

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

COMMONWEALTH EDISON COMPANY	:	
	:	
Petition to approve proposed Federal Stimulus	:	No. 09-0407
Project and associated tariffs.	:	

**COMMONWEALTH EDISON COMPANY’S REPLY IN SUPPORT
OF ITS MOTION TO STRIKE PORTIONS OF THE REBUTTAL
TESTIMONY OF IBEW WITNESS MR. BRIAN LOOMIS OR
IN THE ALTERNATIVE FOR ADDITIONAL TIME TO RESPOND**

Commonwealth Edison Company (“ComEd”) hereby submits this Reply in Support of its Motion to Strike Certain Portions of the Rebuttal Testimony of IBEW Witness Mr. Brian Loomis or in the Alternative for Additional Time to Respond (the “Motion”). IBEW cannot deny that Mr. Loomis’ “rebuttal” testimony is not rebuttal. Much of the Response is rather an attempt to justify the filing of improper rebuttal, but IBEW’s arguments are legally unsound and factually untrue and should be rejected. In particular, the claim that the schedule was too swift to permit IBEW to file its response to ComEd when it was actually due is a claim that was fully litigated in the Motion to Modify the Schedule filed on September 25, 2009, a motion IBEW did not even join. IBEW should not now be allowed to circumvent the schedule established by the Commission and honored by Staff, ComEd, and all other Intervenors.

**IBEW’S Response Only Confirms That
The Loomis Testimony Is Not Rebuttal**

Nothing in IBEW’s Response rebuts the fact that virtually none of Mr. Loomis’ “rebuttal” testimony actually rebuts the direct testimony of Staff or any intervenor. Indeed, IBEW unapologetically admits that the testimony may really be direct testimony and goes so far as to move in the alternative to file supplemental direct testimony *instanter* (IBEW Response, p. 1). Nowhere in the IBEW Response can they identify Staff or Intervenor direct testimony that

are responded to by the portions of Mr. Loomis testimony, just as the improper portions of Mr. Loomis testimony itself did not identify a Staff or Intervenor witness to which he was responding.

Nonetheless, IBEW claims that ComEd is moving to strike portions of Mr. Loomis' testimony that addresses the direct testimony of Citizen Utility Board ("CUB") witness Mr. Christopher Thomas. However, Mr. Loomis' brief mention of Mr. Thomas' testimony is merely an effort to address an issue in ComEd's witness Mr. Val Jensen's direct testimony. Mr. Loomis begins addressing the job creation issue on page 3, line 37 of his rebuttal testimony. On page 4, line 52, Mr. Loomis notes that Mr. Thomas relied on Mr. Jensen's testimony to conclude that the receipt of stimulus money would be beneficial to the Illinois economy. Mr. Loomis ends his discussion of job creation on page 6, line 101, without ever mentioning Mr. Thomas again or why his conclusion is incorrect. The testimony simply does not rebut Mr. Thomas' direct testimony. This is by Mr. Loomis' own formulation of his relevant conclusion:

... with regard to the creation of 3,800 additional jobs, I conclude that although ComEd has made the claim, both in its application for ARRA funding and in the testimony of Val R. Jensen, that the CASGrid will result in the creation of a total of 3,800 jobs, I have seen nothing in the record to support this claim and the only evidence regarding numbers of jobs as a result of the CASGrid shows that ComEd actually plans to eliminate jobs and reduce labor expenditures as a result of the CASGrid project.

Loomis Reb., IBEW Ex. 2.0, 2:22-3:27. In short, it is clear that the purpose of even this portion of Mr. Loomis' "rebuttal" testimony is to respond to Mr. Jensen's direct testimony. This is not rebuttal testimony and must be stricken.

The entire remainder of IBEW's Response is concerned with excusing Mr. Loomis' improper testimony and arguing that the Commission should accept it despite the fact that it is not rebuttal. None of IBEW's arguments are valid.

ComEd's Response to Data Request IBEW 1.02 Was Complete

IBEW complains that it was forced to provide additional direct testimony in Mr. Loomis' "rebuttal" testimony because ComEd did not provide a complete response to a data request. IBEW makes this entire argument with out describing the offending response or providing any particulars. This is because the allegation is untrue. ComEd completely and timely responded to the data requests received.

The particular data request at issue is IBEW 1.02, which is attached to Mr. Loomis' direct testimony, IBEW Ex. 1.1. Data request IBEW 1.02 asks:

Please provide records of all Engineering Investigation Orders ("EIOs") or other reports of unsafe conditions submitted by ComEd meter readers since January 1, 2008, including date, location and type of hazard or condition reported. To the extent the EIOs or other reports contain coded information, please supply a key to that code.

This is exactly what ComEd provided. On October 9, 2009, ComEd provided information for code classifications for which there would be reports on unsafe conditions included. As a follow up data request, IBEW 2.01 asks for reports for all code classifications:

In addition to the information supplied in response to IBEW DR 1.02, please provide the same information, in the same format and for the same time period, for Meter Reader reports of the following conditions: AB- New Construction; AC- Fire; AD- Meter Gone; BI- Fire; BK- Painted; BL- Moisture; CD- Fire; F- Meter Seal Broke; GA- Upside Down Meter; GB- Hole in Glass; GF- Jumpered Thru; GH- Wired Direct; GI- No Meter Ring; GJ- Foreign Meter. As requested in Data Request IBEW 1.02, please supply the date (month and year) and location (reporting center) of the hazards reported. To the extent location information was not supplied for conditions detailed in ComEd's response to IBEW DR 1.02, please supplement that response accordingly.

IBEW Data Request IBEW 2.01 (attached hereto as Attachment A). Upon receipt of this data request, ComEd produced the requested information, and did so promptly.

The fact that the IBEW allegation is a pretext is also evidenced by the fact that ComEd received no phone call, email, letter or other communication from counsel for IBEW stating that the response to Data Request 1.02 was in any way incomplete.

Second, IBEW argues that “had ComEd responded fully to IBEW Data Request 1.02 prior to the date for submission of direct testimony by staff and intervenors, Local 15 would have had no need to submit additional testimony on this issue and could have fully addressed it in direct testimony.” IBEW Response, pp. 2-3. This claim, too, cannot be squared with the facts. ComEd filed its petition initiating this Docket on September 2, 2009, after months of litigation in a related docket. Nonetheless, IBEW waited nearly four weeks, until September 29, 2009, to intervene and serve its first set of data request on ComEd. ComEd has worked with Staff or Intervenors to expedite responses and ComEd has responded to data requests, on average, within 7.7 days. If IBEW’s time was short, it is not ComEd’s fault.

Moreover, in IBEW’s own cover letter accompanying the data requests in question, IBEW states that “Given the compressed timeliness of this proceeding, we ask that the responses be provided as soon as possible and preferably by October 13, 2009”¹, the very same day that their direct testimony was due. Nonetheless ComEd actually provided responses earlier than requested, responding to IBEW’s first set of data requests on October 7th (IBEW 1.04 and 1.05), October 9th (IBEW 1.02), and October 12th (IBEW 1.03).² IBEW cannot excuse its own improper rebuttal when ComEd responded to discovery completely and days earlier than requested.

¹ See Attachment B (emphasis added).

² Note that data request IBEW 1.01 was a “me too” data request, simply seeking responses to all other Staff and Intervenor data requests.

Matters Related to the Commission's Order in Docket No. 09-0263

IBEW argues that it was necessary to address the Commission's Order in Docket No. 09-0263 ("*09-0263 Order*") in rebuttal testimony because it was issued on October 14, 2009, the day after direct testimony was due in this proceeding. Once again IBEW is playing free and loose with the Commission rules and practice. If IBEW had any issue with the clarity of meaning of the *09-0263 Order*, the Public Utility Act ("PUA") provides relief in the form of a petition for rehearing. 220 ILCS 5/10-113(a). *See also* 83 Ill. Admin. §200.210. Section 10-113(a) of the PUA provides in part

Within 30 days after the service of any rule or regulation, order or decision of the Commission any party to the action or proceeding may apply for a rehearing in respect to any matter determined in said action or proceeding and specified in the application for rehearing.

220 ILCS 5/10-113(a) (emphasis added). Therefore, if there was any question regarding the *09-0263 Order*, the appropriate relief for IBEW, as a party to that proceeding, was to file a petition for rehearing.

Further, in its response, IBEW states "Although ComEd feigns incomprehension as to why Local 15 would raise an issue related to a previous docket, ComEd knows full well that these are the same meters and the same technology that ComEd proposes to implement in its CASGrid project that is the subject of this docket." IBEW Response, p.3. (boldface omitted). IBEW's argument is nonsensical. The meters are the same; and IBEW knew that the technology was the same when it filed its direct testimony. The issue of in-person visits by meter readers or other utility staff was an issue IBEW was free to raise in direct testimony, regardless of when the *09-0263 Order* was served. Moreover, if IBEW actually had an issue about compliance with the *09-0263 Order*, that issue belongs in Docket No. 09-0263, not in improper "rebuttal" testimony in this Docket.

IBEW Remaining Arguments Are Equally Unpersuasive

IBEW argues that *Northern Moraine Wastewater Reclamation Dist. v. Illinois Commerce Comm'n*, 392 Ill. App. 3d 542, 575 (2nd Dist., 2009) is inapposite. IBEW Response, p. 5. IBEW is wrong. Whether a schedule set by an agency or court spans days, weeks, or months is not relevant. The *Northern Moraine* court found that the ALJ's schedule directed the District to respond to other parties' rebuttal testimony with its own testimony. *Northern Moraine Wastewater Reclamation Dist. v. Illinois Commerce Comm'n*, 392 Ill. App. 3d 542, 575 (2nd Dist., 2009). However, the District's witness admitted that was not the purpose of his testimony. *Id.* The court, therefore, held, "Because Trotter's rebuttal testimony did not rebut the rebuttal testimony of Rockwell or the ICC staff, the ALJ did not abuse his discretion by barring Trotter's testimony at issue." *Id.* According to the ALJs' schedule in this Docket, IBEW's rebuttal testimony was to address the direct testimony of Staff and other parties. IBEW did not do that.

Finally, IBEW complains that it did not obtain certain information until after October 13, and that in order to ensure a full record, its testimony should not be stricken. As noted above, any delay in receiving discovery responses lays at IBEW's own feet. Moreover, an argument that "new" information should be admitted could be used to justify any late submission of testimony or other evidence. The IBEW also ignores the Commission's own Rules of Practice concerning submission and actions that fail to comply with ALJ or Commission orders. The Commission rules state: "Any party or staff witness who fails, without good cause shown, to comply with an order of the Hearing Examiner for the service of testimony and exhibits may be limited in the presentation of evidence in the proceeding or otherwise restricted in participation, to avoid undue delay and prejudice." 83 Ill. Admin Code §200.660. The IBEW certainly has not

shown good cause and the prospect that their improper testimony might as a result be excluded cannot logically itself be the “good cause” that allows it to be admitted.

Moreover, the fact that the testimony should be stricken does not mean that the claims IBEW wishes to make will go untested. Discovery is customarily conducted in Commission proceedings for purposes other than to file rebuttal testimony. Discovery is regularly admitted at evidentiary hearings and used to conduct cross examinations. Assuming it complies with the rules of evidence, IBEW retains these avenues should it wish to admit this discovery into the records.

WHEREFORE, ComEd requests the above mentioned portions of the rebuttal testimony of IBEW witness Mr. Brian Loomis be stricken or, in the alternative, that ComEd be granted leave to file rebuttal testimony to Mr. Loomis on November 3, 2009.

Dated: October 26, 2009

Respectfully submitted,

COMMONWEALTH EDISON COMPANY



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