STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission	**:**	
On Its Own Motion	**:**	
-vs-	**:**	**11-0593**
Commonwealth Edison Company	**:**	
	:	
Investigation into compliance with the	**:**	
efficiency standard requirement of Section	**:**	
8-103 of the Public Utilities Act.	**:**	

ORDER

September 9, 2013

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ORDER

By the Commission:

I. The Procedural Posture of this Case

On August 23, 2011, the Commission issued an Order initiating the instant proceeding. In that Order, it noted that this proceeding is to determine whether Commonwealth Edison Company ("ComEd") has complied with the incremental energy savings that is mandated by Section 8-103(b) of the Public Utilities Act, (the "Act" or the "PUA") as is modified by 220 ILCS 5/8-103(d) and (e). *Initiating Order at 2*. The Commission notes at the outset 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 the 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).

Thus, Section 8-103(b) of the Public Utilities Act mandates incremental annual energy savings for Illinois electric utilities. 220 ILCS 5/8-103(b). Section 8-103(i) of the Act specifies the liability of a utility when it fails to meet the standards in Section 8-103(b), as is modified by subsections (d) and (e) of that Section. 220 ILCS 5/8-103(i).

Section 8-103(b) of the Act further provides that electric utilities shall implement cost-effective energy efficiency measures to meet the incremental annual energy savings goals at 0.6% of energy delivered in the year commencing June 1, 2010. 220 ILCS 5/8-103(b). That year is Plan Year 3, (sometimes referred to herein as "PY3") and it is the subject of this proceeding.

This same statute also requires a utility to have a portfolio of measures, administered by both the utility and the Illinois Department of Commerce and Economic Opportunity, ("DCEO") which, in combination, must be designed to achieve the annual

savings targets described in subsections (b) and (c) of Section 8-103, as is modified by subsection (d) of that statute. *See,* 220 ILCS 5/8-103(e). It further requires that electric utilities shall:

> Provide for an annual independent evaluation of the performance of the cost-effectiveness of the utility's portfolio of measures and the Department's portfolio of measures, as well as a full review of the 3-year results of the broader net program impacts and, to the extent practical, for adjustment of the measures on a going-forward basis as a result of the evaluations. . . .

220 ILCS 5/8-103(f)(7). The independent evaluation required by the statute above was admitted into evidence in this proceeding and that evaluator concluded the combined energy savings that ComEd and DCEO produced, when taken together, exceeded the Plan Year 3 energy savings goals. No party contests this factual assertion made by the independent evaluator.

On February 6, 2008, the Commission entered an Order in Docket No. 07-0540. That Order was the first to implement 220 ILCS 5/8-103 and it set certain standards and guidelines to be used in the future when implementing this statute. It required, among other things, that an energy efficiency savings docket for PY3 must be initiated before September 1, 2011. The purpose of that docket is to ensure compliance with the Plan Year 3 energy savings goals set forth in the Act. *Commonwealth Edison Company: Petition for Approval of the Energy Efficiency and Demand-Response Plan Pursuant to Section 12-103(f) of the Public Utilities* Act, Docket No. 07-0540, Order of February 6, 2008 (hereinafter "*Plan 1 Order"*) at 27. Also relevant is the Commission's Final Order in Docket 10-0570, ("the *PY2 Order*") in *Commonwealth Edison Company: Approval of the Energy efficiency and Demand Response Plan Pursuant to Section 8-103 of the Public Utilities Act,* Order of December 21, 2010, and the Commission's final Order in Docket 10-0520,in, in *Commonwealth Edison Company*, *Investigation into compliance with the efficiency standard requirements of Section 8-103 of the Public Utilities Act*, Order of May 16, 2012.

Participating in this proceeding were Commission Staff, ComEd, the Illinois Attorney General's Office, (the "AG") and DCEO. Testifying for ComEd was Michael S. Brandt, the Manager of Energy Efficiency Planning and Measurement for ComEd. Testifying for Staff was Jennifer L. Hinman, an Economic Analyst at the Commission. Testifying for the Illinois Attorney General was Philip H. Mosenthal, founding partner of Optimal Energy Inc. Testifying for DCEO was Agnes Mrozowski, Deputy Director of Illinois Energy Office of DCEO.

The evidentiary hearing convened on April 16, 2013. Staff, ComEd and the AG filed and served Initial Posttrial Briefs on May 21, 2013. Those same entities filed and served Reply Briefs on June 4, 2013. DCEO did not file any briefs. An Administrative Law Judge's Proposed Order (an "ALJPO") was served on the parties on July 18, 2013.

Staff, ComEd and the AG filed Briefs on Exception on July 31, 2013. These same parties filed Reply Briefs on Exception on August 7, 2013.

ComEd has requested Oral Argument.

II. Uncontested Matters

1. General Achievement of Energy Savings Goals

Staff states that the statutory energy savings goal approved by the Commission for both ComEd and DCEO for ComEd's service territory for PY3 is 584,077 megawatt-hours ("MWH"), which is 0.6% of the projected energy delivered in the ComEd service territory. Staff Ex. 1.0 at 7-8. It is not contested that ComEd and DCEO in combination exceeded the energy savings goal for PY3.

2. Energy Savings Achieved by ComEd

ComEd posits that although ComEd and Staff initially disputed the amount of ComEd's PY3 energy savings goal, ComEd agreed to accept Staff witness Ms. Hinman's proposal in order to narrow the issues in this docket. As a result, ComEd and Staff agree that ComEd's PY3 energy savings goal is 458,656 MWHs. ComEd Initial Brief at 5-6.

All parties agree that ComEd achieved and exceeded its PY3 KWH energy savings goal. The exact amount of savings achieved, however is a contested matter. It is discussed in the Section herein entitled "Adjustment to Appliance Recycling Program."

All parties also agreed that ComEd should be allowed to "bank" its energy savings. The correct banking calculation method is contested; it is addressed in the Section herein entitled "Banking of Energy Savings."

3. Section 8-103(c) Demand Response Goal

Staff states that the Commission-approved statutory demand response goal for ComEd in PY3 is 10 megawatts ("MWs"). Staff recommends finding that ComEd met its statutory demand response goal for Plan Year 3. In support, it states that ComEd implemented the Central Air Conditioning ("CAC") Cycling Program element to achieve its demand-response goal of 10 MWs for PY3. The independent evaluator reported 14.7 MW of demand-response capability was achieved through the addition of 10,180 new participants joining ComEd's CAC Cycling Program in Plan Year 3. *Id.* at 8. In Staff's view, the evaluator's conclusion that ComEd exceeded the 10 MW demand response goal through the addition of 10,180 new participants joining ComEd's CAC Cycling Program appears reasonable. Staff Ex. 1.0 at 8-9. All parties agree. *See, e.g.,* Staff Initial Brief at 11-12.

III. Contested Issues

1. DCEO's Portion of the Section 8-103(b) Energy Savings Goals

DCEO's programs primarily consist of programs for local governmental entities and low-income households. *See, e.g.*, 220 ILCS 5/8-103(e). For PY3, DCEO's portion of the statutory energy savings goal in ComEd's service territory that was approved by the Commission is 1235,421 MWH (21.5% of the total statutory goal).

See, Staff Ex. 1.0 at 10-11. Also for that year, DCEO achieved 54,130 MWH of energy savings in ComEd's service territory, which is only approximately 43% of the Commission-approved goal for DCEO. *See, e.g.,* Staff Cross Ex. 2 at 72. Thus, DCEO did not meet that goal.

Section 8-103(k) provides that: "No electric utility shall be deemed to have failed to meet the energy efficiency standards to the extent (that) any such failure is due to a failure of the Department. . . 220 ILCS 5/8-103(k). Further, Section 103(e) provides, in pertinent part, that:

> If the Department is unable to meet incremental annual performance goals for the portion of the portfolio implemented by the Department, then the utility and the Department shall jointly submit a modified filing to the Commission explaining the performance shortfall and recommending an appropriate course going forward, including any program modifications that may be appropriate in light of the evaluations conducted under item (7) of subsection (f) of this Section. In this case, the utility obligation to collect the Department's costs and turn over those funds to the Department under this subsection (e) shall continue only if the Commission approves the modifications to the plan proposed by the Department.

220 ILCS 5/8-103(e).

Staff's Position

Staff recommends that the Commission direct ComEd to file modified energy efficiency plans, if it finds that DCEO failed to meet its portion of the energy savings goal for PY3. Staff Initial Brief at 9-10. The most efficient method for such a filing, Staff continues, is for DCEO to provide modified plans pursuant to Section 8-103(e) in future energy savings dockets, as opposed to having an entirely separate energy efficiency plan modification proceeding. Staff witness Ms. Hinman opined that it is reasonable for the Commission to approve program modifications that adjusting future plan years, regardless of whether any adjusted future plan year is part of the same energy efficiency plan as the plan year, in which, the savings goal was not achieved. In support, Staff cites the portion of 220 ILCS 5/8-108(e) which is set forth above. *Id.* at 11.

Staff also recommends that the Commission approve modified portions of the savings goals for DCEO in the instant proceeding (for the ComEd service territory) for a future three-year period in the amounts of 56,812 MWH for Plan Year 4; 57,317 MWH for Plan Year 5 and 57,629 MWH for Plan Year 6. *Id.* However, Staff does not state facts establishing that these energy savings goals are achievable or beneficial for Illinois citizens in ComEd's service territory.

ComEd's Position

ComEd argues that no action should be taken in the instant proceeding. According to ComEd, DCEO's goals have already been adjusted downward and the Commission has established evaluation dockets beginning with Plan Year 4 to review DCEO's compliance with the modified goals. Also, ComEd continues, to the extent that the Commission decides to revisit DCEO's energy savings goals, both ComEd and the AG recommend that this review take place in a separate docket. ComEd points out that the AG argued that the issue of modifying DCEO's goals should not be determined here where the other Illinois utilities with whom DCEO also shares energy savings goals are not participants. The correct docket for such review, in ComEd's opinion, is the upcoming three-year energy efficiency plan filings to be made by Illinois utilities. ComEd Initial Brief at 14.

ComEd avers that it and DCEO provided testimony establishing that this modified plan filing was effected through the filing of the 2011-2013 Plan, which addresses DCEO's known shortfall to date, citing ComEd Ex. 2.0 at 8 and DCEO Ex. 1.0 at 51. It posits that its 2011-2013 Plan reflects substantially lower DCEO goals due to DCEO's inability to achieve its savings goals for PY1 and PY2 under the 2008-2010 Plan. Under the 2011-2013 Plan approved by the Commission, the level of funding remained the same, but ComEd's percentage of the goal increased from 79% to 85% and DCEO's percentage decreased from 21% to 15%. *See* ComEd Ex. 2.0 at 9. Thus, ComEd's goal increased without providing ComEd with any additional funding to achieve that higher goal. ComEd Initial Brief at 16.

ComEd also argues that the records in Dockets 07-0540 and 10-0570 contradict Staff's and the AG's claims that DCEO's goals were thrust upon it and were never achievable. *See* ComEd Ex. 3.0 at 8. In both dockets, ComEd continues, ComEd's personnel worked with DCEO to determine what a reasonable goal for DCEO would be. ComEd points out that in Docket 10-0570, the AG entered into a settlement stipulation with ComEd (and with the Citizens Utility Board, the City of Chicago, the Natural Resources Defense Council, and the Environmental Law & Policy Center) that was approved by the Commission and that confirmed DCEO's goals for PY5 and PY6. *See, 2011-2013 Plan Order* at 18, 20; ComEd Initial Brief at 17.

ComEd further states that the 2011-2013 Plan filing is the only modified plan filing that could have been made to date, citing its witness Mr. Brandt's testimony, ComEd Ex. 3.0 at 9; and that of DCEO witness Ms. Mrozowski, DCEO Ex. 1.0 at 5-6. It argues that, in order for ComEd to work with DCEO on a revised plan pursuant to Section 8-103(e) of the Act, ComEd and DCEO must first know that DCEO did not

achieve its annual goal; it must also consider comments from the independent evaluation of the 2011-2013 energy efficiency plan, which requires the results of the independent evaluator. However, these reports are issued at least six months, if not over a year, after the close of the Plan Year. ComEd Ex. 3.0 at 9. ComEd further states that the results are not official until the Commission rules that the savings goal has been missed. ComEd Initial Brief at 18.

ComEd maintains that it and DCEO addressed DCEO's known shortfall in Plan Years 1 and 2 through the filing of the 2011-2013 Plan, which reduced DCEO's goals. It concludes that DCEO's failure to achieve the Plan Year 3 goals does not require another modified plan filing because the goals for Plan Years 4 through 6 have already been modified. Also, ComEd continues, the independent evaluation of whether DCEO achieved the lowered, modified Plan Year 4 goal under the 2011-2013 Plan (PY4) is not yet complete, and therefore neither the independent evaluator nor the Commission has yet determined whether DCEO achieved its reduced energy savings goal. It concludes that there is no basis at this time for filing another energy efficiency plan with the Commission when performance under the 2011-2013 Plan remains to be evaluated. ComEd posits that these revisions should be considered in the filing of ComEd's next three-year plan, which will occur no later than September 1, 2013, citing 220 ILCS 5/8-103(f). *Id.* at 19.

With respect to Commission oversight regarding whether DCEO achieves the modified goals that were already set forth in the 2011-2013 Plan in Docket 10-0570, ComEd cites the *Plan Year 2* Order at 2. ComEd concludes that the Commission has already modified DCEO's goals and will be evaluating DCEO's performance under those modified goals for Plan Years 4 through 6.

It asserts that the present docket does not provide a forum or a factual record for considering changes to DCEO's goals. ComEd cites the *Initiating Order* in this proceeding, which states that "the Commission should initiate a proceeding to determine whether the respondent [ComEd] has complied with the incremental energy savings mandated by Section 8-103(b) of the Public Utilities Act, as modified by subsections (d) and (e) of that Section." *See, Initiating Order* at 2. ComEd argues that the *Initiating Order* in this proceeding does not make DCEO a respondent and it contains no reference to DCEO or its goals. According to ComEd, DCEO's compliance with its goals will be reviewed beginning with Plan Year 4.

ComEd additionally argues that the evidence upon which Staff relies to support a 50% reduction in DCEO's goals is either "thin" or nonexistent. According to ComEd, Staff purports to "agree with DCEO witness Ms. Mrozowski" when she testified that "DCEO adjusted its goals in the second three-year plan to be more reasonable, but they are still at least 50% greater than the load reduction goals in the law and in the utility plans." *See,* DCEO Ex. 1.0 at 10. However, ComEd continues, Ms. Mrozowski never recommended that the Plan Year 4 through 6 goals should actually be cut in half by 50% in this docket. ComEd asserts that Ms. Mrozowski testified that "[e]valuation results are not yet available to know whether the goal was able to be achieved in Program Year 4." She also stated, according to ComEd, that "DCEO recommends exploring this option with utilities when developing its third three-year plan. This will

require working with the utilities to determine as well as possible the amount of kilowatt-hours (and therms) attributable to the public sector." *Id*.

ComEd avers that DCEO readily admits that evaluation results for Plan Year 4 are not yet available, and therefore, it is not yet known whether DCEO will achieve the modified PY4 goal. ComEd points out that DCEO concedes that this 50% figure is not at all firm or supported by substantial evidence. Instead, according to ComEd, DCEO's position is that this 50% figure needs to be explored and developed further with the electric and gas utilities in the upcoming three-year plan filings on September 1, 2013. ComEd concludes that the Commission should adopt the AG's, ComEd's, and DCEO's recommendation to consider modifications to DCEO's goals in a separate docket, the upcoming three-year plan filings to be made on September 1, 2013. There, the Commission could fully investigate the factors identified, but not explored, in this docket, such as (i) historical performance, (ii) the actual loads of the customer segments served, and (iii) participation barriers faced by these segments. ComEd Initial Brief at 20-21.

The AG's Position

The AG argues that Section 8-103 of the Act makes it clear that the General Assembly directed DCEO to be a joint administrator with ComEd of energy efficiency programs. It went on further by defining the specific allocation of effort targeted to those segments (25% of "measures"). In support, the AG cites Section 8-103(e) which provides, in pertinent part that:

> Electric utilities shall implement 75% of the energy efficiency measures approved by the Commission, and may, as part of that implementation, outsource various aspects of program development and implementation. The remaining 25% of those energy efficiency measures approved by the Commission shall be implemented by the Department of Commerce and Economic Opportunity, and must be designed in conjunction with the utility and the filing process.

220 ILCS 5/8-103(e). *See,* AG Initial Brief at 11-12. The AG contends that the term "measures" in the statute cited above refers to the efficiency budget amounts rather than a share of savings goals.

The AG further cites another portion of this same statute, which provides that:

> The utility and the Department shall agree upon a reasonable portfolio of measures and determine the measurable corresponding percentage of the savings goals associated with measures implemented by the utility or Department. No utility shall be assessed a penalty under subsection (f) of this Section for failure to make a timely filing if that failure is the result of a lack of agreement with the Department with respect to the allocation of responsibilities

> or related costs or target assignments. In that case, the Department and the utility shall file their respective plans with the Commission and the Commission shall determine an appropriate division of measures and programs that meets the requirements of this Section.

Id. The AG asserts that this language states that the 25% allocation to DCEO is not a savings goal allocation, because the General Assembly anticipated some sort of negotiation between DCEO and the utilities around the appropriate savings goals associated with this mandated 75/25 measure split. The AG further reasons that the General Assembly also established a procedure whereby the utility and DCEO should work out a reasonable allocation of savings goals, and if they cannot, the Commission would impose goals on each entity. AG Initial Brief at 13. The AG also points out that the annual independent evaluation must be of both the utility's portfolio of measures and that of DCEO. *See,* 220 ILCS 5/8-103(f)(7).

The AG concludes, from the statutory language it cites, that the General Assembly intended for the Commission to have some sort of oversight and regulatory role that encompassed the entire utility/DCEO energy efficiency effort in order to ensure that ratepayers capture the net benefits that they pay for. However, according to the AG, the Commission has been "less than authoritative" in overseeing DCEO programs.

The AG states that the lack of rigorous regulation of DCEO to date has a practical importance that, if not resolved, places the provision of cost-effective energy efficiency program efforts at risk. AG witness Mr. Mosenthal testified that to date, DCEO has proposed and filed goals that may not be achievable. The history of the past three years is that DCEO has failed to meet its goals in ComEd's territory every year, with achievements in PY1 of less than 75%, in PY2 approximately 52%, and in PY3 only about 43% of goals. The AG points out that DCEO witness Ms. Mrozowski, Assistant Deputy Director for DCEO's Illinois Energy Office, confirmed that DCEO fell short of meeting the energy savings targets in its plan in each of the first three years of the plan's existence. *See,* DCEO Ex. 1.0 at 4, 5.

During the first three-year electric energy efficiency plan, the AG continues, this situation was not a major problem because the collective utility/DCEO goals were relatively low when compared to all of the cost-effective achievable savings. Also, the spending caps were not so onerous as to put meeting collective goals in jeopardy. However, the AG notes that DCEO's failure to achieve its first three-year electric energy efficiency goals may not indicate that DCEO did not captured a reasonable level of savings. Mr. Mosenthal stated that he understands that while DCEO only met about half of its PY2 savings goal, it did in fact exceed the statutory percentage of the load savings goal as applied to the energy loads of its public and low-income segments. AG Initial Brief at 14.

The AG maintains that in the past, ComEd more than made up for these DCEO shortfalls, and ratepayers have still captured savings and net benefits commensurate

with the legislative intent. The AG concludes, however, that in the future, this will no longer be the case. This is because the spending cap built into Section 8-103 of the Act has necessitated modifications to ComEd's savings goals, which, pursuant to statute, increase in increments. The AG concludes that it is unlikely that electric utilities will far exceed energy savings goals in the future. *Id.* at 15.

The practical outcome, the AG continues, is that a portion of the statutory goals are effectively being "orphaned," because the larger the allocation that DCEO assumes, the smaller the allocation of deliverable savings goals that the electric utility assumes. The AG states that for its first three-year energy savings plan, DCEO agreed to goals of approximately 20% of the total combined goals, despite the fact there was no evidence that DCEO was likely to come close to achieving them, or that this amount fairly represented its share of DCEO sectors' energy load or even that they were achievable in a cost-effective manner. *Id.* at 15.

The AG cites the testimony of DCEO witness Ms. Mrozowski, who, according to the AG, characterized the analysis used to determine DCEO's goals as "simplistic," citing DCEO Ex. 1.0 at 4. Ms. Mrozowski explained that "[e]ssentially DCEO used the average incentive per kilowatt hour saved from the modeling conducted by ComEd and Ameren's contractor, ICF, Inc. and applied that to the DCEO portfolio budget to back into an energy savings target." She noted that this target did not take into account the size of the public sector and low-income market segments that DCEO was serving; nor did it take the "unique challenges" of those markets into account. AG Initial Brief at 15.

The AG further states that DCEO witness Ms. Mrozowski testified that DCEO submitted a revised energy savings plan to ComEd, Ameren, and the Statewide Advisory Group, and that plan changes were implemented in PY 3 and PY 4 that led to a downward revision of DCEO's annual electricity load reduction goal from approximately 20 percent to 15 percent of the total utility/DCEO goal, (*See,* DCEO Ex. 1.0 at 5). However, the AG is of the opinion that it remains unclear whether these revised numbers represent a fair allocation of the energy savings goal. Ms. Mrozowski admitted that even with these reduced goals, DCEO would still have to achieve approximately 50% greater savings among its customers than what is called for in the statutory goals in order to achieve them. *See,* DCEO Ex. 1.0 at 10. The AG opines that because the statute defines the energy savings goal as combined annual savings goals, the current arrangement calling for DCEO to exceed its statutory portion by 50%, which directly results in ComEd's goal representing an underachievement in comparison to the mandated statutory percent-of-load goals. The AG concludes that no evidence has been provided establishing that these reduced goals were a result of detailed analysis based on the cost-effective, achievable potential opportunities and the appropriate savings that could be captured within DCEO's mandated customer segments, given the 25% budget allocation it retains.

The AG recommends requiring each entity (DCEO and ComEd) to separately meet its share of the statutory percent-of-load goals. Any deviation from that, the AG continues, should be justified based upon unanimous agreement between ComEd and

DCEO that the respective goals are reasonable and achievable and consistent with their filed plans; analysis supporting the variance; and, a showing from the entity proposing to adopt goals that are lower than the statutory percent of load goals that achievement of the statutory goals is not feasible within the budget caps and its share of the budget allocation. The AG acknowledges that DCEO intends to address the allocation issue during the development of the next three-year plan. However, the AG states that this issue should be addressed in the instant docket. The AG further states that the Commission should provide consequences for DCEO and ComEd for not revising their energy efficiency plans and provide dates certain when revised plans must be submitted and guidelines about how any shortfalls might be made up in the following year. AG Initial Brief at 18-20.

Analysis and Conclusions

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

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

With regard to Staff's recommendation, at this time, the Commission declines to order DCEO to revise its energy efficiency plan. Staff provides no information establishing that its proffered future energy efficiency goals "fix the problem." Additionally, as ComEd notes, the DCEO goals for Plan Years 4 and 5 have already been modified. A better course of action is to wait and see if DCEO's revised energy savings goals can be achieved, and to what extent. At some point in time, some modifications to DCEO's energy savings goals may be necessary or even just desirable. However, at this time, the Commission shall allow at least one more year of the revised energy savings goals to run their course. In this manner, there will be more information to work with in order to establish a viable and workable course of action.

On Exceptions, the AG urges this Commission to include findings that direct a more formal and rigorous process to establish the goals allocation based upon real analysis and historic performance. One option, the AG continues, is that the energy savings goals for ComEd and DCEO would be calculated based upon the statutory percent of load savings. AG Brief on Exceptions at 2-7.

On Exceptions, ComEd points out that it and DCEO proposed lower goals for Plan Years 4 through 6 in Docket 10-0570. Because the evaluation of Plan Year 4 is not complete, ComEd reasons, it is not yet known whether the modification was sufficient. ComEd Reply Brief on Exceptions at 10-11.

Additionally on Exceptions, ComEd asserts that the record in this proceeding contains no evidence that the AG's recommended methodology concerning calculation of energy savings goals is valid or is capable of being implemented. According to ComEd, it is not clear how the load that would be attributable to the DCEO customer segments would be determined. *Id.* at 12. ComEd additionally asserts that if the load that is attributable to DECO customers segments were determined, it is not clear how this number would correspond to the statutory mandate that DCEO must receive 25% of the annual budget. *See*, 220 ILCS 5/80193(e); ComEd Reply Brief on Exceptions at 12-13.

The Commission notes that the AG has given this Commission a vague request which, if granted, would be difficult to enforce, due to the esoteric nature of the argument the AG presents. (*See,* AG Exceptions at 7-9). The Commission therefore declines to modify the ALJPO in the manner that the AG requests.

2. Three-Year Cost-Effectiveness Review

Staff's Position

Staff states that this proceeding is the appropriate place to review the cost-effectiveness of the programs in ComEd's portfolio for the three-year period that encompasses ComEd's Plan 1.[1] Staff points out that ComEd witness Mr. Brandt testified that ComEd's independent evaluator is currently in the process of developing a report that that reviews the cost-effectiveness of the first three plan years, but this report has been completed. Staff recommends that an efficient approach to facilitate this review, which is required by law, would be for the Commission to open a docket to conduct the three-year cost-effectiveness review, upon receipt of this report. Staff further recommends that the Commission order ComEd and DCEO to file the three-year evaluations and annual cost-effectiveness analyses of their energy efficiency programs that were implemented during Plan 1 in the *Plan 1* Docket (07-0540) within 90 days of the date, upon which, the Commission enters a final Order in the instant proceeding. Staff additionally recommends that the Commission require Staff to submit a Staff Report to the Commission to initiate a proceeding to review the cost-effectiveness of these energy efficiency programs over the life of Plan 1 within 120 days of the date that the Commission enters a final Order in the instant proceeding. Staff Initial Brief at 17-19.

[1] *See,* 220 ILCS 5/8-103(a), which provides, in pertinent part 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."

The AG's Position

The AG does not concur with Staff. The AG notes that the involvement of numerous stakeholders and Commission Staff in developing and approving three-year plans through the Stakeholder Advisory Group process provide important protections that the planned programs and portfolio are sufficiently cost-effective to provide net benefits to ratepayers. The AG recommends that the Commission find that ComEd has met or exceeded its Plan Year 3 goals and allow any concerns about a possible finding of non-cost-effectiveness to be dealt with in a future proceeding. The AG points out that when assessing cost-effectiveness, the Commission has repeatedly found that cost-effectiveness evaluations should occur at the portfolio level, as opposed to evaluation of each individual level. AG Initial Brief at 24-25.

ComEd's Position

ComEd recommends that, to avoid administrative inefficiency and waste, the Commission review the independent evaluator's report before determining whether to open another docketed proceeding related to Section 8-103 of the Act. ComEd Initial Brief at 13-14. ComEd also concludes that this proposal is premature. It concludes that because the three-year report is not yet final, there is no basis for pre-judging the issue and concluding now that a docket should be opened. *Id.* at 13.

Analysis and Conclusions

The Commission disagrees with Staff on this issue. The independent evaluator's three-year report should provide the Commission with guidance regarding ComEd's energy efficiency program, and it should be examined before any three-year analysis takes place. Therefore, at this time, the Commission declines to act in the manner that Staff recommends.

3. "Banking" of Energy Savings

In the final Order in Docket 07-0540, (the *PY1 Order*) the Commission determined that it is not possible to have energy efficiency programs without incurring some overruns, or, excess energy savings, in any given plan year. *Plan 1 Order* at 39. That Order acknowledged that Section 8-103(b) did not specifically provide for a utility to carry over energy savings from one year into the next year to meet that year's statutory energy efficiency or demand response goal. However, it allowed for some "banking" to the next year of *de minimus* amounts of excess energy savings, in acknowledgement of the fact that *de minimus* banking of energy savings was a practical reality. It capped the "banking" allowed of excess energy savings from one year to the next at 10 percent. *Id.* at 40. However, the "banking" allowed of energy savings was only from one year to the next. The fact that only a *de minimus* amount of "banked" energy savings was allowed establishes that there was to be no carry-over of excess energy savings beyond that point. *Id.*

Staff's Position

Staff recommends approving "the maximum 10%5 banking allowed," 58408 MWH from PY3, for a cumulative total of 97,777 MWH of net energy savings banked at the end of PY3 in ComEd's service territory.[2] Staff Initial Brief at 6. The "banking" approach that the Commission adopted in the *Plan 1 Order* is beneficial, Staff reasons, in that it gives ComEd an incentive to fill shortfalls by DCEO, thereby helping to ensure that the goals set forth in Section 8-103(b) of the Act are achieved. Staff Ex. 2.0 at 8. Staff cites the testimony of the AG witness Mr. Mosenthal, who observed that: "ComEd has more than made up for these DCEO shortfalls and ratepayers have still captured savings and net benefits commensurate with legislative intent." AG Ex. 1.0 at 16. It is Staff's position that the statutory energy savings goal of 584,077 MWHs was exceeded by 75,472 MWH in PY3, resulting in a total of 97,777 cumulative banked MWHs. Staff Ex. 1.0 at 19-20; Staff Initial Brief at 5.

Staff states that while Mr. Mosenthal did not dispute that the *PY2 Order* clarified the method for calculation of banking, he nonetheless recommended that the Commission use an alternative banking calculation. Mr. Mosenthal recommended allowing ComEd only to bank 10% of energy savings that are in excess of its portion of the statutory savings goal, which would not include DCEO's portion, citing AG Ex. 1.0 at 10. In Staff's opinion, the banking approaches adopted by the Commission in the *PY1 Order* and in the *PY2 Order* are the most beneficial. Staff Ex. 2.0 at 8-9.

However, if the Commission chooses not to adopt Staff's calculation of ComEd's cumulative banked savings in this docket and to adopt Mr. Mosenthal's banking proposal, Staff recommends that the Commission revise the amount of banked savings allowed from the value presented in Mr. Mosenthal's testimony to be consistent with Staff's calculation of ComEd's portion of the savings goal regarding other issues. Staff Initial Brief at 5-6. Staff avers that, pursuant to Mr. Mosenthal's proposal, the corrected amount of incremental banked savings allowed from PY3 for ComEd to carry forward would be 45,865.6 MWH and the total cumulative amount of banked savings at the end of PY3 would be 85,234.6 MWH. Staff Ex. 2.0 at 9. This is in comparison to ComEd's and Staff's calculated cumulative banking of 97,777 MWH, resulting in a difference of 12,542 MWH. Staff Initial Brief at 5-6.

ComEd's Position

ComEd points out that in the *PY2 Order*, the Commission adopted Staff's proposal that "banking" could only be achieved after the overall energy savings goal applicable to both ComEd and DCEO was achieved. Thus, if DCEO were to fail to achieve its annual energy savings goal, ComEd's performance would have to "cover"

[2] The difference between 58,408MWH and 97,777MWH is a carry-over of banked energy savings from previous years.

DCEO's shortfall in an amount that is sufficient to exceed the combined ComEd and DCEO energy savings goal for a given Plan year. *See, PY2 Order* at 5. ComEd avers that the AG's proposal unfairly "switches back" to focus on only ComEd's goal and it permits ComEd to bank no more than 10% of its individual goal. In other words, after being called on to achieve its own goal and cover any DCEO shortfall, ComEd would then be limited to banking only 10% of its own goal. ComEd Initial Brief at 8-10.

ComEd further contends that the AG participated in the PY2 proceeding and it voiced no objection there to the methodology in question when it was posed by Staff. ComEd argues that therefore, by raising this issue here, the AG is collaterally attacking this methodology in the instant proceeding. *Id.* at 10-11.

The AG's Position

For PY3, the year in question here, DCEO only achieved 43% of its energy savings goals. AG Reply Brief at 3. The AG contends that in the *PY1 Order,* the Commission limited banking of excess energy savings to 10 percent of the applicable energy savings goals. The AG believes that anything greater than a *de minimus* amount would have the effect of undermining the statutory intent in Section 8-103 to have annual goals met every year. In support, it cites that Order at 41. According to the AG, ComEd has shown that, while DCEO has once again failed to meet its plan goal by a significant margin, the combined total of both ComEd and DCEO savings still far exceeds the original statutory goal approved by the Commission because of the large excess of savings achieved by ComEd. (*See,* ComEd Ex. 1.0 Corr. at 7). The AG states that the total combined goal was 584,077 MWH, and the combined PY3 savings achieved was 680,844 MWH. The AG concludes that this is both higher than the combined goal, and also is significantly in excess of the 10% excess savings cap for purposes of banking. The AG concludes that as a result, ComEd has proposed allowing it to bank an additional 10% of the combined savings goal, or 58,408 MWH. AG Initial Brief at 7-8.

The AG asserts that, when the 10% banking cap authorized in Docket 07-0540 is applied to the combined (between ComEd and DCEO) energy savings goal rather than a ComEd-specific goal, ComEd benefits because the megawatt hours included in banking calculations increases, due to the increase in the total from which the 10% is derived. AG Reply Brief at 8.

The AG avers that it would not be "appropriate" to allow DCEO to bank 10% of its energy savings goal when DCEO failed to even come close to meeting its goal, just because ComEd captured excess savings. The AG reasons that ComEd's proposal is effectively asking the Commission to give this additional theoretical banked savings opportunity (the 10% of DCEO's individual goal) to ComEd to apply to its future goals. *Id.* at 9.

The AG opines that in essence, ComEd is "leveraging" DCEO's obligations to capture approximately 20% more banking that is unrelated to both its individual goal in

PY3 and ComEd's future individual goals, to which, the banking would be applied. This result, the AG maintains, is not in the interests of ratepayers, given the General Assembly's clear interest in ensuring the achievement of annual energy savings, citing 220 ILCS 5/8-103(b). It is also illogical, the AG continues, because ComEd has never had responsibility for the DCEO goals, and it will never apply the banked savings to the DCEO portion of future goals. According to the AG, ComEd is effectively turning the 10% banking limit into an approximate 12% limit (due to the additional greater banking). The AG concludes that this situation is contrary to Commission's intent when it established the 10% banking rule. *Id.* at 9; *See also* AG Ex. 2.0 at 6.

AG witness Mr. Mosenthal recalculated the banking apropos to the AG's position as follows: ComEd's individual PY3 goal was 458,919 MWH. According to the AG, ComEd should only be allowed to bank 45,892 MWH of additional incremental savings. This is a reduction in what ComEd proposed as additional incremental banking of 12,516 MWH (58,408-45,892). AG Ex. 1.0 at 9. However, the AG's suggested limitation solely concerns how much excess energy savings can be applied to future years; it does concern the overall obligations provided by statute. *See, e.g.,* AG Reply Brief at 8.

Analysis and Conclusions

The AG's Argument Regarding DCEO

The Commission notes that the purpose of Section 8-103(a) of the PUA is that:

> It is the policy of the State that electric utilities are required to use cost-effective energy efficiency and demand-response measures will reduce direct and indirect costs to consumers. . . . Requiring investment in cost-effective energy efficiency and demand-response measures will reduce the 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). All citizens of Illinois thus benefit from DCEO's programs, which primarily serve two segments of the population that are more difficult to serve than the general residential and commercial population. The two segments that DCEO serves are, generally, low-income residents and governmental agencies. These groups of ratepayers can be more difficult to serve, (*e.g.*, due to the difficulty of identifying who is in a low-income household and the difficulty of dealing with governmental "red tape." Thus, DCEO has an important, but challenging, role in Illinois energy efficiency programs. Because all ratepayers benefit, as the statutory citation above states, from the lower energy consumption of all ratepayers, and there is no evidence here that DCEO did not perform its challenging role in good faith, the Commission declines to segregate the "banked" energy savings in the manner that the AG proffers.

ComEd points out on Exceptions that in the past, the statute has been interpreted to provide that, if DCEO were to fail to achieve its individual energy savings goal, ComEd would be required to make up that shortfall and also exceed the combined goal before being permitted to bank any excess savings. ComEd Reply Brief on Exceptions at 3. ComEd states that the final Orders in both Docket 07-0540 (Order of February 6, 2008, at 41) and in Docket 10-0520 (Order of May 16, 2012) required ComEd to make up any shortfall in this regard. ComEd Reply Brief on Exceptions at 2-5. ComEd further maintains that no party disputes that customers fund the energy efficiency programs. Also, according to ComEd, no party dispute that fact that the amount of savings to be achieved for any given Plan year is no more than 10% in excess of that Plan year's combined energy savings goal. *Id.* at 6.

The Commission acknowledges that DCEO did not achieve its PY3 energy savings goal. However, in that year, regardless of any "banked" energy savings, ComEd achieved energy savings that "covered" DCEO's shortfall and also exceeded ComEd's and DCEO's combined energy savings goal. The AG has not proffered an argument establishing that this burden, which ComEd voluntarily accepts, is not something that the General Assembly intended to place upon an electric utility when it enacted Section 8-103 of the Act.

"Banking" of Excess Energy Savings

The Commission notes at the outset that all of the parties seem to have no quarrel with allowing a utility to include energy savings from previous years, despite the plain language in Docket 07-0540 requiring only *de minimus* "banking" of energy savings. This is why, in this proceeding, ComEd's "banked" energy savings jumped from 58,408 MWHs to 97,777 MWHs.

However, as was noted in docket 07-0540, the Commission only approved the "banking" of *de minimus* energy savings. The term "*de minimus"* is a matter that is "so insignificant that a court may over look it in deciding an issue or a case." Black's Law Dictionary, 9th ed., 2009). An increase in banked energy savings from 58,408 MWHs to 97,777 MWHs, which is an increase in excess of 75% is not *de minimus.* Therefore, the initial ruling in Docket 07-0540 has been violated by inclusion of any energy savings from previous years. Yet, no party explained this discrepancy, even though this carry-over is contrary to the ruling in that docket. The Commission points out that the statute does not allow for *any* "banking" or carry-over of energy savings. *See generally,* 220 ILCS 5/8-103. Therefore any banking of energy saving that is not insignificant in amount violates Section 8-103 of the Act. The Commission therefore iterates that the 10% carryover for energy savings is only from one year to the next. It does not carry further into a year beyond that point. The correct amount of "banked" energy savings is 58,408 MWHs.

On Exceptions, the AG states that the parties to Docket 10-0570 entered into a Settlement Stipulation resolving many of the contested issues in that docket, including

banking.[3] The Commission approved the Stipulation in its Final Order in that docket, which specifically permitted ComEd to accumulate banked savings across more than one year, including amounts banked from PY 1 through PY3, for future savings calculations in PY 4 through PY 6. *See,* Docket 10-0570, Order of December 21, 2010 at 20. The AG avers that this Stipulation provides:

> ComEd's request to accumulate and apply "banked" kWh savings across years – specifically from PY 1 through PY4 for application in PY5 was approved.
>
> Consistent with the above, applying any banked savings or CFL carryover from PY1 through PY5 to PY6 was also approved.
>
> The banking provisions are subject to the following restrictions:
>
> In any given Plan year, no more than 15% of that year's compliance obligation should be met with banked savings from previous Plan years. (Thus, in effect, raising the *de minimus* ceiling amount from 10% to 15% of the total amount for any year in question), but subject to the following:
>
> Except that, in any Plan year for which the statutory target has been adjusted downward to accommodate the rate impact screen, if the availability of banked savings, including banked savings in excess of 15% of the current year's target, plus planned program savings, would allow ComEd to come closer to reaching the statutory target, the target shall be readjusted upward accordingly.

The AG asserts that while that settlement applied to calculations of banked savings for PY 4 through PY6, it also authorized application of savings over multiple years, including savings achieved from PY 1 through PY3. While the AG agrees with the Proposed Order's application of the Commission's 07-0540 Order, the AG avers that ComEd "understandably" applied a similar approach to the PY3 calculation. The AG concludes that rather than address it in this docket, the Commission should revisit this issue in the upcoming three-year filing. AG Brief on Exceptions at 11-12; *See also* Staff Brief on Exceptions at 4-5.

Citing the 07-0540 Order, the AG acknowledges that neither Section 8-103 of the Act nor any other provision in the Public Utilities Act mentions the concept of a carryover or "banking." The AG points out that banking is a concept that was introduced by ComEd in its first three-year plan (*See,* Docket 07-0540, Order of February 6, 2008 at 40-41). The AG opines that while the Order in Docket 07-0540 did not address whether DCEO's goal should be included in the banked savings calculation, it did find that banked savings should be limited to 10% and no more. AG Reply Brief on Exceptions at 2-5.

[3] The parties raised the terms of this settlement agreement for the first time in Briefs on Exception.

As was stated above, the intent articulated by the General Assembly in Section 8-103 of the Act is to reduce energy consumption. This Commission is a creature of statute. *Illinois Bell Telephone v. Ill. Commerce Comm.,* 362 Ill. App. 3d 652, 655-56 840 N.E.2d 704 (4th Dist. 2005); *Illinois Power Co v. Ill. Commerce Comm.,* 111 Ill. 2d 505, 510-11, 490 N.E.2d 1255 (1986). As such, it only has the powers that the statute confers upon it. The Commission acknowledges that some "banking" of energy savings is necessary, due to the fact that programs and measures do no cease at the end of any given year. However, any amount of "banking that is not insignificant is contrary to the plain meaning in Section 8-103, which permits no "banking." Additionally, the "banking" of energy savings that is not *de minimus* does not reduce energy consumption and is therefore contrary to the purposes articulated in Section 8-103 of the Act.

Here, the "banked" energy savings for the applicable year is 58, 405 MWHs. The amount that ComEd claims is 97,777 an increase in an amount in excess of 75%, which cannot be *de minimus.* The Commission notes that no party has presented a legal argument for deviating from the ruling in Docket 07-0540 and from the plain language and intent of Section 8-103 of the Act. In fact, the AG acknowledges that the agreement in Docket 10-0570 violates the ruling in Docket 07-0540 and that it violates Section 8-103 of the Act.

The Commission additionally notes that no party mentioned the agreement before Briefs on Exception. The parties are reminded that they must provide the necessary factual background for their factual and legal conclusions, which, in legal parlance, is "laying a factual foundation." The Commission therefore declines to construe Section 8-103 of the Act in the manner that the parties proffer, irrespective of any agreement that they entered into.

4. Free Ridership in the Public Sector

The AG's Position

Free ridership is an energy efficiency evaluation term which describes energy efficiency program participants who would have taken the recommended actions on their own, even if the program did not exist. ACEEE.org/glossary. The AG points out that it is not in dispute that the statutory goals reflect new net savings from program efforts. DCEO witness Ms. Mrozowski, however, expressed the opinion that free ridership in the public sector should not be accounted for, "given the complexities of public taxation, capital planning, etc." DCEO Ex. 1.0 at 7-8. AG witness Mr. Mosenthal agreed that accurately estimating free ridership in the public sector can be more challenging for evaluators than that in some other customer segments. However, he rejected the notion that this concept should not apply to public sector customers. The AG concludes that simply counting the naturally occurring savings for the public sector and crediting them to DCEO undermines the statutory intent. AG Initial Brief at 17.

Analysis and Conclusions

It seems to be somewhat unlikely, in the present economic downturn, and with all levels of government experiencing severe budget cutbacks, that the governmental entities served by DCEO's programs have immediate plans for energy efficiency. A possible explanation is that these entities have energy efficiency goals that they intend to meet some time in the future, when increased funds become available. Therefore, the Commission declines, at this time, to decide whether free ridership should be eliminated with respect to government programs. However, all parties, including DCEO, are cautioned that, with respect to a determination regarding "free ridership," the person or entity in question should have actual energy efficiency plans before they are to be considered to be "free riders," as opposed to persons who have some goal to be met in the distant future regarding energy efficiency products and services.

On Exceptions, the AG avers that the conclusion above would place program evaluators, the Commission Staff and intervening parties in the impossible position of having to uncover evidence that efficiency investments had been budgeted for by the purchaser before the conclusion of free ridership could be reached. AG Brief on Exceptions at 16-17. This simply is not correct. All that need be done when evaluating for purposes of determining whether an entity is a "free rider," is to ask that entity if it has actual plans for energy efficiency.

Both the AG and Staff, on Exceptions, argue that the conclusion above "favors" gross, rather than net, evaluation metrics for Section 8-103 programs. AG Brief on Exceptions at 16-17; Staff Reply Brief on Exceptions at 5. Neither party explains why they come to this conclusion when all that is required in the language above is to ensure that a governmental agency is actually a "free rider" before determining that it belongs in such a category.

5. Proposed Adjustments to ComEd's Appliance Recycling Program Energy Savings

IV. Staff's Position

Staff recommends that the Commission adjust ComEd's proposed energy savings values for its Appliance Recycling Program. These adjustments, Staff continues, are based upon the ComEd Appliance Recycling Program *in situ* metering study, which is described in Staff Ex. 1.3. The Appliance Recycling Program *in situ* metering study, in Staff's opinion, shows the best estimates of the actual energy savings that were achieved in ComEd's services territory. Staff concludes that this study results in more reasonable estimates of energy savings. Staff avers that the *in situ* metering is more accurate than the lab-based metering in ComEd's proffered study, due to the fact that the laboratory-based metering protocols in ComEd's proffered study involve the metering of units that are conducted with a constant 90 degree ambient temperature, which does not reflect the temperatures that the units would actually be operating under in ComEd's service territory. Staff points out that the room temperature where an appliance is positioned influence the energy use of the appliances in question. Staff

Initial Brief at 12, 14. Staff's proposed adjustment is 21,296 MWH to ComEd's figure for energy savings for this program. *See,* Staff Ex. 1.0 at 13, 16-17.

Staff argues that its approach is consistent with the approach that is set forth by the Commission in the *PY1* Order. It points out that the California study that ComEd relies upon was of older refrigerators and freezers that were recycled primarily in 1993/1994, which is 17 years before PY3. *Id.* at 13.

In contrast, Staff continues, the *in situ* study upon which Staff relies was conducted within one year of PY3, and that study, which was funded by ratepayers, focused on refrigerators and freezers that were actually recycled through the ComEd energy efficiency program. Staff reasons that the ComEd *in situ* study is more accurate, due to the fact that it is more recent, as well as the fact that it reflects facts that exist in Illinois. *Id.*

Staff disputes the veracity of ComEd's argument that the sample size of the ComEd Appliance Recycling Program *in situ* study is not sufficient. Staff argues that this study was primarily completed to satisfy PJM[4] requirements, including those for PJM regarding sampling, statistical precision requirements and the preference to conduct studies in ComEd's service territory. Staff Ex. 2.0 at 5-6. Staff notes that there are two equations in this study, one that estimates the kilowatt-hour energy savings and the other that estimates the summer kilowatt-hour peak demand savings. In support, Staff cites ComEd Ex. 3.0 at 6.

ComEd's Position

ComEd argues that Staff's proposal contradicts the independent evaluator's recommendation that the revised methodology should be applied prospectively, rather than retroactively, to prior Plan years such as this one. ComEd further argues that the independent evaluator's conclusion that the PY4 *in situ* study should be applied prospectively should be determinative because the *in situ* study was never intended for use in PY3, and the equipment tested was not from the PY3 customer base. ComEd Initial Brief at 6, 7. ComEd also avers that the *in situ* study is less accurate because, according to ComEd, it does not test equipment from the PY3 customer base. ComEd Reply Brief at 4.

According to ComEd, Staff witness Ms. Hinman admitted in her rebuttal testimony that she "picked and chose" which variables to include in her analysis, some from PY3 and others from the PY4 *in situ* study, citing Staff Ex. 2.0 at 6-7. Use of the *in situ* study by PJM for kW demand reduction impacts, ComEd continues, does not justify use of this study for kWh energy savings impacts at issue in this docket because PJM's standards of precision do not at all address the kWh energy savings at issue in this docket. While ComEd is willing to accept this shortcoming and apply this study as the "best available" data for PY5, it maintains that there are still inherent issues that need to be addressed on a forward-looking basis, including looking at a larger sample size,

[4] PJM is a regional transmission organization. PJM.com.

longer metering periods, and obtaining data from customers who have not already signed up to have their refrigerators picked up. It concludes that the fact that PJM will use this study for kW impacts is irrelevant here. *Id.* at 8.

Analysis and Conclusions

ComEd does not state facts establishing that its survey is more accurate than the *in situ* study. Stating generally that there are issues that need to be addressed, without stating specific facts establishing that the *in situ* study does not address those issues, or why, does not establish that the *in situ* study is deficient. Thus, ComEd has not presented an argument that establishes that the *in situ* study done for PJM is not relevant here. Further, while ComEd cites the independent evaluator's recommendation that the revised methodology should be applied prospectively, ComEd provides no evidentiary law or facts establishing that this conclusion should be followed. Also, while ComEd claims Ms. Hinman "picked and chose" her variables, the testimony it cited does not so state. In short, ComEd has provided this Commission with no facts indicating that Staff witness Ms. Hinman's conclusion is incorrect, as ComEd has provided no facts or laws to support this argument.

Additionally, the study, upon which, ComEd relies, was a laboratory study conducted at 90 degree temperatures, which is not typical for Illinois. As Staff notes, the temperatures of the room, in which, an appliance such as a refrigerator sits, has an obvious impact upon the energy used by that appliance. This is especially true when the appliances involved provide refrigeration.

Further, the study upon which ComEd relies was of older recycled refrigerators and freezers that were recycled primarily in 1993/1994. ComEd proffered no evidence establishing that the refrigerators or freezers that were recycled pursuant to the program that it proffers used the same amount of energy as the ones in the more recent study, in the *in situ* study. The appliance recycling program will be adjusted in accordance with Staff's recommendation.

On Exceptions, ComEd argues that Staff witness Ms. Hinman readily admitted on page 6 of her rebuttal testimony that the only piece of data that she "picked" from the PY4 study was the regression equation used to estimate energy savings. (*See,* Staff EX. 2.0 at 6-7). From this, ComEd concludes that Staff's approach "picked and chose" variables from the PY3 evaluation and the PY4 study, resulting in a factually unsupported "hybrid methodology." ComEd Brief on Exceptions at 7-8. However, as Staff points out, the supported methodology is the same, as it applies variables from the PY3 evaluation to the old California lab-based model. Staff further states that ComEd's independent evaluator stated that the PY3 characteristics were used in the study because they are the most similar. In support, Staff cites ComEd Ex. 2.1 at 13-14. Staff Reply Brief on Exceptions at 7-8. ComEd did not establish that Staff did any "picking and choosing."

Also on Exceptions, ComEd argues that use of the study that Staff recommends constitutes impermissible hindsight review. ComEd surmises that Staff is attempting to attack the independent evaluator's determination regarding the PY3 energy savings goals that are attributable to the Appliance Recycling Program using information that was not available to the independent evaluator and which do not relate to the plan year at issue. ComEd Brief on Exceptions at 8-9. Absent from ComEd's Briefs, however, is any evidence that older appliances that were recycled in 1993/1994 are as efficient as those that were recycled when Staff's proffered study was conducted, which is 2011. Additionally, Staff states that the independent evaluator included a re-estimation of the PY3 energy savings estimates that were in the *in situ* metering study after the PY3 evaluation report was finalized. Staff Reply Brief on Exceptions at 8. Thus, ComEd has been on notice that the *in situ* study could be used as evidence in this proceeding for quite some time. This argument does not aid ComEd.

6. Compact Fluorescent Light ("CFL") Carryover

Staff's Position

CFL carryover refers to the CFL light bulbs that are purchased in a program year, but are not completely installed until a future year. Staff cites the *Plan 2* Order at 53, contending that in that Order, the Commission decided that ComEd can allow savings for these light bulbs, based upon their anticipated future use. However, Staff continues, the Commission did not specify exactly how the CFL carryover calculation should be performed. Staff opines that it is important to clarify this issue here because savings from CFL light bulbs sold through ComEd's Residential Lighting Program represent approximately half of the energy savings from ComEd's portfolio. Staff Initial Brief at 15.

Staff contends that the key issue here involves whether the savings should be based upon the savings assumptions that are in effect during the year of purchase, as opposed to the year in which the light bulb is actually installed. *See,* Staff Ex. 1.0 at 27. Staff avers that the intent behind the CFL carryover approach is to more accurately measure the energy savings from CFLs by counting the savings in the year in which the savings actually occur. Staff contends that therefore, the more accurate methodology would be to measure the savings based on the savings values determined for the installation year. *Id.* at 16.

Staff further argues that its proposal ensures that the CFL carryover for PY3 remains consistent with the statewide Technical Resource Manual ("TRM"). Because the Commission approved use of the statewide TRM in Docket 12-0528 for ComEd beginning with Plan Year 5, Staff states that its concern is that the statewide TRM only impacts the PY3 purchased CFL light bulbs that are then installed in PY5. Staff Reply Brief at 6.

The AG's Position

The AG posits that, at this time, it is not necessary for the Commission to determine an explicit savings approach for these future CFL savings. The AG agrees with Staff that the correct savings should be based upon the difference between the CFL energy usage and that of a baseline lamp that would otherwise probably have been installed at the time the CFL was installed. However, the AG points out that because of recent Federal standards, the assumed baseline practice is changing annually, and therefore, using savings estimates based on a future year of actual installation would reflect lower savings. *See,* AG Ex. 2.0 at 14.

The AG is of the opinion that ComEd is correct in contending that the carryover savings that Staff witness Ms. Hinman is addressing will be claimed in PY4 and PY5. As a result, the AG continues, the statewide Technical Resource Manual, filed in Docket 12-0528, should prevail as the documentation of the correct savings calculations, and the savings for PY4 and PY5 are not yet before the Commission. The AG further states that ComEd witness Mr. Brandt also noted that there is an effective collaborative process to address this issue through the Stakeholder Advisory Group's TRM development and updating process. Also, and that consensus can be reached before any future savings claim filings by ComEd and other utilities in PY4 and PY5. AG Initial Brief at 22-23.

ComEd's Position

ComEd states that of the reported 626,715 MWHs of energy savings achieved in PY3, 51,201 MWHs were credited to ComEd from CFL carryover, which reflects energy savings from the installation of CFL light bulbs that were purchased in Plan Years 1 and 2, but were not installed until PY3. This carryover amount, ComEd continues, which was calculated pursuant to the independent evaluator's methodology, includes light bulbs purchased in PY1 in the commercial and industrial sector, as well as light bulbs purchased during PY1 and PY2 in the residential sector.

ComEd comments that although the independent evaluator had developed a methodology for accounting for these additional savings, Staff, ComEd and the evaluator had been working to refine and finalize this methodology during the pendency of this docket. The final methodology was included in the filing of the TRM on September 19, 2012, which was not contested by ComEd, Staff or any intervenors. In support, ComEd cites Docket 12-0528, *State of Illinois Energy Efficiency Technical Reference Manual* (Order of January 9, 2013 at 4-5).

ComEd opines that Staff is ignoring the TRM process and the related docket throughout this proceeding by requesting that the Commission pre-litigate (or simultaneously litigate) the CFL carryover methodology issue in this docket. ComEd concludes that the principle of administrative efficiency and the risk of inconsistent judgments should be applied here. ComEd Initial Brief at 11-12; ComEd Reply Brief at 7.

Analysis and Conclusions

The Commission agrees with ComEd and the AG that it is not necessary at this time to determine an explicit savings approach regarding this issue. The collaborative process in the Stakeholder Advisory Group appears to be addressing this issue. Also, the carryover savings that Staff is addressing will be claimed in PY4 and PY5, which are outside of this proceeding. Further, the AG indicates that the federal standards are in a constant state of flux regarding this issue. Staff presents no indication that the AG's representation regarding federal standards is not accurate. The Commission therefore declines to modify ComEd's figures in the manner that Staff recommends.

On Exceptions, the AG contends that its witness Mr. Mosenthal noted that the carryover savings that Staff is addressing here will be claimed in PY4 and PY5. The AG concludes that as a result, the newly-filed statewide TRM should prevail as the documentation of the appropriate savings calculations. The AG also points out that the savings for PY4 and PY5 are not yet before this Commission and also that there is an effective collaborative process in the Stakeholder Advisory Group to address this issue. AG Reply Brief on Exceptions at 5-6.

On Exceptions, Staff argues that failure to resolve the CFL carryover issue here will result in additional litigation of this issue in future proceedings. Also, according to Staff, on a going forward basis beginning with PY3 purchased CFL light bulbs, savings from CFL carryover light bulbs should be measured based upon the savings values (*e.g.,* based upon the baseline) determined for the installation year. Staff Brief on Exceptions at 7-10.

The problem with Staff's argument is that Staff does not present facts establishing what is involved in the determination of a savings value for a particular year or what is involved in determining savings values. Additionally, Staff does not state what a "baseline" is. Without clarity as to what Staff's argument involves, the Commission declines to adopt Staff's recommendation.

7. Other Cost-Effectiveness Adjustments Raised by the AG

a. Whether ComEd Should be Required to Allocate All Program Related Costs to each Program

The AG's Position

According to the AG, Staff witness Ms. Hinman "suggested" that ComEd should be required to allocate all "program-related" costs to each individual program. AG witness Mr. Mosenthal agreed, but he stated that he thought that some clarification is warranted of Ms. Hinman's statement. The AG avers that Ms. Hinman cited marketing costs that appear to be directly related to the Appliance Recycling Program as an example. Staff Ex. 1.0 at 24. Assuming that this marketing was specific to this particular program, AG witness Mr. Mosenthal concurred that it is correct that the costs

associated with it should be counted as a program cost. AG Ex. 2.0 at 17-18. However, the AG argues, it is important to define Ms. Hinman's term, which is: "program-related." The AG opines that general administrative costs that are not directly tied to a particular program should not be allocated to each program for purposes of cost-effectiveness. The AG cites the testimony of Mr. Mosenthal, who explained, for example, that the costs that are associated with rent, information technology infrastructure, planning, and other areas that are not tied directly to a program should be omitted from program-level cost-effectiveness analysis. In his opinion, these costs should all be included in any portfolio level analysis, to ensure the overall effort is cost-effective. The AG asserts that this is critical because even when a utility discontinued a single program – or added an additional program – these relatively fixed costs would still exist. AG Ex. 2.0 at 18; AG Initial Brief at 25-26. .

Staff's Position

Staff states that since the filing of direct testimony in the instant docket, the Commission has made a decision regarding the cost-classification issue with regard to ComEd's Appliance Recycling Program in Docket 12-0544, *Illinois Power Agency: Petition for Approval of Procurement Plan,* Order of December 19, 2012, at 270. Therefore, with respect to this particular program, Staff is of the opinion that it is not necessary for the Commission to make a decision here. Staff Reply Brief at 8.[5] Concerning this issue as it relates to other programs, Staff concurs with the AG.

Analysis and Conclusions

Fundamental due process requires notice of what is at issue in a pleading. *See, e.g., Quantum Pipeline Co. v. Illinois Commerce Comm.,* 304 Ill. App. 3d 310, 320, 709 N.E.2d 950 (3rd Dist. 1999). Indeed, notice in advance of an evidentiary hearing of the parties' legal theories is imperative. It is elemental that all parties must receive advanced notice of the issues to be tried before the evidentiary hearing. Otherwise the parties are not advised before the hearing as to what it will concern. Because the AG did not raise this issue before the evidentiary hearing, the Commission declines to entertain it.

On Exceptions, the AG argues, essentially, that there could be no waiver because the Commission Rules do not provide for pleadings. AG Brief on Exceptions at 21. This argument overlooks the fact that it is the due process clauses in the United States and Illinois Constitutions, which require notice in advance of trial of what will be at issue at trial. *See, e.g., Illinois Bell Telephone Company v. Ill. Commerce Commission,* 343 Ill. App. 3d 249, 259-60, 797 N.E.2d 716 (3rd Dist. 2003).

The AG also states that it did raise the issue, albeit in testimony. AG Brief on Exceptions at 21. This argument overlooks the fact that testimony is not a pleading.

[5] Staff did not discuss this issue in its initial brief but states that the AG did not address this issue in its Pretrial Memorandum and concludes that therefore, the Commission should not decide it now. Staff Reply Brief at 7.

Many things are stated in testimony which are not statements of legal issues. Significantly, the AG cites no law on the subject. This argument does not aid the AG.

Three-Year Allocation of Costs

The AG's Position

According to the AG, Staff witness Ms. Hinman opined that "the Company allocates certain costs consistently across the three years in the cost-effectiveness analysis." Staff Ex. 1.0 at 24. AG witness Mr. Mosenthal disagreed with this recommendation because the statute defines the Total Resource Cost ("TRC") test as the item that quantifies the net present value of benefits and costs. (*See,* 20 ILCS 3855/1-10) Because there is a time value of money, he continued, the actual timing of expenditures matters in terms of cost-effectiveness results. The AG argues that thus, costs should be recognized as occurring in the actual year they occur as much as possible. AG Initial Brief at 28.

Staff's Position

Staff does not disagree with the proposal that ComEd should be required to allocate certain costs consistently across the three years in its cost-effectiveness analysis.[6] However, Staff states that the AG has misrepresented what Ms. Hinman stated. Staff does not recommend "taking all costs over a three year period and averaging them and allocating them evenly across all years." Rather, Staff states, its recommendation relates to the fact that ComEd has classified costs in its TRC test cost-effectiveness analysis inconsistently across program years. Staff's recommendation is that ComEd treat certain costs consistently across program years in its cost-effectiveness analysis. This, Staff states, would allow the Commission and interested parties to make more meaningful comparisons among the cost-effectiveness results for a specific program across program years. Staff Reply Brief at 8-9.

Analysis and Conclusions

As was the case with the previous issue concerning cost allocation, the AG did not raise this matter in its prehearing memorandum. The Commission declines to entertain it here.

IV. Finding and Ordering Paragraphs

The Commission, having given due consideration to the entire record and being fully advised in the premises, is of the opinion and finds that:

[6] This issue, also, was not discussed in Staff's Initial Brief. However, as was the case with the previous issue, Staff states that the AG did not address this issue in its Pretrial Memorandum and concludes that therefore, the Commission should not decide it now. Staff Reply Brief at 7.

(1) Commonwealth Edison Company is an Illinois corporation engaged in the transmission, sale and distribution of electricity to the public in Illinois, and is a public utility as defined in Section 3-105 of the Public Utilities Act;

(2) the Commission has jurisdiction over Commonwealth Edison Company and the subject matter of this proceeding;

(3) the statements of fact set forth in the prefatory portion of this Order are supported by the evidence and the record and are hereby adopted as findings of fact;

(4) the statutory energy savings goal for Plan Year 3 as set forth in Section 8-103(b) and the demand response reduction goal as set forth in Section 8-103(c) have been achieved in the Commonwealth Edison Company service territory;

(5) Commonwealth Edison Company, which achieved 605,419 MWHs (626,715 MWHs – 21,296 MWHs) of energy savings during PY3, exceeded its portion of the statutory energy savings goal mandated by Section 8-103(b) of the Public Utilities Act, as modified by subsections (d) and (e) of that Section, and therefore no penalties will be assessed;

(6) Commonwealth Edison Company is permitted to bank 58,408 MWHs from Plan Year 3 for use in the following year, but not in any other year.

IT IS THEREFORE ORDERED that Commonwealth Edison Company is found to have achieved 605,419 MWHs of energy savings during Plan Year 3, and therefore is found to have complied with the incremental energy savings mandated by Section 8-103(b) of the Public Utilities Act, as modified by subsections (d) and (e) of that Section.

IT IS FURTHER ORDERED that Commonwealth Edison Company is permitted to bank 58,408 MWHs from Plan Year 3 for use in the following year.

IT IS FURTHER ORDERED that, subject to the provisions of Section 10-113 of the Public Utilities Act and 83 Illinois Administrative Code 200.880, this Order is final; it is not subject to the Administrative Review Law.

By Order of the Commission this 18th day of September, 2013.

(SIGNED) DOUGLAS P. SCOTT

Chairman