2017 IL App (1st) 162410-U

FOURTH DIVISION
August 10, 2017

No. 1-16-2410

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

COMMONWEALTH EDISON COMPANY,	)	Petition for Review of the
	)	Order of the Illinois
Plaintiff-Appellant,	)	Commerce Commission
	)	
v.	)	No. 140567
	)	
ILLINOIS COMMERCE COMMISSION,	)	
	)	
Defendant-Appellee.	)	

JUSTICE BURKE delivered the judgment of the court.
Justices McBride and Howse concurred in the judgment.

ORDER

Held: We affirm the order of the Illinois Commerce Commission denying ComEd recovery of costs incurred from two energy efficiency programs as they were not reasonably and prudently incurred.

¶ 1 Plaintiff Commonwealth Edison Company (ComEd) appeals from a decision of the Illinois Commerce Commission (the Commission) finding ComEd responsible for paying $387,500 of costs incurred from two energy efficiency programs which the Commission determined were not reasonably and prudently incurred. ComEd argues that the decision violated

statutory law, will deter third party participation in energy efficiency programs, and was arbitrary and capricious and unsupported by substantial evidence. For the following reasons, we affirm.

¶ 2 I. BACKGROUND

¶ 3 A. Regulatory Framework

¶ 4 In 2007, the General Assembly implemented energy efficiency and demand-response measures through enactment of section 8-103 of the Public Utilities Act (the Act) (220 ILCS 5/8-101; 8-103 (West 2008). Section 8-103 requires electric utilities such as ComEd to implement cost-effective energy efficiency measures to meet specified annual energy savings goals. 220 ILCS 5/8-103(b) (West 2014). Electric utilities are responsible for overseeing the design, development, and filing of an energy efficiency and demand-response plan with the Commission, which the Commission then approves. 220 ILCS 5/8-103(e) (West 2014). The plan covers three-year increments beginning in 2008. 220 ILCS 5/8-103(f) (West 2014). Electric utilities are responsible for implementing 100% of the demand-response measures in the plans and 75% of the energy efficiency measures approved by the Commission. 220 ILCS 5/8-103(e) (West 2014). The Department of Commerce and Economic Opportunity is responsible for implementing the remaining 25% of the approved energy efficiency measures. *Id.*

¶ 5 Section 8-103 also allows recoupment by the utilities to recover costs for "reasonably and prudently incurred expenses" in implementing the energy efficiency measures. 220 ILCS 5/8-103(a) (West 2014). This is accomplished through a tariff filed with and approved by the Commission, which the Commission also reviews yearly. 220 ILCS 5/8-103(e) (West 2014).

¶ 6 In 2011, the General Assembly enacted section 8-111.5B (220 ILCS 5/8-111.5B (West 2012), which created a new energy efficiency procurement requirement under the Act. Utilities are requested to prepare annually procurement plans for submission to the IPA. 220 ILCS 5/16-

111.5(b) (West 2012). With the enactment of section 8-111.5B, utilities are also required, in preparing their procurement plans, to assess opportunities to "expand the programs promoting energy efficiency measures" offered under section 8-103 plans and to implement additional cost-effective energy efficiency programs. 220 ILCS 5/16-111.5B(a)(2) (West 2012). Utilities must submit to the IPA an assessment of third-party administered cost-effective energy efficiency programs for inclusion in their procurement plans, including identifying new or expanded "cost-effective energy efficiency programs or measures that are incremental to those included in energy efficiency and demand-response plans approved by the Commission pursuant to Section 8-103 ***." 220 ILCS 5/16-111.5B(a)(3)(C) (West 2012). To that end, utilities "shall conduct an annual solicitation process" for proposals from third-party vendors. 220 ILCS 5/16-111.5B(a)(3) (West 2012). After conducting the request for proposals (RFP) process, the utility submits its assessment to the IPA, including a cost-effectiveness analysis and a determination of whether any third-party programs are duplicative or competitive with other programs. 220 ILCS 5/16-111.5B(a)(3) (West 2012).

¶ 7 In turn, the IPA selects which third-party programs it believes are cost-effective and includes those in the utility's procurement plan. 220 ILCS 5/16-111.5B(a)(4) (West 2012). The procurement plan is then submitted to the Commission for approval. The Commission "shall *** approve the energy efficiency programs and measures included in the procurement plan, including the annual energy savings goal, if the Commission determines they fully capture the potential for all achievable cost-effective savings, to the extent practicable, and otherwise satisfy the requirements of Section 8-103 of this Act." 220 ILCS 5/16-111.5B(a)(5) (West 2012). The first year that ComEd included third-party programs in its IPA procurement plan was in the fall of 2012 for plan year 6 (PY6) (June 1, 2013 through May 31, 2014).

¶ 8 As with section 8-103, section 16-111.5B provides a mechanism for a utility such as ComEd to recover from ratepayers "its costs incurred" in implementing approved third-party programs under a procurement plan via the same cost-recovery mechanism available under section 3-108. 220 ILCS 5/16-111.5B(a)(6) (West 2012). This mechanism is known as the "Energy Efficiency and Demand Response Adjustment Rider," or "Rider EDA," which allows for recovery of "reasonably and prudently incurred expenses." 220 ILCS 5/8-103(a), (e), (f)(6) (West 2014); 220 ILCS 16-111.5B(a)(6) (West 2014).

¶ 9 B. ComEd's Energy Efficiency Programs

¶ 10 Pursuant to this regulatory scheme, Project Porchlight, Inc., had two programs in ComEd's service area which made it through the section 16-111.5B process explained above. The first program was the "One Change Compact Fluorescent Lamp Distribution" Program (CFL Distribution Program), which distributed free energy-efficient light bulbs to residential customers least likely to respond to typical lighting offers. This program took place in PY6 (June 2013 through May 2014).

¶ 11 The second Project Porchlight program was the "One Change Small Commercial Power Strips" Program (Power Strips Program), which targeted 25,000 small commercial customers to provide each with two free energy-efficient power strips. This one-year program was scheduled to be implemented in Plan Year 7 (PY7) (June 2014 through May 2015).

¶ 12 Following the Commission's approval of ComEd's IPA procurement plan under section 16-111.5B, ComEd then negotiated and entered into contracts with Project Porchlight to implement the two energy efficiency programs. Under the contract terms, Project Porchlight received start-up costs and progress payments. At the end of the plan year, the contracts provided that the program's expenses are compared to the actual energy savings achieved, as verified by

an independent evaluator, to determine whether the program achieved the promised energy savings. If the program fell short, the vendor must return funds in proportion to any shortfall.

¶ 13 Unfortunately, Project Porchlight failed to achieve the projected energy savings as promised under the CFL Distribution Program in PY6. ComEd and the Commission do not dispute that under the CFL Distribution Program, ComEd is owed a refund of $137,500, based on the evaluation by an independent evaluator.[1] However, Project Porchlight became insolvent in PY7. It was thus unable to return the money it owed to ComEd for the CFL Distribution Program. It was also unable to implement or achieve any savings under the Power Strips Program due to the insolvency. For the Power Strips Program, ComEd advanced to Project Porchlight in PY6 start-up funds for the project. It is undisputed that ComEd is owed a $250,000 refund.[2] ComEd sought repayment from Project Porchlight for the Power Strips Program and recovered during PY7 approximately half of the funds paid, which was credited to ratepayers in the PY7 reconciliation.

¶ 14 C. Commission Proceedings

¶ 15 On August 29, 2014, in reconciling ComEd's costs and revenues for PY6 (June 1, 2013, through May 31, 2014), ComEd filed its annual report regarding the Rider EDA. The Commission Staff (Staff) instituted reconciliation proceedings on September 18, 2014, ordering ComEd to reconcile revenues collected with costs prudently incurred with regard to those efficiency measures under the Rider EDA. An evidentiary hearing was held on January 12, 2016, before an administrative law judge. ComEd presented an affidavit, annual report, and the testimony of Michael Brandt. Staff presented the affidavit and the testimony of Scott Tolsdorf.

[1] The independent evaluator was only able to verify 72.5% of the claimed light bulb distributions. ComEd had paid Project Porchlight $500,000. Thus: $500,000 x (1-.725) = $137,500.

[2] The Commission notes that ComEd is also owed a refund of $278,200 for PY7 from Project Porchlight, but the parties dispute whether these costs are recoverable from customers and this dispute is pending before the Commission (ICC Docket No. 15-0546).

ComEd and Staff thereafter filed briefs. The administrative law judge issued a written proposed order, to which the parties filed exceptions and replies to exceptions.

¶ 16 In total, ComEd sought to recover costs related to section 8-103 plan (Energy Efficiency and Demand Response Plan) costs and section 16-111.5B plan costs through the Rider EDA. Staff accepted most of ComEd's expenditures. The central dispute in the reconciliation proceedings before the Commission and on appeal relates to Staff's proposal to disallow recoupment of $387,500 related to Project Porchlight's insolvency and failure to perform under its contracts with ComEd.

¶ 17 For its part, ComEd argued that it was required by law to procure energy efficiency programs through two platforms: section 8-103 and section 16-111.5B. It argued that Staff's proposed disallowances amounted to an attack on the General Assembly's third-party IPA energy efficiency programs under section 16-111.5B. ComEd argued that it was permitted to recover costs associated with energy efficiency programs under section 16-111.5B through the Rider EDA, just as in the case of section 8-103 plans. Pursuant to section 16-111.5B, ComEd conducted RFPs through an affiliate company. ComEd reviewed the bids and conducted a cost-effectiveness analysis and determined whether any were duplicative or competitive. From those, it submitted selected programs to the IPA. The IPA reviewed the submission and included the programs in its final procurement plan. The Commission approved the programs as part of its approval of the overall IPA procurement plan. A stakeholder advisory group was also kept apprised of the process.

¶ 18 ComEd asserted that negotiated "pay-for-performance" contracts with Project Porchlight and other third party vendors pursuant to the approved procurement plan. Vendors received initial payment to cover start-up costs or in-progress payments throughout the plan year, and at

the end of the plan year the expenses were "trued up" with the actual net energy savings achieved. ComEd argued that this structure protected consumers from a third party vendor's failure to perform by requiring the vendor to return funds in proportion to any shortfall in promised energy savings, as determined by an independent evaluator. ComEd asserted that this "pay-for-performance" structure was industry standard and reflected a prudent strategy to protect from risk, and Project Porchlight's insolvency was unforeseen. ComEd indicated that after the contracts were executed, it merely administered the contracts and the third party vendors were responsible to implement the programs.

¶ 19 ComEd argued that Staff's proposal of withholding payment until after a final evaluation and verification of energy efficiency results would deter third party participation in section 16-111.5B programs. ComEd pointed out that the Commission rejected this same proposal by the staff in the 2016 Procurement Plan Order (Docket No. 15-0541), and that this prior ruling should control and the Commission cannot arbitrarily depart from its past decisions. According to ComEd, small vendors would not be able to participate without receiving start-up costs and progress payments as they could not otherwise afford these expenses and wait for years until energy savings are verified. ComEd asserted that its "pay-for-performance" model was prudent and industry standard. Further, Staff's proposal would dismantle IPA energy efficiency programs due to a single vendor insolvency over the course of eight years of offering such programs.

¶ 20 In response, Staff argued that regardless of the fact that the Commission ultimately decided which programs would be implemented under the IPA procurement plan, the implementation and management of those programs was ComEd's responsibility and ComEd was obligated to structure contracts prudently. Staff asserted that the Commission did not direct ComEd to structure the contracts so that all the risk was placed on its utility customers. Staff

asserted that the costs were not prudently incurred because ComEd should have structured its contracts to protect customers from a third party vendor's nonperformance and insolvency. Staff asserted that ComEd should not be allowed to recover the Project Porchlight costs from its customers because the contracts were between ComEd and Project Porchlight, Customers had no input into the structure of the contracts, and that structure failed to protect customers. The staff argued that the contracts were not "pay-for-performance" as ComEd suggests, but, rather, ComEd paid *before* Project Porchlight performed. Staff asserted that under any other contract, ComEd's sole remedy would be to pursue recovery from the breaching party, not from customers, nonparties to the contracts.

¶ 21 With regard to the CFL Distribution program, Staff asserted that the independent evaluator was only able to verify that 72.5% of the target homes received the light bulbs, and therefore ComEd was due a refund from Project Porchlight of 27.5%, or $137,500. But the terms of the contract required ComEd to pay Project Porchlight before verification by the independent evaluator. There was no provision for payment only after results were verified or for a holdback in the case of failure to perform. Project Porchlight was unable to reimburse ComEd because it became insolvent. Staff argued that ComEd put itself in the position of paying up front without holdbacks or other protections, and ComEd's contract was designed to benefit shareholders, not ratepayers, and costs associated with failed energy savings should be born by ComEd. Although it may have been unforeseeable that Project Porchlight would become insolvent, it was not unforeseeable that something could happen which would hinder success or that the project would not be 100% successful.

¶ 22 Staff asserted that the Power Strips Program's contract required ComEd to pay start-up costs initially. Project Porchlight was obligated to refund these costs in the case of

nonperformance. Due to its insolvency, Project Porchlight was unable to refund the start up costs. Staff argued that ComEd sought full recovery from its customers for Project Porchlight's failure to perform resulting from insolvency. Staff asserted that ComEd alone determined the terms of the contract and failed to provide for further protections in its contracts.

¶ 23 Although Staff did not dispute that the Commission approved the procurement plan which included the Project Porchlight programs, it asserted that the Commission did not order the contracts to be structured in this way and ComEd was responsible for negotiating, structuring, and managing the contracts. ComEd thus assumed the risk that the third party contractor would not perform. Staff denied ComEd's allegation that Staff was advocating that the only appropriate type of contract would be to completely withhold payment until after completion of an independent evaluation after performance. Staff asserted that there were a number of alternatives ComEd could have chosen which would have prevented ComEd trying to collect from customers due to an insolvent nonperforming vendor. Tolsdorf testified to options available such as performance bonds or a holdback provision. Staff further argued that the approval of the 2016 IPA Procurement Plan Docket No. 15-0541, did not resolve any issues in the current proceeding, and the order in that case specifically so stated.

¶ 24 The Commission ultimately issued its order on June 21, 2016. The Commission found, in relevant part, that the $137,500 of unrecovered costs from the CFL Distribution program and the $250,000 in prepaid start-up costs for the Power Strips Program "were not prudently incurred." In ruling, the Commission held that ComEd negotiated and executed the contracts after the Commission approved the programs. It held that ComEd chose the structure of the contracts in an effort to protect customers but, in fact, the contracts paid vendors in advance without safeguards or protections for insolvency or nonperformance, and the Commission did not order

ComEd to structure the contracts this way. The Commission noted the several alternative contract structures presented in Tolsdorf's testimony, such as requiring performance bonds or holdback provisions. The Commission held that ComEd was a sophisticated party with experience in contract drafting and administration and nonperformance and insolvency were common pitfalls that must be routinely anticipated. The Commission observed that a percentage holdback provision could have minimized losses in the CFL Distribution Program, and a performance bond could have protected the start-up costs in the Power Strips Program.

¶ 25 The Commission rejected ComEd's argument that the 2016 Procurement Plan Order (holding that utilities shall not be required to withhold payment and disallow costs for under-performing programs) controlled in the present case because timely payment after performance was not at issue here and Staff was not asserting that future payments to third party vendors should be withheld until verification of energy savings. Rather, Staff argued only for disallowance of costs for two specific programs where the vendor failed to perform the contracts and ComEd failed to adequately structure the contracts to protect customers. The Commission observed that the 2016 Procurement Plan Order specifically stated that issues in the present case should not be resolved in that case.

¶ 26 The Commission held that ComEd "negotiated, structured, and executed" the two contracts at issue, the contracts provided that the vendor was responsible in the case of failure to achieve the energy savings goals, not the customers, and therefore the costs and losses should not be recovered from customers. The Commission also urged stakesholders to further discuss the contract structure in the Stakeholder Advisory Group (SAG) workshop process.

¶ 27 ComEd filed an application for rehearing, which the Commission denied on August 9, 2016. ComEd then filed the present appeal to this court pursuant to Illinois Supreme Court Rule 335 (eff. Jan. 1, 2016) and section 10-201 of the Act. 220 ILCS 5/10-201 (West 2014).

¶ 28 II. ANALYSIS

¶ 29 A. Standard of Review

¶ 30 An appeal of an order or decision of the Commission is governed by the terms of the Act. *People ex rel. Madigan v. Illinois Commerce Comm'n*, 2014 IL 116642, ¶ 11. The Act provides, in relevant part:

> " 'The findings and conclusions of the Commission on questions of fact shall be held *prima facie* to be true and as found by the Commission; rules, regulations, orders or decisions of the Commission shall be held to be *prima facie* reasonable, and the burden of proof upon all issues raised by the appeal shall be upon the person or corporation appealing from such rules, regulations, orders or decisions.' " *Citizens Utility Board v. Illinois Commerce Comm'n*, 291 Ill. App. 3d 300, 303 (1997) (quoting 220 ILCS 5/10–201(d) (West 1994)).

¶ 31 "[T]he Commission is entitled to great deference because it is an administrative body possessing expertise in the field of public utilities." *Archer-Daniels-Midland Co. v. Illinois Commerce Comm'n*, 184 Ill. 2d 391, 397 (1998). "The Commission's interpretation of the Act is accorded deference because administrative agencies enjoy wide latitude in effectuating their statutory functions." *People ex rel. Madigan v. Illinois Commerce Comm'n*, 2015 IL 116005, ¶ 22. As such, the Commission's "findings will be reversed only if they 'are not supported by substantial evidence based on the record; the Commission acted outside the scope of its statutory

authority; the Commission issued findings in violation of the State or Federal Constitution or law; or the proceedings or the manner in which the Commission reached its findings violates the State or Federal Constitution or laws, to the prejudice of the appellant.' " *Citizens Utility Board*, 291 Ill. App. 3d at 304 (quoting *Citizens Utility Board v. Illinois Commerce Comm'n*, 166 Ill. 2d 111, 120-21 (1995)). "Substantial evidence" is defined as "more than a mere scintilla but may be something less than a preponderance of evidence and is such evidence as a reasoning mind would accept as sufficient to support a particular conclusion." (Internal quotation marks omitted.) *Id*. In reviewing the Commission's decision, this court may not "reevaluate the credibility or weight of the evidence" and we will not substitute our judgment for that of the Commission. *Id.* The Commission must provide "findings or analysis sufficient to allow an informed judicial review" but need not make findings on each evidentiary fact or issue. (Internal quotation marks omitted.) *Id.* at 304-05.

¶ 32 B. Forfeiture

¶ 33 ComEd raises two primary issues on appeal. First, it asserts that the Commission's order violated section 16-111.5B(a)(5)'s mandate to "fully capture the potential for all achievable cost-effective savings" by requiring "draconian" contractual provisions that will deter participation by third-party vendors, particularly small businesses, and increase the costs of energy efficiency programs. Second, ComEd argues that the Commission's order was arbitrary and capricious and not supported by substantial evidence because it (1) failed to consider section 16-111.5B(a)(5); (2) it departed from the 2016 Procurement Plan Order; (3) it lacked evidentiary support; and (4) it ignored the costs imposed.

¶ 34 Initially, we address the Commission's argument that, with the exception of the argument that the order was inconsistent with the 2016 Procurement Plan order, ComEd forfeited all other

arguments because ComEd failed to raise them in its application for rehearing before the Commission.

¶ 35 "Under section 10–113(a) of the Act, 'No person or corporation in any appeal shall urge or rely upon any grounds not set forth in [an] application for a rehearing before the Commission.' " *Illinois Commerce Comm'n,* 2015 IL 116005, ¶ 44 (quoting 220 ILCS 5/10-113(a) (West 2010)). This statutory language requires strict compliance, and it is "quite plain" that an appellant "may not raise an issue or objection that was not expressly raised in an application for rehearing before the Commission. [Citations.] The purpose of that requirement is to inform the Commission and opposing parties of putative legal and factual errors." *Id.* As such, this section does not permit a party to "raise issues by implication [citation], or to substitute a general allegation for a specific one [citation]," and a party also may not "bootstrap" issues raised in prior cases into a current appeal. *Id.* ¶ 45. Because our court "has jurisdiction to review administrative decisions only as provided by statute," we are thus bound by the language of the Act conferring or limiting jurisdiction. *Id.* ¶ 46.

¶ 36 In its application for rehearing, ComEd reviewed the statutory framework of section 8-103 and section 16-111.5B energy efficiency programs and argued that it was required by law to implement energy efficiency programs under section 16-111.5B approved by the Commission. It asserted that the Commission arbitrarily departed from its prior order in approving the 2016 Procurement Plan Order (Docket No. 15-0541) in which it rejected Staff's proposal to require utilities to withhold payments. ComEd asserted that the order would "have a chilling effect on vendor participation in Illinois energy efficiency programs," it would effectively terminate IPA third-party energy efficiency programs, vendors could not wait to be paid until after an independent evaluation was completed, and the provisions were also unlawful. ComEd argued

that the Commission's decision was at odds with evidence showing the success of such contracts as ComEd administered $670 million in energy efficiency programs in PY6 and the lone vendor insolvency reflected only .0006% of this total cost. It further argued that the order at issue was "bereft of a citation to any authority in support of its conclusion" and it mischaracterized the structure of ComEd's contracts. It argued that the Commission should grant rehearing to "correct the distressing policy implications resulting from the order." It argued that the evidence did not support that Staff's proposed provisions were necessary and Staff never cited examples of holdback or performance bond provisions being applied in energy efficiency programs. ComEd asserted that a performance bond would not ensure full recovery. It asserted that the order would result in contracting delays, higher costs, and demise of third-party vendor participation. ComEd argued that the order was based on incorrect facts and failed to apply a legal standard, citing the standard in section 8-103 and 16-111.5B(a)(6). ComEd asserted that the evidence showed that the "pay-for-performance" contract structure was a reasonable and prudent method to protect consumers and promote third-party energy efficiency programming. ComEd asserted that the Commission applied hindsight judgment to the contracts. ComEd also incorporated its arguments set forth in its rebuttal, surrebuttal testimony, initial brief, reply brief, corrected brief on exceptions, and its exceptions language, wherein it had further argued about the statutory requirements and Staff's proposed provisions.

¶ 37 In light of the arguments ComEd raised in its petition for rehearing, we find that ComEd preserved the arguments it presents in the instant appeal. 220 ILCS 5/10-113(a) (West 2014)

¶ 38 C. Section 16-111.5B

¶ 39 We now turn to ComEd's first argument that the Commission's order violated section 16-111.5B's mandate to "fully capture the potential for all achievable cost-effective savings" by

requiring "draconian" contractual provisions that will deter participation by third-party vendors, particularly small businesses, and increase the costs of energy efficiency programs. 220 ILCS 5/16-111.5B(a)(5) (West 2014).

¶ 40 The Commission argues that ComEd misreads the order as it does not require ComEd to withhold all payment to vendors until savings are verified, or otherwise structure contracts to create absolute protection from vendor insolvency. Rather, the order merely found that the contested costs were not reasonably or prudently incurred because ComEd did not design the contracts to properly safeguard customers against vendor insolvency. The Commission also argues that section 16-111.5B(a)(5) is inapplicable as it concerns the Commission's approval of the energy efficiency programs in procurement plans, whereas the current proceeding concerns section 16-111.5B(a)(6)—recovery of costs in a rider reconciliation proceeding. The Commission asserts that ComEd overstates the amount dispensed under the pay-for-performance contracts as the $670 million figure is a cumulative amount from both section 8-103 and section 16-111.5B programs. The actual amount of costs attributable to third-party vendor programs under section 16-111.5B for PY6 was $1,397,763, with $387,500 (28%) unrecoverable. The Commission asserts that ComEd's claim that it would take years for vendors to be paid was based on Brandt's speculative testimony. The Commission argues that in the CFL Distribution program, the independent evaluator issued its report approximately only seven months after PY6 ended, and ComEd presented no evidence that this minor delay would reduce participation in the program.

¶ 41 Initially, we observe that we agree with the Commission that ComEd misinterprets the Commission's order. It does not require ComEd to utilize 100% holdback or performance bond provisions in all of its contracts with third-party vendors. Indeed, the order specifically states that

the Commission "did not order ComEd to structure its" contracts to pay "costs up-front without safeguards against the risk of non-performance and insolvency." The order relates that Staff "noted a number of alternatives available to ComEd which could have at least mitigated the loss caused by a pre-paid, non-performing, vendor." The Commission's order also does not require ComEd to completely protect customers from loss. Rather, the Commission found that the specific costs at issue were not reasonably and prudently incurred as the contracts at issue did not sufficiently protect ratepayers from insolvency. The Commission's order otherwise allows ComEd discretion to structure its third party contracts. As the Commission concluded, ComEd was responsible for negotiating the actual terms of the contracts, entering into the contracts, and administering them. The order observed that despite ComEd's sophistication in contract drafting and administration, there was no evidence that the risk of insolvency was incorporated into the contracts.

¶ 42 ComEd's argument also fails because section 16-111.5B(a)(5) relates to an entirely separate issue and statutory step than the recoupment of costs after implementation of third-party energy savings programs at issue here. The instant case and the Commission's order concerned ComEd's attempt to recoup from ratepayers specific vendor costs under the Rider EDA pursuant to section 8-103 and section 16-111.5B(a)(6).

¶ 43 Subsection (a)(5) provides that "the Commission shall also approve the energy efficiency programs and measures included in the procurement plan, including the annual energy savings goal, if the Commission determines they fully capture the potential for all achievable cost-effective savings, to the extent practicable, and otherwise satisfy the requirements of Section 8-103 of this Act." 220 ILCS 5/16-111.5B(a)(5) (West 2014). That is, subsection (a)(5) concerns the Commission's initial approval of a procurement plan and the energy efficiency programs that

are included in that plan by the IPA, after the IPA has reviewed the programs and ComEd's assessment of the programs and determined which ones to include in the procurement plan based on whether the programs are cost effective.

¶ 44 In contrast, subsection (a)(6) concerns a utility's ability to recover costs associated with implementing energy efficiency programs under section 8-103 and 16-111.5B. Subsection 16-111.5B(a)(6) provides that a utility such as ComEd "shall recover its costs incurred under this Section related to the implementation of energy efficiency programs and measures approved by the Commission *** including, but not limited to, all costs associated with complying with this Section and all start-up and administrative costs and the costs for any evaluation, measurement, and verification of the measures, from all retail customers *** through the automatic adjustment clause tariff established pursuant to Section 8-103 of this Act ***." 220 ILCS 5/16-111.5B(a)(6) (West 2014).

¶ 45 As such, the order did not violate the statutory language of section 16-111.5B(a)(5), which was not applicable to the present case.[3] The instant case concerns the Commission's reconciliation of ComEd's proposed Rider EDA, pursuant to which ComEd is attempting to recoup its losses related to those programs. "A rider is a cost recovery method. It generally alters an otherwise applicable rate and recovers a specific cost under particular circumstances. *** [A rider] often include[s] a reconciliation formula, designed to match revenue recovery with actual costs." (Internal quotation marks omitted.) *People ex rel. Madigan v. Illinois Commerce Comm'n*, 2015 IL 116005, ¶ 9. As explained in section 8-103(a), the legislature has determined that "[i]t serves the public interest to allow electric utilities to recover costs for *reasonably and*

[3] ComEd is not challenging the Commission's prior approval of the CFL Distribution Program or Small Commercial Power Strips Program for inclusion in ComEd's annual procurement plans under subsection 16-111.5B(a)(5). Indeed, as the Commission points out, ComEd may not collaterally attack the Commission's prior 2013 and 2014 procurement plan orders in which it approved the procurement plans containing these third party programs.

prudently incurred expenses for energy efficiency and demand-response measures." (Emphasis added.) 220 ILCS 5/8-103(a) (West 2014). Section 8-103(e) provides that a utility

> "shall be permitted to recover costs of those [approved energy efficiency and demand-response] measures through an automatic adjustment clause tariff filed with and approved by the Commission. *** Each year the Commission shall initiate a review to reconcile any amounts collected with the actual costs and to determine the required adjustment to the annual tariff factor to match annual expenditures. Each utility shall include, in its recovery of costs, the costs estimated for *** the utility's *** implementation of energy efficiency and demand-response measures." 220 ILCS 5/8-103(e) (West 2014).

¶ 46 To that end, the Commission's order in the present rider reconciliation proceeding was authorized under subsection 16-111.5B(a)(6). It cannot constitute a violation of subsection 16-111.5B(a)(5).

¶ 47 We also observe that the Act opens with a broad statement of purpose and intent:

> " 'The General Assembly finds that the health, welfare and prosperity of all Illinois citizens require the provision of adequate, efficient, reliable, environmentally safe and least-cost public utility services at prices which accurately reflect the long-term cost of such services and which are equitable to all citizens. It is therefore declared to be the policy of the State that public utilities shall continue to be regulated effectively and comprehensively.' " *People ex rel. Madigan v. Illinois Commerce Comm'n*, 2015 IL 116005, ¶ 5 (quoting 220 ILCS 5/1-102 (West 2010)).

¶ 48 In regulating utilities, the stated "goals and objectives" of the Act are efficiency, environmental quality, reliability, and equity. 220 ILCS 5/8-102(a)-(d) (West 2014). Thus, the objectives of the Act are broader than the single-minded goal to "fully capture" energy efficiency savings through the third party programs outlined in the procedures set forth in section 16-111.5B. In sum, the order did not violate section 16-111.5B(a)(5).

¶ 49 D. The Commission's Order is Not Arbitrary and Capricious

¶ 50 ComEd's second contention on appeal is that the Commission's decision disallowing the costs associated with Project Porchlight from the Rider EDA was arbitrary and capricious and unsupported by substantial evidence. ComEd primarily raises four contentions in support: (1) similar to its first argument, ComEd asserts the Commission failed to consider the impact of requiring the burdensome contractual provisions which violated section 16-111.5B(a)(5); (2) the Commission inexplicably reversed course from its holding in the 2016 Procurement Plan Order; (3) the Commission's findings were not supported by the evidence; and (4) the order ignored the costs imposed on vendors, ComEd, and legislative goals.

¶ 51 We have already addressed ComEd's first argument above. The initial approval of third party programs pursuant to subsection 16-111.5B(a)(5) is not at issue here, and we do not find that provision applicable to our analysis of the Commission's decision in the rider reconciliation proceedings under subsection 16-111.5B(a)(6). And as stated, the order did not require ComEd to utilize a specific contract provision to protect customers or require ComEd to completely protect customers from all risks.

¶ 52 We next turn to ComEd's allegation that the Commission took opposing positions without explanation in the order at issue here and in the Commission's prior order (2016 Procurement Plan Order).

¶ 53 "[O]nly where the Commission departs from its usual rules of decision to reach a different, unexplained result in a single case, thus depriving a party of equal treatment before the Commission, will its decision be entitled to less deference on review." (Internal quotation marks omitted.) *Illinois Commerce Comm'n*, 2015 IL 116005, ¶ 25.

¶ 54 The order in this case and the 2016 Procurement Plan Order did not require ComEd to implement any specific contract provisions, such as a 100% holdback or performance bond provision, or ensure total protection of customers. Rather, the order in the present rider reconciliation proceeding found that, based on the evidence presented, ComEd did not adequately protect customers from the risk of insolvency in the two specific contracts at issue and the resulting costs were, therefore, not prudently incurred. The order noted that Staff had not, in fact, asserted that payments to vendors should be completely withheld until verification of energy savings, but instead argued that the specific costs for the two failed programs should be disallowed as ComEd failed to adequately structure the contracts to protect customers.

¶ 55 In the 2016 procurement plan proceedings, Staff recommended that ComEd adjust the process to ensure vendors were not significantly compensated before achieving savings and urged the Commission to require ComEd to use holdback or performance bonds. The Commission rejected Staff's proposal to require withholding of all payment and instead ordered ComEd to utilize the stakeholder workshop to develop a plan to apply more scrutiny to section 16-111.5B contracts. Thus, the Commission did not depart inexplicably from a prior decision and there is no inconsistency between the two orders. Indeed, in the order at issue here, the Commission specifically observed that in its prior 2016 Procurement Plan Order, it did not consider the cost recovery issue and stated that this issue was to be decided only in the present rider reconciliation proceeding.

¶ 56 In analyzing ComEd's next contention, that the order lacked substantial evidence to support it, we reiterate that we afford the Commission's decision great deference on appeal. *Acher-Daniels-Midland Co.*, 184 Ill. 2d at 397. We reverse the Commission's findings only if they are not supported by substantial evidence. *Citizens Utility Board*, 291 Ill. App. 3d at 304. And the Commission's decision is considered *prima facie* reasonable, its findings of fact are held to be *prima facie* true, and ComEd bears the burden of proof on all issues it raises on appeal. *Id.* at 303. The Commission's findings are supported by substantial evidence if there is more than a scintilla but less than a preponderance of evidence. *Id.* at 304. We do not determine anew the weight or credibility of the evidence. *Id.*

¶ 57 Under this standard, we find the Commission's decision was supported by substantial evidence. The record evidence demonstrated that ComEd was responsible for negotiating, entering into, and managing the contracts with Project Porchlight. ComEd maintains that the contracts accounted for risk in that they were structured as "pay-for-performance" contracts wherein the expected energy savings would be "trued up" with the actual savings and costs at the end of the plan year. But as the Commission recognized, this did not protect against the risk of insolvency as ComEd paid money to Project Porchlight upfront for both start up costs and periodic progress payments before any results or benchmarks were realized.

¶ 58 In ruling, the Commission found credible the testimony of Staff witness Tolsdorf, who suggested alternative contract structures which offered enhanced risk protection against insolvency by withholding payment until independent verification of the achieved savings, employing holdback provisions, or requiring a performance bond. Tolsdorf testified that it was not reasonable for customers to pay for the Project Porchlight programs that did not provide them with a benefit or only a partial benefit and customers should not bear the risk of unverified

or unrecoverable costs. Tolsdorf testified that the phrase "pay-for-performance" did not correctly characterize ComEd's contracts because Project Porchlight was actually paid prior to performance. He testified that they were designed to protect ComEd's shareholders instead of its customers, and ComEd should absorb any shortfall. Although ComEd argues that Tolsdorf was an accountant whose role did not involve drafting contracts, we observe that he was an accountant in the financial analysis division of the ICC. We note that Tolsdorf's testimony was admitted into evidence without objection. Moreover, the focus of Tolsdorf's testimony was whether the costs were reasonable and prudent, an area directly related to his expertise.

¶ 59 Juxtaposed to this, ComEd offered the testimony of Brandt, a manager of energy efficiency planning and measurement at ComEd. Brandt testified that Staff's proposal would mean vendors would not be paid until years after they incurred costs to implement their programs, and this was not used in energy efficiency contracting and would not be best practice or industry standard. Brandt testified in surrebuttal that its "pay-for-performance" contracts were best practice and industry standard.

¶ 60 On review, we decline to substitute our judgment for that of the Commission regarding the weight or credibility of the witnesses' testimony and evaluation of this evidence. *Citizens Utility* Board, 291 Ill. App. 3d at 304. Brandt did not address the holdback or performance bond ideas. Brandt did not offer testimony that ComEd conducted an insolvency risk analysis in structuring its contracts. Despite ComEd's assertion that Project Porchlight's insolvency was impossible to predict and unforeseen, we find the Commission reasonably concluded that insolvency is a "common peril" that contracting parties must "routinely anticipate and protect against."

¶ 61 We again note that the order did not conclude that Staff's proposed contract provisions must be implemented. ComEd relies on a subsequent order by the Commission wherein ComEd and another utility utilized different, more protective, contract structures than the "pay-for-performance" structure here and they sought guidance from the Commission regarding acceptable contract terms. However, the Commission merely ruled in that case that it was not clear whether the contractual terms adopted by ComEd and the other utility were appropriate and the issue of which contractual terms best strike a balance between protecting customers and not reducing bid participation should be addressed in further stakeholder workshops.

¶ 62 In its final claim, ComEd argues that the Commission's order was arbitrary and capricious because it ignored the costs its ruling imposes on customers, ComEd, and the legislature's goals.

¶ 63 We find no indication that the Commission failed to consider any evidence presented in rendering its decision. Again, the issue at hand in the reconciliation proceedings here was not whether the Commission "fully captured" potential energy efficiency savings through third party programs, but rather, whether the costs incurred by ComEd were reasonable and prudent pursuant to section 16-111.5B(a)(6). As noted, the order did not require ComEd to withhold all payment to vendors until independent verification of achieved energy savings. It also did not completely prohibit provision of any startup funds. ComEd presented no evidence supporting its contention that third party vendors would pass the costs of holdbacks or other similar provisions on to customers. It did not present evidence that it considered requiring a performance bond or other measure or how this would impact cost effectiveness or third party participation.[4]

[4] We decline to consider ComEd's citation of a document filed by the Attorney General in another proceeding which was not included in the record below. See. 220 ILCS 5/10-201(d) (West 2014).

¶ 64 We also reject ComEd's claim that the ruling essentially requires ComEd to become the guarantor of all money spent on energy efficiency programs. The Commission did not hold that ComEd will always be liable under any circumstance for costs associated with any third party insolvency or failure to perform. Rather, it concluded that the costs here were not reasonably and prudently incurred with respect to two specific programs as no risk protections were incorporated into the contracts and ComEd was attempting to impose this burden of loss solely on customers. Further, of the $670 million ComEd asserts was spent on energy efficiency programs, only $1.4 million was attributable to third party vendor programs undertaken pursuant to section 16-111.5B. Other programs fall under section 8-103 and are not part of the third party vendor process under section 16-111.5B. In addition, we observe that the legislature did not open the door to any and all third party programs. It directed that energy efficiency programs must be "cost effective" and it employs a total resource cost test to ensure cost effectiveness by balancing the benefits of a program against its costs. See 220 ILCS 5/16-111.5B(a)(2-5), (b) (West 2014); 20 ILCS 3855/1-10 (West 2014).

¶ 65 III. CONCLUSION

¶ 66 For the reasons stated, we affirm the Commission's decision to disallow recovery of the $137,500 loss associated with the CFL Distribution Program and the $250,000 loss associated with the Power Strips Program.

¶ 67 Affirmed.