THE PEOPLE OF THE STATE OF ILLINOIS’ RESPONSE TO COMMONWEALTH EDISON’S VERIFIED PETITION

The People of the State of Illinois ("the People"), by and through the Illinois Attorney General, Lisa Madigan, hereby file their response to Commonwealth Edison Company’s ("ComEd" or "Company"), pursuant to the ruling of the Administrative Law Judge in the instant docket on February 26, 2008.

Background

On or about August 23, 2007, over the course of several hours, more than 630,000 ComEd customers lost electric power to their homes and business for 4 hours or more. Although many customers were reconnected within a few days, significant numbers of customers were without power for as long as 6 days. Verified Petition, at para. 6. Under Section 16-125 (e) and (f) of the Public Utilities Act, ComEd’s customers are protected from the damages resulting from prolonged electric power outages, which requires the company to compensate customers for actual damages related to an outage or interruption, if the outage or interruption affects 30,000 customers or more for four hours or more. 220 ILCS 5/16-125(e) – (f).

On September 21, 2007, in response to the events of August, 2007, ComEd filed its Verified Petition in this docket, 07-0491, arguing that the Company is not liable for reimbursing customers for outage-related damages as required by Section 16-125 (e),
which requires ComEd to pay customers for damages resulting if more than 30,000 customers are affected by a continuous power interruption of 4 or more hours. On page 1 of its Verified Petition, ComEd states that a total of over 630,000 of the Company’s customers were without power for 4 or more hours. Section 16-125(e) clearly states that

In the event that more than 30,000 customers of an electric utility are subjected to a continuous power interruption of 4 hours or more that results in the transmission of power at less than 50% of the standard voltage, or that results in the total loss of power transmission, the utility shall be responsible for compensating customers affected by that interruption for 4 hours or more for all actual damages, which shall not include consequential damages, suffered as a result of the power interruption. The utility shall also reimburse the affected municipality, county, or other unit of local government in which the power interruption has taken place for all emergency and contingency expenses incurred by the unit of local government as a result of the interruption.

**Argument**

ComEd seeks a waiver of liability on two different grounds. First, the Company argues that 220 ILCS 5/16-126 (e) does not apply to the August 23, 2007 customer outages. Second, ComEd argues, if the August 23rd outages are subject to Section 16-125 (e), the company is entitled to a waiver of liability on the grounds that the outages were caused by unpreventable weather forces.

The first argument should be rejected because it requires the Commission to construe the statute in a way that runs afoul of many rules of statutory construction. ComEd would require the Commission to adopt an interpretation of Section 16-125 that (i) is opposite to the plain language of the statute; (ii) will lead to an absurd result that is contrary to the intent of the General Assembly; (iii) is based on meritless arguments and (iv) would force the Commission to rule on the constitutionality of a statute, in violation of its statutory powers.
ComEd’s alternative theory should also be rejected because the interruptions were not caused by the storm front of August 23, 2007 were not unpreventable weather events. The numbers of outages were high because of the advancing age of the overhead distribution facilities on the Company’s overhead electric distribution system and other failures of the Company’s system.

I. **The Commission Should Reject the Company’s Flawed Interpretation of Section 16-125 (e).**

Section 16-125 (e) is clear: ComEd must pay actual damages to customers and, in various scenarios, municipalities, counties, or other units of local government, if:

(i) more than 30,000 ComEd customers are subjected to a continuous power interruption;
(ii) the interruption lasts 4 or more hours; AND
(iii) the interruption results in the loss of at least 50% of the standard voltage or in total power loss.

220 ILCS 5/16-125 (e)

The argument that Section 16-125 (e) does not apply should be rejected because it requires the Commission to construe the statute in a way that runs afoul of many rules of statutory construction.

First, ComEd’s reading of the statute achieves the opposite of the statute’s plain meaning. It appears that ComEd is arguing that 30,000 customers must be subject to a single, continuous power interruption. Yet there is simply no language in the statute that suggests liability is triggered only by a *single* continuous interruption. Second, if the Commission were to agree with ComEd’s interpretation that more than 30,000 customers must suffer because of a *single* power interruption before liability attaches, the statute would be drained of its power and rendered meaningless.
Third, the additional legal and policy reasons that ComEd cites are meritless and misconstrue the relevant information pertaining to Section 16-125 (e). Finally, ComEd argues that Section 16-125 (e) is unconstitutional, but the Commission, as an agency created by statute, cannot rule on the constitutionality of a statute.

A. ComEd’s Proposed Interpretation of Section 16-125 (e) Goes Against the Plain Language of the Statute.

ComEd argues that Section 16-125(e) of the Public Utilities Act does not apply in this situation because not one of the “over 4,300 interruptions affected more than 30,000 customers.” Petition, at par. 8. Such a reading ignores the intention of the legislature in passing this section, as well as the plain meaning of the statute, attempting to create an ambiguity where none exists.

The primary rule of statutory construction is to ascertain and give effect to the intention of the legislature. The best evidence of legislative intent is the language used in the statute itself, which must be given its plain and ordinary meaning. The statute should be evaluated as a whole, with each provision construed in connection with every other section. Paris v. Feder, 179 Ill. 2d 173, 177 (1997); Abrahamson v. Illinois Department of Professional Regulation, 153 Ill. 2d 76, 91 (1992). When the statutory language is clear, no resort is necessary to other tools of construction. Nottage v. Jeka, 172 Ill. 2d 386, 392 (1996); Envirite Corp. v. Illinois Environmental Protection Agency, 158 Ill. 2d 210, 216-17 (1994). Where the meaning of a statute is ambiguous, courts may look beyond the statutory language and consider the purpose of the law, the evils it was intended to remedy, and the legislative history of the statute. Stroger v. Regional Transportation Authority, 201 Ill. 2d 508, 524 (2002).
The clear and unambiguous language of this provision requires ComEd to pay actual damages to customers and, in various scenarios, municipalities, counties, or other units of local government, if:

(i) more than 30,000 ComEd customers are subjected to a continuous power interruption;
(ii) the interruption lasts 4 or more hours; AND
(iii) the interruption results in the loss of at least 50% of the standard voltage or in total power loss.

Section 16-125 (f) is similar to 16-125 (e), in that it requires ComEd to pay certain damages to customers in the event “of a power surge or other fluctuation that causes damage and affects more than 30,000 customers.” 220 ILCS 5/16-125 (e)-(f).

ComEd argues that customers affected by the August 23rd outages were subject only to a variety of individual interruptions and not a single, “continuous power interruption” and suggests that such a situation is not covered by 16-125 (e). But the statute’s remedies are not related to the cause of the interruptions. Whether they are due to the failure of one piece of equipment or a series of pieces of equipment is irrelevant to the fact that the General Assembly intended to protect ComEd’s customers from the actual damages resulting from prolonged and widespread electric power outages.

The language in the statute is clear and unambiguous that ComEd is liable when 30,000 customers are subjected to a continuous power interruption lasting 4 or more hours. It is not disputed that the August 23, 2007 storm left more than 30,000 customers without power for several days. If the drafters of this legislation wanted to limit ComEd’s liability to instances when a “continuous power interruption” was caused by a single power interruption, they would have specifically stated such a limitation.
The fact that the legislature was not concerned with whether the outage was due to a series of single interruptions is also evident by reading the statute in connection with the other sections of 16-125. These other sections make it clear that the legislature was trying to make sure that public utilities provide reliable power on a system-wide basis. First, Section 16-125 (b) imposes on all electric utilities the duty “to adopt and implement procedures for restoring transmission and distribution services to customers after transmission or distribution outages on a nondiscriminatory basis without regard to whether a customer has chosen the electric utility, an affiliate of the electric utility, or another entity as its provider of electric power and energy.” This shows that the legislature was concerned with the provision of reliable power to all customers, without regard to which entity may be providing their power or whether a geographically concentrated group of a competitor’s customers might be the victims of an interruption separate from that of ComEd’s own customers.

Section 16-125 (g) requires ComEd to notify “potentially affected customers” if it performs maintenance or repairs that will result in transmission of power at less than 50% of the standard voltage, loss of power, or power fluctuation. But again, there is no release from the obligation to warn customers of the power downgrade just because the customers to be affected would be impacted by a “single” interruption.

Section 16-125 (j) is an even more extreme example of the legislature’s intent to require utilities to provide reliable power, as it requires ComEd to maintain accurate service records detailing information on each instance “of transmission of power at less than 50% of the standard voltage, loss of power, or power fluctuation . . . that affects 10 or more customers.”
A reading of these other sections clearly establishes that the General Assembly was concerned with the provision of reliable power to all of ComEd’s customers on a system-wide basis. The legislature was not concerned with the reasons for the interruptions but was concerned that the company provides reliable service throughout its service territory. All of the requirements imposed by Section 16-125 are aimed at forcing ComEd to provide reliable power to its all of its customers, no matter how a preventable outage may have occurred.

B. Section 16-125 (e) Will Provide an Absurd Result That Does Not Promote the Statute's Essential Purpose if the Commission Adopts ComEd’s Reasoning.

Each word, clause and sentence of the statute, if possible, must be given reasonable meaning and not rendered superfluous. Sylvester v. Industrial Comm’n, 197 Ill. 2d 225, 232 (2001). Further, when undertaking the interpretation of a statute, courts must presume that when the legislature enacted a law, it did not intend to produce absurd, inconvenient or unjust results. Vine Street Clinic v. HealthLink, Inc., 222 Ill. 2d 276, 282 (2006).

A statute should be interpreted so as to promote its essential purposes and to avoid, if possible, a construction that would raise doubts as to its validity. Morton Grove Park District v. American National Bank & Trust Co., 78 Ill. 2d 353, 363 (1980). It would be difficult, if not impossible, for one outage to cause damages to 30,000 or more ComEd customers because of redundancy factors that ComEd has built into its infrastructure. ComEd’s response to AG DR 2.05 (attached as AG Exhibit 1.05) provides that “ComEd’s system is expressly designed to limit the number of components the
failure of which could cause an outage of this magnitude, in part because of the public policy preference reflected in Section 16-125.

Thus, during “normal” operating conditions, there are a limited number of components whose failure or malfunction could cause an outage or other interruption to more than 30,000 customers. (For example, there are only 3 substations within ComEd’s service territory where there are more than 30,000 customers that are supplied from a single radial double-circuit line on common structures under normal circumstances). In normal conditions, there are only 3 substations whose malfunction could affect 30,000 customers. If the Commission were to find that Section 16-125(e) applies only in cases where a single outage caused interruption to more than 30,000 customers, then the practical application of the statute would render it moot in the vast majority of cases.

Since ComEd states that there are limited pieces of equipment that could affect 30,000 customers during normal operating conditions and that they only have 3 substations that can affect 30,000 customers at one time, the narrow reading of the statute that ComEd prefers would suggest that the General Assembly passed Sections 16-125(e) and (f) with the intention of protecting only a very select group of ComEd customers, an absurd result that the Commission must reject. In fact, ComEd stated in its response to AG DR 2.05 that it objects to the People’s question requesting the number of components that affect 30,000 or more customers that were affected by the August 23, 2007 storm front because to “count these components . . . would be both unreasonably burdensome and that the request is not reasonably calculated to result in admissible evidence.” AG Exhibit 1.05. Seeing that ComEd cannot classify how many customers suffered an interruption from a single piece of equipment because it is “burdensome”, how can
intervenors, affected municipalities or the Commission determine if a single interruption affected 30,000 or more people, as ComEd is asking the Commission to do in this docket?

Since ComEd cannot determine at what point a customer loses power and how many customers are affected by the failure of a given piece of equipment, it would be illogical to hold that they have to pay damages to customers pursuant to Section 16-125 only when it is determined that a given group of customers have been the victims of a single, continuous power interruption, as that is a determination which the company says it cannot make. Since the Company cannot know how many customers are affected by one outage, it is therefore impossible to enforce the statute in the way ComEd suggests it should be enforced, since ComEd and the Commission will not be able to determine whether or not a single interruption affected 30,000 or more customers without this data.

C. ComEd’s “Additional Legal and Policy” Reasons are Without Merit.

Paragraph 10 of the Verified Petition states ComEd’s “additional legal and policy reasons” warrant a finding by the Commission that the outages were not a “single” continuous interruption. These reasons are conclusory statements, presented without evidentiary support, as ComEd does not cite a single piece of outside authority to sustain them.

**ComEd’s Paragraph 10 (a) – (b)**

Paragraph 10 (a) states that “Section 16-125(e) is aimed at failures in design, construction, and maintenance of key system elements on which service to a large number of customers depend.” ComEd bases this assertion not on the legislative record, but on its characterization of the remedy contained in Section 16-125 (e) as “harsh.”
Paragraph 10 (b) states that aggregation of thousands of distinct storm-related interruptions is also inconsistent with the purpose of Section 16-125 to induce utilities to take prudent and reasonable action to promote reliability. Both of these “reasons” are provided with no citations to any piece of legislative history.

ComEd’s Paragraph 10 (c)

Paragraph 10 (c) states that aggregation of interruptions is inconsistent with the language of other subsections of Section 16-125. ComEd cites to subsection 16-125(j), which specifies data that must be collected and reported with respect to interruptions and fluctuations, and argues that each such event is tied to “specific equipment involved in the fluctuation or interruption,” a specific time when the event occurred, a specific cause, and a specific group of affected customers. ComEd miscategorizes these requirements. Section 16-125 (j) requires that data must be reported for incidents involving 10 or more customers without regard to whether or not these customers were affected by a single continuous interruption. There is nothing in this subsection that states that the reporting requirements are limited to customers who are affected by only one piece of equipment.

When 10 or more customer are affected by transmission of power at less than 50% of the standard voltage, loss of power, or power fluctuation, then Section 16-125 (j) requires an electric utility to provide

(1) The date.
(2) The time of occurrence.
(3) The duration of the incident.
(4) The number of customers affected.
(5) A description of the cause.
(6) The geographic area affected.
(7) The specific equipment involved in the fluctuation or interruption.
(8) A description of measures taken to restore service.
(9) A description of measures taken to remedy the cause of the power interruption or fluctuation.
(10) A description of measures taken to prevent future occurrence.
(11) The amount of remuneration, if any, paid to affected customers.
(12) A statement of whether the fixed charge was waived for affected customers.

There is nothing in this subsection that provides any direction on treating an outage as a single continuous interruption, nor does this language suggest that such treatment is preferable or even appropriate.

Also in Paragraph 10 (c), ComEd states that the language concerning municipal claims also anticipates that interruptions will occur in individual municipalities and not be aggregated across the service territory. ComEd is apparently citing to the requirement in 16-125 (e) that the utility shall also reimburse the affected municipality, county, or other unit of local government in which the power interruption has taken place for all emergency and contingency expenses incurred. However, the fact that a municipality is entitled to reimbursement has nothing to do with the number of affected customers or how that number is calculated.

This argument by ComEd is contrary to the rest of its Verified Petition. In one instance, ComEd argues that the total number of customers should be based on whether or not they suffered a single continuous interruption, but here, ComEd argues that the relevant “total number of customers” is to be determined by their location. The Commission should reject these arguments because they both run afoul of the plain reading of 16-125 (e) and are inconsistent with each other. Additionally, the fact that the legislature explicitly provided that damages shall be paid by municipality but did not provide that a “continuous power interruption” must somehow be the result of a “single”
interruption is further proof that the legislature did not intend to treat power interruptions separately.

**ComEd’s Paragraph 10 (d)**

Paragraph 10 (d) states that aggregation of interruptions is inconsistent with longstanding practice under the Public Utilities Act because the “Commission has never sustained a complaint, or awarded statutory damages, based on the claim that Section 16-125(e) applies to the consequences of a storm system as a whole, rather than to an individual ‘power interruption.’”

In fact, it appears that only one case has been filed before the Commission “seeking statutory damages under Section 16-125 for the consequences of a storm system as a whole rather than an individual power interruption. The complaint was voluntarily dismissed before any decision by the Commission, or award of statutory damages.”

ComEd Response to AG DR 1.05 (attached as AG Exhibit 1.06); see also ComEd Response to AG DR 2.03 (attached as AG exhibit 1.07).\(^1\) The fact that the Commission never had an opportunity to interpret this provision and award damages in reliance upon that interpretation does not prohibit the Commission from doing so in this docket.

**D. The Commission Cannot Determine the Constitutionality of Section 16-125 (e) as Suggested in ComEd’s Paragraph 10 (e).**

ComEd argues in Paragraph 10 (e) of its Verified Petition that if the Commission were to impose liability pursuant to Section 16-125 (e), that would unconstitutionally subject the utility to liability. Statutes are presumed constitutional, and courts have a duty to construe enactments by the General Assembly so as to uphold their validity if there is any reasonable way to do so. Wade v. City of North Chicago Police Pension

\(^1\) That docket number is ICC 06-0680.
Board, 226 Ill.2d 485, 510 (2007). In Illinois, an administrative agency must accept as constitutional the statute over which it has jurisdiction. *Wiseman v. Elward*, 5 Ill.App.3d 249, 257 (1st Dist. 1972); *Phelan v. County Officers Electoral Board*, 240 Ill.App.3d 368, 373 (1st Dist. 1992). An agency lacks the authority to invalidate a statute on constitutional grounds or even to question its validity. *Texaco-Cities Serv. Pipeline Co. v. McGaw*, 182 Ill.2d 262, 278 (1998). The basis for this is the fact that an administrative agency is statutorily created and its powers are limited to those granted to it in the relevant statute, which do not include ruling on the constitutionality of statutes.

The Commission is created pursuant to Article II of the Public Utilities Act and thus lacks the authority to rule upon the constitutionality of Section 16-125. 220 ILCS 5/Art. II et seq. Notably, the Company does not cite what theories or provisions of the constitution would be violated. Regardless, the Commission is an administrative agency created by statute that has the powers conferred on it by the legislature. Nowhere is the Commission given the ability to rule upon the constitutionality of a statute.

II. The Commission Should Find That the Customer Interruptions Were Not Caused by Unpreventable Weather.

The People have retained an expert witness, Peter Lanzalotta, to review the facts and circumstances surrounding the outages of August 23, 2007 and his findings are attached as AG Exhibit 1.0-1.4, which are hereby incorporated by reference. As witness Lanzalotta explains, the outages are not independent events but are, in fact, strongly interrelated as both cause and effect. Additionally, the high number of customers who lost power is not due to weather conditions but to the condition of the overhead distribution facilities.
A. The Outages Are Related.

The primary cause of the interruptions and the related weather of August 23, 2007 are related to the advancing age of the Company’s overhead electric distribution system. The interruptions also had identical effects on disperse customers, who were without power for hours or even days, since service restoration times for outages were greatly increased from what they would have been had these outages been independent and isolated events. It is apparent that the outages were part of a general system breakdown and service restoration efforts were affected by both the complexities of each repair task as well as by sheer volume of the repairs needed. As Mr. Lanzalotta points out on AG Ex. 1.0, page 9, there were 173 outage segments lasting 48 hours or longer that required a fuse replacement to restore service. Normally, a fuse replacement takes only a few hours, but, because there were so many outages to be dealt with, a blown fuse in this instance frequently resulted in much longer outages.

B. The Outages Were Caused by ComEd’s Distribution System.

The Company has expressed concern about the reliability impacts of the advancing age of its distribution system before the Commission in other proceedings. In data responses provided by the Company in its electric rate case, Docket No. 07-0566, the Company indicated that an aging distribution system was affecting its reliability performance. One of these responses to AG(MLB) 2.06, Attachment 2 (the public version of which is attached as AG Ex. 1.3) is a ComEd document titled “System Reliability Plan 2008-2012” and dated May 11, 2007. On page 3 of this document, ComEd states:

The distribution system’s reliability performance is challenged by:
- Aging infrastructure (system degradation)
- Adverse weather conditions
- Increasing consumer requirements for higher reliability
- Regulatory oversight

This is also evident on page 4 of this document, which states:

Distribution overhead equipment malfunction is a leading cause of outages to customers. Overhead system outages are influenced by aging infrastructure and adverse weather conditions (system degradation). These outages include broken equipment such as cross arms, poles, insulators, cutouts, connectors, and blown lightning arrestors.

Mr. Lanzalotta points out that the highest number of outages is caused by “Equipment/Material Failure,” according to ComEd. Data provided by ComEd in ICC Docket No. 07-0566 shows that 37.5% of outages in 2006 were due to equipment or material failure, and the outages due to this failure in the years 2005 and 2004 were 43.5% and 32.5%. AG Ex. 1.0, page 6. No other category is attributed with a higher percentage of outages. Id.

Mr. Lanzalotta correctly points out that ComEd uses old cross arms that are, or soon will be, in need of replacement. Id. at pp 7-9. Cross arms are used on the top of wooden distribution poles to support and separate the primary phase wires. According to documents from ComEd in docket 07-0566, it can be seen that about 365,000 cross arms are 36-40 years old. Id. at 7; AG Exhibit 1.4, p. G-5. Mr. Lanzalotta states that “wooden cross arms typically have an effective service life of from 25 to 35 years, depending on conditions. As they get older, they tend to get less resilient and more brittle, thereby making them more susceptible to breakage upon impact from tree limbs on cross arms or on the conductors.” Id. at 7; AG Exhibit 1.4, p. G-5.

It is evident from the information provided by ComEd and relied on in AG Exhibit 1.0 that some 365,000 cross arms will fail or otherwise need to be replaced over
the next ten years, or about 19% of a system total of an estimated 1.9 million cross arms that ComEd relies on to deliver electricity. The chart on page G-5 of AG Exhibit 1.4 also shows that a roughly equal amount will fail or otherwise need replacement in the next five years after that, or sooner. The number of cross arms that is expected to fail or need replacement in the next 15 years, or sooner, is about 39% of the cross arms on the system, or about 740,000 cross arms. This represents 740,000 potential outages that may occur during normal periods but are more likely to occur during storms and other periods of high mechanical stress on the system.

Cross arms support the main primary voltage conductors on many distribution poles and are important, especially during storms, when tree branches or trunks may fall on the conductors. Older cross arms are more likely to break in these conditions. While younger cross arms can also break in storms, on a system with large numbers of very old cross arms, or other old components, the impacts of storms accompanied by high winds, ice, or other sources of increased mechanical loading on overhead distribution facilities will tend to be increased. In ComEd’s response to Staff’s data request OGC 1.01, in Attachment 1 in this docket, it shows that more than 40% of the almost 6,800 outage segments reflected in Appendix A are attributed to a problem with phase wires of all voltages that required repair or replacement of facilities. Mr. Lanzalotta states that “phase wires are typically supported by cross arms at the poles, so a phase wire problem frequently involves cross arms as well. When the Company experiences especially severe damage from storms, the large numbers of old cross arms on the Company’s system are likely a contributing factor.” AG Exhibit 1.0 at p. 9.

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2 Since the document is voluminous, a hard copy will be provided to the administrative law judge. Staff should be in possession of this document. Copies can be provided to other parties upon request.
Mr. Lanzalotta states that he uses cross arms as just one example of flaws in an aging system such as ComEd’s.  *Id.* at 10.  As can be seen on AG Ex. 1.4, the aging of the system affects other pieces of equipment. Therefore, the Commission should deny a waiver request that is being sought by ComEd.

**Conclusion**

For all the reasons set forth above, the Commission should find that Section 16-125(e) is applicable to ComEd and to the outages suffered on August 23, 2007 and require the Company to reimburse affected customers and municipalities. Additionally, the Commission should find that the outages were not due to unpreventable weather and
deny ComEd’s waiver request from the duty to reimburse affected customers and municipalities.

Respectfully submitted,

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