals filed by other parties or for further litigation before the Commission of issues that are the subject of a remand order. (Staff IB, 23-24.) The ALJPO also does not specifically address Staff's recommendation, to which ComEd agreed, that costs incurred for the appeal and remand associated with rate case proceedings are subject to Section 9-229 of the Act for a specific assessment of justness and reasonableness. (Staff IB, 24-25.) The Order should address Staff's recommendation regarding responsive appeals costs and court-ordered remand costs. Further, the Order should clearly state the Commission's conclusion that appeals and remand costs are subject to Section 9-229.

#### Recovery of Costs Associated with Affirmative Rate Case Appeal

In allowing ComEd to recover affirmative appeal costs, the ALJPO states, "Moreover, we agree that appeals are a normal part of the rate case process and that the utility's ability to appeal plays a role in ensuring that rates are just and reasonable and enabling utilities to provide safe, adequate and reliable service for customers." (ALJPO, 25.) This conclusion incorrectly implies that until a Commission Order is reviewed and affirmed by the court, it cannot be presumed that the decisions contained therein are just and reasonable and enabling utilities to provide safe, adequate and reliable service. This is wrong. Appellate courts give wide deference to the finder of fact, and recognize the Commission's considerable expertise in interpreting its own statute. Commonwealth Edison Co. v. Illinois Commerce Comm'n, 398 Ill. App. 3d. 510,

514.<sup>1</sup> Further, court appeals of ICC orders are **not** a normal part of the rate case process which begins with the utility's rate filing at the ICC and ends with the Commission's Final Order or may occasionally extend to an Order on Rehearing. Instead, it is the exception to the rule. In fact, the Act itself recognizes this extraordinary step of appeal in that Section 10-204(a) states that appeals do not "stay or suspect the operation of the rule, resolution, order or decision of the Commission..." 220 ILCS 5/10-204(a). Based on this Section of the Act, the presumption is that the Commission "got it right."

As stated in its testimony and repeated in briefs, Staff is not suggesting that utilities be prevented from seeking every legal recourse available to them in order to be able to charge ratepayers more for their services; the utilities always have the ability to appeal and for the last several years, ComEd has appealed certain Commission decisions on almost every rate case. What Staff is suggesting, however, is that the Commission should find it unreasonable for the Company to shift responsibility of those costs from shareholders to ratepayers. Ratepayers should not be burdened with the costs associated with the Companies' decision to pursue such recourse. (Staff IB, 22-23.) Furthermore, the Commission is charged to "ensur[e] rates are just and reasonable and enabl[e] utilities to provide safe, adequate and reliable service for customers." (ALJPO, 25.) It is not an Appellate Court that makes that factual determination. On the contrary, under well established legal principles, the Appellate Court is required to give substantial deference to the decisions of the Commission. Alhambra-Grantfork

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<sup>1</sup> "Great weight and deference should be given to the Commission's decisions; and the administrative rules and regulations it promulgates, acting in its quasi-legislative capacity, enjoy a presumption of validity." Central Illinois Pub. Serv. Co. v. Illinois Commerce Comm'n, 268 Ill. App. 3d 471, 479 (4th Dist. 1994)

Telephone Co. v. Illinois Commerce Comm'n, 358 Ill. App.3d 818,821 (2005). On review, the court can neither reevaluate the credibility or weight of the evidence nor substitute its judgment for that of the Commission. Illinois Bell Telephone Co., v. Illinois Commerce Comm'n, 283 Ill. App. 3d 188,200-201 (1996). With regard to the evidentiary issues in a case, great deference is accorded to Commission findings of fact. When reviewing Commission factual findings, a court must determine whether the findings are supported by the evidence, not whether based on that evidence the court would have arrived at the same conclusion as the Commission. Champaign County Tel. Co. v. Commerce Comm'n, 37 Ill. 2d 312, 320-321 (1967); Commerce Comm'n v. Cleveland, Cincinnati, Chicago and St. Louis Railway Co., 309 Ill. 165, 170 (1923).

The ALJPO also states, "In order for there to be a proper adjudication of rates, where appeals are allowed by right, this Commission cannot impose on a utility the cost of appealing a Commission decision that the utility believes to be erroneous in some regard." (ALJPO, 25.) However, this view unjustly imposes on ratepayers those same costs. It is unclear why it is more appropriate for ratepayers to pay the appeals costs associated with the Company's dissatisfaction with the Commission's Order. The Commission's final order represents its attempt to balance the interests of shareholders and ratepayers. Company management's decision to appeal a Commission order is the Company's attempt to alter that Commission-determined balance in favor of shareholders. (Staff IB, 21-22.) Further, should the utility lose its affirmative appeal, and the Appellate Court affirm the Commission's Final Order that set rates was just and reasonable, then there would have been no "erroneous" Commission decision.

Therefore, ratepayers should not be required to pay for the costs of this type of appellate litigation. (Staff RB, 9-10.)

Recovery of Costs Associated with Responsive Rate Case Appeals or Further Litigation Before the Commission of Issues That Are the Subject of a Remand Order

Although it is not reasonable to require ratepayers to pay the appeals costs associated with the Company's dissatisfaction with the Commission's Order, to the extent that the Company incurs expenses in responding to appeals filed by other parties to support Commission orders or for further litigation before the Commission of issues that are the subject of a remand order, these costs could be determined to be recoverable from ratepayers. Under those circumstances, the Company is not voluntarily litigating for the sole purpose of increasing its revenue requirement. The PO does not make this critical distinction since it accepts any and all appeal costs as allowable. Consistent with its position, Staff recommends the ALJPO be revised to indicate that only responsive appeal costs and remand litigation costs are allowable for recovery from ratepayers. (Staff IB, 23-24.)

Classification of Rate Case Appeal & Remand Costs as Rate Case Expense

Staff and the Company agreed that costs incurred for the appeal and remand of rate case proceedings should be subject to Section 9-229 of the Act for a specific assessment of justness and reasonableness. Staff also recommended that the Commission specifically reflect the appeal and remand costs in the rate case expense amount that it concludes to be just and reasonable in its Findings and Ordering paragraph regarding Section 9-229. However, the ALJPO does not specifically address

the issue of whether appeals and remand costs are subject to Section 9-229.<sup>2</sup> Therefore, the Order should set forth a conclusion which states that to the extent that the Company's rate case appeal and remand costs are determined to be recoverable from ratepayers, the Company's rate case appeal and remand costs are subject to the requirements of Section 9-229 of the Act.

#### Alternative Language Modification

If the Commission disagrees with Staff's position regarding the recoverability of costs associated with affirmative rate case appeals, Staff recommends alternative language modifications which acknowledge the parties' agreement that appeals and remand costs are rate case expenses subject to the specific assessment of justness and reasonableness set forth in Section 9-229 of the Act.

#### Proposed Modification (ALJPO, 25.)

#### Staff's Position

...  
~~Staff addressed most of ComEd's arguments in its initial brief, and will not do so again here. However,~~states that in ComEd's IB, the Company advances a new argument that a utility appeal is identical in substance and effect to any other utility filing for a rate increase. Staff disagrees with this new ComEd argument, because an appeal of a Commission order in a rate case is clearly distinguishable from an initial rate increase filing. An appeal involves argument of facts before an Appellate Court that were already litigated before the Commission and were already the subject of a Commission order. An initial rate increase filing involves the presentation and litigation of new set of facts not previously litigated at the Commission and that has not yet been the subject of a Commission order. Further, appeals are directly attributed to a party's dissatisfaction with the Commission order, whereas initial rate increase filings are the result of a utility's claim of

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<sup>2</sup> Further, the Findings and Ordering paragraphs in Section XIII of the ALJPO omit any specific finding regarding rate case expense required by Section 9-229 of the Act. This omission is addressed within Section XIII of Staff's BOE, below.

insufficiency of revenues which could originate from any number of economic or operational causes. From the perspective of a utility eager to boost its bottom line, both scenarios may have the same end result in mind – an increase in customer rates – but both are clearly distinguishable.

...

### **Commission Analysis and Conclusion**

~~The Commission agrees with ComEdStaff. Section 9-229 clearly contemplates recovery of a utility's just and reasonable costs "to prepare and litigate a general rate filing." As ComEd correctly notes, the provision does not distinguish between Commission and appellate rate case litigation costs. Moreover, we agree that appeals are a normal part of the rate case process and that the utility's ability to appeal plays a role in ensuring that rates are just and reasonable and enabling utilities to provide safe, adequate and reliable service for customers. In order for there to be a proper adjudication of rates, where appeals are allowed by right, this Commission cannot impose on a utility the cost of appealing a Commission decision that the utility believes to be erroneous in some regard. The costs associated with the Company's affirmative appeal of Commission orders on rate cases should not be recovered from ratepayers. It is not reasonable to require ratepayers to pay the appeals costs associated with the Company's dissatisfaction with the Commission's Order. The Commission's final order represents the Commission's attempt to balance the needs of shareholders and ratepayers. Company management's decision to appeal a Commission order is the Company's attempt to alter that balance in favor of shareholders. Further, should the utility lose its appeal, and the Appellate Court affirms the Commission's Final Order that set rates it determined were just and reasonable, then there was no "erroneous" Commission decision and ratepayers should not be required to pay for the Company's appellate litigation. Finally, and as discussed in the Conclusions in Sections V.C.4 and V.C.5 below, a utility appeal presumably believes it will prevail in court. The Commission does not agree. In the Commission's view, it would be unfair to ratepayers to burden them with costs that are not their responsibility. For these reasons, we conclude that the rate case expenses related to ComEd's appeals in Docket Nos. 07-0566 and 10-0467 are not recoverable.~~

The Commission also agrees with Staff that costs incurred by the Company for the responsive appeal and court-ordered remand of rate case proceedings are recoverable from ratepayers, subject to Section 9-229 for a specific assessment of justness and reasonableness. These expenses are incurred by the Company in

response to appeals filed by other parties to a case and to which the Company has to respond.

### **Alternative Proposed Modification**

...

Staff ~~addressed most of ComEd's arguments in its initial brief, and will not do so again here.~~ However, states that in ComEd's IB, the Company advances a new argument that a utility appeal is identical in substance and effect to any other utility filing for a rate increase. Staff disagrees with this new ComEd argument, because an appeal of a Commission order in a rate case is clearly distinguishable from an initial rate increase filing. An appeal involves argument of facts before an Appellate Court that were already litigated before the Commission and were already the subject of a Commission order. An initial rate increase filing involves the presentation and litigation of new set of facts not previously litigated at the Commission and that has not yet been the subject of a Commission order. Further, appeals are directly attributed to a party's dissatisfaction with the Commission order, whereas initial rate increase filings are the result of a utility's claim of insufficiency of revenues which could originate from any number of economic or operational causes. From the perspective of a utility eager to boost its bottom line, both scenarios may have the same end result in mind – an increase in customer rates – but both are clearly distinguishable.

...

### **Commission Analysis and Conclusion**

The Commission agrees with ComEd. Section 9-229 clearly contemplates recovery of a utility's just and reasonable costs "to prepare and litigate a general rate filing." As ComEd correctly notes, the provision does not distinguish between Commission and appellate rate case litigation costs. Moreover, we agree that appeals are a normal part of the rate case process and that the utility's ability to appeal plays a role in ensuring that rates are just and reasonable and enabling utilities to provide safe, adequate and reliable service for customers. As such, the costs of appeals must be considered under Section 9-229 similar to all other rate case expenses. In order for there to be a proper adjudication of rates, where appeals are allowed by right, this Commission cannot impose on a utility the prudent, just,

and reasonable cost of appealing a Commission decision that the utility believes to be erroneous in some regard. For these reasons, we conclude that the rate case expenses related to ComEd's appeals in Docket Nos. 07-0566 and 10-0467 are recoverable.

b. Attorneys

The ALJPO errs in its conclusion to allow recovery of ComEd's legal fees associated with hours billed in excess of ten hours per day by individual attorneys and paralegals in 2012. Given the large number (i.e., 25) of competent and experienced attorneys working on Docket Nos. 11-0721 and 12-0321, it is not reasonable for attorneys to routinely bill ComEd for ten or more hours per day, and then expect that ratepayers will pay the tab. (Staff IB, 25.) Further, the ALJPO fails to address Staff's arguments regarding the non-traditional attorney-client relationship surrounding rate case expenses, in that ratepayers – not the utility – are paying for legal bills incurred by the utility in the utility's effort to raise ratepayers' rates.

For Docket Nos. 11-0721 and 12-0321, several attorneys and paralegals routinely billed the Company in excess of ten hours in a day. For an attorney or paralegal to bill the Company in excess of ten hours in a day, then he or she likely had to expend more than the hours that were billed. Otherwise, this would mean that the attorney or paralegal did not receive any calls or review any emails on any other matter and took few breaks during that day. Given that ComEd incurred rate case expense associated with 25 attorneys and paralegals from four large law firms during 2012, in addition to in-house ComEd attorneys, experts, and administrative staff, it is not reasonable that several external attorneys and paralegals needed to routinely bill ten or more hours a day. (Id., 25-26.)

ComEd believes it is not “unusual, surprising nor disturbing” for lawyers to bill large numbers of hours in law firms. Staff disagrees. In a more traditional attorney-client relationship, where the client pays its own bills, that client would be able to review his bills and be clear about his expectations of what services the client wants to pay for. As has been repeatedly noted by the Commission in its prior Orders, the utility “client” is not paying the attorneys’ bills in a rate case – its ratepayers are.<sup>3</sup> As such, the issue of hours billed warrants careful review for the justness and reasonableness of amounts expended for rate case litigation as required by Section 9-229 of the Act. Justness and reasonableness are the standards set forth in Section 9-229, not “usualness, surprise or disturbance” as intimated by the Company witness. Additionally, what may be “ordinary and necessary business expenses” as they relate to a corporation and its law firm also does not meet the required standard. (Id., 26.)

ComEd also opines that limiting attorneys to ten hours per day is counterintuitive and inefficient, and that attorneys may not charge more per hour for hours in excess of ten hours per day. This completely misses the point. Ratepayers are paying for these legal bills incurred by the utility in the utility’s effort to raise ratepayers’ rates. Accordingly, such expenses ought to be subject to the just and reasonable standard assessment under Section 9-229. Any other “standard” that ComEd proffers should be disregarded. Further, contrary to ComEd’s opinion, allowing these expenses *carte blanche* encourages greater inefficiency since there is an inherent incentive for law firms to increase their billable hours. Attorneys are free to bill the Company for all hours

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<sup>3</sup> See generally Commonwealth Edison Co., ICC Order Docket No. 12-0321, 52-53 (December 19, 2012); Commonwealth Edison Co., ICC Order Docket No. 10-0467, 82, 89 (May 24, 2011).

worked; however, those billings need not automatically translate into costs recoverable from ratepayers. (Id., 26-27.)

The Ameren Illinois Company (“Ameren”) formula rate update ALJPO similarly recognizes that certain Ameren expenses are not reasonably recovered from ratepayers. Though the types of expenses at issue in the Ameren case are different, the just and reasonable standard is still the same. Additionally, in the Ameren case, the Staff witnesses took a “snapshot” of the evidence provided and extrapolated an adjustment from that snapshot. Ameren Illinois Co., Proposed Order, Docket No. 13-0301, November 14, 2013, 62. The ALJPO did not criticize Staff’s use of an estimate. (Id. 68.) The Ameren ALJPO notes that:

...although such expenses may be permissible, or even usual, in an unregulated business that competes with other unregulated businesses for customers, the expenses are not appropriate for regulated rate recovery since AIC customers have no choice but to obtain delivery services from AIC.

(Id., 69.)

Similarly, Staff took a snapshot of the rate case expense evidence submitted and made recommendations based thereon. What may be reasonable for corporations in terms of agreements they reach with private counsel, those relationships do not exist here. The Commission should not allow ComEd’s outside counsel to continue to inappropriately bill ratepayers.

As noted in Staff’s reply brief, Staff acknowledges that its 5% disallowance is an estimate, but maintains that regardless of its precision, an adjustment is warranted for this issue. (Staff RB, 11.) Staff disagrees with the ALJPO’s finding that there is no evidence to support Staff’s proposed disallowance of \$180,963. (ALJPO, 28.) Staff

thoroughly explained how it achieved its adjustment based on the limited information that Staff was given through discovery. The ALJPO fails to recognize the substantial evidence upon which an order must be based means more than a mere scintilla, however, the quantity of evidence does not have to rise to the level of a preponderance of the evidence. Citizens Utility Board v. Illinois Commerce Comm'n, 291 Ill.App.3d 300,304 (1997). It is evidence that a “reasoning mind would accept as sufficient to support a particular conclusion.” Citizens Utility Board, 291 Ill. App.3d at 304.

### **Proposed Modification**

(ALJPO, 28.)

### **Commission Analysis and Conclusion**

~~The Commission agrees with Staff and finds that ComEd’s legal fees associated with hours billed in excess of ten hours per day by individual attorneys in 2012 are not recoverable rate case expenses, and Staff’s 5% disallowance is therefore approved. Given the large number of competent and experienced attorneys and paralegals working on ComEd rate cases during 2012, it is not reasonable for those attorneys or paralegals to routinely bill ComEd for ten or more hours per day and then expect that ratepayers will pay the tabthere is no evidence in the record that supports Staff’s proposed disallowance of \$180,963 of outside attorney costs. Indeed, Staff concurs that there are occasions when billing ten hours a day is reasonable. The record evidence also shows that ComEd’s outside attorneys only billed in excess of ten hours a day 1.17% of the time. This can only be characterized as rare and is in some instances reasonable. Further, the Commission finds Staff’s methodology for arriving at its 5% reduction wholly unsupported in the record. As there is no evidence to support the disallowance or the quantification of the proposed reduction, the Commission declines to adopt Staff’s proposal.~~

#### c. Experts

The Company’s draft PO and the ALJPO’s conclusion regarding the recovery of Analysis Group fees is unfounded. Therefore, Staff takes exception to the ALJPO regarding the fees paid to Analysis Group. (ALJPO, 30-31.) The Commission should

disallow the \$23,502.55 of expenses paid to Analysis Group for invoice 833617 from Docket No. 11-0721 because the Company has failed to show that those expenses were just and reasonable pursuant to Section 9-201(c) of the Act. (Staff IB, 30; Staff RB, 13.) It is the Company's burden to demonstrate that the expenses it seeks to recover through rates were prudently and reasonably incurred. (Staff IB, 28.) It is clear, therefore, that ComEd, as petitioner here, bears the burden of proof.

The ALJPO's ten sentence conclusion on this topic amounts to nothing more than three conclusory statements interspersed among observations that, if accepted, turn the legally mandated burden of proof requirement on its head. The ALJPO concludes that the record evidence supports that these costs "were prudently incurred and reasonable in amount," "that all work performed was reasonable," and that the "expenses are just and reasonable." (ALJPO, 30-31.) However, as fully explained in Staff's IB, the Company presented nothing to show that any work was actually even performed. (Staff IB, 29; Staff RB, 12-13.) Having failed to establish that basic foundational element, the Commission cannot find that ComEd met its burden of proof in establishing the prudence and reasonableness of its expenses.

The only explanation offered for the ALJPO's conclusion is that "ComEd's decision to engage Dr. Hubbard and Analysis Group was reasonable based on ComEd's belief that ComEd's capital structure may be contested in light of the discovery requests issued by Staff and Intervenors." (ALJPO, 30.) However, the Company did not have to act on "belief" regarding what arguments *might* be presented; it could have simply waited for the anticipated testimony to be filed, just as other parties must do. Instead, ComEd guessed – and guessed wrong – in an attempt to get a head start on its

rebuttal testimony.<sup>4</sup> Now, it wants ratepayers to pay for that failed gamble. Unfortunately, the ALJPO's conclusion grants the Company a no-lose situation: the Company gains the advantage of additional time to work on its testimony if it guesses correctly, with no downside if it guesses incorrectly – either way, ratepayers pay. (Staff IB, 33) Utilities, which already enjoy the advantage over other parties of recovering from rate payers the costs of hiring a legion of consultants, would now effectively be able to buy time, too. With no downside, why would a utility ever turn down such an opportunity?

In fact, the ALJPO fails to recognize the overarching reality that Analysis Group's work was simply not necessary at all. Staff notes that in rejecting certain expenses for rate of return experts in a prior ComEd rate case, the Commission stated that "one component of justness and reasonableness for rate case expense is necessity." Commonwealth Edison Co., ICC Order Docket No. 10-0467, 76 (May 24, 2011).<sup>5</sup> However, as explained in Staff's IB, Analysis Group has no role in making capital structure decisions at ComEd, nor did it participate in the development of the capital structure report ComEd presented in this proceeding pursuant to the Final Order in Docket No. 11-0721. Moreover, it appears that Analysis Group possesses no particular

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<sup>4</sup> The Company's denial that it was seeking any kind of advantage by getting a head start on its response to the anticipated arguments (ComEd RB, 28) strains credulity. It would be akin to denying that a runner gains an advantage by jumping the gun in a footrace. The Company obviously thought it was advantageous to jump the gun or it would have just waited until the anticipated testimony was filed to find out what arguments it truly needed to address.

<sup>5</sup> ComEd claims that this quote was taken out of context. (ComEd RB, 29.) However, the statement stands on its own; the context does nothing to change its meaning. The Commission was simply applying a general rule to a particular circumstance. Despite ComEd's suggestion, nowhere did the Commission in its Order limit the applicability of necessity as a component of just and reasonable rate case expense solely to that particular circumstance. The implication of ComEd's argument is that since duplicated work is one form of unnecessary work, then unnecessary equals duplicated. That is simply a violation of basic logic, like saying all Beagles are dogs, therefore all dogs are Beagles, which is clearly not true.

expertise or resources that are not possessed by employees of ComEd. Thus, it is clear that the Company is perfectly capable of managing its own capital structure, and performing the related research, without any input from Analysis Group. (Staff IB, 34.) Add to that the fact that the Company's impatience is the only reason Analysis Group was hired to begin with, and it is clear that the Company has also failed to satisfy the necessity element of justness and reasonableness.

Also included in the ALJPO's conclusion were the observations that neither the absence of a numbered exhibit or report, nor the inclusion of work pre-dating the engagement letter, nor the use of a blended billing rate precludes the finding that the costs associated with the alleged work were just and reasonable. (ALJPO, 30-31.) Staff fully addressed all of these arguments in its initial brief, along with numerous other concerns, all of which the ALJPO ignores. (Staff IB, 28-35.) As a result, the ALJPO errs in rejecting Staff's position on these issues. More importantly, the implication of the ALJPO's observations is to turn the burden of proof on its head. As noted previously, it is not Staff's burden to prove imprudence and unreasonableness, but rather, the Company's burden to demonstrate that the expenses it seeks to recover through rates were prudently and reasonably incurred. Even if the Commission were to dismiss the valid concerns Staff raised regarding the complete absence of any tangible work product and questionable billing (or any of the other concerns Staff brought to light), which it should not, that does not relieve the Company of its burden to establish the prudence and reasonableness of the expenses for which it seeks reimbursement. Merely claiming, or even demonstrating, that expenses were incurred does not

demonstrate those expenses were prudent and reasonable.<sup>6</sup> The simple fact of the matter is that the Company has presented nothing to demonstrate that any work was actually done, let alone that the expense in question was prudent and reasonable. (Staff IB, 28-29.) The evidence the Company presented in its attempt to demonstrate the prudence and reasonableness of the expenses for Analysis Group is limited to an engagement letter, an invoice, and the testimony of a ComEd witness. (Staff IB, 34-35.) However, as explained in Staff's IB, even the Company implicitly acknowledged that the presentation of engagement letters and invoices does not prove recoverability. (Staff IB, 28-29.) Likewise, the Commission obviously cannot simply accept the word of a utility witness. Overall, the documentation the Company has provided does not justify the work reportedly performed or the amount expended as prudent or reasonable and, thus, the expenses related to invoice 833617 should be removed from the revenue requirement. (Staff IB, 34-35.)

**Proposed Modification**  
(ALJPO, 30-31.)

**Commission Analysis and Conclusion**

The Commission concludes that the evidentiary record provides insufficient support that the \$23,502.55 of expenses relating to work performed by Analysis Group on capital structure issues in Docket No. 11-0721 were prudently incurred and reasonable in amount. It is the Company's burden to demonstrate that the expenses it seeks to recover through rates were prudently and reasonably incurred. ("If the Commission enters upon a hearing concerning the propriety of any proposed rate or other charge...the burden of proof to establish the justness and reasonableness of the proposed rates or other

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<sup>6</sup> ComEd's reply brief cites Peoples v. Slattery and suggests that proof of costs incurred is enough to make a *prima facie* case for recovery. (ComEd RB, 28, citing Peoples v. Slattery, 373 Ill. 31, 61-62 (1939).) But that finding dealt with the amount to recover, rather than the general recoverability in terms of reasonableness and prudence. Thus, that case is not relevant to the issue at hand.

charges...shall be upon the utility.” 220 ILCS 5/9-201(c); “The Commission shall apply the same evidentiary standards, including, but not limited to, those concerning the prudence and reasonableness of the costs incurred by the utility, in the hearing as it would apply in a hearing to review a filing for a general increase in rates under Article IX of this Act.” 220 ILCS 5/16-108.5(d.) However, the Company has presented nothing to demonstrate that any work was actually done, let alone that the expense in question was prudent and reasonable. When asked to provide copies of the analysis or other work performed, the Company refused, citing attorney client and work product privileges. Although the Company can refuse to provide information that might demonstrate prudence and reasonableness of its expenses, by making that choice it is also choosing to forego its opportunity to recover those expenses from rate payers. The only documentation the Company provided was two engagement letters (one for Dr. Hubbard and one for Dr. Chambers) and two invoices (invoice 833617 and invoice 831794) from Analysis Group. However, an engagement letter is obviously not proof of appropriately recoverable fees, since even the Company acknowledges that Dr. Chambers performed no work and billed no fees, despite his signed engagement letter. Likewise, the submission of an invoice is not proof of appropriately recoverable fees. Indeed, the Company admits that one of the invoices it submitted is not recoverable. Further, the Company has failed to show that Analysis Group’s work was not duplicative or redundant of the research performed and testimony that was filed on the subject by other ComEd representatives in Docket No. 11-0721.

Additionally, as we have stated before, one component of justness and reasonableness for rate case expense is necessity. However, the Company failed to establish that Analysis Group’s work was necessary. To the contrary, the evidence demonstrates that it was not. It is clear that the Company is perfectly capable of managing its own capital structure, and performing the related research, without any input from Analysis Group. Furthermore, the anticipated arguments for which Analysis Group was hired to respond were never even presented. Thus, there never was any need in the first place, only the Company’s desire to gain more time to work on its rebuttal testimony than allotted by the case schedule. We will not compel rate payers to reimburse the Company for its failed maneuver to get ahead of the approved schedule. Specifically, the evidence shows that ComEd’s decision to engage Dr. Hubbard and Analysis Group was reasonable based on ComEd’s belief that ComEd’s capital structure may be contested in light of the discovery requests issued by Staff and Interveners. Also, as ComEd correctly states, the fact that the work did not result in a numbered exhibit or a report does not prohibit a determination that the costs associated with the work were just and reasonable. Nor does the fact that some of the work performed by

~~Analysis Group pre-dated the engagement letter prohibit such a determination. ComEd provided insufficient evidence to support that all work performed was reasonable. Last, the use of a blended rate also provides no basis to disallow this expense. We agree with ComEd that because the blended rate was in fact the billing rate the arrangement was transparent. Transparency was further enhanced because ComEd disclosed the standard rate that Analysis Group charged as well as the hours billed per professional. Further, the blended rate was a cost savings mechanism that should be encouraged. Based on the evidence presented, we conclude that ComEd's expert expenses for Analysis Group are not just and reasonable and, thus, the \$23,502.55 of expenses related to invoice 833617 should be removed from the revenue requirement.~~

- d. Other
  - i. SFIO Consulting
  - ii. Westlaw/Lexis Research

The ALJPO errs in its conclusion to allow recovery of charges ComEd's outside counsel incurred in connection with research performed on the web-based research platforms Westlaw and Lexis. (ALJPO, 34.) The costs in question were not specifically authorized as required by the Exelon Corporation Billing and Procedural Guidelines for Outside Counsel ("Billing Guidelines"), and as such, the costs for Westlaw/Lexis research should not have been paid by ComEd and should not be recovered from ratepayers.

The ALJPO agrees with ComEd that there is no evidence showing that written authorization is required for this expense and authorization to conduct reasonable electronic research exists when ComEd tasks outside counsel to engage in specific projects. Id. First, Staff never claimed that written authorization was required; rather, Staff testified that "specific" authorization is required. (Staff IB, 27.) Second, and more importantly, the ALJPO fails to explain how it reconciles its agreement with ComEd to

the specific language of the Billing Guidelines which specifically state: “The Company will not pay for: ... Lexis/Westlaw/ electronic research charges (except as specifically authorized by Exelon...” (ComEd Ex. 8.04, 12.) (Emphasis added.) Clearly, there is evidence in the record showing that electronic research will not be paid for unless specifically authorized. However, the record is void of any evidence which indicates that the electronic research in question was specifically authorized, as required by the Billing Guidelines for payment by the Company. (Staff IB, 27.)

The ALJPO also agrees with ComEd that requiring attorneys to obtain documented permission to engage in such research would make providing legal services unnecessarily time consuming and expensive. It is unclear how sending a letter or e-mail to ComEd requesting its permission to incur expenses for web-based research would be time consuming and expensive. Nonetheless, Staff never claimed that documented permission was required; rather, Staff testified that “specific” authorization was required. Further, it was not Staff that set forth the requirement for specific authorization; it was the Company’s own Billing Guidelines that set forth the requirement. The Billing Guidelines are specific and direct. In addition to stating what ComEd will not pay for, the “Conclusion” section of the Billing Guidelines states, “We expect these guidelines to be **strictly followed.**” (ComEd Ex.8.03, 14.) (Emphasis added.) This language clearly indicates what actions would result in non-payment. If the Company’s Billing Guidelines need not be followed by its external vendors, as the Company claims, then it is unclear why the Billing Guidelines even exist, and more importantly, why it was presented by the Company as evidence in this proceeding. (Staff IB, 28.)

Finally, Staff would be remiss to not point out that this is not the first time ComEd's non-compliance with the Exelon Corporation Billing and Procedural Guidelines for Outside Counsel has been at issue. As noted in the Commission's Order in ComEd's most recent formula rate update proceeding, Docket No. 12-0321, there Staff also recommended the disallowance of costs which were not appropriate under the Guidelines. Specifically, in summarizing Staff's position, the Order stated, in part:

[...] Staff also recommends that the Commission place ComEd on notice that the Commission will be reviewing the bills from outside counsel in future cases to ensure that it is diligent in ensuring compliance with Exelon Corporation's Billing and Procedural Guidelines for Outside Counsel. Included in the compensation for attorneys and technical experts to prepare and litigate Docket 11-0721 are several meals invoiced for ComEd's outside legal firm. Staff states that the outside legal counsel with which ComEd contracts is required to review and accept Exelon Corporation's Billing and Procedural Guidelines for Outside Counsel, which clearly indicate that ComEd will not pay for meals unless those meals are related to long distance travel.

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

Commonwealth Edison Co., ICC Order Docket No. 12-0321, 52 (December 19, 2012). However, in that proceeding, the Commission did not reach a specific conclusion regarding the Billing Guidelines, deciding instead to not allow recovery of

ANY rate case expenses save for a portion of the required filing fee, concluding that rate case expenses were not supported in the record.<sup>7</sup>

The emerging pattern of a ComEd's lack of attention to its own internal guidelines is troubling to Staff, and indicates that the Company does not carefully review the bills and expenses from outside counsel, or does not desire to implement its own Billing Guidelines. It prompts the question of whether the Billing Guidelines only apply when ComEd shareholders are paying the legal bills, not ratepayers. The Commission should find that ComEd's Billing Guidelines must be followed by ComEd, and that in absence of specific authorization, charges that ComEd's outside counsel incurred in connection with research performed on the web-based research platforms Westlaw and Lexis are not recoverable from ratepayers.

**Proposed Modification**  
(ALJPO, 34.)

**Commission Analysis and Conclusion**

The Commission declines to adopt Staff's proposed disallowance of \$8,000 for charges ComEd incurred in connection with legal research performed on the web-based research platforms Westlaw and Lexis. We agree with Staff that contrary to the requirements of the Exelon Corporation Billing and Procedural Guidelines for Preferred Providers of outside Legal Services, there was no specific authorization for the electronic research at issue; as such, it is not reasonable for ratepayers to pay the fees associated with that research. ~~ComEd that there is no evidence showing that written authorization is required for this expense and authorization to conduct reasonable electronic research exists when ComEd tasks outside counsel to engage in specific projects. We also agree that requiring attorneys to obtain documented permission to engage in such research would make providing legal services unnecessarily time consuming~~

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<sup>7</sup> The cost of attorney meals are not at issue in the current proceeding, as ComEd voluntarily removed those costs in rebuttal testimony after they were challenged by Staff's direct testimony. (Staff IB, 28.)

~~and expensive.~~ If the Company's Billing Guidelines need not be followed by its external vendors, as the Company claims, then it is unclear why the Billing Guidelines even exists, and more importantly, why the Billing Guidelines were presented by the Company as evidence in this proceeding. ComEd should be held to the standards that the Company itself provided as evidence. The charges ComEd incurred in connection to legal research performed on Westlaw and Lexis are not recoverable.

iii. Attorney General Position

2. Incentive Compensation Program Expenses

a. Long-Term Performance Share Awards Program  
("LTPSAP")

Staff recommends minor technical changes to the introduction of this section of the Order which provide reference to conclusions found elsewhere in the Order. Although this section of the Order addresses contested Incentive Compensation, there are other contested costs associated with Incentive Compensation which are addressed elsewhere in the Order. Staff's recommended edits identify and provide references to those other related issues within the Order.

**Proposed Modification**  
(ALJPO, 36.)

The incentive compensation program expenses at issue in this docket are: (1) ComEd's Long-Term Performance Share Awards Program ("LTPSAP"), and (2) incentive compensation associated with ComEd's energy efficiency employees. ComEd originally sought to recover 50% of its LTPSAP expenses, amounting to \$1,573,000, and 100% of its energy efficiency incentive compensation expenses in the amount of \$981,000. Additional costs associated with Incentive Compensation – Payroll Taxes and Pension Costs – are addressed in Sections V.C.4 and V.C.5 of this Order, below.

b. Energy Efficiency/Rider EDA

Staff supports the ALJPO's sound conclusion that ComEd had no authority to create a regulatory asset for its pre-2012 Energy Efficiency ("EE") incentive compensation costs, and that the Energy Infrastructure and Modernization Act ("EIMA") provides no authorization to recover costs incurred prior to 2012 in this proceeding. (ALJPO, 47.) The ALJPO, however, erroneously rejects Staff's adjustment to disallow the incentive compensation costs paid to incremental EE employees during 2012. As will be explained below, this issue comes down to whether the Commission ought to approve recovery of incentive compensation costs for EE employees that it previously rejected under the EE Rider because it was not shown to be related to EE efforts and that ComEd now wants to inappropriately recover through formula rates. In Docket No. 10-0570, the Commission directed ComEd to demonstrate how the incentive compensation costs at issue here relates to EE or how it has tailored its incentive compensation for these employees. Commonwealth Edison Co., ICC Order Docket No. 10-0570, 44 (December 21, 2010). Had it made that demonstration, ComEd could have recovered such costs through the EE Rider. Instead, ComEd has chosen to ignore that directive and attempt to recover those rejected costs another way: through distribution formula rates. Such intransigence should not now be rewarded by granting such costs recovery as if they were distribution related, which the record evidence shows they are not.

Under EIMA ComEd is only allowed to recover through its formula rates its delivery services costs. 220 ILCS 5/16-111.5(c). ("A participating utility may elect to recover its delivery services costs through a performance-based formula rate approved

by the Commission, ...”) The ALJPO fails to take this into account when it reaches its conclusion on the recovery of incentive compensation costs for energy efficiency employees. There is no dispute that the incentive compensation energy efficiency/Rider EDA costs which ComEd seeks recovery of are not delivery services costs. ComEd admits it in witness Fruehe’s direct testimony. (ComEd Ex. 3.0, 41.) (“Has ComEd included in its revenue requirement any incentive compensation associated with employees who perform energy efficiency activities? Yes. ...”) While the ALJPO acknowledges that the expenses at issue are for implementation of energy efficiency programs, it fails to take that into account in reaching its conclusion on the issue. (ALJPO, 46.) Accordingly, the Commission must reject the ALJPO’s erroneous conclusion that AIP expenses associated with ComEd’s incremental energy efficiency employees for 2012 in the amount of \$268,000 are recoverable. (ALJPO, 47.) The appropriate place to consider the costs at issue is under Rider EDA. (Staff Ex. 3.0 Public, 7.) The Commission did consider the costs in a Rider EDA reconciliation proceeding and found that the costs should not be recovered. Commonwealth Edison Co., ICC Order Docket No. 10-0537, 25 (October 17, 2012).

The ALJPO states:

The Commission treats reasonable and prudent ComEd employee AIP expense associated with the achievement of ComEd’s operational metrics as recoverable. The Company has shown that the incremental energy efficiency employees are full ComEd employees who participate in the same AIP program as other ComEd employees and Staff does not dispute this fact.

(ALJPO, 47.) Staff does not dispute, but rather points to the fact that the EE employees participate in the same AIP program as all other ComEd employees. The ALJPO further states:

The Commission denied recovery of these costs through Rider EDA in Docket No. 10-0537 because it found that they did not meet the standard for recovery in that docket, finding specifically that the costs were not sufficiently related to energy efficiency or tailored to energy efficiency employees. See Commonwealth Edison Co., ICC Docket No. 10-0537, Order (Oct. 17, 2012) at 23.

(ALJPO, 46.)

Staff argues that the AIP plan is not sufficiently related to energy efficiency or tailored to incremental EE employees. The AIP plan used for the incremental EE employees, which as the ALJPO points out is the same as that used for all employees, has already been determined to be deficient in incentivizing the incremental EE employees. In Docket No. 10-0537, the Commission specifically disallowed incentive compensation costs for energy efficiency employees stating that, "...the efforts of the incremental EE employees have very little to do with the incentive compensation which the Company seeks to recover from ratepayers through Rider EDA." Commonwealth Edison Co., ICC Order Docket No. 10-0537, 25 (October 17, 2012). There is no difference between the efforts of the incremental EE employees in Docket No. 10-0537 and the efforts of those employees in Docket No. 13-0318. There are no additional customer benefits created simply because a different recovery mechanism is chosen. In Docket No. 10-0570, Staff advocated a language change to the EE tariff Rider EDA to exclude the recovery of incentive compensation through the Rider. The Commission rejected this proposal stating, "Accordingly, Staff's suggestion is contrary to the statute because it would have ComEd recover most of the Plan costs through Rider EDA, but then recover the incentive compensation costs through base rates." Commonwealth Edison Co., ICC Order Docket No. 10-0570, 44 (December 21, 2010). The Commission has already clearly determined that it is contrary to statute to "split the baby" and recover the

incentive compensation costs through base rates. Staff recommends the ALJPO be modified, as follows:

### **Proposed Modification**

(ALJPO, 46-47.)

### **Commission Analysis and Conclusion**

ComEd seeks to recover AIP expense associated with ComEd's incremental employees who implement and administer ComEd's energy efficiency programs and plans. The Commission denied recovery of these costs through Rider EDA in Docket No. 10-0537 because it found that they did not meet the standard for recovery in that docket, finding specifically that the costs were not sufficiently related to energy efficiency or tailored to energy efficiency employees. See Commonwealth Edison Co., ICC Docket No. 10-0537, Order (Oct. 17, 2012) at 23.

EIMA explicitly allows recovery of incentive costs relating to the achievement of operational metrics. See 220 ILCS 5/16-108.5(c)(4)(A). However, nothing in EIMA contradicts the longstanding Commission tradition of showing a benefit to ratepayers due to AIP to recover incentive compensation cost. The Commission treats reasonable and prudent ComEd employee AIP expense associated with the achievement of ComEd's operational metrics as recoverable. In addition, EIMA only allows for the recovery of delivery service costs through the formula rate. There is no dispute that the costs which the Company seeks recovery of are for energy efficiency not delivery services. The Company has shown that the incremental energy efficiency employees are full ComEd employees who participate in the same AIP program as other ComEd employees and Staff does not dispute this fact. In Docket No. 10-0537 the Commission specifically disallowed incentive compensation costs for energy efficiency employees stating that, "...the efforts of the incremental EE employees have very little to do with the incentive compensation which the Company seeks to recover from ratepayers through Rider EDA." Commonwealth Edison Co., ICC Order Docket No. 10-0537, 25 (October 17, 2012). There is no difference between the efforts of the incremental EE employees in Docket No. 10-0537 and the efforts of those employees in Docket No. 13-0318. There are no additional customer benefits created simply because a different recovery mechanism is chosen. The AIP expense associated with the

~~energy efficiency employees therefore should be treated no differently than any AIP expense associated with other ComEd employees and is similarly recoverable. Further Staff's assertion that these expenses must be recovered through Rider EDA misstates the Commission's finding. As ComEd correctly states, the Commission disallowed these costs in Docket No. 10-0537 expressly because it found that energy efficiency employees' AIP costs are not associated with ComEd's energy efficiency plans and it is therefore not proper to seek them in that proceeding. The Commission has also determined that it is contrary to statute to recover the incremental EE employees' incentive compensation costs through base rates. See Commonwealth Edison Co., ICC Docket No. 10-0570, Order (Dec. 21, 2010) at 44. In Docket No. 10-0570, Staff advocated a language change to the EE tariff Rider EDA to exclude the recovery of incentive compensation through the Rider. The Commission rejected this proposal stating, "Accordingly, Staff's suggestion is contrary to the statute because it would have ComEd recover most of the Plan costs through Rider EDA, but then recover the incentive compensation costs through base rates." Commonwealth Edison Co., ICC Order Docket No. 10-0570, 44 (December 21, 2010). The Commission has already clearly determined that it is contrary to statute to "split the baby" and recover the incentive compensation costs through base rates and EIMA only allows for the recovery of delivery services costs through formula rates.~~

With regard to the costs incurred prior to 2012, ComEd had no authority to create a regulatory asset to recover such costs through this proceeding. Regardless of the type of costs in question, it is not appropriate to seek recovery of out of period costs. These costs were not incurred during 2012, the Company had no previous Commission approval to defer these costs and the EIMA legislation which gave rise to the pending formula rate update and reconciliation proceeding does not authorize the Company to recover costs incurred prior to 2012 in this proceeding.

~~The Commission finds that ComEd's AIP expense associated with the energy efficiency employees incurred in 2012 is more appropriately considered for recoverability in a proceeding concerning Rider EDA. As such, this expense will not be allowed for purposes of this proceeding. ~~were properly recorded as a regulatory assetan expense. We conclude, therefore, that the AIP expenses associated with ComEd's incremental energy efficiency employees for 2012 are prudent and reasonable and ComEd should be allowed to recover \$268,000 of AIP expense associated with the energy efficiency employees.~~~~

3. Employee Stock Purchase Plan (“ESPP”)
  - a. Stock Price Issue
  - b. Income Tax Issue

Staff agrees with the ALJPO’s well-reasoned conclusion regarding ESPP costs. Staff recommends minimal changes to clarify the reasons for appropriately including the ESPP tax expenses in ComEd’s 2012 expenses. The ESPP tax expenses are appropriate for inclusion in 2012 expenses because they are an actual cost incurred during the 2012 calendar year which is not otherwise unreasonable. (Staff IB, 42.) The fact that amounts were not previously reflected in or recovered through prior revenue requirements is inconsequential – while Section 16-108.5(c) of the Act provides for the recovery of the utility’s actual costs for the rate year, the Act does not provide for blanket recovery of costs that were not previously accounted for or recovered in prior revenue requirements. 220 ILCS 16-108.5(c).

**Proposed Modification**  
(ALJPO, 55.)

**Commission Analysis and Conclusion**

...

The record shows that income taxes associated with ESPP are associated with the value of the benefit provided. Here, that benefit is the discount received. The AG and CCI however, improperly conflate the ESPP-related taxes with tax deductions that Exelon takes regarding dividends paid on shares of Exelon stock held in employee 401(k) accounts. The record shows, however, that the ESPP and employee 401(k) accounts are not related and the derivative tax issues presented by them are also unrelated. The record shows that Staff has concluded that the A&G and tax aspects of the proposed disallowance are incorrect. The Commission also finds that the ESPP

tax expenses related to years prior to 2012 are appropriately included in ComEd's 2012 rate year because they were incurred and appropriately recorded in 2012 ~~have not been reflected in prior revenue requirements and ComEd has not accounted for or recovered them.~~ The Commission therefore declines to adopt the proposed disallowances relating to ComEd's ESPP.

#### 4. Payroll taxes

Staff agrees with the ALJPO's well-reasoned conclusion regarding Payroll Taxes associated with disallowed or excluded incentive compensation. Staff recommends minimal changes which are necessary to address ComEd's suggestion that the Commission should wait for an appellate court decision on a related incentive compensation issue in a manner similar to how the ALJPO addressed the same ComEd suggestion regarding Pension Costs associated with disallowed or excluded incentive compensation, below.

#### **Proposed Modification** (ALJPO, 57.)

#### **Commission Analysis & Conclusion**

The Commission finds that payroll taxes associated with disallowed or excluded incentive compensation are not reasonable for recovery from ratepayers. The payroll taxes in question would not have been incurred if not for the associated incentive compensation; thus, they payroll taxes related to disallowed incentive compensation should also be disallowed ~~provided equal treatment and excluded from the revenue requirement like the incentive compensation costs that gave rise to those payroll taxes. The Commission therefore declines to allow ComEd's payroll taxes associated with the incentive compensation disallowed in this docket.~~

ComEd's suggestion that the Commission should wait for an appellate court decision on a related incentive issue cannot be accepted. While ComEd presumably believes it will prevail in court, the Commission does not agree. In the Commission's view, it would

be unfair to ratepayers to burden them with costs that are not their responsibility while a related issue is litigated. Therefore, the Commission adopts the disallowance as proposed by Staff.

5. Pension Costs

**VI. Rate of Return**

- A. Overview
- B. Capital Structure
- C. Cost of Capital Components
  - 1. Cost of Short-term Debt
  - 2. Cost of Long-term Debt
  - 3. Rate of Return on Common Equity

**VII. RECONCILIATION**

- A. Overview
- B. Potential contested Issues
  - 1. Deferred Income Taxes on Reconciliation Balance
  - 2. WACC Gross-Up

Staff suggests the following modifications to clarify the approved WACC in this proceeding, consistent with Docket No. 13-0553. Staff also recommends language to authorize inclusion of the necessary WACC adjustment to implement the Order in Docket No. 13-0553 for the rate period June through December 2013. This adjustment was quantified in the Responses to ALJ Post Record Data Request in Docket No. 13-0553 filed by Staff and ComEd.

**Proposed Modification**  
(ALJPO, 61.)

The proposal to consider and change the structure and protocols of ComEd's formula rate related to the calculation of WACC are beyond the scope of this Section 16-108.5(d) annual update and reconciliation proceeding. This issue ~~will be~~ has been decided in Docket No. 13-0553. Accordingly, Appendix A, Schedule 8 FY, line 2, reflects 6.94%, the approved WACC without any gross up for income taxes. Further, the Commission orders an adjustment of \$1,043,000 to the filing year revenue requirement to reflect the proper WACC on rates from the period June through December, 2013, in accordance with the findings of Docket No. 13-0553.

## **VIII. ROE COLLAR**

- A. Overview
- B. Potential contested Issues
  - 1. Rate Base for ROE Collar Calculation

## **IX. REVENUES**

- A. Overview
- B. Potentially Uncontested Issues
  - 1. Allocation of PORCB LPCs to Delivery Services
  - 2. Other Revenues
- C. Potentially Contested Issues
  - 1. Late Payment Revenues related to Transmission
  - 2. Billing Determinants

## **X. COST OF SERVICE AND RATE DESIGN**

- A. Overview
- B. Potentially Uncontested Issues
  - 1. Embedded Cost of Service Study

2. Distribution System Loss Factor Study
3. Rider PE – Purchased Electricity

## **XI. OTHER**

- A. Overview
- B. Potentially Uncontested Issues
  1. Staff Investigation into BSC
  2. Reporting Requirements
    - a. EIMA Investments
    - b. Reconciliation Year Plant Additions
    - c. Contributions to energy low-income and support programs
- C. Potentially Contested Issues
  1. Use of Rate Formula Template / Traditional Schedules for Analysis of Adjustments / Disallowances

## **XII. CONCLUSION**

Staff recommends minimal technical corrections to the conclusion set forth in Section XII of the ALJPO which clarify that the revenue requirement and ROE Collar adjustment approved in this proceeding are those set forth in the appendices to the Order. This change makes clear that the Commission is approving the amounts set forth in the appendices as opposed to amounts set forth elsewhere in the record or Order.

### **Proposed Modification** (ALJPO, 86.)

For the reasons stated herein, the Commission approves Commonwealth Edison Company's annual formula rate update and revenue requirement reconciliation, including the ROE Collar adjustment relating to 2012, as set forth in the attached appendices, to

be applicable to delivery services provided by ComEd beginning on the first day of its January 2014 billing period, subject to ComEd's final compliance filing and the rulings in this Order.

### **XIII. FINDINGS AND ORDERING PARAGRAPHS**

Findings and Orderings paragraphs (6) and (8) contain scriveners' errors which erroneously set forth amounts from the Reconciliation Year schedules, ALJPO Appendix B. The correct amounts should be derived from the Filing Year schedules set forth in Appendix A to the Order in this proceeding and Appendix A to the Commission's Order in Docket No. 12-0321.

The ALJPO also omits the specific assessment of the justness and reasonableness of rate case expenses incurred by ComEd. Section 9-229 states:

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

220 ILCS 5/9-229. As such, a new Findings and Ordering Paragraph should be inserted which expressly addresses this issue.

#### **Proposed Modification** (ALJPO, 87.)

- (6) the rates of return set forth in Finding (5) result in tariffed operating revenues of ~~\$2,261,815,000~~2,348,698,000 and net annual operating income of ~~\$443,402,000~~465,087,000 (both figures reflecting the reconciliation and ROE Collar adjustment);

...

- (8) Commonwealth Edison Company is authorized to place into effect tariff sheets and associated informational sheets designed

to produce annual tariffed revenues of ~~\$2,132,543,000~~2,348,698,000, which represent an increase of ~~\$102,550,000~~325,429,000 over total revenues established in Docket 12-0321 for the 2013 Rate Year Net Revenue Requirement; such revenues in addition to other revenues will provide ComEd with an opportunity to earn the rates of return set forth in Finding (5);

...

(X) The Commission has considered the costs expended by the Company during 2012 to compensate attorneys and technical experts to prepare and litigate rate case proceedings and assesses that the amount included as rate case expense in the revenue requirements of \$3,005,482 is just and reasonable. This amount includes the following costs: (1) \$724,485<sup>8</sup> amortized rate case expense associated with the initial formula rate proceeding, Docket No. 11-0721; (2) \$2,160,822<sup>9</sup> associated with Docket No. 12-0321; and (3) \$120,175<sup>10</sup> associated with the appeal of Docket No. 10-0467 and the appeal Docket No. 07-0566.

## TECHNICAL CORRECTIONS

Staff has some suggested technical corrections/clarifications to the schedules attached to the ALJPO which are identified and discussed in Appendix A, attached hereto.

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<sup>8</sup> See Staff IB, Appendix C Sch. 13, p. 2, ln. 13. Rate case expense amount included in the revenue requirements and related to Docket No. 11-0721 consists of 1/3 of the one-time filing fee incurred during 2011 plus 1/3 of the Docket No. 11-0721 rate case expenses incurred during 2012, as permitted by Section 16-108.5(c)(4)(E) of the Act (220 ILCS 5/16-108.5(c)(4)(E)).

<sup>9</sup> See Staff IB, Appendix C, Sch. 13, p. 3, ln. 9. Rate case expense included in the revenue requirements and related to Docket No. 12-0321 is not amortized.

<sup>10</sup> See Staff IB, Appendix C, Sch. 13, p. 4, ln. 10. Rate case expense included in the revenue requirements and related to appeal and remand is not amortized.

WHEREFORE, for each of the following reasons, Staff respectfully requests that the Commission's order in this proceeding reflect all of Staff's recommendations regarding the Company's tariffs and charges submitted pursuant to Section 16-108.5 of the Public Utilities Act.

Respectfully submitted,

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November 22, 2013

*Counsel for the Staff of the  
Illinois Commerce Commission*

## **APPENDICES A AND B SCHEDULE 10 FY AND 10 RY Technical Correction**

ALJPO Appendices A and B Schedule 10 FY and 10 RY, Cash Working Capital (“CWC Schedules”), should be modified to reflect certain adjustments made in Appendices A and B Schedule 2 FY and 2 RY of the ALJPO. ALJPO Appendices A and B Schedule 2 FY and 2 RY contain adjustments to operating expenses which are not reflected in the ALJPO’s CWC Schedules. This correction is needed so that the appropriate amount of each expense is matched to that expense’s expense lead days. Some or all of the adjustments in columns (c), (d) and (e) of Appendices A and B Schedule 2 FY and 2 RY relate to expenses which are listed separately from Other Operations and Maintenance Expenses (“Other O&M”) on the CWC Schedules and are presented below. These adjustments relate to expenses that have expense lead days other than the days used for Other O&M. The adjustments made to Appendix A or B Schedule 2 FY or RY that are not presented below are either not included in the CWC Schedules or are included within Other O&M in the CWC Schedules. This correction does not change the total outlays in the CWC Schedules.

The following table indicates adjustments to Appendices A and B Schedule 2 FY or 2 RY and their effect on the CWC Schedules.

Adjustment	Expense Item			
	Other O&M	Incentive Pay Expense	Employee Benefits	FICA Tax
	a	b	c	d
As Presented in Proposed Order	\$ 327,181	\$ 21,326	\$ 148,867	\$ 21,340
Pension Exp. Associated w/ Disallowed Incentive Comp	43	-	(43)	-
Long-Term Performance Share Award Program	420	(420)	-	-
Payroll Taxes Assoc. w/ Disallowed Incentive Comp	<u>655</u>	<u>-</u>	<u>-</u>	<u>(655)</u>
As Corrected	<u>328,299</u>	<u>20,906</u>	<u>148,824</u>	<u>20,685</u>

The “As Corrected” amounts in columns a, b, c and d in the preceding table should be entered on page 1 of the ALJPO’s CWC Schedules with the source noted as Per Order.