

**STATE OF ILLINOIS  
ILLINOIS COMMERCE COMMISSION**

<b>Robert Zimmerman</b>	:	
<b>-vs-</b>	:	<b>10-0262</b>
<b>Commonwealth Edison Company</b>	:	
	:	
<b>Complaint pursuant to Section 10-108</b>	:	
<b>of the Public Utilities Act.</b>	:	

**REPLY BRIEF OF ROBERT ZIMMERMAN**

**Introduction**

As shown in Mr. Zimmerman’s Initial Brief, there is no legal authority for ComEd to make Mr. Zimmerman pay ComEd’s cost of complying with the National Electric Safety Code (“NESC). In its Initial Brief, ComEd argues that there are three reasons why Mr. Zimmerman should pay ComEd to move its 7,200 kV line in order to come into compliance with the NESC standards: 1. ComEd’s tariff allows it to charge customers the cost of moving utility facilities, 2. Mr. Zimmerman’s house is inside ComEd’s easement, and: (3) There is no reason to transfer the cost of complying with Village of Park Ridge (“Village”) setbacks and Occupational Safety and Health Administration (“OSHA”) clearance standards. All of those reasons are invalid.

**I. ComEd’s Tariff Does Not Apply Here**

ComEd cites to various sections of its tariff that it claims entitle it to charge Mr. Zimmerman the cost of moving its line in order to comply with NESC clearance requirements. (ComEd Brief at 10-11). ComEd’s tariff does not apply to this situation because that tariff applies to facilities used to serve the customer, not facilities used to serve other customers:

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)

ComEd tariff ILL. C.C. No. 10, Original Sheet No. 156

Another relevant section of that same tariff page provides as follows:

Any relocation, removal, or alteration of distribution *facilities provided by the Company*, as required or requested by the retail customer, is provided in accordance with the provisions for providing nonstandard services and facilities. For a situation in which there is a change in the retail customer's operation, construction, or property, which in the judgment of the Company makes the relocation of the Company's distribution facilities necessary, the Company relocates such facilities in accordance with the provisions for providing nonstandard services and facilities.

(See ComEd Group Ex. 7, Tariff, ILL. C.C. No. 10, Original Sheet No. 156 (effective January 15, 2009))

Given the context of this paragraph, the phrase "facilities provided by the Company" clearly refers to facilities provided by the Company to serve that customer – not facilities installed by the Company to serve other customers.

In this case, ComEd is attempting to force Mr. Zimmerman to pay the cost of moving facilities used to serve an entire neighborhood – a 7,200 kV line. At most, ComEd's tariff would allow it to charge Mr. Zimmerman to move facilities such as the 110/220 kV line serving his home.

Regardless of whether the tariff applies to facilities used solely to serve Mr. Zimmerman or also serving a large portion of the Village of Park Ridge, ComEd's tariff does not allow it to charge a customer when it is ComEd that created the problem in the first place. Here, ComEd chose to place its poles on the far edge of its 15 foot easement. In fact, as can be seen from the survey commissioned by ComEd, ComEd Ex. 3, the line is exactly at the edge of that 15 foot easement at the north end of Mr. Zimmerman's

property. That exhibit shows that because the line angles from a few feet inside the easement to the very edge of the easement, the clearance between the house and the line grows increasingly smaller from south to north along the building. Moreover, ComEd chose to install that line inside the property line of lots on the east side of that line and thus along the sides of homes, instead of the back yards of homes, where there is much more open space. ComEd took the risk that its line would eventually need to be moved in order to accommodate a two story home on any of the side lots east of its line. It should not be allowed to use its tariff to avoid those costs.

The interpretation of ComEd's tariff must result in its application being just and reasonable. "A utility tariff, such as Rider 30, falls within the definition of a "rate" as contained in the Public Utilities Act (see 220 ILCS 5/3-116 (West 1998)), and that act mandates that all rates must be reasonable." *Bloom Tp. High Sch. v. ICC*, 309 Ill. App. 3d 163, 175 (1999, 1st Dist., 4<sup>th</sup> Div.) In *Bloom*, the Court applied just and reasonable principles and rejected ComEd's and the Commission's interpretation of ComEd Rider 30 to allow the Company unfettered discretion whether to obtain replacement power. The Court stated:

If Rider 30 were a garden variety contract, it would never be interpreted as permitting ComEd to exercise its discretion arbitrarily, capriciously, or in a manner inconsistent with the reasonable expectations of the parties. Absent an express disavowal, every contract, as a matter of law, contains an implied covenant of good faith and fair dealing which requires a party vested with contractual discretion to act reasonably in its exercise. . . . Although a utility tariff has the force of law and is not considered to be a contract, we fail to see any logic in a rule absolving a public utility from acting reasonably in the exercise of its discretion merely because it is vested with such power by a tariff as opposed to a contract.

*Bloom Township*, 309 Ill. App. 3d at 175 (citations omitted.)

Given the totality of the circumstances here, it is not just and reasonable for ComEd to use its tariff to, in effect, obtain an easement that goes far beyond the five feet it obtained in 1944.

## **II. The New Building Does Not Violate ComEd's Easement**

ComEd argues that both the foundation and the eaves of the new house of Mr. Zimmerman are located inside ComEd's easement. Therefore, "ComEd is certainly entitled to payment for moving its facilities to avoid the clearance issue created by the Complainant's inconsistent occupation of the easement area." (ComEd Brief at 11).

ComEd's argument that the foundation is inside ComEd's easement is almost literally hairsplitting: 3/100 of a foot to be exact. The survey Mr. Zimmerman provided to the Village when he requested a building permit showed that the south end of the west foundation was 4.97 feet from the property line and the north end was 5.0 feet from the property line. (Zimmerman Ex. 2). ComEd's survey found that those distances were 4.92 feet and 5 feet respectively. (ComEd Ex. 3) While ComEd's survey shows the foundation to be slightly closer to the property boundary, it is still under an inch and more importantly, it shows there is a margin of error in surveys. This fact is confirmed by a comparison of the clearances found by the two surveys on the east side of the building. ComEd's survey found the building to be 10.01 feet from the property line (ComEd Ex. 3), while Mr. Zimmerman's survey found the building to be 9.96 feet on the north end and 9.97 feet on the south end. As can be seen, surveys of the same location can vary by fractions of an inch. Thus, even the 4.97 feet found by Mr. Zimmerman's survey may be in error and there may be no encroachment whatsoever. In any event,

whether the foundation is 3/100 of a foot or 8/100 of a foot inside the easement, it is irrelevant as long as this fact is not resulting in the need to move the line. Of course, it is not. Regardless of whether the line needs to be moved to create the 7.5 foot clearance required by the current NESC standard or the 3 foot clearance required by the 1961 NESC standard, such a move is not required by the fact that the foundation is a fraction of an inch closer than five feet from the property line. It is caused by the fact that ComEd chose to build its line on the far edge of the easement creating no room for NESC clearances. Moreover, ComEd's easement does not prohibit the land owner from erecting facilities under or alongside its line. It merely gives ComEd the right to construct and operate a line. The location of the foundation does not affect that line.

It is also important that the new foundation was laid in the same place as the old foundation. (Zimmerman, Tr. 36). If ComEd had no problem with the old foundation, it cannot impose tens of thousands of dollars of cost of Mr. Zimmerman now to correct a problem that, if it exists at all, has existed since the original home was built.

ComEd's argument that the eaves encroach into its easement is equally invalid. As can be seen from ComEd Ex. 14, the original house also had eaves that extended into ComEd's easement. In fact, viewing that photograph and the photographs of the new structure (ComEd group Ex. 9), it appears that the new eaves are considerably more narrow than the old eaves. This is important because ComEd's easement is unrecorded. While ComEd may be able to rely on *Duresa v. Commonwealth Edison Co.*, 348 Ill. App. 3d 90, 100-01, 807 N.E.2d 1054, 1062 (1st Dist. 2004) for the proposition that Mr. Zimmerman was on constructive notice that there was an easement for a power line, he could not have been on constructive notice that he must build a house with eaves that stay

outside a five foot easement because the existing house had eaves that extended well into that five foot area – more so than the house he eventually built.

Finally, ComEd’s argument is contrary to the law addressing the respective rights of easement holders and property owners.

In the construction of instruments creating easements, it is the duty of the court to ascertain and give effect to the intention of the parties. " 28A C.J.S. *Easements* § 57, at 233 (1996). See *McMahon v. Hines*, 298 Ill. App. 3d 231, 236, 697 N.E.2d 1199, 232 Ill. Dec. 269 (1998).

*Duresa*, 348 Ill. App. 3d at 101.

Here, the fact that the original home was constructed with a foundation that may have been a fraction of an inch within the easement and an eave that was well inside the easement, there was clearly an intention of the parties to allow some portion of the house to be within the easement. Additionally, it is clear that the utility anticipated that homes in this area could be two stories high. ComEd Ex. 1, is the Declaration of Protective Covenants for six of the lots in the block where the Zimmerman house is located (Block 3) including lot 11, which is the lot directly north of the Zimmerman lot and is also a side lot adjacent to the east of ComEd line (see Zimmerman Ex. 1 for map of the area showing the lot numbers). ComEd Ex. 1 provides that homes on those lots could be up to two and a half stories high. ComeEd Ex. 1, para. VII.

Even without that express warning to ComEd that homes could reach two and a half stories, case law supports the concept that no court would interpret ComEd’s easement to prohibit a property owner from building a two story home: “Courts tend to strictly construe easement agreements so as to permit the greatest possible use of property by its owner. *McMahon*, 298 Ill. App. 3d at 236-37.” *Duresa*, 348 Ill. App. 3d at 101.

Similarly, “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.

Building a two story house, similar to others in the neighborhood, that is no closer to the ComEd line than the existing house, is consistent with that principle of greatest possible use. It should also be noted that it would not have done Mr. Zimmerman any good to build the new house on the far eastern edge of his property. Given the fact that the Village has a five foot setback requirement and the existing structure is ten feet from the eastern property line, the house could have only been moved five feet east. Yet Mr. D’Hooge testified that the line needs to be moved horizontally 6.5 feet or vertically 9 feet in order to comply with NESC requirements. (Tr. 80, 90). So Mr. Zimmerman’s options would have been to build a one story house or build a particularly narrow two story house. Neither is the “greatest possible use of property by its owner.”<sup>1</sup>

Finally, forcing Mr. Zimmerman to pay ComEd’s cost of complying with the NESC clearance requirements imposes a huge cost on him that is not anticipated in ComEd’s easement. “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. Nothing in the easement gives ComEd the right to clearance beyond its five foot easement. Even if one could somehow imply such a right in the easement, such a right would only be for clearance required on the date the easement was granted. In 1944, if there were any

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<sup>1</sup> This fact shows that ComEd’s argument that Mr. Zimmerman should have notified it before he began construction (ComEd Brief at 5-6) is a red herring. Even if he had done so, there was no construction short of building a one story home or building a narrow two story home that would have prevented this Complaint proceeding.

NESC clearance requirements, they were either three feet, as set out in the 1961 standards, or they were non-existent. ComEd cannot now demand that a 65 year old easement allows it to claim the right to 7.5 feet of clearance that it was first established by NESC a few years ago.

### **III. The Village Setbacks and OSHA Clearance Requirements Are Not Relevant.**

ComEd argues that Mr. Zimmerman must pay the costs of moving the ComEd line in order to meet Village setback requirements and the OSHA clearance requirements. ComEd Brief at 14. The argument regarding Village setbacks is puzzling because there is no violation of Village setbacks and if there was, moving the line will not correct that violation. Mr. Zimmerman provided the Village the survey showing the foundation ranging from 4.97 to 5.0 feet from the property line. He also provided architectural drawing, so the Village was aware of the location of the foundation and that there would be eaves that extended beyond the foundation. (Zimmerman, Tr. 12-15) There is no evidence that the Village's setback requirement extends to eaves. In fact, because the construction plans were approved by the Village and Village inspectors reviewed the construction at each stage, including the laying of the foundation and framing (Zimmerman, Tr. 15), it is obvious that eaves are not part of the five foot setback requirement. In any event, if at this late date the Village decides that the setback requirement is not met, then the solution would be for Mr. Zimmerman to request a variance from the zoning requirement. Moving the ComEd line would solve absolutely nothing.

The argument regarding OSHA clearances addresses the request in Mr. Zimmerman's Complaint that ComEd move the line 10 feet in order to meet the OSHA

requirement. As was implied in Mr. Zimmerman's Initial Brief (but admittedly should have been stated explicitly), he is no longer making that request. Evidence presented during the hearing by ComEd, including both the OSHA requirements and the testimony of Mr. Weaver, showed that the OSHA clearance requirement is for non-qualified workers. (ComEd Ex. 11B, para. 1910.333(c)(3)(i)(A); Weaver, Tr. 131.) Mr. Zimmerman is willing to absorb the cost of retaining workers qualified to work near a 7,200 kV line, so there is no need to move the line to create 10 feet of clearance. It should be noted that this willingness to hire workers qualified to work near power lines rebuts ComEd's argument that Mr. Zimmerman is attempting to shift to ComEd all of the costs of maintaining proper clearances. If ComEd had built its line further west in its easement, Mr. Zimmerman would not need to absorb the cost of these qualified workers. Nevertheless, in order to minimize ComEd's cost, he has recommended that the Company move the line a sufficient distance to comply with the 1961 NESC three foot clearance requirement. Even if ComEd insists on moving the line 7.5 feet to comply with the current NESC requirement, Mr. Zimmerman would still be left with the extra construction costs of complying with OSHA requirements.

#### **IV. Response to ComEd Statement of Facts**

Although there are several statements in the "Testimony and Evidence" section of ComEd's brief that are contrary to the evidence, one statement deserves special attention

ComEd's brief claims that the NESC requirements apply to "new construction, like that done by Zimmerman." (ComEd Brief at 7.) Thus, ComEd eliminated any reconfiguration of its line that left less than 7.5 feet clearance under the NESC rules for

new construction. ComEd's brief demonstrates its confusion regarding utility facilities and non-utility structures under NESC and this Commission's rules. The NESC grandfathering clause is as follows:

Existing installations including maintenance replacements that currently comply with prior editions of the code need not be modified to comply with these rules except as may be required for safety reasons by the administrative authority.

(D'Hooge Tr. 89)

The phrase "existing installations including maintenance replacements" clearly refers to the utility's facilities. The NESC covers far more than clearance between utility facilities and buildings, signs etc. This NESC provision, labeled "Application of the Code" applies to all of these provisions, not just clearances. Thus, the installations referred to in this provision are the utility's facilities, not the customer's structure.

The Commission's rule is even more explicit. Section 305.40(a) addresses "new installations and extensions." Obviously, extensions refer to extension of existing utility lines, so this section applies to utility installations. Section 305.40(b)(1) states that "existing installations . . . need not be modified" under certain conditions." This Commission has no authority to order the owners of buildings, signs bridges etc. to modify their facilities – it only has authority to order utilities to modify their facilities. So again, this section is referring to utility facilities, not non-utility structures.

Finally, Section 305.40(b)(3) is the provision that applies to his proceeding:

Where *conductors or equipment* are added, altered or replaced on an existing structure, the structure or 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; or

C) The rules currently in effect.

(ComEd Ex. 10, emphasis added)

This provision specifically refers to conductors or other equipment – not to non-utility structures. Also, as with the NESC, this provision applies to all of the code requirements, not just clearance of utility facilities from non-utility buildings and other structures. Finally, as noted previously, this Commission has no authority to order non-utilities to modify their structures in order to comply with the NESC rules, so the provision referring to such modifications can only apply to utility installations. The history of this provision also demonstrates its applicability to utility installations and not non-utility structures. In its order in ICC Docket 93-0034, this Commission issued its order submitting this rule to the Joint Committee on Administrative Rules for a second notice period. In that order, the Commission stated:

Central Illinois Public Service Company ("CIPS") filed a comment requesting that certain language be added to the proposed amendment to make clear what standards apply to the upgrading of facilities. CIPS offered language intended to clarify that when a utility modifies an installation that has previously been upgraded, the utility may either upgrade that installation to the currently effective Commission rules or leave it in compliance with the rules that were in effect at the time of the previous upgrading.

ICC Docket No. 93-0034 Order (Oct. 27, 1993) p. 1.

As can be seen, the only discussion there was how the rule applied to utility facilities. In summary, Section 305.40 addresses utility facilities, not the buildings or other structures owned by non-utilities.

By reading the NESC and this Commission's grandfathering clauses to apply to non-utility structures instead of utility structures, ComEd has inflated the cost of

complying with those standards. It only needs to move its line three feet, which it can accomplish without the need to move its poles. If ComEd is unwilling to read the NESC and Commission standards in that fashion, then this Commission should exercise its authority under Section 305.40(a) to waive the rules, which it can do in response to “space limitations.” 83 IAC 305.40(a) Requiring ComEd to pay the cost of moving the line enough to create 3 feet of clearance, while Mr. Zimmerman pays the cost of hiring workers that are qualified by OSHA to work near that line, is a fair allocation of costs between the parties. A commitment by Mr. Zimmerman to comply with OSHA standards would also meet the additional requirement in Section 305.40(a) that waiver of the rules be accompanied by special working methods. *Id.*

### CONCLUSION

For the reasons stated above and in the Initial Brief of Robert Zimmerman, the Commission should grant the relief requested in that initial brief.

Dated: July 9, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the Reply 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 9th day of July, 2010, by electronic mail.

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

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