STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Lt. Governor Pat Quinn	:	
	:	
Petition for an Emergency Investigation of	:	**06-0686**
ComEd's Relationship to CORE and	:	
Advertising Misleading Information.	:	

PETITIONER'S BRIEF IN REPLY TO EXCEPTIONS

Lt. Governor Pat Quinn (Petitioner) submits this Brief in Reply to Exceptions pursuant to Section 200.830 of the Rules of Practice of the Illinois Commerce Commission (Commission), 83 ILL. ADMIN. CODE 200.830. The Commission should incorporate Staff's suggestion that the Order be entered as an Interim Order and that the investigation be carried out as part of this Docket. The Commission should otherwise adopt the Proposed Order as written.

Petitioner rejects Respondent's Exceptions to the Proposed Order in their entirety. The facts and legal authority support the analysis and conclusions of the Administrative Law Judge that were incorporated into the Proposed Order.

Petitioner's request for a Commission rule making to require that Illinois utility companies place conspicuous disclosure of their identity in their advertisements does not implicate the First Amendment. The regulatory change is within the powers of the Commission and will foster a competitive and fair electric rate market.

ARGUMENT

I. The Commission Has Authority to Determine the Outcome of the Petition Filed Under the Current Docket

The Proposed Order granted Petitioner's request for an investigation concerning Commonwealth Edison's (ComEd) financial support for its front group Consumers

Organized for Reliable Electricity (CORE). Proposed Order at 20. The Order also acknowledged the Commission's authority to impose disclosure requirements on advertising sponsored by Illinois public utilities. *Id.* at 19.

The Commission has the authority to regulate promotional activities of public utilities in the State of Illinois. 83 ILL. ADMIN. CODE 275; Proposed Order at 18. Under this authority, the Commission may impose reasonable disclosure regulations. The Commission is charged by the Public Utilities Act with ensuring reliable and safe service at the least cost. 200 ILCS 5/8-102. Nothing in the Act requires the Commission to act retroactively. The Commission may pro-actively adopt the proposed regulation. *Citizens for a Better Env't v. Ill. Commerce Comm'n*, 430 N.E.2d 684 (Ill. App. 4th Dist. 1981) (establishing that the Commission is empowered to discipline a utility, and that it need not do so in a rate proceeding, but may take action independently).

Furthermore, the Commission has authority to determine what the public interest requires and to adopt the regulations necessary for the protection of those interests. *Peoples Gas Light and Coke Co. v. Ill. Commerce Comm'n*, 520 N.E.2d 46 (Ill. App. 1st Dist. 1987). The Commission's legal authority in this matter is quite clear. The Commission has a duty to adopt an appropriate regulation mandating disclosure. Disclosure will best serve the public interest.

II. **The Commission's Decision in *Citizens Utility Board*, Docket No. 05-0691 is not Determinative in the Instant Case**

The proceedings under *Citizens Utility Board*, Commission Docket 05-0691 (Order, Feb. 8, 2006), are not duplicated by the instant case. In *Citizens Utility Board*, Petitioner requested the Commission investigate the messages sponsored by ComEd/CORE. This investigation would necessitate a content-based inquiry. *Citizens Utility Bd.*, Pet'r Pet. at 3, Oct. 26. 2005. Additionally, in *Citizens Utility Board*, the

Petitioner requested that the Commission force ComEd to stop running the questioned advertisements. *Id*. Such a remedy would be content based, and would have resulted in invidious viewpoint discrimination. Order at 5, Feb. 8, 2006.

In contrast to *Citizens Utility Board*, Petitioner in the instant case proposes that the Commission adopt a rule requiring utilities to disclose their financial support for advertisements. Pet. at 4; Pet'r Resp. at 14. This proposed requirement is content neutral and does not infringe upon protected First Amendment speech. The holding of *Citizens Utility Board* is not controlling because the content of the speech is not at issue in the instant case.

Citizens Utility Board was an attempt to stop certain advertising. The current petition is a request to impose a content-neutral economic regulation. *Citizens Utility Board* is inapposite to the present docket.

III. **The Proposed Regulation is Permissible Because It Does Not Infringe Upon the First Amendment**

The First Amendment doctrine extending protection to political speech is not implicated in the instant case. Instead of regulating political speech, the proposed disclosure requirement is an economic regulation. The speech in question is being regulated based on the state's significant economic and regulatory interests, rather than on the political views of speaker.

The proposed regulation is supported by a line of Supreme Court decisions upholding regulations that implicate the state's economic or regulatory interests. The Political Speech Doctrine relied on by ComEd is not relevant to an economic regulation that is content-neutral and supported by legitimate governmental interests. *See West Coast Hotel v. Parrish*, 300 U.S. 379, 399 (1937) (establishing that the government can regulate to serve any legitimate purpose); *United States v. Carolene Products Co.*, 304

U.S. 144 (1938) (holding that an economic regulation should be upheld so long as it is supported by some conceivable rational basis).

Commission orders that forbid specified communications in advance of when the communications were to occur would be impermissible prior restraints. *Alexander v. United States*, 509 U.S. 544 (1993). However, the proposed disclosure requirement does not restrict the content of ComEd's advertisements. Nor does the regulation limit the time, place or manner of the messages.

The proposed requirement does not compel speech, nor does it limit speech. It is not a prior restraint, but rather an economic regulation that merely compels identification disclosure in utility advertisements.

IV. **The Commission Has A Substantial Government Interest in the Proposed Disclosure Requirement**

Where the questioned regulation implicates the speech of a licensed participant in a highly regulated industry or profession, the Court will uphold the regulation where it finds that the state has a significant economic or regulatory interest at stake, and the questioned regulation is justified by that state interest. *Va. Bd. of Pharmacy v. Citizens Consumer Council*, 425 U.S. 748, 770-72 (1976) (establishing that where an industry is so affected with a public interest that state or federal regulation of that industry is justified, related commercial speech may be regulated to the extent reasonably necessary to serve the government's interest.)

In *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), the statute in question required licensed physicians to provide counseling to patients as part of the process of obtaining informed consent prior to performing an abortion. The statue was challenged on several grounds, including the theory that it infringed upon the physicians' First Amendment right to not speak. *Id.* at 884. The Court upheld the statute on the basis that

it implicated the physicians' rights only as part of the practice of medicine, an industry that is subject to reasonable licensing and regulations by the state. *Id*. In *Planned Parenthood*, the Court found "no constitutional infirmity in the requirement that the physician provide the information mandated by the State." *Id*.

In the instant case, the right of a utility to not speak would not be implicated to any greater an extent than the right of a physician to not speak was implicated in *Planned Parenthood*. In fact, the Petitioner's proposed disclosure regulation would require Illinois utility companies to say a whole lot less than the doctors were required to disclose in *Planned Parenthood*. Unlike in *Planned Parenthood,* where the Pennsylvania statute in question required physicians to disclose and explain a long list of items outlined in the statute, *Id.* at 881, the mandatory disclosure provision requested by Petitioner in this docket would require utilities to only disclose its name and the fact that it provided financial support for the advertisement.

The Court has also upheld laws regulating the speech of an industry or profession in cases involving agricultural check-offs. *See Glickman v. Wileman Bros. & Elliot, Inc.*, 521 U.S. 457(1997) (holding that a tax for an industry-wide advertising campaign is constitutional because the program was an economic regulation rather than a limit placed on protected speech.) Several years later, the Court refined its analysis of agricultural check-offs to require a substantial government interest in the industry being regulated. *See United States v. United Foods, Inc.*, 533 U.S. 405 (2001).

A careful analysis of the decisions in *Virginia Board of Pharmacy, Planned Parenthood, Glickman, and United Foods* reveals a doctrine through which the Court has repeatedly upheld state laws involving the regulation of a profession or industry in which the state has a significant interest. The present situation fits squarely within this line of

cases based upon Illinois's economic and regulatory interests at stake in the electricity rate auction. These cases are the controlling law in the instant case.

In *Central Hudson*, the Court established that advertising by public utilities may be regulated, but that the regulation must be proportional to the governmental interest served. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980). The proposed regulation in this docket satisfies several state interests and is exactly proportional to the state interests served.

Supreme Court Justice Louis Brandeis said "the best disinfectant is sunshine." The Commission has a legitimate state interest in preventing consumer deception and false statements in commercial or mixed commercial/political messages. *Central Hudson*, 447 U.S. at 569; Proposed Order at 17. The public has an interest in spreading sunshine on deceptive public relations and advertising campaigns. *McConnell v. Federal Election Comm'n*, 540 U.S. 93 (2003); Proposed Order at 18.

The proposed disclosure requirement helps provide the public with full and fair information about their electric service choices and helps to foster an open and competitive rate environment. As an economic regulation that is nondiscriminatory and content neutral, the proposed requirement is constitutional and necessary to satisfy the government's interests.

V. **The Commission Should Order a Full Investigation as Part of This Docket Pursuant to the Commission Staff's Second Alternative**

The Commission should order an immediate investigation of ComEd's involvement with CORE as the Administrative Law Judge concluded is justified. Proposed Order at 19, 20. The Staff Report produced following the investigation should become part of the record in this proceeding in accordance with the Commission Staff's "Second Alternative". Staff Br. on Exceptions at 6-7.

As has been established, existing constitutional doctrine supports a disclosure regulation. Stare Decisis requires application of the principles elaborated in *Virginia Board of Pharmacy, Planned Parenthood, Glickman, and United Foods* to the instant case. *See Helvering v. Hallock*, 309 U.S. 106, 119 (1940) (establishing that stare decisis embodies an important social policy and represents an element of continuity in law); *Chicago Bar Ass'n v. Ill. State Bd. of Elections*, 641 N.E.2d 525 (Ill. 1994) (citing *Vasquez v. Hillery* 474 U.S. 254, 265-66 (1986) (explaining that stare decisis is the means by which courts ensure that the law will develop in a principled and intelligible fashion, and that a court will detour from established doctrine only when confronted with a compelling justification for doing so)). The circumstances that exist in the instant case do not justify discarding the established doctrine allowing the regulation of an industry or profession where important state economic or regulatory interests justify the proposed regulation.

The Commission has a constitutional obligation to follow the established doctrine. There is also a statutory duty to initiate the administrative procedures required by the rulemaking process. This Docket should not be closed so long as the proposed disclosure requirement exists as a viable remedy in the instant case. Therefore, the Order entered should be an Interim Order so as to allow for speedy adoption of the proposed disclosure remedy.

CONCLUSION

For the reasons stated above, the Petitioner respectfully requests that the Illinois Commerce Commission adopt the Proposed Order as submitted by the Administrative Law Judge and implement the proposed disclosure requirement and any other reasonable remedies.

Dated: January 12, 2007

Respectfully submitted,
Lt. Governor Pat Quinn

_____
By One Of His Attorneys

Daniel Persky
100 W. Randolph , Suite 15-200
Chicago, Illinois 60601

Counsel for Lt. Governor Pat Quinn