

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission	:	
On its Own Motion	:	
	:	
v.	:	No. 13-0589
	:	
Commonwealth Edison Company	:	
	:	
Investigation into customer refunds for	:	
payments made under invalidated riders.	:	

COMMONWEALTH EDISON COMPANY'S
REPLY BRIEF ON THE SCOPE OF THIS DOCKET

Thomas S. O'Neill
COMMONWEALTH EDISON COMPANY
440 S. LaSalle Street, Suite 330
Chicago, Illinois 60605
(312) 394-7205
thomas.oneill@exeloncorp.com

Eugene H. Bernstein
10 S. Dearborn, Suite 4900
Chicago, Illinois 60603
(312) 394-5400
eugene.bernstein@exeloncorp.com

John P. Ratnaswamy
Carla Scarsella
ROONEY RIPPIE & RATNASWAMY LLP
350 West Hubbard Street, Suite 600
Chicago, Illinois 60654
(312) 447-2800
john.ratnaswamy@r3law.com
carla.scarsella@r3law.com

April 25, 2014

TABLE OF CONTENTS

	<u>Page</u>
I. Overview and Summary	1
II. The Subject of Whether a Refund Is Owed.....	3
III. The Extent of a Refund (the Potential Refund Calculation Period)	9
IV. The Amount of a Refund.....	11
V. The Refund Mechanism	14

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission	:	
On its Own Motion	:	
	:	
v.	:	No. 13-0589
	:	
Commonwealth Edison Company	:	
	:	
Investigation into customer refunds for	:	
payments made under invalidated riders.	:	

**COMMONWEALTH EDISON COMPANY’S
REPLY BRIEF ON THE SCOPE OF THIS DOCKET**

Commonwealth Edison Company (“ComEd”), by its counsel, pursuant to the order of the Administrative Law Judge (“ALJ”), submits this Reply Brief on the Scope of this Docket.

I. Overview and Summary

AG/CUB and Staff, in their Initial Briefs on Scope, claim that, as a matter of law, by virtue of the *Rider SMP Appeal*¹ and *Rider AMP Appeal*² decisions read in combination with “*IVT*”³ and “*ComEd 07-0566 Remand Appeal*”⁴, ComEd cannot retain the advanced metering infrastructure (“AMI”) pilot costs that it recovered under “Rider AMP” from September 30, 2010, to December 31, 2012, which amount they contend is \$14.6 million (rounded).

There are four kinds of fatal flaws in their claim. First, their claim assumes that once a charge is held to be the product of single issue ratemaking, all cost recovery under that charge must be refunded. The Supreme Court of Illinois’ decision in *BPI II*⁵ is to the contrary.

¹ *Commonwealth Edison Co. v. Illinois Commerce Comm’n*, Nos. 2-08-0959 Cons., 405 Ill. App. 3d 389 (Sept. 30, 2010) (“*Rider SMP Appeal*”), appeal denied (Ill. March 30, 2011).

² *People ex. rel Madigan v. Illinois Commerce Comm’n*, 2012 IL App (2d) 100024 (March 19, 2012) (“*Rider AMP Appeal*”), appeal denied (Ill. Sept. 26, 2012).

³ *Independent Voters of Illinois v. Illinois Commerce Comm’n*, 117 Ill. 2d 90 (1987) (“*IVT*”).

⁴ *Commonwealth Edison Co. v. Illinois Commerce Comm’n*, 2013 IL App (2d) 120334 (Sept. 27, 2013) (“*ComEd 07-0566 Remand Appeal*”).

⁵ *Business and Prof’al People for the Pub. Interest v. Illinois Commerce Comm’n*, 146 Ill. 2d 175 (1991) (“*BPI II*”).

AG/CUB and Staff cite no court decision that supports an automatic refund in all instances when single issue ratemaking is found. ComEd knows of none. Plus, the *Rider SMP Appeal* and *Rider AMP Appeal* decisions did not order a refund. Moreover, AG/CUB now concede that equity matters, as they must given what the Supreme Court said in *IVI*, although they argue incorrectly that the facts should be ignored in determining equity. AG/CUB and Staff are pursuing a claim that would mean ComEd must provide \$14.6 million of advanced meters and related customer applications for free. That is not equity. That is a windfall for customers.

Second, despite the filed rate doctrine and the rule against retroactive ratemaking, AG/CUB and Staff want the Commission to jump backward in time from the March 19, 2012, *Rider AMP Appeal* decision, to order a refund as of September 30, 2010. However, on December 3, 2010, the Commission itself allowed the continued recovery of costs of AMI Pilot capital investments under the Rider AMP mechanism. **Even more importantly, neither AG/CUB nor Staff mention, much less explain how their claim can be correct given, that on February 8, 2011, the Appellate Court that issued the *Rider AMP Appeal* decision denied the AG's motion for an order to "make clear that refunds are due to ratepayers from the date the Court entered judgment in [*Rider SMP Appeal*] – September 30 2010".**

Third, the \$14.6 million claim is overstated, for a number of independent reasons, including but not limited to the proposed refund calculation period.

Fourth, **it is undisputed that ComEd already credited customers with \$5.1 million of the \$14.6 million at issue.** Staff does not mention this fact. AG/CUB offer a tangle of confused and irrelevant rhetoric to try to rationalize why they want the credits to be ignored, but they do not dispute that ComEd credited the \$5.1 million.

The only lawful and just conclusions here are that, at most, only the amount recovered after the *Rider AMP Appeal* decision, \$400,000 (rounded), is subject to refund, and that any refund is subject to reduction by the \$5.1 million that ComEd already credited to customers.

II. The Subject of Whether a Refund Is Owed

As noted above, AG/CUB and Staff rely on the combination of the *Rider SMP Appeal* and *Rider AMP Appeal* decisions with *IVI* and *07-0566 Remand Appeal* to argue that a refund is “automatic” here (and that it automatically includes all costs recovered). *E.g.*, AG/CUB Initial Brief on Scope (“Init. Br.”) at 8-14; Staff Init. Br. at 2-8.

ComEd previously has shown that that theory is incorrect, because:

1. The Supreme Court of Illinois’ decision in *BPI II* illustrates that a finding of single issue ratemaking requires further analysis (including evidence) to determine whether or in what amount a refund may be owed. AG/CUB seek to distinguish *BPI II* on its facts, but that only confirms that the facts of each case must be examined, as discussed further below.
2. In contrast, AG/CUB and Staff have cited no court decision holding that when single issue ratemaking is found, a refund is automatic, much less that it automatically requires refund of 100% of the amount of costs recovered.
3. The *Rider SMP Appeal* and *Rider AMP Appeal* decisions did not order a remand or a refund on the subject at issue. Nor do they support a claim that a refund is automatic (or must be 100%) or that whether one is owed is a pure issue of law.
4. In fact, on February 8, 2011, the Appellate Court that later issued *Rider AMP Appeal* denied the AG’s motion for summary reversal (based on *Rider SMP Appeal*) and for an order to “make clear that refunds are due to ratepayers from

the date the Court entered judgment in [*Rider SMP Appeal*] – September 30 2010” and for a remand.

5. After that ruling, the AG did not pursue its refund claim, thereby waiving it. (CUB did not even appeal from the Commission’s approval of Rider AMP.)
6. A utility has the basic right to rates that allow it the opportunity to recover its prudent and reasonable costs.
7. The filed rate doctrine and the rule against retroactive ratemaking limit the Commission’s authority to order a refund of costs recovered under an approved tariff.
8. There is nothing in the single issue ratemaking doctrine that means when a violation is found, the amount collected automatically is too high, much less 100% invalid, as opposed to too low, as the *Rider SMP Appeal* decision recognized.
9. *IVI* does not support the claim that a refund is automatic if single issue ratemaking is found. *IVI* did not involve single issue ratemaking, but rather rates that were set to allow recovery of certain types of costs despite the fact that the Supreme Court of Illinois already had held the costs were unrecoverable. *IVI* was based on the Court’s equitable powers, and in particular the ability to order restitution of unjust enrichment. No one claims the costs at issue here are unrecoverable. The Commission repeatedly has approved recovery of AMI Pilot costs.
10. Moreover, the evidence that ComEd proposes to offer shows that the costs at issue were prudent and reasonable, and benefitted customers, which means that ComEd was not unjustly enriched, and that a refund would be a windfall for customers.

11. The *07-0566 Remand Appeal* decision involved application of a prior Appellate Court holding that ComEd's rate base had been overstated, and a refund of the amount by which the costs were overstated in the applicable period. The decision discusses the rejection of consideration of equity in that context. AG/CUB and Staff do not and cannot claim that ComEd's costs here were overstated.

ComEd Init. Br. at 2-6.

AG/CUB's and Staff's Initial Briefs offer some other arguments, but they all lack merit. First, AG/CUB try to distinguish *BPI II*, and to argue that *BPI II* should be limited to its facts, while *IVI* should not (AG/CUB Init. Br. at 19).⁶ Their arguments fail. AG/CUB claim that whether a refund is owed is a pure question of law, but they prove that the facts matter when they say that the *BPI II* "holding was specific to the particular situation of that case's utility...." *Id.* AG/CUB note, among other things, that *BPI II* involved deferred recovery of certain depreciation expense, and that the purpose of the deferral was to protect ComEd from adverse financial impact caused by regulatory delay and to allow ComEd the opportunity to recover these costs. AG/CUB Init. Br. at 19, fn. 4. None of that distinguishes *BPI II*. Here, under Rider AMP, costs were not "deferred" but costs incurred in one quarter were recovered in the following quarter, as discussed further below. Even more importantly, AG/CUB's observations fail to explain away that *BPI II* supports consideration of the financial impacts on ComEd as well as customers here, and of ComEd's opportunity to recover the costs at issue. AG/CUB argue that the "*BPI II* holding did not present a rule of general applicability for any case where the Appellate Court holds a rider mechanism to be unlawful single-issue ratemaking; absent a Commission-approved accounting rule for the utility to measure financial hardship, the simple

⁶ Staff cited *BPI II* for a general reference to what is single issue ratemaking (Staff Init. Br. at 4-5), but did not address ComEd's points regarding *BPI II*.

policy of *IVI* controls.” AG/CUB Init. Br. at 19. *BPI II* involved single issue ratemaking. *IVI* did not. AG/CUB give no principled reason for treating *BPI II* as limited to its facts while treating *IVI* not only as a rule of general applicability but one that extends beyond unrecoverable costs to recoverable costs and to the context of a tariff found to violate single issue ratemaking. Moreover, AG/CUB have cited no case that holds that when single issue ratemaking is found, a refund is automatic, nor that it automatically is at the 100% level. Thus, there is no case supporting their attempt to limit *BPI II* to its facts or setting up a contrary general principle.

Second, AG/CUB now agree that principles of equity and unjust enrichment apply here, although they claim the only fact that matters in assessing equity and unjust enrichment is that the cost recovery provisions were held to be single issue ratemaking. See AG/CUB Init. Br. at 7-9, 11, 20. They give no sound reason for the Commission to consider no other facts. They cite *IVI* and *ComEd 07-0566 Remand Appeal*, but those cases involved costs held to be unrecoverable and costs held to be excessive, respectively, as noted above. AG/CUB do not cite anything that warrants reading either of those decisions to mean no other facts matter when a case involves single issue ratemaking and the costs at issue are recoverable and are not excessive.

AG/CUB are turning the principles of equity and unjust enrichment on their heads. This is not how equity and unjust enrichment principles work. For example, even when a plaintiff has established as a matter of law that the defendant has maintained a nuisance, a court looks to all the circumstances and the real equities to consider whether an injunction should issue. *E.g.*, *Haack v. Lindsay Light & Chemical Co.*, 393 Ill. 367, 371-372 (1946) (“It is equally clear that the rule in this State and generally, is, and should be, that even though a right has been established in law, a court of equity will not, as a matter of course, interpose by injunction but

will consider all the circumstances, the consequences of such action and the real equity of the case.”). In affirming the rejection of a claim to an award from a tax indemnity fund, the Supreme Court of Illinois in *Malmloff v. Kerr*, 227 Ill. 2d 18 (2007), discussed at length what equity means. While that discussion is too lengthy to quote in full here, ComEd notes that the Court stated, among other things, that “equity ‘looks mainly to the real justice and merits of a cause’” (citing a case that in turn cited Black’s Law Dictionary’s definition of equity), and that “such a broad concept of fairness can be applied in a given case only if a broad range of circumstances are considered”. *Id.* at 125-126 (additional citations omitted).⁷ With respect to unjust enrichment, under Illinois law, a party has been unjustly enriched as a result of an order or judgment that is later ruled invalid only if the party has received benefits that belong to another. *See Village of Oak Lawn v. Faber*, 378 Ill. App. 3d 458, 469 (1st Dist. 2007) (defining “unjust enrichment” as “the retention of a benefit conferred by another, without offering compensation, in circumstances where compensation is reasonably expected” (quoting Black’s Law Dictionary (8th ed. 2004))). Thus, a refund of the \$14.6 million is not automatic, and the Commission must consider the facts to determine if ComEd has been unjustly enriched by retaining the \$14.6 million. Whether the costs were prudent and reasonable, and benefited customers, is central to whether ComEd was unjustly enriched or, conversely, whether a refund would be a windfall to customers.

AG/CUB suggest that considering the facts is the same thing as saying there is no remedy. AG/CUB Init. Br. at 20-21. That argument assumes that considering the facts would result in the conclusion that the costs are prudent and reasonable and, therefore, that there should

⁷ See also, e.g., *Tamalunis v. City of Georgetown*, 185 Ill. App. 3d 173 (4th Dist. 1989) (reversing injunction and quoting *Haack*). See also *Wells Fargo Nat’l Bank v. McCluskey*, 2013 IL 115469 at ¶ 23 (2013) (“Although in both a proceeding to vacate a default judgment under section 2-1301(e) and a section 15-508(b) hearing, justice is the driving force; it is the nature, procedural posture, and the facts and circumstances of the case that informs the court’s equitable discretion and understanding of whether justice is being done.”).

be no refund. If that assumption is made, then there is no sound reason to assume that a refund nonetheless should be ordered, at least when the underlying legal concern is single issue ratemaking. That concern, unlike a finding of unrecoverable or excessive costs, does not imply that costs were over-recovered as opposed to under-recovered.

AG/CUB also cite the \$2.3 million refund that was approved on remand in the 2009 Peoples Gas rate case (AG/CUB Init. Br. at 8), but there the refund was agreed to by the utility, and the order on remand was an agreed order. The issues in dispute here were not litigated there.

AG/CUB and Staff also cite certain statutory provisions, especially Section 9-250 of the Act, 220 ILCS 5/9-250 (AG/CUB Init. Br. at 5-6, 12; Staff Init. Br. at 5-6), but ComEd does not understand them to argue that any of those sections standing alone gives the Commission the authority to order a refund in this case. That would be incorrect. The power to order a refund here, if any, derives from the equity power of a court. *IVI*, 117 Ill. 2d at 96; *People ex rel. Hartigan v. Illinois Commerce Comm'n*, 148 Ill. 2d 348, 396, 416 (1992). AG/CUB later agree, as they must, that the Act itself does not provide such authority. AG/CUB Init. Br. at 7, 11.

Finally, AG/CUB argue that it is beyond this Docket's scope whether the AMI Pilot costs at issue were prudent, reasonable, and benefitted customers. AG/CUB Init. Br. at 18. AG/CUB's circular argument assumes their legal arguments are right. They are not right.

AG/CUB's and Staff's claim -- that ComEd, as a matter of law, cannot retain the \$14.6 million that it recovered for costs it incurred prudently, reasonably, and on behalf of customers -- is not a pure issue of law, much less is it supported by the law. There is no case so holding when single issue ratemaking is found. *BPI II* is to the contrary. The Commission must consider the facts to determine the real equities and whether or to what extent ComEd was unjustly enriched, or, conversely, whether a refund would be a windfall for customers.

III. The Extent of a Refund (the Potential Refund Calculation Period)

AG/CUB and Staff argue for jumping back in time from the March 19, 2012, *Rider AMP Appeal* decision, to make a refund due as to cost recovery from the date of the September 30, 2010, *Rider SMP Appeal* decision. They have to justify this jumping back in time in order to avoid their claim being improper under the filed rate doctrine and the rule against retroactive ratemaking, referenced above, except as to the \$400,000 (rounded) of the \$14.6 million at issue that was recovered from March 19, 2012, on. Their arguments are incorrect.

The foundation of their argument is the fact that the *Rider AMP Appeal* decision applied collateral estoppel and law of the case doctrines to the question of whether the cost recovery provisions of Rider AMP were single issue ratemaking, holding, in the context of this issue, that Rider AMP and Rider SMP were the “same rider”, even though it is undisputed that there are differences between the two riders.⁸ *See, e.g.*, AG/CUB Init. Br. at 10-11, 20; Staff Init. Br. at 4. They reason from that starting point that this means cost recovery under Rider AMP became unlawful as of September 30, 2010. *See, e.g.*, AG/CUB Init. Br. at 6-7; Staff Init. Br. at 4, 7-8.

Their reasoning is wrong. On December 9, 2010, the Commission itself allowed the continued recovery of costs of AMI Pilot capital investments under the Rider AMP mechanism. The Commission did so when it acted on the “Bridge Tariff” petition in ICC Docket No. 10-0597. ComEd contends that the Bridge Tariff was authority for recovery of AMI Pilot costs through the Rider AMP mechanism from January 2011 on, as discussed further below. While AG/CUB and Staff disagree, they do not deny, at a minimum, that the Commission at that

⁸ No one can claim there are no differences between the Riders, because a comparison of the two tariffs shows that they are different in various ways. When determining whether the cost recovery provisions of Rider AMP were single issue ratemaking, the Appellate Court said, in part: “For purposes of testing their validity under ratemaking principles, Rider SMP and Rider AMP are indistinguishable.” *Rider AMP Appeal*, 2012 IL App (2d) 100024 at ¶ 48. (Emphasis added.) That is not the same as saying they are the same for all purposes and in all respects.

time permitted the recovery of those costs to continue. After the Commission did so, no party sought a stay in that Docket, and no party appealed from it.

Even more importantly, neither AG/CUB nor Staff mention, much less explain how their claim can be correct given, that on February 8, 2011, the Appellate Court that issued the *Rider AMP* Appeal decision denied the AG’s motion for an order to “make clear that refunds are due to ratepayers from the date the Court entered judgment in [*Rider SMP Appeal*] – September 30 2010”.

AG/CUB’s assertion that, after September 30, 2010, ComEd was “on notice” and “gamble[d]” (AG/CUB Init. Br. at 13-14), cannot withstand scrutiny given the action of the Commission on December 9, 2010, the failure of any party to seek a stay or appeal from that action, and the action of the Appellate Court on February 8, 2011.⁹

AG/CUB now try to argue that their jump back in time claim is supported by *Archer-Daniels-Midland Co. v. Illinois Commerce Comm’n*, 293 Ill. App. 3d 459 (3d Dist. 1997). AG/CUB Init. Br. at 19-20. Their argument is circular, and it also is erroneous. Their argument is circular, because it assumes that the time recovery under Rider AMP became unlawful was September 30, 2010. Their argument is incorrect, as well. The Appellate Court did not approve a jump back in time. The Appellate Court held certain costs were not recoverable through a fuel adjustment clause (“FAC”) as well as holding that they were the product of single issue ratemaking, and yet the Appellate Court still made its ruling prospective only “due to the potential inequitable consequences resulting from this reversal”. *Id.* at 468. The Supreme Court of Illinois reversed, but on the grounds that the costs were recoverable through

⁹ AG/CUB criticize ComEd for pointing to the fact that the two Rider decisions did not order a remand or a refund (see AG/CUB Init. Br. at 8-9, 21), but that is a straw man argument. ComEd’s point is that the Appellate Court, after denying the AG motion for an order that a refund was owed, then heard the merits, in which no party argued that a refund was owed or requested one (thus waiving it), and the Court did not order a refund (or a remand).

the FAC and that single issue ratemaking doctrine does not apply outside of a base rate case. *Archer-Daniels-Midland Co. v. Illinois Commerce Comm'n*, 184 Ill. 2d 391 (1998). The Supreme Court did not address the ruling of the Appellate Court on equity. Nothing in the Appellate Court decision supports jumping backward in time as AG/CUB and Staff propose. To the contrary, it supports not jumping back in time, for that would be inequitable.

Thus, any refund calculation period in this Docket, if there is to be one, cannot start before March 19, 2012. Also, alternatively, if a refund calculation period started as of September 30, 2010, then it ended as of December 31, 2010, as discussed further below.

IV. The Amount of a Refund

ComEd contends that no refund is owed. Equity does not support or permit any refund, because what is at issue is its retention of recovery of \$14.6 million that it spent prudently, reasonably, and to benefit customers, such that it was not unjustly enriched, and a refund would be a windfall to customers, as discussed earlier.¹⁰

ComEd contends, in the alternative, that, at most \$400,000 potentially is subject to refund, *i.e.*, the amount collected from March 19, 2012, on, and that any refund is subject to offset of the \$5.1 million out of the \$14.6 million at issue that ComEd already credited to customers. That offset is discussed further below.

ComEd also contends, further in the alternative, that only \$6.3 million of the \$14.6 million at issue was recovered under Rider AMP, with the other \$8.3 million being recovered under the authority of the Bridge Tariff through the Rider AMP mechanism (the Rider AMP line on customer bills) from January 2011 through December 2012. ComEd Init. Br. at 8.

¹⁰ ComEd notes that its current understanding is that Staff may contend that approximately \$3,000 was recovered in 2013 as a result of billing adjustments and should be included in the proposed refund.

This means that, even if the potential refund calculation period were to start on September 30, 2010, it would end on December 31, 2010.

AG/CUB argue that, as a matter of law, the Bridge Tariff was not the source of authority for recovering that \$8.3 million. AG/CUB Init. Br. at 15-18. However, at the same time, they cite as evidence an excerpt from ComEd's petition in support of the Bridge Tariff. *Id.* at 16 and fn. 3. AG/CUB here overlook a different section of ComEd's petition (Section 6(b)), which expressly recognized that certain costs of capital investments incurred under the AMI Pilot would continue to be recovered through the Rider AMP mechanism. AG/CUB also admit that, in the AG's verified response to ComEd's petition in the Bridge Tariff Docket, the AG argued that the continued cost recovery would "continue through the Bridge Tariff", although they now argue that what the AG said then was an error. AG/CUB Init. Br. at 16, fn. 2. AG/CUB also now argue that ComEd's position is inconsistent with certain discovery responses (AG/CUB Init. Br. at 17-18), but that again is reliance on evidence, and it is mistaken because it fails to recognize differentiation between Rider AMP and the Rider AMP mechanism. In addition, the Bridge Tariff was not addressed in either Rider appeal. The Commission must hear all the facts on this subject, if it reaches this point.

AG/CUB's assertion that the issues related to the Bridge Tariff are beyond the scope of this Docket (AG/CUB Init. Br. at 15) makes no sense. The scope of the Docket as specified by the Order Commencing Investigation includes whether a refund is owed under Rider AMP, and, if so, the refund calculation period and the amount (and the refund mechanism). The suggestion, that the scope of this Docket does not include litigation of whether costs at issue were or were not in fact recovered under Rider AMP, is frivolous.

ComEd also proposes to submit evidence that of the \$8.3 million recovered in 2011 and 2012, \$3.6 million was for cost under-recovery in 2010, and, of that, approximately \$1.9 million was for cost under-recovery that occurred before September 30, 2010. ComEd Init. Br. at 8. ComEd submits that there is no valid or just reason to require a refund of that \$1.9 million. To do so would be contrary to the reasoning of *BPI II*, among other reasons. AG/CUB's and Staff's Initial Briefs do not directly address this point.

Finally, as noted above, it remains undisputed that ComEd already credited to customers \$5.1 million of the \$14.6 million at issue. If any refund is ordered, it has to be offset with the amount already credited, or else a double-refund will occur, which would be a windfall on top of a windfall for customers. Staff has offered no reason for ignoring this offset. Staff's Initial Brief does not mention it.

AG/CUB have offered no meaningful reason to ignore this offset. Instead, they offer a mish-mosh of irrelevant points. First, they argue that whether ComEd already credited any of the refund that AG/CUB seek is beyond the scope of this Docket. AG/CUB Init. Br. at 21. That is nonsense. This subject plainly falls within the scope of the Order Commencing Investigation, and for the AG and CUB to invoke equity and unjust enrichment while simultaneously claiming that the Commission should ignore whether customers already have been credited with any of the refund claim is absurd. Moreover, the AG/CUB argument is inconsistent, to say the least, for they also argue that the treatment in pending or future formula rate updates of a refund ordered in this Docket is within the scope of the instant Docket. *See* AG/CUB Init. Br. at 14-15.

Second, AG/CUB argue that when ComEd made the undisputed credits of \$4.7 million in its 2012 formula rate update and \$400,000 in its 2013 formula rate update, ComEd had to do so, in order to avoid double-recovery of the costs through base rates and Rider AMP, and, at the

same time, that this reflected a choice by ComEd about how to recover the costs. AG/CUB Init. Br. at 21-24. This is not an argument for disregarding those credits. That does not change that customers were credited by ComEd with the \$5.1 million of the \$14.6 million at issue. Rates were set to reduce their bills by \$5.1 million. AG/CUB also argue that the \$5.1 million was not “return[ed]” to customers, rather rates were reduced to avoid recovery of the \$5.1 million. AG/CUB Init. Br. at 23, 24. That is just word games. The rates set in those two Dockets were reduced by \$5.1 million. AG/CUB also say that the \$5.1 million reduction was not a “refund”, because it was not labeled as a “refund” and it occurs over the course of 12 months in each Docket instead of “a short period of time”. AG/CUB Init. Br. at 23-24. That is just more word games. None of the AG/CUB rhetorical legerdemain on this subject is supported by any citation that actually supports their claim. AG/CUB, ironically, assert that ComEd is playing a “shell game” (AG/CUB Init. Br. at 24), but it is AG/CUB who are using word games to try to rationalize their asking the Commission to ignore the undisputed fact that customers already were credited with \$5.1 million of the \$14.6 million at issue.

Finally, all parties agree that evidence may be offered on the subject of interest owed, if any, if a refund is directed, although it currently appears that, if a refund is ordered, the interest calculation might not be a disputed issue. *E.g.*, AG/CUB Init. Br. at 14; Staff Init. Br. at 10-11.

V. The Refund Mechanism

All parties agree that evidence is proper on the subject on the refund mechanism, if a refund is ordered. *E.g.*, AG/CUB Init. Br. at 14-15; Staff Init. Br. at 12-14. Staff also makes a legal argument about inclusion of former customers. Staff Init. Br. at 12.

ComEd plans to offer evidence responding to Staff and AG/CUB's proposals on this subject, and to present evidence regarding refund administration costs, which will be increased if former customers are included.

ComEd does not believe that the scope of this Docket includes the question of whether or how, in pending or future formula rate cases, to treat any amount that might be paid out as a refund as a result of the instant Docket. AG/CUB have indicated that they plan to address that subject here. AG/CUB Init. Br. at 14-15. That is not consistent with their attempt to exclude as "beyond the scope" issues that actually do belong in this Docket, including the offset that would have to be made for the \$5.1 million already credited in formula rate updates, as discussed above. However, in any event, if the subject of future treatment in formula rate updates is to be considered here, then ComEd reserves the right to offer evidence as well as argument upon it.

April 25, 2014

COMMONWEALTH EDISON COMPANY



By one of its counsel

Thomas S. O'Neill
COMMONWEALTH EDISON COMPANY
440 S. LaSalle Street, Suite 330
Chicago, Illinois 60605
(312) 394-7205
thomas.oneill@exeloncorp.com

Eugene H. Bernstein
10 S. Dearborn, Suite 4900
Chicago, Illinois 60603
(312) 394-5400
eugene.bernstein@exeloncorp.com

John P. Ratnaswamy
Carla Scarsella
ROONEY RIPPIE & RATNASWAMY LLP
350 West Hubbard Street, Suite 600
Chicago, Illinois 60654
(312) 447-2800
john.ratnaswamy@r3law.com
carla.scarsella@r3law.com