

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

Commonwealth Edison Company)
) ICC Docket No. 13-0495
Approval of the Energy Efficiency and Demand)
Response Plan Pursuant to Section 8-103(f) of)
The Public Utilities Act.)

INITIAL BRIEF

On behalf of

**THE COALITION TO REQUEST
EQUITABLE ALLOCATION OF COSTS TOGETHER**

REACT

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INITIAL BRIEF OF REACT

The Coalition to Request Equitable Allocation of Costs Together ("REACT"),¹ by and through its attorneys, Quarles & Brady LLP, pursuant to Section 200.800 of the Rules of Practice of the Illinois Commerce Commission ("Commission"), respectfully submits this Initial Brief in the above-captioned proceeding regarding the approval of the Energy Efficiency and Demand Response Plan (the "Energy Efficiency Plan") proposed by Commonwealth Edison Company ("ComEd").

I.

INTRODUCTION / STATEMENT OF THE CASE

REACT's goal in this proceeding is straightforward: to ensure that the largest electricity customers in Northern Illinois are able to participate fully and easily in ComEd's energy efficiency programs. As a result of REACT's discussions with ComEd prior to and during the course of the instant proceeding, REACT is pleased to advise the Commission of an agreement between REACT and ComEd, resulting in a modified form of the Large C&I Pilot Program

¹ The REACT members for purposes of this Initial Brief include: A. Finkl & Sons, Co.; Aux Sable Liquid Products, LP; Charter Dura-Bar (f/k/a Wells Manufacturing, Inc.); Flint Hills Resources, LP; FutureMark Paper Group; The Metropolitan Water Reclamation District of Greater Chicago; PDV Midwest Refining, LLC (CITGO); and United Airlines, Inc. The opinions herein do not necessarily represent the positions of any particular member of REACT.

originally presented by ComEd in its Energy Efficiency Plan. (See ComEd/REACT Joint Ex. 1. For the Commission's convenience, the agreed upon pilot program description is attached hereto and made a part hereof as Attachment 1.) This modified Large C&I Pilot Program, which is supported by both REACT and ComEd, presents an opportunity to increase large customer implementation of energy efficiency projects, and REACT respectfully requests that the Commission approve that modified Program.

The agreement between REACT and ComEd arises in a context in which the largest electric customers in Northern Illinois to date have not had appropriate access to energy efficiency programs. REACT presented evidence demonstrating that through the first six (6) years of the statutorily mandated energy efficiency programs, the largest energy users in Northern Illinois have paid millions of dollars to support those electric energy efficiency programs, but have received very little direct benefit, resulting in low participation rates and high frustration rates among such customers. (See REACT Ex. 1.0 at 9:191-201, 13:269-15:310, 20:417-26:552; REACT Ex. 2.0 at 6:126-13:286; REACT Ex. 3.0 at 3:51-6:120; REACT Ex. 4.0 at 3:53-7:159.)

The lack of appropriate access to energy efficiency funds for the largest energy users is contrary to the fundamental public policy embodied in the Public Utility Act ("Act"), which unambiguously seeks to expand the implementation of electric energy efficiency projects. Section 8-103 of the Act provides that "It is the policy of the State that electric utilities are required to use cost-effective energy efficiency and demand-response measures to reduce delivery load." (220 ILCS 8-103(a).) The Act also specifically requires energy efficiency programs to "represent a diverse cross-section of opportunities for customers of **all rate classes** to participate in the programs." (220 ILCS 5/8-103(f)(5) (emphasis added).)

To address this situation, REACT originally proposed a Self-Direct Pilot Program to give the largest electricity customers improved access to energy efficiency funds and enable increased deployment of energy efficiency projects by those customers. (*See* REACT Ex. 3.02.)

At the same time that REACT advocated in favor of a Self-Direct Pilot Program in the course of this proceeding, REACT engaged with ComEd regarding potential additional ways to address large customer access to ComEd's energy efficiency programs. With the indulgence of the Administrative Law Judge and without objection by any party to the instant proceeding, the evidentiary record was held open to allow the talks to continue. The result of those discussions is the agreement between REACT and ComEd to modify the form of the Large C&I Pilot Program originally presented by ComEd in its Energy Efficiency Plan. (*See* Attachment 1, ComEd/REACT Joint Ex. 1.) REACT respectfully requests that the Commission approve that modified Large C&I Pilot Program outlined in the attachment to ComEd/REACT Joint Ex. 1. In doing so, the Commission also should direct the initiation of a stakeholder-driven process to formulate the implementation details of that Program. ComEd has indicated that it supports that collaborative process as well, and has agreed to work with interested stakeholders during that process. (*See* ComEd/REACT Joint Ex. 2.0.)

While REACT advocates the Commission's approval of the modified Large C&I Pilot Program outlined in the attachment to ComEd/REACT Joint Ex. 1 and the accompanying collaborative stakeholder process, REACT also presents herein a summary of the evidence presented in this docket relating to large customer concerns about the energy efficiency programs, as well as the legal basis for a longer-term multi-year self-direct pilot program. This information is intended for the Commission's consideration with the understanding that energy efficiency implementation under Section 8-103 of the Act evolves over time, as experience is

accumulated. As that evolution continues, it would be beneficial to understand the Commission's perspective regarding whether various solutions to encourage long-term investments in larger energy efficiency projects may be considered by the Commission in its analysis of future energy plans.

The REACT Coalition And Its Witnesses

REACT is an *ad hoc* coalition, with diverse members, including some of the largest commercial, industrial, and governmental delivery services customers in Northern Illinois in ComEd's Extra Large Load Customer Delivery Class (referred to herein as the "ELLC class") and in its over 10 MW High Voltage Delivery subclass (referred to herein as the "HV Over 10 MW class"). (*See* REACT Ex. 1.0 at 8:159-9:189.) Since 2007, costs have increased significantly for REACT's members, due to changes in ComEd's distribution rates as well as increases in charges imposed under ComEd's energy efficiency tariff known as "Rider EDA." (*See id.*) Yet, while their costs have increased, ELLC class and HV Over 10 MW class customers have faced barriers to accessing the energy efficiency funds that they have paid. (*See id.*)

To explain its position in this proceeding, REACT presented the written testimony of Bradley O. Fults and Rick Flowers. (*See generally* REACT Exs. 1.0, 2.0, 3.0, 4.0.) Mr. Fults is the Managing Principal of an energy consulting firm with over 25 years of experience and familiarity with large customer issues in the ComEd service territory. (*See* REACT Ex. 1.0 at 2:16-5:86.) Mr. Fults has extensive experience analyzing cost impacts for the largest energy users associated with ComEd's rate design approaches. (*See id.*) Mr. Flowers is the Manager of Utility Services for the FutureMark Paper Group ("FutureMark"), which is an over 10 MW energy user that is the leading North American provider of responsibly-made recycled paper for

books and magazines, as well as for commercial printing and packaging applications; FutureMark is highly committed to reduced environmental impacts through innovation and improved efficiency. (*See* REACT Ex. 2.0 at 1:4-7, 2:34-5:98.) Mr. Flowers has 24 years of experience handling utility-related issues for FutureMark and its predecessors. (*See id.* 2:16-19.)

In this proceeding, Mr. Fults provided important historical context regarding large energy users' frustration with energy efficiency programs in Northern Illinois based upon his experience of consulting with those customers since their inception. (*See generally* REACT Exs. 1.0 and 3.0.) He also outlined the structure and value of REACT's proposed Electric Self-Direct Pilot Program. (*See id.*)

Mr. Flowers presented a first-hand account of the large customer perspective that serves as an instructive case study about the ComEd energy efficiency programs to date. (*See id.* at 2:21-32, 5:100-118, 7:158-13:286.) Mr. Flowers has extensive experience regarding FutureMark's day-to-day energy-related operations as well as its longer term planning and implementation of energy efficiency improvement projects, and has been directly involved in FutureMark's efforts to participate in ComEd's energy efficiency programs. (*See id.*) He detailed FutureMark's frustration with trying to work through the various programs offered by ComEd and its inability to get timely responses, much less access the funds that it has paid into ComEd's program. (*See id.*)

This Case Presents The Commission With An Opportunity To Enable The Largest Electricity Customers To Meaningfully Participate In Energy Efficiency Programs

REACT's message in this proceeding is to emphasize to the Commission the importance of practical, accessible energy efficiency programs for the largest Illinois electricity users. As REACT witnesses Mr. Fults and Mr. Flowers both explained, the largest customers in Northern Illinois have been frustrated because they have paid in millions of dollars to support the existing ComEd and DCEO energy efficiency programs, but, in large part, have not been able to access those funds. (*See generally* REACT Exs. 1.0, 2.0, 3.0, 4.0.) While energy efficiency charges collected under ComEd's Rider EDA have increased for REACT members and similar large energy users, those customers have faced significant barriers to accessing the energy efficiency funds that they have paid. (*See id.*)

The largest energy users are sophisticated and continuously are seeking ways to lower their energy costs through energy conservation, load management, and competitive supply purchases. (*See* REACT Ex. 1.0 at 20:430-21:439; REACT Ex. 2.0 at 4:69-5:98.) However, energy efficiency projects for large users oftentimes involve more complexity, longer lead times, and large capital outlays. (*See* REACT Ex. 1.0 at 21:441-48.) The constraints of a rigid three-year structure result in substantial hurdles for implementation of energy efficiency projects for the largest energy users who frequently operate their facilities in a manner that would not allow for installation within a three-year window. (*See id.* at 22:466-23:485.) Since the “low-hanging fruit” projects such as lighting upgrades likely already have been completed, it is all the more challenging for the largest users to implement new energy efficiency savings projects. (*See id.* at 20:430-21:448.) That challenge has been exacerbated by the bureaucracy

and lack of clarity that has been inherent in ComEd's programs to date. (*See id.* at 21:450-22:464; REACT Ex. 2.0 at 7:158-13:286.)

To address these issues, REACT originally proposed an Electric Self-Direct Pilot Program for the largest energy users, as a way to enable the largest energy users to become active participants in the ComEd energy efficiency programs. (*See* REACT Ex. 1.0 at 28:620-32:704; REACT Ex. 3.0 at 7:122-8:148; REACT Ex. 3.02.) The REACT proposal was distinct from the Section 8-104 natural gas opt-out approach, which excludes those customers from the natural gas energy efficiency programs; all energy efficiency achieved under the REACT proposal would have been subject to ComEd's cost-effectiveness test as well as its monitoring and verification processes, and would have counted toward ComEd's Section 8-103 statutory energy efficiency requirements. (*See* REACT Ex. 3.02.) REACT's proposal also would have addressed longer-term planning issues associated with large energy efficiency programs and the funding-access issues that have been sources of frustration for large energy users under historic ComEd programs. As discussed further herein, although REACT no longer is advocating for its Electric Self-Direct Pilot Program in this proceeding, in order to facilitate future program development, REACT is requesting that the Commission recognize that the legal structure of the Self-Direct Pilot Program originally proposed by REACT is permitted under Section 8-103 of the Act.

In addition to advancing its proposed Self-Direct Pilot Program, REACT engaged with ComEd to explore potential modifications to ComEd's proposed Large C&I Pilot Program (*see* ComEd Ex. 1.0 at 82-83) as an alternative means to encourage increased implementation of energy efficiency measures by ComEd's largest customers. REACT has reached agreement with ComEd regarding a modified version of the ComEd Larger C&I Pilot Program. That

modified proposal is found in ComEd/REACT Joint Ex. 1, attached hereto as Attachment 1. REACT respectfully requests that the Commission approve that modified proposal.

In sum, REACT respectfully requests that the Commission approve the modified Large C&I Pilot Program contained in ComEd/REACT Joint Ex. 1 and direct ComEd to initiate a stakeholder-driven process to formulate the implementation details of the modified program during final program design following approval of ComEd's 2014-2016 Plan -- a process to which ComEd has agreed. (*See* ComEd/REACT Joint Ex. 2.)

II.

COMED'S ENERGY EFFICIENCY PROGRAMS HISTORICALLY HAVE NOT WORKED FOR ITS LARGEST CUSTOMERS

ComEd's energy efficiency programs to date have been ineffective in terms of assisting the largest energy users -- such as REACT members -- with implementing energy efficiency projects. (*See* REACT Ex. 1.0 at 270-73; REACT Ex. 2.0 at 12:265-13:286.) Yet, those are precisely the types of customers that, if given an appropriate level of flexibility, can have a material impact -- a real "bang for the buck" impact -- on energy savings. (*See* REACT Ex. 1.0 at 13:273-75.) In Plan Years 1-6, the offered programs lacked the features to allow straightforward access for the largest customers. (*See id.* at 275-78.)

The information provided by ComEd demonstrates that ComEd historically has incurred substantial overhead costs associated with ComEd's administration of its energy efficiency portfolio for these customers. (*See id.* at 13-14.) The data shows that ComEd collected over \$48 million from ELLC and HV Over 10 MW customers during the first five program years. (*See id.* at 15.) Of that amount, only \$4.7 million in direct energy efficiency benefits went to those customers. (*See id.*)

As demonstrated most clearly by the testimony of REACT witness Mr. Flowers, the largest customers in Northern Illinois are frustrated, in that although they have been required to pay ComEd a substantial amount of money to support energy efficiency, they have been unable to meaningfully participate in the ComEd program. (*See* REACT Ex. 2.0 at 7:158-66; *see also* REACT Ex. 1.0 at 20:420-22.) In short, the largest customers have paid in millions of dollars to support the ComEd Energy Efficiency Program, but have received very little direct benefit. (*See* REACT Ex. 1.0 at 20:422-24.) As Mr. Flowers stated, FutureMark alone has paid over \$860,000 into the ComEd program, and despite expending substantial effort and resources to access program funds, FutureMark has received only \$9,682. (*See* REACT Ex. 2.0 at 12:265-78.) A corresponding point is that the ComEd Energy Efficiency Program has received limited benefit from the type of large-impact energy efficiency projects that could be implemented if program accessibility were improved. (*See id.* at 20:424-28.)

A number of factors have caused this circumstance. First, most of the largest energy users have dedicated energy managers or utility supervisors who are continuously seeking ways to lower their energy costs through energy conservation, load management, and competitive supply purchases. (*See id.* at 20:430-39.) As part of their job, those dedicated professionals already have implemented many of the “low-hanging fruit” options such as lighting and variable speed motors. (*See id.*) ComEd witness Mr. Brandt acknowledged that much of the “low-hanging fruit” already has been captured. (*See id. citing* ComEd Ex. 2.0 at 9:178.) Second, oftentimes energy efficiency projects at large facilities require complex planning, longer lead times, and larger capital contributions to achieve energy efficiency savings beyond the “low hanging fruit.” (*See* REACT Ex. 1.0 at 21:441-43.) Third, large energy users have been frustrated by the bureaucracy and lack of clarity associated with the ComEd Energy

Efficiency Program. (*See id.* at 21:450-51.) Simply trying to figure out the rules under which the energy efficiency program funds might be accessed has been a struggle. (*See id.* at 21:451-53.) For example, FutureMark applied to the ComEd Request for Incentive ("RFI") Program, and did not receive a response from ComEd until 230 days after the submission of its application. (*See REACT Ex. 2.0 at 9:190-10:221.*) After additional lag time, ComEd informed FutureMark that its application -- along with the 35 other applications made to the RFI program -- had been rejected; the RFI program had been discontinued; and FutureMark would be transferred to a new program under the ComEd portfolio. (*See id.*)

ComEd's largest customers have been further frustrated by the three-year planning horizon for ComEd's energy efficiency programs, such as the June 2014 to May 2017 planning period being reviewed in this proceeding. (*See REACT Ex. 1.0 at 22:466-85.*) The uniqueness or complexity of the manufacturing and production process lengthens the timeline for energy efficiency investment at an industrial facility. (*See id.*) For example, some REACT members only shut down facilities or processes for maintenance once every three to five years. (*See id.*) Many energy efficiency projects must be completed during these "down times." (*See id.*) If the time to obtain approval of an application under the Energy Efficiency Plan is lengthy, a three-year project timeline may become unworkable. (*See id.*) Even ComEd appears to recognize this problem. (*See REACT Ex. 1.06 (ComEd Response to REACT Data Request 2.15)* (recognizing "the long lead time required to develop and implement projects for industrial customers" standing in contrast to utility "annual goals and budgets . . ."))

The bottom line is that ComEd's current energy efficiency programs are not working for its largest customers. These customers are sophisticated energy users who have the potential for substantial, long-term energy savings if they are given sufficient flexibility. Retaining the status

quo -- a mix of "off-the-shelf" energy efficiency incentives that can only be accessed after navigating the bureaucracy of the ComEd program -- will not help ComEd meet its energy efficiency goals in future planning years, especially as the challenge for meeting those goals becomes more difficult.

III.

COMED'S MODIFIED LARGE C&I PROGRAM SHOULD BE APPROVED IN THIS PROCEEDING

As a result of REACT's discussions with ComEd prior to and during the course of the instant proceeding, REACT and ComEd have reached an agreement resulting in a modified form of the Large C&I Pilot Program originally presented by ComEd in its Energy Efficiency Plan. (*See* Attachment 1, ComEd/REACT Joint Ex. 1.) This modified Large C&I Pilot, which is supported by both REACT and ComEd, presents an opportunity to increase large customer implementation of energy efficiency projects with ComEd's Energy Efficiency Plan. REACT respectfully requests that the Commission approve the modified Program.

The modified Large C&I Pilot Program "is intended to stimulate the implementation of large scale energy efficiency measures by ComEd's largest (i.e., over 10 MW) customers." (*Id.* at 1.) The program will have a "specific emphasis on increased and improved coordination between ComEd and program participants, increased flexibility to accommodate the complexity of large scale energy efficiency projects, expedited approval mechanisms, and increased certainty in funding availability." (*Id.*) The full modified program description is attached hereto as Attachment 1.

The modified ComEd Large C&I Pilot Program contains provisions intended to enable ComEd's largest customers to participate more actively in implementing energy efficiency projects that will contribute to ComEd meeting its statutory energy efficiency goals. The

program description conforms to Section 8-103 and presents increased detail and guidance regarding the format of the program, in comparison to the initial proposal shown at pages 82-83 of ComEd Ex. 1.0. The modified plan incorporates not only the "grant" proposal identified by ComEd witness Mr. Brandt in his Rebuttal Testimony (*see* REACT Ex. 3.0 at 51:1170-80), but also additional modifications that are designed to provide additional clarity and assurances regarding implementation of the pilot program and encourage additional participation by ComEd's largest customers.

Thus, REACT advocates that the Commission approve the modified Large C&I Pilot Program. To facilitate the development of final implementation details, the Commission also should direct the initiation of a stakeholder-driven process to formulate the implementation details of that Program. ComEd has indicated that it supports that collaborative process as well, and has agreed to work with interested stakeholders during that process. (*See* ComEd/REACT Joint Ex. 2.) Other parties likewise have expressed support of a post-proceeding collaborative process to further develop program details. (*See* REACT Cross Ex. 2.0 (Midwest Cogeneration Association), REACT Cross Ex. 4.0 (NRDC), REACT Cross Ex. 5.0 (ELPC), REACT Cross Ex. 17.0 (AG); REACT Cross Ex. 18.0 (IIEC).)

IV.

A SELF-DIRECT PROGRAM THAT ENABLES LONG-TERM ENERGY EFFICIENCY PROJECTS IS AUTHORIZED UNDER SECTION 8-103 OF THE PUBLIC UTILITIES ACT

As stated herein, REACT recommends Commission approval of the modified ComEd proposed Large C&I Pilot Program. (*See* ComEd/REACT Joint Ex. 1.) Nevertheless, given that energy efficiency implementation under Section 8-103 of the Act evolves over time as experience is accumulated, REACT includes the following discussion of certain "legal issues"

that were alluded to by other parties in response to REACT's originally proposed Self-Direct Pilot Program, to allow various solutions to be considered by the Commission in the analysis of future programs. It would be helpful to the energy efficiency planning process for future years for the Commission to evaluate and provide guidance regarding these issues within the context of the instant proceeding.

Two basic issues were raised with respect to the legal adequacy of the REACT Self-Direct Pilot Program:

1. Whether any "self-direct" program is permitted under Section 8-103 of the Act;
and
2. Whether a self-direct program that allows the accumulation and spending of funds beyond a three-year period is permitted by Section 8-103 of the Act.

These issues are important because several parties, including REACT, support the concept of a "self-direct" approach as a potentially effective strategy in encouraging large customer deployment of substantial long-term energy efficiency projects. (*See generally* REACT Exs. 1.0, 2.0, 3.0, 4.0; *see also* REACT Cross Ex. 1.0 (Midwest Cogeneration Association); REACT Cross Ex. 3.0 (NRDC); REACT Cross Ex. 16.0 (AG).) Likewise, several parties, including REACT, support a self-direct structure that would permit the accumulation of funds for a period in excess of three years. (*See generally* REACT Exs. 1.0, 2.0, 3.0, 4.0; *see also* REACT Cross Ex. 3.0 (NRDC); REACT Cross Ex. 16.0 (AG).)

Nothing In Section 8-103 Prohibits A Self-Direct Pilot Program

Section 8-103 of the Act declares in its first two sentences that:

It is the policy of the State that electric utilities are required to use cost-effective energy efficiency and demand-response measures to reduce delivery load. Requiring investment in cost-effective energy efficiency and demand-response measures will reduce direct and indirect costs to consumers by decreasing

environmental impacts and by avoiding or delaying the need for new generation, transmission, and distribution infrastructure.

(220 ILCS 5/8-103(a).) Nothing in this statement of legislative intent suggests that the utility cannot empower customers to develop and implement energy efficiency projects using the funds that otherwise would be spent by the utility to advance energy efficiency.

That broad statement of policy is followed by a series of statutory provisions, *none of which* states anything about the specific types of energy efficiency programs that may or may not be included in the overall utility plan, and *none of which* precludes the inclusion of a Self-Direct Pilot Program as part of the overall utility portfolio of programs under the plan. Unambiguous Illinois law dictates that where a statute fails to specifically preclude something or is silent, there is no authority of an agency to insert any limitation or create any requirement not specifically provided. (*See, e.g., Schultz v. Ill. Farmers Ins. Co.*, 237 Ill. 2d 391, 408 (2010) ("A court may not add provisions that are not found in a statute, nor may it depart from a statute's plain language by reading into the law exceptions, limitations, or conditions that the legislature did not express."); *Madison Two Assoc. v. Pappas*, 227 Ill. 2d 474, 495 (2008) (same); *Waste Mgmt of Ill., Inc. v. Ill. Pollution Control Bd.*, 145 Ill. 2d 345, 348 (1991) (same); *Bailey v. Ill. Liquor Control Comm'n*, 405 Ill. App. 3d 550, 554 (1st Dist. 2010) (same).)

Rather than dictate specific limitations or parameters on the types of programs that may be presented, Section 8-103 specifically leaves it to the utility's discretion to design the plan, stating: "Electric utilities shall be responsible for overseeing the design, development, and filing of energy efficiency and demand-response plans with the Commission." (220 ILCS 5/8-103(e).)

Of course, the utility's plan may be approved or disapproved by the Commission. (*See* 220 ILCS 5/8-103(f).) Section 8-103(f)(1)-(7) lists the requirements of what the plan must show, and therefore provides the statutory criteria by which the Commission must evaluate the

plan. (See 220 ILCS 5/8-103(f)(1)-(7).) Again, *none of those criteria*, either individually or collectively, precludes the inclusion of a Self-Direct Pilot Program as part of the overall utility portfolio of programs under the plan. The criteria are summarized below:

- (1) A demonstration that the measures will achieve the statutory energy efficiency and demand response requirements;
- (2) A demonstration of specific proposals to implement new building and appliance standards;
- (3) An estimation of the total amount paid for electric service expressed on a per kilowatthour basis associated with the proposed portfolio of measures designed to meet the energy efficiency and demand response requirements;
- (4) A demonstration of coordination with DCEO regarding energy efficiency measures directed toward low income households;
- (5) A demonstration that the energy efficiency measures (other than low income programs) are cost-effective using the total resource cost test and that those measures represent a diverse cross-section of opportunities for customers in all rate classes;
- (6) The inclusion of a proposed cost-recover tariff mechanism to fund the proposed energy efficiency and demand-response measures to ensure prudent and reasonable utility cost recovery for Commission-approved programs; and
- (7) The provision for an annual and three-year independent evaluation of the performance of the cost-effectiveness of the measures, and for adjustment of the measures on a going-forward basis as a result of evaluations (which evaluations shall be subject to a 3% cost cap).

(See 220 ILCS 5/8-103(f)(1)-(7).)

Nothing in that set of criteria, or any other provision of Section 8-103, identifies any specific program that may or may not be included in the overall utility plan. The discretion to craft program offerings is left entirely up to ComEd, as approved by the Commission. In determining whether the plan conforms with the statute, the Commission also possesses discretion to encourage energy efficiency programs that will best conform to the statutory public policy plainly set forth in Section 8-103. (See, e.g., *Lake County Bd. of Review v.*

Property Tax Appeal Bd of the State of Ill., 119 Ill. 2d 419, 428 (1988) ("[W]ide latitude must be given to administrative agencies in fulfilling their duties. . . .[A]dministrative officers may validly exercise discretion to accomplish in detail what is legislatively authorized in general terms." (internal citations omitted); *Chemetco, Inc. v. Ill. Pollution Control Bd.*, 140 Ill. App. 3d 283, 286-87 (5th Dist. 1986) ("[W]here there is an express grant of authority, there is likewise the clear and express grant of power to do all that is reasonably necessary to execute the power or perform the duty specifically conferred."); *Ray v. Ill. Racing Bd.*, 113 Ill. App. 3d 510, 513 (1983) (same).)

In its Rebuttal Testimony, ComEd offers the following statement regarding the legality of a Self-Direct Pilot Program:

. . . Section 8-103 of the Act does not contain the self-direct provision set forth in Section 8-104, and as a result, Section 8-103 does not exempt the large customers from being included within the energy savings goals calculations or the applicability of the cost recovery tariff. As a result, I have been advised by counsel that ComEd cannot propose a self-direct program that mirrors the gas program

(ComEd Ex. 3.0 at 44:992-97.)

ComEd's statement did not answer the legal question whether a Self-Direct Pilot Program is permitted under Section 8-103. Further, ComEd's statement incorrectly implied that REACT had proposed a Self-Direct Pilot Program that "mirrors" the "opt-out" program on the natural gas side under Section 8-104. That is not the case. The customers in the REACT proposed Self-Direct Pilot Program would not have been "exempt" from participating in ComEd's energy efficiency plan. The Self-Direct Pilot Program that REACT proposed was not an opt-out program -- all energy savings resulting from the program would have been subject to ComEd's cost-effectiveness test as well as its monitoring and verification processes, and would have counted toward the energy savings goals to which ComEd referred. (See REACT Ex. 3.02

at page 1.) Further, unlike on the "opt-out" structure that exists on the gas side, the electric self-direct customers under REACT's proposal would have been subject to the charges under ComEd's Rider EDA -- Rider EDA would be the mechanism used to determine the amount of money that each customer would pay into a reserve account, which would be reduced by the amount that would be paid to ComEd both to (1) cover ComEd's administration, marketing, monitoring, and verification costs; and (2) account for the statutory 25% of Rider EDA funds reserved for use by DCEO. (*See id.* at page 2.)

ComEd's statement did not identify any actual requirement or prohibition in Section 8-103 that precludes a Self-Direct Pilot Program as part of ComEd's overall energy efficiency plan.

Nothing In Section 8-103 Prohibits A Self-Direct Structure With Accumulation Of Funds And Spending Beyond A Three-Year Horizon

Contrary to the suggestion of some parties, nothing in Section 8-103 prohibits a self-direct structure under which funds might be accumulated for a period in excess of three years or spent beyond the three-year horizon. Of course, Section 8-103 provides that a utility energy efficiency *plan* shall be *submitted* for Commission review and approval every three years. (*See* 220 ILCS 5/8-103(f).) However, that requirement does not mean that a utility is legally precluded from submitting (or that the Commission would be legally precluded from approving) a program within the overall plan that would allow for accounting for or spending of energy efficiency funds on a basis other than three years. There simply is no such provision in Section 8-103.

As discussed above, there are several statutory criteria that apply to a utility energy efficiency plan. (*See* 220 ILCS 5/8-103(f)(1)-(7).) None of those criteria precludes a program under which funds are tracked and accounted for on a basis other than three years. REACT

acknowledges that ComEd's current approach to its planning, implementation, and reporting processes, does, with some exceptions, generally run on a three-year track. However, that is a matter of practice and convenience -- it is not statutorily mandated. Moving outside of the currently-observed three-year structure for a given program likely would require adjustments in ComEd's current general methods of savings estimations and financial accounting, and may even justify an adjustment of ComEd's energy efficiency goals, but those are not legal impediments. That is, if the Commission were to determine as a matter of policy that a self-direct program that allowed the accumulation of funds on a basis other than three years were desirable as consistent with the clear statutory goal of expanding energy efficiency projects, the Commission could approve that approach without any fear of legal error.

In its Rebuttal Testimony, ComEd again suggested a legal impediment, but failed to identify a specific provision of Section 8-103 that would preclude accumulation and spending of funds outside a three-year framework. Rather, ComEd stated that the REACT proposal was objectionable "because participants would retain their funds without regard to achievement of the three-year energy savings goals or evaluation processes set forth in Section 8-103." (ComEd Ex. 3.0 at 47:1075-77.) However, ComEd misstated the legal requirement.² There are no "three-year energy savings goals" -- Section 8-103 provides for "annual energy savings goals." (220 ILCS 5/8-103(b).) Due to a recent amendment, Section 8-103(b) now provides the utility with the option for meeting either each annual savings goal or waiting to use a cumulative total savings over a three year period to demonstrate the achievement of the required

² ComEd also misstated the REACT proposal, which would have *allowed* a participant to retain the funds for more than three years but would not *require* them to do so, as ComEd suggested. (*Compare* REACT Ex. 3.02 at page 3 *with* ComEd Ex. 3 at 47:1075.)

savings, but in either case the methodology is specifically tied to "*each annual incremental savings requirement.*" (220 ILCS 8-103(b) (emphasis added).)

As a matter of administrative convenience, ComEd may prefer not to have to adjust its savings estimates and measurement process for a period other than three years, but that is dictated by administrative convenience only, rather than a legal requirement that ComEd operate in that manner. Likewise, nothing in Section 8-103 or ComEd's Rider EDA requires a rigid three-year timeline regarding accounting for accumulation of funds. Both Section 8-103 and Rider EDA run on annual calendars, but nonetheless ComEd's programs generally are proposed and implemented on a three-year basis.

Later in its Rebuttal Testimony, ComEd again essentially repeated its argument:

Of course, this proposal [i.e., REACT's proposal to allow for accumulation of Rider EDA funds for a period other than three years] is entirely unconcerned with achievement of the Plan 3 energy savings goals, which must be achieved by the end of Plan Year 9. In other words, all funds must be spent and goals achieved after 36 months.

(ComEd Ex. 30 at 51:1166-69.) Again, this view reflects ComEd's administrative process, rather than a legal requirement that prevents a program under which funds could be accumulated and disbursed on a schedule other than three years. Simply stated, contrary to ComEd's suggestion, nothing in Section 8-103 requires that "all funds must be spent and goals achieved after 36 months." The statute imposes annual savings requirements and ComEd has discretion in how it formulates programs to meet those requirements. (*See* 220 ILCS 5/8-103(b).) ComEd must present an energy efficiency plan every three years, but nothing in Section 8-103 precludes the plan from including a program that will continue beyond a three-year horizon. Including such a program to enable significant energy efficiency opportunities beyond the three-year horizon would be entirely consistent with the policy of Section 8-103.

In sum, REACT appreciates that ComEd has established an administrative process that currently operates, with some exceptions, on a three-year schedule. However, a modification of that administrative process to accommodate potentially high impact energy efficiency projects that could be achieved through a self-direct approach that requires accumulation of funds for more than three years is not legally precluded by Section 8-103, which says nothing about which programs may or may not be included in the overall energy efficiency plan.

V.

CONCLUSIONS AND RECOMMENDATIONS

For the reasons stated herein, in the written testimony of REACT's expert witness Bradley O. Fults and Rick Flowers, and in the Exhibits presented by REACT (both individually and jointly with ComEd), REACT respectfully requests that the Commission:

- Recognize that the ComEd Energy Efficiency Program has not been working for ComEd's largest customers;
- Approve the modified version of ComEd's Large C&I Pilot Program; and
- Recognize that the Commission has the legal authority to implement an electric self-direct pilot program that contains provisions that extend beyond the three-years of the Energy Efficiency Plan.

Respectfully submitted,

**THE COALITION TO REQUEST EQUITABLE
ALLOCATION OF COSTS TOGETHER**

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