

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

COMMONWEALTH EDISON COMPANY	:	
	:	
Annual formula rate update and revenue	:	No. 13-0318
requirement reconciliation under	:	
Section 16-108.5 of the Public Utilities Act.	:	

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

TABLE OF CONTENTS

		Page
I.	INTRODUCTION	1
III.	SCOPE OF THIS PROCEEDING	2
A.	Response to Staff Exception	2
B.	Response to the AG’s Position	4
C.	Response to CCI’s Exception	5
IV.	RATE BASE	8
B.	Potentially Uncontested Issues	8
7.	Accumulated Provisions for Depreciation and Amortization	8
C.	Potentially Contested Issues	8
1.	Accumulated Deferred Income Taxes (ADIT) Adjustment on Vacation Pay	8
V.	OPERATING EXPENSES	11
B.	Potentially Uncontested Issues	11
1.	Distribution O&M Expenses	11
2.	Customer-Related O&M Expenses	12
3.	Administrative and General Expense	12
12.	Depreciation Expense	12
13.	Regulatory Asset Amortization	12
C.	Potentially Contested Issues	12
1.	Rate Case Expenses	12
a.	Appeal & Remand	12
b.	Attorneys	15
c.	Experts	19
d.	Other	21
(ii)	Westlaw/Lexis Research	21
2.	Incentive Compensation Program Expenses	23
b.	Energy Efficiency/Rider EDA	23
3.	Employee Stock Purchase Plan (“ESPP”)	26
a.	Stock Price Issue	26
b.	Income Tax Issue	30
VII.	RECONCILIATION	32
B.	Potentially Contested Issues	32
2.	WACC Gross-Up	32
IX.	REVENUES	36
C.	Potentially Contested Issues	36
1.	Late Payment Revenues Related to Transmission	36
XII.	PROPOSED ORDER’S CONCLUSION	37

XIII.	FINDING AND ORDERING PARAGRAPHS AND APPENDICES	37
XIV.	STAFF’S PROPOSED “TECHNICAL CORRECTIONS”	38
XV.	CONCLUSION	39

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

COMMONWEALTH EDISON COMPANY :
 :
Annual formula rate update and revenue : No. 13-0318
requirement reconciliation under Section 16- :
108.5 of the Public Utilities Act. :

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

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

I. INTRODUCTION

This Docket involves the determination of the costs to be included in setting rates for 2014 under the formula rate approved by the Illinois Commerce Commission (the “Commission” or “ICC”) under the Energy Infrastructure Modernization Act (“EIMA”).¹

The Proposed Order on most issues makes recommendations consistent with the record and the law, subject to the then-pending final Order in ICC Docket No. 13-0553. Docket No. 13-0553 involves a review of certain changes to the rate formula approved by the Commission in ICC Docket No. 13-0386. ComEd’s Brief on Exceptions identified a limited number of changes that should be made in the Proposed Order in the instant Docket, a small number of which were substantive, and the remaining involving language or technical corrections, subject to the outcome in Docket No. 13-0553 and any further proceedings in that

¹ “EIMA” refers to the Energy Infrastructure Modernization Act, Public Act (“PA”) 97-0616, as amended by PA 97-0646 and PA 98-0015, and the changes and additions it made to the Illinois Public Utilities Act (“PUA”). Public Act (“PA”) 98-0015, previously known as Senate Bill (“SB”) 9, became law on May 22, 2013.

and the instant Docket. On November 26, 2013, the Commission issued the final Order in Docket No. 13-0553. ComEd, in this Reply Brief on Exceptions, will factor in that Order.

Staff's Brief on Exceptions presents a number of technical Exceptions, which generally are correct, and some substantive Exceptions, which mostly should not be adopted. Staff proposes an Exception relating to the impact of Docket No. 13-0553 that has merit, but which requires some clarification.

The AG (the Illinois Attorney General's office) and CCI (the Citizens Utility Board, City of Chicago, and Illinois Industrial Energy Consumers) propose several meritless Exceptions. By far the most troubling is CCI's continued and mistaken claims regarding the years that should be used in the reconciliation process and that this process has been misunderstood. No one shares CCI's position. The Commission, in establishing ComEd's rate formula and approving its revision to reflect amendments to EIMA, the ALJs in the instant Docket, and every party (including Staff) in every formula rate Docket to date have had no trouble identifying which years are to be used under EIMA. The notion that a mistake about which years to use has been discovered in year three of the formula rate process lacks any credibility as it is contrary to EIMA and the Commission's past determinations. The AG and CCI Exceptions should not be adopted.

III. SCOPE OF THIS PROCEEDING

A. Response to Staff Exception

Staff proposes to delete the first sentence of the second paragraph of Section III on page 4 of the Proposed Order, which states: "Staff does not contest that changes to the CWC [cash working capital] components of ComEd's formula rate should occur outside of this proceeding." Staff Brief on Exceptions ("BoE") at 2-3. (Bracketed material added.) Staff's proposed deletion

of that sentence is unwarranted. However, if, and only if, ComEd's related Exception Nos. 1 and 2 are adopted, then, in the interest of narrowing the issues, ComEd would not object to deleting that sentence, as explained below.

The two paragraphs of Section III of the Proposed Order (at 4) in combination: (1) correctly recognize that EIMA defines the scope of this proceeding and that the scope is to set rates under the previously approved rate formula for the 2014 Rate Year; (2) state that all parties' comments on this subject have been considered; (3) correctly indicate that changes to the approved rate formula are beyond the scope of this Docket; (4) refer to Staff's Initial Brief's position relating to cash working capital; and (5) allude to pending ICC Docket No. 13-0553.²

Staff's Brief on Exceptions (at 2) claims the sentence in question is inaccurate, but identifies no error. The sentence is accurate. Staff's Initial Brief at 14-15 stated in part: "In addition, Staff, in an effort to narrow the issues for the purposes of this docket, but without conceding the issue that the Company should have a CWC calculation for the filing year based on the filing year revenue requirement as Staff has proposed, Staff will not contest the Company's position that changes to the CWC schedules should be made outside of this proceeding." At most, the sentence in question should be revised simply to set forth this quote from Staff's Initial Brief. That would be compatible with ComEd's Exception Nos. 1 and 2, discussed below.

Staff's Brief on Exceptions (at 2) also suggests that the sentence in question, in combination with the last sentence of the same paragraph, implies that Staff's CWC proposal is pending in ICC Docket No. 13-0553. Even if this were true, that would not justify deleting the

² Section IV.C.2 of the Proposed Order also addresses Staff's CWC proposal, and does so in a manner contrary to Section III, as discussed further below. ComEd BoE at 1-8.

sentence in question. Rather, at most, it might justify revising the last sentence of the paragraph.

The last sentence could read as follows:

The Commission has initiated another proceeding to address ~~these~~ certain rate formula issues and there is no reason to consider ~~them~~ proposed rate formula changes in this proceeding. Staff's CWC proposal is addressed in Section IV.C.2 of this Order.

ComEd's Exception No. 2 would correct the Proposed Order's incorrect and inconsistent recommendation of Staff's CWC proposal in Section IV.C.2, and would conform Section IV.C.2 to Section III. ComEd's Exception No. 1 proposes additional language in Section III of the Proposed Order to address certain points in an express manner. ComEd BoE at 1-8.

If and only if the Commission adopts ComEd's Exception Nos. 1 and 2, then, in the interest of narrowing the issues, ComEd would not object to deleting the sentence in question. Doing so would address both of Staff's above-referenced concerns while at the same time accurately addressing Staff's CWC proposal. Otherwise, the sentence in question should not be deleted, or it should be replaced by quoting Staff's Initial Brief as discussed above.

B. Response to the AG's Position

The AG's Brief on Exceptions did not submit a formal Exception to Section III of the Proposed Order, but the AG did argue and propose: (1) that in ICC Docket No. 13-0553, the Commission should decide the issues in favor of the AG's positions; and (2) then the Commission should apply those rulings in the final Order in the instant Docket. AG BoE at 3-4.

ComEd disagrees with the AG about the correct resolutions of the contested issues in ICC Docket No. 13-0553, and, in any event, the November 26, 2013, final Order in that Docket now speaks for itself.

ComEd agrees with the AG that the results of the final Order in Docket No. 13-0553 should be applied in the instant Docket, subject to ComEd's reservation of its legal rights in its

pending appeals from prior formula rate case orders (*see* ComEd BoE at 3-4) and of ComEd's rights to pursue rehearing and appeals on the applicable issues in ICC Docket No. 13-0553 and in the instant Docket.

C. Response to CCI's Exception

CCI's Brief on Exceptions pursues its legally incorrect claim that essentially everyone -- the Commission, in establishing ComEd's approved rate formula and approving its revision to reflect amendments to EIMA, the ALJs in the instant Docket, and every party (including Staff) in every formula rate Docket until now -- has misunderstood which years are supposed to be reconciled under EIMA. *See* CCI BoE at 1, 3-10,³ and its Appendix A, which is a copy of the aggregate 29 pages of CCI's prior briefs in this case on this subject.

The Proposed Order, throughout its calculations, used the correct years and rejected the CCI position. ComEd's Exception No. 1 would add express language to Section III to clarify further these points. ComEd BoE at 1-2, 3-4.

ComEd briefly discusses here why CCI's claim is wrong.⁴ EIMA establishes an annual process by which ComEd's Rate Year costs and revenue requirements are first estimated to set rates, and later reconciled when actual costs are known. 220 ILCS 5/16-108.5(d); *see also* 220 ILCS 5/16-108.5(c)(6). The objective is to:

... ultimately reconcile the revenue requirement reflected in rates for each calendar year, beginning with the calendar year in which the utility files its performance-based formula rate tariff pursuant to subsection (c) of this Section, with what the revenue requirement would have been had the actual cost information for the applicable calendar year been available at the filing date.

³ The CCI BoE does not contain page numbers. The citations herein assume that the title page would not be numbered and begin numbering the page containing the Introduction as page 1.

⁴ For a detailed elaboration on this subject, including further citation and quotation of EIMA and discussion of past Commission Orders, *see* Attachment 1 hereto, which contains excerpts from ComEd's Initial Brief (at 8-10) and its Reply Brief (at 11-16) in this case.

220 ILCS 5/16-108.5(d)(1). To accomplish that, EIMA requires that each formula rate update case involve both a final reconciliation of the revenue requirement “for the prior rate year,” for which actual costs will be known by the time of filing, and a provisional projection of the Initial Revenue Requirement for the following calendar year. *Id.* That provisional Initial Revenue Requirement for the following calendar year will be reconciled two years hence (in the year after the year in which the rates based on the Initial Revenue Requirement were in effect). EIMA requires that projection to be based on “historical data reflected in the utility’s most recently filed annual FERC Form 1 plus projected plant additions and correspondingly updated depreciation reserve and expense for the calendar year in which the inputs are filed.” 220 ILCS 5/16-108.5(d)(1). EIMA thereby establishes a two-year cycle of before-the-fact estimation based on actual and projected costs for years earlier than the rate year and a subsequent after-the-fact reconciliation of that estimated Initial Rate Year Revenue Requirement with the actual data. Thus, in the end, and after adjustment for interest, the rates for each year should be based purely on actual cost.

ComEd’s proposals in the instant case use the reconciliation process specified by EIMA. 220 ILCS 5/16-108.5(d); Hemphill Sur., ComEd Ex. 16.0, 7:125-35. That process is conducted using the rate formula exactly as approved “in both Docket Nos. 11-0721 and 13-0386, and using the specific rate formula the Commission found fully compliant with EIMA in its Order in Docket No. 13-0386.” Hemphill Sur., ComEd Ex. 16.0, 8:136-38. Moreover, this structure replicates the structure used in Docket No. 12-0321 (which reconciled rate year 2011 and calculated an initial revenue requirement for rate year 2013 based on 2011 actual costs and 2012 projected plant additions with associated adjustments) and, insofar as is possible given the special start-up rules, also mirrors the process followed in Docket No. 11-0721 (which set the

initial revenue requirement for rate year 2012 based on 2010 actual costs and 2011 plant additions). *Id.* at 8:138-45.

The Staff proposals in the instant Docket use the same years as ComEd's proposals, and so does the Proposed Order. The Proposed Order, throughout its calculations, makes that clear. *See, e.g.*, Proposed Order, Appendix B.

CCI's flawed position is based on the Illinois Industrial Energy Consumers' ("IIEC") witness Mr. Gorman's erroneous suggestion that the reconciliation process is defective or that a mismatch somehow exists. No other witness supports his claims. Rather, his suggestion is contrary to law, the approved rate formula, and past practice. "There is no mismatch in the years" being reconciled and ComEd is using "exactly the reconciliation approach approved by the Commission in prior ComEd and Ameren rate orders." Hemphill Reb., ComEd Ex. 12.0 CORR., 7:150-51. The Commission should continue to respect and apply that approach.

ComEd's Initial Brief (at 8-10) and its Reply Brief (at 11-16) set forth irrefutable quotes and citations on this subject from EIMA and past Commission Dockets, and show that CCI's position is not supported by the Commission's Order on Rehearing in ICC Docket No. 11-0721 and instead suffers from misinterpretations and misapplications of language in that order. ComEd's prior briefs show both that CCI's arguments are improper, because they amount to futile arguments with the clear language of EIMA, and that they are wrong on their merits even if one disregards the law. *See* Attachment 1 hereto. CCI's Exception must be rejected. Instead, ComEd's Exception No.1 should be adopted to put an end to the meritless litigation of this subject.

IV. RATE BASE

B. Potentially Uncontested Issues

7. Accumulated Provisions for Depreciation and Amortization

ComEd does not oppose Staff's Exception. Staff BoE at 3-4. However, like Staff's Exceptions to Sections V.B.1, V.B.2, V.B.3, V.B.12, and V.B.13 of the Proposed Order, the language that Staff proposes to add is unnecessary if ComEd's Exceptions on revenue requirement issues are adopted in full.

C. Potentially Contested Issues

1. Accumulated Deferred Income Taxes (ADIT) Adjustment on Vacation Pay

Through Mr. Effron, the AG proposed and CCI supported a rate base disallowance of \$8,945,000 related to accumulated deferred income taxes ("ADIT") on accrued vacation pay. Effron Dir., AG Ex. 2.0, 5:109-113; Effron Reb., AG Ex. 4.0, 4:78-81; CCI Init. Br. at 22-24. The Proposed Order correctly rejected this proposed disallowance. PO at 15. Contrary to the AG's and CCI's claims (AG BoE at 4; CCI BoE at 9-10), there is nothing mechanical, improper, or erroneous about the Proposed Order's analysis and conclusions regarding ADIT on accrued vacation pay, and neither the ALJs nor the parties to this proceeding misunderstood the AG's proposed adjustment. To the contrary, the Proposed Order recognizes the flaws in Mr. Effron's arguments and the Commission should adopt its findings on this topic.

Indeed, Mr. Effron, the AG, and CCI cloud the issue at hand – deferred taxes – by comingling a discussion of the treatment of the *underlying* accrued vacation pay liability with a discussion of *deferred taxes* on accrued vacation pay. They attempt to re-cast this as a question of "whether the capitalized portion of accrued vacation pay should be included in rate base at all." Effron Reb., AG Ex. 4.0, 2:28-29; AG BoE at 4. That is a question regarding the

underlying accrued vacation pay liability. It does not inform the issue of deferred taxes on accrued vacation pay and it is not the subject that the Commission requested the parties address in this proceeding. *See Commonwealth Edison Co.*, ICC Docket No. 12-0321 (Order Dec. 19, 2012) at 11, 17.

ComEd properly calculates ADIT on accrued vacation pay based on the figures in ComEd's book income statement, otherwise known as its FERC Form 1. *See Brinkman Sur.*, ComEd Ex. 17.0, 21:451 - 22:457. This is the correct accounting treatment for ADIT. *Id.* To calculate ADIT in any other manner would simply be incorrect. *Id.* The AG nonetheless proposes otherwise: "In its simplest form, the People are proposing that the ADIT be limited to the accrued vacation pay that should be taken into account in the determination of rate base." AG BoE at 5. *See also* CCI BoE at 9-10 (supporting calculation of ADIT based on ComEd's operating reserve formula rate inputs as opposed to its FERC Form 1).

Whether an item is included in or excluded from rate base clearly should not dictate accounting treatment. The AG and CCI misunderstand this basic underlying issue, and as a result they claim that the Proposed Order misunderstands their proposed disallowance. *See, e.g.*, AG BoE at 4-6, CCI BoE at 10. Moreover, the AG and CCI appear to be confused by their own position. Neither party contends that ADIT on the operating expense portion of the underlying accrued vacation pay liability is improperly included in rate base – they contest only the ADIT on the capitalized portion of the underlying accrued vacation pay liability. AG BoE at 4; CCI BoE at 9-10; Efron Reb., AG Ex. 4.0, 2:28 - 3:55. However, the AG now states that the "essence" of their "adjustment" is that "when the capitalized vacation pay is excluded from rate base, as it should be, it is *irrelevant* whether there are any related deferred taxes or not." AG BoE at 5. This position is incomprehensible because the operating expense portion of accrued

vacation pay is “excluded from” or reduces ComEd’s rate base, and no party claims that it is *irrelevant* whether there are any related deferred taxes on this portion of ADIT on accrued vacation pay. *See* ComEd Ex. 14.02, WP 5 CORR., page 4, line 12 (\$49.2 million); ComEd Ex. 14.01, App 5, line 30 (the \$49.2 million is included in the \$100.6 million of total Deferred Credits, account 253).

To be clear – what is irrelevant is whether or not the underlying liability increases or decreases (or is included in or excluded from) ComEd’s rate base – neither scenario changes the fact that ComEd has paid taxes on the underlying liability in the current period and the tax benefit is deferred to a future period. Thus, neither scenario changes what is recorded on ComEd’s FERC Form 1. As explained in more detail below, ComEd therefore has a deferred tax asset on the entire underlying liability. *See* ComEd Init. Br. at 23-24. Whether ComEd applies the two components of the underlying liability to rate base on two separate lines in the formula (as it does) or nets the two components of the underlying liability on one line (as Mr. Effron proposes) is irrelevant.⁵ *Id.* Both approaches result in the same net adjustment to rate base, and neither approach impacts ComEd’s FERC Form 1 or the deferred tax issue. *Id.* at 21; Brinkman Sur., ComEd Ex. 17.0 21:448-449.

In a nutshell, ComEd has a *deferred tax asset* on the full amount of the operating reserve liability – both the capital and expense portions. Mr. Effron does not dispute any of the testimony ComEd has presented regarding deferred taxes.⁶ And he agrees with ComEd and Staff that treating the deferred debit – the capitalized portion of vacation pay – as a deferred tax liability would be “inappropriate.” Effron Reb., AG Ex. 4.0, 2:41-44. But that is exactly what

⁵ Aside, of course, from the fact that Mr. Effron’s method does not comport with the Commission approved formula, and is therefore prohibited for the same reasons discussed in ComEd’s Initial Brief at 5-8.

⁶ For a detailed discussion of deferred taxes generally and ADIT on accrued vacation pay specifically, please see ComEd’s Initial and Reply Briefs. ComEd Init. Br. at 20-25; ComEd Reply Br. at 18-19.

the mathematics of his proposed adjustment does. Whether or not he explicitly describes it that way, he imputes a *deferred tax liability* with regard to the capitalized portion of accrued vacation pay. *See* Kahle Tr. at 230:22 - 233:23 (Oct. 1, 2013). Neither the Proposed Order, ComEd, nor Staff misconstrues Mr. Effron’s adjustment.

Because it is undisputed that no deferred tax liability is associated with the capitalized portion of accrued vacation pay and it would be “inappropriate” to impute such a deferred tax liability, the Commission should adopt the Proposed Order’s conclusion and reject the AG and CCI’s proposed disallowance. *See* Effron Reb., AG Ex. 4.0, 2:34-44; Kahle Tr. at 230:22 - 233:23 (Oct. 1, 2013); Kahle Reb., Staff Ex. 8.0, 11:204-14; Brinkman Dir., ComEd Ex. 2.0 REV., 23:492 - 24:499; Brinkman Reb., ComEd Ex. 13.0, 25:547 - 26:557. Nothing in the record in this case or in the Commission’s order in Docket No. 12-0321 suggests otherwise. *Compare* CCI BoE at 11 (urging the Commission to “follow through on its apparent belief ... that this amount should be offset from rate base”) *with* *Commonwealth Edison Co.*, ICC Docket No. 12-0321 (Order Dec. 19, 2012) at 17 (manifesting no belief on this topic). The Commission correctly rejected this same proposal in ICC Docket No. 12-0321 and the Proposed Order has confirmed in this Docket that the outcome in ICC Docket No. 12-0321 was correct. *See* *Commonwealth Edison Co.*, ICC Docket No. 12-0321 (Order Dec. 19, 2012) at 17. Staff agrees with the Proposed Order’s and ComEd’s analysis of this issue and disagrees with Mr. Effron’s proposed disallowance. Kahle Reb., Staff Ex. 8.0, 11:204-14.

V. OPERATING EXPENSES

B. Potentially Uncontested Issues

1. Distribution O&M Expenses

ComEd does not oppose Staff’s Exception. Staff BoE at 4-5.

2. Customer-Related O&M Expenses

ComEd does not oppose Staff's Exception. Staff BoE at 5-6.

3. Administrative and General Expense

ComEd does not oppose Staff's Exception. Staff BoE at 6-7.

12. Depreciation and Amortization Expense

ComEd does not oppose Staff's Exception. Staff BoE at 7-8.

13. Regulatory Asset Amortization

ComEd does not oppose Staff's Exception. Staff BoE at 8-9.

C. Potentially Contested Issues

1. Rate Case Expenses

a. Appeal and Remand

Staff proposes a disallowance of \$101,723 and \$16,000 in rate case expenses related to ComEd's appeals in ICC Docket Nos. 07-0566 and 10-0467, respectively. Staff BoE at 9. The Proposed Order correctly concludes that these amounts are recoverable. PO at 25. Staff takes exception to this conclusion. Staff BoE at 9. As a preliminary matter, while ComEd believes that the Proposed Order's conclusion adequately reflects that Section 9-229 applies to rate case appeal and remand costs, ComEd does not object to the recommended language in Staff's Alternative Proposed Modification to the Proposed Order's Commission Analysis and Conclusion affirmatively and clearly stating this. *See* Staff BoE at 16-17. Indeed, Staff's acknowledgement that Section 9-229 does not distinguish between the costs of litigating rate orders at the Commission or in the Appellate Court illustrates their error in recommending that ComEd be allowed to recover its costs associated with responsive rate case appeals or remands, but not be allowed to recover its costs associated with rate case appeals that ComEd initiates.

ComEd strongly objects, however, to Staff's erroneous contention that ComEd should not be allowed to recover the costs associated with its affirmative appeals of Commission orders. In an effort to support its claim, Staff mischaracterizes the Proposed Order's conclusion, engages in a wholly irrelevant discussion of judicial deference, and rehashes the same unpersuasive argument that it presented in its Initial Brief, namely, that a utility's appeal of a Commission rate order is beneficial only to shareholders and thus shareholders should bear the cost of those efforts. *See* Staff BoE at 10-13.

First, Staff advances a baseless claim: that the Proposed Order's conclusion 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" is tantamount to finding that a Commission order cannot be just and reasonable unless it is reviewed and affirmed by a court. *See* Staff BoE at 10. In truth, the conclusion simply acknowledges the fact that the right to appeal helps to ensure that rates are just and reasonable by providing an opportunity to correct Commission orders in those instances where a utility, or any party, reasonably believes that a mistake has been made.

Contrary to Staff's implication, ComEd has no incentive to bring baseless appeals. ComEd faces the deterrent of disallowance if the appeal is unreasonable, unjust or imprudent, and is also subject to sanctions, including attorneys' fees, for frivolous appeals. In fact, ComEd rarely, if ever appeals every issue it loses and sometimes chooses not to pursue an appeal. *See e.g.*, ComEd Cross Ex. No. 29 (includes ComEd Second Supplemental Response to Data Request RWB stating that ComEd withdrew its appeal of the Order in ICC Docket No. 10-0467); *Commonwealth Edison Co. v. Illinois Commerce Comm'n*, 405 Ill. App. 3d 389, 398, 937 N.E.2d 685, 698 (2nd Dist. 2010) (ComEd appealing only the Commission's denial of full recovery of salary and wages of certain employees). Nor does Section 10-204(a), regarding stay pursuant to

appeal, support Staff's position. Nothing in the language of Section 10-204(a) indicates that appeal is considered an "extraordinary step." Rather, Section 10-204(a) merely reflects the fact that a Commission action is considered to be final and operational *unless* it is found to be in error in some way on appeal or the Appellate Court exercises its discretion to stay the action. *See* 220 ILCS 5/10-204(a).

Second, whether the Commission is presumed to have made the correct determination is beside the point. No party, including Staff, would argue that all Commission determinations are always correct. Such an argument would be preposterous. It is undeniable that on occasion, a Commission action may be in error in some respect. In such instances, a reasonable system of adjudication of just and reasonable rates cannot impose on the utility the costs of appealing from such a Commission decision. Nor is it relevant that appellate courts defer to Commission findings of fact. A just and reasonable rate does not rest solely on factual or technical issues decided by the Commission. It also rests on legal determinations or statutory interpretations made by the Commission, a recent case in point being the Commission decision to allow the upward adjustment of historical billing determinants, even though the governing statute expressly requires the use of historical weather normalized billing determinants. It is entirely possible in any case that the Commission may have incorrectly applied a legal standard and that is ultimately for the courts to decide. Even the decision of predominantly factual or technical issues implicates issues of law, such as whether the findings and conclusions are based on sufficient evidence as opposed to speculation or conjecture.

Third, Staff's overly simplistic claim that the purpose for a utility appeal is to "alter [the] balance in favor of shareholders" also fails. *See* Staff BoE at 12. Utility customers have as great a stake as shareholders in a lawful, just and reasonable rate so that the utility can remain

financially healthy, and provide reliable, continuous and appropriately priced electricity. Further, a utility appeal is identical in substance and effect to an initial rate increase filing in that each attempts to supplant rates that the Commission has previously found to be just and reasonable. Just as no party contests the utility's ability to recover the costs of litigating a filing at the Commission, no blanket denial of the opportunity to recover the costs of an appeal should be deemed meritorious.

b. Attorneys

Staff proposed a disallowance of \$180,963 related to the recovery of fees associated with billing in excess of ten hours per day by individual attorneys and paralegals in 2012. The Proposed Order correctly rejects this proposed disallowance. PO at 28. Staff takes exception to this conclusion, reiterating its prior arguments. Staff BoE at 17. First, Staff claims that ComEd's attorneys "routinely" bill more than ten hours per day and that is not reasonable because "ratepayers – not the utility – are paying for legal bills incurred by the utility." *Id.* Though Staff repeatedly claims this billing practice is "routine" the record evidence shows that it occurred 1.17% of the time. This is hardly "routine" and the Proposed Order recognized this when it stated: "The record evidence also shows that ComEd's outside attorney's only billed in excess of ten hours a day 1.17% of the time. This can only be characterized as rare and in some instances reasonable." PO at 28.

Second, Staff witness Mr. Bridal is simply not qualified to make the legal judgment that billing in excess of ten hours per day is unjust or unreasonable. As he readily admits in his rebuttal testimony, and again on cross-examination, he is not an attorney, has never worked in a law firm, and cannot speak to the number of hours lawyers in law firms typically bill in a year. Bridal Reb., Staff Ex. 7.0, 30:648-649; Tr. at 248:19 - 249:6 (Oct. 1, 2013). His only rationale

that billing in excess of ten hours a day is unreasonable can be found in his direct testimony: he does not believe that any one attorney “needed” to bill that much time, but at the same time he concedes that billing in excess of ten hours a day is sometimes reasonable. Bridal Dir., Staff Ex. 1.0, 18:387 - 19:404. “Need” or “necessity” is not the legal standard under Section 9-229, justness and reasonableness is. In any event, ComEd witness Polek-O’Brien, an attorney with twelve years of experience in private law firm practice, testified that it was not at all unusual for attorneys to bill 2,500 or more hours per year, an average of *more* than ten per day, considering week-ends, holidays and vacations. Polek-O’Brien Reb., ComEd Ex. 15.0 CORR., 15:375 - 16:382.

Staff also cites the number of attorneys working on the case as another reason billing in excess of ten hours a day is unreasonable, apparently under the belief that every attorney, at all times, was working on this case. Notably, a review of the docket information from the four rate cases in question – ICC Docket Nos. 07-0566, 10-0467, 11-0721, and 12-0321 – reveals that approximately 75 attorneys have appeared at either the Commission or in the courts on behalf of the Commission or Intervenors; approximately three times as many as for ComEd. ComEd Reply Br. at 24. Moreover, the record shows that the ten hours per day were often spent on a number of different ComEd matters, not just rate cases. Polek-O’Brien Reb., ComEd Ex. 15.0 CORR, 16:393 - 17:404.

Third, lacking any legal reason to disallow the proposed recovery, Staff argues that it is because of the non-traditional relationship surrounding rate case expenses, with the ratepayers paying for ComEd’s bills, that billing in excess of ten hours is unreasonable because in a “more traditional attorney-client relationship ... that client would be able to review his bills and be clear about his expectations of what services the client wants to pay for.” Staff BoE at 18. This

argument also fails because, as Ms. O'Brien testified, ComEd reviews all detailed monthly invoices and all bills are subject to approval prior to payment. Polek-O'Brien Reb., ComEd Ex. 15.0 CORR., 8:218-223.

ComEd does not disagree with Staff's assertion that "the issue of hours billed warrants careful review for the justness and reasonableness of amounts expended for rate case litigation." Staff BoE at 18. If, at the end of "careful review" the hours or some portion of them are shown to have been wasteful or duplicative, then they should not be recovered.⁷ But no Staff witness has identified any one of the hours billed over ten per day as objectionable, wasteful or duplicative. Yet Staff recommends a blanket disallowance of all hours in excess of ten per day – and indeed *more* than the hours he identified as in excess of ten per day⁸ – without any showing of unreasonableness or imprudence, and *in the face of Mr. Bridal's acknowledgement that it is not always unreasonable for an attorney to bill more than ten hours per day.*

Fourth, Mr. Bridal's sample and methodology are flawed. Even if it were appropriate to disallow a percentage of attorney fees, the 5% reduction in attorney fees Mr. Bridal proposes to disallow is the result of an estimate based loosely on a limited, and exceptionally busy, sample of time entries that he reviewed during discovery. Bridal Tr. at 268:4-8 (Oct. 1, 2013). As Mr. Bridal acknowledged, the eight days in the invoice period Mr. Bridal used to derive the 5% were particularly busy, as two formula rate cases were pending before the Commission and

⁷ Staff also asserts without any citation to any evidence (because none was presented) that law firms have an "inherent incentive" to increase their billable hours. Staff BoE at 18. Even in the absence of a fixed or capped fee (as Eimer Stahl LLP had with regard to the rehearing in Docket No. 11-0721) where no such incentive can plausibly be argued, this is a highly debatable proposition given the intensely competitive market for legal services. The Commission should disregard Staff's assertion of such an incentive.

⁸ His own flawed sample showed only 4.3% of hours billed in excess of ten per day, yet he proposed a disallowance of more than 116% of that calculated number, or 5%. This itself accounts for about \$25,335 of his disallowance. Even if everything else in Mr. Bridal's analysis is accepted, the disallowance ought to be reduced by \$25,335 for this reason alone.

ComEd had just received the Commission's Order in its first formula rate case, ICC Docket No. 11-0721. *Id.*, 268:4-18; Polek-O'Brien Reb., ComEd Ex. 15.0 CORR., 18:425-427.

Moreover, Mr. Bridal's methodology is both arbitrary and inconsistently applied by him. His 5% number is not even a calculated number. Bridal Tr. at 257:19 - 259:17 (Oct. 1, 2013). When he first attempted to calculate a disallowance, he calculated that 14.4% of the hours billed were in excess of ten per day. However, based on his own conclusion that it is not *always* unreasonable to bill more than ten hours per day (which completely undermines the entire basis for this disallowance in the first place), he reduced the 14.4% to 5% – a 65.3% decrease. Bridal Reb., Staff Ex. 7.0, 28:598-612; Bridal Tr. at 261:2-20 (Oct. 1, 2013). No explanation was offered by Mr. Bridal to support the quantification of this reduction.

Nonetheless, Mr. Bridal then acknowledged that he had miscalculated, and that the percentage of hours in excess of ten per day in his limited sample was not 14.4% at all, but only 4.3%. Bridal Reb., Staff Ex. 7.0, 29:640-644. However, instead of applying his earlier reasoning that his calculated number should be reduced (by 65.3%) because – as he acknowledges – it is not always unreasonable to work more than ten hours per day, he *increased* his calculated 4.3% to achieve his projected 5%, a 16.3% *increase*. *Id.* According to his cross-examination testimony, Mr. Bridal did not change his proposed disallowance from 5% down to 4.3% because he “didn’t see the difference between a 4.3% and the 5% to be a significant difference.” Bridal Tr. at 260:24 - 261:1 (Oct. 1, 2013). The only reasonable way to describe a methodology that produces a recommended 5% disallowance whether the calculated number is 14.4% or 4.3% is “result driven.” The Commission should not endorse such a transparently unjustified attempt to reduce ComEd's revenue requirement.

Finally, Staff attempts to justify their proposed disallowance based on a finding in a Proposed Order in ICC Docket No. 13-0301, citing the approval in that Docket of the use of taking a “snapshot” of the evidence provided and then extrapolating an adjustment based on that snapshot. Staff BoE at 19. ComEd does not dispute that the use of a “snapshot” may sometimes be appropriate. The issue ComEd has is that the “snapshot” needs to be representative and the extrapolation must use scientifically and mathematically correct methodology. As explained above, that is not what occurred here. As the Proposed Order correctly concluded, “there is no evidence in the record that supports Staff’s proposed disallowance ... the 5% reduction is wholly unsupported in the record.” PO at 28. ComEd urges the Commission to adopt the Proposed Order’s conclusion and find these costs recoverable.⁹

c. Experts

Staff proposed a disallowance of \$23,502 related to the Analysis Group and Dr. Hubbard. The Proposed Order correctly rejects this proposed disallowance. PO at 30. Staff’s proposed disallowance has no basis in the evidentiary record and ignores current law, and should therefore be rejected. ComEd urges the Commission to adopt the Proposed Order’s recommendation.

Staff makes the argument that ComEd was “gambling” by hiring Analysis Group in an effort to gain an advantage in these proceedings. Staff BoE at 21-22. This is simply incorrect. The expenses associated with Analysis Group were prudently incurred and reasonable in amount.

⁹ Staff’s discussion of evidentiary standards (Staff BoE at 20) – in which Staff concludes that its position may be adopted if it is supported only by “some” evidence more than a “scintilla” without regard to weighing of the entirety of the evidence – improperly confuses the standard of proof to be applied at the Commission with the deferential standard applied by an Appellate Court on review. ComEd Rep. Br. at 2. By so doing, Staff invites the Commission to commit legal error (inadvertently emphasizing why the utility should not be precluded from recovering the costs of affirmative appeals). Staff also applies these standards inconsistently, arguing that ComEd’s presentation of a witness (unimpeached) on the Analysis Group issue, as well as an invoice and a letter outlining the services to be performed by Analysis Group, is insufficient, even though that evidence is clearly “some” evidence, and indeed far more substantial than Mr. Bridal’s uninformed opinion on the propriety of attorneys billing more than 10 hours a day. *See* Staff BoE at 24.

Dr. Hubbard was engaged when, based on discovery requests issued by Staff and Intervenors, it appeared that Staff and potentially others intended to contest ComEd's capital structure and propose an alternate structure. Polek-O'Brien Reb., ComEd Ex. 15.0 CORR., 21:488-491; ComEd Redirect Exs. 21, 22, and 23. Dr. Hubbard was thus engaged to evaluate the prudence and reasonableness of ComEd's capital structure, focusing specifically on its equity ratio. Polek-O'Brien Reb., ComEd Ex. 15.0 CORR., 21:492-494. The circumstances of and purpose for the retention of Analysis Group were explained. *See* ComEd Init. Br. at 40-41.

ComEd was not seeking to gain any kind of "advantage" other than to prepare itself to litigate (in the compressed time parameters established for the first formula rate case) a potential issue (foreshadowed in discovery) concerning the prudence of ComEd's capital structure. That Staff may be unable now to understand in hindsight how the capital structure issue may have been relevant to the formula rate case (Staff BoE at 22) or the "need" for this work, presupposes the wrong question.¹⁰ The right question is whether it was reasonable at the time for ComEd to be concerned that this would be an issue, and that must be answered in the affirmative – in light of the data requests (some by Staff) addressed to that issue. *See* ComEd Init. Br. at 40-41.

Staff's assertion that the Company has failed to present any documentation to demonstrate that any work was actually performed by Dr. Hubbard and that as a result the Proposed Order's observations "turn the legally mandated burden of proof requirement on its head" is likewise false. Staff BoE at 21. In support of this argument Staff continues to cite the lack of numbered exhibits as evidence of Analysis Group's work being unjust and unreasonable.

¹⁰ The quote from the Commission's order in ICC Docket No. 10-0467 that "one component of justness and reasonableness ... is necessity" (Staff BoE at 22) is taken out of context. There the Commission was questioning the *need* for more than one witness on cost of capital issues. Duplication of effort between Dr. Hubbard and Dr. Chambers is not an issue here – Staff's insinuations to the contrary notwithstanding – inasmuch as the record is clear that Dr. Chambers spent no time on Docket No. 11-0721. Polek-O'Brien Tr. at 154:11 - 164:12 (Sept. 30, 2013).

ComEd presented sufficient evidence to demonstrate the prudence of retaining Analysis Group and the reasonableness of the charges. ComEd’s rationale for recovery of the costs reflected in the one Analysis Group invoice is not, as Staff implies, that the mere “submission of invoices ... prove[s] recoverability” (Staff Init. Br. at 29; *see also* Staff BoE at 23-24), although proof that utility costs were incurred for utility services is enough to make a *prima facie* case of recovery. *See Peoples Gas Light & Coke Co. v. Slattery*, 373 Ill. 31, 61-62, 25 N.E.2d 482, 497-498 (1939) (finding that where the amount of maintenance operating expense was shown to be a bona fide expense and the expense amount was definitively provable, it may not be reduced unless there is a showing that the amount was improperly increased).

In support of ComEd’s claim that these charges are just and reasonable, ComEd provided the testimony of Ms. Polek-O’Brien, an invoice from Analysis Group, and an engagement letter which outlined the work Dr. Hubbard had been hired to perform. Although Staff ironically seems to denigrate the fact that ComEd presented only “one witness” on that issue, Ms. Polek-O’Brien’s testimony was unimpeached on cross-examination or otherwise. The Proposed Order found that this was enough to satisfy the burden of proof and ComEd agrees. As noted in the Proposed Order: “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.” PO at 30. For the above reasons the Commission should adopt the Proposed Order’s finding.

d. Other

(ii) Westlaw/Lexis Research

Staff proposed a disallowance of \$7,000 related to the recovery of web-based electronic research on Westlaw and Lexis. The Proposed Order correctly rejected this proposed disallowance. PO at 34. Staff continues to take exception to the recovery of these fees. Staff

BoE at 26-30. Based on the evidence in the record, the Proposed Order should be adopted and ComEd should be allowed to recover these fees.

Mr. Bridal relies on ComEd's Billing Guidelines to support his belief that online research requires some sort of documented approval for every bit of research performed. Bridal Reb., Staff Ex. 7.0, Sched. 7.13. This is not the case. Requiring attorneys to obtain documented permission prior to engaging in legal research would make it unnecessarily expensive and time consuming to provide legal advice and prepare briefs. Polek-O'Brien Reb., ComEd Ex. 15.0 CORR., 20:466-470. When an outside firm is tasked with preparing specific court papers or engaging in other projects, the attorneys are authorized to conduct reasonable legal research to enable them to complete the assignment. *Id.*, 20:470-473. Requiring issue by issue approval to conduct research has never been required. Polek-O'Brien Sur., ComEd Ex. 19.0 2nd CORR., 9:193-198. The Billing Guidelines protect ComEd from electronic research done without explicit or implicit approval, and not as a trap to ensnare outside counsel and deprive them of payment for work reasonably performed. Polek-O'Brien Sur., ComEd Ex. 19.0 2nd CORR., 10:199-204. Moreover, "specific" authorization does not mean written or even contemporaneous. *See* Staff BoE at 26-27.

Staff's assertion in their BoE that 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" is at best disingenuous. Staff BoE at 27. Taking the time to draft an email or letter, laying out exactly what you plan to do, then awaiting a response is clearly more time consuming than simply performing the research for a task you were specifically hired to perform. To require this would certainly make things less efficient and more time consuming, which the Proposed Order recognized: "We also agree that requiring attorneys to obtain documented

permission to engage in such research would make providing legal services unnecessarily time consuming and expensive.”

The proposed disallowance of these costs again shows how little Mr. Bridal understands about how law firms and their clients operate. ComEd and the firms and attorneys working on ComEd rate matters have had a working relationship for many years. They understand what is authorized and what is not. The idea of a lawyer having to receive written authorization for any research performed on behalf of ComEd is not reflective of how the world works. If this were required, the result would be lawyers working even longer hours because they would need to take the time to contact ComEd and then wait to hear back before they could perform work they were already retained to do. The result would likely be inefficiency and delay and more time billed for less work performed, a result not in any party’s interest.

Outside counsel is hired to perform a job and for them to be able to perform their job well and professionally they need to be able to utilize all tools available to them, including the performance of legal research – none of which Staff claims was imprudent or unreasonable. Nonetheless, Staff proposes a blanket disallowance based on a supposed failure to follow internal guidelines. The Proposed Order recognized the flawed nature of this argument: “We agree 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.” PO at 34. ComEd urges the Commission to adopt the Proposed Order’s ruling and to find these fees recoverable.

2. Incentive Compensation Program Expenses

b. Energy Efficiency/Rider EDA

Staff proposes a disallowance of \$713,000 in Annual Incentive Plan (“AIP”) expense associated with Energy Efficiency (“EE”) employees paid in 2009-2011 and \$268,000 paid in

2012. Staff Init. Br. at 39. The Proposed Order correctly concludes that ComEd may recover its reasonable and prudent AIP expense associated with the achievement of ComEd's operational metrics by its incremental EE employees in 2012 but denies recovery of expenses paid in 2009 - 2011. PO at 47. In so doing, the Proposed Order recognizes that the issue is not, as Staff contends (Staff BoE at 31), whether the Commission ought to "reward" ComEd's alleged "intransigence" by allowing it to recover its prudent and reasonable EE AIP costs in the instant proceeding, but rather, whether EIMA allows for recovery of these costs – and it unequivocally does.

In reaching its conclusion, the Proposed Order properly applies the language of EIMA which explicitly allows recovery of incentive costs relating to the achievement of operational metrics. *See* 220 ILCS 5/16-108.5(c)(4)(A). As Staff does not dispute, energy efficiency employees participate in the same AIP associated with the achievement of operational metrics that is applicable to all ComEd employees and therefore delivers the very same customer benefits. *See* ComEd Init. Br. at 49-50. To the extent that EE employees provide the same customer benefits as other ComEd employees, Staff's assertion that "[t]here 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. 13-0138" is quite correct. *See* Staff BoE at 33. Indeed, it is for this very reason that, as the Proposed Order aptly concludes, "[t]he AIP expense associated with the energy efficiency employees ... should be treated no differently than any AIP expense associated with other ComEd employees and is similarly recoverable." PO at 47.

Staff attempts to circumvent the fact that ComEd's EE AIP expense is recoverable by arguing that "the AIP plan is not sufficiently related to energy efficiency or tailored to incremental EE employees." Staff BoE at 33. This argument is unavailing and, as the Proposed

Order correctly notes, misstates the Commission’s finding. PO at 47. The Commission’s order in ICC Docket No. 10-0570 makes clear that “the General Assembly has determined that *the costs associated with ComEd’s plans* are to be recovered through the automatic adjustment clause authorized under Section 8-103” *Commonwealth Edison Co.*, ICC Docket No. 10-0570 (Order Dec. 21, 2010) at 44 (emphasis added). Thus, it is precisely because the Commission has found that energy efficiency employees’ AIP costs are *not* associated with ComEd’s energy efficiency *plans* that it is appropriate that ComEd seek their recovery here.

Put simply, the Commission’s conclusion in ICC Docket No. 10-0537 that the “efforts of the incremental EE employees have very little to do with the incentive compensation which the Company [sought] to recover ... through Rider EDA,” does not justify the denial of the recovery of ComEd’s EE AIP costs completely, but underscores that these undisputedly prudent and reasonable costs are appropriately recoverable here. *Commonwealth Edison Co.*, ICC Docket No. 10-0537 (Order Oct. 17, 2012) at 23. By allowing ComEd to recover its EE AIP costs in this docket, the Proposed Order does not “split the baby” but reaches a conclusion that is in accord with the intent of the General Assembly and that properly applies the plain language of EIMA.

In addition, for the reasons detailed in ComEd’s Brief on Exceptions, ComEd takes Exception to the Proposed Order’s disallowance of recovery of its AIP expenses for the years 2009 – 2011 on the basis of its conclusion that ComEd had no authority to create a regulatory asset and that it is inappropriate to seek recovery of out of period costs. PO at 47; ComEd BoE at 13. ComEd thus strongly disagrees with Staff’s assertion that the Proposed Order’s conclusion in this regard is “sound.” Staff BoE at 31. As detailed in its Brief on Exceptions, ComEd’s recording of these costs as a regulatory asset is consistent with past Commission

practice. *See* ComEd BoE at 13-14. To reject the EE AIP expenses based on the lack of approval for the creation of a regulatory asset would be inconsistent with this practice.

Moreover, because these costs were not and could not have been expensed until the Commission's Order in ICC Docket No. 10-0537 was issued in 2012, they were not "incurred" until 2012 and they have not been recovered through any other mechanism. Disallowing the portion of costs attributable to the regulatory asset will therefore result in "trapped costs" that ComEd is unable to recoup, contradicting the Commission's finding that such costs are prudent, reasonable and can be recovered in rate case proceedings. For these reasons, Staff's recommended modifications to the Proposed Order that would result in disallowance of ComEd's EE AIP expense in its entirety should be rejected.

3. Employee Stock Purchase Plan ("ESPP")

a. Stock Price Issue

Through Mr. Brosch, the AG proposed and CCI supported a disallowance of \$2,334,000 related to ComEd's Employee Stock Purchase Plan ("ESPP"). This consists of \$319,000 of A&G expenses and \$2,015,000 related to permanent tax differences (\$1,185,000 x 1.70 GRCF). AG Ex. 1.3, page 3 of 4. The Proposed Order correctly rejected these proposed disallowances. PO at 55. The AG harshly criticizes the Proposed Order as unfortunate, conclusory, and without evidentiary or legal support. AG BoE at 7. To the contrary, the Proposed Order's conclusions are supported by the record and mandated by EIMA. Although the AG describes its proposed disallowances as "well-reasoned" and "strong," they are neither. AG BoE at 7. The Proposed Order recognizes that the fatal flaw in the AG's arguments is that they rely on findings that the ESPP is: (1) incentive compensation; and (2) based on net income or an affiliate's earnings per share ("EPS"). PO at 54-55. ComEd's ESPP does not satisfy either of these criteria – both the Proposed Order and Staff witness Mr. Bridal recognize

this. Bridal Reb., Staff Ex. 7.0, 37:804-38:818. For the reasons discussed below, Mr. Brosch's analysis is incorrect and the Commission should adopt the Proposed Order's findings on this topic and reject Mr. Brosch's proposed disallowances.

First, Section 16-108.5(c)(4)(A) governs incentive compensation. It is undisputed that ComEd's ESPP is *not* incentive compensation. Even the AG, whose witness sponsors this proposed disallowance, cannot bring itself to describe the ESPP as incentive compensation, and instead calls it "stock-based compensation" as opposed to "stock-based *incentive* compensation." AG Init. Br. at 24-25 (emphasis added). *See also* AG BoE at 7 and 12 (describing the ESPP as a "stock-based compensation arrangement" and "employee benefit plans"). Mr. Brosch himself does not even include the ESPP in the incentive compensation section of his testimony. *Compare* Brosch Dir., AG Ex. 1.0, 26:589 - 30:698 *with* Brosch Dir., AG Ex. 1.0, 31:700 - 34:790.

The discussion should end there. The section of EIMA upon which Mr. Brosch relies for this proposed disallowance prohibits the recovery of certain types of incentive compensation: "Incentive compensation expense that is based on net income or an affiliate's earnings per share shall not be recoverable under the performance-based formula rate." 220 ILCS 5/16-108.5(c)(4)(A). Yet the AG inexplicably claims that this section governs anything that "creates expenses for the regulated utility that benefit the parent company." AG BoE at 9. The Commission should not be fooled by this transparent attempt to rewrite the law. Section 16-108.5(c)(4)(A) clearly governs only incentive compensation. That section, and its requirements, cannot lawfully be applied to other types of compensation or expenses.

Indeed, ComEd disputes that the ESPP even rises to the level of compensation – it is instead a fringe benefit that employees may procure with their own funds. *See* ComEd Init. Br.

at 53. It is a program available to ComEd employees under which they are voluntarily allowed to purchase Exelon Corporation (“Exelon”) common stock at a discounted price, regardless of their individual performance or the attainment of any corporate goals. Brinkman Reb., ComEd Ex. 13.0, 20:432-435. This is not unlike medical, vision, or dental insurance that employees purchase at a price below that which is offered on the market because of a subsidy provided by an employer. *Id.*, 21:445-448.

As explained by Ms. Brinkman, “[i]ncentive compensation is merit based compensation that is awarded to employees based on achieving stated goals such as operational metrics, net income, or various other items. Incentive compensation seeks to reward good work.” *Id.*, 20:437-439. Incentive compensation is also often available only to a limited group of employees. *Id.*, 20:439-21:440. In contrast, stock purchased pursuant to the ESPP is not awarded – it is up to each employee to determine whether to purchase the stock with his or her own funds. *Id.*, 21:444-445. The ESPP also has no merit or performance component and is open to all ComEd employees as long as they meet minimum employment requirements. *Id.*, 21:447-52.

The AG argues that the “functioning” of ComEd’s ESPP somehow transforms this fringe benefit into an incentive compensation plan. *See e.g.* AG BoE at 8. The crux of this argument appears to be that because ComEd expends money to operate the ESPP, it is incentive compensation. *See* AG Init. Br. at 26. This is simply incorrect. Employers routinely incur expenses related to fringe benefits provided to their employees. This is exactly like health insurance, wellness programs, and other fringe benefits, all of which cause employers to incur costs, none of which are fully funded by employees, and all of which are properly included in rates. *See* Brinkman Reb., ComEd Ex. 13.0, 24:509-517; ComEd Init. Br. at 53. The Proposed

Order correctly rejects this argument, noting that “the fact that ESPP is not fully funded by employees provides no basis to disallow these expenses.” PO at 55.

In addition, the stated purpose of the ESPP to “provide an added incentive” for employees “to promote Exelon’s best interests” by permitting them to purchase stock does not render expenses related to ComEd’s ESPP unrecoverable. *See* AG Ex. 1.8 (attachment to ComEd’s Data Request Response to AG 4.01, labeled as AG 4.01_Attach 1) at 2013 CFRU 0003180 and AG BoE at 9. The mere fact that the statement of purpose uses the word “incentive” does not turn this fringe benefit into incentive compensation, much less incentive compensation based on some measure of a prohibited metric. In fact, it is not uncommon for fringe benefits to be designed to incentivize employees to take voluntary actions unrelated to their compensation that are in the best interest of both the employee and the employer or corporate parent. *Brinkman Reb.*, ComEd Ex. 13.0, 23:500 - 24:509.

Ms. Brinkman explained this in detail, analogizing the ESPP to wellness programs, which incentivize behaviors such as healthy eating and losing weight or controlling substance abuse and stress. *Id.*, 24:509-517. The employee benefits by becoming healthier and the employer and corporate parent benefit from potentially reduced health insurance premiums and employee absences as well as increased productivity. *Id.* No one would argue that these types of incentive programs are incentive compensation. *Id.* The same is true of the ESPP, which incentivizes employees to buy Exelon stock and hopefully provides a benefit to them in the form of a profitable investment while at the same time providing some benefit to Exelon with an infusion of capital. *Id.*

Moreover, promoting Exelon’s best interests does not make expenses related to the ESPP unrecoverable. Even when we deal with recoverable incentive compensation under EIMA, no

one ever asks whether the achievement of the allowed metrics provides some benefit to Exelon – of course it does – and seeks to disallow the payment for that reason. *Id.*, 24:518-23. Even less should some incidental benefit to Exelon preclude recovery of something that is not incentive compensation. Once again, this is not the relevant inquiry under EIMA. *Id.*

Second, even if the ESPP was an incentive compensation program – and it is not – the fact that the expenses for the program are somehow related to Exelon’s stock price is irrelevant. *Id.*, 23:481-485. As Ms. Brinkman testified: “The correct inquiry would be whether eligibility for the plan and the size of the award under the plan are based on, or dependent upon achievement of, one of the statutorily prohibited metrics – net income or an affiliate’s earnings per share.” *Id.*, 23:485-488. EIMA does not prohibit benefits that are in some way related to stocks or stock prices. The AG’s observation that the Proposed Order ignores the “critical point that there is no observable link between Exelon share prices and the quality of delivery services being provided in Illinois” is a red herring. AG BoE at 9. There is also no observable link between the value of a dollar and the quality of delivery services being provided in Illinois, but that is not a basis to disallow ComEd’s cash expenditures such as wages and salaries.

b. Income Tax Issue

Income taxes associated with ComEd’s ESPP are the taxes associated with the value of the benefit provided, in this case taxes on the discount received. *See* AG Ex. 1.8 at 2 (ComEd’s Data Request Response to AG 2.09 subpart (b), explaining a portion of the ESPP-related taxes). Just as ComEd pays income taxes on the value of fringe benefits such as medical insurance, ComEd pays taxes on the value of the benefit provided under the ESPP. This is standard practice and those income taxes should be included in the revenue requirement. *See* Brinkman Reb., ComEd Ex. 13.0, 25:533-540.

The AG has conflated these ESPP-related taxes with tax deductions that Exelon takes regarding dividends paid on shares of Exelon stock held in employee 401(k) accounts. *See* AG BoE at 10-12; AG Init. Br. at 29-30. These are two completely separate issues – the ESPP and employee 401(k) accounts are not related and the derivative tax issues presented by them are also unrelated. ComEd has explained this and the AG is clearly aware of this, as it specifically requested information from ComEd regarding tax impacts of programs *other* than the ESPP, using employee 401(k) accounts as an example. *See* AG Ex. 3.4. Nonetheless, the AG and CCI twist the information provided by ComEd in response to those requests about 401(k) accounts in an attempt to show some sort of inequity related to the ESPP. *See* AG Init. Br. at 29-30 (discussing Exelon’s \$13-15 million tax deductions related to 401(k) accounts as if they are related to the ESPP issue); CCI Init. Br. at 29 (same); AG BoE at 10-12 (repeating the same disingenuous argument and claiming that the Proposed Order misunderstands the AG’s adjustment).

The AG then continues to attack the level of work Staff expended on this issue. AG BoE at 12. This criticism is unfounded, particularly from the AG, who routinely utilizes Staff’s discovery and analysis on other issues, for example regarding rate case expense in this Docket. ComEd reminds the Commission that the AG has misstated Staff’s position on this issue – claiming that “Staff offered no position on this proposed adjustment to operating expenses, Staff also acknowledged that it performed no discovery on this issue and Staff witness Mr. Bridal provided no workpapers or evidence of analysis to the ESPP or its costs.” AG Init. Br. at 30.

To the contrary, Staff offered the testimony of Mr. Bridal, who specifically analyzed this issue and concluded that both the A&G and tax aspects of Mr. Brosch’s proposed disallowance are incorrect and should be rejected by the Commission. Bridal Reb., Staff Ex. 7.0, 37:802 –

38:827. Moreover, the document the AG cites in support of its erroneous characterization of Mr. Bridal's efforts states that Mr. Bridal had "not performed extensive research on the issue" of employee benefit accounts such as 401(k) accounts, but it does not undermine his analysis of the ESPP issue. *See* AG Cross Ex. 6 at 4.

The AG also argues, and the Proposed Order correctly rejects, that income tax expenses attributable to ComEd's ESPP related to tax years prior to 2012 should be disallowed. AG BoE at 10-12; PO at 55. The AG fails to realize the simple fact that tax return amendments that involve expenses realized or recorded in 2012 are appropriately included in ComEd's 2012 rate year. *Brinkman Reb.*, ComEd Ex. 13.0, 25:533-540. This is true for all costs incurred by ComEd, not just ESPP. ComEd further notes that these specific costs have not been reflected in prior revenue requirements and ComEd has not yet accounted for or recovered them. *Brinkman Sur.*, ComEd Ex. 17.0, 20:427-428. The Proposed Order and Staff disagree with Mr. Brosch's proposed disallowance. PO at 55; *Bridal Reb.*, Staff Ex. 7.0, 37:804 - 38:827. The Commission should adopt the Proposed Order's findings on these issues and reject Mr. Brosch's proposed disallowances regarding ComEd's ESPP.

VII. RECONCILIATION

B. Potentially Contested Issues

2. WACC Gross-Up

The Proposed Order (at 61) notes correctly that the issue of how to calculate interest on a reconciliation balance was to be decided in ICC Docket No. 13-0553. The final Order since has been issued in Docket No. 13-0553. In Docket No. 13-0553, ComEd argued that an interest rate based on the weighted average cost of capital ("WACC") should include the income tax costs associated with the cost of the capital that finances the reconciliation balance. Excerpts of

ComEd's arguments regarding this issue in Docket No. 13-0553 are attached hereto as Attachment 2. The application of income tax costs is referred to as "grossing up". The final Order in Docket No. 13-0553 found, however, that interest should not include the income tax costs associated with the cost of the capital that finances the reconciliation balance, and provides for a limited retroactive adjustment under Public Act 98-0015. The Proposed Order in the instant Docket, in its calculations, applies that principle (but omits the retroactive adjustment), and reduces the reconciliation adjustment by \$9,002,000. *See* ComEd BoE at 16; Proposed Order, Appendix A, Sch. 1 FY, line 3.¹¹

Staff's Brief on Exceptions in the instant Docket proposes a modification to the Proposed Order's conclusion regarding WACC gross-up (the "Proposed Modification") to reflect in the revenue requirements approved in the instant Docket the then-anticipated Commission ruling in Docket No. 13-0553, which is how the Commission ultimately ruled. According to Staff, these modifications are intended to "clarify the approved WACC in this proceeding, consistent with Docket No. 13-0553." Staff BoE at 38. Staff's Proposed Modification is as follows:

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.

¹¹ The impact of this figure is reflected on the above line of Proposed Order Appendix A, but it does not appear as such there and has to be derived from other data. Staff's Brief on Exceptions (at 38) references "the Responses to ALJ Post Record Data Request in Docket No. 13-0553 filed by Staff and ComEd". The figure also can be derived from ComEd's response there.

Staff BoE at 39. The \$1,043,000 adjustment is an increase to the 2014 Rate Year Net Revenue Requirement, *i.e.*, it is a partial offset to the above-referenced \$9,002,000 reduction made by the Proposed Order in the instant Docket.

ComEd agrees that the Commission's Order in the instant proceeding should accurately reflect the Commission's final Order in Docket No. 13-0553, subject to ComEd's reservation of its rights in its prior appeals and its applicable rehearing and appeal rights in each Docket. Staff's Proposed Modification was premised on the assumption that the final Order in ICC Docket No. 13-0553 would rule the same on the WACC gross-up issue as the Proposed Order in that Docket, as it did. However, ComEd believes that Staff's Proposed Modification must be revised to provide further clarification.

Staff's Proposed Modification is intended to reflect two separate revenue requirement impacts resulting from the then-anticipated WACC gross-up ruling in Docket No. 13-0553. First, Staff's Proposed Modification makes clear that the interest rate applied to the reconciliation balance for Rate Year 2012 – as determined in the instant docket – is “6.94%, the approved WACC without any gross up for income taxes.” This language is accurate because the final Order in Docket No. 13-0553 adopts the ruling on the WACC gross-up issue contained in the Proposed Order in that Docket. Second, because all parties agreed or did not oppose and the final Order in Docket No. 13-0553 determined that the rulings made there would apply retrospectively as well as prospectively, the WACC gross-up ruling also needs to be applied to the prior year's reconciliation for Rate Year 2011 (as approved in ICC Docket No. 13-0386 to implement PA 98-0015¹²), with any resulting adjustment reflected as an adjustment to the net revenue requirement used to set rates for 2014. Thus, the second sentence of Staff's Proposed

¹² The rates implemented pursuant to the approval in ICC Docket No. 13-0386 went into effect starting in July 2013.

Modification attempts to reflect that the net revenue requirement for 2013 as approved in ICC Docket No. 13-0386 was understated by an additional \$1,043,000 (based on calculating interest at WACC excluding income tax effects per the Proposed Order in 13-0553), and applies that correction as an adjustment (increase) to the revenue requirement used to set rates for 2014. With the exception noted below, Staff's second sentence is appropriate given the final Order in Docket No. 13-0553.

ComEd's remaining issues with the second sentence of Staff's Proposed Modification are that it contains certain incorrect / confusing terminology. The Proposed Modification purports to adjust the "filing year revenue requirement" for Rate Year 2014 (*i.e.*, the revenue requirement based on 2012 actual costs plus projected plant additions and related depreciation reserve and expense for 2013). The \$1,043,000 adjustment itself is unrelated to the 2014 Rate Year Initial Revenue Requirement (what Staff has referred to as the filing year revenue requirement). It would be more accurate and less confusing if Staff's language referenced an adjustment to the net revenue requirement used to establish rates for 2014, a term already included in the filing year attachment to the Proposed Order here. Another minor issue is that Staff refers to the adjustment with respect to rates that were in effect from June 2013 (rather than July 2013) through December 2013. As a result, subject to the above assumptions about the final Order in Docket No. 13-0553, and preserving its rehearing and appeal rights, ComEd proposes the following revisions to Staff's Proposed Modification to make it more accurate:

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 upward adjustment of \$1,043,000 to the net filing year revenue requirement used to set rates for 2014 to reflect the proper calculation of interest at WACC on the reconciliation balance

for Rate Year 2011 that was reflected in on rates during from the period June July through December, 2013, in accordance with the findings of Docket No. 13-0553.

(The highlighting indicates the incremental changes for the reader's assistance.)

IX. REVENUES

C. Potentially Contested Issues

1. Late Payment Revenues Related to Transmission

The AG's BoE (at 2, 15-17) conditionally proposes an adjustment to late payment revenues associated with transmission service. The AG's position now is that its proposal need not be adopted unless the final Order does not follow the Proposed Order's recommendation regarding functionalization of General and Intangible Plant. CCI's Brief on Exceptions (at 2) unconditionally urges adoption of the AG's proposed adjustment. The Proposed Order (at 67) correctly rejects the AG proposal.

ComEd has shown that: (1) its proposed treatment of late payment revenues associated with transmission service is correct and is consistent with the treatment approved by the Commission in ComEd's last five "Article IX" and formula rate cases; (2) ComEd already credits the \$2,562,000 in question to customers in its transmission rates; (3) the AG itself proposed the treatment in ComEd's 2010 rate case that ComEd uses; (4) the Commission rejected in ComEd's 2011 formula rate case the same AG proposal that the AG presented here; and (5) the AG proposal seeks improperly to credit customers twice with the same revenues. ComEd Init. Br. at 70; ComEd Rep. Br. at 52-55; *Commonwealth Edison Co.*, ICC Docket No. 11-9721 (Order May 29, 2012) at 73 (rejecting the same proposal that the AG made in the instant Docket).

The Proposed Order (at 67) agrees with ComEd's treatment. Staff and the Proposed Order agree that the AG proposal should be rejected, just as it was in ComEd's 2011 formula rate

case, and that the AG has shown no reasons for a different ruling here. PO at 67; Staff Init. Br. at 57-58; Staff Rep. Br. at 28.

ComEd's prior briefing showed in detail that all of the AG's (and CCI's) attempted rationalizations of the AG proposal are mistaken and/or irrelevant, and that double-counting revenues is unjustified. ComEd Rep. Br. at 53-55. The AG's Brief on Exceptions recycles the same arguments that ComEd previously refuted. *See* AG BoE at 2, 15-17. CCI's Brief on Exceptions relies on its prior briefs and presents no argument. *See* CCI BoE at 2.

The AG's making its proposal conditional does not change the facts discussed above. The AG's proposal is wrong in all conditions. ComEd's treatment is correct, and it will never be proper to double-count the revenues in question as credits to customers. The AG and CCI Exceptions must and should be rejected.

XII. PROPOSED ORDER'S CONCLUSION

Staff's BoE (at 40-41) proposes to add to the Proposed Order's overall Conclusion section (Proposed Order at 86) a reference to the Proposed Order's Appendices. ComEd does not object to Staff's proposal, which ComEd understands not to be a substantive Exception.

XIII. FINDING AND ORDERING PARAGRAPHS AND APPENDICES

Staff's BoE (at 41-42) proposes changes to figures in Findings (6) and (8). ComEd opposes Staff's Exception because Staff is proposing its own figures based on its requested outcomes on contested issues, just as ComEd's Exception No. 15 proposes ComEd's own figures. The final Order should set forth the correct figures based on its rulings on the issues.

Staff proposes a modification to the Proposed Order's Findings and Ordering Paragraphs that explicitly states that the amount of ComEd's rate case expense included in its revenue requirement is just and reasonable. *See* Staff BoE at 42. Putting aside Staff and ComEd's

disagreement about the dollar amount of rate case expense that should be included, ComEd agrees that the Proposed Order should be modified to explicitly state that ComEd's rate case expenses are just and reasonable pursuant to Section 9-229. ComEd believes, however, that the language that Staff proposes should be supplemented. Specifically, Staff's language does not contain a sufficient evidentiary discussion and therefore does not rise to the standard stated in *Madigan v. Illinois Commerce Comm'n*, 2011 IL App (1st) 101776 ¶ 51 (2012). ComEd therefore recommends that the Commission adopt the language that it proposes at its Exception No. 5. See Exception No. 5 to ComEd's BoE at 27.

XIV. STAFF'S PROPOSED "TECHNICAL CORRECTIONS"

Staff's BoE (at 42 and Appendix A) propose changes to certain of the Proposed Order's Appendices. More specifically, Staff proposes that the calculation of CWC in rate base in the Appendices reflect Staff's operating expenses Exceptions that affect inputs to the CWC calculation. The proposal should not be adopted for two reasons.

As a threshold matter, ComEd and Staff do agree that the calculation of CWC in rate base should reflect the Commission's rulings on the applicable operating expense items that affect the dollar inputs to the CWC calculation, and ComEd has proposed confirming language. *E.g.*, ComEd Init. Br. at 28; Kahle Dir., Staff Ex. 2.0, 7:122 – 9:126; ComEd BoE at 6.

However, Staff's proposal should not be adopted here because it: (1) adopts the Proposed Order's incorrect use of two different CWC calculations, one for the reconciliation year and one for the filing year (*see* ComEd BoE at 4, 5-8, and Section III.A of this Reply Brief on Exceptions); and (2) assumes the adoption of certain of Staff's applicable operating expense adjustments, which ComEd has shown in its Brief on Exceptions (in Sections V.C.2.a, V.C.4,

and V.C.5) should not be adopted. Accordingly, Staff's proposal should not be adopted, because the underlying Staff positions contain flawed premises.

XV. CONCLUSION

Based on the record and the arguments made herein, the Commission should issue a final Order consistent with ComEd's Brief on Exceptions and its separate Exceptions to the Proposed Order and this Reply Brief on Exceptions, approve ComEd's proposed 2014 Rate Year Net Revenue Requirement, and authorize and direct ComEd to make a compliance filing implementing the resulting rates and charges.

Dated: November 27, 2013

Respectfully submitted,

COMMONWEALTH EDISON COMPANY



By: _____
One of its attorneys

Thomas S. O'Neill
Senior Vice President & General Counsel
COMMONWEALTH EDISON COMPANY
440 S. LaSalle Street, Suite 3300
Chicago, Illinois 60605
(312) 394-5400
thomas.oneill@exeloncorp.com

Richard G. Bernet
10 S. Dearborn Street, Suite 4900
Chicago, IL 60603
(312) 394-5400
richard.bernet@exeloncorp.com

E. Glenn Rippie
John P. Ratnaswamy
Carmen L. Fosco
ROONEY RIPPIE & RATNASWAMY LLP
350 W. Hubbard St., Suite 600
Chicago, Illinois 60654
(312) 447-2800
glenn.rippie@r3law.com
john.ratnaswamy@r3law.com
carmen.fosco@r3law.com

David M. Stahl
Ronit C. Barrett
EIMER STAHL LLP
224 South Michigan Avenue, Suite 1100
Chicago, Illinois 60604
(312) 660-7600
dstahl@eimerstahl.com
rbarrett@eimerstahl.com

Attorneys for Commonwealth Edison Company