



## **MEMORANDUM OF AGREEMENT**

### **BETWEEN COMMONWEALTH EDISON COMPANY AND UNITED STATES ARMY CORPS OF ENGINEERS, FOR THE FUNDING OF A REVIEW POSITION**

WHEREAS, this Memorandum of Agreement (Agreement) is between Commonwealth Edison Company (COMED), and the Chicago District of the United States Army Corps of Engineers (USACE) (hereinafter referred to as "the Parties"); and

WHEREAS, Section 214 of the Water Resources Development Act (WRDA)-of 2000, as amended (codified at 33 U.S.C. §2352), provides that the Secretary of the Army (Secretary), after public notice, may accept and expend funds contributed by a non-Federal public entity to expedite the evaluation of a permit application of that entity related to a project or activity for a public purpose under the jurisdiction of the Department of the Army (DA); and

WHEREAS, the authority of the Secretary of the Army was delegated to the Assistant Secretary of the Army for Civil Works by memorandum dated January 8, 2018, re-delegated to the Chief of Engineers by memorandum dated January 19, 2018, and further re-delegated to District and Division Commanders by memorandum dated April 18, 2018, in effect to date; and

WHEREAS, the Acting Assistant Secretary of the Army for Civil Works, by memorandum dated January 19, 2018, has provided implementation guidance for District and Division Commanders to accept and expend funds contributed by non-federal entities to expedite the evaluation of permit applications pursuant to Section 214 of WRDA 2000, as amended, subject to the limitations described in the implementation guidance, including the District Engineer's approval of said agreements and additional standards with which the District must comply to ensure impartial decision making; and

WHEREAS, COMED has programmed a substantial number of utility projects that will require authorizations from the USACE for impacts to "waters of the United States" pursuant to Section 10 of the Rivers and Harbors Act of 1899 and Section 404 of the Clean Water Act; and

WHEREAS, COMED desires that the USACE provide an expedited review of COMED DA permit applications, proposed mitigation banks and sites, and permitted projects with a public purpose (hereinafter, collectively, "COMED Projects"); and

WHEREAS, the Parties have determined that it would be mutually beneficial to supplement USACE staffing above existing levels; and

WHEREAS, the Chicago District Commander has determined that expenditure of funds received from COMED will be in compliance with Section 214 of WRDA 2000, as amended; and

WHEREAS, USACE issued a public notice, dated June 20, 2019, soliciting comments regarding the District Engineer's intent to accept and expend funds contributed by non-Federal public entities for the purposes described above; and

WHEREAS, the Commander, USACE has determined USACE involvement in the environmental analysis of proposed utility -projects undertaken by COMED to be in the public interest; and

WHEREAS, the Parties have determined that supplemental USACE staff dedicated to the review of COMED Projects will reduce the customary time for reviews and processing required under the statutory responsibility of USACE; and

WHEREAS, COMED agrees to fund supplemental USACE staff dedicated to work on COMED Projects;

NOW THEREFORE, the Parties agree as follows:

## I. COMED RESPONSIBILITIES

### A. RESOURCES

1. Subject to the continued authority of USACE to accept such funds, COMED shall be responsible for payment to USACE of an amount equal to 25% of USACE's costs to employ a USACE staff member as a USACE Project Manager dedicated to the review of COMED Projects (Funded Employee), as contemplated by this Agreement. The employment costs of the Funded Employee shall include all fully burdened salary-related costs assessed by USACE, and, unless otherwise agreed to by COMED, COMED's funding obligation shall not exceed \$50,000.00 annually.

Prior to each subsequent budget cycle following execution of this Agreement, COMED will review USACE cost proposals for future budget cycles related to the employment costs of the Funded Employee. Annual budgets submitted by USACE will reflect the costs of appropriate salary step-increases, salary awards, and salary cost of living allowances within the employee's pay grade under the General Schedule (GS) pay scale, and administrative cost adjustments.

Allowable costs of employment of the Funded Employee may include but are not limited to the following:

- a. Salary and benefits (including paid Federal holidays) for one quarter of (1) permanent, full-time USACE Project Manager for the length of this Agreement;
- b. Actual burdened overhead rate carried by the Chicago District, including Effective Rate, Departmental Rate, General and Administrative Rate, Training and Travel and other items as appropriate;
- c. Credit hours and any necessary compensatory and overtime labor compensation;
- d. Cost of a leased USACE fleet vehicle, privately owned vehicle or rental car for field inspections.

## B. PAYMENTS

1. COMED shall adhere to its obligations as set forth in the Agreement and will make an annual payment to the USACE for its payment obligations under this Agreement. Payment will be made within 45 days of receiving an invoice from USACE.
2. Upon execution of this Agreement, COMED shall transmit an advance payment equal to the remaining amount of the Corps' approved FY2020 budget (October 1, 2019-September 30, 2020) related to the employment costs of the Funded Employee.
3. Upon receipt of future budget estimates from USACE of the employment costs of the Funded Employee, COMED shall within 90 days transmit an advance payment to cover its annual payment obligations under this Agreement.
4. COMED will review quarterly USACE submittals documenting actual account of expenditures for the items as listed above in support of work contemplated by this Agreement.
5. If COMED disagrees with the USACE's Quarterly Project and Expenditures Report, COMED will, within twenty (20) working days of receipt of the Report, request a meeting, confer, and collaborate with USACE to resolve the account of expenditures.
6. If USACE forecasts that its actual costs will exceed the amount paid in advance by COMED to cover its obligations under this Agreement, it shall promptly notify COMED of the amount of additional funds necessary to cover COMED's obligations. COMED shall either provide the additional funds to USACE, require that the scope of work be limited to that which can be paid

for by the previously obligated funds, or direct the termination of this Agreement pursuant to paragraph V.C. If COMED elects to provide additional funds to USACE, USACE shall promptly send an invoice for the required amount to COMED. COMED shall process invoices to make payments via electronic funds transfer within forty-five (45) days of receipt of such invoices.

## II. USACE RESPONSIBILITIES

### A. RESOURCES

1. Consistent with U.S. Government, DA, and USACE hiring and employment laws and rules, USACE will supplement its Regulatory Branch staff by hiring, or identifying from current its employees, one employee, at the GS-11 or GS-12 level, with the knowledge, skills and abilities necessary to perform the functions and responsibilities of a Funded Employee job. The Funded Employee will be dedicated 25% of the employee's working hours to the review and processing of COMED Projects under Section 10 of the Rivers and Harbors Act and Section 404 of the Clean Water Act.
2. USACE shall ensure that 25% of the Funded Employee's work time is dedicated exclusively to COMED Projects identified in accordance with the defined coordination procedures or other activities as outlined in this Agreement, as well as any permit compliance work associated with permitted COMED Projects and any attendant required training and general personnel responsibilities.
3. The Funded Employee will be physically located in the Chicago District Office, unless, by mutual agreement of all Parties, it is determined that delivery functions would be served more efficiently by other physical duty locations. The Funded Employee shall be supervised solely by the Chicago District.

## III. JOINT COMED AND USACE RESPONSIBILITIES

### A. DUTIES

1. COMED shall request and hold meetings with USACE to discuss projects, establish priorities and evaluate work performed under the Agreement. This may include:

- a. Design milestone/plan review meetings at concept (30%), preliminary (60%) and pre-final (95%) stages of plan development, as deemed necessary, for assessing USACE jurisdiction within project scope of work;
  - b. Pre-application meetings with the USACE for each Project, as deemed necessary, for application review and to benefit project delivery;
  - c. Quarterly project scheduling meetings, or more frequently if deemed necessary, with USACE to discuss project priorities, pending applications, and anticipated submittals;
  - d. Annual Leadership meetings, or more frequently, and if deemed necessary, to evaluate the timeliness of work performed under this Agreement during the previous period. USACE performance goals as defined in paragraph III. (D) of this Agreement will be reviewed and evaluated; and
  - e. Other meetings, as necessary, to discuss information on COMED projects, including corridor plans and location studies in order to identify USACE concerns and comments.
2. COMED shall provide reasonable access to COMED working-level staff and its consultants in an effort to minimize the need for formal meetings.
  3. COMED acknowledges that the Funded Employee under this Agreement will be required to attend USACE staff meetings and to complete USACE mandated training, and that these and similar work-related items are provided for and reimbursable under this Agreement.
  4. COMED shall provide USACE with pertinent project information for timely application review, including complete applications, mapping, mitigation plans, and documentation satisfying Section 106 of the National Historic Preservation Act (Section 106), documentation satisfying Section 7 of the Endangered Species Act (Section 7), or other appropriate information, as necessary and required.
  5. COMED shall identify internal training on utility planning, utility plan understanding, utility development process, project scheduling, distribution and transmission engineering and other program support activities as may be beneficial to the Funded Employee in the execution of their work on COMED permit applications. Opportunities to attend such training shall be communicated to USACE.
  6. The Parties agree that the scope of the Funded Employee's job duties include, but is not limited to, the following tasks:
    - a. Provide timely review and response on all formal correspondence including but not limited to; jurisdictional determinations, Letter of No Objection Requests and permit applications submitted by COMED;

- b. Support process improvements to increase the efficiency of review of COMED permit applications and decision-making;
  - c. Participate in COMED design standards and construction specification review so to provide comments on alternatives for updating COMED standards and specifications necessary to satisfy Least Environmentally Damaging Practicable Alternative requirements;
  - d. Provide comments regarding project and mitigation alternatives and the screening of alternatives according to USACE regulations, including Least Environmentally Damaging Practicable Alternative requirements;
  - e. Participate in design milestone/plan review and preconstruction meetings;
  - f. Perform compliance inspections during and after project construction;
  - g. Assist in the development of programmatic agreements/consultation pursuant to the Clean Water Act to facilitate permit determinations;
  - h. Representing the USACE at various utility planning, design and construction forums in effort to educate the utility industry on USACE protocols relating to the permitting process; and
  - i. Perform other related tasks as defined and agreed to by COMED and USACE.
7. The Funded Employee shall be responsible for addressing the requirements for the review of all on-going and future work associated with COMED mitigation sites, including these following activities:
- a. Newly proposed mitigation sites will be reviewed in a timely fashion and in accordance with USACE processes and procedures; and
  - b. Monitoring reports shall be reviewed in a timely manner to allow COMED to make site changes or alterations, as deemed necessary. Site inspections shall be conducted to confirm compliance with all approved mitigation plans and reports. Where feasible, and in light of project priorities established during coordination meetings, project reviews shall be scheduled to identify any changes or alterations before the start of the next growing season.

## B. COORDINATION

1. The Funded Employee will participate in meetings including, but not limited to:
  - a. Design milestone/plan review meetings;
  - b. Pre-application meetings;
  - c. Pre-construction meetings;
  - d. Quarterly project scheduling meetings, or more frequently if deemed necessary;
  - e. Energy industry forums; and

2. USACE leadership shall attend annual leadership meetings with COMED to evaluate work performed under this Agreement during the previous period; and
3. The Funded Employee shall alert COMED staff to changes to statutes, regulations and guidance during the term of this Agreement that may affect Section 10 and Section 404 permit reviews.

#### C. TRAINING

1. The Funded Employee shall be provided an opportunity to attend required USACE training and COMED recommended training as necessary to provide the utility project review services described under this Agreement.
2. The Funded Employee will provide training to COMED staff and consultants on the USACE Permit Process.

#### D. PERFORMANCE GOALS USACE

Performance goals are indicators of performance pertaining to achievement of the goals of this Agreement. Performance measure results can be used to determine the effectiveness of the Agreement, which will help all Parties to understand, manage, and allow for modification of the Agreement, as necessary. Detailed performance measures are described below.

1. Individual Permits and Letter of Permission Actions
  - a. Within 30 days of receipt of a submitted application, the USACE will complete the initial technical review of impacts to "waters of the U.S.," provide written comments regarding deficiencies or concerns, and determine the potential method of application review.
  - b. Within 30 days of notification of the additional information necessary to complete the application, COMED will submit the requested information or the application will be withdrawn. Within 10 days of receipt of additional information, USACE shall determine whether the application is complete for processing or identify any additional information that may be required to supplement the information provided.
  - c. If the application is being reviewed as an Individual Permit: The Public Notice (PN) will be prepared within 15 days of receipt of a complete application and published immediately thereafter. Following the close of the Public Notice comment period, all comments received will be forwarded to COMED within 5 days. Following receipt of any information from COMED to address the issues identified during the PN comment period and any other information that may be necessary to complete the

review of the application including alternatives analysis, and an appropriate mitigation plan, USACE will render a decision.

- i. For a non-controversial application that does not require submittal of additional information by COMED following the public comment period, it is the objective that the decision will be made within 60 days of publication of the PN or within 30 days following issuance of the 401 Water Quality Certification, whichever is later.
- ii. For a non-controversial application that does require submittal of additional information by COMED following the public comment period, it is the objective that the decision will be made within 80 days of USACE's receipt of that information from COMED.
- iii. No definitive timelines can be specified for controversial applications or disagreement. However, USACE will keep COMED fully informed regarding the pending issues and requirements of the law including elevation procedures by the USFWS or the USEPA in accordance with the 1992 Memorandum of Agreement Part IV, Section 404(q) of the CWA, when the discharge will result in a substantial and unacceptable adverse effect to aquatic resources of national importance.

## 2. General Permits

- a. Within 15 days of receipt of a submitted application, the USACE will complete the initial technical review of impacts to "waters of the U.S.," and provide written comments regarding deficiencies or concerns or provide a written statement that the application is complete.
- b. Within 30 days of notification of the additional information necessary to complete the application, COMED will submit the requested information or the application will be withdrawn.
- c. If the application requires notification to other agencies in accordance with Regional General Conditions or Agency Coordination as described in the General Permit, the 10-day notification to the agencies and/or 30-day notification to State Historic Preservation office or Tribes will be sent within 10 days of receipt of the information necessary to complete the application in accordance with the conditions. The agencies may request an additional 15 days. Following completion of the notification period and provided USACE is satisfied that all appropriate determinations and concurrences regarding Endangered Species and Historic Properties have been issued, USACE will render a decision within 30 days.

3. Results for performance goals, either positive or negative should be considered as opportunities to examine the processes that generated them, to capitalize on successes and identify ways to implement this Agreement more effectively. Quantitative results for any particular measure are likely to require careful analysis before drawing firm conclusions, as they may be

influenced by a complex mix of the COMED, USACE and other actions and circumstances.

#### IV. IMPARTIAL DECISION MAKING

It is understood and agreed that in order to ensure that the acceptance and expenditure of funds will not impact impartial decision making with respect to permit review and final permit decision, either substantially or procedurally, the Corps will comply with the following standards, as implemented by Headquarters, USACE.

- A. The review must comply with all applicable laws and regulations. Any procedures or decisions that would otherwise be required for a specific type of project or review under consideration cannot be eliminated. However, process improvements that are developed under a funding agreement are encouraged to be applied widely, when applicable, for all members of the regulated public to benefit;
- B. In cases where funds from external entities are used, all final permit decisions (including individual permit decisions and all reporting general permit verifications, such as nationwide, general, regional general, and state programmatic general permits) and associated decision documents must be reviewed and signed a responsible official that is at least one level above the decision-maker. No permit required decisions must also be reviewed and signed by the one-level above reviewer. For the purposes of this guidance, the permit decision-maker is the person that has been delegated signature authority. For example, if the decision-maker is a Regulatory Section Chief, then the one-level-above reviewer may be the Regulatory Chief or Deputy Chief. Section chiefs and team leaders are appropriate one-level above reviewers provided that signature authority has been delegated to the project manager level. For example, if the funded project manager would otherwise have signature authority for a general permit for non-funded projects, then the section chief or team leader could be an appropriate one-level-above reviewer for general permits reviewed under a funding agreement by that project manager. Additionally, the one-level-above reviewer must meet the following requirements: must hold a position that is not partially or fully funded by the same funding entity, and; has not been partially or fully funded by the same funding entity for at least one year;
- C. Instruments for mitigation banks or in-lieu-fee programs developed for an entity with a funding agreement must be signed by a Regulatory Branch/Division Chief, an equivalent, or a higher level position that is not funded by any funding agreement;

- D. All preliminary jurisdictional determinations (JDs) and approved JDs where funds are used to complete the JD must have documentation that a non-funded regulator conducted a review of the determination. This review is intended to maintain impartiality in the decision and does not require a one-level-above reviewer. The JD review does not need to be a field review, but upon receipt of a request for a JD, the USACE will provide a determination within 45 days. For those approved JDs that require coordination with EPA, additional internal review is not required;
- E. Funds from this Agreement cannot be used for enforcement activities. Funds from this Agreement may be used for compliance inspections (i.e. of issued permits and monitoring of compensatory mitigation banks, etc.), but cannot be used to resolve noncompliance issues. Enforcement activities must be charged to Regulatory's appropriated funds in accordance with the most recent budget execution guidance;
- F. The USACE will establish a separate account to track the acceptance and expenditure of funds with the current fiscal year budget guidance.

## V. GENERAL TERMS

- A. Length of Agreement. This Agreement is effective upon being executed by the Parties and expires on June 10, 2024, unless modified, amended or terminated as provided in paragraphs V(B). or V(C).
- B. Supplement, Modification and Extension. This Agreement may be modified, amended, or extended by the mutual agreement of the Parties. This Agreement may be renewed on two-year cycles to update the budget and other provisions as appropriate.
- C. Termination. COMED or USACE may terminate this Agreement for any reason. The party wishing to terminate shall provide written notice to the other party indicating the intent to terminate the Agreement six (6) months from the date of receipt of the written notice, unless both Parties agree to an alternate date.
- D. Severability. If any provision of this Agreement, or the application thereof to any person or circumstance, is found to be invalid or unenforceable, the remainder of the provisions in this Agreement, or the application of such provision to persons or circumstances other than those as to which it is found to be invalid or unenforceable, as the case may be, will remain valid and binding and will not be affected thereby.

- E. **Excess Funds.** In the event of termination, all funds that have not yet been obligated by USACE as of the effective date of termination (Termination Date) shall be refunded to COMED within sixty (60) days after Termination Date. USACE may offset the funds necessary for the actual costs of termination as described below against the excess funds. Neither party shall incur any new obligations for the terminated portion of the Agreement after the Termination Date and shall cancel as many obligations as possible. Full credit shall be allowed for each party's expenses and all non-cancelable obligations properly incurred up to the Termination Date. In the event of termination of this Agreement, USACE shall conduct a final accounting. USACE shall be paid for all actual expenses of employing, and reviewing COMED's permit applications. If additional funds are necessary, USACE shall be entitled to compensation for work performed prior to receipt of notice of termination, less any funds previously paid by or on behalf of COMED. COMED shall not be liable for any further claims. Should USACE be unable to complete the provision of this Agreement for any reason, all monies provided by COMED which prove to be cancelable obligations or unallowable shall be refunded to COMED.
- F. By signature below, COMED certifies that the individuals listed in this Agreement as representatives of COMED are authorized to act in their respective areas for matters related to this Agreement. All Parties acknowledge that any person executing this Agreement in a representative capacity hereby represents that he or she has been duly authorized by his or her principal to execute this Agreement on such principal's behalf.
- G. **Points of Contact/Project Managers.** The title of the current point of contact for each signatory agency is listed below.

COMED  
Sara Race,  
Commonwealth Edison Company

USACE  
Keith L. Wozniak  
Chief, Regulatory Branch  
U.S. Army Corps of Engineers Chicago District  
231 South LaSalle Street  
Chicago, Illinois 60604

- H. During the performance of this Agreement, the Parties agree to abide by the terms of Executive Order 11246 on nondiscrimination and will not discriminate against any person because of age, race, color, religion, sex, or national origin.

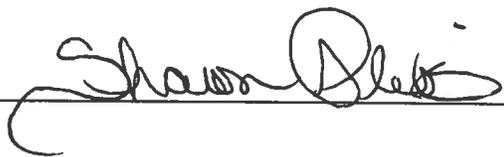
The participants will take affirmative action to ensure that applicants are employed without regard to their age, race, color, religion, sex, or national origin.

- I. All contracts to be developed and awarded pursuant to this Agreement shall at all times conform to the applicable Federal laws, rules, regulations, orders and approvals, including procedures and requirements relating to labor standards, equal employment opportunity non-discrimination, compliance with the Americans with Disabilities Act, anti-solicitation, information, auditing and reporting requirements.
- J. This Agreement and any disputes or claims arising out of this Agreement shall be governed by the laws of the United States, and venue shall lie in the district courts of the Northern District of Illinois.
- K. Continuation of Existing Responsibilities
  1. The Parties to this Agreement are acting in an independent capacity in the performance of their respective legally authorized functions under this Agreement, and none of the Parties' employees are to be considered the officer, agent, or employee of another party, to include the Funded Employee to be hired by USACE to support priority review of COMED utility projects.
  2. This Agreement shall not abrogate any obligations or duties to comply with the regulations promulgated under the 1973 (Federal) Endangered Species Act, as amended; the 1958 (Federal) Fish and Wildlife Coordination Act, as amended; the National Environmental Policy Act of 1969; the (Federal) Clean Water Act of 1977, as amended; or any other Federal statute or implementing regulations.
- L. USACE shall maintain books and records relating to the performance of this Agreement necessary to support amounts charged to COMED. Books and records, including information stored in databases or other computer systems, shall be maintained by USACE for a period of five (5) years from the later of the date of final payment under this Agreement or completion of the work performed under this Agreement. To the extent permitted under applicable Federal laws and regulations, books and records required to be maintained under this section shall be available for review or audit by representatives of governmental entities with monitoring authority upon reasonable notice and during normal business hours.
- M. Nothing in this Agreement is intended to create a joint employer relationship among COMED, USACE, and the Funded Employee. USACE shall exclusively direct the work of the Funded Employee.

THE REMAINDER OF THIS PAGE IS INTENTIONALLY LEFT BLANK

VI. SIGNATURES

COMMONWEALTH EDISON COMPANY

By:  Date: 09/12/19

U.S. ARMY CORPS OF ENGINEERS - Chicago District

By: REISINGER.AARON.W  
WILLIAM.1161675209 Digitally signed by  
REISINGER.AARON.WILLIAM.1161675  
209  
Date: 2019.10.07 14:13:12 -05'00'  
AARON W. REISINGER  
COL, EN Commanding