STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Commonwealth Edison Company	)	
	)	
Petition for Approval of Delivery	)	Docket 01-0423
Service Tariffs and Tariff Revisions	)	
and of Residential Delivery Services	)	
Implementation Plan and for	)	
Approval of Certain Other	)	
Amendments and Additions to its	)	
Rates, Terms and Conditions	)	

GOVERNMENT AND CONSUMER PARTIES' BRIEF ON EXCEPTIONS

Pursuant to Section 200.830 of the Rules of Practice of the Illinois Commerce Commission (the "Commission") and the schedule established by the Administrative Law Judges, the City of Chicago, the Peoples of the State of Illinois, the Peoples of Cook County, and the Citizens Utility Board (collectively, "Government and Consumer Parties, "GCP," "GC," or "GCI") by their respective attorneys, submit their Brief on Exceptions in this case. The Government and Consumer Parties' Brief on Exceptions responds to the Administrative Law Judge's Proposed Order ("Proposed Order") issued on February 8, 2002. The sections of this brief on exceptions are organized in accordance with the outline of issues approved by the ALJs.

For the most part, the exceptions for this brief are included in the "Replacement Language for the Administrative Law Judges' Proposed Interim Order" ("Joint Replacement Language") filed today by the Government and Consumer Parties, AES New Energy, Blackhawk Energy Services, L.L.C. (collectively, the "ARES Coalition"), the Building Owners and Managers Association of Chicago and Suburban Chicago, Nicor Energy L.L.C., and the National Energy Marketers Association. However, exceptions for certain issues are not included in the Joint Replacement Language because of differences of opinion between the Government and

Consumer Parties and the other parties to the Joint Replacement Language or because time constraints prohibited inclusion of exceptions in the Joint Replacement Language. Those instances are identified in this Brief on Exceptions and exceptions for such issues are included in this brief.

Also, there are certain issues included in the Joint Replacement Language about which GC took no position. Those issues are identified in this brief by the absence of an exception, and GC does not join in the exceptions regarding those issues.

ARGUMENT

I. LEGAL ISSUES AND STANDARDS FOR DECISION

A. Substantive Standards and Policies Governing Requested Rates

Exception #1

The section of the Proposed Order that recites the positions of the parties with respect to Edison's claim that it is entitled to "full recovery" does not present fully the case against Edison's advocacy of a novel expansion of its regulatory entitlement to an opportunity to recover its prudent, just and reasonable costs, as they are proved on the record as a whole. Edison contends that under its DST tariffs it is instead entitled to what it calls "full recovery." As articulated in Edison's testimony and briefs, the utility would override consumer protection provisions of the Act – *e.g.*, the legal requirements of prudence, reasonableness, and proof by a preponderance of the evidence – to include in DST rates every cost of providing delivery services that it can identify.

The Proposed Order notes the opposition of the Commission Staff to Edison's claims and recounts principal arguments offered by Staff. The Proposed Order however, does not acknowledge the related arguments presented by GCI. Further, the Proposed Order fails to recount or to consider the numerous provisions of the Act identified in GCI's Reply Brief that contradict Edison's claim (*see,* pp. 9-10). Those provisions condition utilities' right to recover costs and establish the Commission's obligation to consider non-cost factors in rate setting. The Proposed Order should be modified to correct these omissions.

In addition, the Proposed Order should be modified to articulate more fully the reasoning and legal conclusions the Commission is adopting. The Proposed Order correctly concludes that Edison is entitled to only "an opportunity" to recover its revenue requirement. In addition, the Proposed Order holds that recoverable costs must be "determinable with particular certainty". Costs that fail this test will be disallowed. Proposed Order at 9. However, given Edison's claims of special entitlement for DST rates, the Proposed Order may leave an impression that this is an exhaustive list of considerations relevant to evaluating delivery services costs.

The language of the Proposed Order should be modified as shown at pages 11-15 of the Joint Replacement Language to reflect fully the appropriate legal conclusions. Those conclusions acknowledge that the non-cost factors GCI identified, as well as policy considerations, are properly considered in the rate-making process and that they may require some deviation from the "penny for penny" recovery to which the Company claims an entitlement.

B. Procedural Issues

Exception #2

The Proposed Order very briefly recounts the procedural history of disputes in this case regarding the scope of and the bases for Commission approval of certain requests to withhold from public view information or documents on which regulated rates are based. The Proposed Order, however, fails to disclose the opposing arguments of the parties, the manner in which the Commission's authority was exercised, or the standard under which the ALJs (acting for the Commission) evaluated requests for orders imposing onerous confidential treatment obligations on parties to this proceeding. Proposed Order at 10. By its cursory treatment of this issue, the Proposed Order continues to hide from the Commission the Proposed Order's abuse of the Commission's authority to grant exceptions to the statutory presumptions of a public process and public access to Commission records.

In this proceeding, many of the utility's requests for orders compelling confidential treatment were granted without <u>any</u> evidentiary foundations. Those parties who requested that information be withheld from the public record were never required to present justifying evidence, and parties who challenged requests for that special treatment had no meaningful opportunity to challenge supporting testimony. The rulings at issue were made solely on the basis of untestable representations and arguments of counsel.

Testimony from the custodians or producers of the information, who could provide evidence on the nature and uses of the documents and information, was never required. That procedural deficiency effectively precluded meaningful evidentiary challenges by other parties.

In a classic Catch-22 – they were denied access to the information at issue without first submitting to the onerous confidentiality requirements they sought to contest.

Even though motion practice on this issue comprised a significant portion of the litigation in this proceeding, there was never a written opinion on the issue and the ALJs provided nothing else that will serve as meaningful guidance on future requests for confidential treatment of information in Commission proceedings. Even when the Commission granted the GC parties' interlocutory appeal of grants of confidential treatment, it did so without a written opinion that could serve as an articulation of the Commission's policy or guide implementation of the decision on remand, or in future cases. Predictably, the absence of articulated expectations resulted in further disagreement about the scope and meaning of the Commission's ruling.

The ALJs apparently interpreted the Commission's ruling merely as a requirement for argument on individual requests, rejecting all other aspects of the appeal. The arguments apparently rejected by the ALJs, though not expressly by the Commission, included the application of an objective standard for confidential treatment, and examination of the appropriateness of the proposed protective arrangements. Without a plainly stated policy, it is likely that the "course of least resistance" – granting utility requests and burying the issue among other rate case issues – will make the burdens on public participation in Commission proceedings more and more excessive.

This issue is of considerable importance. And, the issue recurs with such regularity that it should not remain hidden in the unrecorded motion practice of the Commission, subject to the unguided discretion or whim of ALJs acting in the Commission's name. The Commission should make a definitive statement on the issue for the benefit of the parties and to clarify for its

ALJs the applicability of its previously approved policy on withholding information from public view.

The ALJs in this proceeding appear to have construed the Act's grant of <u>authority</u> to exercise discretion (Section 4-404) as a prescription to use discretion as the <u>standard</u> for their determinations. Such unconstrained discretion would be unlawfully arbitrary and capricious, as well as inconsistent with expressed Commission policy. Indeed, the ALJ's purported application of the discretion they found in the Act <u>rejected</u> the Commission's most recent explication of its position on the question!

Without a clarifying opinion from the full Commission, an unfortunate legacy of this proceeding may be unwitting Commission acceptance of illegal exceptions to the Commission's public proceedings and public records based solely on the unguided, unbridled discretion of its ALJs. In this case, and perhaps others as well, that discretion has been exercised with no objective standard in place and without requiring any evidentiary showing of the appropriateness of such an exercise of the Commission's authority. *See*, Tr. 188.

The Proposed Order's discussion of this issue misstates the position of the GC parties and the import of governing Illinois law.

> GCI repeats its request that the Commission depart from Illinois law and establish its own special standards for affording confidential treatment to documents in future cases. We conclude that this request is inappropriate, that the Commission should follow Illinois law in future cases, just as it did in this proceeding, and that our rulings in this proceeding afford appropriate treatment to confidential documents.

Proposed Order at 10-11. This single paragraph:

❑ erroneously characterizes the GCI request that the Commission follow the policy it established in its *Cass* decision as a departure from the governing law;

❑ erroneously asserts that it followed Illinois law in this proceeding, even though the ALJs rejected application of the Commission's *Cass* policy in favor of unguided ALJ discretion; and

❑ ignores the basis of our challenge by offering a conclusion on the issue of <u>how</u> confidential documents were treated, when the issue was the standard for determining <u>whether</u> documents warranted confidential treatment at all.

The GC parties' arguments are set forth fully in the petition for interlocutory review appended to its Initial Brief. The language of the Proposed Order should be modified as set forth at pages 15-17 of the Joint Replacement Language, in order to exercise appropriately the Commission's discretion by addressing this important, recurring issue in its final order.

C. Other Policy Issues

1. Impact on Customers

2. Impact on Cost Based Rates

3. Impact on the Development of an Effectively Competitive and Efficient Electricity Market

4. Impact on Future Rate Cases

5. Impact on Capital Markets and Cost of Capital

6. Impact on Distribution Adequacy and Reliability

7. Additional Policy Concerns

D. Resolution of the Joint Motion

Exception #3

The Proposed Order concludes that "The Commission has not made any finding that ComEd has or has not met its burden of proof as to any costs that are contained in its revised proposed jurisdictional revenue requirement but <u>that are not incorporated</u> in the jurisdictional revenue requirement on which the charges in the residential delivery services tariffs approved herein are based." Proposed Order at 25 (emphasis added).

It is arguable that, implicitly, the Proposed Order concludes that on those amounts included in the revenue requirement (almost all), Edison has met its burden of proof. Those elements of Edison's requested revenue requirement include some amounts now subject to the audit ordered by the Commission. The inclusion of amounts the Commission found questionable enough to warrant an audit is, at the very least, surprising.

In Docket 01-0664, the Commission exercised its authority to order an audit of Edison recovery program expenditures. The open questions surrounding Edison's recovery program costs were sufficient for the Commission to exercise its discretion by accepting the Docket 01-0664 parties' agreed plan for an audit. Yet, in the face of the Commission's findings in its Docket 01-0664 order initiating an audit, the Proposed Order finds that Edison has, on this record, already met its burden of proving the justness and reasonableness of the very costs for which the Commission has ordered an audit.

The evidence ComEd submitted failed to establish: (1) that ComEd's proposed test year revenue requirement accounts properly for its intense "recovery program" during the test year;

and, therefore, (2) that ComEd's proposed rates, which would be based on ComEd's proposed test year, will be just and reasonable. This is unacceptable, considering that the proposed delivery services rate base and test-year revenue requirement would increase by almost 40% the rate base and the revenue requirement from those to be found just and reasonable by the Commission less than two years ago in ICC Docket No. 99-0117.

The critical failure in ComEd's proof relates to the rehabilitation of its T&D system that ComEd initiated in 1999 as a result of repeated failures of its transmission and distribution ("T&D") system that culminated in large-scale outages in that year and 2000. Specifically, ComEd implemented what it referred to as a "two-year recovery program, aimed at bringing service reliability up to or beyond industry norms." September 15, 1999 Transmission and Distribution Investigation Report at A.1. Consequently, ComEd, by its own admission, incurred extraordinary recovery-program expenditures during the 2000 test year. See ComEd Annual Report in Compliance with the Settlement Agreement Dated June 3, 1999, Docket 98-0514, June 29, 2001.

Notwithstanding the uncontested evidence of this extraordinary recovery program, ComEd has failed or refused to provide sufficient evidence that the expenditures incurred to overhaul its transmission and distribution system were, in fact, prudently incurred and reasonable in amount. ComEd never quantified the effect of the recovery program on its proposed test-year revenue requirement and proposed rates. Where, as here, a utility must prove by a preponderance of the evidence that its proposed charges are just and reasonable, it fails to meet its burden by creating uncertainty about the prudence and reasonableness of its test-year expenditures.

As to the customer and market impacts of Edison's proposal, the Proposed Order makes other unexplained and unsupported findings. The record contains uncontroverted testimony from Edison and other parties in the case that Edison's proposed delivery service rates are so high that residential customers are unlikely to choose delivery services. Yet the Proposed Order finds – without substantive explanation – that, without any substantial reduction in the proposed revenue requirement or level of rates, "These tariffs are appropriate in light of their impacts on residential customers, . . . and will not have an inappropriate adverse effect on the development of a competitive market . . . ." Proposed Order at 25.

The Proposed Order does not explain how rates that virtually guarantee no residential customers will take delivery services are "appropriate in light of their impacts." *Id.* Equally curious (and also unexplained) is the Proposed Order's finding about the effect on market development: that rates the record shows will assure no development of a competitive market "will not have an inappropriate adverse effect" on competitive market development in Edison's service area. *Id.* For these reasons, GCI supports the Joint Replacement Language at pages 40-41 on this issue.

II. REVENUE REQUIREMENT ISSUES

A. Calculation of Revenue Requirement

Exception #4

The Proposed Order's conclusion regarding the proposed revenue requirement implies that it has substantially adjusted Edison's revised proposed revenue requirement ("the Commission agrees with many of the adjustments recommended by Staff and GCI."). Proposed Order at 31. This implication is misleading.

As the Proposed Order states, Edison initially asked for a revenue requirement of $1,786,970,000. Proposed Order at 28. As this case unfolded, Edison revised its proposal to $1,682,705,000. The vast majority of the reduction in Edison's proposal comes from Edison's agreement to accept a more realistic return on equity, which reduced its overall proposed cost of capital by almost a full percentage point. The most contentious part of this case – the enormous expenditures that Edison incurred to implement its so-called "two-year recovery plan" precipitated by the repeated and serious outages on Edison's T&D system in Summer 1999 – remain in Edison's revised request. Even with its reduced request, Edison's revised proposed revenue requirement represents an increase of $471,234,000, or an almost 39% increase over the revenue requirement the Commission approved less than three years ago in Docket 99-0117 – ComEd's last delivery services rate case.

The Proposed Order grants Edison $438,373,000 of its proposed $471,234,000, increase over the revenue requirement approved in Docket 99-0117. This figure represents an astounding ***93%*** of Edison's requested increase and yields a more than ***36%*** increase in the revenue requirement approved in Docket 99-0117.

This almost unquestioning embrace of Edison's positions is disheartening. As alluded to above, Edison suffered a series of lengthy, severe outages on its transmission and distribution system in Summer 1999. Following those outages – but prior to yet another major outage that occurred in the south Loop in early Fall 1999 – an embarrassed and contrite Edison conducted a "comprehensive investigation into the outages of July and August and the integrity of the entire system." City Cross Ex. 22, "A Blueprint for Change" at A.1. ComEd's "comprehensive investigation" culminated in an "Investigation Report by Commonwealth Edison to the Illinois

Commerce Commission, Illinois Public Officials, and the Customers of Commonwealth Edison" ("Investigation Report") issued on September 15, 1999. The Executive Summary to the Investigation Report – entitled "A Blueprint for Change" – boasted that the "comprehensive investigation" Edison conducted was "'unprecedented'"– unprecedented not only for Edison, but "in the history of publicly-owned utilities." City Cross Ex. 22, "A Blueprint for Change" at A.1.

"A Blueprint for Change" was withering in its criticisms of Edison's past shoddy inspection and maintenance practices and haphazard system design problems that led to the dilapidated and unreliable state of Edison's transmission and distribution system. The problems on Edison's system were so egregious and so pervasive that "A Blueprint for Change" declared that the "management of its distribution business requires" nothing less than "truly <u>radical</u> change" (*Id.* at A.2 (emphasis in original)) and that "ComEd needs a <u>performance</u> <u>revolution</u> in its transmission and distribution system." *Id.* at A.3 (emphasis added).

To effect this "<u>radical</u> change" and "performance revolution," ComEd embarked on what it called "a two-year recovery program." "A Blueprint for Change" at A.1. Edison estimated that its two-year recovery program would cost "more than <u>$1.5</u> <u>billion</u> over the next two years." *Id.* at A.3 (emphasis in original).

Because of the severity of the problems on Edison's system, the Commission closely monitored Edison's remedial efforts. In presentations to the Commission, Edison confirmed that it was spending substantial sums of money to implement the "two-year recovery program." In a January 6, 2000 presentation to the Commission, Carl Croskey – the person responsible for executing the recovery program (Tr. 2629) – told the Commission that "my boss, the chairman, as well as the Board of Directors, has authorized me to spend what it takes to fix" the transmission and distribution system. City Cross Ex. 56 at 30. Mr. Croskey told the Commission about unprecedented magnitude of the expenditures ComEd was making to fix its broken system. Mr. Croskey said that ComEd had "bought out complete factories of transformer capacities" (*id*. At 70); that ComEd was using "as many outside contractors as we could find" (*id* at 29); that ComEd had "people from around the world working on this, on designs, equipment installations" (*id*.); that ComEd had "all of [its] resources, I'd say as a minimum, working 60 hours a week (*id*.). Mr. Croskey added that "realistically, we're looking at two summers" to complete the recovery program. *Id*. at 69. In other words, Mr. Croskey told the Commission that these tremendous expenditures and efforts would include all of 2000 – the test year Edison selected for this case.

Incredibly, Edison now claims that the two-year crash catch-up program it embarked upon in September 1999 is a run-of-the- mill event that is not at all uncommon. Somehow, the post-outage investigation and ComEd's response thereto that ComEd boasted were "'unprecedented' in the history of publicly-owned utilities" have now transformed into nothing more than the routine type of changes that any operator of an electricity distribution system makes from time to time. ComEd Ex. 19 at 3 (Helwig Rebuttal). The tremendous and far-reaching problems uncovered by Edison's Investigation Report requiring "truly <u>radical</u> change" in ComEd's "management of its distribution business" and "a performance revolution in its transmission and distribution system" have mutated into garden-variety "changes that many distribution companies have found they need to make." Tr. 2620 (Helwig).

Moreover, and amazingly, the blitz of spending authorized by ComEd's Board of Directors (City Cross Ex. 56 at 70) to rescue the system from its "serious, but stable condition," (“A Blueprint for Change at A-1) did not result in a single penny of costs additional to what Edison otherwise would have spent to upgrade its system. ComEd witness Helwig insisted that the extraordinary expenditures necessary to achieve the fundamental changes defined in the Investigation Report have not inflated ComEd’s proposed revenue requirement in any way. ComEd Ex. 19 at 2 (Helwig Rebuttal). Apparently, seemingly unusual costs like a “24 hour/7 days a week campaign to repair, replace or upgrade major equipment such as transmission lines, substations, feeder cables and other components” (City Cross Ex. 22, “A Blueprint for Change” at A.2), the buyout of “complete factories of transformer capacities” (City Cross Ex. 56 at 70), using “as many outside contractors as [ComEd] could find” (*id*. at 29), using “people from around the world working on [the two-year recovery program], on designs, equipment installations” (*id*.), and having “all of [its] resources, . . . [at] a minimum, working 60 hours a week (*id*.), are customary expenses that ComEd will incur on an ongoing basis indefinitely.

Accepting more than ***93%*** of ComEd’s proposed revenue requirement increase shows that, unfortunately, the Proposed Order uncritically adopts most of this inherently incredible testimony. The Proposed Order rejects the inherently more plausible statements Edison made to the Commission and an outraged public at a time when its credibility was at stake for self-interested testimony designed to maximize the utility’s revenue requirement. The Proposed Order’s almost unconditional acceptance of Edison’s assertions is reflected in the minimalist reasoning and rationale presented for its conclusions. Most conclusions are a mere recitation of Edison’s arguments, providing no indication that record evidence like cross-examination or cross-exhibits were seriously considered. This should not be surprising since many of the conclusions and most of the text of the Proposed Order are taken almost *verbatim* from ComEd's Draft Order.

Government and Consumer Parties' replacement language for the **Commission Analysis and Conclusion** for Section II.A (page 31 of the Proposed Order) is included in the Joint Replacement Language at pages 41-45.

B. Selection of Test Year

Exception #5

The Proposed Order's description of GC's position on Edison's choice of test year is not complete. The Proposed Order neglects to mention that Government and Consumer Parties expressed serious concerns about the use of the 2000 test year raises issues about the legitimacy of the costs ComEd seeks to recover. As just discussed, the year 2000 is in the middle of ComEd's "two-year recovery program" that the utility launched following the repeated, lengthy outages that occurred on its system in the Summer and early Fall 1999. Several cost items included in ComEd's proposed revenue requirement appear to reflect increased expenditures made in response to the 1999 outages. GCI witness David J. Effron testified that the level of certain expenses is far greater in comparison not only to those approved by the Commission in Docket 99-0117, but also to the actual level over recent years. GC Ex. 2.0 at 8. Mr. Effron added that "Commission should not routinely assume that because certain expenses were incurred in 2000, the expense amounts are representative of the amounts that ComEd can reasonably be expected to incur prospectively on an ongoing basis under normal conditions." *Id.*

Government and Consumer Parties' replacement language for the **Commission Analysis and Conclusion** for Section II.B (page 33 of the Proposed Order) is included in the Joint

Replacement Language 48-50. However, replacement language accurately describing GCI's position is <u>not</u> included in the Joint Replacement Language. To rectify the Proposed Order's incomplete description of GC's position, the second full paragraph on page 32 of the Proposed Order should be deleted and replaced with the following language:

> While Government and Consumer Parties concede that it is ComEd's prerogative to select a test year, GC expressed concerns that the use of the 2000 test year raises issues about the legitimacy of the costs ComEd seeks to recover. GC argued that the year 2000 is in the middle of ComEd's "two-year recovery program" that the utility launched following the repeated, lengthy outages that occurred on its system in the Summer and early Fall 1999. Several cost items included in ComEd's proposed revenue requirement appear to reflect increased expenditures made in response to the 1999 outages. GCI witness David J. Effron testified that the level of certain expenses is far greater in comparison not only to those approved by the Commission in Docket 99-0117, but also to the actual level over recent years. GC Ex. 2.0 at 8. Mr. Effron added that "Commission should not routinely assume that because certain expenses were incurred in 2000, the expense amounts are representative of the amounts that ComEd can reasonably be expected to incur prospectively on an ongoing basis under normal conditions." *Id.*

C. Rate Base

1. Functionalization of Distribution Plant

2. General and Intangible Plant -- Direct Assignment and Allocation

Exception #6

At pages 41-42, the Proposed Order, in language lifted directly from Edison's Draft Order, erroneously adopts ComEd's proposed allocation of general and intangible plant. The Proposed Order's conclusion is wrong and should be rejected.

With little explanation, the Proposed Order endorses an approach that the Commission expressly rejected in Edison's last delivery services rate case. In Docket 99-0117, the Commission stated that it:

> . . . disagrees with Edison's direct assignment approach. The very nature of these costs suggests that they are not amenable to direct assignment. In previous cases, Edison used a labor allocator to assign these costs. Edison has not made a convincing argument for deviating from this past practice. Accordingly, IIEC's proposed labor allocator for general plant is reasonable and should be approved.

Docket 99-0117, Order at 11. In its Initial Brief, Staff accurately characterized the Commission's conclusion as "striking" because "The Commission objected, not just to ComEd's specific proposal in the case, but to the general concept of functionalizing these accounts on the basis of direct assignments." Staff Initial Brief at 12.

Suggesting that the Commission do an about-face and deviate from a decision it reached barely more than two years ago requires extensive proof. The litany of inconsistencies and shortcomings in ComEd's functionalization approach recounted in Staff's testimony and briefs shows that Edison has not presented such evidence.

Moreover, the level of proof necessary is greater here because ComEd's approach conflicts with the approach approved by the Commission for other Illinois utilities. For example, as Staff noted, in the latest round of delivery service cases, both Ameren UE and Ameren CIPS adhered to the labor allocator adopted by the Commission in the first round of delivery services cases. And, in the Proposed Order in the current Illinois Power Company ("IP") delivery services case – Docket 01-0432 – IP proposed use of a labor allocator. The ALJ rejected IP's labor allocator because it did not include the generation function. Instead, the Proposed Order adopts Staff's labor allocator, which includes the generation function. Docket 01-0432, Proposed Order at 17.

In short, the General and Intangible Plant costs to be functionalized in this case are of substantially the same nature in this case as they were in Docket No. 99-0117. These are the same costs that the Commission concluded "are not amenable to direct assignment." Docket 99-0117, Order at 11. ComEd has not presented sufficient evidence either (1) to persuade the Commission that such costs are amenable to direct assignment now or (2) to justify why its costs should be allocated inconsistent with the manner in which other Illinois utilities' costs are allocated.

The **Commission Analysis and Conclusion** for Section II.C.2 (pages 41-42 of the Proposed Order) should be deleted. Government and Consumer Parties support the replacement language for Section II.C.2 in the Joint Replacement Language at pages 50-58 with one exception. Government and Consumer Parties support adoption of Mr. Effron's labor allocator described in Schedule DJE-8 attached to his Direct Testimony instead of Staff's labor allocator recommended in the Joint Replacement Language at page 58.

3. Known & Measurable Changes to Test Year Plant Balances

Exception #7

The Proposed Order correctly accepts Staff's and GCI's proposed adjustment for ComEd's proposed *pro forma* adjustment to test year balances for distribution plant that was expected to be placed in service in the second quarter of 2001. The Proposed Order's conclusion points out that although given the opportunity to do so, ComEd failed to provide documentation supporting its proposed outside-of-test-year adjustment. GCI notes that this conclusion is consistent with the Commission's Order on Remand in Docket 99-0117, wherein the Commission rejected several *pro forma* adjustments proposed by Edison because the utility failed to submit sufficient documentation establishing that the proposed adjustments were both ***known and measurable***. The **Commission Analysis and Conclusion** for Section II.C.3 (page 45 of the Proposed Order) should be modified to explain that the conclusion adopting Staff's and GCI's proposed adjustment is consistent with the Commission's rationale and analysis in its Remand Order in Docket 99-0117.

Although the Proposed Order appropriately adopts Staff's and GCI's adjustment to ComEd's proposed *pro forma* adjustment to test year balances for distribution plant expected to be placed in service in the second quarter of 2001, the Proposed Order, in a single sentence, wrongly rejects Mr. Effron's proposal to adjust ComEd's accumulated appreciation reserve to reflect the post-test year additions to rate base. Mr. Effron's adjustment is based on the common-sense logic that if Edison is permitted to make post-test year additions to rate base, then the utility's accumulated appreciation reserve should also be adjusted to reflect these *pro forma* adjustments. GC Ex. 2.0 at 40 (Effron Direct). Mr. Effron testified that ComEd's proposal to adjust the accumulated depreciation reserve by one year's worth of depreciation on plant additions is inadequate because ComEd's proposed adjustment does not include increases in the depreciation reserve that occurred when the post-test year additions went into service. *Id*. Failing to account for increases in post-test year growth in depreciation reserve while recognizing post-test year growth in plant distorts the revenue requirements calculation.

The Proposed Order relies on Edison's arguments to reject Mr. Effron's proposal. Proposed Order at 45. Edison's arguments do not seriously challenge Mr. Effron's point. First, the Proposed Order's summary of Edison's argument, obliquely referring to Mr. Effron's Direct Testimony, asserts that Mr. Effron admitted that Edison had already made the adjustment Mr. Effron was proposing. *Id*. It is not clear what the Proposed Order is pointing to in Mr. Effron's Direct Testimony, but suffice to say, if Mr. Effron testified that ComEd had correctly made the adjustment he was discussing, he would not then argue that ComEd failed to make the adjustment. The Proposed Order's comment on this issue is incomprehensible.

Next, the Proposed Order states that ComEd argued that Mr. Effron's adjustment is inflated because Mr. Effron assumed that the entire increase in depreciation reserve from December 31, 2000 through June 30, 2001 reflects distribution plant additions. Proposed Order at 45. Even a cursory reading of Mr. Effron's proposal shows that the Proposed Order's characterization of Mr. Effron's testimony is flat wrong. Mr. Effron explained that approximately 2/3 of the $144,732,000 growth in distribution plant from December 31, 2000 through June 30, 2001 represented post-test year plant additions. Accordingly, Mr. Effron applied the 66.7% to the $144,732,000 growth in distribution plant reserve and found that the appropriate adjustment to the depreciation reserve is $96,920,000, which Mr. Effron explained is $90,226,000 larger than the adjustment proposed by the utility. City Ex. 2.0 at 41.

Finally, the Proposed Order's summary of Edison's response to Mr. Effron's adjustment asserts that Mr. Effron's proposal would improperly "shift the test year to the year ending on June 30, 2001, just for the accumulated depreciation reserve." Proposed Order at 45. This merely echoes an assertion made by ComEd witness Hill. ComEd Ex. 23.0 at 32 (Hill Rebuttal). Mr. Effron blunted Mr. Hill's argument, stating that "My proposed adjustment to the depreciation reserve is no more a proposed change to the test year than is the Company's proposed adjustment to rate base for additions to distribution plant taking place in 2001. If Mr. Hill is concerned about the purity of the test year, then he should retract his proposed adjustment to rate base for post-test year additions to distribution plant. Then my adjustment to the accumulated depreciation reserve on distribution plant would not be necessary." GC Ex 5.0 at 16 (Effron Rebuttal).

In sum, the Edison arguments that the Proposed Order relies on to reject Mr. Effron's proposal concerning accumulated depreciation reserve are baseless.

The second paragraph of the **Commission Analysis and Conclusion** for Section II.C.3 (page 45 of the Proposed Order) should be deleted. The replacement language for the **Commission Analysis and Conclusion** for Section II.C.3 in the Joint Replacement Language at page 62 should be adopted.

4. Other Adjustments to Rate Base

a. Budget Payment Plan

b. Accumulated Deferred Income Taxes

5. Plant Adjustments

a. Plant Expenditures for Q2 2001

b. Proposed Retired Plant

c. Retirements Related to 2001 Replacement Plant

d. Accumulated Depreciation Adjustment Related to Overtime and Alleged Premiums Paid

e. Deferred Taxes Related to Overtime and Alleged Premiums Paid

6. Prudence of Distribution Capital Investment Costs

a. Effect of Alleged Imprudence on Rates

Exception #8

The Proposed Order inexplicably ignores the legal issue that is at the center of the single most contentious matter in this case. The focus of that contention is Edison's request for revenue requirement amounts related to Edison's extraordinary distribution system recovery program. The legal question that Edison's request presents is whether, on this record, Edison has met its statutory burden of proving that those costs are just and reasonable.

As GCI showed in our Reply Brief (*see, e.g*, at 15), Edison's "proof" with respect to its recovery program costs consists almost entirely of self-serving, conclusory opinions of Edison managers, without even meeting requirements the Proposed Order does acknowledge -- *e.g.*, being "determinable with particular certainty." Proposed Order at 9. Edison maintained that it was unable even to quantify the costs of its recovery program. The Company was even less able (or willing) to provide information necessary to demonstrate that its costs were prudently incurred and reasonable, or to permit the scrutiny of the program costs the facts warrant. Despite an admitted capability to track these costs, and full knowledge of the relevance of that quantitative data to this rate-making, Edison did not track program costs. The resulting uncertainty about the amounts, specific purposes, and support for these remedial expenditures must be construed against the utility, since it has the statutory burden of proof.

Despite a recent Commission decision that finds sufficient uncertainty about the quantity, justness, and reasonableness of those costs to approve an arrangement for an audit of those very costs, the Proposed Order concludes – curiously and without justification in the record evidence

– that "the company has satisfied its burden." Proposed Order at 47. In the face of that earlier Commission decision and of Edison's admissions that its recovery program was unprecedented and that it required extraordinary cost and effort, the Proposed Order finds that Edison has met its burden of proving that the challenged costs were prudently incurred, just, and reasonable. The Proposed Order reaches this conclusion even though Edison was unable to quantify the costs it asserts were prudently incurred to repair its system. Since the utility was unable to identify particular recovery program costs, it was also unable to presented specific justifications for those costs.

The Proposed Order does not require from Edison the strong proof logically necessary to validate Edison's extraordinary (and contradictory) claims that its unprecedented, short-term recovery program produced only ordinary expenditures that are representative of its anticipated on-going costs. Instead the Proposed Order accepts the flimsiest of evidence – unsubstantiated, subjective opinion testimony – as fully adequate. That conclusion is not supported by substantial evidence on the whole record and must be rejected by the Commission.

Consequently, GCI supports the Alternative 1 at pages 70-72 of the Joint Replacement Language on this issue.

b. Prudence of Specific Distribution Capital Investments in Rate Base

c. Request for Audit of New Distribution Capital Investment Costs

Owing to the Commission's initiation of an audit in Docket 01-0664, and the terms under which the audit will be conducted and considered in this proceeding, GCI take no exceptions on this issue.

7. Other Rate Base Issues

Exception #9

At page 58, the Proposed Order rejects Mr. Effron's use of his labor allocator to functionalize operating reserves. The Proposed Order relies on its rationale for rejecting a labor allocator for General and Intangible Plant in Section II.C.2. The several flaws with the Proposed Order's rationale for rejecting a labor allocator for functionalizing General and Intangible Plant discussed above are equally applicable to the Proposed Order's rejection of Mr. Effron's use of his labor allocator to functionalize operating reserves. For sake of brevity, we will not repeat those arguments here.

The **Commission Analysis and Conclusion** for Section II.C.8 (page 58 of the Proposed Order) should be deleted. The replacement language for the **Commission Analysis and Conclusion** for Section II.C.8 at page 79 of the Joint Replacement Language should be adopted.

D. Operating Revenues And Expenses

1. Recommended Operating Income Statement

2. Operating Revenues

3. Operating Expenses

a. Functionalization Of Generation, Transmission, and Distribution Expenses

Exception #10

As we stated in our Reply Brief, Edison contends that "No party now appears to contest ComEd's functionalization of distribution plant. In any event, no party has identified any error in the functionalization." However, The Commission cannot base its factual determinations solely on prepared testimony. The entire record also contains the testimony elicited on cross-examination.

The entire record – and in particular, testimony developed through cross-examination of Edison's witnesses – permits a closer examination of Edison's functionalization of expenses. It also compels a conclusion different from Proposed Order's. The open questions surrounding Edison's use of its unexamined functionalization tool create such uncertainty that Edison cannot be deemed to have met its burden of proving that the amounts proposed for inclusion in its revenue requirement are just and reasonable.

The ARES Coalition has marshaled a compelling case that Edison's blind reliance on an untested, never-before-used accounting system is unjustified. Indeed, it would be unreasonable. ARES Initial Brief at 13, 66-68. The significance of Edison's reliance on this system is shown in its statement that 40% of the increase in O&M expenses from several FERC accounts in the 580-598 range is attributable to accounting changes, rather than actual spending increases. Edison Initial Brief at 91. However, the accounting system in use cannot alter the nature – and appropriate allocation – of the expenditures being recorded.

For example, costs that "first appeared in distribution FERC accounts in the 2000 test year" (Edison Initial Brief at 94) are not automatically transformed to distribution costs merely by a change in the account to which they are assigned. The determinative factor should be the function of the asset or expense, not the account in which it appears. Either the previous system or the current system was in error. There is no evidence of record, however, that the classifications of costs according to the CBMS system are superior to prior allocations.

For these reasons, GCI supports the Joint Replacement Language at pages 80-84 on this issue.

b. A&G Expenses -- Direct Assignment and Allocation

Exception #11

Like its conclusion concerning assignment of General and Intangible Plant, the Proposed Order adopts ComEd's proposal that administrative and general ("A&G") expenses be directly assigned. Proposed Order at 68-69. The Proposed Order repeats the same arguments in favor of direct assignment of A&G costs that it did for its proposal for direct assignment of General and Intangible Plant.

GCP addressed the assignment and allocation of A&G expenses in its arguments regarding the Proposed Order's conclusion concerning direct assignment and allocation of General and Intangible Plant in Section II.C.2 above. Those arguments apply equally to Edison's proposed direct allocation methodology for A&G expenses and are adopted here. In the interest of brevity, we will not restate all of those arguments here, but it is important to point out that in Docket 99-0117, the Commission explicitly rejected a direct assignment allocator for A&G expenses such as that proposed by ComEd in this case. In that case, the Commission stated that:

> While direct assignment may be a better method in some cases, the Commission does not believe costs, which include CEO and executive salaries, are amenable to direct assignment. Were such costs amenable to direct assignment, Edison would have assigned these costs directly to the distribution function in prior cases. Edison did not. For the same reasons that we disagreed with Edison's direct assignment of General Plant costs, we also disagree with Edison's direct assignment of A&G expenses. We, therefore, adopt IIEC's proposal for allocation.

Docket 99-0117, Order at 27. As was the case with General and Intangible Plant costs, ComEd has not presented evidence sufficient to warrant a different conclusion here and the Proposed Order's conclusion should be rejected.

Instead, the Commission should adopt a labor allocator to assign A&G expenses. Mr. Effron proposed a labor allocator consistent with the Commission's methodology in Docket 99-0117 to calculate A&G expenses. Use of the Mr. Effron's labor allocator reduces ComEd's A&G expenses by $55,924,000. GC Ex. 2.0 at Sch. DJE-2.6 (Effron Direct).

The **Commission Analysis and Conclusion** for Section II.D.3.b. (pages 68-69 of the Proposed Order) should be deleted. The replacement language for Section II.D.3.b. at pages 84-91 of the Joint Replacement Language should be adopted.

c. Proposed Known & Measurable Changes to Test Year Expenses

i. Expense Adjustments Related To Rate Base Adjustments

ii. "Levelization" Adjustments

A. Tree Management Expense

B. Storm Restoration Costs

C. Reserve for Levelized Variable Storm Damage Expenses

D. Other

Exception #12

FERC Accounts 580, 590, 592, 593, 594, and 903

At pages 85-86, the Proposed Order rejects Mr. Effron's proposal to normalize the expenses included in FERC Accounts 580, 590, 592, 593, 594, and 903 during the 2000 test year. The Proposed Order states that there is not sufficient evidence to indicate that the test year costs for these accounts are inappropriate. Proposed Order at 86. In an opaque statement, the Proposed Order adds that "Mr. Effron's inconsistent normalization formulae are inappropriate and contrary to the basic tenets of test year principles and must be rejected." *Id*. Neither of these statements are supportable.

As to the first statement, the Proposed Order may be applying an inappropriate standard. Mr. Effron's testimony was that the amounts charged to the six FERC accounts were abnormal when compared to the amounts charged to those accounts in the prior five years. There is no allegation that the amounts were "inappropriately" charged to these accounts. Instead the claim is that the amounts charged in 2000 do not represent a normal amount to be charged to these accounts and a normalization adjustment is appropriate. There is nothing wrong in normalizing expenses, as the Proposed Order recognizes with respect to tree trimming expenses and storm restoration costs.

Perhaps the Proposed Order intended to state that there is insufficient evidence to show that the six FERC accounts require normalization. If that is the case, the Proposed Order's summary of Mr. Effron's testimony refutes that suggestion. Mr. Effron's Direct Testimony and his Supplemental Direct Testimony recount the wild fluctuations in the FERC accounts at issue.

For example, the amount charged to FERC Account 580 increased by ***169%*** from 1999 to 2000. GC Ex. 2.0 at 15 (Effron Direct). The amount charged to Account 590 increased by ***180%*** from 1999 to 2000. *Id.* Mr. Effron's Supplemental Direct Testimony elucidated further the dramatic increases in charges to these accounts in 2000 from the amounts charged in the years 1995-1997. GC Ex. 2.0 (Supp.) at 1-2.

In his Supplemental Direct Testimony, Mr. Effron also testified that the amounts charged to FERC Accounts 592, 593, 594, 903 in 2000 were abnormal. Mr. Effron testified that expenses included in distribution maintenance Account 592 – Maintenance of Station Equipment for 1995-2000 show an expense pattern similar to those for Accounts 580 and 590. GC Ex. 2.0 (Supp.) at 4. For the years 1995-1997, the expenses were in the range of $7-8 million. *Id.* In 1998, the expense increased two-fold to $16 million. *Id.* In 1999, the expense soared to $30 million. The expense went up again, to $40 million in 2000. *Id.* Thus, the expense in 2000 was four times the expense in the years 1995-1997, 150% greater than the expense in 1998, and about 30% greater than the expense in 1999. *Id.* Obviously, the expense incurred in 2000 was out of line with ComEd's recent experience.

Mr. Effron testified that the expenses in 2000 for Account 593 (except for tree trimming and storm damage which have been separately normalized) and for Account 594 are not as far out of line with the expenses incurred in earlier years as are Accounts 580, 590, and 592. GC Ex. 2.0 (Supp.) at 4. Nonetheless, the expenses in Accounts 593 and 594 were still significantly higher in 2000 than in prior years. *Id*, Sch. DJE-1S.

Finally, Mr. Effron proposed an adjustment to Account 903 – Customer Records and Collection Expense. The expenses charged to this account for 2000 were abnormally high as compared to actual expenses charged to this account for the years 1995-1999. While the amount charged to Account 903 in 2000 was less than that charged to the account in 1999, the amount charged in 2000 was, nonetheless, significantly greater than the amount charged in the years 1995-1998. GC Ex. 2.0 (Supp.) at 5, Sch. DJE 2S. For example, Mr. Effron showed that the expense charged to Account 903 in 2000 was approximately $55 million greater than the average for the years 1995-1997. *Id.*

In short, the record is clear that the amounts charged to these accounts in 2000 were not normal as compared to past years. Mr. Effron's testimony – as summarized at pages 81-83 of the Proposed Order – makes this obvious. The amounts charged to these accounts in 2000 are drastically higher – sometimes more than twice as much – than the amounts charged in 1999 and earlier years. It is unfathomable that the Proposed Order could conclude otherwise.

It may be that the Proposed Order, without stating it, accepts Edison's various attempts to obfuscate Mr. Effron's testimony. If that is the case – and again, that is not clear from the Proposed Order – Mr. Effron's testimony and cross-examination of Edison's witnesses exposed the weaknesses of Edison's arguments. *See*, *e.g.*, GC Ex. 2.0 at 17 (Effron Direct); Tr. 2005-06. Thus, there is no basis for the Proposed Order's conclusion there is insufficient evidence showing that the amounts charged to the six FERC accounts in 2000 were abnormal.

The Proposed Order's second statement – that "Mr. Effron's inconsistent normalization formulae are inappropriate and contrary to the basic tenets of test year principles and must be rejected" (Proposed Order at 86) – is especially untenable. Although the exact intent of this statement is unclear, it appears to respond to Edison's *ad hominem* and weightless claim that Mr. Effron uses a result-oriented normalization process to choose the normalization period for each adjustment that will result in the greatest decrease in revenue requirement. Edison also criticized Mr. Effron for using judgment in determining the appropriate normalization period. If this is the Proposed Order's point, it is flat wrong.

Like Mr. Effron, the Proposed Order makes normalization adjustments using different time periods. Adopting ***Mr. Effron's*** proposal, the Proposed Order recommends normalizing tree trimming costs over ***six*** years. As to storm restoration costs, the Proposed Order, again adopting ***Mr. Effron's*** proposal, normalizes those expenses over ***five*** years.

Moreover, both Edison and Staff used different time periods in proposing various normalization adjustments. Edison witness Hill admitted on cross-examination that Edison used different time periods to normalize expenses. Tr. 3487. Mr. Hill also admitted that it is necessary to use judgment in determining the length of the period to use to normalize expenses. Tr. 3489. Similarly, Staff used different periods to normalize expenses. For example, Staff recommended an eight-year period to normalize tree trimming expenses and a nine-year period to normalize storm restoration costs.

In sum, the Proposed Order provides no viable basis for rejecting Mr. Effron's adjustments for FERC Accounts 580, 590, 592, 593, 594, and 903. The Commission should reject the Proposed Order's conclusion and adopt Mr. Effron's proposed adjustments, as modified in GC's Reply Brief.

The **Commission Analysis and Conclusion** for Section II.D.3.d.ii. (pages 85-86 of the Proposed Order) should be deleted. The replacement language for Section II.D.3.d.ii. at pages 101-06 of the Joint Replacement Language should be adopted.

iii. Salary and Wage Adjustment for General Pay Increases

iv. Adjustments for Post-Test Year "Merger Savings"

Exception #13

The Proposed Order appropriately criticizes ComEd for its self-serving interpretation of *pro forma* adjustments. That is, ComEd is willing to accept any out-of-test year adjustment as "known and measurable" as long as it increases rates. However, if a *pro forma* adjustment decreases rates, ComEd reflexively claims that the adjustment cannot be "known and measurable."

While the Proposed Order's adoption of Staff's adjustment to reflect post-test year merger savings is infinitely preferable to ComEd's ridiculous position that no merger savings should be reflected in rates, Staff's proposal is too conservative in light of the enormous savings ComEd has told regulators that it will realize because of the Unicom-PECO merger. In an 8-K filing with the Securities and Exchange Commission, Exelon represented that approximately 2,900 positions would be eliminated as a result of the merger. GC Ex. 2.0 at 20 (Effron Direct). According to the filing, the terminations will occur primarily in the areas of corporate support, generation, and energy delivery. *Id*. In another 8-K filing, Exelon stated that it anticipated that the merger would result in $100 million in savings in the first year and over $180 million in savings by the third year. City Cross Ex. 57 at Bates #COC 0001167.

As described in the Proposed Order, Mr. Effron proposed that the revenue requirement be adjusted to reflect savings that ComEd can reasonably expect to achieve. Because ComEd did not provide details of projected cost savings, Mr. Effron developed a conservative proxy to estimate merger savings. To start, Mr. Effron calculated that elimination of 2,900 jobs is about 8.8% of the total of 33,000 Exelon employees in 2000. GC Ex. 2.0 at 21 (Effron Direct). Mr. Effron testified that he interpreted the statement that the job cuts are to come primarily from the areas of corporate support, generation, and energy delivery to mean that more than 8.8% of the positions eliminated will come from those areas. *Id*. Based on that, Mr. Effron stated that it is reasonable to assume that 10% of the positions in the areas of corporate support, generation, and energy delivery will be eliminated. *Id*.

Applying that 10% figure to the 7,205 delivery services employees ComEd had in 2000 results in a reduction of 721 positions. GC Ex. 2.0 at 21 (Effron Direct). ComEd's per employee adjusted payroll and payroll-related costs in 2000 was $53,256. *Id*. Multiplying those figures results in a reduction to payroll of $38,371,000. *Id*. at 21-22. Mr. Effron offset these savings by accounting for the costs ComEd states it will incur to eliminate the 2,900 positions. Mr. Effron reduced his projected merger savings by $10,708,000 to reflect these costs. *Id*. at 22.

Mr. Effron's savings estimate is conservative. In its September 24, 1999 8-K ComEd stated that only 50% of the projected $100 million savings in the first year and the $180 million projected savings over three years will come from labor savings. That is, Mr. Effron's proposal does not account for ½ of the savings Exelon represents it expects to realize.

Mr. Effron's proposal is also is known and measurable. It is known that the merger will produce savings. Exelon's SEC Form 8-K dated March 16, 2001 states that approximately 2,900 positions have been identified to be eliminated as a result of the Merger Transaction. GC Ex. 5.0 at 13. The elimination of these positions will certainly result in reductions to expenses. ComEd does not deny this.

In sum, the Proposed Order's adoption of Staff's recommendation concerning merger savings is a good start. However, the proposed adjustment is too conservative and does not approach the level of savings that ComEd will realize. Accordingly, Mr. Effron's adjustment – which is also quite conservative compared to the savings Edison is likely to receive – should be adopted.

The **Commission Analysis and Conclusion** for Section II.D.3.d.iv. (page 92 of the Proposed Order) should be deleted. The replacement language for Section II.D.3.d.iv. at pages 107-13 of the Joint Replacement Language should be adopted.

d. Other Proposed Adjustments to Expenses

i. Exclusion of Incremental Expenses Related to Unicom/PECO Merger

ii. Exclusion of Audit-Related Costs

iii. Environmental Remediation Expenses

Exception #14

At page 95, the Proposed Order rejects the ARES Coalition's argument that environmental remediation expenses are not appropriately recovered through delivery services rates. The Proposed Order also implicitly rejects Mr. Effron's proposal to normalize this expense, as it adopts Edison's recommended amount. The Proposed Order's adoption of Edison's proposal is not supported by the record.

Mr. Effron testified that his adjustment was appropriate because ComEd's proposal to include $9,206,000 of environmental remediation costs in test year administrative and general expenses is more than twice as large as it was for all years from 1996-1999 except one. GC Ex. 2.0 at 27, Sch. DJE-2.8 (Effron Direct). Mr. Effron added that the costs from 1996-2000 varied greatly, ranging from $2,001,000 in 1996 to $9,206,000 in the test year. ComEd, however, provides absolutely no explanation for its position. *Id*. Therefore, Mr. Effron testified, environmental remediation costs should be based on a five-year average for the years 1996-2000. The five-year average results in environmental remediation costs of $4,232,000. *Id*. Applying Mr. Effron's labor allocator to this amount reduces ComEd's proposed environmental remediation costs by $1,519,000. *Id*.

Normalizing this cost is appropriate given the wide variation in this expense item over the past five years. The Proposed Order provides no explanation or argument why Mr. Effron's analysis was not correct or why his position should be rejected.

The **Commission Analysis and Conclusion** for Section II.D.3.e.iii. (page 95 of the Proposed Order) should be deleted. The replacement language for Section II.D.3.d.iv. included at pages 114-16 of the Joint Replacement Language should be adopted with the following caveat. As it reads now, the language in the Joint Replacement Language could be interpreted to mean the Proposed Order adopts GCI's position that all environmental remediation costs should be disallowed. GCI agrees with the ARES Coalition that there are legitimate legal questions as to whether environmental remediation costs are appropriately recovered through delivery service rates. However, it should be made clear that if the Commission rejects that legal proposition, GCI recommend that Mr. Effron's proposal to reduce ComEd's proposed environmental remediation costs by $1,519,000 should be adopted.

iv. Advertising Costs

v. **Bank Commitment Fees**

vi. **Legal Expenses**

vii. **Charitable Contributions & Memberships**

viii. **Special Projects**

ix. **Research and Development Costs**

x. **Interest On Customer Deposits**

xi. **Uncollectibles Expense**

Exception #15

Without explanation, the Proposed Order rejects Mr. Effron's proposal to modify Edison's uncollectibles expense. The Proposed Order's conclusion is inconsistent with the approach approved by the Commission in Docket 99-0117 and should be rejected.

Mr. Effron calculated uncollectible accounts expense based on the delivery services revenue requirement exclusive of uncollectible accounts. GC Ex. 2.0 at 23 (Effron Direct). Mr. Effron used the uncollectible account ratio of 0.71% included in ComEd Ex. 4.0, App. C at Sch. A.2..1 in his calculation. *Id*. Mr. Effron grossed up the total delivery services revenue requirement to reflect the inclusion of uncollectible accounts expense equal to 0.71% of the revenue requirement. *Id*. The difference between the revenue requirement exclusive of uncollectible accounts expense and the grossed up revenue requirement is the uncollectible accounts expense amount that should be included in the revenue requirement for this case. *Id*. at 24.

Mr. Effron's method uses ComEd's four-year average for uncollectible accounts ratio and recognizes that changes in the revenue requirement will cause changes in the uncollectible accounts expense. *Id*. Staff witness Burma Jones uses a similar approach. Staff Ex. 2.0 at 6. Mr. Effron's proposed uncollectible accounts expense is $10,209,000, a reduction of $6,091,000 to ComEd's proposed amount. GC Ex. 2.0 at Sch. DJE 2.5.

Moreover, Mr. Effron's approach is similar to that adopted by the Commission in Docket 99-0117. ComEd's proposal, on the other hand, sounds like the method of determining uncollectible accounts expense that the Commission rejected as overly complicated. Docket 99-0117, Order at 24. ComEd has not presented sufficient evidence to justify Commission deviation from its conclusion on this issue in Docket 99-0117.

The **Commission Analysis and Conclusion** for Section II.D.3.e.xi. (page 108 of the Proposed Order) should be deleted. The following language should be substituted in its place:

> The Commission rejects ComEd's proposal for calculating uncollectibles expense. ComEd's proposal is similar to the utility's proposal in Docket 99-0117 that the Commission rejected as too complicated. The Company's proposal in this case is also too complicated and Edison has not presented sufficient evidence to justify reversing the decision we made less than three years ago.
>
> The Commission finds persuasive Mr. Effron's proposal. Mr. Effron's methodology is similar to that adopted in Docket 99-0117 and recognizes that changes in the revenue requirement will cause changes in the uncollectible accounts expense. Accordingly, Mr. Effron's proposed uncollectible accounts expense of $10,209,000 is adopted. Mr. Effron's proposal represents a reduction of $6,091,000 to ComEd's proposed amount.

xii. Taxes Other Than Income Taxes

Exception #16

Real Estate Tax

At page 111, the Proposed Order reaches its conclusion concerning "Taxes Other than Income Taxes." As part of its conclusion, the Proposed Order notes that it accepts ComEd's proposal to make two adjustments to "Taxes Other than Income Taxes" that relate to the Illinois Electricity Distribution Tax. According to the Proposed Order, the second adjustment is appropriate because it is based on the same logic as Mr. Effron's proposal to modify real estate taxes. However, the Proposed Order does not make clear that it adopts Mr. Effron's real estate takes adjustment. The Proposed Order should be modified to rectify this oversight.

The **Commission Analysis and Conclusion** for Section II.D.3.e.xii. (page 111 of the Proposed Order) should be modified by adding the following language between the second and third paragraphs:

> The Commission adopts Mr. Effron's proposal to adjust real estate tax expense. ComEd's proposed real estate tax expense consists of an accrual of real estate taxes to be paid in 2001, a true-up of the accrual booked in 1999, and refunds received in 2000. GC Ex. 2.0 at 30. The true-up ComEd booked in 2000 added $1,367,000 to the accrual booked in 1999. That is, ComEd underestimated the accrual in 1999 and had to book that amount in 2000 to true up the accrual in 2000. *Id*. ComEd's real estate tax proposal assumes that ComEd will again underestimate the accrual for 2000. *Id*.
>
> The Commission agrees with Mr. Effron's testimony that ComEd's assumption is not appropriate because in each year from 1995-1999, ComEd overestimated the accrual for real estate taxes in the prior year. *Id*. In other words, the true up ComEd booked in 2000 was an anomaly compared to recent history. The five-year average applicable to delivery service facilities for 1996-2000 was

> $(1,266,000). Thus, the Commission adopts Mr. Effron's recommendation that the true up booked by ComEd in 2000 be reduced by $2,633,000.

Payroll Taxes

The Proposed Order rejects Mr. Effron's proposal regarding payroll taxes because it also rejected Mr. Effron's proposals concerning labor expense. As discussed in Section II.D.3.d.ii. above, the Proposed Order's rejection of Mr. Effron's adjustment to labor expense concerning incentive compensation charged to FERC Account 580 is erroneous. Accordingly, the Proposed Order should be modified to adopt Mr. Effron's proposal concerning payroll taxes that results from this adjustment to labor expense.

The **Commission Analysis and Conclusion** for Section II.D.3.e.xii. (page 111 of the Proposed Order) should be modified by deleting the third full paragraph of that section and adding the following language in its place:

> As discussed in Section II.D.3.d.ii. above, the Commission adopts Mr. Effron's adjustment to labor expense concerning incentive compensation charged to FERC Account 580. Because payroll taxes are based on the level of labor expense, the Commission also adopts Mr. Effron's proposal adjustment for payroll taxes.

xiii. Incentive Compensation

xiv. Rate Case Expenses

4. Prudence of Expenses

5. Other Revenue & Expense Issues

E. Cost of Capital

1. Capital Structure

a. Known And Measurable Changes to Test Year Capital Structure

i. TFI Retirements in 2001 and 2002

ii. Other

b. Purchase Accounting Adjustments

c. Note Receivable from Exelon

2. Cost of Debt

a. Purchase Accounting Adjustments

b. Cost of Variable Rate Long-Term Debt

3. Cost of Common Equity

a. Comparable Groups

b. Methodological Issues

c. Market Versus Book Issues

4. Overall Rate of Return

F. Cost Of Service and Rate Design

1. Cost of Service Study Issues

a. Marginal Cost Study

b. Embedded Cost Study

Exception #17

GCI, in testimony and in briefs, has championed the use of a four coincident peak (4-CP) allocator because it best allocates the costs of regional distribution facilities according to the principle of cost causation. In its ECOSS, Edison proposed the use of a single coincident peak (1-NCP) allocator. The Proposed Order rejected the arguments of GCI for a multiple peak allocator in favor of a 1-CP allocator. Proposed Order at 121.

Although not as precise a cost-causation tool as the 4-CP allocator the GCI proposed, the 1-CP allocator is superior to the novel 1-NCP allocator Edison proposed. In fact, for the last two decades, when Edison used marginal costs for ratemaking, the allocation of the costs of facilities with distribution characteristics have been allocated using the 1-CP allocator the Proposed Order recommends.

The GC parties, however, continue to believe that a 4-CP allocator that recognizes the reality that Edison bases its distribution plant investments on the repetition of peak loads (not single occurrences) is superior to the allocator chosen by the Proposed Order. However, we acknowledge that the 1-CP allocator improves Edison's proposed ECOSS and is consistent with historical Commission policy on the allocation of distribution-type costs.

Accordingly, the GC parties do not agree with the Joint Replacement Language on this issue. We have included below alternative substitute language proposals that address both positions. If the Commission elects to use the more precise implementation of cost causation principles and approve the 4-CP allocator, the language in Alternative A should be used. If the Commission elects to continue its historical use of a 1-CP allocator, then the language of Alternative B should be used to clarify the reasons for the selection of that allocator.

Proposed Language

Alternative A:

The Commission accepts the embedded cost methodology provided by the Company, as modified and corrected in its rebuttal and surrebuttal testimony. Except as noted below, the ~~The~~ arguments of IIEC and GCI are rejected. Naturally, when inputs to a formula change the results will change. Simply put, IIEC doesn't like the result. The Commission has historically approved the use of a 1-CP allocator for the regional distribution costs at issue. The parties in this case have proposed different allocation methods that bracket the Commission's historical position. The Commission finds that the Company's assertion that it lacks information for a more refined allocation is without support in the record and that the proposal to depart from historical practice to allocate the regional distribution costs at issue on the same basis it uses for local distribution costs, 1-NCP, is not just and reasonable. The GC parties also propose a departure from historical practice -- to use a 4-CP allocator. The record supports their assertions that most facilities in the accounts being allocated are more like the facilities historically allocated on the 1-CP basis and that the Company relies on repeated peak loads, not single instances, in making investment decisions. Consequently, the proposed 4-CP allocator better traces cost causation , and it is therefore approved. ~~The Company's use of a 1-CP is accepted.~~ The Commission agrees that the Company use of traditional allocations of customer related expenses (in particular, the allocation of customer information, uncollectibles, and billing costs) are of concern and should reviewed in future filings. That review should incorporate the results of a study by the Company of its allocation processes for the costs, which we order the Company to conduct and to provide report at least three months prior to filing a case that involves those costs.

Alternative B:

The Commission accepts the embedded cost methodology provided by the Company, as modified and corrected in its rebuttal and surrebuttal testimony. Except as noted below, the ~~The~~ arguments of IIEC and GCI are rejected. Naturally, when inputs to a formula change the results will change. Simply put, IIEC doesn't like the result. The Commission has historically approved the use of a 1-CP allocator for the regional distribution costs at issue. Accordingly, the ~~The~~ Company's use of a 1-CP is accepted. The Commission agrees that the Company use of traditional allocations of customer related expenses (in particular, the allocation of customer information, uncollectibles, and billing costs) are of concern and should reviewed in future filings. That review should incorporate the results of a study by the Company of its allocation processes for the costs, which we order the Company to conduct and to provide report at least three months prior to filing a case that involves those costs.

2. Interclass Revenue Allocation

G. Rate Design

1. RCDS Rate Design

a. Demand Ratchet

i. General Service Ratchet

ii. Special Ratchet for Standby Customers

b. Definition Of Billing Demand In Rate RCDS

c. Impact on CTCs

d. Generation Facilities Under Rate RCDS

i. Proposals for Production Credit

ii. Proposals for Production Adder

2. Rate HVDS

a. Eligibility

b. Calculation of Credit

c. Allocation of Costs to Other Classes

d. Exemption From Rate RCDS Facility Charges

e. Adoption Prior to Bundled Rate Tariff Change

3. Rider ISS

a. Pricing

Exception #18

Since ComEd's proposed Rider ISS exposes residential customers to extremely high and volatile prices for energy, the Commission should reject it. Staff's proposed charge of a bundled rate plus 10% provides a residential customer with much more certainty as to what is at stake when he or she is deciding to leave the traditional regulated bundled service. ICC Ex. 22.0 at 1-2. Moreover, customers who cannot afford to pay such high and volatile electric prices when they lose their electric supplier are adequately protected. Staff Ex. 8.0 at 2. (Harden Direct).

As Staff witness Harden testified, Illinois historically has had high and sometimes extraordinary prices for power to serve summer demand. In fact, "just three summers ago, the price per mWh for peak power in Illinois spiked into the thousand of dollars." Staff Ex. 8.0 at 3. If ComEd's proposed Rider ISS was adopted during this spike, then residential customers would be shielded less from these volatile market prices.

The evidence shows that residential customers do need some price certainty. ICC Ex. 22.0 at 1-2. Even ComEd witness Strobel testified that certainty is important to market participants, including residential customers. Tr. 681-684. In addition, Strobel testified that a known fixed price is important to residential customers. Tr. 684, lines 2-9. Although ComEd's proposed Rider ISS would not change daily, it would still not provide as much certainty as Staff's proposed method. ICC Staff Ex. 22.0 at 1-2, lines 21-27 (Harden Rebuttal). Staff's method should be adopted since it is just, reasonable and promotes competition.

It should also be noted that ComEd's argument that the seasonal market value index methodology should be approved because the Commission previously approved it in Docket 99-

0117 is not controlling. The Commission has plenary authority to address each matter before it freely, even if it involves issues identical to a previous case. *Mississippi River Fuel Corp. v. Illinois Commerce Commission*, 1 Ill.2d 509 (1953). In this docket, the Commission is for the first time determining the pricing of a Rider ISS for residential customers. Residential customers are for the first time in history being offered an opportunity to choose an alternative electric supplier. To enhance consumer welfare and promote competition, this Commission should adopt Staff's proposal since it is the best option.

Accordingly, GCI does not adopt the language as proposed in the Joint Replacement Language. GCI requests the following replacement language for the Proposed Order at pages 123-125:

> **1. Rider ISS**
>
> **a. Pricing**
>
> **ComEd's Position**
>
> ComEd proposes that Rider ISS – Interim Supply Service ("Rider ISS") be extended to residential customers and that the charges in Rider ISS be set equal to the seasonal PPO energy rate plus an additional ten percent charge. ComEd provided testimony that without a 10% adder, many customers would not have any incentive to seek out an alternative provider and get off of Rider ISS.
>
> ComEd explains in detail why various alternative pricing proposals are inappropriate. ComEd notes that its Interim Supply Service has always been priced based upon a seasonal market value index methodology and was approved by the Commission in ComEd's initial delivery services filing in Docket 99-0117.
>
> **Staff's Position**

Staff recommends that the charge for Rider ISS for residential delivery service customers be the applicable bundled rate, plus a 10% adder. Staff suggests that its recommended changes to Rider ISS helps to reduce the barriers present for residential customers to participate in the competitive market. Therefore, Staff argues that a bundled rate is more appropriate for pricing power and energy to residential customers who have lost their alternative provider and that the Commission should approve a more appropriate rate format for Rider ISS for residential delivery services customers.

GCI's Position

GCI also agrees with Staff's proposed Rider ISS. GCI Reply Br. at 62-63. GCI argues that certainty is important for residential customers. A residential customer needs more certainty as to what is stake when he is deciding to leave the traditional regulated bundled service. Even ComEd recognizes that residential customers need price certainty. However, ComEd's proposed Rider ISS would not provide as much certainty as Staff's proposed method. Therefore, the Commission should approve Staff's Rider ISS as just and reasonable.

IIEC's Position

IIEC agrees with ComEd that the price for the service under Rider ISS should be based on the market price. However, IIEC suggests that the Commission should modify the Rider ISS pricing methodology. The IIEC's position is that the Commission should base Rider ISS charges on ComEd's hourly energy prices pursuant to its current Rate HEP. It is also IIEC's position that ComEd should not be allowed to charge the current 10% adder on top of the energy prices under Rider ISS. IIEC Br. at 27.

IIEC argues that the market value calculation for energy under Rate HEP would be preferable to the current market value at the time a customer takes service under Rider ISS rather than the market value derived from ComEd's Rider MVI which is used in the Rider PPO. According to IIEC, the Rate HEP market value will more closely reflect the actual market value of energy at the time that the customer is under Rider ISS. IIEC argues that other utilities such as Illinois Power already use a real time pricing rate as the basis for their interim supply service charges.

IIEC disagrees with ComEd's proposal to include a 10% adder in the pricing for Rider ISS. IIEC states that a 10% adder is not cost based and therefore not appropriate and that the 10% adder fails to provide a proper price signal, incentive or disincentive to customers.

IIEC also responds to Staff's proposed Rider ISS. In its response to Staff, IIEC urges the Commission to reject Staff's proposal for a number of reasons. IIEC supports many of ComEd's arguments as to why Staff's proposal should be rejected including ComEd's argument that Staff's proposal would create undue discrimination. IIEC Br. at 33.

The ARES Position

ARES Coalition contends that the Company should be required to implement one of the alternative solutions described by ARES Witness Ulrich. ARES Coalition recommends that for certain customers, Rider ISS should be an option for supply in the interim without paying the first month of services at PPO prices. Ulrich Dir., ARES Ex. 2.0. During the second month the rate should be the PPO price plus a 5% premium and in the third month the price should be a 10% premium to the PPO. The ARES Coalition argues that the alternative pricing described above, does not penalize the customers for a supplier's departure or for the intricacies of billing cycle timing in the first month of service on Rider ISS, but still provides an increasing incentive for customers to choose a supplier. ARES Br. at 99.

ARES Coalition also recommends that the Commission track the penalty dollars collected by ComEd under Rider ISS and treat the penalties collected under Rider ISS in the same manner as penalties collected under imbalance tariffs. The penalties collected by the Company should be estimated and used to decrease ComEd's asserted delivery services revenue requirements. ARES Br. at 99.

ARES Coalition additionally requests that the Commission approve a modified version of ComEd's proposed Rider ISS, with no penalty in the first month, a 5% penalty in the second month and a 10% penalty in the third month. The ARES Coalition further requests that the Commission direct ComEd to provide the Commission with an accounting of the penalties which the

Company collects and that these funds be used to reduce ComEd's delivery service revenue requirements.

ComEd's Response

ComEd indicates that a 10% additional charge provides an incentive to residential customers to seek out new suppliers, thereby encouraging competition, while preventing gaming. ComEd attacks alternative pricing proposals, noting that ComEd's billing system is not equipped to price Rider ISS on Hourly Energy Pricing, as IIEC suggests, and that use of bundled rates, as Staff submits, is discriminating and contrary to recent Commission decisions.

Commission Analysis and Conclusion

The Commission supports the opportunity for residential customers to have access to the competitive electric generation market without facing unnecessary risks or barriers. The Commission believes that the provision of interim supply service through Rider ISS will be a useful tool toward this end. Therefore, the Commission adopts Staff's proposed Rider ISS. The Commission agrees with Staff, GCI and ComEd that residential customers do need price certainty. Although ComEd's proposed Rider ISS would not change daily, it would not provide as much certainty as Staff's proposed method. ~~While the Commission appreciates Staff's concerns, the Commission cannot in this case, as in Docket No. 00-0802, accept Staff's recommendation that residential Rider ISS rates be based on bundled electric rates.~~

~~Rather, the Commission believes that Staff's proposal would likely result in cross-subsidies, as revenue shortfalls from customers who use the rider are ultimately borne by other customers. Although to some extent unintended cross-subsidies are inevitable, the Commission does not believe it is appropriate in this situation to intentionally develop rates at the outset that have little relationship to cost-causation. Further basing Rider ISS prices on bundled rates would provide opportunities and incentives for RESs and residential customers to game the system if residential customers can temporarily switch to or rely on ComEd for firm supply at prices based on bundled rates in situations when market prices are high. The Commission believes that it is more appropriate for residential customers to pay prices based on market~~

> ~~prices for interim supply service, as non-residential customers are already doing.~~
>
> In Docket 99-0117 this Commission agreed with parties who suggested that Rider ISS should be provided to customers at market based rates. We see ~~no~~ reason to deviate from this position at the current time. There is ~~no~~ demonstration that the proposed difference in Rider ISS for residential customers as compared to non-residential customers is reasonably related to the <u>need for residential customers to have more certainty to what is at stake when deciding to leave the traditional regulated bundled service.</u> ~~difference in the cost of providing service.~~
>
> <u>ComEd's argument that the seasonal market value index methodology should be approved because the Commission previously approved it in Docket 99-0117 is not controlling. The Commission has plenary authority to address each matter before it freely, even if it involves issues identical to a previous case. *Mississippi River Fuel Corp. v. Illinois Commerce Commission*, 1 Ill.2d 509 (1953). In this docket, the Commission is for the first time determining the pricing of a Rider ISS for residential customers. Residential customers are for the first time in history being offered an opportunity to choose an alternative electric supplier. To enhance consumer welfare and promote competition, this Commission adopts Staff's proposal as just and reasonable.</u> The Commission further finds that the ARES proposal is not reasonable and does not adopt it.

b. Commission Authority to Alter ComEd's Proposal

Exception #19

The Proposed Order incorrectly concludes that the Commission should determine the issue as to whether the Commission has authority to alter ComEd's proposal. Proposed Order at 126. First, the Commission's authority with respect to altering ComEd's proposal is clear. Nothing in the PUA truncates the Commission's authority to ensure that tariffed services are just and reasonable. 220 ILCS 5/9-201. GCI Reply Brief at 63. There are no unregulated tariffed services and prices. ARES Initial Brief at 101. If the Commission finds that ComEd's proposed Rider ISS is unjust and unreasonable, the Commission must modify or reject the tariff as proposed. If ComEd wants the benefits of a tariff (force of law, statutory limitation of liability, uniform terms and conditions without the expense of individual contract negotiations, etc.), it must accept Commission regulation.

Second, as shown above, the Commission should modify ComEd's proposed tariff. The evidence shows that Staff's proposed tariff is just and reasonable. GCI Reply Brief at 62-63. Accordingly, GCI does not adopt the language as proposed in the Joint Replacement Language. GCI requests the following replacement language for the Proposed Order at pages 125-126:

> **b. Commission Authority to Alter ComEd's Proposal**
>
> **ComEd's Position**
>
> ComEd's position is that the Commission lacks the authority to alter ComEd's proposed service offering for Rider ISS. ComEd states that the Act does not require ComEd to offer the service provided pursuant to Rider ISS. 220 ILCS 5/16-103. Instead, ComEd has agreed to voluntarily offer interim supply service on terms and conditions proposed by ComEd to address the situation that would confront retail customers if their RES service were abruptly terminated. However, ComEd has not offered or agreed to offer this service on terms other than those proposed by ComEd and, the Commission does not have the authority to force ComEd to offer a revised Rider ISS service. *Id.*
>
> **GCI's Position**
>
> GCI's position is that nothing in the Public Utilities Act truncates the Commission's authority to ensure tariffed services are just and reasonable. 220 ILCS 5/9-201. There are no unregulated tariffed services and prices. If ComEd's proposed Rider ISS is unjust and unreasonable, the Commission must modify or reject it.

IIEC's Position

IIEC asserts that as Rider ISS is already an approved rate or tariff, and therefore, ComEd cannot unilaterally decide to withdraw the service based on Sections 8-505 and 9-201 of the Act. 220 ILCS 5/8-505, 9201. While a utility may propose a change in a rate or tariff, the IIEC alleges that it is the Commission's responsibility to determine whether the proposed rate or tariff is approved, set for hearing, or repealed. IIEC Br. at 35.

The ARES Position

ARES Coalition takes the position that since ComEd has filed Rider ISS with the Commission for approval that the Commission retains all of its powers under the Act to review the tariff and propose modifications to the tariff. ARES Br. at 101.

ComEd's Response

ComEd refers to Section 16103 of the Act, which expressly prohibits the Commission for directing utilities such as ComEd to offer services such as Rider ISS. ComEd points out that since Rider ISS is not a delivery service, and interim supply service is not otherwise required by the Act, ComEd need not offer it and the Commission lacks authority to order ComEd to provide interim supply service. Section 16-103(e) plainly directs that "The Commission shall not require an electric utility to offer any tariffed service other than the services required by this Section…." 220 ILCS 5/16103(e). ComEd indicates that, for the Commission to adopt the theory that it can circumvent Section 16103 by revising ComEd's proposal in respects not consented to by ComEd would be contrary to Section 16103. ComEd states that it is true that the Commission may reject ComEd's proposal as unjust and unreasonable, but the Commission may not order ComEd to provide the service on other or different terms. As noted by ComEd, the Commission's order must be within its jurisdiction and authority, lawful, and based exclusively on the evidence in the record. 220 ILCS 5/10103, 10201(e)(iv); *Business and Professional People for the Public Interest v. Illinois Commerce Commission*, 136 Ill. 2d 192, 201, 227, 555 N.E.2d 693, 697, 709 (1989). The Commission's jurisdiction is carefully circumscribed. "The Commission only has those powers given it by the legislature through the Act." *BPI*, 136 Ill. 2d. at 201, 555 N.E. 2d at 697. In addition, because the Act is in derogation of common law, no requirement to be imposed on public utilities can be read into the Act by intendment or implication. *Turgeon v. Commonwealth Edison Co.*, 258 Ill. App. 3d 234, 251, 630 N.E.2d 1318, 1330 (2d Dist.), *appeal denied*, 157 Ill. 2d 524, 642 N.E.2d 1305 (1994).

Commission Analysis and Conclusion

The Commission agrees with GCI. Nothing in the Public Utilities Act truncates the Commission's authority to ensure that tariffed services are just and reasonable. ~~need not determine this issue.~~ As noted above, we find that Staff's ~~ComEd's~~ proposal is just and reasonable and should be approved.

4. Other Customer Class Definition Issues

5. Residential Customer Eligibility for Rider PPO

6. SBO Credit

7. Metering Service Charge Credit

8. Rider TS – Transmission Service

9. 24 Month Return To Bundled Service Requirements

Exception #20

Although the Proposed Order rejects ComEd's interpretation of section 16-103(d) as requiring a minimum of 24 months before a residential customer may again elect delivery services, the Proposed Order incorrectly adopts ComEd's 24-month requirement simply because it is consistent with the Act. Proposed Order at 138. Despite the fact that ComEd's 24-month proposal is permitted by the Act, the Commission is still required to approve delivery service tariffs that are just and reasonable. 220 ILCS 5/16-108(d). Moreover, ComEd has the burden of proof. 220 ILCS 5/9-201(c). Yet, ComEd gives no justification for use of a 24-month requirement, except for ComEd's assumption that the customer has voluntarily chosen not to select another supplier. ComEd Initial Brief at 136. ComEd provides no evidence as to why it cannot allow customers to return to delivery services sooner. ComEd witness Juracek, a non-lawyer, merely states that the "Act entitles ComEd to implement a tariff with a 24-month limitation." ComEd Ex. 20 p. 19, lines 776-770.

Staff correctly concludes that the 24-month requirement is merely a penalty. Staff Initial Brief at 115-116. Unlike ComEd, Staff provides unrebutted evidence that a 12-month requirement is reasonable. Staff expert, Dr. Schlaf testifies that (1) other utilities impose only a 12-month minimum stay on bundled services for former smaller use delivery services customers; and (2) a 24-month requirement may unnecessarily prevent customers from participating in the competitive market. ICC Initial Brief at 115, ICC Staff Ex. 10.0 at 15-16. In sum, the evidence shows that a 12-month requirement for former residential delivery services customers is just and reasonable.

Accordingly, GCI does not adopt the language as proposed in the Joint Replacement Language. GCI requests the following replacement language for the Proposed Order at pages 137-138:

> **6. 24-Month Return to Bundled Service Requirements**
>
> **ComEd's Position**
>
> ComEd suggests that under its proposed revised Rate RCDS, small commercial and residential delivery services customers that return to bundled service be subject to a 24 month minimum period before they may re-elect delivery services. ComEd argues that it is entitled, as a matter of law, to impose that restriction consistent with Section 16-103(d) of the Act. ComEd proposes to limit delivery services customers' return to bundled service to two circumstances: (a) through their own voluntary election; or (b) after having been placed on Rider ISS (of which they promptly are notified), by through their failure to select another RES or, if eligible, the PPO, despite having approximately

three months in which to make such a selection under Rider ISS. Thus, ComEd points out, a customer will become subject to the 24-month minimum requirement only by choice.

GCI Position

GCI agrees with the Commission's Staff that ComEd should reduce the 24-month period to 12 months. GCI Reply Br. at 65-66. Staff correctly concludes that the 24-month requirement is merely a penalty. Staff Initial Brief at 115-116. Staff provides unrebutted evidence that a 12-month requirement is reasonable. Staff expert Dr. Schlaf testifies that (1) other utilities impose only a 12-month minimum stay on bundled services for former smaller use delivery services customers; and (2) a 24-month requirement may unnecessarily prevent customers from participating in the competitive market. ICC Initial Brief at 115, ICC Staff Ex. 10.0 at 15-16. On the other hand, ComEd provides no evidence as to why it cannot allow customers to return to delivery services sooner. ComEd witness Juracek, a non-lawyer, merely states that the "Act entitles ComEd to implement a tariff with a 24-month limitation." ComEd Ex. 20 p. 19, lines 776-770.

Nicor and Staff suggest that ComEd consider reducing the 24-month minimum period to 12 months. Staff acknowledges the Company's right under the Act to impose this requirement, but nonetheless argues that imposing a 24-month requirement on customers would be a harsh penalty. Staff suggests that if ComEd implements this discretionary measure, Rate RCDS should state that the stay is "permitted by" the Act rather than "in accordance with the Act." NEMA challenges ComEd's statutory right to impose the requirement.

ComEd's Response

ComEd has taken Staff's proposal under advisement, but ComEd has not determined to accept any reduction. The Company ComEd contends that NEMA's position has no legal basis and is contrary to the plain language of the Act.

Commission Analysis and Conclusion

Section 16-103(d) of the Act, provides that, for residential and small commercial customers, utilities "shall be entitled to impose the condition that such customers may not elect delivery services for up to 24 months thereafter." We agree that a 24-month minimum duration of service for return to bundled service is consistent with the Act and may be imposed by the Company. However, we agree with GCI that despite the fact that ComEd's 24-month proposal is permitted by the Act, the Commission is still required to approve delivery service tariffs that are just and reasonable. 220 ILCS 5/16-108(d). Moreover, ComEd has the burden of proof. 220 ILCS 5/9-201(c). Yet, ComEd gives no justification for use of a 24-month requirement, except for ComEd's assumption that the customer has voluntarily chosen not to select another supplier. ComEd Initial Brief at 136. ComEd provides no evidence as to why it cannot allow customers to return to delivery services sooner. ComEd witness Juracek, a non-lawyer, merely states that the "Act entitles ComEd to implement a tariff with a 24-month limitation." ComEd Ex. 20 p. 19, lines 776-770.

Appropriately, the Commission accepts ~~declines~~ Nicor's and Staff's suggestions to reduce this period because the record evidence supports a reduction. ~~neither required by the Act nor permitted to be imposed without ComEd's consent.~~ Staff expert, Dr. Schlaf testifies that (1) other utilities impose only a 12-month minimum stay on bundled services for former smaller use delivery services customers; and (2) a 24-month requirement may unnecessarily prevent customers from participating in the competitive market. ICC Initial Brief at 115, ICC Staff Ex. 10.0 at 15-16. On the other hand, we agree with GCI that ComEd provides no evidence as to why it cannot allow customers to return to delivery services sooner. The Commission finds that a 12-month minimum stay on bundled services for former smaller use delivery services customers is just and reasonable. We also reject as unnecessary Staff's proposed amendment to ComEd's tariff language.

10. Rider 25

11. Other Topics

III. TERMS AND CONDITIONS ISSUES

A. SBO Credit Eligibility (Customers With Past Due Bundled Service Balances)

Exception #21

Even as modified per Staff's recommendation (to account for customers' attempts to obtain delivery service that are denied based on this pre-condition to service), the "pay your bundled service bill first" pre-condition to access to competitive billing services is unjust, unreasonable, and imposes a cost of Edison's bundled service (collections) on prospective delivery services customers.

The logic of the GCI's opposition to this condition is very similar to the Proposed Order's own reasoning in rejecting Edison's attempt to impose FERC collections on delivery services customers. Proposed Order at 137. The principal difference here is merely that the <u>non-DST</u> service benefitted by an unnecessary tariff provision is an ICC jurisdictional service instead of a FERC jurisdictional service. As the Proposed Order observes in a different context, "The Commission supports the opportunity for residential customers to have access to the competitive electric generation market without facing unnecessary risks or barriers." Proposed Order at 124-125.

As with its FERC transmission services, Edison has the ability under its bundled service tariffs "to impose credit security requirements" as needed. Imposing bundled service collections as a preconditions to selected competitive services – to augment bundled service credit security and collection terms that have been fully adequate for years – is an unnecessary barrier to customers' use of alternatives to the bundled service provider.

Proposed Language

> The Commission observes that ComEd, in its rebuttal, amended its proposal to incorporate Staff's suggested changes. However, even with ~~With~~ these changes we conclude the Company's proposal ~~as modified is appropriate and reasonable and should be approved.~~ is not necessary. The Company's ability to impose credit security requirements and pursue collection under its bundled service tariffs have been deemed just and reasonable (for both customers and the utility) for years. Shifting the risk of non-payment of bundled service onto a competitive service would be inappropriate.

B. Enrollment Issues

C. Release and Use of Customer Specific Information

D. Off-Cycle Or Non-Standard Switching For Residential Customers

E. General Account Agency Issues

Note: For the following exceptions as to general account agency issues, GCI support the Joint Replacement Language at pages 185-88.

1. Use of Electronic Signatures for Customers - RES Letters of Agency

Exception #22

The Proposed Order appears to have determined that a Section 2EE Letter of Agency ("LOA") may be authorized by an electronic signature. 815 ILCS 505/2EE. However, the Proposed Order provides absolutely no analysis regarding whether an LOA may be authorized via electronic signature under the controlling law, or which of the federal or state laws apply to this issue. The Proposed Order's determination that ". . . we direct the parties to begin the workshop process with the understanding that the parties should arrive at a process to implement electronic signatures" appears to find that an LOA may be authorized by an electronic signature, with only the implementation to be determined. Proposed Order at 141-42. As the Commission appears to have determined that an LOA may be electronically signed, the Commission's order must provide an adequate legal analysis to support this conclusion. *See* 220 ILCS 5/10-201(e)(iii). Therefore, the Proposed Order should provide adequate legal analysis regarding whether an electronic signature meets the requirements of Section 2EE. 815 ILCS 505/2EE.

2. Requirements of Section 2EE.

Exception #23

Section 2EE Illinois Consumer Fraud and Deceptive Business Practices Act (815 ILCS 505/1 et seq. (hereinafter "Fraud Act")) requires an electric services provider ("ESP") to secure a signed and dated LOA from a customer before it can submit or execute a change in the customer's electricity service. Standing alone, Section 2EE appears to require a physical or "wet" signature. 815 ILCS 505/2EE(2). However, both the Illinois Electronic Commerce and Security Act ("ECSA") (5 ILCS 175/1 et seq.) and the federal Electronic Signatures in Global and National Commerce Act of 2000 ("ESGNCA" or "E-Sign Act") (15 USCS § 7001 et seq.) allow, with a few exceptions, a secure electronic signature to validate a document that otherwise requires a "wet" signature.

The ECSA states: "where a rule of law requires a signature, or provides for certain consequences if a document is not signed, an electronic signature satisfies that rule of law." 5 ILCS 175/5-120(a). Therefore, the Section 2EE requirement that an LOA must be signed and dated by the subscriber requesting the electric service provider change will be met by an electronic signature under ECSA.

The E-Sign Act provides that "a signature, contract, or other record, may not be denied legal effect, validity, or enforceability solely because it is in electronic form, . . . [or] because an electronic signature or electronic record was used in its formation." 15 USCS § 7001(a). Therefore, for the same reasons that ECSA meets the requirements of Section 2EE, E-Sign allows electronic signatures in this context.

3. Implementation of an Electronically Signed LOA.

Exception #24

While GCI believes that either act authorizes an electronic signature of a Section 2EE LOA, that is not the end of this issue. Both ECSA and the E-Sign Act provide for verification of an electronic signature, such that the procedure used ensures that only the party, to which the electronic signature is attributed, could have executed the electronic signature. *See* 5 ILCS 175/5-120; 5 ILCS 175/10-110; 15 USCS § 7001(c). The GCI is deeply concerned about how the electronic signature will be implemented and the manner in which the electronic signature will be verified. As with telemarketing, internet marketing is rife with opportunities for fraud. Electricity is a vital service upon which individuals and businesses depend. As such, the Commission should mandate that the workshops use the procedures set out in these acts as a template to generate rules regarding the methods and verification requirements of electronic signatures to be presented to the Commission for adoption.

As noted above, GCI adopts the Joint Replacement Language at pages 185-88 on the foregoing exceptions concerning general account agency issues.

F. Value-Added Aggregation Services

Exception #25

The Commission should not approve ComEd's proposed value-added services at this time. ComEd admits that the opportunity to aggregate load is not a delivery service. GCI Reply Brief at 69. In addition, ComEd states that the value-added services are not tariffed services. Proposed Order at 145. Pursuant to the Act, the Commission may adopt rules and regulations governing the criteria for aggregation of loads utilizing delivery services. 220 ILCS 5/16-104(b). However, the Commission cannot make a decision now whether ComEd's proposed value-added services need any rules or regulations. This docket does not have sufficient evidence for the Commission to make a determination whether ComEd or Staff's arguments have any validity. As Staff witness Borden pointed out, "currently, Staff and the Commission know nothing about the proposed services . . .." ICC Staff Ex. 25 at 7, lines 147-148. ComEd has the burden of proof. 220 ILCS 5/9-201(c). Therefore, the Commission should refrain from making a decision on ComEd's proposed services.

Accordingly, GCI does not adopt the language as proposed in the Joint Replacement Language. GCI requests the following replacement language for the Proposed Order at page 145:

> **Commission Analysis and Conclusion**
>
> The Commission cannot find~~s~~ that ComEd's proposal to initiate fee-based consulting services is reasonable and should be approved at this time. We agree with Staff that the Commission does not have enough information concerning the proposed services. We also agree with GCI and ComEd that the proposed services are not related to delivery services. The Commission may pursuant to the Act require rules and regulations concerning aggregation services. GCI Reply Brief at 69. Therefore, since ComEd's proposed services are unrelated to delivery services and

ComEd has not provided sufficient record evidence concerning the services, the Commission finds that it is not necessary to approve ComEd's proposed value-added services at this time. ~~We find that these services, as described by ComEd, do not involve marketing of retail electric services and therefore the Company would not be obligated to file a tariff with the Commission for these services.~~

G. Collection of FERC Charges Under DSTs

IV. OTHER ISSUES

EXCEPTIONS END HERE.

CONCLUSION AND SIGNATURES IN SEPARATE FILE.