

**STATE OF ILLINOIS**  
**ILLINOIS COMMERCE COMMISSION**

**Commonwealth Edison Company** :  
: **Docket No. 10-0467**  
**Proposed General Increase in Electric** :  
**Rates** :

**VERIFIED REPLY IN FURTHER SUPPORT OF MOTION TO STRIKE CERTAIN  
PORTIONS OF COMED’S RESPONSE TO THE PETITION FOR  
INTERLOCUTORY REVIEW OF THE  
COALITION TO REQUEST EQUITABLE ALLOCATION OF COSTS TOGETHER**

The Coalition to Request Equitable Allocation of Costs Together (“REACT”), by its attorneys DLA Piper LLP (US) and pursuant to Section 200.190 of the Rules of Practice of the Illinois Commerce Commission (“Commission”), respectfully replies in further support of its Motion to Strike Certain Portions of the Response of Commonwealth Edison Company (“ComEd”) to REACT’s Petition for Interlocutory Review (“REACT’s Petition”).<sup>1</sup>

ComEd’s October 22, 2010 Response to REACT’s Motion to Strike states, without citation to its earlier filings, that all of its arguments “were each made below.” (ComEd Response to Mot. to Strike at 2.) That is simply not accurate, as explained in REACT’s Motion to Strike. REACT will not reargue the points it made, and also will not respond to ComEd’s improper attempts to bolster its original and new arguments.

REACT replies briefly, however, to address ComEd’s inaccurate view of what arguments and factual assertions are properly presented to the Commission on interlocutory review of the ALJs’ Ruling. ComEd appears to think that it can provide any argument or fact at any time, in

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<sup>1</sup> The members customer members of REACT currently are: A. Finkl & Sons Company; Aux Sable Liquid Products, LP; the City of Chicago; Flint Hills Resources, LP; FutureMark Paper Company (formerly known as the Alsip Paper Condominium Association); the Metropolitan Water Reclamation District of Greater Chicago; PDV Midwest Refining LLC; United Airlines, Inc.; and Wells Manufacturing Company. All of these REACT customer members participated in the 2007 ComEd Rate Case and the 2008 ComEd Special Investigation Proceeding as members of REACT. REACT’s supplier members currently are Commerce Energy, Inc.; Integrys Energy Services, Inc.; and Interstate Gas Supply of Illinois, Inc. The positions stated herein do not necessarily represent the positions of any individual member of REACT. The City of Chicago does not join in this Reply.

its sole discretion, even if it failed (by choice or by accident) to provide that information for the ALJs' consideration in the first instance. ComEd's view is wrong. It cannot add new facts or arguments, especially at the interlocutory appellate stage.

ComEd's Response to REACT's Motion to Strike asserts without citation that "there is no policy or rule limiting the facts or arguments the Commission can hear." (ComEd Response to Mot. to Strike at 2.) That statement is incorrect. The basic concept of an "appeal" undercuts ComEd's view, and it is uncontroversial, black letter law that "[a] party may generally not rely on matters outside the record to support its position on appeal." (*Keener v. City of Herrin*, 235 Ill. 2d 338, 346 (2009).) ComEd simply disregards that rule, and fails to cite any authority to the contrary.

Contrary to ComEd's statement, the Commission itself specifically discussed the policy against improper expansion of an appellate record in recent circumstances involving a Petition for Interlocutory Review. The minutes from the Commission's January 7, 2009 Bench Meeting indicate that, during a discussion of the record on an interlocutory appeal, "Commissioner O'Connell-Diaz expressed concerns that the Petition for Interlocutory Review contained information not presented to the ALJ by the attorneys; she cautioned the attorneys to review the Commission's rules of practice and have the appropriate information for the ALJ to review in the future." (ICC Docket No. 08-0364, *BlueStar Energy Services, Inc. v. American Energy Solutions, Inc., et al.*, Minutes of the Commission's Jan. 7, 2009 Bench Meeting at 2.)

The policy that Commissioner O'Connell-Diaz articulated at the Bench Meeting was also summarized by the Administrative Law Judge in his December 15, 2008 Memorandum to the Commission in ICC Docket No. 08-0364, at 3, which discussed the submission of new information on a Petition for Interlocutory Review: "When that occurs, there really is nothing to

‘review,’ because the ALJ will not have had an opportunity to consider petitioner’s argument, along with the views of the other participants in the docket, and render a thoughtful initial ruling.” In short, ComEd’s assertion that the Commission has not expressed a policy view on this issue is plainly inaccurate.

ComEd also refers to the Commission’s power of “*de novo*” review. (ComEd Response to Mot. to Strike at 2.) That reference is irrelevant to the question of the content of a record on appeal. “De novo” simply refers to the standard of review used by the reviewing authority when considering the decision brought before it on appeal. It has nothing to do with the content of the record supporting that decision.

ComEd’s reference to an appeal being decided “on any grounds” is similarly unavailing. (ComEd Response to Mot. to Strike at 3.) Indeed, the case quotation that ComEd provides on this point confirms REACT’s position and contradicts ComEd’s: the decision may be affirmed “on any basis supported by the record.” (*Id.*, citing *Cwik v. Giannoulis*, 237 Ill. 2d 409, 424 (1020); *City of Champaign v. Torres*, 214 Ill. 2d 234, 241 (2005) (quotation identical in both cases).) Thus, the Supreme Court makes it clear that the scope of review permitted on appeal is constrained by the record of what was presented to the initial decision-maker – which is directly contrary to the position that ComEd is trying to now argue. This point is driven home in footnote 1 on the same page of the *Torres* case that ComEd cites – there the Supreme Court specifically rejects an argument that was not properly raised before the decision makers who rendered the decision then appealed to the Supreme Court. (*See Torres*, 214 Ill. 2d at 241 n.1.)

ComEd also references Section 200.520(a) of the Commission’s Rules of Practice, and states – inaccurately – that Section 200.520(a) “expressly provides that parties may submit ‘any

offer of proof' with respect to a petition for interlocutory review.'" (ComEd Response to Mot. To Strike at 2.) Section 200.520(a) states, in relevant part:

The petition shall be filed with the Chief Clerk together with any offer of proof and shall be served upon the Hearing Examiner and upon Staff and all parties to the proceeding. Other parties and Staff may file responses within seven days of the filing of the petition.

(83 Ill. Admin. Code §200.520(a).)

By its plain language, Section 200.520(a) permits only the party filing the Petition for Interlocutory Review (i.e., REACT) to submit an "offer of proof." The responding party (i.e., ComEd) has no such right under the rule. This makes perfect sense – an "offer of proof" gives "the party aggrieved by the ruling" the opportunity to present evidence that may have been excluded by the ruling, so that the appellate authority "is then in a position to determine from the record the correctness of the ruling." (Black's Law Dictionary 1082 (6th ed. 1990).) The non-aggrieved party need not and should not make any offer of proof because it prevailed regarding the contested issue below. Thus, both the Commission's Rules of Practice and longstanding Commission practice on interlocutory review rebut ComEd's apparent position that it can present any information it wants on appeal.

The Commission should strike the new arguments ComEd raised in its response to the REACT Petition for Interlocutory Review and similarly should ignore any further support for those arguments improperly placed in ComEd's Response to REACT's Motion to Strike. Further, ComEd's addition of the completely new Hemphill Affidavit to attest to facts apparently known since the initial ComEd Motion to Supplement Testimony is similarly untimely and should be stricken.

Accordingly, for the reasons stated herein and in its Motion to Strike, REACT respectfully requests that the Commission strike the identified portions of ComEd's Response on

pages 12, 16, and 17, and the entirety of the Hemphill Affidavit, or, in the alternative, consider the summary responses to ComEd's new arguments contained in REACT's Motion to Strike.

Respectfully submitted,

**THE COALITION TO REQUEST EQUITABLE  
ALLOCATION OF COSTS TOGETHER**

By: /s/ Christopher J. Townsend  
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VERIFICATION

STATE OF ILLINOIS        )  
COUNTY OF COOK         )       ss:

Christopher N. Skey, being first duly sworn, deposes and says that he is counsel for The Coalition To Request Equitable Allocation of Costs Together; that he has read the foregoing document; and that the statements contained therein are true, correct and complete to the best of his knowledge, information and belief.

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Christopher N. Skey

Subscribed and sworn to before me  
this \_\_\_ day of October, 2010.

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Notary Public