

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

COMMONWEALTH EDISON COMPANY	:	
	:	
Annual formula rate update and revenue	:	No. 16-0259
requirement reconciliation under	:	
Section 16-108.5 of the Public Utilities Act.	:	

DRAFT POSITION STATEMENTS AND DRAFT CONCLUSIONS
SUBMITTED BY COMMONWEALTH EDISON COMPANY

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PROPOSED ORDER

I. INTRODUCTION / STATEMENT OF THE CASE

A. Procedural History

On April 13, 2016, Commonwealth Edison Company (“ComEd”) filed with the Illinois Commerce Commission (the “Commission” or “ICC”) ComEd’s annual formula rate update and revenue requirement reconciliation and requested the Commission to authorize and direct ComEd to make the compliance filings necessary to place into effect the resulting charges to be applicable to delivery services provided by ComEd beginning on the first day of ComEd’s January 2017 billing period, as authorized by Section 16-108.5(d) of the Public Utilities Act (the “Act” or “PUA”), 220 ILCS 5/16-108.5(d).

ComEd’s filing, consistent with Section 16-108.5(d)(1), included:

- updated inputs to the performance-based formula rate for the applicable rate year (2017) that are based on final historical data reflected in the utility’s most recently filed annual FERC Form 1 (for 2015) plus projected plant additions and correspondingly updated depreciation reserve and expense for the calendar year in which the inputs are filed (2016).
- a reconciliation of the revenue requirement that was in effect for the prior rate year (2015) (as set by the cost inputs for the prior rate year) with the actual revenue requirement for the prior rate year (as reflected in the applicable FERC Form 1 (for 2015) that reports the actual costs for the prior rate year).

The filing, consistent with Section 16-108.5(d)(1), also included: (1) a corporate officer certification relating to reconciliation Schedule “Sch FR A-1 REC” and (2) the new delivery services charges corresponding to the updated costs and reconciled revenue requirement.

Statutorily, this docket must conclude by December 9, 2016. 220 ILCS 5/16-108.5(d)(3).

The following ComEd witnesses testified in this case: Christine M. Brinkman, Chad A. Newhouse, Christ T. Siambekos, Jennifer Montague, Michael C. Moy, Frank A. Luedtke, P.E., John L. Leick, John Prueitt, P.E., and Anastasia M. Polek-O'Brien.

The following Staff witnesses testified in this case: Scott Tolsdorf, Richard W. Bridal II, and Janis Freetly.

In addition to ComEd and Staff, the People of the State of Illinois ("AG") has submitted testimony in this case. The following witnesses testified on behalf of the AG in this case: Michael L. Brosch, and Robert M. Fagan and Maximilian Chang.

During the course of the proceeding, Staff and the AG proposed adjustments and changes to the Company's proposed revenue requirements. ComEd accepted some of these adjustments and changes.

An evidentiary hearing was convened in this docket at the Commission's Chicago Office before duly authorized Administrative Law Judges ("ALJs") on August 24th, 2016. Staff, the AG, and the Citizens Utility Board ("CUB") filed and served Initial Briefs on September 9, 2016. Reply Briefs were filed and served on September 21, 2016. Briefs on Exceptions were filed and served on October 27, 2016. Reply Briefs on Exceptions were filed and served on November 3, 2016.

II. OVERVIEW OF THE RATE FORMULA AND UPDATE

ComEd states that EIMA establishes an annual process by which ComEd's rate year costs and revenue requirements are first estimated, and then finally fixed and reconciled when actual costs are known. The objective is to:

... ultimately reconcile the revenue requirement reflected in rates for each calendar year, beginning with the calendar year in which the utility files its performance-based formula rate tariff pursuant to subsection (c) of this Section, with what the revenue requirement determined using a year-end rate base for the applicable calendar year would have been had the actual cost information for the applicable calendar year been available at the filing date.

220 ILCS 5/16-108.5(d)(1).

ComEd explains that, to accomplish this objective, EIMA requires that each FRU involve both a final reconciliation of the revenue requirement "for the prior rate year," for which actual costs will be known by the time of filing, and a provisional projection of the revenue requirement for the following calendar year. That provisional Initial Revenue Requirement will be reconciled two years hence. EIMA requires ComEd to base that

projection on “historical data reflected in the utility’s most recently filed annual FERC Form 1 plus projected plant additions and correspondingly updated depreciation reserve and expense for the calendar year in which the inputs are filed.” 220 ILCS 5/16-108.5(d)(1). ComEd states that EIMA thereby establishes a two-year cycle of before-the-fact estimation based on actual and projected costs for years earlier than the rate year and a subsequent after-the-fact reconciliation of that estimated Initial Rate Year Revenue Requirement with the actual data. Thus, in the end, and after adjustment for interest, the rates for each year should be based purely on actual cost.

This process is conducted using the rate formula exactly as approved and found compliant with EIMA in Docket Nos. 11-0721, 13-0386, and 13-0553. Moreover, this structure replicates the structure used in Docket Nos. 15-0287, 14-0312, 13-0318, 12-0321, and, insofar as is possible given the special start up rules, also mirrors the process followed in Docket No. 11-0721. See generally *Commonwealth Edison Co.*, ICC Docket No. 15-0287, Final Order (Dec. 9, 2015) (“2015 Rate Case Order”); *Commonwealth Edison Co.*, ICC Docket No. 14-0312, Final Order (Dec. 10, 2014) (“2014 Rate Case Order”); *Commonwealth Edison Co.*, ICC Docket No. 13-0318, Final Order (Dec. 18, 2013) (“2013 Rate Case Order”); *Commonwealth Edison Co.*, ICC Docket No. 12-0321, Final Order (Dec. 19, 2012) (“2012 Rate Case Order”); *Commonwealth Edison Co.*, ICC Docket No. 11-0721, Final Order (May 28, 2012) (“2011 Rate Case Order”). ComEd Init. Br. at 2-3.

III. OVERALL REVENUE REQUIREMENT

This formula rate update (“FRU”) proceeding sets ComEd’s distribution rates applicable during 2017. Those rates are set in order to recover the balance of ComEd’s fully reconciled actual costs for rate year 2015 as well as the initial projection of ComEd’s 2017 costs as provided for by EIMA. “EIMA” refers to the Energy Infrastructure Modernization Act, Public Act (“PA”) 97-0616, as amended by PA 97-0646 and PA 98-0015, and the changes and additions it made to the PUA. The 2017 Rate Year Net Revenue Requirement used to set those rates derives from the following figures:

1. The 2015 Reconciliation Adjustment – the difference between ComEd’s rates in effect in 2015 and the 2015 Reconciliation Revenue Requirement determined based on ComEd’s actual 2015 costs as reported in its Federal Energy Regulatory Commission (“FERC”) Form 1 for 2015, corrected for the lost time value of money;
2. The 2017 Initial Rate Year Revenue Requirement – a projection of 2017 costs based on ComEd’s actual 2015 operating costs and rate base plus projected 2016 plant additions and the associated adjustments to accumulated depreciation (the associated change in the depreciation reserve), depreciation expense, and, per the Commission’s prior Orders, accumulated deferred income taxes (“ADIT”);
3. The “ROE Collar” adjustment relating to 2015 and the “ROE Penalty Calculation” applicable to 2015.

E.g., ComEd Ex. 1.0 at 10-18.

ComEd presented substantial evidence supporting its proposed 2017 Rate Year Net Revenue Requirement and the components thereof through the testimony of 9 witnesses and the attachments, schedules, and exhibits they sponsored. Staff and the AG presented evidence on a limited number of contested issues. The Commission's determinations on the subject of rate base issues are reflected and set forth below in the applicable sections of this Order.

A. 2017 Initial Rate Year Revenue Requirement

ComEd presented extensive evidence showing that its properly calculated 2017 Initial Rate Year Revenue Requirement as adjusted in its surrebuttal testimony is \$2,568,747,000. ComEd Ex. 13.0 at 5; ComEd Ex. 13.01, Sch FR A-1, line 23. [The Commission approves ComEd's figure based on the extensive evidence in the record and the reasons indicated later in this Order with respect to the contested issues.] [The Commission's determination regarding the 2017 Initial Rate Year Revenue Requirement is set forth later in this Order.]

B. 2015 Reconciliation Adjustment

ComEd presented detailed evidence that its properly calculated 2015 Reconciliation Adjustment (including interest), reflecting the difference between the rates in effect in 2015 and the actual 2015 Reconciliation Revenue Requirement as adjusted in surrebuttal is \$71,829,000. ComEd Ex. 13.01, Sch FR A-4, line 31. [The Commission approves ComEd's figure based on the detailed evidence in the record and the reasons indicated later in this Order with respect to the contested issues.] [The Commission's determination regarding the 2015 Reconciliation Adjustment is set forth later in this Order.]

C. ROE Collar and ROE Penalty Calculation

ComEd presented detailed evidence that its properly calculated ROE Collar adjustment is \$7,104,000. ComEd Ex. 13.01, Sch FR A-1, line 35. The ROE Penalty Calculation is set forth on workpaper ("WP") 23 and is reflected in ComEd's Cost of Capital Computation on Sch FR D-1. See ComEd Ex. 13.01, Sch FR D-1; see also ComEd Ex. 2.02, WP 23. ComEd has reflected a penalty of 5 basis points for the Reconciliation Year on Sch FR D-1, line 9 as a result of failing to meet a service reliability performance metric resulting in a reduction of the allowed ROE to 8.59%. ComEd Ex. 1.0 at 15; ComEd Ex. 13.01, Sch FR D-1, lines 9, 11. The Commission approves ComEd's figure based on the detailed evidence in the record.

D. 2017 Rate Year Net Revenue Requirement

Accordingly, ComEd provided extensive evidence that its properly calculated 2017 Rate Year Net Revenue Requirement, reflecting the adjustments made in surrebuttal testimony, is \$2,647,680,000. ComEd Ex. 13.0 at 5; ComEd Ex. 13.01, Sch FR A-1, line 36.

IV. RATE BASE

A. Overview

ComEd fully supported its 2015 Reconciliation Year rate base and its 2017 Initial Rate Year rate base through the testimony of multiple witnesses. ComEd's figures should be approved. The prudence and reasonableness of ComEd's rate base was supported by detailed testimony and documentation. No witness proposed any rate base disallowance.

1. 2015 Reconciliation Rate Base

ComEd submitted extensive evidence that its properly calculated 2015 Reconciliation Year rate base, as adjusted in its rebuttal and surrebuttal testimony is \$7,781,270,000. ComEd Ex. 9.0 at 8; ComEd Ex. 13.01, Sch FR B-1, line 28. The Commission approves ComEd's figure based on the extensive evidence in the record.

2. 2017 Initial Rate Year Rate Base

ComEd also submitted extensive evidence that its properly calculated 2017 Initial Rate Year rate base as adjusted in its rebuttal and surrebuttal testimony is \$8,831,123,000. ComEd Ex. 9.01, Sch FR B-1, line 36; ComEd Ex. 13.01, Sch FR B-1, line 36. The Commission approves ComEd's figure based on the extensive evidence in the record.

B. Potentially Uncontested Issues

1. Plant in Service

a. Distribution Plant

ComEd's Distribution Plant in rate base for the 2015 Reconciliation Revenue Requirement and the 2017 Initial Rate Year Revenue Requirement is uncontested. ComEd's Distribution Plant in service as of December 31, 2015 includes the Chicago Training Center (ITN 47300), TDC 525 Normantown (ITN 51023), Customer Project (ITN 49134), OMS Lifecycle Upgrade (ITN 46246), and 3P160001 TSS 174 University Install Transformer (Dist) (ITN 52008). ComEd Ex. 5.01, Sch F-4, lines 1-5; ComEd Ex. 5.0 at 29-41. ComEd's 2016 projected plant additions consist of \$1,950,071,000 of Distribution Plant additions expected to be in service as of December 31, 2016. ComEd Ex. 2.0 at 26; ComEd Ex. 2.01, Sch FR B-1, lines 29 and 31. These additions were described in accordance with 83 Ill. Admin. Code § 285.6100. ComEd demonstrated that its Distribution Plant for the 2015 Reconciliation Revenue Requirement was prudently

acquired at a reasonable cost and was used and useful when placed into service. ComEd further demonstrated that its Distribution Plant for the 2017 Initial Rate Year Revenue Requirement is prudent and reasonable and the underlying assets are used and useful. ComEd Ex. 5.0 at 24-26. ComEd Init. Br. at 6-7. Neither Staff nor the AG disagreed. The Commission therefore approves the foregoing Distribution Plant costs.

b. General and Intangible Plant

ComEd's General and Intangible ("G&I") Plant in rate base for the 2015 Reconciliation Revenue Requirement and 2017 Initial Rate Year Revenue Requirement is uncontested. ComEd's 2016 projected plant additions include \$298,986,000 of G&I Plant additions. ComEd Ex. 2.0 at 26; ComEd Ex. 2.01, Sch FR B-1, line 31. ComEd demonstrated that its General and Intangible ("G&I") Plant for the 2015 Reconciliation Revenue Requirement was prudently acquired at a reasonable cost and was used and useful when placed into service. ComEd further demonstrated that its G&I Plant for the 2017 Initial Rate Year Revenue Requirement is prudent and reasonable and the underlying assets are used and useful. ComEd Ex. 5.0 at 24-26. ComEd Init. Br. at 7. Neither Staff nor the AG disagreed. The Commission therefore approves the foregoing G&I Plant costs.

2. Regulatory Assets and Liabilities

ComEd included in its 2015 Reconciliation Revenue Requirement rate base and its 2017 Initial Rate Year Revenue Requirement rate base Regulatory Assets amounting to \$147,089,000. ComEd Ex. 2.01, Sch FR B-1, line 19. ComEd's Regulatory Assets are comprised of: (1) a regulatory asset representing the unamortized balance (as of year-end 2015) of capitalized incentive compensation costs, (2) the unrecovered costs related to ComEd's Advanced Metering Infrastructure ("AMI") pilot, and (3) the unrecovered balance of the accelerated depreciation associated with ComEd's AMI investment (apart from the AMI pilot). ComEd Ex. 2.0 at 22; ComEd Ex. 2.01, App 5, line 4. The Regulatory Assets and Liabilities for the 2015 Reconciliation Revenue Requirement and the 2017 Initial Rate Year Revenue Requirement are uncontested. ComEd Init. Br. at 7. Therefore, the Commission approves this component of rate base.

3. Deferred Debits

ComEd included in its 2015 Reconciliation Revenue Requirement rate base and its 2017 Initial Rate Year Revenue Requirement rate base Deferred Debits amounting to \$34,034,000. ComEd Ex. 2.0 at 22-23; ComEd Ex. 2.01, Sch FR B-1, line 20. ComEd's Deferred Debits included in the rate base are comprised of: (1) Cook County Forest Preserve Fees related to licensing fees for distribution lines; (2) a Long Term Receivable from the Mutual Beneficial Association ("MBA") Plan related to ComEd's payments to the trust on behalf of union employees for short term disability and for which it is awaiting reimbursement; (3) a deferred debit associated with ComEd's capitalized vacation pay not included in plant-in-service; (4) expected recoveries from insurance on claims made by the public against ComEd; and (5) payment to the Commission for fees related to future long-term debt issuances. ComEd Ex. 2.0 at 22-23; ComEd Ex. 2.01, App 5, lines

5-9. ComEd Init. Br. at 8. The Deferred Debits for the 2015 Reconciliation Revenue Requirement rate base and the 2017 Initial Rate Year Revenue Requirement rate base are uncontested and therefore approved.

4. Other Deferred Charges

ComEd states that it included in its 2015 Reconciliation Revenue Requirement rate base and its 2017 Initial Rate Year Revenue Requirement rate base Other Deferred Charges relating to incremental distribution storm costs greater than \$10 million. ComEd Ex. 2.0 at 23-24. These costs include certain storm expenses, which ComEd is amortizing over five years pursuant to Section 16-108.5(c)(4)(F). Specifically, ComEd is amortizing over five years the expenses of three 2011 storms, two 2012 storms, two 2013 storms, and two 2014 storms, each of which incurred costs in excess of \$10 million. In 2011, 2012, 2013, and 2014, these storm costs totaled \$68,201,000, \$21,271,000, \$21,987,000, and \$38,139,000, respectively. ComEd Ex. 2.0 at 23. The unamortized balances of the 2011, 2012, 2013, and 2014 storm expenses, \$0, \$4,249,000, \$8,795,000, and \$22,883,000, respectively, are included in rate base. *Id.*; ComEd Ex. 2.02, WP 8, lines 10-13. No storm expenses were greater than \$10 million in 2015. ComEd Ex. 2.0 at 23.

In addition, ComEd explains that it has removed certain merger expenses related to the Exelon/Constellation Energy Group (“CEG”) merger from its operating expenses, and is amortizing them over a five-year period. *Id.* ComEd Init. Br. at 8. ComEd recorded CEG merger expenses of \$31,912,000, and \$11,432,000 in 2012 and 2013, respectively, and unamortized merger expense balances for 2012 and 2013 of \$6,291,000 and \$4,566,000, respectively. *Id.* at 23-24.

The total unamortized balance related to all of these storm-related and merger expenses is \$46,784,000. *Id.* at 24; ComEd Ex. 2.01, Sch FR B-1, line 24; ComEd Ex. 2.02, WP 5, page 1, lines 2, 15, 30. No party contested these issues. ComEd Init. Br. at 9. The Commission therefore approves this component of rate base.

5. Accumulated Provisions for Depreciation and Amortization

The total Accumulated Depreciation related to ComEd’s rate base, as of December 31, 2015, is \$6,697,788,000. This total was comprised of \$5,826,795,000 related to Distribution Plant and \$870,993,000 related to G&I Plant. ComEd Ex. 13.01, Sch FR B-1, lines 7-12. ComEd’s Accumulated Provisions for Depreciation and Amortization related to ComEd’s rate base is uncontested. ComEd Ex. 13.01, Sch FR B-1, lines 7-12. ComEd Init. Br. at 9. The Commission approves this component of rate base.

6. Accumulated Miscellaneous Operating Provisions

ComEd explains that it has also included other liabilities in its rate base. These liabilities, after adjustments, are Operating Reserves of \$311,319,000, Asset Retirement Obligations of \$22,055,000, and Deferred Credits of \$115,148,000. ComEd Ex. 2.02, WP 5, pages 3-4. ComEd’s Operating Reserves and Deferred Liabilities for the 2015

reconciliation year and 2016 filing year are uncontested. ComEd Ex. 2.0 at 24; ComEd Ex. 2.01, Sch FR B-1, lines 21 through 23. ComEd Init. Br. at 9. The Commission therefore approves this component of rate base.

7. Asset Retirement Obligation

ComEd's Asset Retirement Obligation represents asset removal costs recovered through depreciation accounts. The Asset Retirement Obligation consists of \$22,055,000 and is recorded in Account 230, as noted in the testimony of Mr. Newhouse. The Asset Retirement Obligation costs were previously recorded in Account 108 – Accumulated Depreciation and were reclassified in 2005 in accordance with the Uniform System of Accounts (“USOA”). ComEd Ex. 2.01, Sch FR B-1, line 22; ComEd Ex. 2.0 at 25. ComEd's Asset Retirement Obligation is uncontested. ComEd Init. Br. at 10. Therefore, the Commission approves this component of rate base.

8. Customer Advances

ComEd explains that under the terms of Rider DE – Distribution System Extensions, ComEd receives refundable distribution system extension deposits from customers as customer advances to begin construction. ComEd has reduced rate base for these deposits as of December 31, 2015 in the amount of \$107,807,000. ComEd Ex. 2.0 at 26; ComEd Ex. 2.01, Sch FR B-1, line 26. These items are uncontested. ComEd Init. Br. at 10. The Commission therefore approves this component of rate base.

9. Customer Deposits

ComEd receives refundable deposits from certain new customers as a condition of initiating electric service. ComEd applied its year-end balance of those refundable customer deposits to its rate base, which resulted in a reduction to the rate base of \$131,133,000. ComEd Ex. 2.0 at 25-26; ComEd Ex. 2.01, Sch FR B-1, line 25, and App 2 “Customer Deposits Information.” ComEd's Customer Deposits for the 2015 Reconciliation Revenue Requirement rate base and the 2017 Initial Rate Year Revenue Requirement rate base are uncontested. ComEd Init. Br. at 10. Therefore, the Commission approves this component of the rate base.

10. Cash Working Capital

ComEd states that the Cash Working Capital (“CWC”) reflected in its rate base is the amount of cash that ComEd maintains in order to meet its expenses and other cash outflow obligations. ComEd Init. Br. at 10. ComEd explains that the amount of CWC is based on its lead/lag study, which is a specific analysis of the timing of applicable cash inflows to and cash outflows from a utility. ComEd Ex. 2.0 at 19. ComEd Init. Br. at 10-11.

ComEd's rate base includes a deduction as adjusted in its rebuttal and surrebuttal testimony of \$50,297,000 for CWC that impacts both the 2015 Reconciliation Revenue Requirement and the 2017 Initial Rate Year Revenue Requirement. ComEd Ex. 13.01,

Sch FR B-1, line 16. ComEd states that in accordance with the final Order in Docket No. 13-0318 (2013 Rate Case Order at 18), ComEd has adjusted the formula rate App 3 to include a calculation of CWC specifically for the 2016 Initial Rate Year Revenue Requirement. ComEd Ex. 2.0 at 19. ComEd further states that this 2017 Initial Rate Year Revenue Requirement adjustment was a deduction in the amount of \$2,379,000. ComEd Ex. 13.01, Sch FR B-1, line 34a. The leads and lags used to determine CWC were approved in ICC Docket No. 14-0312. ComEd Ex. 2.0 at 19-20. These items are uncontested. ComEd Init. Br. at 11. The Commission therefore approves this component of rate base.

11. Construction Work in Progress

ComEd's Construction Work in Progress ("CWIP") for the 2015 Reconciliation Revenue Requirement rate base is uncontested. ComEd has included \$40,654,000 of CWIP for projects that do not accrue AFUDC in its rate base for the 2015 Reconciliation Rate Year. ComEd Ex. 2.0 at 18; ComEd Ex. 2.01, Sch FR B-1, line 14. ComEd demonstrated that its CWIP for the 2015 Reconciliation Revenue Requirement is prudent and reasonable. See ComEd Ex. 5.0 at 21. ComEd Init. Br. at 11-12. Neither Staff nor the AG disagreed. Therefore, the Commission approves this component of rate base.

12. Accumulated Deferred Income Taxes

ComEd states that the appropriate level of ADIT to be deducted from rate base as of December 31, 2016 is \$3,562,361,000, after adjustments, as shown in ComEd Ex. 13.01, Sch FR B-1, line 17. This amount was derived through an analysis of the components of the deferred tax balances which are then either directly assigned or allocated based on the assignment or allocation of the operating items to which they relate. The 2015 ADIT balance is reflective of the 50% bonus depreciation applicable to 2015 capital investments as well as of the current year deduction under the safe harbor method of tax accounting for repair costs. The jurisdictional amounts allocated to delivery service are presented in ComEd Ex. 9.01 App 4 "Accumulated Deferred Income Taxes Information." The calculation complies with the determinations of the Commission and of the Courts concerning this issue. ComEd Ex. 2.0 at 20-21. ComEd also notes that an Accounting Standard Update ("ASU") was issued in November 2015 by the Financial Accounting Standards Board ("FASB") to simplify the presentation of deferred income taxes by requiring that deferred tax liabilities and assets be classified as non-current in a classified statement of financial position. As a result, deferred tax assets and liabilities with a current and non-current designation have been combined and reflected as non-current within their respective FERC accounts (190, 282, or 283) and presented as such in ComEd Ex. 9.01, App 4. This presentation change does not, in any way, have an impact on ComEd's revenue requirement. *Id.* at 21. ComEd Init. Br. at 12. These items are uncontested. The Commission therefore approves this component of rate base.

13. Materials & Supplies

ComEd states that its Materials & Supplies ("M&S") balance includes items purchased primarily for use in the construction and maintenance of utility property.

ComEd explains that these items are kept in inventory until needed, and include, for example, building and construction materials, hand tools, and paints and adhesives. ComEd Ex. 2.0 at 21. ComEd included in its rate base the year-end balance of Materials and Supplies less the associated accounts payable. The balance of Materials and Supplies related to distribution is \$94,730,000. ComEd Ex. 2.01, App 1, line 53. The accounts payable related to distribution was calculated by multiplying the distribution related Materials and Supplies balance by the O&M factor included in cash working capital. The result of the calculation is an accounts payable balance of \$22,665,000. ComEd Ex. 2.01, App 1, line 54. The net amount of Materials and Supplies included in rate base is \$72,065,000. ComEd Ex. 2.01, Sch FR B-1, line 18. ComEd Ex. 2.0 at 21-22. ComEd Init. Br. at 12-13. These items are uncontested. The Commission therefore approves this component of rate base.

C. Operations and Planning

ComEd's Position

ComEd explains that no witness identified *any* asset in ComEd's rate base – in general or specifically related to Voltage Optimization (“VO”) and business intelligence/data analytics (“BI/DA”) applications – that should be disallowed. ComEd Init. Br. at 13. ComEd notes the evidence substantiates its rate base as reasonable in amount and as having been acquired and placed into service prudently. ComEd pointed out that the evidence also detailed the processes that it undertakes to ensure its investments meet those standards.

ComEd observes, however, that in the joint issue outline, the AG identified as rate base issues two topics discussed by its panel witnesses Messrs. Fagan and Chang. ComEd points out that the claims made by these witnesses focus on future investments and future deployment of cloud-based computing solutions and VO technologies beyond the rate horizon. While the purpose of this proceeding is to review ComEd's “updated cost inputs to the performance-based formula rate for the applicable rate year and the corresponding new charges” (220 ILCS 5/16-108.5(d)), ComEd notes that the Fagan-Chang testimony instead focuses on long-term business strategies and policy-level recommendations divorced from the rates at issue. ComEd Init. Br. at 13.

ComEd explains that, even if the Fagan-Chang claims concerning these technologies were valid and supported, they would not justify any disallowance of ComEd's rate base or any downward adjustment to its rates in this case. Thus, with respect to VO, ComEd observes that Messrs. Fagan and Chang do not focus on VO costs in the rates, but instead claim that what is “at issue” is “finding the appropriate technologies and investments to implement voltage optimization where prudent on the Company's system,” a planning question extending far beyond the rate horizon at issue in this proceeding. AG Ex. 2.0 at 10. With respect to BI/DA, ComEd points to the AG's recommendation that “the Commission require [ComEd] to develop a comprehensive, long-term plan to identify BI/DA [business intelligence / data analytics] solutions” (AG Ex. 4.0 at 17), and notes that it not only ignores the fact that ComEd already has a

comprehensive BI/DA strategy, but also that it would not affect ComEd's 2015 costs, its 2016 investments, or its 2017 rates. ComEd also notes the acknowledgment by Messrs. Fagan and Chang that they "have no basis to question the prudence of specific investments in this proceeding." AG Ex. 2.0 at 29. According to ComEd, while long-term policy questions can be raised in proper forums, the AG's acknowledgment that they have no basis to question the prudence of investments in this proceeding should end the debate over these questions in this case. ComEd Init. Br. at 13-14.

Both in its Initial and Reply Briefs, ComEd emphasizes that the AG fails to apply the well-established prudence standard to the evidence, which asks whether a past management decision was within the range of reasonability when made, based on the information then available. ComEd asserts that such a finding must be supported by a preponderance of the evidence, and not by the "substantial evidence" standard advanced by the AG.

Finally, in its Reply Brief, ComEd addresses the standard of proof applicable to the Commission's resolution of prudence claims and other contested matters in ratemaking proceedings. ComEd notes that the AG's initial brief argued that a "finding of imprudence and unreasonableness" requires only "substantial evidence, meaning 'more than a mere scintilla; however, it does not have to rise to the level of a preponderance of the evidence ...'" AG Init. Br. at 6. ComEd points out that the "substantial evidence" test the AG cites is an appellate standard, designed to be applied on review of a Commission decision based on the record, and that Illinois law calls on the Commission to base its determinations on the preponderance of the evidence. ComEd notes that this argument implies that the Commission should adopt findings of fact even where the evidence, on balance, shows those findings to be - more likely than not - incorrect, and argues that such a result would not be just, reasonable, or lawful.

Staff and Intervenor Positions

Commission Analysis and Conclusion

The purpose of this proceeding is to update ComEd's rates in accordance with the requirements of the EIMA and the established rate formula and protocols. To determine what the just, reasonable, and lawful rates are, it is the Commission's task to carefully consider the updated cost and other data which ComEd must submit and all of the other evidence that bears on those inputs and rates. To be sure, the Commission has many other regulatory functions and duties, and there may very well be occasions when long-

term business plans or future investments occurring after the rate year are shown to impact the rates being considered or the data supporting them. That, however, is not the case with the requests relating to VO and BI/DA in this proceeding. The witnesses for the AG do not seek any disallowance from the rate base at issue, nor do they claim or establish that ComEd's 2017 rates should be anything less than what ComEd proposed. Indeed, their testimony suggests a belief that, if anything, ComEd should have a greater rate base now and in the future, and should invest more. We do not find that these issues are unimportant, or unworthy of consideration. However, this is a statutory rate proceeding. We will consider and evaluate the arguments made in the context of our obligation, in this proceeding, to set rates for 2017 based on the approved rate formula and protocols and on the evidence of the relevant inputs.

There are, as ComEd witness Ms. Brinkman observed, other procedures and regulatory forums where broad issues of future investment plans may be properly raised. We urge the AG to raise these issues where they can be properly explored. For this case, however, we observe that neither the AG nor its witnesses identify or support any rate base disallowance or change in ComEd's proposed 2017 rates. If, as the AG suggests in its post-hearing Brief, the evidence is different with respect to next years' formula rate update, we are confident that the AG will bring that evidence to our attention then.

We also note that the standard applicable to any claim that rate base investments should be disallowed based on claims of "imprudence" is well established by Illinois law. The prudence of a utility decision, plan, or strategy is to be measured against the "standard of care which a reasonable person would be expected to exercise under the circumstances encountered by utility management at the time decisions had to be made." *E.g., Illinois Power Co. v. Illinois Commerce Comm'n*, 339 Ill. App. 3d 425, 435 (5th Dist. 2003); *Illinois Commerce Comm'n v. Commonwealth Edison Co.*, ICC Docket No. 84-0395, Order (Oct. 7, 1987) ("*ComEd '87*") at 17. It is established law that a finding of imprudence cannot be based on an after-the-fact analysis of information known later -- what is referred to as "hindsight." The prudence of a decision must be judged "under the circumstances encountered ... at the time decisions had to be made." *ComEd '87* at 17. Moreover, a finding of "[i]mprudence cannot be sustained by substituting one's judgment for that of another. The prudence standard recognizes that reasonable persons can have honest differences of opinion without one or the other necessarily being 'imprudent'." *ComEd '87* at 17 (emphasis added); *accord Illinois Power Co.*, 339 Ill. App. 3d at 435; *BPI '96*, 279 Ill. App. 3d at 828. We apply those standards in this Order.

We also wish to make clear that our findings are, as they must be, based on the preponderance of the evidence. That is our duty under Illinois law, including the PUA and the Illinois Administrative Procedure Act. 220 ILCS 5/10-201; 5 ILCS 100/10-15. The "preponderance of the evidence is evidence that renders a fact more likely than not." *People v. Brown*, 229 Ill. 2d 374, 385 (2008). Our application of that standard also makes sense; our findings should reflect the weight of the evidence, not a position that the evidence shows to be less likely true than not. In contrast, the "substantial evidence" standard cited by the AG sets a lower bar which is appropriate for appellate review of our decisions already based on the preponderance of the evidence.

1. Voltage Optimization (“VO”)

ComEd’s Position

ComEd explains that it established the reasonableness and prudence of the VO-related investments included in its proposed rates. In addition to the evidence supporting its overall rate base and the rigorous process of evaluating and monitoring investments discussed above, ComEd offered the testimony of a professional engineer with extensive actual experience, including in the systems at issue. According to ComEd, his testimony not only confirmed ComEd’s commitment to investigating and implementing VO efficiently, cost-effectively, and reliably, but also specifically supported the prudence of the decisions underlying the design of the validation study. ComEd Ex. 10.0 at 3-4; ComEd Ex. 14.0 at 6. ComEd Init. Br. at 14.

The record shows that ComEd completed a review of potential VO technologies, including through a comprehensive study conducted by Applied Energy Group (“AEG”), an engineering firm with specialized knowledge and experience in that area. ComEd Ex. 8.0 at 8; ComEd Ex. 10.0 at 5; ComEd Ex. 14.0 at 6. ComEd explains that this study, referred to throughout the testimony as the AEG study, preceded and is distinct from the subsequent validation study at issue in this case. The AEG study was included in ComEd’s 2015 annual Smart Grid Advanced Metering Implementation Progress Report (“AIPR”). ComEd Ex. 8.0 at 8. As explained by ComEd, on motion of the AG, and without objection from ComEd, the Commission has taken administrative notice of that document. Tr. at 20-21. The costs of the AEG study are not part of the rate base update nor the operating expenses at issue in this case. ComEd states that study is complete and its costs are not at issue in this update. What is added to rate base in this update are certain capitalized costs of the recommended follow-up study that will validate on the ComEd system specific AEG conclusions. ComEd Ex. 10.0 at 4, 8, 9. According to ComEd, approximately \$4 million of the cost of that study is capitalized and included in projected 2016 plant. ComEd Ex. 8.0 at 2; ComEd Ex. 10.0 at 9. ComEd argues that the record shows that this ongoing validation study project is properly designed, including its scope. ComEd Ex. 10.0 at 3-4, 5. ComEd Init. Br. at 14-15.

ComEd further explains that Messrs. Fagan and Chang fail to make or substantiate a claim that ComEd’s study costs are imprudent in any ratemaking sense of that word. As argued by ComEd, although they make a conclusory claim that ComEd’s validation study design is not “prudent,” they also do not state, apply, or evaluate the established legal standards for determining prudence. And as explained by ComEd, prudence has a specific legal meaning defined by Illinois courts and the Commission: the “standard of care which a reasonable person would be expected to exercise under the circumstances encountered by utility management at the time decisions had to be made.” *E.g., Illinois Power Co. v. Illinois Commerce Comm’n*, 339 Ill. App. 3d 425, 435 (5th Dist. 2003); *ComEd ‘87* at 17. ComEd Init. Br. at 15.

ComEd states that Messrs. Fagan and Chang instead simply express an after-the-fact opinion disagreeing with ComEd’s decisions. The law, however, makes clear that, even when such a dissenting view is offered by an equally qualified and informed expert

and supported by other evidence, which ComEd argues is not the case here, prudent decision-makers can and do disagree, even about what is reasonable. A finding of “[i]mprudence cannot be sustained by substituting one’s judgment for that of another. The prudence standard recognizes that reasonable persons can have honest differences of opinion without one or the other necessarily being ‘imprudent.’” *ComEd ’87* at 17 (emphasis added); *accord Illinois Power Co.*, 339 Ill. App. 3d at 435; *BPI ’96*, 279 Ill. App. 3d at 828. To be imprudent, an action or omission must not only be shown to have been wrong, but to have been outside the realm of reasoned disagreement based on the information available at the time it was made. According to ComEd, there is no evidence of that here. ComEd Init. Br. at 16.

In its Reply Brief, ComEd notes that while Messrs. Fagan and Chang sometimes use the word “imprudence,” they do not establish or opine that the conclusions of the ComEd professional engineers and experienced VO consultants who designed ComEd’s validation study were outside the range of reasonable decisions now or at the time. Moreover, ComEd asserts that when the question of the prudence of the actual rate base investments at issue was put to them, Messrs. Fagan and Chang affirmed that they “have no basis to question the prudence” of those investments. AG Ex. 2.0 at 29. ComEd explains that such an acknowledgement is consistent with the absence of any discussion in the testimony of Messrs. Fagan and Chang of the information available to ComEd at the time and the lack of any description or analysis of the range of different, yet reasonable, study design choices.

ComEd also asserts that the AG fails to address the evidence, data, and studies presented in support of the Company’s position. In particular, ComEd explains it will study nineteen diverse feeders. Yet, Messrs. Fagan and Chang posit that because those feeders are supplied by one substation, that sample “may not be sufficient.” AG Ex. 2.0 at 5. ComEd contends that aside from the tentativeness of their claim, they fail to provide data or analysis to support it. ComEd further argues that they neither identified nor produced a single workpaper, and they did not communicate with any outside expert on the underlying design or engineering. DRRs ComEd → AG 1.02 & 2.01, ComEd Group CX Ex. 1.0. And, ComEd argues, other than claiming that ComEd should study more than one substation, they do not identify the minimum characteristics of what they believe a “prudent” study would be. DRR ComEd → AG 3.01, ComEd Group CX Ex. 1.0. In contrast, ComEd explains that Mr. Prueitt not only rejects their views but explains why the study’s scope is sufficient and appropriate, a question on which their subsequent rebuttal testimony is silent. ComEd Ex. 10.0 at 6-7. ComEd notes that Mr. Prueitt’s conclusions are also consistent with the AEG study itself and with the available engineering data. ComEd Init. Br. at 16.

ComEd explains that its validation study was, moreover, not presented for the first time in this case. ComEd, in its 2016 AIPR, discussed the approach and projected cost of the validation study. ComEd further notes that report was filed with and accepted without investigation by the Commission, and without any request for investigation by the AG or any other party. ComEd Ex. 8.0 at 9; ComEd Ex. 8.01. ComEd states that AEG’s own recommendation that there be such a targeted validation study has also been part

of ComEd's annual AIPR filings since 2014 and no party opposed the VO validation project in those instances, either. ComEd Ex. 10.0 at 4. ComEd Init. Br. at 17.

Additionally, as ComEd argues, even if it were substantiated, the dissenting view of the AG's witnesses would not support the conclusion that ComEd's validation study is excessively costly or that its costs should be disallowed. To the contrary, ComEd contends, Messrs. Fagan and Chang assert that the study is *too limited* and that what they consider to be "[a] prudent study may be **more** costly" AG Ex. 2.0 at 22 (emphasis supplied). Furthermore, ComEd explains that Messrs. Fagan and Chang do not claim that a larger, more costly study like they envision would exclude the nineteen feeders selected by ComEd. ComEd argues that they cannot, therefore, conclude the costs to study those nineteen feeders are excessive, let alone imprudent, even under their view that still more feeders must also be studied. ComEd Init. Br. at 17.

ComEd explains that in the end, far from reducing ComEd's rate base, the upshot of the AG witnesses' claims is that ComEd should invest still more in these two areas and, if anything, do it faster. ComEd Ex. 8.0 at 6; ComEd Ex. 12.0 at 3-4. See also, e.g., AG Ex. 2.0 at 4 ("... investments proposed by [ComEd] and the amount of money that has been spent thus far on voltage optimization have been unreasonably small"); AG Ex. 2.0 at 21 ("[W]e are concerned that the scope of the validation project is too limited"). And, as ComEd argues, given that they acknowledge that ComEd could fully recover the greater costs of their hypothetical expanded study (assuming they were correct that such a study is actually required), they cannot justify any rate reduction. See DRR ComEd → AG 3.02, ComEd Group CX Ex. 1.0. ComEd Init. Br. at 17-18.

In its Reply Brief, ComEd also responds to the AG claims that ComEd has not "made much progress in planning to implement VO" (AG Init. Br. at 10), pointing to ComEd's 2012 Revised Smart Grid Advanced Metering Infrastructure Deployment Plan ("AMI Plan"). ComEd emphasizes that the AG bases this argument on a misinterpretation of a metric that measures something else entirely. ComEd explains that the AMI Plan measures deployment of AMI systems that can enable certain forms of VO. The AMI Plan does not commit to deploying any particular VO technology on any particular schedule; nor could it do so in advance of the studies now underway. Likewise, ComEd asserts, the metric at issue is "not a measure of the status of ComEd's study or deployment of VO generally." ComEd Ex. 10.0 at 9. Instead, ComEd states that it measures the "number and percentage of distribution lines using sensing from an AMI meter as part of ComEd's voltage regulation scheme" (AMI Plan at 39) and is designed to "determine the number of feeders that could use sensing data from AMI meters to monitor or regulate voltage." ComEd Ex. 14.0 at 4.

ComEd also responds to the AG claims that certain legislative proposals supported by ComEd that, if adopted, would among other things, support future VO investment and also call ComEd's current VO investments into question. See AG Init. Br. at 10; see also AG Ex. 2.0 at 13-14. ComEd emphasizes that these legislative proposals do not state or imply that there is any deficiency in ComEd's investment or commitment to VO and, moreover, have no relevance to the specific VO investments at issues in this case. That

proposed legislation, which remains just that, makes no reference to the VO validation project at issue here, or to VO validation at all. Tr. at 112-113. Nor does the proposed legislation address the costs at issue here. See ComEd Ex. 8.0 at 9.

ComEd requests that the Commission find that the record shows that ComEd is prudently and effectively proceeding to investigate, validate, and plan for the reliable deployment of VO, that the validation study at issue has been proven prudent, and that no disallowance is warranted.

Staff and Intervenor Positions

Commission Analysis and Conclusion

The record shows that ComEd incurred approximately \$4 million in capitalized costs in 2016 related to a VO validation study. ComEd provided testimony and documentation supporting the prudence and reasonableness of that study and its costs. The AG claims that the study is insufficiently robust, but those claims were not supported by analysis of the specific study or of the equipment and data ComEd's study will include. It comes, moreover, after the fact and is not adequate to show imprudence. It neither considers the question of study design from the perspective of what was known at the time, nor does it establish anything more than a difference of opinion about that design. As important, nothing in the AG's arguments or evidence suggests that the ComEd study was unnecessary or excessive. To the contrary, it appears that the AG witnesses would have ComEd conduct additional studies, or study additional equipment, on top of what ComEd is studying. There is no evidence that ComEd's study, or the costs it has expended, were inadequate or without benefit even were we to conclude that, here or in the future, ComEd should also do more. The Commission, therefore, concludes, based on the evidence, that ComEd's VO validation study is prudent and that there is no basis in the record for disallowing any portion of its cost.

The Commission also notes that the AG focused on other requests unrelated to the rates at issue. While the Commission remains interested in the benefits that VO technology may be able to deliver to customers, we also note that investments in this technology can be very costly and the technologies ComEd adopts must not unreasonably compromise reliability or affordability of service. We emphasize that future investments in VO will be reviewed by this Commission before they become part of rate base and the Illinois utilities' long-term plans and policies for investment and efficiency programs are also subject to regulatory inquiry and review in appropriate proceedings, including those concerning energy efficiency programs. However, this proceeding

concerns ComEd's rates for 2017 and there is nothing in this record showing that the manner in which ComEd is pursuing VO technologies warrants a reduction in those rates.

2. Data Analytics – Cloud Computing

ComEd's Position

ComEd states that its rate base update includes \$6.2 million related to the ongoing development of ComEd's data analytics platform. These costs include the ongoing development and implementation of ComEd's BI/DA strategy to define and implement "a common data management layer" within ComEd that allows applications, including "applications related to the customer, grid and business support functions" to easily connect to a broad range of data. ComEd Ex. 8.0 at 11. ComEd Init. Br. at 18. Data analytics, as used consistently throughout this proceeding, is defined as: "the tools and techniques used to understand and forecast business outcomes by analyzing the relationships among data." ComEd Ex. 8.0 at 10; AG Ex. 2.4 BI/DA is defined as: "a system of tools and technologies that fit together to assemble, transform, display and analyze data collected from a variety of sources." AG Ex. 2.4.

As ComEd explains, its BI/DA strategy is detailed and complex, and contains a data platform and five functional domains that fall within three main categories: Grid (T&D) (which includes both AMI and Grid (T&D)), Customer (which includes Smart Energy Services and Customer Experience), and Business Support. ComEd Ex. 12.0 at 5; AG Ex. 2.4. A document reflecting ComEd's overall layered BI/DA strategy is attached to the direct testimony of Messrs. Fagan and Chang as AG Ex. 2.4. ComEd further explains, in developing that strategy, ComEd and its sister Exelon-owned utilities collaborated and considered present and developing technologies, including potential business intelligence and data analytics opportunities and initiatives. AG Ex. 2.4. ComEd Init. Br. at 18.

ComEd states that the record shows that ComEd's BI/DA strategy is implemented in each domain through three stages: exploring, engaging, and establishing potential functions and applications. ComEd Ex. 8.0 at 11, 12; AG Ex. 2.6; Tr. at 30-31. That implementation is already far along in the first domain, Smart Energy Services, and ComEd is currently working on implementing the remainder. Tr. at 32. That work will require the involvement of multiple departments, including not only information services areas, but also AMI Operations and Revenue Protection. ComEd Ex. 8.0 at 10; AG Ex. 2.4. As ComEd explains, the resources ComEd devotes to the evaluation, piloting, and installation of these solutions will also enable future enhancements to the system and help identify areas in which additional functionality may be required. *Id.* at 11-12. ComEd Init. Br. at 18-19.

ComEd notes that the record backs up the prudence and reasonableness of the costs associated with ComEd's data analytics strategy and investments. Included in that support is the Data Analytics strategy presentation and a formal benchmarking study prepared for ComEd by the Boston Consulting Group ("BCG"). See AG Ex. 2.4; AG Ex. 2.6. ComEd argues that its investment in the development and execution of its BI/DA strategy is appropriate in scope and length, especially when compared with the "overall

maturity of the industry with regard to data analytics.” ComEd Ex. 8.0 at 12. As ComEd further argues, as the BCG benchmarking study explains, the “majority of utilities are in the very early stages of the BI/DA journey,” and there are currently “no clear winning technologies or solutions across the utility industry...” *Id.* at 12; AG Ex. 2.4. According to ComEd, its investment in its BI/DA strategy is also in line with other utilities, and its overall data strategy is appropriate in its scope and detail. *Id.* at 12-13. As ComEd notes, in the domains where applications are already being used, that evidence shows that success:

ComEd AMI Operations and Revenue Protection are using Operations Optimizer (formerly Detectent) software and algorithms to monitor the health and performance of the AMI network and related equipment, examine meter outage events and last gasp messages, meter alarms, meter voltage levels to ensure safe and regular levels at the customer premise, and to ensure the accuracy of billing data to prevent inaccurate bills to customers, among other analytics metrics.

AG Ex. 2.4. ComEd Init. Br. at 19.

ComEd contends that AG witnesses Fagan and Chang can deny none of this evidence, yet they nonetheless claim that ComEd does not have “an overall data strategy.” AG Ex. 2.0 at 23. Without conducting any comparable study or analysis, they assert that the Commission should “require ComEd to develop a long-term plan to fully utilize the extensive data that is becoming available due to the installation of smart meters and modern distribution infrastructure.” *Id.* at 23, 24. ComEd argues that these criticisms, like the criticisms Messrs. Fagan and Chang offered with regard to ComEd’s VO validation project, are unfounded and irrelevant. ComEd Init. Br. at 20.

As ComEd stated above, ComEd’s long-term data analytics strategy has no impact on the “prudence and reasonableness of the costs incurred by [ComEd] to be recovered during [2017].” See 220 ILCS 5/16-108.5(d) (“[T]he Commission shall have the authority ... to enter upon a hearing concerning the prudence and reasonableness of the costs incurred by the utility to be recovered during the applicable rate year”). Putting aside that ComEd does have such a strategy, ComEd argues that Messrs. Fagan and Chang fail to show that any cost or rate input is excessive or that their recommendation would have made any difference in ComEd’s rates this year. Beyond that, according to ComEd, the question of how ComEd should invest in data analytics in subsequent years is not a rate case issue, nor one the Commission can or should take up in any annual rate update. ComEd Ex. 8.0 at 4-5; ComEd Ex. 12.0 at 3-4; ComEd Init. Br. at 20.

ComEd states that as for the costs actually at issue, Messrs. Fagan and Chang never challenge them. As ComEd argues, their statement that “the prudence and reasonableness of ComEd’s expenditures on data analytics needs to be understood in light of ComEd’s overall data analytics/business intelligence approach” (AG Ex. 2.0 at 33) neither alleges nor shows any imprudence or even excessive cost. ComEd notes that the AG neither refers to any investment or component of ComEd’s rate base nor provides any reasoning or justification for any claim that any related cost is excessive or imprudent.

Indeed, ComEd states, they admit that there is no basis for such findings. *Id.* at 29. ComEd Init. Br. at 20-21.

In its Reply Brief, ComEd explains that the AG's claims concerning a report purporting to "quantify" the value of the services offered by a vendor who had commissioned the report are baseless. See AG Init. Br. at 19; AG Ex. 2.9. ComEd notes that the "report" – a short slide deck promoting a particular vendor and its product – was neither offered nor admitted into evidence for the proof of any claim made therein. Tr. at 59. Further, ComEd argues that the "report" was not entered into the record because it lacked any foundation, was not shown to be reliable, and was not substantiated by any witness. Indeed, Ms. Brinkman confirmed that the report was "stale and limited, as it only addresses one vendor's technology solutions." ComEd Ex. 12.0 at 6.

Finally, ComEd's Reply Brief also responds to the AG's claim that Messrs. Fagan and Chang "could not determine whether spending on data analytics to date is 'consistent with an overall business intelligence/data analytics strategy.'" AG Init. Br. at 17. ComEd explains that the AG witnesses did not evaluate any particular application, underway or proposed, or the related investment in the rate base in this case. And, while they professed to lack information, they also acknowledged that they "have no basis to question the prudence of specific investments in this proceeding" AG Ex. 2.0 at 29. ComEd also notes that Messrs. Fagan and Chang had access to documents, admitted into evidence, detailing that very strategy. To the extent Messrs. Fagan and Chang claim to be unable to evaluate ComEd's BI/DA strategy, that strategy was established and addressed but ignored.

In sum, ComEd claims that the AG's recommendation that the Commission "require the Company to provide updates on its progress in considering and implementing the five domains identified in the Exelon BI/DA effort" is unjustified and unrelated to the rate setting function of this case. See AG Ex. 4.0 at 3. ComEd states that this proceeding is not the appropriate forum to litigate long-term future business strategies having no impact on the rates at issue. Moreover as ComEd explains, even if the issues were conceptually germane, the evidence supports no disallowance whatsoever. According to ComEd, Messrs. Fagan and Chang cannot support their recommendations. ComEd Init. Br. at 21.

Staff and Intervenor Positions

Commission Analysis and Conclusion

ComEd has demonstrated that it has prudently and reasonably incurred \$6.2 million related to the ongoing development of ComEd's data analytics platform. These costs include the ongoing development and implementation of ComEd's Business Intelligence/Data Analytics strategy to define and implement a common data management layer within ComEd that allows applications, including applications related to the customer, grid, and business support functions, to easily connect to a broad range of data. ComEd has provided sufficient evidence to demonstrate the prudence and reasonableness of these costs, and they are approved.

Similar to our discussion of VO costs, above, the AG has failed to present a legitimate legal challenge to ComEd's DA costs. The AG's arguments disregard the record and evidence presented here, and focus largely on issues outside the scope of this proceeding. The AG is attempting to utilize this formula rate proceeding to criticize ComEd's long-term business strategies and vendor choices – such an approach is not proper, and must be rejected. The record supports ComEd's data analytics investments (indeed, no party offers a criticism of any specific cost or investment), and no disallowance is appropriate here.

V. OPERATING EXPENSES

A. Overview

ComEd fully supported its 2015 total operating expenses, adjusted to reflect the depreciation expense associated with the projected 2016 plant additions, which as presented in its surrebuttal testimony are \$1,883,410,000. ComEd Ex. 13.01, Sch FR A-1, line 11. The prudence and reasonableness of those expenses were supported by detailed testimony of primarily ComEd witnesses Brinkman, Moy, Montague, Leick, Luedtke, and Newhouse, and documentation which, with limited exceptions, was uncontested.

B. Potentially Uncontested Issues

1. Distribution O&M Expenses

ComEd states that its Distribution Operating and Maintenance ("O&M") expenses were \$465,652,000 for 2015. ComEd explains that after reflecting adjustments, a revised total of \$460,095,000 in distribution O&M expenses recorded in FERC Accounts 580-598 is included in the revenue requirement. ComEd Ex. 2.0 at 28-29; ComEd Ex. 13.01, Sch FR A-1, line 1 and Sch FR C-1, lines 1 and 11. No parties contest the amount of distribution O&M expenses. ComEd Init. Br. at 21-22. The Commission approves this amount.

2. Customer-Related O&M Expenses

ComEd states that its customer-related expenses are expenses recorded in FERC Accounts 901-910, which include the costs of maintaining and servicing customer accounts, e.g., meter reading, customer service, and billing and credit activities. ComEd

Ex. 2.0 at 29. ComEd explains that in determining the revenue requirement, ComEd has adjusted the \$498,865,000 of customer related expense for the following:

- (1) \$213,348,000 reduction to remove the costs associated with ComEd's energy efficiency and demand response program recovered under Rider EDA;
- (2) \$38,762,000 reduction to reflect the total amount of uncollectible accounts expense recorded in FERC Account 904, costs recovered through Rider UF;
- (3) \$13,106,000 reduction to remove customer care costs related to supply;
- (4) \$481,000 reduction to remove the non-jurisdictional amount of Outside Agency Collection Fees related to uncollectibles;
- (5) \$17,000 increase to include interest on customer deposits in operating expenses;
- (6) \$1,437,000 reduction to remove costs recovered under Rider PORCB;
- (7) \$959,000 reduction to remove customer assistance costs incurred as part of the \$10,000,000 EIMA customer assistance program;
- (8) \$124,000 reduction for company credit card costs;
- (9) \$2,661,000 increase for a donation to the Illinois Science and Technology Foundation;
- (10) \$826,000 reduction to remove costs associated with the 401(k) profit sharing match; and
- (11) \$74,000 reduction to remove costs associated with employee recognition expenses.

ComEd Ex. 2.0 at 29-30; see also ComEd Ex. 13.01, App 7, lines 5 through 22; ComEd Init. Br. at 22.

ComEd states that after these adjustments, \$232,426,000 of FERC Accounts 901-910 directly related to and supporting the delivery service function are included in the revenue requirement. ComEd Ex. 2.0 at 30; ComEd Ex. 13.01, Sch FR A-1, lines 2 and 3 and Sch FR A-1-REC, lines 2 and 3. No party has objected to the amount of customer-related O&M expenses. ComEd Init. Br. at 22-23. The Commission approves this amount.

3. Uncollectibles Expense

ComEd states that it has removed \$38.8 million from FERC Account 904 related to uncollectible expense and therefore has included no uncollectible customer balance in its delivery service revenue requirement. ComEd also states that it has included in the

delivery service revenue requirement the costs associated with ComEd's activities to collect past due accounts. ComEd Ex. 4.0 at 10; ComEd Ex. 2.0 at 29; ComEd Ex. 13.01, App 7, line 11. ComEd Init. Br. at 23. The Commission approves these amounts.

4. Administrative and General Expenses

ComEd states that its Administrative and General ("A&G") expenses were \$374,212,000, as adjusted in surrebuttal, for 2015. ComEd explains that A&G costs are recorded in FERC Accounts 920-935 and include corporate support and overhead costs that benefit or derive from more than one business function; costs of employee pension benefits; regulatory expenses; and certain other non-operation costs. ComEd Ex. 2.0 at 31; ComEd Ex. 13.01, Sch FR A-1, line 4; see *also* ComEd Ex. 4.0 at 9-10; ComEd Ex. 5.0 at 59-61. No party has objected to the amount of A&G expenses. ComEd Init. Br. at 23. The Commission approves this amount.

5. Charitable Contributions

ComEd states that it has included in its operating expenses a pre-jurisdictionalized amount of \$6,920,000. Of this amount, \$2,661,000 is included in customer accounts, \$4,259,000 is included in A&G accounts, and based on the W&S allocator applied to the A&G portion, \$6,386,000 is included in the revenue requirement. ComEd Ex. 2.0 at 43-44. ComEd provided a description of each charitable organization, the purpose of each donation, and how the donation meets the requirements set by Section 9-227 of the PUA. ComEd Ex. 2.02, WP 7, page 4, subpages 42-67. No party has objected to the amount of charitable contribution expenses. ComEd Init. Br. at 23-24. The Commission approves this amount.

6. Merger Expense

ComEd states that on April 14, 2014, Exelon and Pepco Holdings, Inc. ("PHI") signed an agreement and plan of merger to combine the two companies. Exelon and PHI received final approval for the merger on March 23, 2016. ComEd incurred in 2015 a total of approximately \$10.4 million in merger related costs to achieve ("CTA"). The Illinois jurisdictional amount is approximately \$9.1 million, and is included in ComEd's total A&G. ComEd Ex. 2.0 at 35-36; ComEd Ex. 13.01, Sch FR A-1, line 4 and FR A-1 REC, line 4. ComEd Init. Br. at 24.

In addition, as ComEd explains, while there were no costs (expense or capital) incurred in 2015 related to the prior merger of Exelon with Constellation Energy ("CEG"), ComEd has included in the revenue requirement the continuing amortization and return on rate base related to CEG merger costs greater than \$10 million (jurisdictional) incurred in 2012 and 2013. A breakdown of the expense and rate base components included in the revenue requirement for the CEG merger is shown in ComEd Ex. 2.08. ComEd Ex. 2.0 at 36; ComEd Ex. 2.08. ComEd Init. Br. at 24.

ComEd states that its 2017 Net Revenue Requirement is increased by \$12.6 million in CTA related to the CEG merger and \$19.4 million in CTA related to the PHI merger for a total impact of \$32.0 million. ComEd further states that its 2017 Initial Rate

Year Revenue Requirement is increased by \$22.7 million (\$13.6 million for CEG and \$9.1 million for PHI) and the 2015 Reconciliation is increased by \$9.3 million ((\$1.1) million for CEG and \$10.4 million for PHI). These amounts include the amortization of CEG merger-related costs approved in ICC Docket Nos. 13-0318 and 14-0312. The calculations supporting these amounts are included in ComEd Ex. 2.08. ComEd Ex. 2.0 at 36. No party has objected to any of these amounts. ComEd Init. Br. at 24. The Commission approves these amounts.

7. Charges for Services Provided by BSC

ComEd states that BSC is an Exelon affiliate service company that provides services such as information technology, supply, finance, and human relations to ComEd and Exelon's other business units. ComEd Ex. 3.0 at 6. In 2015, ComEd states it incurred \$295.8 million in costs for services provided by BSC. ComEd Ex. 3.0 at 6; ComEd Ex. 2.10, page 4, column (b). Pursuant to a data request by the AG, ComEd notes that \$534,000 of those costs were inadvertently included in A&G FERC Account 923. ComEd Ex. 9.0 at 21. ComEd removed those costs. *Id.* Staff witness Bridal notes that ComEd inadvertently included \$534,000 in BSC costs related to FERC Account 923, lobbying activities, and transmission services in the revenue requirement. Staff Ex. 2.0 at 9-10. ComEd removed those costs. ComEd Ex. 9.0 at 21; ComEd Ex. 9.02, WP 7, page 2, lines 37-38. No party contests the BSC charges for the services provided to ComEd. ComEd Init. Br. at 25. Therefore, the Commission approves the amount of charges.

8. Depreciation and Amortization Expense

ComEd states that its revenue requirement, adjusted on surrebuttal, includes \$569,140,000 of depreciation and amortization expense. ComEd Ex. 13.01, Sch FR C-2, line 10. ComEd explains that the level of 2015 depreciation and amortization expense included in the revenue requirement is \$510,562,000, comprised of \$403,771,000 related to Distribution Plant and \$106,791,000 related to G&I Plant. ComEd Ex. 2.0 at 37; ComEd Ex. 13.01, Sch FR C-2, lines 4, 6. ComEd further explains that the 2017 Initial Rate Year Revenue Requirement and the 2017 Rate Year Net Revenue Requirement include \$58,578,000 of depreciation expense associated with the 2016 projected plant additions. ComEd Ex. 13.01, Sch FR C-2, line 9b. No party has objected to the amount of depreciation and amortization expense. ComEd Init. Br. at 26. Therefore, the Commission approves this amount.

9. Taxes

ComEd states that the amount of taxes other than income included in its revenue requirement is \$146,022,000. ComEd explains that these taxes include real estate taxes, the Illinois Electricity Distribution Tax ("IEDT"), payroll taxes, and several other taxes. ComEd Ex. 2.0 at 38; ComEd Ex. 2.01, App 7, page 2, lines 41 through 62; ComEd Ex. 2.01, Sch FR C-1, line 10. ComEd states that regarding IEDT, ComEd recorded an accrual in 2015 for an estimated IEDT credit of \$13,788,000 related to its actual 2015 IEDT of \$114,903,000, and a credit adjustment of \$204,000 to the estimated IEDT credits for the year 2014, reflecting the net amount of \$100,911,000 in operating expense. *Id.* at

38. ComEd also states that in compliance with the Commission's final Order in ICC Docket No. 13-0318, it excluded \$264,000 of payroll taxes related to previously disallowed incentive compensation. *Id.* at 38; See ComEd Ex. 2.02, WP 7, page 2, line 39. ComEd Init. Br. at 26.

ComEd further states that the amount of income taxes included in the 2015 Reconciliation Revenue Requirement is \$198,494,000 and that the amount of income taxes included in the 2017 Initial Rate Year Revenue Requirement, which includes the impact of the projected 2016 plant additions, is \$227,152,000. ComEd Ex. 13.01, Sch FR A-1- REC, lines 15, 18 and 19; ComEd Ex. 13.01, Sch FR A-1, lines 15, 18, and 19. ComEd explains that income taxes have been calculated based on the expenses and miscellaneous revenues assigned or allocated to the delivery service function. ComEd further explains that it also analyzed differences in book and tax treatment of 2015 revenues and expenses and assigned or allocated those differences to the delivery service function as described in ComEd Ex. 13.01, Sch FR C-4 "Taxes Computation" and App 9 "Permanent Tax Impacts Information." ComEd Ex. 2.0 at 39. No party contests ComEd's tax expense. ComEd Init. Br. at 26-27. Therefore, the Commission approves the amounts.

10. Lobbying Expense

ComEd has not included any lobbying expenses in its revenue requirement. ComEd Init. Br. at 27. The Commission finds that lobbying expenses are not at issue in this docket.

11. Rate Case Expenses

ComEd seeks to recover rate case expenses totaling \$713,000, comprised of the following:

- (1) Amortization of \$65,994 of allowed expenses incurred in 2013 for ICC Docket No. 11-0721 and approved in ICC Docket No. 14-0312;
- (2) Amortization of \$23,691 of expenses incurred in 2014 for ICC Docket No. 11-0721 and approved in ICC Docket No. 15-0287;
- (3) ComEd's rate case expenses of \$49 incurred in 2015 for ICC Docket No. 12-0321;
- (4) ComEd's rate case expenses of (\$51) incurred in 2015, or \$49 incurred in 2015 offset by an accrual of \$100 reversed in 2015, for ICC Docket No. 13-0318;
- (5) ComEd's rate case expenses of \$130,977 incurred in 2015 for ICC Docket No. 14-0312; and
- (6) ComEd's rate case expenses of \$492,706 incurred in 2015 for ICC Docket No. 15-0287.

ComEd supported these expenses with an affidavit (ComEd Ex. 2.12) and supporting invoices. ComEd Init. Br. at 27.

ComEd submits that this evidence allows the Commission to make a finding pursuant to Section 9-229 of the PUA that the expenses incurred were just and reasonable. ComEd explains that the attachments to the affidavit provide the evidentiary support for each ICC proceeding for which ComEd seeks recovery. See ComEd Ex. 2.12 APO-04 (ICC Docket No. 12-0321), Ex. 2.12 APO-05 (ICC Docket No. 13-0318), Ex. 2.12 APO-06 (ICC Docket No. 14-0312), Ex. 2.12 APO-07 (ICC Docket No. 15-0287). ComEd further explains that the affidavit also describes the services provided in connection with the fees for which recovery is sought, identifies the individuals working on the matters and their qualifications, and discusses the market rates charged by regulatory lawyers in Chicago to support the reasonableness of the fees charged. ComEd Ex. 2.12 APO-01 (identifying individuals and qualifications). ComEd Init. Br. at 27-28.

In response to Staff witness Mr. Bridal's proposed adjustment to disallow \$2,100 of rate case expense related to amounts not associated with rate case expense, completely redacted line items, and miscellaneous charges for attorney and witness meals, in order to limit the issues in this case, and without waiving its right to contest other proposed disallowances based on similar arguments in this case, or disallowances based on this or similar arguments in any other proceeding, ComEd agreed not to seek recovery for this expense in this Docket and made the adjustment, thus reducing ComEd's 2017 Rate Year Net Revenue requirement by \$6,000. ComEd Ex. 9.0 at 22; Staff Ex. 2.0, Sched. 2.04, page 3. ComEd Init. Br. at 28.

The Commission has considered the costs expended by the Company during 2015 to compensate attorneys and technical experts to prepare and litigate rate case proceedings and finds, pursuant to Section 9-229 of the PUA, that the amount included as rate case expense in the revenue requirements of \$713,000 is just and reasonable. This amount includes the following costs: (1) \$89,685 amortized rate case expense associated with the initial formula rate proceeding, Docket No. 11-0721; (2) \$49 associated with Docket No. 12-0321; (3) (\$51) associated with Docket No. 13-0318; and (3) \$130,977 associated with Docket No. 14-0312; and \$492,706 associated with Docket No. 15-0287.

12. Employee Recognition

ComEd explains that as alluded to in Section V.B.2. above, Mr. Bridal initially proposed an adjustment to disallow all expenditures related to employee recognition. Staff Ex. 2.0 at 5-9. Mr. Bridal subsequently revised his proposed disallowance to distinguish between safety and service/longevity awards on the one hand and achievement/performance awards on the other. Mr. Bridal continued to propose a disallowance "to remove from the revenue requirement only employee recognition costs associated with safety awards and service/longevity awards." Staff Ex. 5.0 at 5. See also ComEd Ex. 9.0 at 15-21. ComEd states that Mr. Bridal, however, agreed that "[c]osts associated with employee achievement/performance awards are retained as a recoverable cost. ... As such, the costs of awards which ComEd claims are for employee

performance above and beyond what is required in the ordinary course of employment will be recovered from ratepayers.” Staff Ex. 5.0 at 5. ComEd Init. Br. at 28-29.

Although ComEd does not agree with the portion of Staff’s proposal regarding safety awards and employee service/longevity awards, in order to limit the issues in this case and without waiving its right to contest other proposed disallowances based on similar arguments in this case, or disallowances based on this or similar arguments in any other proceeding, ComEd accepts Mr. Bridal’s proposal to remove those specific employee recognition expenditures resulting in the removal of \$1,596,000 from the revenue requirement. ComEd Ex. 13.0 at 6. ComEd Init. Br. at 29. The Commission approves the adjusted amount.

13. Incentive Compensation Program Expenses

ComEd explains that in the May 29, 2012 final Order in ICC Docket No. 11-0721, the Commission decided that “ComEd should be required to file, with its initial performance-based rate filing, evidence establishing that its employees have achieved the statutory [incentive compensation] metrics,” including evidence “as to what its employees did to achieve the performance metrics in Section 16-108.5.” *Commonwealth Edison Co.*, ICC Docket No. 11-0721, Final Order (May 29, 2012) at 92. ComEd states that its testimony regarding the incentive compensation plans – ComEd witnesses Ms. Brinkman (ComEd Ex. 1.0), Mr. Siambekos (ComEd Ex. 3.0), Mr. Moy (ComEd Ex. 5.0), and Ms. Montague (ComEd Ex. 4.0) – substantiated ComEd’s entitlement to recover its incentive compensation expenses and described the metrics set forth in ComEd’s incentive compensation plans, how ComEd performed under the metrics, and what employees did to achieve their performance on those metrics. ComEd Ex. 1.0 at 19. ComEd Init. Br. at 29.

In brief, in 2015 ComEd offered an Annual Incentive Program (“AIP”), a Key Manager and Executive Long Term Performance Program (“LTPP”), an Executive Long Term Performance Cash Award Program (“LTPCAP”), and an Executive Long Term Performance Share Award Program (“LTPSAP”) to its employees. ComEd explains that the total compensation that ComEd pays its employees is based on the levels needed in the marketplace to attract and retain qualified personnel. Instead of paying the entire amount of an employee’s compensation through base salaries, ComEd makes a portion of each employee’s pay subject to the achievement of operational metrics specified in the incentive compensation plans. ComEd further explains that by structuring compensation in this manner, ComEd’s employees are at risk of receiving less than the marketplace level of compensation if the metrics of the plans are not achieved. ComEd Ex. 1.0 at 19-20. No party contested that the 2015 incentive compensation costs, which resulted in market-based compensation levels, were prudently incurred and reasonable in amount. ComEd Ex. 1.0 at 20. ComEd Init. Br. at 29-30. Therefore the Commission approves the incentive compensation program expenses. Each plan is discussed briefly below.

a. Annual Incentive Program (“AIP”)

ComEd states that ComEd’s 2015 AIP had nine operational metrics. ComEd Ex. 1.0 at 22. The AIP, as to each of its metrics, includes three levels: (1) a threshold level that must be met in order for any payment to be made under the metric, and which, if met, results in 50% payment of the target payment level for the metric; (2) a target level, which, if met, results in 100% payment of the target level for the metric; and (3) a more rigorous distinguished level, which, if met, could result in up to 200% payment of the target level for the metric. *Id.* at 23-24. ComEd Init. Br. at 30.

ComEd summarizes the 2015 performance under the AIP metrics as follows. With respect to SAIFI (weather-normalized), performance of 0.78 surpassed the threshold level of .87; the 82 minute CAIDI performance of ComEd’s employees met the distinguished performance level of 82; the customer Satisfaction Index result of 7.85 in 2015 surpassed the target level of 7.79; the OSHA Recordable Rate of 0.57 achieved by ComEd’s employees was better than the target level of .77 and was ComEd’s best OSHA performance on record for the second year in a row; ComEd employees achieved a Service Level rating of 91.3%, exceeding the distinguished performance threshold level of 90.1%; Call Center Satisfaction performance was 81.2, exceeding the target of 80.3; total capital expenditures were \$109 million lower (favorable) than the threshold level; total O&M costs were \$9 million lower (favorable) than the target level; and performance on the EIMA Performance Metrics Index was 156% and exceeded the target rating of 100%. ComEd Ex. 1.0 at 24-25. ComEd states that overall, ComEd employee performance resulted in a calculated AIP payout of 131.3%. *Id.* at 25. As ComEd explains, by performing their respective duties skillfully and efficiently, ComEd employees contributed to the achievements in 2015 under the AIP. *Id.* at 25. ComEd Init. Br. at 30-31. The inclusion of the costs associated with AIP is uncontested and are therefore approved.

b. Key Manager Long-Term Performance Plan (“LTPP”)

ComEd states that the LTPP grants a cash award that vests over three years. ComEd Ex. 1.0 at 27-28. LTPP goals mirror the goals of the AIP. *Id.* ComEd Init. Br. at 32. The inclusion of the costs associated with LTPP is uncontested and are therefore approved.

c. Long-Term Performance Cash Awards Program (“LTPCAP”)

ComEd states that the LTPCAP also grants a cash award that vests at the end of a three year performance cycle. ComEd Ex. 1.0 at 27-28; see ComEd Ex. 1.01 at 22. The goals of LTPCAP similarly mirror the goals of the AIP. ComEd Ex. 1.0 at 27-28. ComEd Init. Br. at 32. The inclusion of the costs associated with LTPCAP is uncontested and are therefore approved.

d. **Long-Term Performance Share Awards Program (“LTPSAP”)**

ComEd states that certain ComEd executives were eligible for the LTPSAP. ComEd explains that consistent with the Commission’s Order in ICC Docket No. 14-0312, ComEd has excluded 95% or approximately \$3.0 million in related 2013, 2014 and 2015 LTPSAP costs vesting in 2015. The 5% of LTPSAP costs, approximately \$0.2 million, which is included in the 2017 Rate Year net revenue requirement, represents the 2015 incentive compensation payout for the achievement of CAIDI and SAIFI performance by ComEd. See Ex. 2.01, App 7, line 21 and ComEd Ex. 2.02, WP 7, page 12. ComEd Ex. 1.0 at 28. ComEd Init. Br. at 32. The inclusion of the costs associated with LTPSAP is uncontested and are therefore approved.

14. **Gross Revenue Conversion Factor**

ComEd submits that its Gross Revenue Conversion Factor (“GRCF”) is 1.6677. No party has objected to the GRCF. ComEd Init. Br. at 32. Therefore, the Commission approves ComEd’s GRCF.

15. **#SmartMeetsSweet (“SMS”) Initiative**

ComEd states that #SmartMeetsSweet is a program used for distributing information and educating customers on automated metering infrastructure (“AMI”) meters. ComEd Ex. 9.0 at 10. ComEd voluntarily excluded \$33,000 related to ice cream costs incurred as part of the #SmartMeetsSweet Initiative in 2015. ComEd Ex. 2.0 at 35. Mr. Bridal initially proposed a disallowance of the remainder of the costs of the program. Staff Ex. 2.0 at 2-5. ComEd explains that in rebuttal, however, Mr. Bridal withdrew his recommended disallowance noting:

Mr. Newhouse stated that the entire SMS initiative is built around ComEd’s goal to educate customers on the benefits of smart meters at locations where the smart meters are being deployed, and explains details regarding the educational messages communicated as part of the SMS initiative. (citation omitted) Further, in response to subsequent Staff data requests, additional support for the recovery of SMS costs was provided.

Staff Ex. 5.0 at 3. ComEd states that Mr. Bridal further agreed that “Mr. Newhouse’s rebuttal testimony and the subsequent data request responses demonstrate that the costs of the SMS initiative which ComEd seeks to recover through its revenue requirements in this proceeding are associated with customer education and informational advertising that is allowable under Section 9-225(3) of the Public Utilities Act.” *Id.* at 3-4. See also ComEd Ex. 9.0 at 10-15; ComEd Ex. 13.0 at 5. ComEd Init. Br. at 33. Based on the record in this case, the Commission approves these expenses.

C. Potentially Contested Issues

1. Telephone Consumer Protection Act (“TCPA”) Settlement

ComEd’s Position

ComEd observes that AG witness Mr. Michael L. Brosch recommends disallowing \$2,281,456 associated with ComEd’s settlement of *Michael Grant v. Commonwealth Edison Co.*, Case No. 1:13-cv-08310 (“*Grant*”). AG Ex. 1.0 at 2-3, 6. *Grant* was a TCPA class action lawsuit alleging that ComEd, through its outage alert program, sent unsolicited text messages to customers’ cell phones without those customers’ prior express consent. ComEd Ex. 11.0 at 4. ComEd Init. Br. at 33-34.

ComEd contends that Mr. Brosch’s recommended disallowance is based on his after-the-fact opinion that “ComEd could and should have designed its Outage Alert Program to [sic] in such a way as to avoid *potential* litigation and liability under the TCPA.” AG Ex. 1.0 at 5 (emphasis added). ComEd clarifies that Mr. Brosch does not claim that ComEd acted imprudently or unreasonably in settling the *Grant* case. AG Ex. 1.0 at 5. Indeed, as ComEd argues and explains further below, the undisputed evidence shows that ComEd’s decision to settle the case was prudent and the amount for which ComEd settled the case was reasonable. ComEd Ex. 11.0 at 5-6. ComEd Init. Br. at 34.

Likewise, ComEd further clarifies, Mr. Brosch does not claim that ComEd’s outage alert program actually violated the TCPA. See *generally* AG Ex. 1.0. To the contrary, as ComEd also explains below, the undisputed evidence shows that ComEd’s outage alert program complied with the rules and regulations promulgated by the Federal Communications Commission (“FCC”), the federal administrative agency charged with administrative oversight and interpretation of the TCPA and authorized to make rules and to render decisions interpreting and applying the TCPA. See *generally In the Matter of Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 7 FCC 8752, (Oct. 16, 1992) (“1992 FCC Order”); *In re Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991*, CG Docket No. 02-0278, Declaratory Ruling (Aug. 4, 2016) (“2016 FCC Order”). ComEd Init. Br. at 34.

ComEd states that Mr. Brosch does not even opine that based on circumstances known or knowable at the time ComEd designed the outage alert program, if ComEd had incorporated certain features or designed the program in a certain way, ComEd would have avoided litigation similar to *Grant*. ComEd further states that even had he so opined – and he did not – there is nothing in his training or experience that remotely qualifies him to express that opinion. See AG Ex. 1.0 at 2-3. In short, ComEd argues, Mr. Brosch offers nothing in the way of facts or evidence showing imprudent design or implementation at the time ComEd rolled out the outage alert program. According to ComEd, he brings to bear no knowledge or expertise regarding the state of the art of utility outage alert programs in 2013. ComEd Init. Br. at 34-35.

ComEd states that what Mr. Brosch does claim is that based on present knowledge, ComEd should have known that someone would eventually file a claim that

would incorrectly but artfully allege that ComEd's outage alert program violated the TCPA. See AG Ex. 1.0 at 5. ComEd further states that Mr. Brosch asks the Commission to substitute his view – an impermissible hindsight view – that ComEd's program should have been “designed” to avoid “potential litigation and liability under the TCPA” for the relevant historical view of the FCC that programs like ComEd's were appropriate. Compare AG Ex. 1.0 at 5 with 1992 FCC Order and 2016 FCC Order. According to ComEd, the Commission should reject Mr. Brosch's theory. ComEd Init. Br. at 35.

a. The *Grant* Settlement

ComEd notes that the Commission has long encouraged settlements and allows recovery of prudent and reasonable settlement amounts included in a utility's revenue requirement. See, e.g., *Nat'l Cas. Co. v. White Mountain Reinsurance Co. of Am.*, 735 F.3d 549, 556 (7th Cir. 2013) (American legal system favors the compromise and settlement of disputes); *Advanced Bodycare Sols., LLC v. Thione Int'l, Inc.*, 524 F.3d 1235, 1241 (11th Cir. 2008) (adjudicatory bodies are often empowered to encourage settlements, thereby discouraging litigation and its associated expense); ComEd Ex. 11.0 at 2-3. To do otherwise would discourage settlements as non-recoverable and encourage litigation expenses that are recoverable. According to ComEd, virtually every rate case ComEd files includes litigation-related settlements in the revenue requirement. ComEd Init. Br. at 35-36.

Therefore, the Commission analyzes litigation settlement costs exactly the same as other utility costs, *i.e.*, subject to a prudence and reasonableness standard: actual prudent and reasonable costs of providing delivery service are recoverable through a utility's formula rate. 220 ILCS 5/16-108.5(c)(1). See *also* 220 ILCS 5/1-102 (a)(iv) (applying same standard to traditional rate cases). In short, the Commission allows recovery of settlement costs as long as the underlying activity relates to delivery service, the decision to settle is prudent, and the settlement amount is reasonable. ComEd Ex. 11.0 at 2-3. ComEd Init. Br. at 36.

ComEd argues that the *Grant* settlement clearly meets these standards of recovery. First, as ComEd states, the messaging program sought to improve the speed and efficiency of ComEd's communications with its customers concerning power outages. ComEd Ex. 11.0 at 4. According to ComEd, this is undoubtedly related to delivery service. *Id.* at 4. Mr. Brosch does not contend otherwise. See *generally* Brosch Dir., AG Ex. 1.0. ComEd Init. Br. at 36.

Second, as mentioned above, ComEd contends that Mr. Brosch does not challenge whether it was prudent for ComEd to settle the potential liability. AG Ex. 1.0 at 5. Again, ComEd argues that the evidence affirmatively shows the decision to settle was prudent. This was a large claim, with a range of exposure of approximately \$600 million to \$1.8 billion. ComEd Ex. 11.0. at 5. ComEd states that although it was prepared to fully and vigorously defend this matter because it believed that it had two defenses that were strong and that Plaintiff's claim was flawed, proceeding to a decision or judgment was not without risk. *Id.* at 5. Despite ComEd's conviction that it had not violated the law, the manner in which the court would interpret ComEd's first defense, ComEd states, was

uncertain and no binding legal precedent addressed ComEd's second defense. Moreover, according to ComEd, a loss of this magnitude would have been catastrophic. *Id.* Therefore, faced with this legal uncertainty, it was a prudent business decision to settle the *Grant* case. *Id.* Indeed, ComEd explains that literature indicates that any TCPA lawsuit is "a destructive force" that can threaten a company with "annihilation" for actions that caused no real harm to consumers. See Becca J. Wahlquist, *The Juggernaut of TCPA Litigation: The Problems with Uncapped Statutory Damages*, U.S. CHAMBER INSTITUTE FOR LEGAL REFORM (Oct. 2013) at 1; ComEd Ex. 11.0 at 5. ComEd Init. Br. at 36-37.

Third, as also stated above, ComEd states that the settlement amount was reasonable. And again, ComEd argues that Mr. Brosch does not challenge this, nor could he. AG Ex. 1.0 at 5. ComEd notes that a settlement of \$4.95 million – less than 1% of the potential exposure – is quite small in relation to the maximum exposure and is undoubtedly reasonable in amount. ComEd Ex. 11.0 at 5. Moreover, ComEd finds it noteworthy that TCPA cases frequently involve settlements ranging from \$6 million to as much as \$47 million. *The Juggernaut of TCPA Litigation* at 3. ComEd's *Grant* settlement is at the very low end of this range. ComEd Ex. 11.0 at 5-6. ComEd Init. Br. at 37.

According to ComEd, this should be the end of the inquiry and the Commission should allow recovery of the full amount at issue. Mr. Brosch, however, argues that the Commission should continue its review and analyze the design of ComEd's outage alert program. While ComEd disagrees as to whether this is necessary or appropriate, as explained below, ComEd contends that a further inquiry shows that ComEd prudently designed its outage alert program and that the Commission should reject Mr. Brosch's proposed disallowance. ComEd Init. Br. at 37.

b. Outage Alert Program Design

ComEd states that Mr. Brosch presumes that the mere fact that Mr. Grant sued ComEd – and that ComEd in turn settled the case – indicates that ComEd did something wrong. ComEd argues that is an invalid after-the-fact inference and a factually incorrect conclusion. According to ComEd, it acted reasonably when it designed the outage alert program, including the opt-out aspect of the program. ComEd Ex. 11.0 at 6. Mr. Brosch does not suggest an alternative program design that – based on the facts and evidence known in 2013 – would have avoided similar litigation. ComEd contends that his analysis is nothing more than an impermissible hindsight review and that even had he so opined, nothing in his training or experience remotely qualifies him to express that opinion. ComEd Init. Br. at 38.

ComEd explains that with the wave in recent years of extreme weather conditions across the country leading to mass, prolonged power outages, ComEd sought to harness emerging communications technologies and practices to improve the speed and efficiency of its communications with its customers, particularly those concerning power outages. ComEd Ex. 11.0 at 6. ComEd explains that the outage alert program provided an efficient two-way means of delivering emergency power-outage related information. *Id.* at 6-7. Enrolling customers in the text messaging program allowed ComEd to provide

customers with critical updates regarding power outages and with the ability to report power outages using a distinctly efficient and effective means. *Id.* at 7. ComEd Init. Br. at 38.

Prior to implementing the program, ComEd conducted an inquiry into whether the outage alert program, including the opt-out feature, was consistent with Federal requirements for disseminating text messages. ComEd Ex. 11.0 at 7. ComEd explains that in conducting this inquiry, ComEd learned that the FCC plainly stated that outage-related communications by power companies are “within either the broad exemption for emergency calls, or the exemption for calls to which the called party has given prior express consent.” 1992 FCC Order at 8777-78. This comported with ComEd’s understanding that the TCPA was designed to address telemarketing calls, not informational text messages that alert customers to an outage alert program, particularly when the customers voluntarily provide their cell phone numbers and the text message provides an opportunity to opt-out of the program. ComEd Ex. 11.0 at 8. The statute therefore restricts unsolicited advertisements – messages sent for commercial gain. In contrast, as ComEd states, ComEd had no commercial motive to send text messages: ComEd sent the text messages in an effort to enhance public safety during electric power outages. *Id.* ComEd Init. Br. at 38-39.

ComEd states that it utilized an opt-in feature on ComEd’s website during the pilot stages of the program, and successfully enrolled a small group of customers. ComEd Ex. 11.0 at 9. However, this required customers to affirmatively visit ComEd’s website, and as a result, many customers never became aware of this valuable safety service. *Id.* To make this emergency notification service available to a wide range of customers, ComEd switched to an opt-out mechanism, under which all customers who had provided their cell phone numbers as a point of contact would learn that the program existed and could easily enjoy the benefits of the program. *Id.* at 9-10. ComEd states that it had reviewed the applicable law and analyzed the change from opt-in to opt-out and reasonably believed that the change did not pose a substantial risk of liability. *Id.* at 10. Weighing the pros and cons, ComEd chose the path that would allow it to reach many more customers with this effective, desirable, and valuable emergency safety service. *Id.* ComEd Init. Br. at 39.

ComEd explains that as a result, in the fall of 2013, and in advance of what turned out to be an unprecedented winter storm season, ComEd rolled the program out as part of its standard electric service to all of its customers who provided cell phone numbers as a point of contact. ComEd Ex. 11.0 at 6. ComEd implemented the program by sending the following text message to those customers, which provided simple instructions on how to unsubscribe: “You are now subscribed to ComEd outage alerts. Up to 21 msgs/mo. Visit ComEd.com/text for details. T&C:agent511.com/tandc. STOP to unsubscribe. HELP for info.” *Id.* ComEd argues that based on its diligent inquiry and good faith understanding of the law and its exemptions, ComEd acted reasonably when it implemented the outage alert program and disseminated the text messages. ComEd Init. Br. at 39-40.

According to ComEd, the FCC further validated ComEd's design and implementation of the outage alert program earlier this summer, when the FCC issued a ruling restating and clarifying that programs like ComEd's outage alert program are in fact lawful and desirable. In the 2016 FCC Order, the FCC stated:

we clarify that consumers who provide their wireless telephone number to a utility company when they initially sign up to receive utility service, subsequently supply the wireless telephone number, or later update their contact information, have given prior express consent to be contacted by their utility company at that number with messages that are closely related to the utility service so long as the consumer has not provided 'instructions to the contrary.'

2016 FCC Order at 13, ¶ 29 (citing 1992 FCC Order). ComEd Init. Br. at 40.

ComEd notes that the FCC went on to state that the types of communications that were the subject of the *Grant* case are "critical to providing safe, efficient and reliable service" and that "customers would welcome" these types of communications. 2016 FCC Order at 14, ¶ 30. ComEd further explains that the FCC went on to note that "low-income households -- especially those in urban and minority communities more reliant upon wireless phones as their primary source of communications -- are particularly vulnerable to service interruptions, making it even more imperative that they receive appropriate notice, especially before, during and after emergency situations." *Id.* (emphasis added). ComEd Init. Br. at 40.

ComEd contends that as shown in both the 1992 FCC Order and the 2016 FCC Order, as well as in the motion to dismiss the *Grant* case attached to Ms. Polek-O'Brien's testimony, two strong and independent bases supported the design of the outage alert program: consent and emergency purpose. See generally 1992 FCC Order; 2016 FCC Order; ComEd Exs. 11.01 and 11.03. In brief, ComEd argues, with regard to the consent defense, by providing their cell numbers in connection with establishing or maintaining their electric service, customers consented to be contacted at that number with informational text messages such as the ones at issue in the suit. The text messages at issue -- which were part of an outage alert program -- also fall under the emergency purpose exemption of the TCPA. Thus, ComEd posits that it acted reasonably when it designed and implemented the outage alert program. ComEd Init. Br. at 41.

Mr. Brosch, however, asks the Commission to substitute his contention that ComEd's program should have been "designed" to avoid what, in his view, was "potential litigation and liability under the TCPA" for the view clearly articulated by the FCC that the program was appropriate -- the view that ComEd relied on in designing and implementing its outage alert program. Compare AG Ex. 1.0 at 5 with 1992 FCC Order; 2016 FCC Order. ComEd argues that Mr. Brosch offers no evidence in support of his proposed disallowance. According to ComEd, there is nothing in the record indicating that he performed any kind of comparison or analysis of outage alert programs designed circa 2013. ComEd argues that it is one thing to state that given the facts known at the time,

and the behavior of other similarly situated companies, ComEd acted imprudently. It is quite another to state that given the facts that we know *now*, ComEd should have made a different choice. ComEd notes that Mr. Brosch does the latter, claiming that despite ComEd's reasonable and diligent actions, ComEd should have known that Mr. Grant would institute his class action lawsuit against ComEd and that ComEd should have incorporated the "prospective relief" that ComEd included in the settlement agreement in its initial design of the outage alert program. AG Ex. 1.0 at 5. ComEd Init. Br. at 41-42.

ComEd claims that Mr. Brosch's contention is unlawful. As ComEd notes, the Commission is not permitted to engage in this type of hindsight review. *Illinois Power Co. v. Illinois Commerce Comm'n*, 339 Ill. App. 3d 425, 428 (5th Dist. 2003). "When a court considers whether a judgment was prudently made, only those facts available at the time judgment was exercised can be considered. Hindsight review is impermissible." *Id.* And, ComEd states that as noted above in regard to VO, "The prudence standard recognizes that reasonable persons can have honest differences of opinion without one or the other necessarily being 'imprudent.'" *Id.* at 435 (citation omitted). At a minimum, ComEd argues, Mr. Brosch's views do not supplant those of the FCC. ComEd Init. Br. at 42.

ComEd contends that Mr. Brosch's argument also runs counter to the well-settled principle in the context of cases alleging negligence that evidence of remedial measures that make an earlier injury or harm less likely to occur are not admissible to show a prior failure of due care. See, e.g., Fed. R. Evid. 407 ("When measures are taken that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove ... negligence."); *Schaffner v. Chicago & N.W. Transp. Co.*, 541 N.E.2d 643, 647-48 (Ill. 1989) ("The rationale for this long-standing rule is twofold: correction of unsafe conditions should not be deterred by the possibility that such an act will constitute an admission of negligence, and, more fundamentally, a post-occurrence change is insufficiently probative of prior negligence, because later carefulness does not necessarily imply prior neglect.") (internal citations and quotation marks omitted). ComEd argues that Mr. Brosch should not be permitted to use vague references to changes that ComEd subsequently implemented to prove prior imprudence on the part of ComEd. AG Ex. 1.0 at 5. ComEd further argues that it should be permitted to continually update the services it provides to customers without fear that the AG will claim that the prior service was imprudently designed. ComEd Init. Br. at 42-43.

Moreover as ComEd states, in support of his proposed disallowance, Mr. Brosch relies on his "prior experience with the regulation of public utilities over the past 38 years, including significant experience with alternative forms of regulation for energy utilities in Illinois and other states." AG Ex. 1.0 at 2-3. ComEd notes that his experience has nothing to do with the design of an effective outage alert program. According to ComEd, he is simply not qualified to testify as an expert witness on the prudence and reasonableness of an outage alert program designed in 2013. The Commission should reject Mr. Brosch's proposed disallowance in its entirety. ComEd Init. Br. at 43.

In reply, ComEd argues that the AG's and CUB's Initial Briefs show in sharp relief that the AG and CUB offer nothing more than an impermissible hindsight analysis and a

misinterpretation of both the substance and the impact of the Federal Communications Commission (“FCC”) orders at issue. ComEd Reply Br. at 12-13.

First, ComEd states that the AG misunderstands the import of the FCC’s recent decision, *In re Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991*, CG Docket No. 02-0278, Declaratory Ruling (Aug. 4, 2016) (“2016 FCC Order”). The AG argues that ComEd engages in impermissible hindsight review in citing the 2016 FCC Order because it “was issued more than three years after ComEd altered its opt-in program, and has no retroactive application.” AG Init. Br. at 29. But, as ComEd clarifies, the portion of the 2016 FCC Order that ComEd cites is simply a clarification of the pre-existing FCC position on this issue. See *In the Matter of Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 7 FCC 8752, Report and Order (Oct. 16, 1992) (“1992 FCC Order”). ComEd explains that it is that pre-existing position as expressed in the 1992 FCC Order that ComEd relied on in designing its outage alert program. ComEd Ex. 11.0 at 7-8; ComEd Init. Br. at 34-35, 38-43. ComEd Reply Br. at 13.

ComEd then explains that the 2016 Order specifically states: “We emphasize that our *clarification* in no way alters the Commission’s prior statements regarding how the TCPA’s ‘emergency purpose’ exception applies to calls made by utility companies.” 2016 FCC Order at 13, ¶ 27 (emphasis added). The 2016 Order then specifically cites to the 1992 FCC Order, stating:

we *clarify* that consumers who provide their wireless telephone number to a utility company when they initially sign up to receive utility service, subsequently supply the wireless telephone number, or later update their contact information, have given prior express consent to be contacted by their utility company at that number with messages that are closely related to the utility service so long as the consumer has not provided “instructions to the contrary.”

2016 FCC Order at 13, ¶ 29 (citing 1992 FCC Order at 8769, ¶ 31) (emphasis added). As ComEd argues, it is clear that ComEd cited to the 2016 FCC Order only to show that what ComEd understood the FCC’s position to be – as stated in 1992 and relied on by ComEd in designing its outage alert program in 2013 – was in fact the FCC’s position. According to ComEd, this is not a hindsight application. ComEd Reply Br. at 13.

Second and according to ComEd, ironically, the AG then does precisely what it complains ComEd is doing: it attempts to apply a prospective portion of the 2016 FCC Order retrospectively. ComEd explains that the AG characterizes this prospective FCC guidance as “clarifying” when in fact that part of the guidance discusses completely new findings. ComEd contends that in contrast to when the FCC used the word “clarify” or “clarification” in the portion of the 2016 FCC Order that ComEd has cited, the portion of the 2016 FCC Order the AG cites uses the prospective words: “we conclude that the utility company should be responsible ... the utility company will bear the burden ... we strongly encourage ... [t]his additional safeguard” 2016 FCC Order at 14, ¶ 31; AG

Init. Br. at 29-30. ComEd posits that these are forward looking additional safeguards that do not in any way reflect the FCC's position in 1992 or even in 2013. ComEd also argues that they are also clearly suggestions as opposed to mandates or binding interpretations. ComEd Reply Br. at 14.

Third, ComEd states that the AG misapplies the October 2013 article that ComEd cites regarding the destructive force of TCPA litigation. See AG Init. Br. at 27. As Ms. Polek-O'Brien testified, ComEd relied on that article only when deciding whether to settle the TCPA claim in 2015. ComEd Ex. 11.0 at 5. In any event, ComEd explains that the evidence shows that ComEd could not have been aware of that October 2013 article when it designed and approved its outage alert program because ComEd was already implementing its outage alert program *with* the opt-out feature in September 2013, prior to the October 2013 article's publication. AG Ex. 1.4 at 2016FRU 001477, ComEd's Answer and Affirmative Defenses to Pl's Compl. at ¶ 20 ("ComEd customers who previously provided ComEd with their cell phone numbers as a point of contact were automatically enrolled in the Outage Alert program on September 20 and 21, 2013 and November 7 and 8, 2013."). And there is no evidence that ComEd immediately became aware of the article and its contents once it was published. ComEd argues that the AG's attempt to institute hindsight review is unavailing. ComEd Reply Br. at 14-15.

Fourth, ComEd contends that the AG obfuscates the facts by insinuating – without citation – that ComEd affirmatively misrepresented whether its program was opt-in or opt-out. See AG Init. Br. at 27, 30. According to ComEd, the significance of the AG's point, even if it were true, is unclear. ComEd argues that the AG makes no showing that this is in any way related to the prudence or reasonableness of ComEd's design and implementation of the program. Moreover, according to ComEd, the AG's point is not true. ComEd states that there is no evidence in the record that it made any affirmative statements to customers regarding the opt-in status of the outage alert program. It is likely that customers who visited ComEd's website when the program was opt-in would have seen that at that time, it was opt-in. AG Ex. 1.3 at 2016FRU 0003343; ComEd Ex. 11.0 at 9. ComEd further states that when it switched to an opt-out mechanism, there is no doubt that it correctly informed customers who received texts that the program was opt-out. ComEd Init. Br. at 39-40; ComEd Ex. 11.0 at 6. According to ComEd, it never misrepresented the status of its program. ComEd Reply Br. at 15.

Fifth, ComEd argues that the AG attempts to make something out of the fact that the program is presently opt-in "notwithstanding the FCC's decision." AG Init. Br. at 30. ComEd freely admitted that it had not changed the opt-in status of its program in the 14 days between when the FCC issued the 2016 FCC Order and when ComEd responded to the AG's data request on this topic. 2016 FCC Order (Released August 4, 2016); AG Cross Exs. 5 and 6 (Data Request Response served August 17, 2016). According to ComEd, however, this is not relevant to *anything* and it is certainly not evidence of imprudence or unreasonableness in ComEd's original design and implementation of its outage alert program in 2013. ComEd Reply Br. at 15.

Sixth, ComEd states that CUB also misinterprets the 2016 FCC Order. CUB states that the 2016 FCC Order “relates to the ‘emergency purpose’ exception of the TCPA.” CUB Init. Br. at 3. CUB further states: “That Order relates to school systems that make automated calls and send automated text messages for an emergency purpose,’ and finds such messages are outside the requirements of the TCPA.” *Id.* ComEd explains that is true of the first eleven pages of the 2016 FCC Order. Those pages contain the findings related to school systems and the emergency purpose defense. ComEd Reply Br. at 16.

With regard to the portion of the 2016 FCC Order related to utilities – the portion that ComEd draws the Commission’s attention to – ComEd argues that CUB could not be further from the truth. Beginning on page 12, the 2016 FCC Order specifically states:

Because we grant in part the *Edison Petition* as modified on other grounds, we do not reach the question of whether the communications sent by utility companies to their customers would fall within the TCPA’s “emergency-purpose” exception, which Edison has requested that we forego, and, as requested, do not rule at this time on the other remaining calls. We emphasize that our clarification in no way alters the Commission’s prior statements regarding how the TCPA’s “emergency-purpose” exception applies to calls made by utility companies.

2016 FCC Order at 12-13 (footnotes omitted). As ComEd has explained, the 2016 FCC Order goes on to clarify that calls from utilities that are closely related to utility service have been and remain within the prior express consent exception to the TCPA. 2016 FCC Order at 12-14. As ComEd has also explained at length, that exception is separate and distinct from the emergency purpose exception and provides a complete defense to a TCPA action. ComEd Init. Br. at 38-39, 40. ComEd Reply Br. at 16.

Seventh, ComEd argues that despite not filing any testimony or issuing any data requests in this proceeding, CUB mirrors the AG and attempts to improperly use the changes ComEd prospectively agreed to make in the 2015 *Grant* settlement to infer that ComEd imprudently designed the outage alert program in 2013. CUB Init. Br. at 4; AG Ex. 1.4 at 2016FRU 0001502, ¶ 2.2. As ComEd explained in its Initial Brief, this is contrary to the well-settled rule against using prospective relief measures to argue initial imprudence. ComEd Init. Br. at 42-43. Moreover, ComEd argues that there is no evidence that those prospective measures would have made the *Grant* lawsuit less likely. There is however, as ComEd claims, much evidence that ComEd’s outage alert program was already TCPA compliant, even without those prospective relief measures. See, e.g., 2016 FCC Order, 1992 FCC Order, ComEd Ex. 11.0 at 4-10; ComEd Init. Br. at 38-43. ComEd Reply Br. at 16-17.

In conclusion, ComEd argues that the AG’s and CUB’s proposed disallowance is ill-founded: there are no legal or evidentiary bases that support their position. As explained in ComEd’s Initial Brief and Reply Brief, this is not a close question and the Commission has only one option here that is consistent with the law and past Commission

precedent. For all of those reasons, ComEd argues that the Commission should reject the AG's and CUB's proposed disallowance.

Staff and Intervenor Positions

Commission Analysis and Conclusion

The Commission agrees with ComEd and declines to adopt the AG's proposed disallowance, adopted by CUB, associated with ComEd's settlement of the *Grant* TCPA class action. The Commission finds that: (1) the underlying activity relates to delivery service; (2) the decision to settle was prudent; and (3) the settlement amount was reasonable. First, the evidence shows that the outage alert program sought to improve the speed and efficiency of ComEd's communications with its customers concerning power outages. This is undoubtedly related to delivery service. Second, faced with the legal uncertainty surrounding TCPA litigation and the magnitude of the potential liability, it was a prudent business decision to settle the *Grant* case. Third, a settlement of \$4.95 million – less than 1% of the potential exposure – is quite small in relation to the maximum exposure and is undoubtedly reasonable in amount. The Commission finds that it is not necessary to analyze the underlying activity – the outage alert program – further.

Nonetheless, the Commission finds that a further inquiry shows that ComEd prudently designed its outage alert program. ComEd conducted an inquiry into whether the outage alert program, including the opt-out feature, was consistent with Federal requirements for disseminating text messages. ComEd reasonably relied on FCC statements that outage-related communications by power companies are “within either the broad exemption for emergency calls, or the exemption for calls to which the called party has given prior express consent.” 1992 FCC Order at 8777-78. The Commission also finds that the FCC further validated ComEd's design and implementation of the outage alert program earlier this summer, when the FCC issued a ruling restating and clarifying that its position has been and continues to be that programs like ComEd's outage alert program are in fact lawful and desirable. 2016 FCC Order at 13, ¶ 29 (citing 1992 FCC Order). Moreover, the Commission agrees with the FCC that embracing emerging technologies like outage alert text messaging programs provides a valuable and worthwhile service to utility customers.

In contrast to the fulsome and persuasive evidence concerning the circumstances in 2013 that ComEd provided, the AG did not provide any evidence of the state of the art of utility outage alert programs in 2013. And the AG does not suggest an alternative program design that – based on the facts and evidence known in 2013 – would have avoided similar litigation. The AG and CUB appear to argue that the mere fact that Mr. Grant sued ComEd proves that ComEd imprudently designed its outage alert program. The Commission finds that this is an impermissible hindsight review, which the Commission must reject.

VI. RATE OF RETURN

A. Overview

ComEd states that it has in large part incorporated Staff's proposed adjustment to the balances of the components of capital structure. The rates of return (weighted average costs of capital) to be applied in the instant Docket, *i.e.*, 6.69% for the 2015 Reconciliation Year and 6.71% for the 2017 Initial Rate Year, are not contested. Staff Ex. 3.0 at 5-6; ComEd Ex. 2.0 at 50; ComEd Ex. 2.01, Sch FR D-1, line 21; ComEd Ex. 9.0 at 22-24. ComEd Init. Br. at 43.

B. Capital Structure

ComEd states that Staff witness Ms. Freetly and ComEd witness Mr. Newhouse concur with ComEd's capital structure and cost for purposes of determining both the 2015 Reconciliation Year and the 2017 Initial Rate Year. Staff Ex. 3.0 at 2; ComEd Ex. 2.0 at 50-51; ComEd Ex. 2.01, Sch FR D-1, line 21; ComEd Ex. 2.01, Sch FR D-2. Therefore, the Commission approves ComEd's rates of return for the 2015 Reconciliation Year and the 2017 Initial Rate Year. ComEd's capital structure is illustrated in the table below.

2015 Reconciliation Year

Capital Structure Component

<i>Weighting</i>	<i>Cost</i>	<i>Weighted Cost</i>
45.62%	8.59% ⁽¹⁾	3.92%
54.11%	5.06%	2.74%
0.27%	0.53%	0.00%
		0.03%
100.00%		6.69%

2017 Initial Filing Year

Capital Structure Component

<i>Weighting</i>	<i>Cost</i>	<i>Weighted Cost</i>
45.62%	8.64%	3.94%
54.11%	5.06%	2.74%
0.27%	0.53%	0.00%
		0.03%
100.00%		6.71%

(1) Incorporates 5 basis points penalty for missing EIMA reliability metric in 2015

ComEd Ex. 2.0 at 50; ComEd Init. Br. at 43-44.

C. Cost of Capital Components

1. Rate of Return on Common Equity

See Section VI.B., *supra*.

2. Cost of Long-Term Debt

See Section VI.B., *supra*.

3. Cost of Short-Term Debt

See Section VI.B., *supra*.

4. Overall Weighted Cost of Capital

See Section VI.B., *supra*.

VII. REVENUES

The record shows that ComEd deducted a total of \$134,383,000, after adjustments, of miscellaneous revenues from its revenue requirement. ComEd Ex. 13.01, App 10, line 59. None of the individual revenue amounts reflected in this total have been contested and this amount is fully supported in the record. ComEd Init. Br. at 45. The Commission approves ComEd's revenue amount.

VIII. COST OF SERVICE AND RATE DESIGN

Cost of service issues in formula rate proceedings are traditionally uncontested. This docket is intended to evaluate the prudence and reasonableness of the costs incurred by ComEd to be recovered during the 2017 Rate Year. ComEd has fully supported all of the cost of service issues in this docket, and neither Staff nor any Intervenor has disagreed. Basic rate design issues are not at issue in this formula rate update case – instead, they were addressed in the rate design tariff filing that was filed on April 30, 2013 in Docket No. 13-0387, the 2013 Rate Design Investigation (“2013 RDI”). The Commission entered a final Order in that docket on December 18, 2013 and the Order was affirmed by the Appellate Court of Illinois for the Second District on March 6, 2015. See *Coalition to Request Equitable Allocation of Costs Together (REACT) v. Illinois Commerce Comm’n*, 2015 IL App (2d) 140202 (Ill. App. Ct. March 6, 2015). ComEd Init. Br. at 45. The cost of service and rate design issues are uncontested and are therefore approved.

IX. OTHER

A. Original Cost Finding

ComEd requests that the Commission, as it has in past FRU Orders (2011 Rate Case Order at 178; 2012 Rate Case Order at 106; 2013 Rate Case Order at 88-89; 2014 Rate Case Order at 8; 2015 Rate Case Order at 5-6), approve ComEd's original cost of plant in service as of the end of the reconciliation rate year which, in this case, is as of December 31, 2015. See ComEd Ex. 2.0 at 14-15. ComEd states that the record shows that the original cost of gross investment in electric utility plant in service in ComEd's rate base as of December 31, 2015 is \$18,481,492,000. *Id.* at 14. Subtracting Asset Retirement costs, capitalized incentive compensation, costs recovered in riders, other costs disallowed in prior ICC orders, and such costs capitalized in 2015, from the total of ComEd's Distribution gross plant and Illinois jurisdictional General and Intangible gross plant results in the original cost of plant in service as of December 31, 2015, of \$18,436,012,000. ComEd Ex. 13.0 at 7; Staff Ex. 4.0 at 7. ComEd Init. Br. at 45-46. The Commission approves this amount.

ComEd explains that per the 2014 and 2015 Rate Case Orders, the original cost calculation excludes assets that are recovered through Rider Energy Efficiency and Demand Response Adjustment ("Rider EDA"), Rider Purchased Electricity ("Rider PE"), and Rider Purchase of Receivables with Consolidated Billing ("Rider PORCB"). As stated in the 2014 and 2015 Rate Case Orders, for these assets excluded from original cost, the Commission will make separate original cost findings. 2014 Rate Case Order at 106; 2015 Rate Case Order at 6. ComEd Init. Br. at 46.

B. Wages and Salaries Allocator Utilized in Rider PE and Rate BESH

In his direct testimony, Staff witness Mr. Tolsdorf affirmed that ComEd provided the information necessary for Staff to make a recommendation regarding the value of the W&S allocator to be used in the determination of rates under Rider PE. Staff Ex. 1.0 at 16-17. ComEd provided this data in ComEd Ex. 2.04, and Mr. Tolsdorf agreed that the W&S allocator applicable to supply is 0.40% and had no objection to ComEd's calculation of the allocator. ComEd Ex. 2.04, WPA-5, page 1, line 1; ComEd Ex. 9.0 at 25; Staff Ex. 1.0 at 17. ComEd agreed with the language proposed by Mr. Tolsdorf (Staff Ex. 1.0 at 17), and no other party has contested the calculation or objected to the proposed language. ComEd Init. Br. at 46. The Commission therefore accepts the use of ComEd's wages and salaries allocator applicable to supply.

C. Reporting Requirements

1. EIMA Investments

ComEd presented evidence in its case in chief identifying separately its EIMA-related expenditures included in the Rate Year 2015 Reconciliation Revenue Requirement and in the projected plant additions included only in the Initial Rate Year

2017 Revenue Requirement. ComEd Init. Br. at 47. This data meets the Commission's requirements as set forth in ICC Docket No. 12-0321. 2012 Rate Case Order at 98; ComEd Ex. 3.0 at 14-15. Furthermore, in ICC Docket No. 13-0318, the Commission noted that ComEd had agreed to Staff's recommendation that it identify by category cumulative actual EIMA investments in addition to annual actual investments for each year. 2013 Rate Case Order at 85; ComEd Ex. 3.0 at 15. To these ends, and in compliance with these orders, ComEd provided this information as ComEd Ex. 3.01. ComEd Init. Br. at 47.

No party contests that ComEd has satisfied its obligation to provide the required information. Accordingly, the Commission finds that ComEd has satisfied its investment obligation.

2. Reconciliation Year Plant Additions

In the Commission's final Order in Docket No. 13-0318, Findings paragraph 13 set forth a table with details for the plant additions placed in service in 2012. 2013 Rate Case Order at 90-91. In this proceeding, ComEd provided a similar summary of the \$666,144,031 investment amount by category placed in service in 2015 by ComEd under Section 16-108.5(b) of the Public Utilities Act. ComEd Ex. 3.0 at 17-18. ComEd also provided a similar table for the \$641,515,121 of plant additions projected to be placed in service in 2016. *Id.* at 18-19. No party contests that ComEd has satisfied its obligation to provide the required information. ComEd Init. Br. at 47. Accordingly, the Commission finds that ComEd has satisfied its obligation to provide the required plant addition information.

3. Contributions to Low-Income Assistance and Support Programs

EIMA requires ComEd to make certain contributions to low-income and other energy assistance programs. See 220 ILCS 5/16-108.5(b-10). These contributions include \$10 million per year, over five years, in customer assistance costs that are not recoverable and that ComEd has removed in full from the determination of its revenue requirement. ComEd presented evidence demonstrating that these EIMA commitments have been met through the sponsorship of various initiatives under ComEd's CARE programs; through these programs, ComEd assists customers that face financial hardships and have difficulty paying their electric utility bills by helping them to avoid disconnection. ComEd Ex. 4.0 at 28-29. Moreover, as ComEd explains, on February 19, 2016, ComEd filed its Annual Customer Assistance Report for 2015 with the Commission. This Report specifies the programs that were funded and reports the amount of money each program received, further demonstrating ComEd's compliance with its obligation to fund EIMA customer assistance programs. *Id.* at 29-30; ComEd Ex. 4.01. No party contests that ComEd has met its obligations to low-income and other energy assistance programs as required by EIMA. ComEd Init. Br. at 48. Therefore, the Commission approves ComEd's reporting of Contributions to Energy Low-Income and Support Programs.

X. CONCLUSION

For the reasons stated herein, the Commission approves Commonwealth Edison Company's proposed 2017 Rate Year Net Revenue Requirement as presented in ComEd's surrebuttal testimony (including ComEd's acceptances of proposals of others, whether to narrow the issues or otherwise), approves the original costs of ComEd's electric plant in service as of December 31, 2015, makes the required factual findings in support thereof, and authorizes and directs ComEd to make a compliance filing implementing the resulting rates and charges. These updates are applicable to delivery services provided by ComEd beginning on the first day of its January 2017 billing period, subject to ComEd's final compliance filing and the rulings in this Order.

XI. FINDINGS AND ORDERING PARAGRAPHS

The Commission, having considered the entire record herein and being fully advised in the premises, is of the opinion and finds that:

- (1) Commonwealth Edison Company is an Illinois corporation engaged in the transmission, distribution, and sale 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 the parties and the subject matter herein;
- (3) the recitals of fact and conclusions of law reached in the prefatory portion of this Order are supported by the evidence of record and are hereby adopted as findings of fact and conclusions of law; the Appendices attached hereto provide supporting calculations;
- (4) for purposes of this proceeding, as adjusted, Commonwealth Edison Company's rate base is \$7,781,270,000 for the 2015 Reconciliation Year Revenue Requirement and \$8,831,123,000 for the Initial 2017 Rate Year Revenue Requirement;
- (5) the rate of return which Commonwealth Edison Company should be allowed to earn on its net original cost rate base is 6.69% for the 2015 Reconciliation Year and 6.71% for the 2017 Rate Year Initial Revenue Requirement, these rates of return incorporating a return on common equity of 8.59% and 8.64%, respectively, on long-term debt of 5.06%, and on short term debt of 0.53%;
- (6) the rates of return set forth in Finding (5) result in tariffed operating revenues of \$2,647,680,000 (reflecting the reconciliation and ROE Collar adjustments) and net annual operating income of \$592,568,000;
- (7) the Commission, based on ComEd's proposed original cost of plant in service as of December 31, 2015, before adjustments, of \$18,481,492,000,

and reflecting the Commission's determination adjusting that figure, unconditionally approves \$18,436,012,000 as the composite original cost of jurisdictional distribution services plant in service as of December 31, 2015;

- (8) Commonwealth Edison Company is authorized to place into effect tariff sheets and associated informational sheets designed to produce annual tariffed revenues of \$2,647,680,000. Such revenues in addition to other revenues will provide ComEd with an opportunity to earn the rates of return set forth in Finding (5);
- (9) the determinations regarding other subjects contained in the prefatory portion of this Order are reasonable for purposes of this proceeding; the compliance filing to be filed by Commonwealth Edison Company shall incorporate such determinations to the extent applicable;
- (10) new charges authorized by this Order shall become effective beginning with the first day of the January 2017 monthly billing period consistent with the requirements set forth in Section 16-108.5 of the Act; Commonwealth Edison Company shall be allowed four business days after the issuance of this Order to submit its compliance filing for informational purposes; the new tariff sheets and associated informational sheets authorized to be filed by this Order shall take effect the next business day after the date of filing, with updated charges listed on said tariff sheets, and associated informational sheets to be effective with the first day of the January 2017 monthly billing period; Commonwealth Edison Company shall provide supporting work papers to the Staff of the Commission concurrently with such informational compliance filing;
- (11) that the approved 2017 Rate Year Initial Revenue Requirement includes \$641,515,121 of projected plant additions expected to be placed in service in 2016 by ComEd in compliance with, or in meeting, the infrastructure investment requirements of Section 16-108.5(b) of the Act. These are projected costs and will be reconciled to actual costs in a future formula rate update and reconciliation filing. The detail of these projected plant additions in the categories as required by Section 16-108.5(b)(1) are as follows:

Distribution infrastructure improvements (URD program, mainline cable system refurbishment and replacement program, Ridgeland 69kV cable replacement program)	\$249,501,210
Training facility construction or upgrade programs (construction of training facilities program)	\$0
Wood pole inspection, treatment, and replacement	\$26,128,150

Reducing the susceptibility of storm-related damage (storm hardening program)	\$62,693,322
Total electric system upgrades, modernization programs, and training facilities	<u>\$338,322,682</u>
Additional smart meters	\$239,102,369
Distribution automation and associated cyber secure data communication network	\$36,148,330
Substation micro-processor relay upgrades	\$27,941,740
Total upgrade and modernization of transmission and distribution infrastructure and Smart Grid electric system upgrades	\$303,192,439
Total projected incremental 2015 plant additions in compliance with Section 16-108.5(b)(1) of the PUA	<u>\$641,515,121</u>

- (12) that the approved Reconciliation Revenue Requirement for 2015 includes \$666,144,031 of plant additions placed in service in 2015 by ComEd in compliance with, or in meeting, the infrastructure investment requirements of Section 16-108.5(b) of the Act. The detail of these actual plant additions in the categories as required by Section 16-108.5(b)(1) are as follows:

Distribution infrastructure improvements (URD program, mainline cable system refurbishment and replacement program, Ridgeland 69kV cable replacement program)	\$274,653,289
Training facility construction or upgrade programs (construction of training facilities program)	\$6,040,222
Wood pole inspection, treatment, and replacement	\$20,711,951
Reducing the susceptibility of storm-related damage (storm hardening program)	\$72,942,880
Total electric system upgrades, modernization programs, and training facilities	<u>\$374,348,343</u>
Additional smart meters	\$230,400,343
Distribution automation and associated cyber secure data communication network	\$54,369,358
Substation micro-processor relay upgrades	\$7,025,988
Total upgrade and modernization of transmission and distribution infrastructure and Smart Grid electric system upgrades	\$291,795,689

**Total actual incremental 2014 plant
additions in compliance with Section 16-
108.5(b)(1) of the PUA**

\$666,144,031

IT IS THEREFORE ORDERED that the updated charges in ComEd's initial filing shall not go into effect.

IT IS FURTHER ORDERED that Commonwealth Edison Company is authorized to file a compliance filing in accordance with Findings (8), (9) and (10) and the prefatory part of this Order, applicable to service furnished on and after the effective date of said compliance filing, with updated charges to be effective with the first day of the January 2017 monthly billing period; work papers supporting the compliance filing shall be provided to the Staff of the Commission concurrently with the filing of said compliance filing.

IT IS FURTHER ORDERED that the approved revenue requirement set forth in Finding (8) above reflects \$666,144,031 of plant additions placed in service in 2015 by ComEd, and \$641,515,121 of projected plant additions expected to be placed in service in 2016 by ComEd, in compliance with or in meeting the infrastructure investment requirements of Subsection 16-108.5(b) of the Act.

IT IS FURTHER ORDERED that Commonwealth Edison Company's updated Embedded Cost of Service Study is accepted as a basis for setting rates in this proceeding.

IT IS FURTHER ORDERED that any motions, petitions, objections, and other matters in this proceeding which remain outstanding are hereby disposed of consistent with the conclusions herein.

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

By Order of the Commission this ____ day of _____ 2016.

(SIGNED) BRIEN SHEAHAN

Chairman