

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Commonwealth Edison Company	:	
	:	
Petition for Statutory Approval of a Smart	:	12-0298
Grid Advanced Metering Infrastructure	:	
Deployment Plan pursuant to Section	:	
16-108.6 of the Public Utilities Act.	:	

ORDER ON REHEARING

December 5, 2012

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By the Commission:

I. Introduction

On April 23, 2012, Commonwealth Edison Company (“ComEd” or “Company”) filed its Verified Petition for approval of its Smart Grid Advanced Metering Infrastructure Deployment Plan (“AMI Plan”), pursuant to Section 16-108.6 of the Illinois Public Utilities Act (“Act” or “PUA”). The Petitions to Intervene of the following parties were granted in the matter: The People of the State of Illinois (“AG”), the Citizens Utility Board (“CUB”), the Environmental Law and Policy Center (“ELPC”), Comverge, Inc. (“Comverge”), AARP, the Illinois Power Agency (“IPA”), the City of Chicago (“City”), and the Building Owners and Managers Association of Chicago (“BOMA”). The Commission approved the AMI Plan with modifications (“Original Plan”) on June 22, 2012. Order, Docket 12-0298 (June 22, 2012).

On July 6, 2012, ComEd filed a Verified Application for Rehearing (“Application for Rehearing”) and supporting Affidavit of Joseph R. Trpik, Jr. (“Trpik Affidavit”) seeking rehearing on the issues of: (1) the AMI Deployment schedule in light of the Commission’s May 29, 2012 Order in the ComEd Formula Rate Docket 11-0721; (2) onsite contact prior to disconnection for nonpayment; and (3) metrics related to vulnerable populations. On July 11, 2012, the Commission granted rehearing on the issue of the AMI Deployment schedule, and denied rehearing on all other issues.

A prehearing conference was held at the Commission’s office in Chicago, IL, on August 9, 2012, at which the Administrative Law Judge (“ALJ”) set a schedule for the rehearing proceeding. On October 3, 2012, pursuant to the schedule, ComEd duly filed Direct Testimony on Rehearing, including a Revised AMI Deployment Plan (“Revised Plan”) and Updated Cost Benefit Analysis, of the following witnesses: Ross C. Hemphill, Richard O’Toole, and Andrew L. Trump. Shortly before 3:00 PM on October 23, 2012, the same day that Staff and Intervener Direct Testimony on Rehearing was due to be filed, ComEd filed an Errata to its Direct Testimony on Rehearing that substantially amended its October 3, 2012 filing by removing references to ComEd’s finances. The ALJ extended the time for the filing of Staff and Intervenor Testimony.

On October 25, 2012, the following Staff witnesses filed Direct Testimony on Rehearing: Alan Pregozen, David Brightwell, and Eric Schlaf. On October 29, 2012, ComEd filed Rebuttal Testimony on Rehearing of Ross C. Hemphill, Richard O'Toole, Andrew L. Trump, and Joseph R. Trpik, Jr.

An evidentiary hearing was held in this matter on November 1, 2012, and testimony was taken and evidence adduced. At the conclusion of the hearing, the record was marked "Heard and Taken".

II. ComEd's Position

ComEd submits that Energy Infrastructure Modernization Act ("EIMA") establishes specific standards – five informational, two technical, and one economic – that govern approval of an AMI plan. See 220 ILCS 5/16-108.6(c). ComEd also asserts that the Commission must approve an AMI Plan if it meets all of those standards. ComEd does not argue that the Commission cannot modify AMI Plans to bring them into compliance with the statutory criteria, nor does ComEd argue on rehearing that the Commission cannot modify Plans with regard to aspects of AMI deployment where the statute is silent.

The Commission granted rehearing to consider a revised meter deployment schedule, and ComEd presented a Revised AMI Plan that reflected changes to the deployment schedule. ComEd Ex. 16.0 REV at 7-11; see also ComEd Ex. 15.03 (redlined copy of Revised AMI Plan). ComEd believes that the question of whether a revised meter deployment schedule should be considered has been resolved by the grant of rehearing, but also submits in the alternative that the Affidavit and rebuttal testimony of Mr. Joseph Trpik, its Chief Financial Officer (ComEd Ex. 21.0) establish facts which warrant reconsideration.

Section 16-108.6 Criteria

ComEd maintains that it established that its Revised AMI Plan meets all the operational criteria of the law, as the Commission applied them to its original AMI Plan. The revised meter deployment schedule provides for installations to begin in 2015 and for AMI meter installations to conclude by December of 2021. ComEd witness O'Toole testified that the revised meter deployment schedule was developed by taking various factors into account, including the following operational factors: 1) complete deployment within the original ten-year deployment period ending in 2021; 2) maintain the original functionality timeline to the extent plausible, with functionality taking precedence over the number of meter installs; 3) support a significantly positive net present value of AMI deployment; 4) maintain or maximize the ability to meet applicable statutory performance metrics to the extent plausible; and 5) reflect plausible staffing strategies for meter installers.

Mr. O'Toole explained that the Revised AMI Plan deploys AMI meters in essentially the same order as the original AMI Plan, with deployment continuing to occur on an operating center basis. ComEd Ex. 16.0 REV at 10. The revised schedule contains an appropriately shaped annual installation curve that ramps up in the early years, peaks in the middle years, and ramps down in the later years. *Id.* Mr. O'Toole also testified that the Revised AMI Plan's deployment levels remain within the range of

levels successfully achieved by other utilities similar in size to ComEd across the country and allows back office systems to be in place for the higher deployment levels. *Id.* at 11. Mr. O'Toole concluded that the Revised Plan allocates material increments of work over the deployment period in a manner that is commensurate with the overall work to be undertaken. *Id.* ComEd submits this testimony establishes that the Revised AMI Plan is reasonable, prudent, and consistent with the statutory directive that ComEd's overall infrastructure investment plan, of which the AMI Plan is a major component, "need not allocate the work equally over the respective periods, but should allocate material increments throughout such periods commensurate with the work to be undertaken." 220 ILCS 5/16-108.5(b).

In addition, ComEd witness O'Toole addressed operational constraints on proceeding under the original deployment schedule. See ComEd Ex. 19.0. Mr. O'Toole explained that installation of the meter data management system ("MDMS") prohibits installing more than 270,000 new meters through October of 2014. *Id.* at 2-6. Similarly, maintaining plausible staffing strategies and meeting other operational factors and goals further limits the number of meters that can be installed. *Id.* at 2-3. The information technology and business process work needed to deliver the new functionality provides another limitation on AMI meter installations to keep the exposure of new meters installed prior to rollout of new functionality to reasonable levels so as to minimize issues and exceptions. *Id.* at 5. For these reasons, ComEd submits that it is not reasonable or feasible to proceed with the original deployment schedule.

ComEd submits that its Revised AMI Plan is cost-beneficial, consistent with applicable statutory requirements. ComEd notes the Commission determined that ComEd's original AMI Plan, as modified by the Commission, satisfied the cost-beneficial requirement. See June 22 Order at 40. ComEd witness Trump, using the same analysis model relied upon by the Commission for its original finding, analyzed the impact of the revised deployment schedule on the net present value ("NPV") of costs and benefits under the Revised AMI Plan. ComEd Ex. 17.0 REV. His analysis showed that ComEd's Revised AMI Plan produced NPV results substantially similar to the \$1.2 billion NPV of ComEd's original AMI Plan, resulting in a NPV in excess of \$1 billion. *Id.* at 2. Moreover, ComEd also submitted testimony that based on the revised AMI deployment schedule, net benefits from a peak time rebate ("PTR") program remain positive and range from \$27 million to \$297 million. ComEd Ex. 16.0 REV at 15. ComEd submits that both analyses confirm that the Revised AMI Plan is cost-beneficial by a wide margin. ComEd Ex. 17.0 REV. at 2. ComEd submits that there is no evidence to the contrary.

ComEd witness O'Toole explained that the Revised AMI Plan reflected changes to some of the AMI Plan milestones and metrics tied to meter deployment to correspond to the new deployment schedule. ComEd Ex. 16.0 REV at 11; see also ComEd Ex. 15.03 at 83. Mr. O'Toole further testified that some factual statements in the customer education and outreach section of the Plan related to the timing of meter deployments were updated to reflect the revised deployment schedule, and updated education and outreach schedules through 2015 were provided. However, no substantive changes were made to the meter technology or to the type or extent of planned customer

education and outreach activities. See ComEd Ex. 15.03 at 88, 105, 107, 112, and 129-33. Mr. O'Toole testified that "the components of ComEd's AMI Plan addressing ComEd's AMI vision statement, AMI strategy, annual milestones and metrics unrelated to deployment schedule, plan for consumer education, interoperability, open standards, cyber security, and the privacy of personal information have not changed." ComEd Ex. 16.0 REV at 11.

ComEd notes the CUB-ELPC argument that EIMA requires ComEd to present evidence that it consulted with the Smart Grid Advisory Council ("SGAC") prior to arguing for a change in the Commission's decision on rehearing. CUB-ELPC I.B. at 11. In response, ComEd states that EIMA calls for consultation with the SGAC prior to filing the initial AMI Plan and says nothing about consultation during the litigation or on rehearing. 220 ILCS 5/16-108.6(c). Section 16-108.6(e) of the Act also refers to the SGAC consultation in the context of the annual report and update, but that is not this proceeding. 220 ILCS 5/16-108.6(e). Nor does EIMA anywhere require a utility to present evidence of its consultation to the Commission, although ComEd did so for the original AMI Plan. ComEd Ex. 1.0 at 20. ComEd argues that it is also improper for CUB-ELPC to wait until briefing to raise such a claim, especially when the issue was not mentioned when rehearing was sought or granted. If CUB or ELPC thought this was actually an issue, it should have been raised by testimony to provide a fair opportunity to respond.

ComEd addresses Staff's discussion of the burden of proof in this proceeding. ComEd acknowledges it has, and always retains, the ultimate burden of proof with respect to each AMI Plan requirement. ComEd states that it has met that burden, amply, with evidence including testimony, affidavits, and attachments admitted into the record. ComEd further asserts that, while disputing the need to reexamine why reconsideration of the deployment schedule is warranted, ComEd, in the alternative, provided evidence confirming why the original deployment schedule was no longer even possible, and also should be reconsidered for financial reasons.

ComEd points out that what is often loosely referred to as the "burden of proof" is actually a two-pronged concept consisting of the burden of persuasion and the burden of producing evidence sufficient to make out a prima facie case. This latter prong is generally referred to as the "burden of production," the "burden of producing evidence," or the "burden of going forward" on an issue. See Consolidated Communications Consultant Serv., Inc. v. Illinois Bell Tel. Co., Docket 99-0429, 2001 Ill. PUC LEXIS 568, 12-14 (June 4, 2001) (explaining two-fold nature of the burden of proof). ComEd notes that "the burden of producing evidence can shift between the parties as the case proceeds, depending on the nature of specific evidence and the issue it addresses." *Id.* at 13. ComEd also cites to the detailed discussion of this principle in Anderson v. Dept. of Public Property, 140 Ill. App. 3d 772, 777-78 (4th Dist. 1986), including the Appellate Court's statement that "the absence of any evidence to meet the prima facie case requires the trier of fact to rule for the burdened party as a matter of law." ComEd also observes that this concept has been applied in past Commission rate cases: "Once a utility makes a showing of the costs necessary to provide service under its proposed rates, it has established a prima facie case, and the burden then shifts to others to show

that the costs incurred by the utility are unreasonable because of inefficiency or bad faith.” City of Chicago v. Illinois Commerce Comm'n, 133 Ill. App. 3d 435, 442 (1st Dist. 1985).

ComEd asserts that none of the parties could claim that ComEd failed to make out its prima facie case, *i.e.*, providing at least some evidence on every statutory element. See Sherman v. Cryns, 203 Ill. 2d 264, 275 (2003) (“A plaintiff establishes a prima facie case by proffering at least ‘some evidence on every element essential to [the underlying] cause of action.’”); accord Happel v. Mecklenburger, 101 Ill. App. 3d 107, 111 (1st Dist. 1981).

ComEd asserts that Illinois Courts have long recognized that a utility, although it has the ultimate burden of proof, need not anticipate and preemptively disprove arguments that other parties may raise but on which they have provided no evidence. Once ComEd has met its burden of establishing its own prima facie case, the burden of production shifts to others with respect to claims they may make in opposition. It is not enough to simply posit hypothetical alternatives, arguments, or supposed facts in briefs and then assert the ComEd “failed” to respond to them. Briefs and arguments of counsel are not evidence and do not prove facts. Johnson v. Lynch, 66 Ill.2d 242, 246, 362 N.E.2d 345, 346 (1977); Lagoni v. Holiday Inn Midway, 262 Ill.App.3d 1020, 1035, 635 N.E.2d 622, 632-33 (1st Dist. 1994). ComEd submits that given the absence of evidence from the AG, AARP, CUB, and ELPC, ComEd’s prima facie showing means that it has met its burden and the deficiency lies with the opponent.

Proposals to Apply Different Criteria

ComEd contends that Intervenors pay only lip service to the “plain language” of the Section 16-108.6 criteria on the issues to which those criteria speak. ComEd notes that the arguments to reject the Revised AMI Plan in the main rely on unlawfully recasting criteria that refer only to the plan under consideration and describe a “pass-fail” test into criteria that require a comparison of new and prior plans. EIMA establishes absolute criteria for AMI Plans. Indeed, while EIMA expressly recognizes that AMI Plans will evolve, it imposes no requirement that newer plans be more beneficial, or have a greater net present value (“NPV”), than their predecessors, even if those predecessor plan remained feasible (which the original AMI Plan is not). There are many reasons why AMI Plans evolve, from financial to technological, and those reasons may raise costs or reduce benefits. ComEd also notes that it would be especially inappropriate to make that comparison where the prior Plan is shown by all testimony to be no longer even possible.

Nor, ComEd asserts, does EIMA state that revised AMI Plans can be revised only on a showing of “financial necessity,” a concept that appears nowhere in Section 16-108.5. Had the General Assembly intended to create such a “standard,” it could have done so, but it did not. ComEd notes that what EIMA does call for – and calls for expressly -- is full recovery of reasonable and prudent costs. 220 ILCS 5/16-108.5(b) Plans that do not permit full recovery are not consistent with this directive. Although it was not required, ComEd argues that it proved the discrepancy between the revenues ComEd anticipated receiving under EIMA, on which the Original Plan was based, versus the revenues under the Docket 11-0721 Orders. The financial recovery of

ComEd's investments has a significant impact on operations and is why ComEd is currently before the Commission seeking approval of the Revised AMI Plan. But, legally, the idea that AMI Plans can only be updated on a showing of "necessity" or a threatened "credit downgrade" is contrary to EIMA.

Finally, there is no basis for "ordering" ComEd to invest per the now impossible original Plan. EIMA recognizes a utility's right to control its own operations even in the scenario – far from this rehearing – where the Commission finds, after notice and hearing, that a participating utility's progress in implementing its AMI Plan is materially deficient. See 220 ILCS 5/16-108.6(e). EIMA is clear that even in that scenario the remedy is for the Commission to "issue an order requiring the participating utility to devise a corrective action plan. *Id.* In contrast, the Commission's general authority to direct a utility to make investments is very limited, not applicable here, and requires a substantial showing very different from that which can, or has, been made in this docket. See 220 ILCS 5/8-503.

ComEd's Finances

Mr. Trpik testified on rebuttal that "ComEd cannot recover its prudent and reasonable costs, including its costs of capital, and will experience, in the aggregate, a continuing revenue shortfall of about \$100 million per year in 2014 and beyond." ComEd Ex. 21.0 at 1; accord *id.* at 3. Mr. Trpik testified on rebuttal, consistent with his earlier Affidavit, that "it would be financially inadvisable for ComEd to proceed with the deployment schedule envisioned by the original AMI Plan in light of the immediate and long-term impacts of the [formula rate decisions] and the uncertainty of future cost recovery." ComEd Ex. 21.0 at 5. He identified the factors that led to that conclusion and confirmed that it was his "professional opinion" as ComEd's CFO, as well as the view of ComEd management as a whole, that a revised meter deployment schedule was required. *Id.* at 5. As a result, he opined that ComEd cannot proceed with the original AMI Plan. *Id.* at 5.

ComEd argues that there is no contrary evidence. Moreover, while the recent decision of the Commission during the reconsideration of the rate case to accept ComEd's view of the return allowed on its pension asset issue was welcome and helpful, it does not change the fact that the original AMI Plan is based on financial assumptions about rates and ratemaking inconsistent with what the Commission, rightly or wrongly, has now approved. Tr. at 95-98, ComEd Ex. 21.0 at 4. Whether the cause of the shortfall is reconciliation interest, accumulated deferred income taxes ("ADIT"), the calculation of billing determinants, or some other decision is beside the point, in ComEd's view. EIMA (220 ILCS 5/16-108.5(b)) refers not to a particular disputed class of disallowance, but rather states that "[a] participating utility shall recover the expenditures made under the infrastructure investment program through the ratemaking process, including, but not limited to, the performance-based formula rate and process set forth in this Section." Mr. Trpik's rebuttal testimony proves that, empirically, ComEd cannot recover its costs of AMI investment under the original AMI Plan. Moreover, it confirms that ComEd proposed that Plan on the assumption that EIMA would be interpreted - and thereafter would operate - in a manner that did give ComEd full cost recovery of its reasonable and prudent costs. Tr. at 95-98.

ComEd points out that Staff witness Pregozen does not address cost recovery at all, but instead opines on whether ComEd is able to access the credit markets to secure “financial resources” by taking on additional debt without a downgrade. Staff Ex. 3.0 at 6-7. ComEd argues that this is not the standard. “Whether or not ComEd has near-term availability of capital through access to the debt markets is simply not the question.” ComEd Ex. 21.0 at 3. ComEd argues that the fact that a company can borrow despite being unable to recover its costs, and does not mean that borrowing is prudent or sensible.

ComEd notes the claim that it will have “adequate funds from operations to comply,” but responds that the fact that levels of Funds from Operations stay above credit default or downgrade levels says nothing about whether ComEd can recover its costs, nothing about whether the investment is sound, and nothing about whether those cash flows or the larger financial picture are consistent with the assumptions of the original Plan. Mr. Trpik testifies that they are not. ComEd Ex. 21.0, 3-4.

ComEd notes Staff’s argument that “ComEd’s own estimates of income available to shareholders ... far exceed the amounts it would have expended for its AMI capital investments under the original AMI Plan.” Staff I.B. at 14. ComEd points out that Staff thereby argues that ComEd should fund the original AMI deployment schedule by using funds devoted to meeting its cost of equity (“income available to shareholders”). Staff’s position, ComEd points out, is both unconstitutional and contrary to EIMA, which not only recognizes the need to recover costs of equity, but establishes a formula defining them. 220 ILCS 5/16-108.5(c)(3); Duquesne Light Co. v. Barasch, 488 U.S. 299, 310 (1989); Federal Power Comm’n v. Hope Natural Gas Co., 320 U.S. 591, 622 (1944); Bluefield Water Works & Improvement Co. v. Public Service Comm’n of West Virginia, 262 U.S. 679, 693 (1923).

Further, ComEd states that its Verified Application for Rehearing clearly requested that the Commission grant rehearing to revise ComEd’s AMI deployment schedule. In response to prior Commission calls for detailed financial data supporting the need to reconsider the deployment schedule to be included with ComEd’s rehearing application, ComEd submitted to the Commission with its Application the Affidavit of Joseph Trpik. Mr. Trpik, ComEd’s Chief Financial Officer (“CFO”), detailed why the “gap between [ComEd’s] actual costs and revenues” led him, and ComEd management generally, to conclude that it was not “a viable financial strategy” to proceed with AMI meter deployment on the original schedule “in light of the projected immediate and long-term revenue and financial impacts of the 11-0721 Order.” Trpik Aff., ¶¶ 1, 7; see also Application, p. 4. The Commission granted rehearing based on this evidence.

ComEd maintains that the Commission’s decision to “grant rehearing on the deployment schedule” (July 11, 2012 Bench Meeting Minutes at 51:8-20) already decided the question of whether the deployment schedule should be reconsidered, and that the question now before the Commission is simply whether ComEd’s revised AMI Plan, including the revised meter deployment schedule, complies with the Act’s criteria for an AMI Plan. ComEd claims that a rehearing is not an appeal of the original order or judgment and does not require the party granted rehearing to again demonstrate that the original order or judgment was deficient. If any party disputes the basis on which

rehearing was granted, according to ComEd, they must demonstrate on appeal that the Commission erred in granting rehearing – not relitigate it during the balance of the rehearing. ComEd states that it is an issue for appeal that is not germane to the actual rehearing.

Annual Report Process

ComEd asserts that seeking rehearing does not usurp the annual report process. ComEd sought rehearing to be forthcoming, transparent, and allow the Staff and other parties a fair opportunity to litigate continuing compliance with statutory requirements given a change in the AMI deployment schedule. ComEd submits it was done in an effort to be responsible and perform the revised cost benefit analysis to ensure the revised schedule met the statutory criteria. ComEd submitted that it hardly seemed appropriate for it to withhold for ten months the information that it was delaying its deployment, inform the Commission and parties for the first time in April 2013 of the situation, and then potentially litigate that issue in an investigatory proceeding at that late juncture.

Other Proposals

ComEd submits that Staff's Initial Brief also identifies a lawful and sensible outcome ("Alternative #3") that ComEd supports. ComEd asserts the Commission should approve the Revised AMI Plan based on the record and the law, but acknowledge and hold ComEd to a commitment to explore financially and operationally prudent opportunities to accelerate meter deployment, and describe that investigation and its results in its April 1, 2013 AMI Plan progress report to the Commission. ComEd concurs with Staff that its AMI Plan should evolve through the annual update process, and this Alternative respects that fact. It also makes clear that neither ComEd nor the Commission is retreating from AMI, or the Smart Grid. ComEd is committed to Smart Grid technology and delivering its many benefits to customers. But, ComEd asserts that as EIMA recognizes, that effort cannot be undertaken imprudently or in a manner inconsistent with the available resources. Alternative #3 is a workable and reasonable solution that adopts a lawful schedule now and preserves future opportunities.

ComEd asserts that Staff's second alternative, a new deployment schedule presented for the first time in Staff's Initial Brief on Rehearing, has not been properly reviewed and analyzed. ComEd submits that the operational and cost-benefit impacts of this new deployment schedule have not been addressed via testimony and are not supported by the record, but it does not address the financial issues either. ComEd never claimed operational issues were the cause for delay; it is clear that operational considerations must be taken into account in developing a revised deployment schedule. ComEd asserts that Staff's new alternative deployment schedule has not been vetted for operational issues and Staff's second alternative should be rejected.

ComEd asserts that the proposals to "reject" the revised Plan and adopt the original plan are neither lawful nor supported. No party can deny that the original AMI Plan is now impossible and the evidence is undisputed that its financial premises have been rendered inapplicable. ComEd submits that the AG-AARP's new-found affection for the original AMI Plan is particularly inconsistent with its earlier opposition to that

plan. Indeed, the AG in its Brief on Exceptions claimed that ComEd's original Plan was too uncertain to approve in part because a revised AMI Plan was forthcoming. See AG Brief on Exceptions (June 1, 2012) at 2-3. Now that ComEd has presented and supported its revised Plan, AG-AARP has done a turnabout and champions the original Plan that is no longer even viable. Their posture should be taken for the stratagem that it is.

In short, ComEd asserts that the Revised AMI Plan satisfies the legal requirements and allows time for uncertainty to be resolved. Staff's Alternative #3 acknowledges that while underscoring that the process remains open. Alternative #3 is supported by the record, and acceptable to Staff. The Commission should take that path.

III. Staff's Position

Staff notes that ComEd bears the burden of proof in this proceeding. Section 16-108(c) specifically requires that "...each participating utility shall file a Smart Grid Advanced Metering Infrastructure Deployment Plan ("AMI Plan") with the Commission..." and further outlines what the utility must include in its Plan. 220 ILCS 5/16-108.6(c). Even where a statute does not specifically place any burden of proof, courts have uniformly imposed on administrative agencies the common-law rule that the party seeking relief has the burden of proof. Scott v. Dept. of Commerce and Community Affairs, 84 Ill. 2d 42, 53 (1981).

The term "burden of proof" includes the burden of going forward with the evidence, and the burden of persuading the trier of fact. People v. Ziltz, 98 Ill. 2d 38, 43 (1983). The burden of persuading the trier of fact does not shift throughout the proceeding, but remains with the party seeking relief. Ambrose v. Thornton Twp. School Trustees, 274 Ill. App. 3d 676, 680 (1st Dist 1995), app. den., 164 Ill. 2d 557 (1995). It is clear, therefore, that ComEd, as petitioner here, bears the burden of proof.

Section 10-15 of the Illinois Administrative Procedure Act provides that "[u]nless otherwise provided by law or stated in the agency's rules, the standard of proof in any contested case hearing conducted under this Act by an agency shall be the preponderance of the evidence." 5 ILCS 100/10-15. The Commission has observed that the Administrative Procedure Act standard is: "the appropriate standard in all contested cases" before the Commission. Order at 4, Illinois Commerce Commission on its Own Motion: Amendment of 83 Ill. Admin. Code Part 200, Docket 92-0024 (April 29, 1992). Accordingly, the standard of proof to be applied is the preponderance of the evidence standard.

Revised AMI Plan

Under ComEd's Revised AMI Plan, the original meter deployment schedule has been delayed by approximately three years, the budget for AMI Capital Investment has been reduced from \$52.2 million to \$20 million, a number of business design processes have been extended, the completion of contract negotiations has been delayed, a number of support activities have been deferred, and the scheduled start date for the replacement of the MDMS has been delayed until September 2013. Staff Ex. 4.0 at 2; ComEd Ex. 16.0 REV at 2-4.

The most significant revision contained in the Revised Plan is to the meter deployment schedule. The original meter deployment plan called for deployment to begin in September 2012 and conclude in 2021. Under the Revised Plan there will be zero meter deployment during 2012-2014, with meter deployment to start in January 2015 and conclude in 2021. Staff Ex. 4.0 at 2-3; ComEd Ex. 16.0 REV at 8. Under the Revised Plan, more than 1 million fewer meters would be deployed by 2014 as compared to the original Plan. ComEd would engage in comparatively large deployment during years 2016-2019, thereby catching up with the original deployment by approximately 2020.

ComEd witness Trump estimates that this delay in meter deployment would reduce net benefits to consumers by approximately 15% compared to the original Plan. Staff Ex. 4.0 at 4; ComEd Ex. 17.0 REV at 2. On a net present value basis, using a discount rate of 3.087%, Mr. Trump estimates that net benefits derived from the revised deployment schedule would be reduced by \$187 million compared to the benefits derived from the original deployment schedule. Staff Ex. 4.0 at 5; ComEd Ex. 17.01 REV at 5.

Section 16-108.6 Criteria

As it pertains to the issue on rehearing of ComEd's deployment schedule, Section 16-108.6(c) of the Act requires that ComEd's Revised Plan must: (1) deploy AMI across its entire service territory over 10 years in a manner consistent with Section 16-108.5(b) of the Act, and (2) be cost-beneficial as that term is defined by Section 16-108.6(b) of the Act. 220 ILCS 5/16-108.6(b) & (c). Staff concludes that ComEd's Revised Plan meets these requirements. Staff Ex. 4.0 at 4; Staff Ex. 5.0 at 3.

The effective date of Section 16-108.6 of the Act was October 26, 2011. ComEd filed a performance-based formula rate in Docket No. 11-0721 on November 8, 2011, or 13 days after the effective date of the Act; thus the 10-year period for ComEd's AMI investments is January 1, 2012 to January 1, 2022. ComEd's Revised Plan indicates that AMI deployment would be completed by December 2021, essentially the same completion date as the Original Plan. Therefore, Staff concludes that ComEd's Revised Plan meets the 10-year deployment requirement of Section 16-108.6(c) of the Act.

To assess whether ComEd's Revised Plan is cost-beneficial, Staff witness Brightwell analyzed the discount rate at which the Revised Plan would no longer be cost-beneficial. In Dr. Brightwell's opinion, the discount rate is likely the most subjective element with a significant impact on the cost-benefit analysis, and it is therefore appropriate to determine the threshold at which the discount rate adversely affects the cost effectiveness of the Revised Plan. Staff Ex. 5.0 at 2-3. Further, the cost benefit methodology used by ComEd in its Revised Plan remained substantially the same as that used in its Original Plan, with variations driven by modifications to the AMI deployment schedule reflective of changes in the timing of costs and benefits incurred rather than to the underlying cost benefit methodology. *Id.* at 4. Accordingly, an examination of the sensitivity of the model to changes in the discount rate provides reasonable guidance as to whether the changes to the deployment schedule, when considered in conjunction with the previously accepted cost benefit methodology, would

have the effect of changing the Revised Plan from one that is cost beneficial to one that is not. *Id.*

The results of Dr. Brightwell's analysis indicate that the Revised Plan was cost-beneficial with any discount rate lower than 19.3%. *Id.* at 3. Based on this finding, Staff concludes that the Revised Plan meets the definition of cost-beneficial as that term is defined by Section 16-108.6(b) of the Act. *Id.*

Relevant Legal Issues

ComEd contends that approval of its Revised Plan is governed solely by the standards set forth in Section 16-108.6 of the Act, *i.e.*, whether the Revised Plan is cost-beneficial and deploys AMI meters on a schedule permitted by EIMA. The premise of ComEd's argument is that "[a] rehearing is not an appeal of the original order or judgment and does not require the party granted rehearing to again demonstrate that the original order or judgment was deficient." ComEd I.B. at 14. Instead, ComEd asserts, "...it is simply a new hearing conducted in accordance with the same legal standards that applied in the original hearing." *Id.* Staff asserts that this argument is entirely without merit. Section 10-113 of the Act provides that the scope of any rehearing clearly extends to consideration of all of the facts, including those arising since the making of the order that is the subject of the rehearing. Further, a decision to alter or amend any part of the order that is the subject of rehearing is clearly to be based on the Commission's consideration of those facts. The Commission is tasked with determining what, if any, change to the AMI deployment schedule that it approved in its June 22, 2012 Order is warranted. The sole factual basis put forth for altering the deployment schedule was ComEd's changed financial circumstances. Therefore, any decision by the Commission to alter or amend the deployment schedule must be based on a consideration of those financial circumstances. Staff opines that ComEd's argument that the Commission's decision must somehow be made in a vacuum, void of any consideration of the primary factual basis that is directly relevant to that decision, is both illogical and directly contrary to the Act.

Moreover, ComEd's position appears not to take into account the Commission's authority to modify ComEd's AMI Plan. It is axiomatic that statutes should be construed so that no term is rendered superfluous or meaningless. Stroger v. Regional Transportation Authority, 201 Ill. 2d 508, 523; 778 N.E. 2d 683, 693 (2002). Staff points to Section 16-108.6(c) of the Act. ComEd's argument that the only issue on rehearing is whether its Revised Plan should be approved pursuant to the statutory criteria contained in Section 16-108.6 of the Act, regardless of any other factor, is at its essence absolute, *i.e.*, if its Revised Plan meets the minimum requirements of Section 16-108.6, then it must be approved. ComEd Ex. 18.0 at 3-4; ComEd. Ex. 18.01; Tr. at 15-17. This position renders the statutory language "or approving with modification" superfluous. It is, in fact, the same argument ComEd made previously, and the Commission already rejected, in this proceeding. See Order at 62, 64, 14, fn1, Docket 12-0298 (June 22, 2012).

According to Staff, ComEd's argument runs contrary to the plain language of Section 10-113(a) of the Act. 220 ILCS 5/10-113(a). Further, ComEd's position inherently limits the Commission's authority to modify the AMI Plan under Section 16-

108.6(c) of the Act, in violation of well-established principles of statutory construction. Staff I.B. at 11. Finally, it is readily apparent that both the Commission and the ALJ envisioned a much wider scope in this rehearing than ComEd's position would entail, specifically one that encompasses consideration of the Company's finances. *Id.* at 10-11. Accordingly, ComEd's attempt to artificially narrow the scope of this rehearing should be rejected.

ComEd's Finances

ComEd's July 6, 2012 Verified Application for Rehearing ("Application") and its accompanying Affidavit by ComEd CFO and Treasurer Joseph Trpik ("Trpik Affidavit") indicate that financial issues played a significant role in the Company's decision to seek rehearing. In its Application, ComEd attributes its decision to delay AMI deployment to the revenue shortfall resulting from the Commission's Order in Docket 11-0721. In its Affidavit, ComEd asserts "future revenues and cash flow resulting from the 11-0721 Order have adversely impacted the investments that ComEd can make in EIMA programs including, but not limited to, AMI." Trpik Affidavit, ¶3. In Mr. Trpik's rebuttal testimony, he states that, as matters currently stand, "ComEd cannot recover its prudent and reasonable costs" and "cannot proceed with the investment in EIMA as originally planned." ComEd Ex. 21.0 at 1, 5. He further avers that the Commission's Orders in Docket 11-0721 created added uncertainty regarding cost recovery. *Id.* at 3-4. While Staff agrees that ComEd did not prevail on all cost-recovery issues in the Commission's Orders in Docket 11-0721, the record does not show this outcome reduced ComEd's financial resources to a degree that ComEd is precluded from implementing its original AMI deployment plan. Moreover, the record does not show that the Commission's Orders in Docket 11-0721 created added uncertainty regarding cost recovery.

Staff has shown that subsequent to the Commission's Orders in Docket 11-0721, ComEd maintained an investment grade credit rating with a "Stable" outlook and no negative warnings for a potential credit rating downgrade. Staff Ex. 3.0 at 4. In other words, the credit rating agencies did not regard the Commission's Orders in Docket 11-0721 to be detrimental to ComEd's credit quality to a degree that endangers ComEd's credit ratings.

Staff notes that ComEd's assessment was prepared and submitted before the Commission issued its Order on Rehearing in Docket 11-0721 ("Order on Rehearing") wherein it authorized full recovery of ComEd's pension asset issue. In other words, Staff notes that ComEd's analysis presented to the credit rating agencies indicates the Commission's Orders in Docket 11-0721 did not endanger ComEd's credit ratings and, thus, did not significantly impair its ability to raise capital.

A comparison of ComEd's estimates of its income available to common shareholders post-Order on Rehearing in Docket 11-0721 against its estimates of capital investments under its original deployment plan suggests ample financial ability to absorb the expenditures of the original plan. According to Staff, ComEd's own estimates of income available to shareholders (largely Exelon) after taking into account the Order on Rehearing far exceed the amounts it would have expended for its AMI capital investments under the original AMI deployment plan approved by the Commission.

A comparison of ComEd's funds flow from operations ("FFO") to ComEd's capital expenditures ("CapEx") under its base case (*i.e.*, ComEd gets everything it asked for in Docket 11-0721) and after the issuance of the Order on Rehearing, assuming no change to its capital expenditures, is also revealing in that it shows that it is not a question of ComEd's financial ability to deploy AMI faster than it proposes but a question of its willingness to do so.

Staff states that ComEd provided no support for its unsubstantiated claim that the Commission's Orders in Docket 11-0721 created uncertainty for cost recovery. The fact that ComEd did not prevail on all its issues in Docket 11-0721 does not mean that the Commission removed or reduced the certainty provided by EIMA. The Commission's Orders have now set the formula rate protocols, albeit not with ComEd's preferred method of calculating the interest rate and rate base for reconciliations. Going forward, ComEd's actual costs will be recovered dollar for dollar in future formula rate cases providing it with greater certainty than it did prior to the issuance of the Orders in Docket 11-0721.

ComEd effectively alleges that its ostensible \$100 million revenue shortfall is a direct result of the Commission's Order on Rehearing in Docket 11-0721 because it did not interpret EIMA "in a manner financially consistent with the interpretation that was subsequently and overwhelmingly confirmed by the Illinois House of Representatives in House Resolution 1157." ComEd I.B. at 11. It is the Company's earnings and not its revenues that determine its ability to undertake the original deployment plan. Staff I.B. at 14. Thus, this allegation needs to be viewed with reference to the facts in this record.

The referenced House Resolution ("HR 1157") dealt with three rate issues that formed the scope of the Commission's Order on Rehearing in Docket No. 11-0721. ComEd did not prevail on two of the three issues (*i.e.*, the interest rate and rate base used for reconciliation or the "true-up"). ComEd assessed the financial impact of those decisions in its response to Staff Data Request FIN 1.01, Attach 2. (Staff Ex. 3.0, Attachment B at 4) All of these ComEd estimates indicate an annual "shortfall" that is significantly less than \$100 million. Clearly, none of these facts of record support ComEd's allegation that it would have \$100 million more revenues annually had the Commission ruled in ComEd's favor in Docket 11-0721 on Rehearing on all three issues.

Equally egregious is the Company's claim of a "\$500 million shortfall." (ComEd I.B. at 12) The record demonstrates that this figure includes Commission adjustments to ComEd's revenue requirement that have nothing to do with EIMA generally or HR 1157 specifically. Specifically, ComEd CFO and Treasurer Mr. Trpik testified that the Commission's Orders in Docket 11-0721 included traditional ratemaking adjustments not necessarily addressed in EIMA. (Tr. at 96-97, 100, November 1, 2012) Nonetheless, ComEd assessed the total financial impact of the two issues on which it did not prevail on rehearing for the years 2012 through 2016 to be significantly less than the \$500 million shortfall it alleges.

Having exposed the inaccuracies underlying the Company's revenue shortfall allegations, it is apparent that the significant difference between the Company's alleged \$100 million annual revenue shortfall and the much lower "shortfall" numbers it provided

in this record are the Commission ordered disallowances (e.g., unreasonable employee bonuses, incentive compensation and perks; assets more properly allocated to ComEd's transmission business; costs already being recovered by the Company from other riders; pass through taxes for which the Company acts only as a collection agent) in its May 29, 2012 Order in Docket 11-0721. The Company's Application for Rehearing of those disallowances, however, was denied by the Commission. Therefore, there is no sound basis for the Company to allege a \$100 million annual revenue shortfall when a substantial portion of that "shortfall" reflects requested costs that were not deemed just or reasonable.

Contrary to ComEd's contention, the Commission's Orders in Docket 11-0721 are not sufficient cause for delaying AMI deployment to 2015. Staff I.B. at 17. The financial data provided by ComEd to both credit rating agencies and in discovery indicate that despite those Orders, ComEd has a healthy projected bottom line that could absorb the expenditures it projected under the original AMI deployment plan. Staff I.B. at 12-17. Except for the Company's unsupported declaratory statements that it is not recovering its cost of service, the Company did not put forth any evidence on rehearing to support that claim. The limited financial data Staff obtained through discovery indicates that ComEd has no strong financial basis for reducing capital expenditures during 2014. Although FFO is projected to be lower in 2013 than 2012, that decline is not a result of a decline in ComEd's projected earnings from the Order on Rehearing. Thus, while one could argue that capital expenditures in 2013 should be reduced out of an abundance of caution; the financial case does not compel this conclusion. Neither ComEd's financial case nor its unsubstantiated claim of increased uncertainty in cost recovery justifies ComEd's unilateral decision to delay its AMI deployment plan to 2015. In short, the record shows that it is not a question of ComEd's financial ability to deploy AMI faster than it proposes, but a question of its willingness to do so.

Operational Considerations

ComEd describes a number of operational considerations that it took into account in developing its revised deployment schedule, but it does not identify any of them as causes for the revision to the previously-approved deployment schedule. It is readily apparent that the original deployment schedule approved by the Commission in its June 22 Order is no longer achievable, and that revisions to the deployment schedule are necessary. It is equally apparent that whatever revisions are made to the deployment schedule must account for any applicable operational considerations. After reviewing ComEd's evidence in this proceeding regarding operational considerations, Staff concludes that from an operational perspective ComEd is capable of beginning its deployment in 2013, as opposed to 2015 under its proposed Revised Plan, and of catching up to its original schedule by 2017, as opposed to 2020 under its Revised Plan.

ComEd witness O'Toole states that the new deployment schedule was developed by taking a number of considerations into account, including applicable capital and O&M budgetary constraints, development of a year over year meter installation profile that reflects plausible staffing strategies for meter installers, and

replacement of the MDMS. ComEd Ex. 16.0 REV at 6-7. However, the only operational factors that ComEd identifies in its testimony on rehearing as potentially affecting the decision to delay deployment until 2015 are the replacement of the MDMS and possible staffing issues. While considerations such as budgetary constraints and factors such as replacement of the MDMS may identify what ComEd took into account when developing its Revised Schedule, they do not explain why the new schedule is being proposed. Nor do they explain why deployment should be delayed until 2015. ComEd fails to demonstrate in its testimony on rehearing any connection between these operational considerations and the decision to delay deployment until 2015.

Regarding the MDMS schedule, ComEd plans to delay replacement of the MDMS for fifteen months, until September 2013, and take about thirteen months to complete. ComEd Ex. 16.0 REV at 3. Under the original plan, the replacement process would have begun in approximately June 2012 and been completed in about July 2013. Thus, as replacement of the MDMS would occur under both the original and revised plans, ComEd's decision to delay replacement of the MDMS until September 2013 appears to be a consequence of the decision to delay deployment rather than a cause of it. Likewise, any staffing issues that ComEd may have do not appear to be the cause of the delayed deployment schedule, but rather are a result of ComEd's decision to delay deployment.

In Staff's opinion, from an operational perspective ComEd is capable of beginning its deployment in 2013, as opposed to 2015 under its proposed Revised Plan, and of catching up to its original schedule by 2017, as opposed to 2020 under its Revised Plan. From an operational perspective, there appears to be no obstacle preventing ComEd from beginning deployment simultaneously with replacement of the MDMS. Staff recognizes that ComEd can only deploy about 270,000 meters during the MDMS replacement period. ComEd Ex. 19.0 at 2. However, the replacement period would conclude by October 2014, which would provide an extra two months for deployment. Based on information provided by the Company, ComEd should be able to deploy 270,000 meters during the MDMS replacement period and continue replacement throughout 2014, *i.e.* 2013-1014. *Id.* Further, once deployment commences, the Revised Plan calls for rapid deployment: 500,000 meters would be deployed during 2015, the first year of deployment, followed by 846,000 in the next two years. ComEd Ex. 16.0 REV at 8-9. Thus, ComEd is confident in its ability to deploy quickly following replacement of the MDMS. ComEd's proposed Revised Plan suggests that the Company could maintain that pace until it catches up with the original schedule. By adhering to this rapid deployment schedule in combination with the 2013-2014 deployment described above, ComEd would catch up to the original deployment schedule by 2017, as opposed to 2020 under ComEd's Revised Plan.

Options and Recommendations

The Commission is tasked in this rehearing with determining what, if any, change to the AMI deployment schedule that it approved in its June 22, 2012 Order is warranted. Staff notes that the state of the record in this proceeding is less fully developed than might be ideal, in part due to ComEd's decision to attempt to remove

financial issues from play in the proceeding. This consideration informs the Staff's recommendation as advanced herein.

In addition, Section 16-108.6(c)(3) requires that an approved plan contain: "a deployment schedule and plan that includes deployment of AMI to all customers for a participating utility other than a combination utility[.]" (220 ILCS 5/16-108.6(c)(3)) Therefore, the Commission's Order on Rehearing must effectively approve some deployment schedule in this proceeding. Three such schedules have been proposed.

The first option before the Commission is the rejection of ComEd's Revised Plan. CUB/ELPC argue that the Commission should reject ComEd's Revised Plan, and require it to comply with the Approved Plan, the latter being the Plan approved by the Commission in its June 22, 2012 Order. There is no question that the Approved Plan is the result of a well-developed evidentiary record, which is less true of the other plans advanced in the proceeding. However, as Staff has noted, the Commission should not require ComEd to comply with the Approved Plan for the compelling reason that the Approved Plan is now impossible to implement. Several critical dates for procurement of technology, deployment of meters, and deployment of staff have irrevocably slipped. While the Staff concurs that the April 1, 2013 Report will provide a useful tool to determine what constraints actually exist with respect to implementation of ComEd's AMI Plan, the Staff cannot in good conscience recommend that the Commission adopt an option that is impossible to implement, regardless of how beneficial to customers it might theoretically be.

The second option before the Commission is the Revised Plan proposed by ComEd. The primary advantage of this plan is that ComEd considers itself capable of implementing it. ComEd has identified operational and (apparently in the alternative) financial issues that in its view prevent earlier implementation. The disadvantages of the Revised Plan are significant. Apart from being weakly supported by evidence (especially as to the financial need for it in the first place), the Revised Plan results in significantly reduced benefits to customers as a result of delayed deployment. ComEd witness Trump has estimated that the loss of benefits resulting from the adoption of the Revised Plan in comparison to the Original Plan to be \$187 million. (ComEd Ex. 17.01 REV at 5).

Finally, Staff advanced a proposal that adopts an alternative deployment schedule, as shown in the table below, based on the testimony of Staff witnesses Schlaf and Brightwell.

Year	<u>Deployment Schedules (number of meters in thousands)</u>										Total
	2012	2013	2014	2015	2016	2017	2018	2019	2020	2121	
Original Plan	131	385	536	531	460	497	448	401	351	289	4,029
Revised Plan	0	0	0	500	846	846	700	485	377	275	4,029
Staff's Plan	0	60	250	500	846	846	600	385	300	242	4,029

This alternative schedule has several advantages, including the fact that its implementation is possible, it affords customers greater benefits than ComEd's Revised Plan (if fewer benefits than the Approved Plan), and it has reasonable evidentiary support. Staff recommends that this schedule be adopted.

Staff further recommends that ComEd be directed to explore opportunities to accelerate deployment and to raise any further matters that it believes bear on its ability to implement the schedule that is ultimately approved in this proceeding, and to describe those opportunities and other matters in detail for the Commission's consideration in ComEd's April 1, 2013 AMI Plan progress report to the Commission prescribed by Section 16-108.6(e) of the Act. (220 ILCS 16-108.6(e)).

IV. AG/AARP Position

AG/AARP notes that on July 11, 2012, the Commission granted ComEd's Application for Rehearing in part, limiting the scope of Rehearing to ComEd's request to revise its approved AMI installation timeline. In doing so, the Commission made clear that the basis for granting the rehearing was ComEd's claims that it could no longer afford to make the AMI investments it had committed to in its initial filing.

On October 3, 2012, ComEd filed its Direct Testimony on Rehearing in this docket. In his pre-filed Direct testimony, ComEd witness Hemphill, stated as follows:

Q. What events precipitated this rehearing?

A. On April 23, 2012, ComEd timely proposed an AMI Plan to the Commission based on its understanding of EIMA and of the actual costs of service that would be recovered under the formula rate structure it authorizes. EIMA recognizes that additional revenues and stable cost recovery are essential companions to the greatly increased investment that it called on utilities to make. The Commission's June 22, 2012, Order found that ComEd's AMI Plan, with certain modifications, met those requirements and accordingly approved the Plan as so modified.

However, well after ComEd developed and proposed its original AMI Plan, and after the hearings in this Docket had been concluded, the Commission entered a final order in Docket No. 11-0721, ComEd's Initial formula rate case. That Order, dated May 29, 2012 (the "May 29 Rate Order"), among other things, slashed ComEd's recoverable annual revenues by more than \$111 million (as of 2012), concomitantly reducing ComEd's ability to fund future investments and operations.

As a result, ComEd sought rehearing of the Commission's June 22 Order to permit it to present a Revised AMI Plan in light of ComEd's changed financial capabilities and to demonstrate that this Revised AMI Plan continues to meet

the statutory criteria. ComEd also sought rehearing on other grounds relating to the content of the AMI Plan. The Commission granted rehearing to consider such a Revised AMI Plan on July 11, 2012, and denied rehearing on all other grounds.

Since that date, the Commission has also conducted rehearing proceedings in Docket No. 11-0721, ComEd's formula rate docket. Those proceedings focused on three of the most financially significant aspects of the May 29 Order. The Commission on October 3, 2012, voted to make two revisions to the May 29 Order: allowing ComEd an investment return on its pension asset and adopting a short term debt interest rate on reconciliation adjustment balances rather than the hybrid approach adopted by the Commission in the May 29 Order. ComEd had proposed a weighted average cost of capital interest rate. While ComEd still needs to review the specific language in the written order, the pension decision result is correct and welcome, but does not eliminate the need to adjust the AMI Plan. Accordingly, ComEd's Revised AMI Plan is premised on the financial capabilities of ComEd under the October 3, 2012, Order on Rehearing in Docket No. 11-0721.

ComEd Ex. 15.0 at 4-6. ComEd's Direct testimony also proposed a revised AMI installation schedule that significantly alters the timeline for the installation of AMI in its service territory, with the installations originally planned for 2012, 2013 and 2014 now cancelled. The first installations would be delayed until 2015.

In addition, Company witness Trump testified that the proposed revised AMI installation timeline resulted in a \$209 million reduction in total benefits over the 20 year timeline of the cost/benefit analysis. ComEd Ex. 17.0 at 11. This results in a net present value reduction of \$182 million, according to ComEd. *Id.*

On October 24, 2012, the same day Staff and Intervenors were scheduled to file Direct Testimony on Rehearing, ComEd filed with the Commission and served the People, AARP, Staff and other parties to the docket a document labeled an "Errata", along with accompanying, modified Direct testimony, that stated as follows:

Enclosed please find revised exhibits ComEd Exs. 15.0 REV, 16.0 REV, 17.0 REV, and 17.1 REV that ComEd will offer into evidence in the above-referenced docket. The discovery served on ComEd during rehearing, especially in the last few days, suggests that at least some parties believe that ComEd intends to put in issue the impact of the Commission's rate case orders on ComEd financial capability to install AMI meters. That is not the case. The question of whether the Revised AMI Plan should be approved is governed by the standards set forth in Section

16-108.6. The utility's finances are not among those standards, and ComEd will not argue that they are.

We do understand that references to the background of 'how we got here,' mainly in Dr. Hemphill's proposed direct testimony, may have contributed to a misimpression. If so, we regret any unintended implication. Moreover, to eliminate any doubt that ComEd is not raising an issue of its finances, we will not offer into evidence direct testimony referring to that background. A revised copy of ComEd's testimony is attached, including redlined versions showing the language that will not be offered.

ComEd Errata letter addressed to ICC Chief Clerk Elizabeth Rolando, dated October 23, 2012. All of the testimony cited above, along with other financial references in the Hemphill and other witnesses' testimony, was deleted in the new Errata filing. In response to an AG data request, the Company made clear that it no longer considered its finances as a basis for the revised deployment schedule, stating, "The revisions solely delete language serving only as background, and not as an element of ComEd's request for approval of the Revised AMI Plan, in order 'to eliminate any doubt that ComEd is not raising an issue of its finances' as a basis for approval of the Revised AMI Plan." AG Cross Ex. 3.

In short, AG/AARP state, the Company's position is that the Commission must accept ComEd's proposed revised AMI installation timeline because under the Company's revised cost-benefit analysis, the revised Plan still passes the cost-benefit test referenced in Section 16-108.6(a) of the Act. In effect, the Company argues that the Commission has no discretionary authority to modify or reject proposed installation timelines or, indeed any other aspect of a proposed AMI Plan, if a formula rate utility has shown that the Plan (revised or otherwise) is cost-beneficial under Section 16-108(a).

AG/AARP argue that the Commission should reject ComEd's request to revise the AMI installation timeline. First, the basis for the Commission's decision to grant Rehearing and modify the AMI installation timeline was effectively withdrawn when the Company filed its revised Direct testimony. Further, the evidence submitted by ComEd on Rehearing shows that approval of the revised timeline will result in a reduction of \$182 million in net present value benefits to the Company and ratepayers. In addition, the proposed revised timeline results in a steep, sudden installation scenario (from zero to 500,000 meters installed in 2015, 846,000 in 2016, 846,000 in 2017 and 700,000 in 2018, for example) that is unexplained, as compared to the more gradual installation ramp up and ramp down approved in the Commission's June 22, 2012 Order. This steep installation timeline raises the question of what kind of rate impacts will be experienced by ratepayers in the years in which these significant meter and installation costs are recovered. As the record stands, the Company failed to explain why the Commission should alter the installation timeline approved in its June Order, given the steep reduction in net benefits of the Plan as a result of the Rehearing request.

Moreover, according to AG/AARP, ComEd's claims that the Commission has no discretion in this rehearing decision if the Plan as revised passes the cost/benefit test of Section 16-108.6(a) of the Act is simply wrong. Section 16-108.6(c) specifically provides the Commission with discretion in its decisions regarding approval, rejection and modification of proposed AMI plans, as discussed further below. In addition, Section 16-108.6(e) requires the Company to file an annual report detailing its progress in its AMI installation, and establishes a framework for the Commission to evaluate the Company's progress in installing meters. If the Company is unable to install meters as originally proposed, it should provide such explanation at the time of its April, 2013 filing, and in any future filing, should it be unable to achieve its commitments as ordered in the Commission's June 22, 2012 Order approving ComEd's AMI Plan with modifications.

ComEd's claims in this regard are wrong. First, Section 16-108.6(c) specifically provides the Commission with discretion in its decisions regarding approval, rejection and modification of proposed AMI plans. This subsection of the Act makes clear that the Commission has the discretion and authority to modify proposed AMI Plans (and any proposed revisions) as it sees fit to ensure the benefits articulated in the Electric Infrastructure Modernization Act ("EIMA") and promised by formula rate utilities are delivered and achieved.

Section 10-113 of the Act, the provision that describes both parties' right to request and the Commission's authority to grant rehearing, makes clear that the legal effect of a rehearing in civil cases vs. the legal effect of a Commission grant of rehearing in ICC cases is different. While ComEd argues that "the rehearing process operates to vacate or supplant the order or judgment, or portion thereof, on which rehearing was granted", citing civil case law, Section 10-113 clearly states that applying for rehearing does not release a party from the obligations of the Commission's previously filed orders. This section also provides that an application for rehearing does not stay or postpone previous Commission orders unless the Commission specifically directs such an action.

In addition, Section 10-113 stands in direct opposition to ComEd's claim that the basis for rehearing, ComEd's financial condition, is an unnecessary and improper basis for evaluating its requested relief. The section allows the Commission on rehearing to consider facts both underlying the original order and occurring since the entry of the order. Section 10-113 makes clear that the Commission need not write a completely new order upon rehearing but rather may choose to alter or amend the previous order.

ComEd cites the case of Colesar v. Star Coal, Co., 255 Ill. 532, 544, 99 N.E.709, 714 (1912) to support its argument that litigating the basis for a rehearing is unnecessary and improper in the rehearing itself. The problem is, the Colesar holding is based on the right of rehearing under Illinois civil practice, not Section 10-113 of the Public Utilities Act. Specifically, Section 2-1203(b) of the Illinois Code of Civil Procedure provides that a motion filed within the statutory timeline provided in the Code "stays enforcement of the judgment" . 735 ILCS 5/2-1203(b). ComEd indicates that Colesar supports the concept that "the rehearing process . . . supplants[s] the order or judgment . . . on which rehearing was granted." ComEd fails, however, to indicate how Colesar

(and rehearing under the Illinois Code of Civil Procedure) relates to issues being examined on rehearing before the Commission and under Section 10-113 of the Act. ComEd lists State Public Utilities Comm'n v. Pittsburg, C., C. & St. L. Ry. Co., 290 Ill. 580, 584, 125 N.E. 495, 497 (1919) as a parallel citation to Colesar in its brief. ComEd I.B. at 13-14. The parenthetical State Public case citation ComEd offers, however, is in fact a sentence from the opinion that cites to Colesar.

The Company is specifically asking the Commission to not consider the circumstances that led ComEd to propose a revised AMI installation schedule. When it entered its Final Order on the originally proposed ComEd AMI Plan, the Commission was aware that ComEd would be seeking revisions to its deployment schedule authorized in the June Order, following ComEd's filing of a Motion to Stay implementation of any final order issued until the Commission reheard ComEd's claims that it no longer had the revenues to implement the originally proposed AMI deployment schedule. In its June 22, 2012 Order in this docket, the Commission made clear that if ComEd was seeking to alter its proposed and approved deployment schedule, it must specifically articulate the rationale for doing so and supply sufficient support for making any changes to the schedule.

Having withdrawn the testimony that supplied the financial rationale for granting rehearing, the Company has hardly presented the kind of "evidence identifying exactly what those challenges are (for instance, what additional capital is now required, for what term, and at what expected rate), what specific assumptions underlying ComEd's original deployment schedule are no longer valid, and what specific impacts that any such challenges would have on its original deployment schedule" that the Commission expected.

In its Rebuttal testimony, ComEd made clear its position is that it need not provide any justification in order for the Commission to grant its rehearing request to revise its AMI Plan. According to AG/AARP, the evidence showed that the Company remains on solid financial footing, despite its claims in Mr. Trpik's Rebuttal Testimony and in its Application for Rehearing. For example, a June 11, 2012 Moody investor rating agency report expects "strong credit metrics" for ComEd. Staff Cross Ex. 2 at 1. It should be noted, too, that this report was issued after the Commission's original, May 29, 2012 formula rate order (Docket 11-0721), which was the stated basis for the Company's Application for Rehearing, and prior to the Commission's October 3, 2012 Order on Rehearing in Docket 11-0721, which resulted in a revenue infusion to ComEd as of January 1, 2013 of \$144 million, based on the Commission's decision to permit ComEd to earn a return on its pension asset. See Tr. at 67-72; AG Cross Exs. 5 and 6.

AG/AARP notes that ComEd's current financial liquidity and ability to access credit is likewise not a basis for the requested deployment delay. ComEd's credit agreement with third party banks requires that the Company maintain a ratio of net cash flow from operations to net interest expense higher than 2.0 percent. Tr. at 78-80. As of March, 2012, the Company's ratio was 6.39 percent. Tr. at 78-79. In addition, ComEd witness Trpik testified that the Company anticipates that the Company's ratio of net cash flow from operations to net interest expense will remain above 2.0 percent, as required under the credit agreement as of December 31, 2012. *Id.* Also, Mr. Trpik

confirmed that the Company just successfully negotiated a renewal of its existing \$1 billion revolving credit agreement, which expires in 2017. Tr. at 80.

In addition, AG/AARP state that cross-examination revealed that ratepayers will begin paying for AMI-related investments on January 1, 2013, despite ComEd's request to delay installation of the meters until 2015. Tr. at 84; AG Cross Ex. 7. On the other hand, ComEd's existing deployment schedule would have brought the benefits ComEd alleges and the General Assembly believes will occur to its customers at the same time customers begin paying for the investment.

ComEd further claims that delay in AMI installation is necessary because "installation of the MDMS prohibits installing more than 270,000 new meters through October of 2014. ComEd I.B. at 6, citing ComEd Ex. 19.0 at 2. But a review of that testimony points to Mr. O'Toole's Direct Testimony on Rehearing, ComEd Ex. 16.0REV. In that testimony, Mr. O'Toole references the deferral of the scheduled start date for the MDMS system by 15 months. Before it struck all references to a discussion of the financial impacts of the Commission's May 29 Formula Rate Order, the Company attributed the cause of that delay, like the AMI installation delay, to the "financial consequences of the May 29 Formula Rate Order" See ComEd Ex. 16.0REV. Accordingly, arguing that AMI must be delayed because installation of the MDMS system is delayed when both installations are tied to claims of strained financial resources that have since been withdrawn is hardly persuasive justification for revising the AMI installation schedule.

ComEd further opines that "[i]n response to prior Commission calls for detailed financial data support the need to reconsider the deployment schedule to be included with ComEd's rehearing application, ComEd submitted to the Commission, along with its Application, the Affidavit of Joseph Trpik." ComEd I.B. at 9. But ComEd's attorney specifically stated during cross-examination that it was not introducing Mr. Trpik's Affidavit as evidence in this proceeding. Tr. at 64.

It should be noted, too, that ComEd specifically highlighted in its Application for Rehearing that the Commission's decision in its May 29, 2012 Formula Rate Order related to (1) whether ComEd would earn a return on its pension asset, (2) whether calculation of its formula rate reconciliation rate base would be based on average or year-end figures; and (3) how the interest rate on reconciliation balances would be calculated, had the most significant impact on its revenue flows. On October 11, the Commission entered an Order on Rehearing that substantially increased the amount of revenues ComEd would cover in future formula rate cases, given its decision to permit ComEd to earn a return on its pension asset. Tr. at 67-72. In addition, the evidence shows that the Commission's decision to calculate ComEd's reconciliation balances in future formula rate proceedings under Section 16-108.5 of the Act based on average rate base values, increased ComEd's revenues in the short term. Tr. at 72-73. Certainly, ComEd cannot point to that particular Commission decision as a basis for its inability to install AMI meters in 2013 and 2014.

ComEd asserts that the financial assumptions underlying the original meter deployment schedule assumed that ComEd "would recover these costs, not only fully, but under 'a more timely and predictable regulatory framework...". ComEd I.B. at 11.

But ComEd's claims that it is not now or in the future recovering its costs as a result of the 11-0721 orders is in reality nothing more than a rehash of ratemaking arguments related to the use of an end of year rate base and a higher interest rate on reconciliation balances that were specifically rejected by the Commission in its Order on Rehearing in Docket 11-0721. See Docket 11-0721, Order of October 3, 2012. The Commission has already reviewed ComEd's arguments about whether the costs it claims are just and reasonable, and the Commission made its final decision in Docket 11-0721 (now on appeal).

AG/AARP agree with Staff that there is no uncertainty associated with ComEd's cost recovery under formula ratemaking. The Commission revisited the three principal issues ComEd sought rehearing on in Docket 11-0721. A decision was reached. The Commission's decision to permit ComEd to earn a return on its pension asset resulted in a revenue infusion to ComEd as of the adoption of the new rates on rehearing and additional revenue of \$144 million as of January 1, 2013. See Tr. at 67-72; AG Cross Exs. 5 and 6. The fact that ComEd did not prevail on all of its ratemaking issues in the formula rate proceedings does not mean cost recovery is threatened or uncertain. The evidence on Rehearing supports Commission rejection of the Company's revised implementation schedule.

AG/AARP maintain that the Commission always retains an obligation when it enters Orders under the EIMA provisions to ensure that rates are just and reasonable. 220 ILCS 5/16-108.5(c)[3]. ComEd's revised deployment schedule creates a steep rise in AMI investment during years 2015 through 2018, unlike the more gradual ramp up and ramp down envisioned in the original deployment schedule. It is unclear what the rate impacts on ComEd customers would be during the years that formula ratemaking captures those heightened investment costs. The Commission should be wary of approving a revised Plan that leaves that question unanswered.

Affirm Original AMI Plan

The Commission should affirm its June 22, 2012 Order approving ComEd's AMI Plan due to the lack of evidence of financial necessity or other grounds to change the Plan. In addition, if there are circumstances that result in ComEd failing to comply with the previously approved Plan, the statute provides for Commission review and the development of a "corrective action plan, subject to Commission approval and oversight, to bring implementation back on schedule consistent with the AMI Plan." 220 ILCS 5/16-108.6(e).

Section 16-108.6(e) requires a formula rate utility to report to the Commission each April 1, beginning in 2013 "regarding the progress it has made toward completing implementation of its AMI Plan." 220 ILCS 5/16-108.6(e). This subsection of EIMA also provides that within 21 days after the utility files its annual report, "the Commission shall have authority, either upon complaint or its own initiative, but with reasonable notice, to enter upon an investigation regarding the utility's progress in implementing the AMI Plan as described in paragraph (1) of this subsection (e)." *Id.* The Commission also has the authority under this subsection to order modifications to a utility AMI Plan, based on the evidence presented in any Section 16-108.6(e) hearing.

The evidence presented in this Rehearing does not support Commission approval of ComEd's revised deployment schedule, given the admitted decline in benefits associated with the revised Plan and the uncertain rate impacts of the steep and sudden installation rate beginning in 2015 that ComEd proposes. The statute provides that if the Company finds that it is unable to achieve the deployment approved in the Commission's June 22, 2012 Order, it should explain that in detail in its April 1, 2013 report required under Section 16-108.6(e) of the Act. The Commission should review the implementation of the AMI Plan it approved on June 22, 2012 according to the terms of the statute, not as a result of an unsupported Rehearing request. EIMA provides for annual reviews to determine what, if any, corrective action plan should be approved to ensure that the benefits envisioned by the General Assembly when it passed the EIMA provisions are achieved. At that time, the impact of recent Commission orders, as well as ComEd's ability to invest in AMI and its financial condition will be clear.

V. CUB/ELPC Position

In the first instance, CUB and ELPC argue that the Commission should reject the Company's proposal because the Company failed to provide the evidence that the Commission requested in its June 22 Final Order in this proceeding. CUB/ELPC claim that ComEd has failed to present this evidence in the Company's Application for Rehearing, the accompanying affidavit, direct testimony, or rebuttal testimony. CUB/ELPC maintain that, at best, the Company has illustrated how its expectations were not met by the Commission's formula rate orders. CUB/ELPC argue that this showing is not coterminous with the showing required by the Commission regarding exactly what the funding challenges are, what additional capital is now required, for what term, at what rate, what assumptions underlying the original deployment schedule are no longer valid and what specific impacts those challenges have. Furthermore, CUB/ELPC point out that initially the Company maintained that proceeding with the original deployment schedule would "not have been a viable financial strategy," although in rebuttal testimony the Company claims that it was simply "financially inadvisable." Trpik Affidavit at 7; ComEd Ex. 21.0 at 5. CUB/ELPC also claim that the Application for Rehearing failed to account for \$144 million in additional revenue resulting from a Commission order on rehearing and failed to account for the use an average year rate base which actually positively affected the Company's revenues.

CUB/ELPC also argue that the Company's interpretation of the EIMA would leave several of its provisions meaningless. CUB/ELPC point out that the Commission retains broad authority under the Public Utilities Act to supervise ComEd and ensure that the General Assembly's objectives are met. Instead of simply rubber-stamping a cost-benefit analysis that projects that benefits will exceed costs by one dollar, CUB/ELPC maintain that the Commission's role under the EIMA is to ensure that consumer benefit from grid modernization is maximized. CUB/ELPC point out that the Commission itself has rejected ComEd's interpretation of the Commission's role under the EIMA, finding that it "is not as limited as ComEd would have the Commission find," and that instead, the Commission must determine whether ComEd's AMI Plan "enhances and enables customers' ability to take advantage of Smart Grid functions."

Final Order at 64. To accomplish this task, CUB/ELPC aver that the General Assembly provided an annual update reporting process wherein the Commission approves, denies, or modifies Company proposals to change their AMI Plan in the face of any challenges regarding proper implementation. 220 ILCS 5/16-108.6(e). CUB/ELPC believe that the power given to the Commission to initiate investigations and order corrective action for any material deficiencies would be meaningless under the Company's interpretation of the EIMA. CUB/ELPC also argue that the Company's failure to produce evidence that it consulted with the Smart Grid Advisory Council ("SGAC") is further evidence that the Company's interpretation of the EIMA would undermine the intent of the law. The Company would have the Commission believe that it need not consult with the SGAC before filing the AMI Plan on rehearing, yet the Company also wants the Commission to act as though the original deployment schedule never existed. If that were true, and the AMI Plan proposed by the Company on rehearing was the only legally recognizable plan for the Commission to review, then CUB/ELPC contend that the EIMA plainly requires ComEd to consult with the SGAC, and it remains ComEd's, not the Intervenors', burden to establish that consultation. 220 ILCS 5/16-108.6(c).

If one assumes that ComEd provided sufficient evidence on rehearing and that the EIMA permits the modifications proposed, CUB/ELPC contend that either the second or third alternatives proposed by Staff could be reasonable compromises. Given the Company's delay in implementation, CUB/ELPC maintain that the second alternative resumes AMI meter deployment in 2013 and thus recaptures some of the consumer benefits lost as a result of ComEd's delay and that "the evidence suggests" that ComEd has the ability to implement Staff's revised schedule. Staff I.B. at 22. CUB and ELPC prefer this alternative since it maximizes consumer benefits while giving ComEd a realistic and practicable path forward. CUB/ELPC also recognize as valid Staff's third alternative which authorizes ComEd to proceed with the New AMI Plan but requires the Company to study opportunities to accelerate deployment in detail for Commission review in ComEd's April 1, 2013 AMI Plan progress report. CUB/ELPC argue, however, that this alternative should only be undertaken by the Commission if the Commission is confident that the detailed study will contain the following information necessary to determine whether accelerated deployment maximizes benefits in a feasible manner:

- analysis of deployment schedules assuming 2013 and 2014 meter deployments;
- analysis of how those schedules affect MDMS, business office processes, staffing, and information technology work ; and
- analysis of changes in costs and benefits to ratepayers as a result of each deployment schedule.

For the reasons stated herein, CUB/ELPC respectfully request the Commission adopt the positions taken and recommendations made by CUB/ELPC herein.

VI. Commission Analysis and Conclusion

This case is controlled by both the rehearing framework and the reality of the situation. The Commission is stuck between the evidentiary problems resulting from

ComEd's legal theory and the result of ComEd's refusal to comply with a Commission Order. ComEd's tactics have left the Commission with a poor evidentiary record and no good options.

Rehearing Framework

ComEd's decision to not build a complete record upon which the Commission could change a previous decision must be addressed first by stating a few of the principles that guide decisions at the Commission. The primary being, of course, that the Commission is a creature of statute and any action taken must be through a power conferred upon it by the PUA. Hence, the Commission must comply with the PUA's provisions regarding rehearing. Also, the PUA must be considered as a whole and one part of that whole is the EIMA. In contrast, ComEd's argument, that the only question before the Commission is that its Revised Plan should be approved because it satisfies the EIMA, ignores the rest of the PUA.

ComEd fails to address the statutory language which controls rehearing proceedings at the Commission. Specifically, Section 10-113 states:

If, after such rehearing and consideration of all the facts, including those arising since the making of the rule, regulation, order or decision, the Commission shall be of the opinion that the original rule, regulation, order or decision or any part thereof is in any respect unjust or unwarranted, or should be changed, the Commission may rescind, alter or amend the same.

220 ILCS 5/10-113(a). Consistent with this statutory requirement, the question before the Commission is not just whether EIMA has been satisfied, but also whether, and on what basis, the original decision should be changed. This requires a showing on the part of ComEd - either that there was an error in the original decision or that facts have arisen since the original decision that warrant a change in the Commission's decision.

ComEd's position that a grant of hearing immediately voids that part of the original decision is similarly in conflict with the plain language of Section 10-113. It states:

An application for rehearing shall not excuse any corporation or person from complying with and obeying any rule, regulation, order or decision or any requirement of any rule, regulation, order or decision of the Commission theretofore made, or operate in any manner to stay or postpone the enforcement thereof, except in such cases and upon such terms as the Commission may by order direct.

220 ILCS 5/10-113(a). Thus, a Commission Order remains enforceable during the rehearing process, unless a stay is granted by the Commission. On June 22, 2012, in this proceeding, the Commission denied ComEd's Motion for Stay and, therefore, the June 22, 2012 Order is enforceable. After the evidence has been fully examined by opposing parties, the witnesses subject to cross-examination, etc., in other words after

due process has been afforded to all parties, then the Commission can reach a decision regarding the merits of changing a legally-enforceable order. ComEd's unprecedented interpretation of the impact of a grant of rehearing would wreck havoc on the validity and enforceability of Commission orders.

Another sentence in Section 10-113 is equally telling. It reads as follows:

in case the Commission shall fail to grant or deny an application for rehearing in whole or in part within 20 days from the date of the receipt thereof, or shall fail to enter a final order upon rehearing within 150 days after such rehearing is granted, the application for rehearing shall be deemed to have been denied and finally disposed of, and an order to that effect shall be deemed to have been served

220 ILCS 5/10-113(a). In other words, if the Commission grants rehearing, but then fails to act, the rehearing is considered to be denied. ComEd's position, that a grant of rehearing immediately voids the original decision, is directly contrary to this statutory provision.

Indeed, the Commission even provided guidance to ComEd on the type of information it would find useful for changing its decision when, in the Order dated June 22, 2012, the Commission stated:

any claim by ComEd that its original deployment schedule cannot be sustained given financing challenges created through the Commission's Order in Docket No. 11-0721 should be supported by evidence identifying exactly what those challenges are (for instance, what additional capital is now required, for what term, and at what expected rate), what specific assumptions underlying ComEd's original deployment schedule are no longer valid, and what specific impacts that any such challenges would have on its original deployment schedule. As evidenced by ComEd's motion, the Commission expects that ComEd will request rehearing on this topic, and the Commission strongly encourages any rehearing application to make such identifications with particularity.

Order, Docket 12-0298, June 22, 2012, at 14-15. As discussed below, this evidence has not been provided by the Company.

When the Commission's statement from the June 22, 2012 Order and Section 10-113 are taken in conjunction with the Part 200.880 requirement that the application for rehearing "shall state the reasons therefore and shall contain a brief statement of proposed additional evidence," the Commission can only reach the conclusion that ComEd's position of a revised AMI plan with no further requirements must be rejected. In Part 200.880, the key word is "proposed." The application for rehearing tells the Commission what the applicant proposes to do on rehearing. The application for rehearing is not a basis for overturning an order, it is a party's request to the

Commission that it be allowed to provide additional evidence that will convince the Commission to change an earlier order.

Significantly, ComEd's position that the granting of rehearing is the same as Commission acceptance of the application for rehearing's argument would be unfair to opposing parties. There is no provision in the Commission's Rules of Practice that allows parties to respond to an Application for Rehearing. It is clear from the evidence in this proceeding that the Revised AMI Plan reduces benefits to ratepayers. Indeed, Company witness Trump testified that the revised AMI installation timeline resulted in a \$209 million reduction in total benefits over the 20 year timeline of the cost/benefit analysis. This results in a net present value reduction of \$182 million. ComEd Ex. 17.0 at 11. Thus, Staff and Intervenors have a right to participate in the process of whether the Commission should accept ComEd's argument of financial strain. Providing sparse financial information in its rebuttal testimony in a schedule that does not allow for parties to file responsive testimony does not satisfy this requirement.

It is clear from ComEd's legal citations that ComEd erroneously analogizes the Commission's grant of rehearing to that of a court's grant of a new trial. In the cases cited by ComEd, the granting of a new trial was based on an error that occurred during the initial trial. That is not what occurred here. The Commission's June 22, 2012 decision was not in error and, indeed, ComEd does not argue that an error occurred. ComEd's application for rehearing was based on new facts that have arisen since the Commission's original decision.

Not only does ComEd fail to explain the relevance of its cases to the process here at the Commission, which is ruled by the PUA and the Commission's Rules of Practice, a cursory investigation into what is required by Section 10-113 reveals ComEd's position to be patently incorrect. In a case actually addressing the rehearing process at the Commission, the Illinois Supreme Court, when it affirmed a lower court's setting aside of a Commission Order on Rehearing, stated that:

Before the commission could lawfully rescind its [original order], it was necessary that it make a finding of facts different from the finding of facts on which the original order was entered, and that the facts as found in the original order were erroneous, or that, since the entry thereof, conditions had changed to such an extent that the facts and conditions as they existed at the time of the rescinding order were different, or that a mistake as to the law had been made, and enter findings of facts applicable to the then conditions. This the commission failed to do, and there is nothing in the record before us authorizing the entry of an order rescinding the [original order].

Central Northwest Business Men's Ass'n et al. v. Illinois Commerce Comm'n et al., 337 Ill. 149, 158 (1929). In that case the Commission had entered an order granting a complaint and then, after rehearing, entered an order denying a complaint - without any explanation. The Commission does not doubt that, in the context of AMI Plans, many different meter deployment scenarios could satisfy the requirements of EIMA, but the

Commission - once it has adopted a particular scenario - must have sufficient basis for overturning it.

In a later case that relied on the Central Northwest Business Men's Ass'n decision, the Illinois Supreme Court overturned a Commission decision on rehearing. There, the Commission had, in an order on rehearing, stated that the original decision was in error and reversed the original order - with no explanation. The Supreme Court overturned the order on rehearing finding that there was no factual basis to say that the original decision was in error. See Black Hawk Motor Transit Co. v. Illinois Commerce Comm'n, 398 Ill. 542, 56. The Commission's actions in this proceeding must be guided by these decisions and, thus, must provide a reason for altering the June 22, 2012 Order.

Burden of Proof

With respect to the parties' arguments regarding the burden of proof, ComEd argues that it has made a prima facie showing that its Revised AMI Plan satisfies all the statutory criteria contained in EIMA, which the Commission finds to be relevant, but not the central question on rehearing. On rehearing, the question is why the Commission should change a previously entered order. ComEd provided three witnesses in Direct Testimony on Rehearing: Hemphill provided an overview, O'Toole discussed the Revised AMI Plan and Trump discussed changes to the cost benefit analysis. ComEd specifically removed all mention of the impact of the Docket 11-0721 Order in an errata filed the day Staff and Intervenor Direct Testimony was due. At the hearing, ComEd's attorney stated that the Company was also not offering into the record Mr. Trpik's affidavit (Tr. at 71), which was attached to its Application for Rehearing. The Company did not make a prima facie showing in its direct case of why the Commission's June 22, 2012 Order should be changed. ComEd did not attempt to make this showing until its Rebuttal Testimony - to which no party had an opportunity to respond.

SGAC

CUB/ELPC argue that consultation with the Smart Grid Advisory Council ("SGAC") was required for the Revised AMI Plan. The Commission notes that consultation with SGAC is required pursuant to 16-108.6 before the initial plan filing and at the time of the annual report. We note ComEd's argument that EIMA does not specifically require consultation with the SGAC, but the converse is also true that the EIMA does not allow for rehearing, just the annual review. Just like the difficulties resulting from the failure to consider rehearing in the formula rate process, here is another omission in the statutory framework that makes regulatory oversight difficult. Regardless, no record has been developed on this issue, thus it is impossible to make a finding either way. However, because of the apparent disagreement regarding the necessity of providing evidence that the Smart Grid Advisory Council has been consulted, the Commission directs the Company to include this information in its annual report filings.

ComEd's Financial Proof

The Commission asked for specific proof regarding how the Company's finances impact the deployment schedule. This has not been provided by the Company. The

extent of the Company's rebuttal evidence is that it faces a \$100 million annual revenue shortfall as a result of the orders in Docket 11-0721. The Company has provided no testimony linking this company-wide revenue "shortfall" to the AMI deployment schedule.

The Commission finds Staff's arguments on the Company's "shortfall" evidence to be compelling. Notably, Staff argues that it is earnings, not revenue that affect the Company's ability to follow through on AMI deployment. Staff I.B. at 14. Under the formula rate process, ComEd is allowed to recover all of its expenses provided those expenses are prudently incurred and reasonable in amount as reflected in its FERC Form 1. Additionally, ComEd is allowed to earn the statutorily established rate of return on its actual investment as well as its projected investment required to deploy its AMI program. In the event ComEd actually has a revenue shortfall, such shortfall would be recovered from customers in a future period, with interest, through the reconciliation process. An important aspect of the reconciliation process is the "earnings collar" provision in Section 16-108.5(c)(5) of the Act. This provision focuses on ComEd's actual earnings which are used, in part, to establish ComEd's revenue requirement and, thus, revenues on a going forward basis.

Further, it is clear to the Commission that any perceived "shortfall" by ComEd results from disallowance of items that the Commission deemed to not be just and reasonable. In other words, ComEd will recover its prudent AMI investment through formula rates that have been found to be just and reasonable. Conspicuously absent from EIMA is a requirement that a desirable formula rate outcome is a prerequisite to ComEd proceeding with AMI deployment. Once a utility becomes a participating utility, it has an obligation to make investments in infrastructure, including its AMI deployment. Taken as a whole, the formula rate process is structured to allow ComEd to recover appropriate expenses and earn an appropriate return on its existing and projected investments that will allow it to continue making investments in its infrastructure.

Also, on October 3, 2012 the Commission entered an Order on Rehearing in Docket 11-0721 that substantially increased the amount of revenues ComEd would cover in future formula rate cases, given its decision to permit ComEd to earn a return on its pension asset. Tr. at 77-79. The Company's Rebuttal Testimony, which was filed on October 29th, does not make clear what difference the Order on Rehearing in Docket 11-0721 made on the Company's finances. Attached to Mr. Trpik's rebuttal testimony is a Moody's report, dated March 5, 2012, which is clearly not proof of changed facts since the issuance of the Commission's Order. Of interest is ComEd Ex. 21.02, a Fitch Ratings Report for September 2012, which is attached to Mr. Trpik's rebuttal testimony. A review of this document shows that ComEd's financial outlook is not particularly gloomy and, in fact, it notes the expected positive impact of the Commission's Order on Rehearing in Docket 11-0721 and ComEd's future formula rate proceedings. The Commission's June 22, 2012 Order cannot be overturned based on these documents.

Deployment Timeline

Having concluded that ComEd's position is unsupported, the Commission is left with the unfortunate reality that ComEd has made compliance with the Original AMI Plan impossible, because some of the implementing dates have already passed.

As noted in the ALJ's memo to the Commission regarding the Company's request for rehearing, one reason for granting rehearing is that it provides the Commission with the ability to oversee revisions to the timeline. Of course, the Commission expected to hear specific information regarding the financial impact of its Docket 11-0721 Order. Nevertheless, if the Commission were not to find out about ComEd's failure to comply with the Original AMI Plan until April of 2013, the Company would be even further behind in deployment. In that respect, this rehearing is not completely fruitless.

As Staff points out, the most significant revision contained in the Revised Plan is to the meter deployment schedule. The original meter deployment plan called for deployment to begin in September 2012 and conclude in 2021. Under the Company's Revised Plan, there would be zero meter deployment during 2012-2014, with meter deployment to start in January 2015 and conclude in 2021. In rebuttal testimony, the Company makes various operational arguments that earlier deployment is impossible. The Commission, however, agrees with Staff's assessment that:

as replacement of the MDMS would occur under both the original and revised plans, ComEd's decision to delay replacement of the MDMS until September 2013 appears to be a consequence of the decision to delay deployment rather than a cause of it. Likewise, any staffing issues that ComEd may have do not appear to be the cause of the delayed deployment schedule, but rather are a result of ComEd's decision to delay deployment.

Staff I.B. at 18-19. Thus, the linkage between its current finances as a result of the Orders in Docket 11-0721 and its delayed deployment plan is not evident. What is apparent, though, is that ratepayers begin paying for AMI deployment in January 2013 (Tr. 95-96) and the Company doesn't want to begin installing meters until 2015.

Mr. Trpik states that because of the Orders in Docket 11-0721, ComEd faces a \$100 million revenue shortfall in 2014 and beyond. ComEd Ex. 21.0 at 1. The evidence also shows that the Commission's decision to calculate ComEd's reconciliation balances in future formula rate proceedings based on average rate base values, increased ComEd's revenues in the short term. Tr. at 72-73. These facts seriously undermine the Company's reasons to delay meter deployment until 2015. The Company has not provided any reason for the Commission to alter its June 22, 2012 Order other than its apparent inability to comply with it.

In theory, the Company should be at most 6 months behind on installation and perhaps, because it has presumably completed at least some work during the rehearing process, it should not even be that far behind. It would have been perfectly reasonable

to request a 6-month delay in the original deployment schedule. Similar to the revised plan, the Company could catch up in 2016 and 2017.

For the first time in its Initial Brief, Staff laid out a specific yearly deployment schedule consistent with its recommended timeframes. The Commission notes that ComEd raises what may be valid concerns regarding possible multiple ramp up periods in Staff's proposal and the short period of peak installations. These perhaps would be fixable problems that could be addressed in the 2013 annual filing. The Company's claims of problems regarding staffing shortages and meter installation occurring at the same time as MDMS roll-out are problems of the Company's own creation. Clearly, MDMS replacement should begin as soon as practicable. And, of course, the Company does not inform the Commission how its finances as a result of the formula rate orders impact these MDMS roll-out problems and staffing shortages.

ComEd, in its Reply Brief, urges the Commission to approve the Revised Plan and then revisit it with ComEd's April 1st filing. Allowing the Revised Plan to go forward is accepting, at least for now, that meters will not be installed until 2015. This is regrettable, because the benefits to ratepayers are greatly reduced with the delayed deployment. But because of the impossibility of implementing the Original AMI Plan and the shortcomings of the proposed Revised Plan, the Commission is left with only bad options.

Staff has offered an alternative to either rejecting the proposed Revised Plan, or to approving it without modification, and that is to allow ComEd to implement their Revised Plan, but with additional requirements. Staff has suggested that the Commission could require ComEd to "explore opportunities to accelerate deployment, and to describe those in detail for the Commission's consideration in ComEd's April 1, 2013 AMI Plan progress report." (Staff Initial Brief at 22)

The Commission agrees with this approach, but under certain conditions. ComEd has indicated that they support this option as proposed by Staff. As Staff has pointed out, it has the benefit of being a timetable that ComEd says they can meet. While that is positive, the Commission should not forget that this instant proceeding is to revise a timetable that ComEd originally proposed and said that they could meet. With this as a backdrop, Staff's recommendation that ComEd describe in detail their efforts to initiate implementation acceleration is adopted. This should be done in the April 2013 AMI Plan Progress Report.

In addition, ComEd should also document in the same report proposed acceleration efforts that were considered and rejected by ComEd. In this way, the Commission, other interested parties, and customers will have the benefit of both a thorough understanding of the issues, and an exploration of the motivations of ComEd with respect to implementation acceleration.

ComEd can also explain any inability to meet the deployment schedule approved herein in its annual filing under Section 16-108.6(e) of the Act. However, given the Company's inability and refusal to supply an adequate reason to change the original AMI Plan, any attempt to lengthen the deployment will be looked upon skeptically, and the Commission expects the Company to show how it has improved the deployment

schedule. Accordingly, and for all the reasons stated herein, ComEd's AMI deployment schedule is modified as set forth above.

VII. Findings and Ordering Paragraphs

The Commission, having reviewed the entire record, is of the opinion and finds that:

- (1) Commonwealth Edison Company is an Illinois corporation engaged in the transmission, sale, and distribution of electricity to the public in Illinois, and is a public utility as defined in Section 3-105 of the Act;
- (2) the Commission has jurisdiction over Commonwealth Edison Company and the subject matter herein;
- (3) the facts recited and conclusions reached in the prefatory portion of this Order are supported by the record and are hereby adopted as findings of fact;
- (4) the Commission's June 22, 2012 Order in this Docket has not been stayed and is enforceable;
- (5) Commonwealth Edison Company's conduct constitutes non-compliance with the Commission's Order;
- (6) the record in its entirety supports altering the original timeline, due to the aforementioned non-compliance;
- (7) the AMI deployment schedule as proposed by Commonwealth Edison Company is supported by the entirety of the record and provides a defensible date for beginning meter installation and should be adopted;
- (8) Commonwealth Edison Company, in its annual filings, shall include information regarding its efforts to improve the deployment schedule to address issues, such as multiple ramp ups, that were identified by the Company;
- (9) Commonwealth Edison Company, in its annual filings, shall also provide information as to decisions made to forgo implementation improvement efforts, including reasons for rejection of any improvements;
- (10) Commonwealth Edison Company, in its annual filings, should include information regarding its consultation with the Smart Grid Advisory Council.

IT IS THEREFORE ORDERED by the Illinois Commerce Commission that Commonwealth Edison Company's Smart Grid Advanced Metering Infrastructure Deployment Plan is modified consistent with the recommendations of Staff of the Commission.

IT IS FURTHER ORDERED that Commonwealth Edison Company, in its annual filings, shall include the information described herein.

IT IS FURTHER ORDERED that all motions, petitions, objections, and other matters in this proceeding which remain unresolved are to matters in this proceeding which remain unresolved are to be disposed of in a manner consistent with the conclusions herein.

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

By Order of the Commission this 5th day of December, 2012.

(SIGNED) DOUGLAS P. SCOTT

Chairman