

**BEFORE THE  
ILLINOIS COMMERCE COMMISSION**

Robert Zimmerman	)	
	)	
v.	)	Docket No. 10-0262
	)	
Commonwealth Edison Company	)	
	)	
Complaint Pursuant to Section	)	
10-108 of the Public Utilities Act	)	

**INITIAL BRIEF OF ROBERT ZIMMERMAN**

The issue here is very simple: can Commonwealth Edison Company (“ComEd”) rely upon the clearance guidelines set forth by the National Electrical Safety Code (“NESC”) to restrict construction outside of its easement? In this case, ComEd has taken the position that even when ComEd constructs a 7,200 kV line at the far edge of an easement, it can effectively extend its rights beyond that easement by requiring its customer to absorb the cost of moving the line to maintain the 7.5 foot horizontal clearance between its line and a structures. As shown below, ComEd has no such right.

**STATEMENT OF FACTS**

On June 16, 1944, ComEd obtained a 10 foot easement to construct a power line in a north-south direction in the back yards of lots on the west side of the block in Park Ridge bounded by Home Ave. on the west, Seminary Ave. on the east, Crescent Ave. on the south and Prairie Ave. on the north. (ComEd Ex. 2) (*see* Zimmerman Ex. 1 for map of the area – this block is identified as block 210 [Tr. 18]. The easement is in the back of lots 001, 002, 006, 007 and 008). On September 20, 1944, ComEd acquired five foot easements just east of and adjacent to

the original 10 foot easement. (ComEd Ex. 2) These lots were perpendicular to the lots with the original easements, so this new five foot easement was along the sides of the homes on lots 09 and 03 in Block 210 in Zimmerman Ex. 1. Although the first 10 foot easement was recorded, the five foot easement was not recorded. For some unknown reason, rather than build the line inside the 10 foot easement that ran through the back yards of homes along Home Ave. or at the very least, centered in the 15 foot combined easement, ComEd chose to build a 7,200 kV line on the eastern edge of the easement, placing its poles inside the five foot easement that ran along the side of the homes on Lots 003 and 009. As can be seen from ComEd Ex. 3, the easternmost conductor is begins several feet inside the five foot easement at the south end of the Zimmerman property and angles eastward as the line heads north. At the northern edge of the Zimmerman property, that conductor is exactly on the far easternmost edge of ComEd's 15 foot easement. That line and those poles, built in 1944, still stand in the same location. At the time, this choice did not affect the homes on Lots 003 and 009 because they were single story houses and the lines passed well above them.

In 2006, Robert Zimmerman and his wife purchased the home on Lot 009. Mr. Zimmerman and his wife decided to tear down the original one story house and build a new two story house. The original plan was to move the garage and driveway from the east side of the lot where they had been originally, to the west side of the lot, which would have put the driveway under the ComEd line. The City of Park Ridge objected to that proposal, however, and required that the driveway remain on the east side of the lot. Mr. Zimmerman then had the plans drawn to place the structure in the same location as the original building and the city gave approval of the construction. Mr. Zimmerman then formally applied for a permit with the City of Park Ridge (ComEd Ex. 4), including with that application a survey of the lot with the new

construction (Zimmerman Ex. 2) and blueprints. During construction, city inspectors came and approved each step of construction, including the completion of foundation and framing.

(Zimmerman, Tr. 12-15). The new home has a foundation that is in the same east-west location as the original home, but now extends further north. The setbacks on both the east and west side are five feet, as they were with the original home. (Zimmerman, Tr. 36).

After the second story was built and the roof was completed, Mr. Zimmerman noticed that the power line was close to the west side of the house. He therefore contacted ComEd to find out what needed to be done. (Zimmerman, Tr. 15) ComEd's records show that he contacted the company on September 4, 2009. ComEd initially dispatched a single phase designer to visit the site because, like Mr. Zimmerman, it assumed it was a single phase line. Upon coming to the site, that designer realized it was a three phase line and ComEd then assigned a three phase designer to inspect the facilities. The three phase ComEd inspector visited the site and informed Mr. Zimmerman that there was insufficient clearance between the conductors and the house. (Weaver, Tr. 108) Sometime after that ComEd informed Mr. Zimmerman that he would be responsible for having the line moved and ComEd would not provide power to the building until he agreed to pay the cost of moving the line. (Zimmerman Ex. 3) ComEd also called the Occupational Safety and Health Administration ("OSHA"), which came to the house and stopped all construction within 10 feet of the line. Since late October, the west side of the house has remained unfinished and there is no power in the building. (Zimmerman, Tr. 25-26). Because of ComEd's denial of service, the basement has flooded because there is no power to operate sump pumps. (Zimmerman, Tr. 25). ComEd has not moved the line, and apparently will not do so unless Mr. Zimmerman pays the cost of that move.

ComEd estimates that the cost of moving the primary, 72,000 kV line serving the neighborhood, and the secondary 110/220 line serving Mr. Zimmerman's house, to be \$34,480.88 and the cost of burying those lines would be \$38,988.88. (ComEd Ex. 16). These costs do not include "tree trimming, underground relocation for service to the neighbor's homes, underground primary pipe and other miscellaneous charges as applied." ComEd Ex. 15.

## **ARGUMENT**

As shown below, ComEd cannot extend its easement beyond the five feet it has on Mr. Zimmerman's property, especially when, as here, that easement was not recorded. Even if somehow Mr. Zimmerman must pay ComEd the costs of creating sufficient clearance, the Commission's rules do not require the 7.5 feet that ComEd has insisted upon in this proceeding. This Commission has authority to order ComEd to maintain any clearance that was required by prior NESC standards, including the 3 feet allowed in the 1961 NESC. Such a ruling would allow for a far less expensive ally arm or vertical construction solution that would also minimize impact on the neighborhood and minimize tree trimming. Finally, while ComEd's tariffs may allow it to charge customers for moving circuits used to serve those customers, they do not allow it to charge for moving costs of the 7,200 kV lines used to serve an entire neighborhood. Thus, at most, Mr. Zimmerman would be responsible for moving the 110/220 secondary line serving his house to a location that meets the less stringent 1961 NESC.

### **I. ComEd Cannot Rely Upon the NESC to Extend its Easement.**

ComEd has a five foot unrecorded easement on the west side of Mr. Zimmerman's property. While an unrecorded easement can still be effective, it is limited by the express terms of that easement: As stated by the Illinois Appellate Court in *Duresa v Commonwealth Edison Co.*, 348 Ill. App. 3d 90 (1<sup>st</sup> Dist. 2<sup>nd</sup> Div., 2004).

Where an easement exists by express grant, its use must be confined to the terms and purposes of the grant." 28A C.J.S. *Easements* § 160, at 370. If an easement is limited in scope or purpose, the property owner is entitled to prevent the burden of the easement from being increased. *Consolidated Cable Utilities, Inc.*, 108 Ill. App. 3d at 1040.

*Duresa* 348 Ill. App. 3d at 101-102

The easement ComEd holds on the Zimmerman property gives ComEd the authority to:

construct, maintain and renew their poles, wires, and necessary fixtures for the transmission and distribution of electricity for heat, light, power, telephone, and other purposes, together with the right of access to the same for the maintenance thereof, and also to trim from time to time such trees, bushes and saplings as may be reasonably required for the construction and efficient operation of said poles, wires and necessary fixtures, upon and over . . . the west 5 ft. of [the Zimmerman property].

ComEd Ex. 2.

ComEd has an easement for five feet on Mr. Zimmerman's property and nothing more.

Nothing in that easement sets forth clearance requirements. That easement does not grant ComEd the right to demand that Mr. Zimmerman maintain a distance outside of the five foot easement between any structures on that property and ComEd's line. Thus, while ComEd may have had the right to place its line on either edge of its total of 15 feet of easement, it took the risk that at some time in the future, that choice would result in needing to move the line in order to comply with national, state or local clearance requirements. Here, ComEd is attempting to make Mr. Zimmerman pay for the choice ComEd made 65 years ago and effectively extend the

reach of that easement by placing upon Mr. Zimmerman the cost of maintaining a horizontal clearance of 7.5 feet required by the NESC. According to ComEd witness Hooge, the line – or Mr. Zimmerman’s house, must be moved 6.5 feet. (Hooge, Tr. 80). In other words, ComEd is claiming to have an 11.5 foot easement on Mr. Zimmerman’s property, not the 5 foot easement it obtained in 1944. In fact, ComEd claims that it had the right to place a line at the far edge of an easement and then impose on Mr. Zimmerman the responsibility to keep the 7.5 clearance between ComEd’s conductors and any structures, effectively creating a 12.5 foot easement. (Hooge, Tr. 63-4). In other words, by placing on Mr. Zimmerman the responsibility to meet the NESC standards, ComEd is increasing the burden on the property beyond the express terms of the easement, a demand that is forbidden in *Duresa*.

## **II. ComEd’ Tariffs Do Not Authorize It to Require Mr. Zimmerman to Pay For Moving the Line.**

Recognizing that its easement does not give it the right to have Mr. Zimmerman pay to move the line, ComEd claims that its tariffs authorize it to impose that charge. ComEd is wrong. Its tariffs do not contain any provision that covers this set of facts – requiring a customer who builds a structure outside of ComEd’s easement to pay the cost of creating the clearance required by the NESC. ComEd has a five foot easement, not an 11.5 foot easement.

Moreover, ComEd is not requesting that Mr. Zimmerman pay for moving facilities serving solely Mr. Zimmerman. Rather, it is requesting that he pay to move a 7,200 kV line that serve an entire neighborhood. Nothing in ComEd’s tariff requires a customer to absorb that type of burden when they construct a home outside ComEd’s easement. While in certain circumstances, ComEd’s tariffs allow it to charge a customer the cost of moving facilities used to

serve **that** customer, they do not allow it to charge customers for moving facilities used to serve **other** customers. More specifically, ComEd tariff ILL. C.C. No. 10, Original Sheet No. 156 provides:

For a situation in which a retail customer anticipates the need for an alteration to or change in the distribution facilities provided by the Company for *such retail customer*, it is the retail customer's responsibility to notify the Company...  
(emphasis added)

That rule then goes on to require the retail customer to pay for any relocation, removal or alteration of those distribution facilities. ComEd Ex. 7. Here, the distribution facility provided by ComEd to serve Mr. Zimmerman is the 220/110 secondary line attached directly to the pole. That conductor could easily be shielded or moved to an alley arm to create the clearance required by NESC.<sup>1</sup> If ComEd must also move the 7,200 kV line serving the entire area, that is a cost its tariffs to not allow it to charge to a customer because those are not distribution facilities provided by the Company for Mr. Zimmerman. If the Commission believes that the meaning of "facilities provided by the Company for such retail customer" is ambiguous, which of course it is not, then such ambiguity must be held against ComEd because the drafter of the tariff is presumed to have used language intended to further its interests over those of its customers. *MCI Telecommunications Corp. v. Ameri-Tel, Inc.*, 881 F.Supp. 1149, 1156 (N.D. Ill. 1995).

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<sup>1</sup> Moreover, as shown in the next section of this brief, if ComEd must only meet the 1961 NESC clearance guidelines, then creating the required clearance for the secondary line would be even easier than ComEd claims in this proceeding.

### **III. The Commission Rule Allows ComEd to Use 1961 NESC Standards in This Case.**

ComEd is insisting on moving the pole and line or burying the line because it argues that it must create not only the 7.5 foot clearance required by NESC for the 7,200 kV primary line, but also the 10 clearance required by OSHA. Therefore, the company rejected less costly remedies such as an aerial cable because, while it would meet the 7.5 foot NESC standard, it would not meet the 10 foot OSHA standard. (Weaver, Tr. 129-30). As shown in the final section of this brief, this Commission should not require the use of OSHA clearance standards in this proceeding.

More importantly, however, ComEd has committed error by relying upon the current, NESC standards for new construction, standards that need not apply in this situation. Thus, ComEd discarded the solution of placing the primary line conductors on an alley arm that extends west of the existing pole because such a technique would not create a 7.5 foot clearance. (Weaver, Tr. 130-32). ComEd also discarded the solution of reconfiguring the three phase conductor so it ran vertically on the pole instead of horizontally, again because that would not create 7.5 foot clearance. (Weaver, Tr. 132). Because it insists on meeting the current NESC standards for new construction, ComEd claims it must either move the poles or bury the lines. Not only are those the most expensive solution, but they are also the most intrusive in the neighborhood. They would require notification of neighbors, the applications for permits, reconfiguration of secondary cables serving neighbors and tree trimming. (Weaver, 134-39).

None of this is necessary. ComEd has ignored the fact that it need not meet the current 7.5 foot horizontal clearance requirement for new construction in the NESC for the 7,200 kV primary line or the 5 foot horizontal clearance requirement for the 110/220 kV secondary line.

First, the Commission has authority to waive or modify the required clearances in instances of space limitations. 83 IAC 305.40 (a). Second, the Illinois Administrative Code allows ComEd to make modifications to the existing line that would comply with previous NESC clearance standards. Section 305.40 of this Commission's rules provides:

b) Existing Installations:

3) Where conductors or equipment are added, altered, or replaced on an existing structure, the structure or the facilities on the structure need not be modified or replaced if the resulting installation will be in compliance with:

- A) The rules which were in effect at the time of the original installation;
- B) The rules in effect at the time of a previous modification;
- C) The rules currently in effect.

83 IAC 305.40 (ComEd Ex. 10)

Similarly, the NESC provides for grandfathering of existing facilities. (Hooge, Tr. 89). According to ComEd witness Hooge, until 1961 the NESC provided for only a three foot horizontal clearance for 7,200 kV lines. (Hooge, Tr. 95). Thus, pursuant to the above rule, ComEd is authorized to move the conductors into a position on the existing pole using an alley arm or vertical construction such that the line meets the three foot clearance under the old NESC standard.

Such a clearance would not only be consistent with the NESC and the Commission's rules, but also consistent with the existing neighborhood. Since ComEd built the line in 1944, homes have been rebuilt or added a second story so that the existing clearances are extremely close. In fact, ComEd witness Hooge testified that there are a number of locations along this line that would not meet the current NESC requirements. (Hooge, Tr. 94). For example.

Zimmerman Ex. 4 shows the home exactly one block north of the Zimmerman home, on the

north side of Prairie Ave. with the same side lot as the Zimmerman home. As can be seen from that photo, that home was rebuilt to two stories with a driveway underneath the line (as Mr. Zimmerman had attempted to do but was denied by the City of Park Ridge). A cutout had to be made in the driveway to avoid the ComEd pole. (Zimmerman, Tr. 27-8, 33). Zimmerman Ex. 7 is a photograph of the home across the street from Mr. Zimmerman's house that shows how close the line is on the block south of Mr. Zimmerman's. (Zimmerman, Tr. 29). Exhibit 8 is a photograph of a home two blocks north of Mr. Zimmerman's house along the same line, showing a chimney that is extremely close to the same, 7,200 kV line. (Zimmerman, Tr. 30). ComEd considers those locations grandfathered, but for some reason, refuses to abide by the Commission's rule that provides for grandfathering of the Zimmerman home.

If ComEd moves the conductors vertically on the pole, or onto an alley arm that extends west, it would, under the Commission rule be altering conductors "on an existing structure." Thus, under the Commission rule, rather than focusing on whether the Zimmerman structure is new, ComEd should be focusing on whether the ComEd structure is new. It is not. In this case, if ComEd keeps the existing pole but modifies it to move the conductors away from the Zimmerman house, it falls under the Commission rule and can be modified in a manner to maintain three feet of clearance. If ComEd insists that this rule does not apply, then this Commission has authority under 83 IAC 305.40 (a) to waive the current standards due to space limitations.

#### **IV. OSHA Guidelines Are Not Relevant to This Proceeding.**

ComEd not only wants Mr. Zimmerman to pay to move the line 7.5 feet away from his home in order to comply with the NECS standard, but it even wants him to pay to move the line enough to create the 10 feet of clearance required by OSHA. This Commission should ignore that request. The OSHA rule cited by ComEd provides a 10 foot clearance standard for **nonqualified** workers. (ComEd Ex. 11B, para. 1910.333(c)(3)(i)(A)) Mr. Zimmerman can comply with the OSHA requirements by completing construction using qualified workers. In fact, even ComEd witness Weaver acknowledged that fact on cross examination, where he admitted: “if he hires qualified workers to put up the scaffolding up and a barricade, then the 7 foot 6 will do for him.” (Weaver, Tr. 131.) There is no need, as ComEd suggests, to permanently create a 10 foot clearance in order to meet an OSHA requirement that only applies during construction to unqualified workers. In any event, this Commission does not have authority to require utility customers to pay for clearance required by OSHA where that clearance is beyond this Commission’s own standards.

#### **CONCLUSION**

The Commission should grant the complaint of Mr. Zimmerman and issue the following findings:

1. ComEd’s easement does not allow it to require customers to pay for the cost of maintaining NESC clearances that extend beyond the boundary of that easement.
2. Because the placement of the conductors on the existing poles can be reconfigured to meet the clearance that was required by prior NESC standards, including the 3 feet

allowed in the 1961 NESC, such reconfiguration would fall within 83 IAC 305.40(b)(3)(A) and would meet this Commission's standards for clearance. The use of less expensive methods that could achieve such clearance, such as vertical alignment of the conductors or use of alley arms extending west of the existing poles would also be less intrusive to the neighborhood and result in less tree trimming than would occur by moving the poles or burying the line. Pursuant to that rule, or pursuant to 83 IAC 305.40 (a), ComEd should be directed to choose a method that is the most cost efficient means of meeting the 1961 NESC requirements.

3. ComEd is not required to maintain the clearances required by OSHA.
4. ComEd's tariffs only allow the company to charge customers for moving circuits used to serve those customers. Those tariffs do not allow ComEd to charge customers for the moving costs of facilities used to serve other customers. In this case, ComEd cannot charge Mr. Zimmerman the cost of moving the 7,200 kV lines.
5. To the extent that ComEd's tariffs allow it to charge a customer for moving distribution facilities, it may not do so in this case because any clearance issues are caused by ComEd's decision where to locate the lines. In this case, by locating the line on the eastern edge of a 15 foot easement along the side of houses, instead of the more prudent placement of either centered in the 15 foot easement or on the western edge of the 15 foot easement in the back yards of the homes along Home Avenue, ComEd caused the clearance problem and is responsible for all costs of correcting that problem. Thus, ComEd should absorb the full cost of reconfiguring both the 7,200 kV primary line and the 110/220 secondary line.

Dated: July 1, 2010

Respectfully submitted,

*s/ Stephen J. Moore*

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the Initial Brief of Robert Zimmerman has been served upon the parties reported by the Clerk of the Commission as being on the service list of this docket, on the 1st day of July, 2010, by electronic mail.

*/s/ Stephen J. Moore* \_\_\_\_\_

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