

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

COMMONWEALTH EDISON COMPANY	:	
	:	
Petition to determine the applicability of	:	No. 07-0491
Section 16-125(e) liability to events caused	:	
by the August 23, 2007 storm front.	:	

POST-HEARING REPLY BRIEF OF
COMMONWEALTH EDISON COMPANY

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POST-HEARING REPLY BRIEF

Commonwealth Edison Company (“ComEd”) hereby submits its Post-Hearing Reply Brief to the Illinois Commerce Commission (the “Commission” or “ICC”).¹

I. INTRODUCTION / SUMMARY

The facts are beyond realistic dispute. The August 23, 2007 Storm System was the worst to strike northern Illinois in nearly ten years. High winds, tens of thousands of lightning strikes, destructive flooding, and a tornado all ravaged the area’s infrastructure and left eight counties declared disaster areas. Although ComEd’s delivery system was designed, constructed, and maintained properly and in accordance with all applicable standards, ComEd’s infrastructure was inevitably damaged too, resulting in over 4,000 separate interruptions. ComEd responded with an award-winning effort that rapidly and efficiently restored power to its customers. Staff independently reviewed data concerning the Storm System, the resulting damage to ComEd’s facilities, and ComEd’s restoration efforts. Staff concurs that no evidence warrants denying ComEd a waiver. Simply put, the interruptions resulted from unpreventable weather damage and

¹ Capitalized abbreviations used herein have the same meaning as in ComEd’s Initial Post-Hearing Brief.

any extraordinary liability that might otherwise be imposed under Section 16-125(e) should be waived.²

Only the AG argues otherwise in the face of this evidence.³ The AG's arguments are unsupported, unrealistic, and ask the Commission to twist both the Act and the rules of evidence. The AG's sole witness, Peter Lanzalotta, does not question the Storm System's severity, the destruction it caused, or ComEd's exemplary restoration efforts. He did not inspect ComEd's system, was not present during the storm or the restoration, lacks both relevant expertise and knowledge, and mischaracterizes accepted industry practice and available data. His opinions have been previously rejected and criticized by the Commission, and his opinions in this case were thoroughly discredited. Perhaps this is why Mr. Lanzalotta, the only witness the AG called, is not mentioned by name even once in the AG's Brief.

Lacking any credible testimony, the AG tries to distort ComEd's own reliability reports. As was shown at the hearing, those reports state neither that ComEd's system is deficient nor that it is susceptible to preventable storm damage. Rather, they demonstrate that ComEd has properly recognized, and is successfully addressing, the challenges of aging infrastructure faced by utilities nationally. Equally meritless is the AG's demand that ComEd provide particular and peculiar types of evidence that -- hardly coincidentally -- are all but impossible to provide or even collect during a storm. The AG's demand is contrary to the Act, the law of evidence, and common sense. The Act and the law of evidence require that ComEd prove a *prima facie* case and carry the ultimate burden of proof. ComEd has done that, and has done it overwhelmingly.

² ComEd has consistently claimed that Section 16-125(e) of the Act is inapplicable to these interruptions because none affected 30,000 customers for four hours or more. That issue, however, has been bifurcated and current briefing addresses the question of waiver assuming *arguendo* that Section 16-125(e) would otherwise apply.

³ The Village of Deerfield also had initially opposed ComEd's Petition.

II. THE RECORD SUPPORTS COMED'S WAIVER REQUEST

The interruptions occurring on August 23, 2007 and through August 29, 2007 directly resulted from the Storm System. The evidence concerning the severity and damage potential of that weather system is unrebutted, as is the evidence of the damage to ComEd's system. It is the type of damage expected to result from the type of extreme weather events that Illinois experienced, and both the field reports and the expert opinions of the qualified engineers support that fact. Moreover, the interruptions empirically occurred where and when the Storm System hit, or shortly thereafter as the effects of water and lightning were felt, not before or long after or when unrelated causes would continue to cause outages. Finally, there is no credible evidence that any prudent and reasonable action by ComEd could have mitigated the effect of the Storm System on ComEd's facilities or prevented outages.

A. The Extraordinarily Severe Nature of the August 23 Storm System is Uncontradicted

In its Initial Brief, ComEd identified the overwhelming and uncontradicted evidence of the nature, extent, and severity of the storm system. That evidence demonstrates that the Storm System spawned an EF-1 tornado (depicted in a National Oceanic and Atmospheric Administration ("NOAA") map, ComEd Ex. 1.02 at 22), severe winds including straight-line winds of 80-100 MPH, over 80,000 lightning strokes, rain that fell up to three inches per hour, and flooding. Pet. at 2-3, ComEd Ex. 1.02 at 4-7, 17-23. The AG offers no contrary evidence. Instead, the AG erroneously claims that ComEd did "not attempt to match a specific weather event to a specific interruption". AG Resp. at 10. Apparently, the AG means to claim that ComEd did not "attempt" to show measurements of wind speeds, lightning strikes, floods, etc., at the exact times and locations throughout the area where its equipment failed. The AG's argument is illogical and legally flawed, as well as being factually false.

ComEd submitted a plethora of uncontradicted evidence demonstrating the severity of the Storm System, including data from the National Weather Service and NOAA, compilations of ComEd's own crews' and field engineers' observations, reports of weather observers, and descriptive evidence of the system's effect on other infrastructure.⁴ That evidence established not only the severity of the Storm System, but also the areas affected. The compilation of interruption specific data (Pet., App. A) stands as uncontradicted evidence of the weather related causes of the specific interruptions. In addition, ComEd provided powerful – and, yet again, unrebutted – circumstantial evidence⁵ that supports its case. ComEd proved that the damage to its infrastructure is what would be expected to be caused by severe weather events like the Storm System and was not consistent with alternative explanations such as, in particular, Mr. Lanzalotta's claims about facility age. ComEd Ex. 2.0 (Corr.), 4:76-12:242; Tr. at 166-182.

The AG also wrongly asserts, without any proof, the severe weather was concentrated in the northern portion of ComEd's service territory and questions how the Storm System affected areas such as Dixon, DeKalb, Minooka, and Channahon. AG Resp. at 10. This argument demonstrates the AG's lack of understanding both of the weather conditions and how they affected ComEd's service territory. In fact, the Storm System did not just appear and strike a limited portion of that area before vanishing. The evidence demonstrates that the Storm System moved across ComEd's Service territory beginning in the southwest and continuing northeast. ComEd Ex. 1.02 at 4-7, 17-23; Pet., App. A. It shows that counties in ComEd's northern region, western region, and southern region were all affected. Indeed, counties in all these regions were

⁴ Pet. at 2-4; Pet, App. A; ComEd Ex. 1.02 at 4-7, 12-13, 17-25; ComEd Ex. 2.0 (Corr.), 9:167-12:242; ComEd Ex. 3.01; Tr. at 158-165, 166-182.

⁵ In the law, circumstantial evidence is entirely proper and probative circumstantial evidence is recognized and persuasive. 1-401 Illinois Evidence Courtroom Manual 1; *Mort v. Walter*, 98 Ill. 2d 391, 396-97; 457 N.E.2d 18, 7-8 (1983)

declared disaster areas. Pet. at 3, ComEd Ex. 1.02 at 4. Even as the Storm System moved off to the east, it remained severe, and while the subsequent damage it caused in Indiana did not cause interruptions in ComEd's territory, it did impact ComEd's ability to get assistance from other nearby utilities who were themselves affected.

Likewise, the AG's claim that areas such as Dixon and DeKalb had interruptions "unexplained" by weather ignores the evidence. Dixon experienced 12,102 lightning strokes and DeKalb experienced 16,110 lightning strokes. During the storm, only Joliet received more lightning strokes, a total of 16,591. ComEd Ex. 1.02 at 19-21. In contrast, the average number of lightning strokes reported for a typical storm over ComEd's entire service territory is only approximately 12,000. *Id.* at 4. As for Minooka and Channahon, these cities are located in counties that were declared disaster areas (i.e., Will and Grundy Counties). The damaging weather conditions that caused interruptions in these areas are far from unexplained.

The AG's claims about the storm also ignore the damage to ComEd's electric distribution system itself. The Storm System caused widespread damage to ComEd distribution facilities, such as wires, switches, poles, arms transformers, control gear, arrestors, insulators, vacuum reclosers, disconnect switches, and sectionalizers (Pet. at 3; Segneri Dir, ComEd Ex. 1.0, 1:19-2:23) and ComEd's infrastructure itself showed extreme wind damage, damage from blown foreign objects such as trees and tree limbs, and lightning damage. ComEd Ex. 1.02 at 24; Segneri Reb., ComEd Ex. 2.0 (Corr.), 10:204-5, 11:221-25, 11:228-29; Tr. at 166:14-182:11; 229:4-18; ComEd Init. Br. at 4-5. The nature and extent of that damage is itself indicative of widespread severe weather. *Id.*

Finally, there is no contrary evidence – no basis to doubt the severity or extent of the August 23 Storm System. In addition to the evidence cited by ComEd, Staff acknowledges and

cites the “meteorological warnings and other data as evidence of the severity of the storms.” Staff Resp. at 10. Moreover, the AG’s only witness, Peter J. Lanzalotta, testified that he was not aware of any data that contradicted the description of winds, lightning and other weather characteristics of the August 23 Storm System and had no basis to question its severity. Tr. at 103. It is remarkable that, in the face of even these concessions, the AG continues to dispute these facts.

B. Severe Weather Caused Unpreventable Damage to ComEd’s Distribution System

The AG argues that ComEd failed to prove that the August 23 Storm System caused unpreventable damage to its electric distribution system. AG Resp. at 9-13. The evidence clearly demonstrates otherwise. It shows that the interruptions were a result of the unpreventable weather damage. It shows that the design and condition of ComEd’s system did not contribute to the interruptions, and that ComEd constructed and maintained its system in accordance with appropriate standards. ComEd Ex. 1.02 at 1-3, 9-10, 15-16, 26-47; ComEd Ex. 2.0 (Corr.), 8:149-156, 10:202-11:217; ComEd Ex. 3.0, 2:38-3:54; ComEd Ex. 3.01 at 10-13; Staff Ex. 1.0, 7:145-8:158, 9:178-195; Staff Ex. 2.0, 4:75-5:96; ComEd Init. Br. at 6. It shows that the interruptions and the damage could not have prevented by reasonable or prudent utility action. ComEd Ex. 2.0 (Corr.), 10:188-10:201. The AG’s attempt to claim otherwise are each unfounded and contrary to the evidence.

ComEd submitted competent, informed expert testimony reviewing the nature and extent of the interruptions and confirming just that fact. ComEd Ex. 2.0 (Corr.), 10:188-12:242. It also provided specific data about the interruptions. Appendix A to the Verified Petition sets forth the storm-related interruptions for the period August 23-29, 2007. With regard to Appendix A, Mr. Segneri testified as follows:

Q. Now are there any cause codes represent - -- any causes represented in Appendix A that are non-storm causes such as vandalism, third-party dig in, tampering, or like that?

A. I don't believe they are. I do not recall seeing anything like that.

Tr. at 227:20-228:3. While the AG says that causes coded by ComEd as “public”, “intentional”, and “unknown” cannot be storm-related, the evidence proves that they can and are. In addition to Mr. Segneri’s testimony explaining that the damage incurred is consistent with storm damage (ComEd Ex. 2.0 (Corr.), 10:202-209; Tr. at 166-182.), AG witness Lanzalotta acknowledged that the public cause code would include when someone slides on a slippery street and drives his car into a pole or someone trying to remove a damaged tree from a yard and drops it on a service line. Tr. at 137. He also agreed that during a storm there would be intentional interruptions in order to repair storm-related damage to utility facilities. *Id.* at 138. The “unknown” cause code simply means that the work crew restoring power did not themselves see a codeable cause, such as a downed tree. Tr. at 210:3-10. It does not mean that, as here, a qualified engineer cannot properly conclude after reviewing all available data that the interruption was caused by the extreme damaging weather occurring at that time.

Moreover, as noted above, the other evidence of cause is equally compelling. The August 23 Storm System caused widespread damage requiring ComEd to replace 416 poles, 513 transformers (and in many cases, the related equipment), and 109 miles of wire. Pet. at 3; Segneri Dir., ComEd Ex. 1.0, 1:19-2:23; ComEd Init. Br. at 4. This damage was not routine, but occurred only in response to severe weather. Further, Mr. Segneri, under cross examination by Staff, methodically walked through the major types of equipment that were damaged as a result of the storm, which represent 91% of all the equipment involved. Tr. at 165-73. That equipment included phase wire, substation breaker, fuse, cable, pole, load break switches, and line reclosers. Staff Cross Ex. 1. Mr. Segneri confirmed that this equipment represents the most common types

damaged in a severe storm. Tr. at 173:1-6. He also testified that the remaining 9% of the equipment is also of the type normally subject to storm damage. *Id.* at 173: 7-16. Then, Mr. Segneri testified concerning the top eleven types of restoration and remediation actions that were needed following the storm, which represented the top 96% of the repairs made. Tr. at 173-82. These restorations included: repaired overhead material, temporary switching, closed substation breaker, tree removed, replaced fuse, replaced overhead material, closed recloser-line, closed switch / disconnect / LT, closed fuse, closed circuit switcher, and disconnect overhead material. Staff Cross Ex. 2. Mr. Segneri confirmed that these actions are consistent with those required by storm damage. Tr. at 181:8-13. Finally, he also testified that the remaining restoration actions are also generally consistent with the restorations made during a storm. *Id.* at 183:14-184:11.

The Commission need not, however, rely only on ComEd's witnesses to substantiate this point. Staff witness Mr. Linkenback also determined that the "sharp increase" in interruptions ComEd experienced is consistent with a sudden increase due to the August 23 Storm System. Staff Ex. 1.0, 6:121-25; Staff Resp. at 9. Mr. Linkenback determined that the weather conditions exceeded reasonable design standards for distribution facilities and, therefore, Staff also concluded that the resulting damage was unpreventable storm damage. Staff Ex. 1.0, 9:181-83; Staff Ex. 2.0, 5:107-10; Staff Resp. 10, 13. Indeed, Mr. Lanzalotta, the AG's own witness, testified that the interruptions at issue were all strongly interrelated because they all resulted from the August 23 Storm System. Tr. at 104:7-11; AG Ex. 1.0, 3:56-58. It is clear that, except perhaps for a few minor exceptions (see "install wild life protections" at Tr. at 181-82), Appendix A represents interruptions that resulted from the severe weather on August 23.

The AG also claims that ComEd did not explain how outages could occur in the days following the storm. Again, the AG simply ignores the evidence. Mr. Segneri testified on this

very question. When asked how could outages occur in the days following a storm, he explained:

Well, actually, in a couple of different ways. After a storm front comes through -- you've got heavy wind and lightning -- just because I don't have an outage on a piece of equipment that doesn't mean I don't have a dangling tree or a broken crossarm that has not caused an outage or an interruption, but it's an adverse situation. Just like lightning can hit a piece of cable and it might not damage it right at that instant enough to cause an outage, but it's breached cable, it caused maybe a hole in it, and its Okay. But then moisture gets into the cable after a couple of days, then it fails.

So with the number of underground failures that we had -- and some of them happened during the storm window and some of them a couple days after the storm window -- it is absolutely reasonable and consistent with past experience that those failures are attributable to the lightning event that we had.

Tr. at 230:8-231:4. There is no contrary evidence, even from Mr. Lanzalotta.

The evidence also establishes that the damage caused to ComEd's electric distribution system by the Storm System was unpreventable. As noted above, the evidence is clear that ComEd built its system in accordance with appropriate standards⁶ and had performed all the necessary maintenance for its electric distribution system prior to the storm.⁷ The record shows that ComEd could have taken no reasonable or prudent action that would have prevented the interruptions in question. ComEd Ex. 2.0 (Corr.), 3:53-60, 8:149-156; 10:202-11:232. That testimony is confirmed by data proving that the conditions during the Storm System exceeded applicable standards. Pet. at 2-3; ComEd Ex. 1.02 at 4-7, 17-23; ComEd Ex. 3.0, 2:38-41, 4:50-54; ComEd Ex. 3.01 at 4-7, 13. Once again, Staff concurs. Based on the engineering and meteorological evidence, Staff determined that "the preponderance of the evidence supports

⁶ Segneri Dir., ComEd Ex. 1.02 at 1-3; Segneri Reb., ComEd Ex. 2.0, 3:57-58; ComEd Init. Br. at 5

⁷ ComEd Ex. 1.02 at 3, 9-10, 26-32; ComEd Ex. 2.0 (Corr.), 8:149-56; ComEd Ex. 3.01 at 10; AG Cross Ex. 2; Tr. at 94:12-95:8; ComEd Init. Br. at 6.

ComEd's claim that the power interruptions occurring August 23-29, 2007, for which it requests a waiver, were the result of unpreventable damage due to weather events and conditions." Staff Ex. 1.0, 9:181-183; Staff Ex. 2.0, 4:90-92, 5:107-110; Staff Resp. at 13.

C. The Damage to ComEd's Electric Distribution System Was Not the Result of the Age of Its Infrastructure

The AG argues that ComEd's electric distribution system and, thus its reliability, was compromised by its supposed advanced age. AG Resp. at 15. Although often misleadingly phrased more broadly, AG witness Lanzalotta focused only on the age of ComEd's wood crossarms. ComEd Ex. 2.0 (Corr.), 9:167-183. The AG's argument that ComEd's equipment age contributed to the failures must be rejected for many reasons.

First, the AG's claim is contrary to the objective evidence. The age of ComEd's wood poles and crossarms exceed no established standard, accepted practice, rule, or regulation. ComEd Ex. 2.0 (Corr.), 5:93-8:156; ComEd Ex. 3.01 at 8-9. The strength standards that do apply were exceeded during the storm. The evidence shows that wind pressure surpassed established wind pressure standards. ComEd Ex. 3.01 at 5-7. It would have been difficult for ComEd to design for wind speeds of such magnitude. *Id.* at 13; *see also* Linkenback Reb., Staff Ex. 2.0, 4:90-5:92. All witnesses – even Mr. Lanzalotta – acknowledge that other causes of equipment failure, such as lightning strikes and physical impacts from trees and limbs, cause damage and interruptions even to new equipment. ComEd Ex. 2.0 (Corr.), 10:188-11:232; ComEd Ex. 3.0, 2:38-41, 3:50-54; ComEd Ex. 3.01 (entirety); Tr. at 98-101. Moreover, actual experience proves that poles and crossarms have a far longer life than assumed by Mr. Lanzalotta, up to 75 or 80 years. ComEd Ex. 3.01 at 9-10. The fact that the outages were not related to equipment age is further underscored by the fact that the actual damage inflicted on ComEd equipment did not correlate with the actual age of ComEd's distribution facilities in the

area, but rather with the severity of the weather. ComEd Ex. 2.0 (Corr.), 5:98-101, 8:159-61, 10:204-9; Cress/Krishnasamy Reb., ComEd Ex. 3.0, 2:43-45; ComEd Ex. 3.01 at 5-8, 10, 13.

The expert testimony also contradicts the AG's claim. Dr. Krishnasamy and Mr. Cress, who together have over 65 years of expertise in material condition assessment (Dr. Krishnasamy specializes in wood poles and crossarms), concluded that the damage to ComEd's poles and crossarms was due to weather conditions, not age. ComEd Ex. 3.0, 2:38-41, 3:50-54; ComEd Ex. 3.01 (entirety). They carefully reviewed the literature and the applicable standards, and considered the actual condition of ComEd's facilities, as well their own expertise. ComEd Ex. 3.0, 2:32-3:54; ComEd Ex. 3.01 (entirety). They confirmed that ComEd's facilities are not inappropriately aged and that the Storm System's severity, not the age of the equipment, was the cause of the interruptions. *Id.*

Second, the AG's reliance on ComEd's reliability reports is misleading. No portion of any of the reports concludes that: (1) ComEd's electric distribution system is inappropriately aged, unreliable, or the cause of an outage; (2) ComEd has not, is not, or will not properly manage its infrastructure; and (3) any asset was out of compliance with accepted standards. The reports recognize appropriately the need to continue to invest in infrastructure, which ComEd is doing. *See* ComEd Init. Br. at 9; ComEd Ex. 2.0 (Corr.), 5:93-6:112. Moreover, as noted above, the evidence demonstrates that ComEd's distribution system is designed and constructed to conform to a detailed set of written standards. Segneri Dir., ComEd Ex. 1.02 at 1-3; Segneri Reb., ComEd Ex. 2.0, 3:57-58. These standards, in turn, are based upon good utility practice generally accepted by qualified professional engineers, and on appropriate industry and regulatory standards such as the National Electric Safety Code ("NESC"), American National Standards Institute, Institute of Electrical and Electronics Engineers, and Commission, FERC,

and NERC rules. *Id.* Further, prior to the Storm System, ComEd had performed the necessary maintenance for its electric distribution system. ComEd Ex. 1.02 at 9, ComEd Init. Br. at 5.

Third, in evaluating the evidence, the Commission should keep in mind the extraordinary weakness of Mr. Lanzalotta's testimony. His opinions do not square with the objective evidence and his qualifications and methodology are severely limited. For example:

- Mr. Lanzalotta lacks an adequate basis for his opinions. He did not inspect ComEd's system before or after the storm. He did not accompany any ComEd crews, and is not familiar with how ComEd operates its maintenance or restoration programs. Tr. at 114:15-22. Mr. Lanzalotta failed to gain this knowledge even though he testified this type of knowledge was important in his past experience. Tr. at 114:1-14
- Mr. Lanzalotta is not a specialist in material condition. To the contrary, he professes to be qualified to testify in over 25 different areas of utility operations and regulation, from nuclear failure to rates of return on equity. AG Ex. 1.1; Tr. at 116:18-118:12. He cannot name a single area of the utility business in which he does not consider himself an expert. Tr. at 118:16-119:6. Charitably put, Mr. Lanzalotta's expertise is spread mighty thin.
- Mr. Lanzalotta is not credible. The Commission has previously found his work to suffer from "numerous engineering and planning errors and omissions" and found that he did not perform "necessary" work. Docket No. 92-0221, *Commonwealth Edison Company*, 1995 Ill. PUC LEXIS 668, *49-50 (1995). It has twice-rejected his engineering and operating recommendations. See also, Docket 94-0179, *Commonwealth Edison Company*, Order at 14.

- As noted above, Mr. Lanzalotta relied (AG Ex. 1.0, 6:131-10-227) on a misreading of ComEd's reliability reports. He assumed that the "age" for plant depreciation purposes of ComEd's wood poles and crossarms reflected their physical age, even for assets that were fully depreciated, and thereby wrongly concluded that ComEd had few if any poles and crossarms in service beyond the end of their depreciation period.
- Even if Mr. Lanzalotta's inaccurate claims regarding ComEd's crossarms were 100% accurate, it would not alter ComEd's entitlement to a waiver. The number of customers affected by interruptions related to crossarms falls far below the number required to trigger Section 16-125(e). ComEd Ex. 2.0 (Corr.), 9:180-183.

ComEd is not alone in its conclusions. Staff determined that Mr. Lanzalotta's claim that the age of ComEd's system contributed to the interruptions was unsupported and insufficient to rebut the evidence demonstrating that the power interruptions were the result of unpreventable damage due to weather events and conditions. Staff Resp. at 12. Further, Staff concluded that his assertion that older equipment will experience more damage than newer equipment to be unsupported and insufficient to rebut the evidence showing that weather conditions exceeded reasonable design standards during the storm. *Id.* at 12-13.

Finally, the AG's claim that because ComEd has other waiver proceedings pending before the Commission is somehow proof that ComEd's distribution system is flawed is both nonsensical and unsupported by any evidence. Those waiver proceedings will be determined on their own merits, just as this proceeding will be determined on the record evidence. The fact that ComEd filed those proceeding could show that storm damage occurs, but it does not show that this or any storm damage was preventable. The AG's argument must be rejected.

III. COMED MET ITS BURDEN; THE AG’S “BURDEN” ARGUMENT IS CONTRARY TO LAW AND MUST BE REJECTED

A. The AG’s Invented “Burden” is Contrary to the Act, the Law of Evidence and Common Sense

The AG says that in order to be granted a waiver, ComEd must prove that the subject outages were “caused by a weather event” and “that such outages were caused by unpreventable damage due to the weather event.” AG Resp. at 10. ComEd did that, as shown both in its Initial Brief and Section II of this Reply Brief. Staff concurs. The AG, however, invents a further burden, and claiming that ComEd must show that “the specific weather event” – which apparently means more than the storm system – that caused “each outage.” *Id.* at 8. Not only is the AG’s standard nonsensical but it is contrary to the rules of evidence and inconsistent with the law.⁸

The Commission’s order in this proceeding must be supported by substantial evidence. *United Cities Gas Co. v. Illinois Commerce Comm’n*, 163 Ill. 2d 1, 12; 643 N.E.2d 719, 725 (1994). Substantial evidence is defined as evidence which a reasonable person would accept as sufficient to support a conclusion. *Amerpan Oil Corp. v. Illinois Commerce Comm’n*, 298 Ill. App. 3d 341, 347; 698 N.E.2d 582, 586 (1998). The rules of evidence accept sworn expert opinion testimony. See 4-60 Illinois Civil Trial Guide §60.04 and §60.30 and 1-702 Illinois Evidence Courtroom Manual 1 They also accept business records and compilations. I Illinois Evidence Courtroom Manual 236 and 3-40 Illinois Civil Trial Guide §40.54. Reasonable people rely on that evidence, as do regulators and utility engineers. Here, ComEd presented documentary, statistical, and expert opinion proof that unpreventable weather damage caused

⁸ ComEd also notes that the AG’s argument is flatly inconsistent with its view that, under Section 16-125(e), all of the interruptions should be treated as a single interruption caused by the storm system, but that contraction need not be addressed at this stage of this bifurcated proceeding.

these outages. Staff agrees that it is persuasive evidence and, aside from Mr. Lanzalotta's limited and debunked views, it is completely uncontradicted.

The Commission is entitled to rely on ComEd's testimony, and to use its expertise in evaluating it. *Wilcox v. Illinois Commerce Comm'n*, 23 Ill. 2d 432, 436-37; 178 N.E.2d 873, 875 (1961). As the trier of fact, the Commission is also entitled to draw reasonable inferences from the evidence. *Brown v. Zimmerman*, 18 Ill. 2d 94, 101-02; 163 N.E.2d, 518, 522-23 (1959); *Winn v. Turner*, 55 Ill. App. 3d 291, 291-92; 371 N.E.2d 170, 172 (1977); *Holland Motor Express, Inc. v. Illinois Commerce Comm'n*, 165 Ill. App. 3d 703, 711-12; 520 N.E.2d 682, 687 (1987). To meet its burden or convince the Commission, ComEd is not required to ask witnesses to provide separate narrative testimony about 4,000 different interruptions, nor to submit whatever other backup evidence the AG now, after the fact, decides it would prefer. In *Commonwealth Edison Co. v. Illinois Commerce Comm'n*, 322 Ill.App.3d 846, 853; 751 N.E.2d 196, 202 (2001), the Appellate Court addressed just such an issue, where competent sworn testimony was rejected in the face of a call of particular types of documents. The Court found that rejection of sworn testimony was clearly erroneous. Nothing in the Public Utilities Act changes this or limits in any way the manner in which utilities can prove facts or causation.

B. The AG's Proposed Misreading of Section 16-125(e) Would Be Unconstitutional

To the extent that the AG argues that ComEd's liability under Section 16-125(e) can be waived only if ComEd proves that it was physically impossible to avoid an outage even through imprudently excessive or unreasonable action, or that ComEd can only support its claim through evidence that is impossible or unrealistic to present (*e.g.*, pictures of lightning striking or tree limbs falling on each piece of damaged equipment), the AG asks the Commission to

unconstitutionally misconstrue Section 16-125(e) and twist it into a statute that would deny ComEd the opportunity to recover its reasonable and prudent costs.

A utility such as ComEd “is entitled to just compensation and, to have the service, the customers must pay for it.” *Bd. of Public Utility Commissioners v. New York Tel. Co.*, 271 U.S. 23, 31 (1926); *accord Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307 (1989) (internal quotation marks and citation omitted). ComEd’s right to a reasonable return necessarily encompasses the right to recover “operating expenses” as well as “the capital costs of the business.” *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944). Illinois law, too, entitles utilities to recover their “prudently and reasonably incurred costs” of providing service to the public. *See, e.g., Citizens Utilities Co. v. Illinois Commerce Comm’n*, 124 Ill. 2d 195, 200-01 (1988). The Illinois Supreme Court has expressly and repeatedly recognized this point. *See Sprague v. Biggs*, 390 Ill. 537, 562 (1945) (“It requires no argument to demonstrate that a rate of fares which does not produce income sufficient to meet operating expenses is confiscatory.”); *People v. Finnegan*, 393 Ill. 562, 565 (1946) (same). Rates cannot “ignore items charged by the utility as operating expenses unless there is an abuse of discretion in that regard by the corporate officers.” *Utilities Comm’n v. Springfield Gas and Electric Co.*, 291 Ill. 209, 234 (1920). *See also, Peoples Gas Light and Coke Co. v. Slattery*, 373 Ill. 31, 61-62 (1940).⁹ Under either Illinois or federal constitutional law, a “taking” occurs where the utility is not able to recover its

⁹ By way of comparison, costs have been disallowed where they were not reasonably and prudently incurred in order to provide service. *See, e.g., United Cities Gas Co. v. Illinois Commerce Comm’n*, 163 Ill.2d 1, 24 (Ill. 1994) (disallowance of portion of gas pipeline “demand charge” was not confiscatory where company demonstrated indifference toward certain customers by failing to review its allocation percentages); *Peoples Gas*, 373 Ill. at 64-65 (costs of maintenance of mains had to be allowed where the evidence showed that they were related to an extremely cold winter; certain costs of promoting gas appliance sales were properly disallowed as insufficiently related to stated purpose of promoting gas utility service); *Du Page Utility Co. v. Illinois Commerce Comm’n*, 47 Ill.2d 550, 560-61 (1981) (proper to exclude officers’ salaries to extent found to be excessive in relation to work performed).

prudently incurred costs and earn a reasonable return on invested capital. *Duquesne*, 488 U.S. at 314-15; *see also West Suburban Transp. Co. v. Chicago & W.T. Ry. Co.*, 309 Ill. 87, 92 (1923).

In this case, if Section 16-125(e) were read to require ComEd to prove that absolutely no action -- not just no action of a reasonable and prudent utility -- could avoid an interruption, its right to recover its costs would be irreparably and unlawfully impaired. ComEd would be left with only a pyrrhic choice: invest in unreasonably and imprudently excessive efforts to prevent interruptions, for which it cannot recover its costs; or take only prudent and reasonable actions and fail to recover its costs due to Section 16-125(e) liability which ComEd is barred from recovering. Likewise, were the Commission to hold that ComEd could not prove a case for a waiver with expert testimony, objective weather data, and business records (as ComEd did here), it would effectively prevent ComEd from ever establishing a claim to a waiver. ComEd would again be left unable to recover its costs, no matter how prudent or reasonable its conduct was to prevent outages.

A statute should be construed so as to avoid grave doubts as to its constitutionality. *See Villegas v. Bd. of Fire & Police Commissioners of Village of Downers Grove*, 167 Ill. 2d 108, 124 (1995) (a state statute should be construed to avoid doubt as to constitutionality under federal or state law); *Clark v. Martinez*, 543 U.S. 371, 380-81 (2005) (“when deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice. If one of them would raise a multitude of constitutional problems, the other should prevail.”). The United States Supreme Court has made clear that regulated rates “must give heed to all legitimate expenses that will be charges upon income during the term of regulation.” *West Ohio Gas Co. v. Public Util. Comm’ of Ohio*, 292 U.S. 63, 74 (1935) (emphasis added). Likewise, ComEd’s right to recover “prudently and reasonably incurred costs” of providing

service to the public is recognized as a matter of Illinois public utility law. *See, e.g., Citizens Util. Co. v. Illinois Commerce Comm'n*, 124 Ill. 2d 195, 200-01 (1988). The AG's efforts to distort Section 16-125(e) into a means of denying that right must be rejected.

IV. CONCLUSION

For the reasons stated herein, ComEd should be granted a waiver of any potential Section 16-125(e) liability that might otherwise apply as a result of the unpreventable damage to its electric distribution system and the resulting interruptions.

Dated: October 20, 2008

Respectfully submitted,

Commonwealth Edison Company



By: _____

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CERTIFICATE OF SERVICE

I, E. Glenn Rippie, do hereby certify that a copy of the foregoing COMMONWEALTH EDISON COMPANY'S REPLY BRIEF was served upon all parties on the attached Service List by the method so indicated this 20th day of October, 2008.

A handwritten signature in black ink, appearing to read 'E. Glenn Rippie', written over a horizontal line.

E. Glenn Rippie