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BEFORE THE

ILLINOIS COMMERCE COMMISSION

IN THE MATTER OF: )  
)  
COMMONWEALTH EDISON COMPANY )  
) No. 06-0270  
Petition for approval pursuant )  
to Section 7-102 of the Public )  
Utilities Act of the entry into )  
certain contracts relating to )  
wind generation and approval )  
under Section 9-201 of a tariff )  
concerning the governor's )  
sustainable energy plan and the )  
Illinois Commerce Commission's )  
resolution in Docket No. 05-0437 )

Chicago, Illinois

February 13, 2007

BEFORE:

MR. DAVID GILBERT, Administrative Law Judge

APPEARANCES:

MR. MARK S. PABIAN  
10 South Dearborn Street, 49th Floor  
Chicago, Illinois 60603  
appearing for Commonwealth Edison Company;

MR. RONALD T. JOLLY and  
MR. J. MARK POWELL  
30 North LaSalle Street, Suite 900  
Chicago, Illinois 60602  
appearing for City of Chicago;

1 APPEARANCES (continued):

2 MS. ANGELA O'BRIEN  
MAYER, BROWN, ROW & MAW  
3 71 South Wacker  
Chicago, Illinois

4 appearing for Horizon Wind Energy LLC

5 MS. SUSAN HEDMAN and  
MR. RISHI GARG (via telephone)  
6 100 West Randolph, 11th Floor  
Chicago, Illinois 60601

7 appearing for People of the State of Illinois;

8 MR. BRIAN ANDERSON (via telephone)  
700 Universal Boulevard  
9 Juno Beach, Florida

appearing for FEL (sic) Energy, LLC

10

MR. JOHN MOORE (via telephone)  
11 35 East Wacker, Suite 1300  
Chicago, Illinois 60601

12 appearing for Environmental Law and Policy  
Center

13

MS. ANNE McKIBBIN (via telephone)  
14 208 South LaSalle, Suite 1760  
Chicago, Illinois 60604

15 appearing for Citizens Utility Board

16 MR. COLLIN POWELL (via telephone)  
700 Universal Boulevard  
17 Juno Beach, Florida

appearing for FEL (sic) Energy

18

MS. JANICE VON QUALEN (via telephone)  
19 527 East Capitol Avenue  
Springfield, Illinois

20 appearing for the Illinois Commerce Commission

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22

1 APPEARANCES (continued):

2 MR. WILLIAM BORDER (via telephone)  
PIPER, RUDNICK  
3 203 North LaSalle Street, Suite 1900  
Chicago, Illinois 60601  
4 appearing for Coalition Energy Suppliers

5 MR. RYAN ROBERTSON (via telephone)  
LUEDERS, ROBERTSON & KONZEN  
6 P. O. BOX 735  
Granite City, Illinois 62040  
7 appearing for IIEC

8 MR. JOHN CONDO (via telephone)  
One South Wacker  
9 Chicago, Illinois 60606  
appearing for Energy Wind, LLC

10 MR. DAVID BAKER (via telephone)  
11 620 East Adams Street  
Springfield, Illinois 62701  
12 appearing for Illinois Department of  
Commerce and Economic Opportunity

13 MR. KEVIN STOGNER (via telephone)  
14 LATHAM & WATKINS  
555 11th Street NW  
15 Washington, DC 20004  
appearing for CPC (sic)

16  
17 SULLIVAN REPORTING COMPANY, by  
18 PATRICIA WESLEY  
License No. 084-002170  
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1 JUDGE GILBERT: Let's go on the record.  
2 Pursuant to the authority of the Illinois Commerce  
3 Commission, I call Docket 06-0270. If I could have  
4 appearances for the record, please, beginning right  
5 here.

6 MR. PABIAN: Mr. Mark Pabian for Commonwealth  
7 Edison Company, 10 South Dearborn Street, 49th  
8 Floor, Chicago, Illinois, 60603.

9 MR. JOLLY: On behalf of the City of Chicago,  
10 Ronald T. Jolly and J. Mark Powell, 30 North  
11 LaSalle, Suite 900, Chicago, Illinois, 60602,  
12 appearing on behalf of Horizon Wind Energy, LLC.

13 MS. O'BRIEN: Angela O'Brien; Mayer, Brown, Row &  
14 Maw, 71 South Wacker, Chicago, Illinois, 60606.

15 JUDGE GILBERT: Okay.

16 MS. HEDMAN: Are you taking phone appearances?

17 JUDGE GILBERT: Yes. We are ready to start. Go  
18 ahead.

19 MS. HEDMAN: On behalf of the People of the State  
20 of Illinois, Susan Hedman and Rishi Garg of the  
21 Office of the Attorney General, 100 West Randolph,  
22 11th Floor, Chicago, 60601.

1 MR. ANDERSON: Good afternoon, Judge Gilbert.

2 This is Brian Anderson on behalf of FEL (sic)  
3 Energy, LLC, 700 Universal Boulevard, Juno Beach,  
4 Florida, 33408.

5 MS. MOORE: John Moore, Environmental Law and  
6 Policy Center, 35 East Wacker, Suite 1300, Chicago,  
7 60601.

8 MS. ANNE MCKIBBIN: This is Anne McKibbin with  
9 Citizens Utility Board, 208 South LaSalle, Suite  
10 1760, Chicago, Illinois, 60604.

11 MR. POWELL: This is Collin Powell with FEL (sic)  
12 Energy, 700 Universal Boulevard, Juno Beach,  
13 Florida, 33408.

14 MS. VON QUALEN: Jan Von Qualen on behalf of the  
15 staff of the Illinois Commerce Commission, 527 East  
16 Capitol Avenue, Springfield, Illinois, 62701.

17 MR. BORDER: On behalf of Coalition Energy  
18 Suppliers, William Border, Piper, Rudnick, 203 North  
19 LaSalle, Suite 1900, 60601.

20 MR. ROBERTSON: On behalf of IIEC, Ryan  
21 Robertson; Lueders, Robertson & Konzen, P. O. Box  
22 735, Granite City, Illinois, 62040.

1 MR. CONDO: On behalf of Energy Wind, LLC, John  
2 Condo, One South Wacker, Chicago, Illinois, 60606.

3 JUDGE GILBERT: Staff.

4 MR. BAKER: David Baker, Illinois Department of  
5 Commerce and Economic Opportunity, 620 East Adams  
6 Street, Springfield, Illinois, 62701.

7 MR. STOGNER: Kevin Stogner on behalf of CP  
8 (sic); Latham & Watkins, LLC, 555 11th Street NW,  
9 Washington, DC, 20004.

10 JUDGE GILBERT: All right. Just to be sure, is  
11 there anyone else, either on the telephone or in the  
12 hearing room, that wants to put in a formal  
13 appearance?

14 (No response.)

15 All right. There is not. All right.  
16 This case is on Com Ed's verified petition  
17 pertaining to wind generation and accompanying  
18 tariffs.

19 The case has been rescheduled several  
20 times for reasons that have already been discussed  
21 on the record. I received an e-mail I think at the  
22 end of last week from Com Ed suggesting that the

1 petition would be withdrawn, and there was another  
2 e-mail which I think I saw today, may have been sent  
3 yesterday, but I saw it today since the office was  
4 not open yesterday, okay, indicating somebody --  
5 someone from Com Ed wanted to go forward with  
6 today's status hearing, and I don't know whether  
7 that has any impact on Com Ed's intention to  
8 withdraw the petition, so let me turn the floor over  
9 to Mr. Pabian and he can tell us what the current  
10 status is.

11 MR. PABIAN: Yes, your Honor. After further  
12 discussions with my client, my client would truly  
13 like to hold the matter in abeyance if that -- if  
14 that is possible. There are current concerns they  
15 have regarding matters in Springfield.

16 While my clients have the upmost  
17 confidence in their petition, and the justice of  
18 their cause in this case, and the Commission's  
19 authority to grant the petition as requested, there  
20 is a concern that notwithstanding that there may be  
21 legislative outcomes in Springfield that would undue  
22 what might be done in this docket.

1                   To that extent, rather than withdrawing  
2 the petition, as was indicated in my earlier e-mail,  
3 my client would beg the Court's indulgence if it  
4 would be possible to stay the proceedings until,  
5 quite frankly, after the regular legislative session  
6 this year, so sometime till I would say probably the  
7 beginning or late June. The legislative session  
8 right now is scheduled to end on the 31st, the  
9 regular session could be extended, but if the judge  
10 sees fit, my client would be grateful if the matter  
11 could be set over until then.

12       JUDGE GILBERT: So I would understand, in the  
13 alternative, if the case were not held in abeyance  
14 until late June, does that mean Com Ed would  
15 withdraw the petition?

16       MR. PABIAN: Well, in the alternative, I suppose  
17 the company would have no choice if the orders were  
18 to proceed with the case forthwith or I guess suffer  
19 a dismissal for lack of prosecution I guess for want  
20 of a better term. My clients understand that and  
21 they understand the Commission's concern about the  
22 need to administer its dockets in an efficient

1 manner.

2                   We have had discussions about that and  
3 so there is an understanding that the Commission  
4 needs to make sure that its resources are dealt with  
5 more efficiently.

6                   My clients -- if matters -- my clients  
7 would like again the matter to be held over if they  
8 are -- if matters are resolved in Springfield in a  
9 way that they're comfortable with being able to  
10 proceed, the docket could be picked up pretty easily  
11 in midstream rather than having to start all over  
12 again with everybody. I think that was the idea was  
13 to conserve everybody's resources in the matter.

14       MS. VON QUALEN: This is Jan Von Qualen in  
15 Springfield. Mr. Pabian, could you be more specific  
16 about what matters in Springfield you are referring  
17 to?

18       MR. PABIAN: Well, there are current proposals in  
19 the legislature pending that would seem to, I guess  
20 for want of a better term, disregard the  
21 Commission's determinations as to what may be  
22 appropriate rates and costs that should be

1 recovered, for want of a better term, and while the  
2 company has confidence in the Commission's ability  
3 to make those determinations, there appears to be a  
4 question in Springfield about that.

5 MR. MOORE: This is John Moore from ELPC.

6 Are you also saying that those matters  
7 would impact more than just the issues in this  
8 docket?

9 MR. PABIAN: Oh, certainly.

10 MR. MOORE: So it affects Com Ed's power purchase  
11 across the board?

12 MR. PABIAN: It would affect a lot -- well, I  
13 think that one piece of legislation speaks for  
14 themselves. I won't attempt to -- to say more than  
15 I have about that.

16 JUDGE GILBERT: Well, the request on the table is  
17 to essentially continue the docket, once again, in  
18 this case until a date approximately in late June.  
19 Any opposition to that?

20 MS. McKIBBIN: This is Anne McKibbin with the  
21 Citizens Utility Board.

22 We would prefer that Com Ed withdraw

1 the docket and refile at a later time if the  
2 situation has changed but they feel that they can  
3 continue with similar contracts. We feel that the  
4 existence of this docket sort of hanging out in  
5 limbo might cause a mistaken impression to outsiders  
6 regarding this docket's sort of ongoing status.

7 MR. PABIAN: I'm not sure what you mean by that.  
8 Could you explain?

9 MS. McKIBBIN: Well, I mean, you are asking that  
10 this docket be continued until June at which point  
11 during that six months nothing would happen;  
12 however, this docket is sort of lingering around at  
13 the Commission and some folks who don't keep up with  
14 these matters on a daily basis might think that  
15 because the docket is here that we're moving forward  
16 when, in fact, we are not.

17 MR. PABIAN: Who are you talking about and why  
18 would it matter? I'm sorry. That's a double  
19 question. Who are you talking about?

20 MS. McKIBBIN: People, customers, perhaps  
21 legislators, the general public.

22 MR. PABIAN: Well, I would suggest that for the

1 members of the public who have access who are  
2 knowledgeable about dockets pending at the  
3 Commission and keep track of those things they could  
4 also access e-docket for the current status of this  
5 proceeding.

6 MS. HEDMAN: Your Honor, this is Susan Hedman.  
7 Can I address this issue?

8 JUDGE GILBERT: Yes.

9 MS. HEDMAN: It seems to me that so long as this  
10 docket remains open, if not active, that it would  
11 allow Commonwealth Edison to say and to report in  
12 official filings that it does have a proposal to  
13 invest in renewable energy pending before the  
14 Commission, and I think perhaps that could create a  
15 kind of mis-impression along the lines that  
16 Ms. McKibbin suggests, and I would say that  
17 Commonwealth Edison needs to move forward with this  
18 proposal or withdraw it and refile at such time  
19 Com Ed actually decides to move forward with the  
20 renewal energy proposal.

21 MR. MOORE: Your Honor, this is John Moore from  
22 Environmental Law and Policy Center.

1                   Our position is similar to that of the  
2 Attorney General and CUB. Com Ed already asked for  
3 one extension time in the docket -- in this docket.  
4 It's not really moved anywhere since the filing,  
5 and, you know, I don't know when it ends because we  
6 are going to have the veto session in November.  
7 There's always the risk of legislation. The  
8 Commission already approved the rules for purchasing  
9 the great majority of Com Ed's electricity supply,  
10 so I just don't know why the pending -- the spring  
11 legislative session in Springfield is a good enough  
12 reason to put this docket on hold for another four  
13 or five months.

14       JUDGE GILBERT: All right. Three parties have  
15 spoken in opposition to extending the time of the  
16 docket and are suggesting that termination would be  
17 the better course.

18                   Anyone else want to speak to that point  
19 before we get responses?

20       MR. ANDERSON: Judge Gilbert, this is Brian  
21 Anderson from FEL (sic) Energy.

22                   We would join in the views we heard

1 expressed in a little different point of view. Our  
2 company is heavily involved in wind development and  
3 the pendency of this proceeding creates a real sense  
4 of uncertainty for many industry participants in  
5 terms of how to proceed and we don't see any problem  
6 down the road. Hopefully Commonwealth Edison will  
7 be in a position to refile and bring something to  
8 the table again but leaving it open at this point we  
9 do not see as productive in that way. Thank you.

10 MS. VON QUALEN: Judge, this is Jan Von Qualen  
11 from Springfield.

12 Staff isn't taking a position as to  
13 whether the docket would be better stayed or  
14 withdrawn; however, I would point out that if the  
15 docket were to move forward again, it would seem  
16 that Com Ed would have to file whole rounds of  
17 testimony with different contracts and different  
18 facts so that I don't really see a benefit keeping  
19 the docket on hold indefinitely.

20 JUDGE GILBERT: Okay. So I have five  
21 participants in opposition to extending the case and  
22 I guess in favor of terminating the case. I'm sure

1 Mr. Pabian will want to respond. Are there any  
2 other parties that want to speak in favor of  
3 extending the case as opposed to terminating it?

4 Okay. Mr. Pabian, did you want to  
5 respond?

6 MR. PABIAN: Sure, at least I like to touch on  
7 staff's point first. I don't think at this time if  
8 we were to proceed direct testimony would be needed.  
9 I mean, as far as my recollection is that none of  
10 these contracts were entered into. We had a process  
11 with a model contract that was proposed and I don't  
12 think -- I don't think anything is going to change  
13 on that. I know that our -- that Com Ed's reply  
14 testimony is next due in line if we were to proceed.

15 I don't -- at least at this point, I  
16 don't see that anything would need to be changed in  
17 the original direct testimony, except insofar as we  
18 had planned to change some things in the reply  
19 testimony in response to a concern that some of the  
20 parties had expressed about some of the provisions  
21 of the contract and other things.

22 With respect to the other comments

1 here, I would just note that again my clients are  
2 certainly hopeful that that much can be decided, if  
3 you will, by the end of the regular session. If  
4 something drastic from my client's standpoint  
5 doesn't happen in the regular session, I think  
6 there's probably some feeling that it's less likely  
7 to happen on further down the road, so it's at that  
8 point that my client may feel comfortable with  
9 proceeding in which case their view, and I tend to  
10 agree with it, that the most efficient way to  
11 proceeding was to simply pick up where we left off  
12 here rather than starting all over again, and it is  
13 for that reason why we would ask that the  
14 continuation be granted.

15 JUDGE GILBERT: Okay. Let me try to put this in  
16 a posture that would lead to my making a ruling on  
17 something definitive here. We have from Com Ed a  
18 suggestion, not a formal motion, but a suggestion,  
19 that we delay any proceeding until late June. We  
20 have a negative response to that suggestion from  
21 several parties.

22 Since yet no motions have been made,

1 let me ask you, Mr. Pabian, given what you heard  
2 from the -- I have got five parties here who would  
3 prefer that the docket be terminated now with your  
4 client's right to reopen at a later date.

5                   Would Com Ed oppose their collective  
6 suggestion for termination at this point?

7       MR. PABIAN: Opposition? Well, let me put it  
8 this way. Com Ed would not voluntarily withdraw its  
9 petition. If the Commission were to decide to --  
10 let me just say my clients are not prepared to  
11 proceed at this time moving forward in the docket.

12                   If in light of that, the Commission  
13 makes a determination that the matter should be  
14 dismissed because of the Commission's desire to  
15 manage its dockets in an effective manner, so be it.  
16 I mean, I don't want to say -- I don't want to say  
17 we would prefer that that not be done. Let me put  
18 it that way. Enough said.

19       JUDGE GILBERT: Okay. Then I'll turn it to the  
20 parties that would apparently prefer that the case  
21 be terminated rather than extended. Com Ed has now  
22 taken the position it's not going to voluntarily

1 terminate the case by withdrawing its petition. Are  
2 some or all of the parties in favor of termination  
3 prepared to make a motion to that effect?

4 MS. McKIBBIN: This is Anne McKibbin from CUB.

5 Yes, I'm prepared to make a motion to that  
6 effect.

7 MS. HEDMAN: Your Honor, this is Susan Hedman.

8 The Attorney General would support that  
9 motion. I'm right now looking at Com Edison's 10Q,  
10 which is the recent 10Q filed with the FCC. The  
11 company Exelon characterizes this filing as follows:  
12 "The filing supports the ICC's resolution of July  
13 19, 2005, which endorse the Illinois Governor's  
14 proposal for a voluntary initiative in which  
15 electric supplier would obtain resources equal to  
16 2 percent of electricity sold to Illinois retail  
17 customers' renewal energy resources by the end of  
18 2007 and gradually increasing to a target of  
19 8 percent by 2013."

20 This filing, unless it moves forward,  
21 is not supporting those objectives, and to the  
22 extent that Com Ed does not want to move forward

1 with this filing, we would support dismissal.

2 JUDGE GILBERT: All right. Well, Mr. Pabian has  
3 been direct on that point. He has said that Com Ed  
4 does not intend to proceed now and would prefer that  
5 the case be held open until late June after the  
6 legislative session and that Com Ed will not  
7 voluntarily terminate the case, and now  
8 Ms. McKibbin has said CUB would be prepared to make  
9 a motion which it would seem to me would be building  
10 on the premises that Mr. Pabian laid down, that is  
11 the motion would be that, taking as a given, that  
12 Com Ed is not going to proceed now and offers only  
13 to consider active participation at some time in  
14 June. It would then be CUB's point of view that the  
15 case ought to terminate now.

16 MS. MCKIBBIN: Yes, your Honor. Thank you.

17 JUDGE GILBERT: That motion I can address, and,  
18 of course, CUB would be given an opportunity to  
19 respond to that motion. We are going to have to do  
20 this in writing.

21 And is the AG going to support that  
22 motion?

1 MS. HEDMAN: Yes, your Honor.

2 JUDGE GILBERT: Anyone can -- I'm curious as to  
3 whether we can define the limits of it and identify  
4 the identity of the fighters right now.

5 MR. MOORE: Your Honor, this is John Moore.

6 I think we probably support that motion  
7 as well.

8 JUDGE GILBERT: Mr. Pabian, I don't think this  
9 will muddy things up, but I could be wrong about  
10 that. Does Com Ed want to offer its own formal  
11 motion for postponement of the case?

12 MR. PABIAN: No, I think, just -- at least I  
13 rather think having cross motions going, I would  
14 leave it to respondent to responding to CUB's motion  
15 at this point.

16 JUDGE GILBERT: All right. Even in your  
17 response, you are going to have to provide some  
18 alternative resolution, because, as I understand  
19 their motion, it's going to make two points, that  
20 you are not willing to proceed now, you are only  
21 offering to proceed later, and, therefore, your case  
22 should be terminated at this point.

1                   Well, if I -- then if I deny that  
2 motion and I'm not going to terminate the case,  
3 where does that leave us? We still don't know when  
4 it is you are going to act.

5       MR. PABIAN: I guess then it would be appropriate  
6 to file a motion to reschedule the status for  
7 mid-to-late June then.

8       MR. MOORE: Your Honor, this is John Moore, ELPC.  
9                   Doesn't it make more sense for Com Ed  
10 to file a motion for continuance than for us to  
11 oppose that or to respond?

12       MR. PABIAN: Well, there are still going to be  
13 the issue of whether the case gets dismissed or not  
14 because Com Ed will not voluntarily dismiss the  
15 case, so simply opposing the motion to continue  
16 won't resolve that question.

17       MS. HEDMAN: This is Susan Hedman.

18                   Perhaps in terms Mr. Moore's suggestion  
19 would make some sense for us to respond to Com Ed's  
20 motion first.

21       MR. MOORE: Frankly, I think Com Ed should bear  
22 the burden here of justifying another extension, and

1 this is a voluntary proceeding and has already been  
2 ruled, the ball is largely in Com Ed's court, so it  
3 ought to be the first party to file a motion for  
4 extension, and clearly the only two alternatives are  
5 either move forward with the case, which Com Ed  
6 doesn't want to do now, or have the Commission  
7 dismiss the case without prejudice to Com Ed to  
8 refile at some other time, and that's something that  
9 seems like those filings are in response to the  
10 motion to easily raise the possibility in their  
11 responses and have that set for the Commission to  
12 then rule on.

13 JUDGE GILBERT: Well, obviously, there's now an  
14 element of gamesmanship to this from all sides. I'm  
15 trying to approach this in what I think is a logical  
16 fashion.

17 If Com Ed moves to extend the time of  
18 the case or the time for action in the case and you  
19 folks oppose that, and if it results for the  
20 opponent, then we're at the proceeding now stage,  
21 and at that point, since Com Ed isn't going to leave  
22 voluntarily, you are going to have to make a motion

1 to drive him out of the case. I don't see how we  
2 get around that.

3 I don't think the party who takes first  
4 bat, no matter what we do, is going to be prejudiced  
5 because they swung first.

6 MR. PABIAN: Com Ed can file -- we'll file a  
7 motion for extension. I mean, we have no problem  
8 with doing that if that will help move the ball.

9 JUDGE GILBERT: All right. And even that can  
10 lead us to the same second step, you file a motion  
11 for extension, the opponent objects to that. If I  
12 rule for them, then you don't get an extension and  
13 then what? And you are not ready to proceed now and  
14 someone has to file to drive you out of the case.

15 MR. PABIAN: On the other hand, if you grant the  
16 motion, then it's -- then the other is moot.

17 JUDGE GILBERT: Aren't some folks saying if you  
18 don't proceed now you should leave?

19 MR. PABIAN: Well, they're saying that, but if  
20 you -- I think that's sort of wrapped up you grant  
21 an extension or not, if you see fit, then extension  
22 is appropriate, then is the issue about -- then I

1 would think that then you have effectively ruled on  
2 their opposition to an extension, which I think  
3 that is the subtext -- I mean, that's the basis for  
4 their -- the case should be dismissed, or whatever,  
5 or we should withdraw the case.

6 MR. MOORE: Judge, this is John Moore speaking.

7 Can't the parties that file in response  
8 to Com Ed'S motion move in the same document for  
9 dismissal?

10 JUDGE GILBERT: I could pose the three questions  
11 here as I see them. I'm concern there will be  
12 arguments without burden of proof, which I assume is  
13 part -- or burden of persuasion, and I assume that's  
14 part of the gamesmanship we're engaging in here, but  
15 the questions, as I see them, are can or should  
16 Com Ed be granted an extension of time for  
17 presenting its case or for taking action in the  
18 case. That's a better way to say it.  
19 Alternatively, should Com Ed be required to take  
20 action now, and the third question is if Com Ed is  
21 not prepared to take action now, but is not given  
22 additional time to present its case, does that

1 constitute, within the meaning of the Commission's  
2 rules, the basis for dismissal on the grounds of  
3 failing to prosecute the case? Now we could have  
4 simply taken filings and replies addressing those  
5 three questions.

6 MR. PABIAN: That's fine.

7 JUDGE GILBERT: It just leaves open questions of  
8 burden of persuasion. If anyone has a problem about  
9 burden of persuasion, say it now because I'm  
10 thinking this is a way to clarify what we're doing,  
11 put everything on the table in the same case and get  
12 this all done in a one-step process.

13 MR. PABIAN: That's fine with Com Ed, your Honor.  
14 I have no problem with that if we were to go in that  
15 direction. Would you just -- so we make sure you  
16 have everything down in your order, just make sure  
17 the three issues are there in the order if we go in  
18 that direction.

19 MS. McKIBBIN: That's fine with CUB as well, your  
20 Honor.

21 JUDGE GILBERT: That's what I'm prepared to do  
22 unless there's an objection to it.

1 MR. PABIAN: That's fine.

2 JUDGE GILBERT: So since it means we're not  
3 working with a formal motion, or if you could say  
4 it's ALJ's motion given the posture of the case and  
5 the positions of the parties, it seems to me that  
6 these three questions need to be briefed and so I'm  
7 identifying the questions.

8 MR. PABIAN: That's fine with Com Ed.

9 JUDGE GILBERT: I think the burden with every  
10 question is one position more persuasive than  
11 another. What we're leaving out is who has the  
12 burden of actual -- I'm not prejudging the --  
13 identifying who has that burden, but the burden is  
14 inherent because somebody will have to have a better  
15 argument.

16 MS. O'BRIEN: Your Honor, just to clarify, if  
17 this is going to be in the nature of the ALJ's  
18 motion, are you requiring all parties to address it?  
19 I mean, in other words, if, for example, my client  
20 -- if it does not take a position with respect to  
21 Com Ed's proposal or, for example, CUB, or AG, are  
22 we required to address those issues?

1 JUDGE GILBERT: That's a good question, and the  
2 answer is no. I'm trying to account for the  
3 disputed questions I see in the case and be  
4 responsive to the parties raising those disputed  
5 questions and create a vehicle by which all of those  
6 disputes can be addressed in a single filing at the  
7 end of which we can have a clear direction for the  
8 case and anyone who's not interested in  
9 participating in that colloquy is free to ignore it.

10 MR. JOLLY: The city is not going to take a  
11 position at this time, but I would like to check  
12 with my client. It's possible we could weigh in on  
13 either side just to make you aware of it.

14 JUDGE GILBERT: I don't think you need to declare  
15 where you are going. You want to you could simply  
16 declare by simply your filing and that will do it.  
17 Let's pick a schedule for this. You could have two  
18 rounds. If somebody wants, I'll make three rounds  
19 if a compelling case for that. We'll do  
20 simultaneous filings twice or three times.

21 MR. PABIAN: I would think twice would be enough,  
22 your Honor, provided that the second round is truly

1 limited to reply.

2 MS. McKIBBIN: This is Anne McKibbin.

3 I would agree.

4 JUDGE GILBERT: Okay. When should the first  
5 round be due? Someone pick a date you feel  
6 comfortable you can meet.

7 MR. PABIAN: 14th? Three weeks? Somewhere the  
8 7th?

9 JUDGE GILBERT: Okay. In case you weren't able  
10 to hear that, Mike Fabian suggested March 7th for  
11 the initial filing. Any objections to March 7th?

12 MS. McKIBBIN: Anne McKibbin.

13 That's fine with me, your Honor.

14 JUDGE GILBERT: Okay.

15 MR. PABIAN: There's a couple of weeks.

16 MS. HEDMAN: I'm fine with one week.

17 JUDGE GILBERT: For response, you mean?

18 MS. HEDMAN: Yes.

19 JUDGE GILBERT: Which would take us to the 14th.

20 MR. PABIAN: We can make it the 16th, your Honor.

21 That's fine with me.

22 JUDGE GILBERT: Counterbid to the 16th. Anyone

1 else?

2 (No response.)

3 Okay. March 16th for reply. All  
4 right. Is everyone comfortable that they know what  
5 they're writing about? Does anyone need that  
6 repeated? Reformulated?

7 MR. PABIAN: I think, your Honor, if you just  
8 said verbatim those questions we're dealing with in  
9 your order, I think that would be -- then everybody  
10 I think would be on the same page.

11 JUDGE GILBERT: Okay. What I said clear enough  
12 for everyone that you have a sense of what you will  
13 be addressing on March 7th and March 16th? You want  
14 to check your notes, please do it.

15 MS. HEDMAN: Yes, your Honor. I think it's clear  
16 to me.

17 MR. MOORE: Would you mind repeating them one  
18 more time.

19 JUDGE GILBERT: I was hoping no one would say  
20 that. All right. The three questions are: Can  
21 Com Ed justifiably extend the period for the next  
22 action by Com Ed in this case? Why or why not? Can

1 and should Com Ed be directed to proceed now with  
2 its next substantive action in the case and if a  
3 delay cannot or should not be allowed, and if Com Ed  
4 is, nevertheless, unwilling to proceed now with its  
5 next direct action in the case, should its petition  
6 be dismissed for want of prosecution? And can we  
7 take it as an apparent fact, for purposes of these  
8 filings, that late June 2007 is the proposed date of  
9 delay or for the proposed filing in case of delay?

10 MR. MOORE: Yes, your Honor. It's John Moore  
11 from ELPC.

12 Michael, can you explain to me or state  
13 one more time exactly what Com Ed's committing to by  
14 June 31st?

15 MR. PABIAN: Well, we would be committing to  
16 reconvene -- let's see. Our proposal -- let's --  
17 our proposal coming in was to reschedule the status  
18 conference for mid-to-late June by which time we  
19 hoped to be in a position to be able to proceed, so  
20 at this point in time there is no commitment to  
21 proceed at that time.

22 MR. MOORE: Okay.

1 JUDGE GILBERT: Does everyone get that?

2 MS. HEDMAN: Yes, your Honor.

3 JUDGE GILBERT: Okay. Simultaneous service of  
4 your filings on all parties by close of business on  
5 the due date. I assume electronic service is  
6 acceptable to everyone. If it's not, please  
7 indicate now. Please send me a courtesy copy  
8 whatever you file.

9 MR. PABIAN: Electronic is okay?

10 JUDGE GILBERT: Yes. I'm thinking that we won't  
11 create another status date now. I mean, depending  
12 upon the resolution of these disputes, there either  
13 won't be another status date, or it may be a status  
14 date in late June, or it may be a status date much  
15 sooner than that and we won't know that until  
16 there's been substantive rulings on the questions  
17 posed, so I propose that to leave the status date  
18 open at this time unless -- unless anyone else has a  
19 persuasive reason for creating one today.

20 (No response.)

21 All right. It sounds like there is not  
22 such a reason in the air right now. Okay. That's

1 it. We're continued generally. Filings are on  
2 March 7th and March 16th. Thank you.

3 MR. PABIAN: Thank you.

4 (Whereupon, the above  
5 matter was continued  
6 generally.)

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