

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

Commonwealth Edison Company	:	
	:	
	:	Docket No. 14-0567
Reconciliation of revenues collected under	:	
Rider EDA with the actual costs associated	:	
With energy efficiency and demand	:	
Response programs.	:	

**POSITION STATEMENT OF THE STAFF
OF THE ILLINOIS COMMERCE COMMISSION**

Staff of the Illinois Commerce Commission (“Staff”), by and through its counsel, pursuant to the direction of the Administrative Law Judges (“ALJ”), respectfully submits its Position Statement in the above-captioned matter.

I. UNCONTESTED ISSUE - GREAT ENERGY STEWARDS

Staff proposed to disallow \$60,000 associated with the Great Energy Stewards Program from the PY6 reconciliation due to the failure of the program to achieve any kWh savings. (Staff Ex. 1.0, 7.) The Company agreed to this adjustment. (ComEd Ex. 4.0, 3.) This issue is no longer contested.

II. CONTESTED ISSUES

The two contested issues that remain both arise from ComEd’s implementation of Illinois Power Agency (“IPA”) Plan energy efficiency programs through two contracts with a third-party. In short, in both instances ComEd paid a contractor upfront for program costs; the contractor did not fully perform and is not due the full contract amount so,

because it was already paid, it must reimburse ComEd for overpayment; the Contractor became insolvent and cannot reimburse ComEd the money it is owed. ComEd argues that ratepayers should be responsible for the losses associated with the contractor's default, while Staff argues the Company alone should bear the financial responsibility for its contracting decisions.

ComEd argues, in essence, that it was just doing what it was told and that it could not have predicted that the contractor would become insolvent. The programs at issue derive from the IPA Plan and were approved by the Commission and so, ComEd argues, the Company cannot be held responsible for the failure of the contractor. Instead, ComEd states that the role it plays in programs is simply to manage the contracts:

Because the nature of the third-party programs is to have the third party design, implement, and run the programs to ensure the terms of the pay-for-performance contract are achieved, ComEd's role is necessarily focused on managing the contract.

(ComEd Ex. 3.0, 9.) Indeed, ComEd argues that "the Commission ultimately decides which programs will be implemented under the IPA procurement plan." *Id.* at 5. ComEd fails to note that the Commission does not instruct the Company on how to structure the contracts for the program.

While Staff acknowledges the Commission's oversight role in the implementation of the programs pursuant to the IPA Plan such oversight is not grounds for the Company to abdicate its responsibilities. ComEd issued Requests for Proposals ("RFPs") asking prospective contractors to identify and bid energy efficiencies projects. (ComEd Ex. 2.0, 26). The RFP of the successful bidder was incorporated into their contracts with ComEd as "the scope of work." (See *generally*, Staff Ex. 2.0, Attach A.) As stated by ComEd, "ComEd is tasked with coordinating the IPA Third Party Efficiency Program request-for-

proposals...and overseeing the contracting for the programs as approved by the ICC.” (Staff Ex. 1.0, 6.) Regardless of how the programs started or who directed ComEd to participate, the implementation and management of those programs is the responsibility of ComEd and ComEd alone, and the Company was obligated to act prudently when structuring its contracts. The Commission did not order ComEd to structure the contracts in such a way that all financial risk is placed solely upon its ratepayers. It would be unjust for the Commission to order that ratepayers bear the financial costs of a failed program, while ComEd, who agreed to the contract without ratepayer input, bears no costs at all.

ComEd has responsibility for contracting with third-party vendors and for managing the subsequent contracts. ComEd has characterized the contracts at issue in this proceeding as “pay for performance” contracts. Such a contract is exactly what the name suggests – a contractor is paid after it has performed. However, the contracts at issue here are not structured entirely in that manner. Rather, ComEd paid the contractor in full in one instance and paid “start-up costs” in the other, both *prior* to performance. While true pay for performance contracts would have protected ratepayers by ensuring that a contractor is only paid for work that is actually completed, the contracts as structured offer no such protection.

ComEd argues that it could not have foreseen that the contractor would become insolvent. (ComEd Ex. 3.0, 16.) While actual insolvency might have been difficult to predict it is not difficult to foresee that *something* could go wrong – in addition to insolvency any number of things such as an employee strike, inclement weather, technical errors, refusal of customers to participate, etc., would have prevented the company from achieving *100% success*. Yet, with all the things that could go wrong,

ComEd assumed the company would be 100% successful and unilaterally decided to make payments prior to any verified energy savings. Of its own accord, ComEd structured the contracts such that it is now in the difficult position of trying to recapture money it has already paid out. Ratepayers should not be responsible for the fact that ComEd is unable to do so.¹ In any other situation, under any other contract, ComEd's sole remedy would be to pursue recovery of costs expended under a contract from the breaching party – not from ratepayers. Though the contractor has failed to perform, for some reason the Company thinks it appropriate to seek financial recovery of its costs from ratepayers, who received no benefits.

Both of the contested issues are, at heart, disputes between ComEd and a third-party. Civil remedies for breach of contract are available to the Company to make it whole but, as discussed more fully herein, ratepayers should not pay the price for a breach by a third party of a contract that ComEd drafted and administered.

A. One Change - Unverified Costs

Staff proposed to disallow 27.5% of the costs associated with the One Change CFL Distribution program that could not be verified by the third party evaluator, Navigant. (Staff Ex. 1.0, 3.) This program was a third-party IPA program that distributed CFL light bulb packs free of charge to customers least likely to respond to typical lighting offers in the ComEd service territory. Id.

¹ If the situation was such that the contractor *refused* to refund money, as opposed to being *unable* to refund it, there is no question that ComEd would be responsible for enforcing the terms of its contract with the third-party contractor rather than turning to ratepayers to make up the shortfall. Failure to refund the overpayment, regardless of the reason, is a breach of contract by the third-party. ComEd is limited to remedies set forth in the contract or available at common law to remedy the breach.

The contract between ComEd and the third-party vendor contracted to perform the One Change CFL Distribution program, Project Porchlight/One Change (“Project Porchlight”), was a pay-for-performance contract based upon the net kWh saved, as determined by the independent evaluator after the close of the program year. (Staff Ex. 2.0, 3.) In other words, Project Porchlight would be paid for only those homes where delivery of CFL bulbs could be verified. Navigant was only able to verify that 72.5% of homes received CFL bulbs under the CFL Distribution program. The independent evaluator determined that there was no tracking data² associated with the remaining 27.5% of homes which supposedly received CFL bulbs and thus delivery to those homes could not be verified.

Pursuant to ComEd’s contract with Project Porchlight, Project Porchlight is not entitled to payment for the 27.5% of homes that are unverified. However, under the terms of the One Change contract, Project Porchlight was paid in full prior to the verification of any savings. The contract was not structured so that payment was only made after results were verified, nor were there any provisions for a holdback in case Project Porchlight failed to perform. Id. at 7. Because Project Porchlight was already paid in full, Project Porchlight is obligated to reimburse ComEd 27.5% of the costs associated with the One Change CFL Distribution program. However, Project Porchlight has become financially insolvent and is unable to reimburse the money it owes to ComEd. Id. at 5. The issue in this proceeding is whether the Company or ratepayers should bear the costs associated with the 27.5% of homes that were unverified but for which Project Porchlight was paid in advance.

² Under the One Change program, the longitude and latitude of every home that received CFL bulbs was to be recording using an iPad so that receipt of the bulbs could be verified. (Staff Ex. 1.0, 4.)

ComEd has stated that this contract, as well as the second contract discussed below, was designed to protect customers:

ComEd negotiated a “pay-for-performance” structure for each contract. This structure is designed to protect customers from a vendor’s failure to perform by requiring the vendor to give back funds in proportion to any shortfall in promised kilowatt-hour (kWh) savings. While vendors can begin receiving payment to cover start-up costs or in-progress payments throughout the Plan Year, at the end of the year expenses are “trued up” under the pay-for-performance structure based on the actual net kWh savings achieved by the program as validated by the independent evaluator.

(ComEd Ex. 3.0, 8.) Although the Company acknowledges that the vendor failed to achieve the agreed kWh savings and thus is not owed payment for the full cost of this program, the Company still requests recovery of the full cost of the program from ratepayers. The sole reason ComEd is in a position of trying to recover these costs from ratepayers is because it structured its contract with Project Porchlight to pay 100% up front with no holdback or other protections. Rather than protect ratepayers, it is clear that the Company’s role in this process was to manage contracts that were designed to benefit *shareholders*. Ratepayers should only be responsible for the costs associated with actual kWh savings. The costs associated with the failed kWh savings should be borne by the Company, as the Company is solely responsible for paying for work that was not and cannot be verified. Those costs should not be passed along to ratepayers and should be disallowed in this proceeding. While ComEd may not have been able to predict that Project Porchlight would become insolvent, the fact that the program achieved less than a 75% success rate is a strong indication that ComEd was not prudent in assuming 100% success.

B. One Change - Small Commercial Power Strip PY7 Start-Up Costs

Staff proposed to disallow the start-up costs paid to Project Porchlight pursuant to their contract with ComEd for the One Change Small Commercial Power Strips program which was scheduled to occur during PY7. The disallowance is based on the fact that the contracted vendor, Project Porchlight, became financially insolvent within a few months of the beginning of PY7 and failed to meet the obligations of the contract. (Staff Ex. 1.0, 5.)

The Company acknowledges that the terms of the contract require the vendor to refund these start-up costs but it is unable to do so as Project Porchlight became insolvent. As stated by the Company in rebuttal testimony:

While the program would not be offered until PY7, Project Porchlight required payment during PY6 to cover the costs of start-up fees to begin implementation of the program. Because start-up costs are commonly incurred to implement energy efficiency programs, ComEd provided Project Porchlight with \$250,000 in PY6 to begin implementation of the PY7 program.

Although the contract with Project Porchlight was again designed as a “pay-for-performance” contract, the company became insolvent and therefore the start-up funds could not be recovered.

(ComEd Ex. 3.0, 14.) Similar to the PY6 CFL Distribution program, the requisite kWh savings were not achieved under this contract and thus no money is owed to Project Porchlight. Again, the Company is in the unfortunate position of trying to collect money it paid in advance from a contractor which has become insolvent. Rather than accepting responsibility for its complacency in drafting a contract that paid prior to performance withhold holdbacks or other protections, ComEd seeks full recovery from its customers for the failed program. ComEd’s customers should not bear the financial burden of the Company’s inability to structure a “pay-for-performance” contract that actually pays for performance and protects the ratepayers from failed programs. ComEd alone determined

the terms of its contract with Project Porchlight and it should not be allowed to pass the costs of contracting errors on to ratepayers. The Small Commercial Power Strip PY7 start-up costs should be disallowed.

III. RESPONSE TO COMED ARGUMENTS

A. Recovery of Costs Under a “Pay-for-Performance” Contract, Where the Vendor Failed to Perform, Should Come from the Vendor rather than Ratepayers

The Company seeks to recover from ratepayers the costs associated with two underachieving energy efficiency and demand response programs administered by the same third-party vendor. That vendor, One Change, became insolvent and as a result did not fulfill its contractual obligations in the program year being reconciled here (“PY6”). As the Company clearly lays out in its IB, following Commission approval of the overall 2013 IPA procurement plan, ComEd negotiated the contracts to implement those programs with third-party vendors (ComEd IB, 9); ComEd negotiated what it calls a “pay-for-performance” structure for each contract (ComEd IB, 10); ComEd executed said “pay-for-performance” contracts with its vendors (ComEd IB, 11); and ComEd paid the vendors under the terms of those contracts (ComEd IB, 13). ComEd admits several times in its IB that the “pay-for-performance” structure it chose for its contracts was driven by the Commission’s directive to protect customers from the vendor’s inability to achieve the required savings. (ComEd IB, 10, 13.) There is no dispute over these facts.

Despite these uncontested facts and terms of the contracts, ComEd now seeks to recover these costs from its customers through its Rider EDA because it is unable to recoup them from One Change, the now-insolvent contractor. What is at issue is whether ratepayers can be made to pay for the failure of a vendor to perform in accordance with

the terms of the contract between ComEd and One Change, when ComEd alone decided how the contracts would be structured and that structure failed to protect its customers from the contractor's failure to perform.

The Company notes that Staff and various intervenors in the 2013 IPA procurement docket reviewed the plan, and that it was approved by the Commission. (ComEd IB, 10-11.) This is true. The Company's statement that "ComEd then executed the pay-for-performance contracts as ordered by the Commission and subsequently paid the vendors under the terms of those contracts" is, however, misleading. (ComEd IB, 13.) The Commission ordered the programs be approved; the Commission did not order ComEd to structure its "pay-for-performance" contracts to pay costs up-front without safeguards against the risk of non-performance and insolvency. ComEd acknowledges that the contracts were structured, negotiated, and executed after Commission approval of the programs. (ComEd IB, 9-11, 13.) The Commission approved programs to be implemented by third-party vendors under pay-for-performance contracts in order to protect ratepayers. As pointed out in Staff's testimony and IB, however, ComEd's contracts were not actually "pay-for-performance" contracts, where payment is dependent on performance. Rather, these contracts were essentially structured as "pay-prior-to-performance."

The Company itself states that its "involvement was limited to the contract manager role." (ComEd IB, 10.) As the "contract manager," ComEd has an obligation to ensure that the terms of the contract are enforced; that is, that costs stemming from programs that underachieve the requisite kWh savings are recouped from the vendor. ComEd repeatedly stated that its purpose in structuring the contracts as it did was to protect

customers. (ComEd IB, 10 (“[t]his structure is designed to *protect customers* from a vendor’s failure to perform by requiring the vendor to give back funds in proportion to any shortfall in promised kWh savings...”) (emphasis added); 13 (“pay-for-performance contract structure is itself a best practice and prudent *means of protecting customers* by ensuring that vendors perform as promised and refund any shortfall) (emphasis added).) While a true “pay for performance” contract – by which a contractor would be paid for actual performance – would have protected customers, ComEd’s contracts did not. In paying One Change prior to performance, ComEd assumed the risk that the contractor would not perform and that the Company would then be obligated to seek reimbursement from the contractor. Inherent in that risk is the risk that the Company would be unable to collect reimbursement. As the contract manager, ComEd failed to structure its contract to safeguard against that risk, failed to enforce the terms of the contract, and accordingly, the costs should not be passed on to ComEd’s customers.

Throughout its IB, the Company incorrectly argues that Staff suggests only that ComEd should withhold vendor payment until the final evaluation report has determined the achieved energy savings. (ComEd IB, 3.) That is patently false. Staff noted a number of alternatives available to ComEd, any one of which would have prevented the current situation of trying to collect a refund from a non-performing vendor. (ICC Staff Ex. 2.0, 7.) Staff witness Scott Tolsdorf provided additional options that were available to ComEd in structuring the contracts, such as requiring performance bonds or inclusion of a holdback provision. Id. The fact that ComEd failed to take any actions to eliminate this risk does not negate the fact that the terms of the contract specify that recovery of these costs is due to ComEd from the vendor.

B. The Commission's Decision in Docket No. 15-0541 is not Relevant

In an attempt to obfuscate the issues here, the Company improperly refers to the Final Order in the 2016 IPA Procurement Plan, Docket No. 15-0541, as having resolved the outstanding issues in this proceeding. (ComEd IB, 14.) In fact, what the Commission Order stated was just the opposite:

The Commission also did not consider matters in another Commission proceeding, Docket No. 14-0567. Issues presented in that proceeding will be resolved in that case.

Illinois Power Agency, ICC Order Docket No. 15-0541, 111 (December 16, 2015). The Commission declined to resolve the outstanding issues in the instant proceeding in the 2016 IPA procurement docket. The facts and circumstances of this matter were neither presented nor resolved in Docket No. 15-0541. The Commission's decision in the 2016 IPA procurement docket was not based upon the merits of Staff's arguments made in the instant case, but rather the fact that this reconciliation docket was the more appropriate setting to consider the failings of individual programs. ComEd relies upon the Commission's determination in the 2016 IPA procurement plan that utilities shall not be required to withhold payment and disallow costs for under-performing programs as support for rejection of Staff's recommendation in the present docket. (ComEd IB, 14.) However, Mr. Tolsdorf never recommended in the instant proceeding that the Commission order future payments to vendors be withheld until verification of energy savings. Rather, Mr. Tolsdorf recommends that the Commission disallow costs for two specific programs, where the terms of the contract were not fulfilled by the vendor and ComEd failed to adequately structure the contracts to protect customers. The 2016 IPA Procurement Plan Order specifically stated that the issues in this case should be resolved

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