

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Citizens Utility Board	:	
	:	
Petition for an Investigation of	:	
ComEd’s Participation in a	:	05-0691
Marketing Campaign by CORE	:	
that Threatens Consumers with	:	
Blackouts and Inquiry into the	:	
Ability of ComEd to Provide	:	
Reliable Electric Service.	:	

ADMINISTRATIVE LAW JUDGE’S PROPOSED ORDER

By the Commission:

Procedural History

On October 26, 2005, the Citizen’s Utility Board (“CUB”) filed its petition with the Commission seeking an expedited investigation into Commonwealth Edison’s (“ComEd”) participation in “a public campaign threatening its customers with blackouts.”

On October 31, 2005 Robert Kelter, Director of Litigation for CUB, sent an ex parte letter to each Commissioner suggesting that the Commission should consider the petition en banc, on an emergency basis, rather than through the usual adversarial process, because the ad campaign in question might be of limited duration.

On November 1, 2005 Commonwealth Edison (“ComEd”) filed a Motion to Dismiss the Petition. On November 14, 2005, Commission Staff and CUB filed responses to the Motion to Dismiss. ComEd filed a response to the replies on November 17, 2005.

On December 1, 2005, ComEd filed Responses To Staff’s Questions Concerning Service Reliability. On December 8, 2005, Commission Staff and CUB filed responses to ComEd’s Responses To Staff’s Questions Concerning Service Reliability. On December 13, 2005, ComEd filed its Reply Concerning Its Responses To Staff Questions. The matter was then marked heard and taken.

CUB’s Position

According to the petition, ComEd is active in an organization known as CORE, an acronym for Consumers Organized for Reliable Electricity. CORE has run television, print and direct mail advertisements warning of potential electric power reliability

problems in Illinois, if Illinois politicians interfere unwisely with the established regulatory process. CUB asserts that a public utility, such as ComEd, should be prohibited from publishing statements such as those contained in these ads. CUB also asks the Commission to investigate the reliability of ComEd because of the statements made in the ads. CUB further requests that the Commission order ComEd to cease and desist from future advertising until the Commission determines whether “the reliability risks described in the petition really exist.”

CORE is not an entity regulated by the Commission. CUB asserts that ComEd is Core’s funding source. One ComEd employee, John Hooker, is on CORE’s “Advisory Committee.” This Committee also includes an array of businesspersons, academics, union officials and trade association representatives not employed by ComEd.

ComEd’s Motion to Dismiss

On November 1, 2005, ComEd filed a motion to dismiss the petition. In that motion, ComEd argues that the petition fails to allege a violation of the Public Utilities Act (“the Act”). It alleges that what CUB requests is an unconstitutional “prior restraint” on ComEd’s exercise of its first amendment rights of free speech and freedom of association. That is, CUB wants the Commission to enjoin CORE/ComEd in advance from making any more statements that decry interference with deregulation by politicians or statements that imply that action by unnamed politicians may affect reliable electric service in Illinois. ComEd points out that neither the Courts nor agencies like the Commission can impose prior restraints of first amendment rights under normal circumstances.

The motion points out that CORE is not a regulated entity, therefore the Commission has no jurisdiction to order it to do anything. CORE’s past, present or future written statements are not subject to Commission control.

ComEd is subject to the Commission’s jurisdiction. However, it argues that nothing referenced in the petition is prohibited by the Act. ComEd concedes it is the principal contributor to CORE. ComEd argues that it has a Constitutional right to make those contributions and to support the views CORE expresses. That right is its right to freedom of association. It can support any point of view it wants. It has a right to participate in a political debate; i.e. its concern about interference by the governor with pending ComEd matters before the Commission. ComEd states that neither CORE nor ComEd’s contributions to it are financed by ratepayers. Section 9-224 of the Act prohibits the Commission from allowing direct or indirect expenses for political advertising as a ~~reimbursed~~-ratepayer reimbursed expense.

ComEd points out that the basis for the petition is CUB’s disagreement with the content of CORE’s political speech. The statements that CUB objects to were not made by ComEd. ComEd argues that there is no statement referenced in the petition made by anyone at ComEd. ComEd says there is a quote from an Exelon employee taken out of context. That Exelon employee referred to lights staying on and not shutting

down the nuclear plants. That statement was not made on the subject referenced in the CORE material. The statement concerned a proposal by a Regional Transmission Organization to change the way “capacity payments” are made.

ComEd argues that there is no basis in the petition for instituting an investigation, let alone an emergency investigation. . ComEd argues that CORE has not asserted that its reliability is in jeopardy. The only emergency is that CORE’s political speech may, according to CUB, be “limited in duration” and “escape CUB’s attempts to stifle it.”

ComEd argues that the issue of service reliability, if it fails to recover its costs, is already before the Commission in other dockets, see e.g., Dockets 05-0159 and 05-0597. Moreover, ComEd has made its annual reliability filing in Docket 05-0193. Therefore, another investigation would be duplicative and unnecessary.

CUB’S Response

CUB response to the Motion to dismiss focuses on whether ComEd’s “threats” raise a legitimate reliability issue. CUB asserts that ComEd should not be allowed to “circumvent its responsibility to act in the public interest by hiding behind a front group.”

CUB asserts that ComEd is claiming that political pressures may impact reliability. It is the Commission’s responsibility to determine whether ComEd’s ability to provide safe reliable service is in jeopardy. CUB asserts that the Commission should investigate to determine whether the statements made in the CORE ads are true. CUB apparently wants the Commission to investigate to determine if future political interference in ratemaking could affect ComEd’s reliability or the cost of electricity. CUB points out that there is a direct connection between ComEd and CORE. It states that the Commission has jurisdiction over Exelon as it relates to these ads under the affiliated interest provisions of the Act. CUB does not allege the Commission has jurisdiction over CORE.

It argues that ComEd should be required to disclose the basis for the statements made in the ads. CUB asserts that it is not true that the proposed investigation would be duplicative of issues in the ComEd procurement Docket 05-0159. CUB says these concerns were never discussed in that case.

Staff’s Position

Although Staff acknowledges generally agrees with ComEd that some of the relief requested by CUB raises serious free speech issues and jurisdictional questions, Staff took no position on ComEd’s motion to dismiss the request to restrain or limit the speech of ComEd or CORE. Staff did take a position, however, on CUB’s request to investigate ComEd’s service reliability. To the extent the ads imply future legislative action may impact service reliability, Staff also believes that an investigation of potential reliability issues related to possible future legislative action is too speculative to be of any value.

Staff was also concerned that some of the ads imply that the outcome of Docket 05-0159 may affect service reliability issues. Staff requested answers from ComEd (in this case) to questions about its reliability arising from Docket 05-0159 issues. Specifically, Staff sought to determine if ComEd had any reason to believe that approval, rejection or modification of its auction proposal in Docket 05-1159 could give rise to imminent service reliability issues. ComEd provided answers to those questions that addressed Staff's concerns regarding the possibility of imminent service reliability issues. Staff also then requested a written statement from ComEd "that it has not advocated that the Commission's determination in Docket 05-0159 should be influenced . . . by potential service reliability concerns." Subject to receipt of that statement, Staff recommended that the Commission not commence the requested investigation given the absence of any basis to suspect imminent service reliability issue. ComEd then provided the written statement requested by Staff.

Commission Analysis

CUB's petition wants two things. First, it requests that the Commission Order ComEd to stop ads run by a corporation not regulated by the Commission. CUB disagrees with the point of view expressed in these ads and requests that the Commission order them stopped until an investigation has determined whether the statements made therein are true. If such an order were enforceable, the time required for the subsequent investigation after the ad ban would probably make further ads, after the conclusion of the investigation, moot.

The ads in question address an issue of public and political interest: i.e. Could political action affect the ability of utilities to provide reliable electric service at affordable rates in Illinois? The ads are constitutionally protected speech. As ComEd points out, CUB is requesting a prior restraint on CORE's first amendment right to free speech and ComEd's first amendment right to associate with and provide financial support for a separate entity expressing political views. Such an order would be unconstitutional. ComEd is correct that there is nothing in the Act that could justify a restraining order by the Commission under these circumstances. Moreover, CORE is the party running the ads. The Commission has no power to order CORE to do anything.

CUB argues that the Commission can restrain "commercial speech" if it is misleading or deceptive. Commercial speech is communication that involves marketing or the advertising of products or services. It is true that there is limited constitutional protection afforded to commercial speech. The state can regulate it. However, CUB does not cite any cases or statutes that trump ComEd's first amendment arguments. CUB's only legal authority is Friedman v. Rogers, a 1979 Supreme Court case that upheld a Virginia statute prohibiting optometrists from practicing under trade names because such names might be deceptive. That case is just not on point. There is no similar statute at issue in this case. CORE's statements are not intended to sell a product or service. CORE's ads warn that allowing ratemaking to be influenced by political pressures could affect the financial viability of the electricity business in Illinois.

The statements at issue are political speech. Regardless of its source of funding, the point of view expressed in CORE's ads is political speech entitled to constitutional protection.

There is nothing in the Act that would allow the Commission to stop these ads. ComEd's customers are not paying for them. ComEd is not publishing them. CORE is not ComEd. CORE is not a regulated entity. The Commission has no authority over CORE. CORE has a right to publish its views and ComEd has a right to fund CORE

Second, CUB requests an investigation of potential electric supply reliability arising from statements made in the ads. Conducting investigations to identify, avoid or eliminate service reliability issues is clearly within the Commission's jurisdiction. The question is whether there is any basis to conduct such an investigation based on the petition or the record. The gist of certain the statements in the ads is: Future political action impacting the electric utility rate making process, may adversely affect ComEd's finances and its ability to continue to supply electricity at reasonable rates. Therefore, with respect to such statements, CUB wants the Commission to investigate whether there is any truth to the assertion that unspecified future action by the General Assembly or the Governor could adversely affect ComEd's bottom line so greatly that it would not continue to be a reliable source of electricity.

The Commission agrees with Staff that such an investigation would be: 1) highly speculative because the Commission does not know what action might be taken; and, 2) because the General Assembly controls the Commission, rather than the other way around, pointless. That is, the Commission has no authority to tell the General Assembly or the Governor what they can do, so nothing constructive would come of looking into what they might do.

Other statements in the ads suggest that service reliability issues could arise based on the Commission's response to ComEd's proposal in Docket 05-0159. The Commission agreed with the recommendation to obtain declarations from ComEd regarding whether it had any basis to believe that the outcome of Docket 05-0159 could result in imminent service reliability issues. ComEd's responses indicated that that it does not anticipate imminent reliability problems will result in the event of a rejection or dismissal of its auction proposal provided some alternative method or mechanism is in place by January 1, 2007 to allow ComEd to recover its just and reasonable cost of procuring electric supply. ComEd has also satisfied Staff's concern that it has not advocated that the Commission's decision in Docket 05-0159 be influenced by potential service reliability concerns. Thus, neither the petition nor the Commission's further inquiry indicate any basis or need for a service reliability investigation at this time.

~~CUB argues that the Commission can restrain "commercial speech" if it is misleading or deceptive. Commercial speech is communication that involves marketing or the advertising of products or services. It is true that there is limited constitutional protection afforded to commercial speech. The state can regulate it. However, CUB~~

~~does not cite any cases or statutes that trump ComEd's first amendment arguments. CUB's only legal authority is Friedman v. Rogers, a 1979 Supreme Court case that upheld a Virginia statute prohibiting optometrists from practicing under trade names because such names might be deceptive. That case is just not on point. There is no similar statute at issue in this case. CORE's statements are not intended to sell a product or service. CORE's ads warn that allowing ratemaking to be influenced by political pressures could affect the financial viability of the electricity business in Illinois. The statements at issue are political speech. Regardless of its source of funding, the point of view expressed in CORE's ads is political speech entitled to constitutional protection.~~

~~There is nothing in the Act that would allow the Commission to stop these ads. ComEd's customers are not paying for them. ComEd is not publishing them. CORE is not ComEd. CORE is not a regulated entity. The Commission has no authority over CORE. CORE has a right to publish its views and ComEd has a right to fund CORE.~~

We concur with the recommendation of the ALJ and conclude that the petition to initiate an investigation should be denied.

Findings and Ordering Paragraphs

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

- (1) Commonwealth Edison Company, is an Illinois corporation, engaged in furnishing electric service in the State of Illinois and, as such, is a public utility within the meaning of the Illinois Public Utility Act;
- (2) the Commission has no jurisdiction over CORE; it does have jurisdiction over the parties in this proceeding;
- (3) the findings of fact and conclusions of law set forth in the prefatory portion of this Order are hereby adopted as findings of fact and law herein;
- (4) Petitioner has failed to demonstrate that the Commission has any authority under the Act to restrain or limit the speech of ComEd or CORE ~~investigate the conduct complained of in the Petition;~~
- (5) based on the petition and the additional information developed in the record, there is no basis to commence an investigation of ComEd's service reliability at this time;
- (~~6~~5) all motions, petitions and objections made in this proceeding should be disposed of consistent with the ultimate conclusions contained herein;
- (~~7~~6) based on Findings (2), (3), (~~4~~) and (~~5~~4), the subject Petition is denied.

IT IS THEREFORE ORDERED that the Petition for an Investigation filed by the Citizen's Utility Board on October 26, 2005, is denied.

IT IS FURTHER ORDERED that all motions, petitions and objections made in this proceeding which are not disposed of, be and are hereby disposed of consistent with the ultimate conclusions contained 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.

DATED:	January 23, 2006
BRIEFS ON EXCEPTIONS DUE:	January 30, 2006
REPLIES ON EXCEPTIONS DUE:	February 3, 2006

Terrance Hilliard
Administrative Law Judge