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**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.)	

DRAFT PROPOSED ORDER OF REACT

The Coalition to Request Equitable Allocation of Costs Together ("REACT"),¹ by and through its attorneys, Quarles & Brady LLP, pursuant to Section 200.810 of the Rules of Practice of the Illinois Commerce Commission ("Commission"), respectfully submits this Draft Proposed Order in the instant proceeding regarding the approval of the Energy Efficiency and Demand Response Plan (the "Energy Efficiency Plan") proposed by Commonwealth Edison Company ("ComEd").

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 program. Through the first six years of statutorily mandated energy efficiency programs, the largest energy users in Northern Illinois have paid tens of millions of dollars to support those electric energy efficiency programs, but have, in large part, been unable to access

¹ The REACT members for purposes of this Draft Proposed Order 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.

those funds. 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* ComEd/REACT Joint Ex. 1.)

REACT is pleased to note that a broad consensus has developed in support of the modified Large C&I Pilot Program. (*See* REACT Reply Br. at 1-2; ComEd Reply Br. at 24-25; AG Reply Br. at 15-16; NRDC Reply Br. at 17-22; ELPC Reply Br. at 1 n.1; IIEC Reply Br. at 3.) Other parties take no position regarding the modified Large C&I Pilot Program. (*See generally* Staff Reply Br.; CUB/City of Chicago Reply Br.; MCA Reply Br.) The bottom line is that no party objects to moving forward with Commission approval of the modified Large C&I Pilot Program. Accordingly, REACT respectfully requested that the Commission approve the modified Large C&I Pilot Program outlined in the attachment to ComEd/REACT Joint Ex. 1.

REACT also respectfully requested that, in the context of approving the modified Large C&I Pilot Program, the Commission also direct the initiation of a stakeholder-driven process to formulate the implementation details of that Program. ComEd indicated that it supports that collaborative process as well, and agreed to work with interested stakeholders during that

process. (See ComEd/REACT Joint Ex. 2.0.) Other parties who have commented on the Program also support that approach, and no party has objected to that approach. (See, e.g., ComEd Reply Br. at 24-25; AG Reply Br. at 15-16; NRDC Reply Br. at 17-22; ELPC Reply Br. at 1 n.1; IIEC Reply Br. at 3; *see also generally* Staff Reply Br.; CUB/City of Chicago Reply Br.; MCA Reply Br.)

Further, while REACT explained that it is no longer requesting that the Commission approve REACT's Self-Direct Pilot Program proposal, REACT respectfully requested that the Commission address in this docket the legal issues associated with the proposed Self-Direct Pilot Program because, as a policy matter, a number of parties indicated their support the concept of a "self-direct" approach as a potentially effective strategy to encourage large customer deployment of substantial long-term energy efficiency projects. REACT explained 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 for stakeholders 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.

Accordingly, REACT respectfully offers the following proposed language for inclusion in the Proposed Order in the instant proceeding.

PROPOSED LANGUAGE FOR INCLUSION IN PROPOSED ORDER

I.

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

REACT explained that 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 Init. Br. at 8, *citing* REACT Ex. 1.0 at 13:270-73; 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 Init. Br. at 8, *citing* REACT Ex. 1.0 at 13:273-75.) REACT explained that, in Plan Years 1-6, the offered programs lacked the features to allow straightforward access for the largest customers. (*See* REACT Init. Br. at 8, *citing* REACT Ex. 1.0 at 13:275-78.)

REACT noted that 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* REACT Init. Br. at 8, *citing* REACT Ex. 1.0 at 13-14.) REACT further noted that the data shows that ComEd collected over \$48 million from ELLC and HV Over 10 MW customers during the first five program years. (*See* REACT Init. Br. at 8, *citing* REACT Ex. 1.0 at 15.) Of that amount, only \$4.7 million in direct energy efficiency benefits went to those customers. (*See id.*)

REACT explained that the largest customers in Northern Illinois are frustrated, as demonstrated most clearly by the testimony of REACT witness Mr. Flowers. (*See* REACT Init. Br. at 9, *citing* REACT Ex. 2.0 at 7:158-66.) REACT noted that although the largest customers

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 id.*; *see also* REACT Ex. 1.0 at 20:420-22.) In short, the largest customers have paid in tens of millions of dollars to support the ComEd Energy Efficiency Program, but have received very little direct benefit. (*See* REACT Init. Br. at 9, *citing* 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 Init. Br. at 9, *citing* REACT Ex. 2.0 at 12:265-78.)

REACT also made the corresponding point: 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* REACT Init. Br. at 9, *citing* REACT Ex. 2.0 at 20:424-28.)

REACT explained that a number of factors have resulted in the largest energy users not participating in ComEd's energy efficiency programs. (*See* REACT Init. Br. at 9.) 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* REACT Init. Br. at 9, *citing* REACT Ex. 2.0 at 20:430-39.) As part of their jobs, those dedicated professionals already have implemented many of the "low-hanging fruit" options such as lighting and variable speed motors. (*See id.*) REACT noted that ComEd witness Mr. Brandt acknowledged that much of the "low-hanging fruit" already has been captured. (*See* REACT Init. Br. at 9, *citing* REACT Ex. 2.0 at 20:430-39; 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 Init. Br. at 9, *citing* REACT Ex. 1.0 at 21:450-51.) Third, large energy users have been frustrated by the bureaucracy and lack of clarity associated with the ComEd Energy Efficiency Program. (*See* REACT Init. Br. at 9-10, *citing* REACT Ex. 1.0 at 21:441-43.) REACT explained that simply trying to figure out the rules under which the energy efficiency program funds might be accessed has been a struggle. (*See* REACT Init. Br. at 10, *citing* REACT Ex. 1.0 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 Init. Br. at 10, *citing* 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.*)

REACT explained that 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 Init. Br. at 10, *citing* REACT Ex. 1.0 at 22:466-85.) REACT noted that 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, as REACT pointed out, 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.*) REACT explained that even ComEd appears to recognize this problem. (*See* REACT Init. Br. at 10, *citing* 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 . . ."))

REACT's Response To ComEd's Position

In response to REACT's testimony regarding the lack of appropriate access to energy efficiency funds for the largest customers, ComEd argued that its energy efficiency program has performed at the highest levels and that it has received national awards for its energy efficiency portfolio. (*See* ComEd Init. Br. at 40.) REACT took issue with ComEd's characterization of how it has performed, particularly with respect to its largest customers, and maintained that ComEd repeatedly mischaracterized the testimony of REACT witness Mr. Fults. (*See* ComEd Init. Br. at 40; REACT Reply Br. at 11.)

REACT pointed out, for example, that ComEd incorrectly suggested that Mr. Fults failed to read ComEd's data request responses and that he testified that ComEd failed to achieve the *Commission-approved* energy efficiency savings goals for each of Plan Years 1 through 5. (*See* REACT Reply Br. at 11, *citing* ComEd Init. Br. at 38.) However, as REACT explained, that was not Mr. Fults' testimony. (*See* REACT Reply Br. at 11.) REACT explained that Mr. Fults' testimony related to the *statutorily-set* goals, and the fact that in both Plan 2 (for Plan Years 3-6) and Plan 3 (for Plan Years 7-9), as filed by ComEd, ComEd requested a variance from those *statutorily-set* goals. (*See* REACT Reply Br. at 11, *citing* REACT Ex. 1.0 at 10:218-37.) REACT explained that ComEd's data request responses did not address the issue that was the subject of Mr. Fults' testimony; rather, the data request responses only discussed the *Commission-approved* goals, and noted that final information regarding the *Commission-approved* goals was not available for Plan Years 5 and 6. (*See* Reply Br. at 11-12, *citing*

ComEd Response to REACT Data Request 2.05 ("[B]ased on the findings of the independent evaluator for Plan Year 1 through Plan Year 4, [ComEd] has achieved the energy savings goals *approved by the Commission* in ICC Docket No. 07-0540 and ICC Docket No. 10-0570. ...the evaluation results from PY5 are not yet available... . Plan Year 6 is currently underway." (Emphasis added).) Further, as REACT noted, ComEd did not dispute that with in its proposed Plan 2, ComEd requested a variance from the *statutorily-set* goals, and that with its Plan 3 it is seeking a significant variance from the *statutorily-set* goals. (See REACT Reply Br. at 12.)

REACT explained that Mr. Fults makes this point within the context of noting that ComEd, at best, has mixed motives when it comes to some energy efficiency issues, something that ComEd fails to recognize. (See REACT Reply Br. at 12.) However, as REACT noted, ComEd did not and could not deny that it has an economic incentive to have the Commission-approved goals set as low as possible, so that ComEd can avoid being penalized. (See REACT Reply Br. at 12, *citing* 220 ILCS 5/8-103(i).) Indeed, the fact that ComEd may have achieved the statutory goals after advocating for lower goals could be viewed as a manifestation of ComEd's mixed motives. (See REACT Reply Br. at 12.) REACT explained that, additionally, as an electric utility, ComEd cannot honestly deny that it has an economic motive to deliver more electricity, rather than less. (See *id.*, *citing* REACT Ex. 1.0 at 12:238-50.) Moreover, REACT explained that it is not truly open to question that, as a result of ComEd's affiliation with Exelon Generation, ComEd's parent company has an economic incentive to sell more electricity, rather than less, particularly at peak times. (See REACT *id.*, *citing* REACT Ex. 1.0 at 12:252-13:267) REACT noted that, in fact, in its public filings, ComEd's parent has recognized that energy efficiency can negatively impact its bottom line. (See *id.*, *citing* Exelon Form 10-K 2012 Annual Report to the United States Securities and Exchange Commission

dated Feb. 21, 2013 at 39 ("Exelon's and Generation's market and financial risks include the risk of price fluctuations in the wholesale and retail power markets. Wholesale power prices are a function of supply and demand, which in turn are driven by factors such as . . . implementation of energy efficiency and demand response programs."))

REACT noted that Mr. Fults explained that ComEd's economic motivations may be one reason why ComEd historically has not been aggressive in its pursuit of energy efficiency projects, particularly with regard to its largest customers, who have the ability to deliver a real "bang for the buck" impact on energy efficiency. (See Reply Br. at 13, *citing* REACT Ex. 1.0 at 13:265-78.) In response, ComEd asserts that it is managing its energy efficiency portfolio "at the highest level" and cites to awards it has received. (See REACT Reply Br. at 13, *citing* ComEd Init. Br. at 40.) However, as REACT explained, those awards were only for particular programs, not for overall portfolio management, and were not for the way in which it has engaged with its largest customers. (See REACT Reply Br. at 13, *citing* <http://www.aceee.org/press/2013/03/aceee-recognizes-exemplary-energy-ef> (demonstrating that the American Council for an Energy-Efficient Economy's award to ComEd was limited to Retro-Commissioning and Monitoring-Based Commissioning); http://www.energystar.gov/index.cfm?fuseaction=pt_awards.showAward_Details&esa_id=5113 (demonstrating that the United States Environmental Protection Agency's award to ComEd was limited to leveraging ENERGY STAR).)

REACT noted that the numbers associated with ComEd's administration of its energy efficiency portfolio speak for themselves. (See REACT Reply Br. at 13.) REACT pointed to data provided by ComEd showing the very low level of participation by ELLC and HV Over 10 MW customers in its energy efficiency programs during the first five years (recognizing that

results for year 6 are not complete). (See REACT Reply Br. at 13, citing REACT Ex. 3.0 at 4:64-5:96.)

COMMISSION ANALYSIS AND CONCLUSIONS

The Commission notes that through the first six years of the statutorily mandated energy efficiency programs, the largest energy users in Northern Illinois have paid millions of dollars to support those programs, but, in large part, have been unable to access those funds, resulting in low participation rates among such customers. It is within this context that REACT has advocated for the creation of pilot program that would allow the largest customers to participate fully and easily in ComEd's energy efficiency program.

The data that ComEd provided about large customer participation in its energy efficiency programs demonstrates that ComEd's programs have not effectively served the largest customers -- the very customers who represent important opportunities for large-impact energy efficiency improvements. For example:

- In two of the six programs specifically targeted at the largest energy users -- i.e., the "Retrocommissioning" program and the "Data Center" program -- ComEd has had **zero customer participants for every plan year 1 through 5**. (See ComEd Response to REACT Data Request 3.02, attached to the Rebuttal Testimony of REACT witness Mr. Fults as REACT Ex. 3.01.) In other words, in those two programs, ComEd has distributed **zero dollars**. (See *id.*)
- In three more of the programs -- the "C&I New Construction" program, the "Compressed Air" program, and the "Commercial Real Estate" program -- participation has been *almost nonexistent*. For "C&I New Construction" there was one customer in year 3 (receiving just \$96,645), one customer in year 5 (receiving just \$41,785), and **zero customers for years 1, 2, and 4**. In "Compressed Air" and "Commercial Real Estate" there was just one customer in each program in year 4 (receiving just \$4,100 and \$95,000, respectively) and **zero customers for years 1, 2, 3, and 5**. (See *id.*)
- Even in the one program where there was something more than *de minimis* participation, the numbers are unimpressive. In the "Prescription/Custom" program, ComEd has averaged just 16 customers over the five full years reported, and thus far for Plan Year 6 only seven customers have participated. (See *id.*)

- The amount of money distributed to ComEd through that "Prescriptive/Custom" program is similarly unimpressive -- the number has exceeded \$1 million in only two of the six program years, and even then just barely -- at \$1,099,576 for Plan Year 3 and \$1,224,897 for Plan Year 5. (*See id.*) In the other years, the numbers have been considerably lower: \$449,190 for Plan Year 1; \$892,772 for Plan Year 2; \$931,700 for Plan Year 4; and \$88,242 thus far for Plan Year 6. (*See id.*) The average over the five full years reported is just \$919,627 per year. (*See id.*)

These numbers are revealing and problematic, given that ComEd has taken in a total of \$48.1 million from ELLC and HV Over 10 MW customers during the life of its energy efficiency programs. (*See* REACT Reply Br. at 14, *citing* REACT Ex. 1.0 at 15:299-306; REACT Ex. 3.0 at 5:93-96.) The amount paid out to customers is dwarfed by the tens of millions of dollars going toward program administration. (*See id.*, *citing* REACT Ex. 1.0 at 12:290-16:333.) The Commission finds this information to be persuasive evidence that new solutions to large customer energy efficiency need to be explored and implemented immediately. We do not address the merits of REACT's proposed self-direct pilot program, since REACT is no longer advocating for that solution, but we do not that there was some support for advancing such a concept. Further, as discussed below, we will address our legal authority to approve such a program, in order to provide guidance to stakeholders as they continue to consider ways to improve ComEd's future energy efficiency plans.

II.

COMED'S MODIFIED LARGE C&I PROGRAM

As a result of an agreement reached between REACT and ComEd, a modified Large C&I Pilot Program is now before the Commission for approval.

REACT explained that, as a result of REACT's discussions with ComEd prior to and during the course of the instant proceeding, REACT and ComEd 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* REACT Reply Br. at 4, *citing* REACT Init. Br. Attachment 1, ComEd/REACT Joint Ex. 1.) Both REACT and ComEd have explained that the modified Large C&I Pilot presents an opportunity to increase large customer implementation of energy efficiency projects within ComEd's Energy Efficiency Plan. (*See* ; REACT Init. Br. at 11; ComEd Init. Br. at 56.)

REACT explained that 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," with 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." (REACT Reply Br. at 4-5 *quoting* REACT Init. Br. Attachment 1, ComEd/REACT Joint Ex. 1.) REACT reports that a broad consensus has developed in support of the modified Large C&I Pilot Program. (*See* REACT Reply Br. at 1-2; ComEd Reply Br. at 24-25; AG Reply Br. at 15-16; NRDC Reply Br. at 17-22; ELPC Reply Br. at 1 n.1; IIEC Reply Br. at 3.) Other parties take no position regarding the modified Large C&I Pilot Program. (*See generally* Staff Reply Br.; CUB/City of Chicago Reply Br.; MCA Reply Br.) The bottom line is that no party objects to moving forward with Commission approval of the modified Large C&I Pilot Program.

REACT's Response To ComEd's Position

REACT explained that ComEd supported the modified version of the ComEd Large C&I Pilot Program, as reflected in ComEd/REACT Joint Ex. 1. (*See* REACT Reply Br. at 5, *citing* ComEd Init. Br. at 54-56.) REACT observed that ComEd correctly noted that the

modified form of the ComEd Large C&I Pilot incorporates advanced funding through a "grant" concept that was first identified by ComEd witness Mr. Brandt in his Rebuttal Testimony. (*See* REACT Reply Br. at 5-6, *citing* ComEd Init. Br. at 54-56.)

REACT noted that ComEd expressed its support for a Commission order directing the initiation of a stakeholder-driven process to formulate the implementation details of the program:

Following Commission approval of the Modified Pilot program, ComEd would work with interested stakeholders during the final program design phase to button down details such as the delivery strategy, market strategy, and program targets.

(REACT Reply Br. at 7, *quoting* ComEd Init. Br. at 57.) REACT stated that it agrees, and has repeatedly expressed its support for a collaborative approach. (*See* REACT Reply Br. at 7, *citing* REACT Init. Br. at 12; REACT Ex. 3.0 at 20:426-21:429.) REACT noted that it always has been willing to engage with ComEd, Staff, and other stakeholders at any stage of the energy efficiency portfolio planning and approval process to craft pilot programs that will allow the largest customers to meaningfully participate in the utility energy efficiency programs, thereby helping ComEd meet its energy efficiency goals. (*See* REACT Reply Br. at 7.)

REACT's Response To The Illinois Attorney General's Position

REACT noted that the Illinois Attorney General ("AG") expressed support for the ComEd Large C&I Pilot:

ComEd has proposed offering a Large C&I Pilot program to its largest customers that would allow them to access the funds they have contributed specifically for their own projects. ComEd Ex. 2.0 at 50. ComEd indicated that the proposal was a direct response to a proposal made by REACT witness Rick Flowers at a SAG meeting this past Spring. ComEd Ex. 3.0 at 42. In general, as noted by ComEd witness Brandt, the framework proposed allows program participating to access the funds they have submitted through Rider EDA, subject to a co-funding agreement. In light of the testimony provided by the REACT and ComEd witnesses, the People support ComEd trying this new approach that large

customers have indicated they would prefer. ComEd's originally proposed design would ensure that large customers adopt cost-effective efficiency measures and also leverage some additional private funding, similar to programs targeted at smaller customers. AG Ex. 1.0 at 12.

(REACT Reply Br. at 7, *quoting* AG Init. Br. at 13-14.) The AG's support for the *modified* form of the ComEd Large C&I Pilot, as agreed to by ComEd and REACT and introduced as ComEd/REACT Joint Ex. 1, as well as an additional stakeholder process to develop implementation details was clear in the AG's Reply Brief. (*See* AG Reply Br. at 15-17.)

REACT's Response To The Natural Resources Defense Council's Position

REACT noted that the Natural Resources Defense Council ("NRDC") in its Initial Brief stated that it has not been afforded an adequate opportunity to study the modified version of the ComEd Large C&I Pilot Program:

Because the large C&I self-direct program has been a moving target that is becoming more fixed only days before the filing of this brief, NRDC has not been able to provide any testimony on the current version.

(REACT Reply Br. at 8, *quoting* NRDC Init. Br. at 25.) REACT explained that NRDC further stated that, due to the limited window of time for parties to examine and comment upon the modified Large C&I Pilot Program, the Commission should deny the Pilot and order negotiations between interested parties instead:

Given these concerns, NRDC recommends that the Commission order that, while it is not approving the large C&I self direct program as it is currently being proposed by REACT, it generally supports the broad principal of a C&I self direct program and that all interested parties should undertake negotiations to determine if agreement can be reached on a program that meets a set of minimum criteria, including but not limited to the rigorous evaluation on the back end, unspent funds going back to into [sic] the energy efficiency customer programs and good up-front analysis of cost-effectiveness.

(REACT Reply Br. at 8, *quoting* NRDC Init. Br. at 25-26.)

REACT explained that, like NRDC, REACT is requesting that the Commission order stakeholders to engage in a collaborative process to formulate the details of the Pilot Program. (*See id.* at 9.) REACT further explained that, unlike NRDC, REACT does not believe that Commission-ordered collaborative process should preclude Commission approval of the modified Pilot Program framework. (*See id.*) REACT stated that REACT and ComEd jointly request that the Commission approve the modified Program in this docket, and simultaneously order that the details of the Program must be refined through a stakeholder-driven process prior to program implementation. (*See id.*)

REACT's Response To The Illinois Industrial Energy Consumers' Position

REACT noted that the Initial Brief of the Illinois Industrial Energy Consumers ("IIEC") identifies the problems with ComEd's current energy efficiency program and, for that reason, generally supported the modified ComEd Large C&I Pilot Program:

To put it more plainly, industrial customer dollars targeted for EE, which are tied up in the utility's programs, are unavailable for cost-effective, customer-initiated investments in energy efficiency and demand response. For these reasons, IIEC supports generally ComEd and REACT's agreed Pilot Program framework that would make funds available for tailored customer investments in energy efficiency and demand response.

(REACT Reply Br. at 9, *quoting* IIEC Init. Br. at 3.) REACT also noted that IIEC further recommended that certain modifications be made to the Pilot Program to improve its "operation and effectiveness." (REACT Reply Br. at 9, *quoting* IIEC Init. Br. at 4.)

REACT expressed its appreciation for IIEC's recognition of REACT's efforts to advance an agreed-upon Pilot Program that is intended to stimulate the implementation of large-scale energy efficiency projects by increasing large customer access to energy efficiency dollars. (*See* REACT Reply Br. at 9.) REACT stated that, with respect to IIEC's suggested

modifications to the negotiated ComEd Large C&I Pilot Program, REACT believed that some of IIEC's concerns could be addressed within the confines of the current, modified form of the Pilot Program framework. (*See id.* at 9-10.) REACT further stated that, if the Commission orders a post-proceeding, stakeholder-driven process to formulate the implementation details of the modified ComEd Large C&I Pilot Program, as REACT and ComEd jointly request, REACT certainly would welcome IIEC's participation. (*See id.* at 10.)

REACT's Response To Staff's Position

REACT explained that, in this proceeding, Staff does not *per se* object to the original or modified versions of the ComEd Large C&I Pilot Program or REACT's proposed Self-Direct Pilot Program. (*See* REACT Reply Br. at 10.) In its Initial Brief, Staff raises an item regarding the original version of the ComEd Large C&I Pilot Program:

ComEd specifies that the "[p]rojects must be cost-effective on [a] TRC basis" for the proposed Large Commercial and Industrial ("C&I") Pilot Program. (ComEd Ex. 1.0, 82.) Given this assertion, it would be inappropriate and unreasonable for ComEd to start funding projects projected to be cost-effective as part of the Large C&I Pilot Program after Commission approval of the Plan.

(REACT Reply Br. at 10, *quoting* Staff Init. Br. at 65.)

REACT noted that Staff's concern appears to be related to ComEd's flexibility to adjust its energy efficiency portfolio, rather than any particular pilot program that may be included within the portfolio. (*See* REACT Reply Br. at 10.) REACT maintained that, in any event, it does not appear that the item Staff raises should prevent a well-intended, well-designed pilot program to be approved by the Commission, with the details to be formulated through a stakeholder-driven collaborative process open to Staff. (*See id.*)

COMMISSION ANALYSIS AND CONCLUSIONS

The Commission begins from the premise that reasonable efforts to increase energy efficiency participation should be encouraged. As discussed above, the data show that ComEd's current energy efficiency programs are not serving the largest customers well and are therefore missing opportunities to encourage implementation of large-scale commercial and industrial energy efficiency projects that could have a material, positive effect on overall energy efficiency. The Commission fully supports efforts to correct this situation.

The Commission also notes that REACT originally presented a creative Electric Self-Direct Pilot Program, which builds on the self-direct model that exists on the gas side, but is clearly not an opt-out model under which energy efficiency savings are somehow outside the statutory savings requirements. The Commission further finds that as a result of recent developments, including an agreement between ComEd and REACT, REACT now supports a modified form of the ComEd Large C&I Pilot program. The Commission applauds the effort to reach a negotiated resolution of that issue, and finds it constructive that REACT and ComEd have been able to make progress in formulating a program that the Commission designed to improve large customer participation in energy efficiency, particularly since the level of large customer participation currently is not what it should be in the Commission's view.

The Commission notes that a broad consensus has now developed in support of the modified Large C&I Pilot Program. (*See* REACT Reply Br. at 1-2; ComEd Reply Br. at 24-25; AG Reply Br. at 15-16; NRDC Reply Br. at 17-22; ELPC Reply Br. at 1 n.1; IIEC Reply Br. at 3.) The Commission particularly notes that supportive parties include not only ComEd and REACT, but also members of the environmental/energy efficiency NGO community, the AG, and another large customer representative group (IIEC). The Commission also notes that while

other parties take no position regarding the modified Large C&I Pilot Program. (*See generally* Staff Reply Br.; CUB/City of Chicago Reply Br.; MCA Reply Br.), no party objects to moving forward with Commission approval of the modified Large C&I Pilot Program. The same can be said for the proposal to iron out the implementation details in a collaborative process -- this proposal has broad consensus support, and there is no objection from any party to that approach.

Accordingly, the Commission hereby approves the modified version of ComEd's Large C&I Pilot Program, the framework of which is reflected in ComEd/REACT Joint Ex. 1, and directs interested parties to engage in an expedited collaborative process to formulate the implementation details of the program.

III.

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

As a result of productive discussions between REACT and ComEd, in consultation with additional parties, REACT and ComEd now mutually support the modified version of the ComEd Large C&I Pilot Program proposal. However, REACT explained that the modified Large C&I program is *substantively different* from the Self-Direct Pilot Program that REACT presented during the testimonial portion of this proceeding. (*Compare* ComEd/REACT Joint Ex. 1 (the mutually agreed upon modified ComEd Large C&I Pilot Program *with* REACT Cross Ex. 16.0 (containing the most updated version of the REACT proposed Self-Direct Pilot Program).)

Although REACT explained that it is not advocating for the Commission to adopt its Self-Direct Pilot Program, REACT requested that the Commission address in this docket the legal issues associated with the Program because, as a policy matter, a number of parties

indicated their support the concept of a "self-direct" approach as a potentially effective strategy to encourage large customer deployment of substantial long-term energy efficiency projects. (See REACT Reply Br. at 16, *citing* 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); IIEC Ex. 1.0 at 9:190-10:199.) Likewise, a number of parties expressed support for a self-direct structure that would permit the accumulation of funds for a period in excess of three years. (See REACT Reply Br. at 16-17, *citing* REACT Exs. 1.0, 2.0, 3.0, 4.0; *see also* REACT Cross Ex. 3.0 (NRDC); REACT Cross Ex. 16.0 (AG); IIEC Ex. 1.0 at 8:150-9:172.) However, some parties suggested that Section 8-103 might prohibit ComEd from proposing, and the Commission from approving, such a worthy program.

REACT's Response To ComEd's Position

REACT explained that, for the most part, ComEd's statements about its "legal" views actually appear to be driven by issues that relate to ComEd's past practice and administrative convenience. (See REACT Reply Br. at 18-20.) REACT acknowledged that these practical considerations may be relevant to policy decisions about how to proceed, but those concerns are not valid objections to the legality of a Self-Direct Pilot Program. (See *id.* at 18, *citing* REACT Init. Br. at 17-19.) In addition, as REACT explained, in several places, ComEd's discussion of REACT's Self-Direct Pilot Program proposal mischaracterizes that proposal, and then uses that mischaracterization to claim that the proposal is illegal. (See *id.*)

REACT's Response To The Illinois Attorney General

REACT noted that the AG's discussion of legal issues associated with the Self-Direct Pilot Program that REACT proposed was much more limited than ComEd's. (See REACT Reply Br. at 27, *citing* AG Init. Br. at 15-16.) REACT explained that the AG's characterization

of the proposal that REACT made was inaccurate and that once the actual proposal is understood, the AG's legal objection is resolved. (*See id.*)

REACT noted that the AG makes the following statement in apparent reference to the Self-Direct Pilot Program that REACT proposed: "the People do not agree with REACT that electric customers can retain Section 8-103 funding for a 'self-direct' program as Section 8-103 now reads." (*See id.*, quoting AG Init. Br. at 15.) However, REACT noted that the revised proposal that REACT made explicitly provided that 100% of Rider EDA funds would have been paid by self-direct pilot program participants to ComEd. (*See* attachment to REACT Cross Ex. 16.0, attached hereto as Attachment 1, at 2.) Thus, REACT explained that those customers would *not* "retain" those funds, as the AG implies. Moreover, 25% of the funds would have been earmarked for DCEO programs, and an additional 5% would be retained by ComEd for program administration. (*See id.*) REACT maintained that, given that REACT did not propose the approach that the AG says would not be legal, the AG's position on this issue is not relevant to the legal analysis of the REACT proposal. (*See* REACT Reply Br. at 28.)

COMMISSION ANALYSIS AND CONCLUSIONS

Although the REACT Self-Direct Pilot Program proposal is no longer formally before the Commission for approval, an active debate about the legality of such a proposal continues. The Commission believes it is appropriate to address this issue here, because energy efficiency planning is a fluid and developing process, and the evidence in this docket communicates a strong interest among some parties -- based on valid concerns about the lack of appropriate programs to serve the largest customers -- in exploring a self-direct pilot program concept to achieve improved energy efficiency deployment.

The Commission is unconvinced by arguments suggesting that Section 8-103 of the Act categorically prevents the possibility of a self-direct pilot program. Section 8-103 does not preclude approval of a self-direct pilot program -- on the contrary, it leaves to the utilities very broad discretion to formulate overall energy efficiency program plans that can incorporate any number of approaches to energy efficiency. The basic requirement that energy savings must count toward the annual statutory savings goals must be respected, but there is nothing about a "self-direct" concept that is inconsistent with that requirement. Moreover, given the evidence showing the tens of millions of dollars that are being paid into ComEd's energy efficiency programs by the largest customers, in comparison to the very low participation levels and payments amounts associated with most of ComEd's programs directed toward the largest customers, the Commission finds that exploring a viable route to a self-direct program may well be in the best interest of all consumers as well as ComEd.

ComEd's Legal Argument Rests On A False Characterization of REACT's Proposed Self-Direct Pilot Program

ComEd appears to maintain that Section 8-103 categorically precludes a self-direct program. ComEd repeatedly invoked the "constraints" of Section 8-103 of the Act and the differences between Section 8-103 and Section 8-104 to suggest that REACT's Self-Direct Pilot Program could not be legally viable under Section 8-103. (*See* REACT Reply Br. at 18, *citing* ComEd Init. Br. at 53, 57-58.) However, whatever "constraints" Section 8-103 includes, it contains nothing that prevents the implementation of a Self-Direct Pilot Program. (*See* REACT Reply Br. at 18.) Moreover, ComEd's invocation of Section 8-104 is at most a distraction because it rests on ComEd's incorrect implication that REACT has proposed an "opt-out" program that is somehow consistent with Section 8-104. (*See* REACT Cross Ex. 16.0

(containing the most updated version of the REACT proposed Self-Direct Pilot Program).) In short, the fact that Section 8-104 *mandates* that the gas utilities allow certain customers to opt-out of the gas utilities' portfolio says nothing about whether Section 8-103 *permits* an electric utility to offer a self-direct pilot program that would be included in the electric utility's portfolio.

ComEd presents a chart that purports to show the differences between Sections 8-103 and 8-104. (*See* ComEd Init. Br. at 53.) However, as REACT explained, premise of that chart is that REACT proposed a Self-Direct Pilot Program *identical to* the natural gas opt-out program under Section 8-104 -- that premise is false. (*See* REACT Reply Br. at 18-19.) In fact, as REACT explained, the proposal that REACT made was substantively distinct from the Section 8-104 opt-out program in numerous respects, as shown in the following chart:

<u>Section 8-104 Opt-Out Program</u>	<u>REACT Self-Direct Pilot Program Proposal</u>
An "opt-out" program where participating customer energy efficiency savings is NOT counted toward statutory energy efficiency goals	NOT an "opt-out" program -- all energy efficiency savings DOES count toward ComEd's statutory energy efficiency goals
Each program customer holds 100% of its own money	Each pilot program customer pays 100% of its Rider EDA funds to ComEd
Each program customer makes no contribution to DCEO programs or to program administration	Each pilot program customer pays 100% of its Rider EDA funds to ComEd -- 25% is earmarked for DCEO and 5% goes toward program administration
Each program customer retains 100% of its own money in its own exclusively controlled account	After receiving 100% of each pilot program customer's Rider EDA funds, ComEd puts 70% of that money in a reserve account, which remains subject to ComEd/Independent Evaluator project approval prior to disbursement
Projects NOT subject to the TRC test	Projects ARE subject to the TRC test
No review/approval process prior to spending of funds	Projects subject to ComEd/Independent Evaluator prior approval
No measurement/verification protocol	Each project requires a specific, up-front Monitoring and Verification Plan which must be developed and submitted by the pilot program customer
No back-end submission of energy efficiency savings data to DCEO	The Monitoring and Verification Plan must provide for submission of data to ComEd

(See REACT Reply Br. at 19, *citing* REACT Cross Ex. 16.0 (containing the most updated version of the REACT proposed Self-Direct Pilot Program).) This chart illustrates that ComEd's suggestion that REACT's proposal "bears many of the key features of Section 8-104's self-direct program" is demonstrably inaccurate. (See REACT Reply Br. at 19-20, *citing* ComEd Init. Br. at 57.) Thus, comments from ComEd that allege, for example, that "Section 8-

103 does not authorize customers to discontinue paying their EDA charges through Rider EDA and retain them in their own reserve account," simply misstate what REACT proposed. (*See* REACT Reply Br. at 19-20, *citing* ComEd Init. Br. at 59.) ComEd's attempt to connect the proposal that REACT made and the requirements of Section 8-104 simply distracts from the issue of whether *Section 8-103* permits or precludes a Self-Direct Pilot Program. (*See* REACT Reply Br. at 20.) ComEd's repeated reference to Section 8-104 is not a legal argument about what programs are legally authorized under the term of Section 8-103. (*See id.*)

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

Sections 8-103 and 8-104 are substantively different provisions of the Act; ComEd's suggestion that the terms of Section 8-104 somehow control the terms of Section 8-103 is a red herring. Section 8-103 applies to ComEd, and it does not legally preclude a Self-Direct Pilot Program along the lines of the proposal that REACT made. Section 8-104 does not apply to ComEd, and says nothing about prohibiting a "self-direct" pilot as part of the utilities' energy efficiency portfolio.

Rather than dictate specific limitations or parameters on the types of programs that may be presented, Section 8-103 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).)

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).) *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. (*See* REACT Init. Br. at 15.) The Commission is legally precluded from reading into the statute restrictions or prohibitions that do not exist. (*See id. citing Schultz v. Ill. Farmers Ins. Co.*, 237 Ill. 2d 391, 408 (2010); *Madison Two Assoc. v. Pappas*, 227 Ill. 2d 474, 495; *Waste Mgmt of Ill., Inc. v. Ill. Pollution Control Bd.*, 145 Ill. 2d 345, 348 (1991); *Bailey v. Ill. Liquor Control Comm'n*, 405 Ill. App. 3d 550, 554 (1st Dist. 2010).)

Nothing in the set of approval 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, and ComEd's repeated invocation of Section 8-104 -- an entirely different statutory section -- does not change what Section 8-103's terms permit or preclude. The discretion to craft program offerings rests entirely with ComEd, subject to final Commission approval.

In determining whether the plan conforms with the statute, the Commission 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).) We see nothing in Section 8-103 that precludes us from exercising our judgment and discretion to approve a properly designed self-direct program.

ComEd Inaccurately Attributes Certain "Assumptions" To REACT's Proposal

ComEd's Initial Brief includes the following heading in the legal argument section of its Initial Brief: "Section 8-103 Does Not Permit Customers to Retain Their EDA Contributions." (ComEd Init. Br. 58.) ComEd then repeats a variation on that theme: "Section 8-103 does not authorize customers to discontinue paying their EDA charges through Rider EDA and retain them in their own reserve account." (*Id.* at 59.) Those statements set an inaccurate basis to discuss the legality of REACT's proposal, because REACT did not require that customers in the Self-Direct Pilot Program "retain" their Rider EDA payments. On the contrary, REACT's modified proposal, which is in evidence in this proceeding, plainly states that "ComEd would collect 100% of the Rider EDA funds." (REACT Cross Ex. 16.0 (containing the most updated version of the REACT proposed Self-Direct Pilot Program).) Again, ComEd has mischaracterized REACT's proposal, in order to argue that the non-existent proposal is not legal.

Along the same lines, ComEd attributes two "mistaken assumptions" to REACT. (*See* ComEd Init. Br. at 59.) First, ComEd alleges that REACT assumes that "(i) large C&I customers should 'get back' all the money they contribute to the portfolio and (ii) the funds paid by large C&I customers should cover 100% of project costs." (*Id.*) ComEd suggests that these assumptions are "fatally flawed in the context of the Section 8-103 electric energy efficiency portfolios." (*Id.*)

ComEd's argument misses the mark. Regarding the first "assumption," ComEd points out that under Section 8-103 certain funds must go to DCEO and that there are also program costs for administration and the like. (*See id.*) Thus, ComEd suggests that REACT did not account for these requirements in its proposal; but, as explained above, REACT explicitly

provided for a 25% carve out for DCEO and a 5% carve out for administrative and related costs. Incredibly, after accusing REACT of ignoring these requirements, in the very next paragraph of its argument ComEd explicitly acknowledges that REACT's revised proposal *did* provide for the 25% and 5% carves outs. (*See id.* at 60.) Thus, ComEd's argument falls flat. ComEd next asserts that the amount of "just 5%" that REACT proposed for administration and related costs is too small. (*Id.*) But this is not an argument about the legality of REACT's proposal, but rather an argument about what percentage of the funds should be dedicated to pay for administration of the program.

ComEd's argument about the second "assumption" is equally unpersuasive. ComEd alleges that REACT's proposal includes the "assumption" that funds paid by large C&I customers "should cover 100% of project costs" (ComEd Init. Br. at 59.) REACT did not propose any "mandatory" 100% cost recovery, as ComEd implies. REACT merely suggested that reserved funds "*could* cover up to 100% of energy efficiency project costs." (REACT Cross Ex. 16.0 (containing the most updated version of the REACT proposed Self-Direct Pilot Program) (emphasis added).) Nothing in Section 8-103 precludes this possibility. Moreover, the possibility of 100% cost recovery is something *that already exists* in other ComEd programs. For example, in ComEd's C&I Optimization Program, customers may recover 100% of project costs. (*See* ComEd Ex. 1.0 at 70.) Thus, while ComEd may disagree as a matter of policy about whether 100% cost recovery should or should not be permitted under the Self-Direct Pilot Program, that disagreement is just a policy issue; it does not form a legal objection to advancing a self-direct program under Section 8-103.

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

ComEd also argues that "Section 8-103 Requires, and Is Limited to, the Approval of a Three-Year Energy Efficiency and Demand Response Plan." (ComEd Init. Br. at 62.) 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 plan that would allow for the accounting 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); REACT Init. Br. at 15.) None of those criteria precludes a program under which funds are tracked and accounted for on a basis other than three years. ComEd's current approach to its planning, implementation, and reporting processes, does, with some exceptions, generally run on a three-year track. (*See* REACT Init. Br. at 18-19.) However, that is a matter of practice and convenience -- it is not statutorily mandated. Although 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, those considerations fall short of actual legal impediments.

In its Rebuttal Testimony, ComEd asserted 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 (as well as REACT's proposal, which would have allowed but not mandated retention of funds beyond three years). There are no "three-year energy savings goals" -- rather, Section 8-103 provides for "annual energy savings goals." (220 ILCS 5/8-103(b).) The Commission notes that ComEd appeared to concede this point in its Initial Brief. (*See* ComEd Init. Br. at 62.) ComEd also appeared to acknowledge the point that REACT made in its Initial Brief that 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 savings, but in either case the methodology is specifically tied to "*each annual incremental savings requirement.*" (220 ILCS 8-103(b) (emphasis added); *see also* REACT Init. Br. at 18-19; ComEd Init. Br. at 63.)

Again, 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.

The statute imposes annual savings requirements -- as ComEd now acknowledges -- 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 pilot program that will continue beyond a three-year horizon. Further, 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.

ComEd's Criticism Of The REACT Self-Direct Pilot Program Plan's EM&V Process Is Not A Valid Legal Objection

In a further attempt to assert a "legal" argument about self-direct programs, ComEd criticizes the evaluation, measurement, and verification ("EM&V") processes that were provided for by REACT's proposed Self-Direct Pilot Program. (*See* ComEd Init. Br. at 64.) ComEd's position, however, is transparently *not* an argument about the legality of the proposal REACT made. Indeed, ComEd acknowledges that REACT's proposal did address EM&V issues. (*See id.*) Instead, ComEd simply criticizes the "brevity" with which REACT's proposal covered those issues. (*Id.*) ComEd then suggests that REACT's proposed program would have somehow skirted the statutory requirement for "independent evaluation." (*Id.*) The basis for ComEd's position is unclear: REACT's proposal contained (as ComEd acknowledges) a process for EM&V. It also contained a specific reference to participating customers having to provide monitoring data to ComEd. (*See* attachment to REACT Cross Ex. 16.0, attached hereto as Attachment 1, at 2.) Further, the proposal provided that implementation details were to be established in a collaborative process. (*See id.*)

Thus, there is no legitimate question that REACT's proposal would have allowed for appropriate evaluation, monitoring and verification by ComEd and an independent evaluator. ComEd's objection is merely about whether the *process* outline in the REACT framework document meets with ComEd's approval. But, again, that is not a legal argument about what Section 8-103 requires -- it is merely a disagreement about implementation detail and administrative convenience.

The Commission 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.

ComEd's Invocation Of "Legislative History" Does Not Preclude Self-Direct

ComEd suggested that the "legislative history" of both Section 8-103 and Section 8-104 somehow dictates that Section 8-103 precludes a self-direct program. (*See* ComEd Reply Br. at 26.) This argument is flawed and unconvincing. As an initial matter, when attempting to determine the meaning of a statute, it is appropriate to resort to examining the "legislative history" *only* where the language of the statute is ambiguous. (*See, e.g., Gruszeczka v. Illinois Workers' Compensation Comm'n*, 2013 IL 114212, ¶ 12 (2013) ("In ascertaining the legislature's intent, if the meaning of an enactment is unclear from the statutory language itself, the court may look beyond the language employed and consider the purpose behind the law and the evils the law was designed to remedy (*Kunkel v. Walton*, 179 Ill.2d 519, 533–34, 228 Ill. Dec. 626, 689 N.E.2d 1047 (1997)), as well as other sources such as legislative history (*People v. Jameson*, 162 Ill.2d 282, 288, 205 Ill. Dec. 90, 642 N.E.2d 1207 (1994)). However, where the statutory language is clear, it will be given effect without resort to other aids for construction."); *see also Petersen v. Wallach*, 198 Ill. 2d 439, 445 (2002) ("When the language of an enactment is clear, it will be given effect without resort to other interpretative aids.")) Here, the statute is clear -- no party has argued otherwise, and the Commission finds nothing ambiguous or

confusing about what Section 8-103 permits or precludes. Therefore, examining "legislative history" is unnecessary, and indeed, is not legally permitted.

Further, ComEd's attempt to read limitations into Section 8-103 based upon the structure of Section 8-104 is neither logical nor legally permitted. Section 8-103 is broadly written to permit the utility -- and therefore the Commission -- discretion regarding the types of programs that may be included in the overall electric energy efficiency plan. Under the revised terms of Section 8-104, the General Assembly mandated that gas utilities offer an opt-out program, and provided specific guidance regarding that program. The General Assembly did not include similar provisions in the revisions to Section 8-103; it neither mandated nor prohibited any program for electric utilities. As a result, the General Assembly maintained the flexibility that previously existed under Section 8-103.

As noted above, since Section 8-103 neither mandates nor prohibits a self-direct program, neither ComEd nor the Commission may impose limits to that broad discretionary grant of authority. (*See Schultz v. Ill. Farmers Ins. Co.*, 237 Ill. 2d 391, 408 (2010); *Madison Two Assoc. v. Pappas*, 227 Ill. 2d 474, 495; *Waste Mgmt of Ill., Inc. v. Ill. Pollution Control Bd.*, 145 Ill. 2d 345, 348 (1991); *Bailey v. Ill. Liquor Control Comm'n*, 405 Ill. App. 3d 550, 554 (1st Dist. 2010).)

Finally, we note that the AG's discussion of the legal issues associated with the self-direct proposal were based upon the mistaken assumption that the customers would "retain" their energy efficiency funds under the REACT proposal. However, REACT did not propose that customers retain their funds, but rather set forth a mechanism under which 100% of their energy efficiency funds would be paid to ComEd. As a result, the AG's position does not relate

to the legality of the proposal that REACT made, and certainly does not preclude all self-direct proposals.

In sum, neither Section 8-103 of the Act nor any other provision discussed by the parties precludes development and implementation of a self-direct program, including a program that permits fund accumulation and spending on a timeline other than three years. While the Commission is not approving the REACT Self-Direct Pilot Program in this proceeding, in the Commission's view there is no legal barrier that would prevent the parties from further exploring that concept in the future.

Respectfully submitted,

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

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