

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

BEFORE THE
ILLINOIS COMMERCE COMMISSION

IN THE MATTER OF:)
)
WILLIAM LYNCH,)
)
Complainant,)
)
vs.) No. 09-0594
)
COMMONWEALTH EDISON COMPANY,)
)
Respondent,)
)
Complaint as to ComEd)
attempting to replace old)
infrastructure without my)
permission or an easement in)
St. Charles Township, Illinois.)

Chicago, Illinois
November 9, 2011

Met pursuant to notice at 11:00 a.m.

BEFORE:
LESLIE HAYNES, Administrative Law Judge.

1 APPEARANCES:

2 MR. BRYAN P. LYNCH
734 North Wells Street
3 Chicago, Illinois 60654
Appearing for the Complainant;

4 MR. MARK L. GOLDSTEIN
3019 Province Circle
5 Mundelein, Illinois 60060
6 Appearing for the Respondent.

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22 SULLIVAN REPORTING COMPANY, by
Steven T. Stefanik, CSR

1 JUDGE HAYNES: Pursuant to the direction of the
2 Illinois Commerce Commission, I now call Docket
3 09-0594. This is the complaint of William Lynch
4 versus Commonwealth Edison Company.

5 May I have the appearances for the
6 record, please.

7 MR. LYNCH: Brian Lynch on behalf of William.

8 JUDGE HAYNES: And your address?

9 MR. LYNCH: 734 North Wells Street, Chicago,
10 Illinois 60654.

11 JUDGE HAYNES: Thank you.

12 MR. GOLDSTEIN: For Commonwealth Edison Company,
13 Mark L. Goldstein, 3019 Province Circle, Mundelein,
14 Illinois 60060. My telephone number is (847)
15 949-1340.

16 With me this morning is Monica Merino of
17 ComEd.

18 JUDGE HAYNES: Thank you.

19 We are together for the first time in a
20 very long time. And I'll note for the record that
21 I've received several filings from the complainant;
22 one to strike the evidentiary hearing, which I have

1 no problem with. I realize parties aren't ready to
2 go ahead with that.

3 But the -- the complainant has also
4 filed an amended complaint and also seeks to set a
5 schedule for responding to that complaint and how
6 the rest of this proceeding should go forward. And
7 before we talk about the schedule for the rest of
8 the proceeding, I just want to have a conversation
9 about this amended complaint.

10 And my first feeling on reading this is
11 that this is awfully late in the proceeding to be
12 changing the complaint, especially without first
13 asking for leave from the ALJ to file an amended
14 complaint.

15 And also, that the amended complaint
16 seems to expand what you're looking for; and also,
17 that the -- not only that it expands it, that it
18 also includes claims that this Commission does not
19 have jurisdiction over, such as trespass, for
20 instance. This Commission doesn't have
21 jurisdiction over that sort of claim.

22 So as this complaint's written, it is

1 not -- I don't give you leave to file this amended
2 complaint.

3 MR. LYNCH: And, obviously, my -- it's not a
4 presumption that there's automatically leave
5 granted.

6 JUDGE HAYNES: Hm-hmm.

7 MR. LYNCH: It's something that I wanted to get
8 on file. I thought it had been styled or thought I
9 had just attached the thing indicating that I
10 wanted leave, since we didn't have a court date --

11 JUDGE HAYNES: Hm-hmm.

12 MR. LYNCH: -- that was necessarily pending at
13 that time, I wanted -- my thought was what we would
14 do is come today, get leave to file --

15 JUDGE HAYNES: Sure.

16 MR. LYNCH: -- and deal with the case management
17 to put things in process.

18 To date, there have been the original, I
19 think, very brief complaint on -- that was filed in
20 a pro se capacity --

21 JUDGE HAYNES: Hm-hmm.

22 MR. LYNCH: -- on the ICC's form without kind of

1 a context of what the issues were with the
2 expectation this would get resolved.

3 To date --

4 JUDGE HAYNES: And -- I'm -- and I don't want
5 you to think that I -- because you didn't ask for
6 leave, that that's the reason I'm not giving leave.

7 MR. LYNCH: Yeah.

8 JUDGE HAYNES: It's because you do cover so many
9 issues that the Commission doesn't have
10 jurisdiction over.

11 And when you say the -- you wanted to
12 provide context in relation to what the original
13 pro se complaint said, after reading your 19-page
14 amended complaint, I was left the feeling that I
15 even knew less of what was going on in this
16 complaint because the original pro se complaint
17 mentioned an issue with poles.

18 There's not even the word "pole" now in
19 the amended complaint and so I even am more
20 clueless as to what this complaint is about with
21 the filing of the amended complaint.

22 MR. LYNCH: I think --

1 JUDGE HAYNES: Factually, there's nothing in
2 this amended complaint.

3 MR. LYNCH: There's nothing -- when you say,
4 there's nothing in the amended --

5 JUDGE HAYNES: I mean, you said ComEd came on
6 your property. Okay. So ComEd came on your
7 property. Well, ComEd always goes on your
8 property.

9 What is it you're even -- what is this
10 complaint about? What have they -- what -- you
11 say, well, they put infrastructure on your -- well,
12 they always put infrastructure on. So what
13 infrastructure are you talking about?

14 MR. LYNCH: They have no property rights. They
15 have no easement rights. They have no --

16 JUDGE HAYNES: Does Mr. Lynch have ComEd utility
17 service?

18 MR. LYNCH: He does.

19 JUDGE HAYNES: Okay. So I'm sorry. I'm really
20 missing how ComEd isn't -- is supposed to get it to
21 you -- or I'm sorry. The complainant.

22 MR. LYNCH: Sure. Sounds like we're drifting

1 into some of the underlying facts or proofs of the
2 complaint, but --

3 JUDGE HAYNES: Well, but that the complaint's
4 got to have some sort of facts.

5 MR. LYNCH: Sure. And I think there are facts.

6 We talk about infrastructure because in
7 the context of this, ComEd doesn't have any
8 property rights to simply come on the property and
9 place infrastructure where it wants when it wants,
10 whenever it wants and expand that and increase the
11 volume of infrastructure.

12 If they simply say if there's something
13 that's intuitively -- record against title. It
14 says they have a utility easement -- which is
15 typically how utilities are placed is through
16 utility easements -- that would be one thing.
17 There is no utility easement on this piece of
18 property. There's no utilities meant for ComEd's
19 infrastructure at all.

20 Now, are there utilities in the
21 immediate area directly across the street for this?
22 Yes, there is, but there's none on the subject

1 property.

2 So unless there is some sort of
3 agreement or permission given from a property
4 owner, a third party does not have inherent
5 rights --

6 JUDGE HAYNES: What third party?

7 MR. LYNCH: Whether it be ComEd or anyone, but
8 ComEd specifically. They don't have any rights to
9 simply come onto the property and place
10 infrastructure on there as they see fit unless
11 there's some area that's prescribed as an easement
12 area.

13 JUDGE HAYNES: I -- I -- just -- this wasn't
14 going -- I'm not going to hold this against you for
15 filing an amended complaint or -- but I would like
16 you to tell me what infrastructure is at issue
17 here.

18 MR. LYNCH: The infrastructure here at issue is
19 all of ComEd's infrastructure.

20 What triggered the complaint is ComEd
21 coming onto the property, calling out the
22 sheriff -- coming out to the property, installing

1 equipment when someone's at home and not take --
2 not giving any notice about them coming on.
3 They're drilling onto the property, installing a
4 pole whilst there are occupants home and minors in
5 and around the area.

6 Then a discussion takes place to say
7 what are you guys doing here? Under what authority
8 do you have to come and place this on here and to
9 start just drilling in my yard? We can do it; get
10 out of here; and if you don't, we'll call the
11 sheriff. That's not, one, the proper way to handle
12 it.

13 But if you have an easement right and if
14 the property owner is wrong, what I'm looking at is
15 trying to figure out what authority ComEd has to
16 simply come onto a property.

17 If simply by ack- -- by receiving
18 utilities, you give carte blanche to a utility
19 company -- specifically ComEd -- to go anywhere
20 whenever, however with whatever equipment they
21 want, then that then, I guess, is something I
22 didn't -- I wasn't aware of. I thought that the

1 property owner would have discretion as it relates
2 to their property and property rights to determine
3 if they're willing to grant certain rights to a
4 utility.

5 Now, if ComEd could come and say, Look,
6 you don't want our equipment on here? Fine. We'll
7 remove our equipment and we won't provide you
8 service; if that is the end result, then I guess
9 that would be a conversation that the property
10 owner would have to be made aware of and then they
11 would have to define it, because I know there's
12 easements in this area and there's easements on
13 properties everywhere for utilities. And,
14 typically, they utilize those for the placement of
15 utilities. Here, they do not have it.

16 If there's not any limitation to what
17 they can do on this property, then I guess then
18 that's something that Mr. Lynch needs to be made
19 aware of.

20 JUDGE HAYNES: So we're talking about a pole? I
21 really need the basics here.

22 So on December 8th, I'm guessing -- is

1 that the date -- they came and they replaced a
2 pole.

3 MR. LYNCH: They added a pole or a pole was
4 placed onto the property, yes.

5 JUDGE HAYNES: Okay. And is the pole in a place
6 where there weren't utility lines before?

7 MR. LYNCH: No, there were utility lines in the
8 general area, yes.

9 JUDGE HAYNES: Okay. And it's just this
10 placement of this pole we're talking about.

11 MR. LYNCH: It's with regard to all of the --
12 all of the infrastructure.

13 They've said -- the question is -- and I
14 guess, since we're talking, you've already said
15 that we're not getting into another -- this is
16 going to be held against the --

17 JUDGE HAYNES: Yeah, it's just --

18 MR. LYNCH: -- the complainant.

19 The issue that we're talking about is
20 they have all of this infrastructure on the
21 property that services other properties in the
22 neighborhood. It's not necessary for the subject

1 property.

2 They are burdening the subject property;
3 have no easement rights, have no property. So what
4 triggered this is this pole.

5 JUDGE HAYNES: Okay.

6 MR. LYNCH: And this looking into it and saying,
7 Why do they have all of this stuff here if they
8 have no easement rights?

9 So, yes, this pole is what triggered it,
10 but it's looking at the entirety of the
11 infrastructure that is located on the property.

12 They have, as I said, infrastructure
13 that is not necessary for the subject property, but
14 yet, the subject property's being burdened so that
15 they can deliver services to other people in the
16 area.

17 And I don't want to narrow it down to
18 just a pole --

19 JUDGE HAYNES: No, I understand that.

20 MR. LYNCH: -- because it's far broader.

21 I mean, to say that we're here over one
22 pole and one incident on one day, I think, does

1 injustice.

2 If somebody showed up at my property or
3 Mr. Goldstein's property or anybody's property or
4 anyone walking down the street and said -- you come
5 home and there's a pole in your front yard; that
6 because you at some point agreed to take electrical
7 service, ComEd can do whatever they want whenever
8 they want with no notice?

9 I think that flies in the face of what
10 the average person, reasonable person would think
11 is acceptable.

12 JUDGE HAYNES: And is this a large property in
13 like a --

14 MR. LYNCH: I mean, it's -- when we say large, I
15 mean, it's out in unincorporated Kane County.

16 JUDGE HAYNES: Oh, okay.

17 MR. LYNCH: So in relation to other properties
18 no, it's not. It's probably of average size.

19 JUDGE HAYNES: And does the utility service,
20 like, come through the street and go to the house
21 and back or does the utility service come from the
22 street, like, go to the house and then go to

1 another house?

2 MR. LYNCH: No, it goes -- it goes, I think,
3 along the street to the house and then it goes --
4 it does -- there's a string or series of poles that
5 run parallel with the street and then jog up the
6 street.

7 It's at like an end line -- end of the
8 line that then turns and goes north. It goes
9 east -- or pardon me, starts from the east and goes
10 to the west along the front edge of the property
11 and then carries on and goes north because there's
12 a bend in the street.

13 JUDGE HAYNES: Oh, okay.

14 Like it goes from the street to the
15 house and then to the street?

16 MR. LYNCH: It --

17 JUDGE HAYNES: Of course, this is getting on the
18 record with my hand signals.

19 That's fine.

20 MR. LYNCH: That's why I was using the east/west
21 description.

22 JUDGE HAYNES: Right.

1 MR. LYNCH: The property sits to the south of
2 Grandma's Lane. And Grandma's Lane runs in an
3 east/west direction --

4 JUDGE HAYNES: Hm-hmm.

5 MR. LYNCH: -- at the point where the subject
6 property is that Mr. Lynch owns.

7 JUDGE HAYNES: Okay.

8 MR. LYNCH: At the point where Mr. Lynch's
9 property ends, the western boundary of the lot line
10 of his property, the road turns to the north. So
11 Grandma's Lane then runs north and south.

12 JUDGE HAYNES: Okay.

13 MR. LYNCH: The poles follow Grandma's Lane.
14 And as it runs along the road, a line comes from
15 those poles to provide service to Mr. Lynch's
16 house.

17 JUDGE HAYNES: Okay. So I guess my problem with
18 your -- the amended complaint, besides what I said
19 before, I really -- it doesn't -- for me, it's --
20 it didn't clarify at all what your complaint had to
21 do with because it was so -- it wasn't clear to me
22 what we were actually -- what infrastructure we

1 were talking about.

2 And so then if -- what is the relief
3 you're requesting?

4 MR. LYNCH: The ultimate relief would be
5 removing the utilities from the subject property --
6 removing the utilities from the subject property
7 that aren't necessary for the subject property or,
8 in the alternative, removing -- removing those
9 utilities so that there isn't -- want to make it
10 absolutely clear that there's not the ability for
11 ComEd to assert a property interest in this land,
12 and that's what we've been trying to do up until
13 now.

14 You say this is coming very late in the
15 game. We've spent and I spent a tremendous amount
16 of time trying to settle this only after I thought
17 we've come to terms saying we're not going to agree
18 to this.

19 We don't want to have infrastructure on
20 this property that ComEd, who's indicated that they
21 have pole sharing agreements -- suddenly now we've
22 got Comcast out there. We've got AT&T. We've got

1 a hundred other utility entities out there
2 utilizing this infrastructure and encumbering this
3 property, when, ultimately, at the end of the day,
4 ComEd didn't have the right to be there. How can
5 they give a right to a third party to start
6 utilizing and burdening this property.

7 And if, down the road, the property
8 owner wants to have the discretion to expand his
9 property, to change his property, and he says,
10 Well, you got this stuff here. I'd like to move
11 it. Fine. We'll move it, Mr. Lynch, but that'll
12 cost you \$15,000 to move.

13 JUDGE HAYNES: But let me go back for a second.

14 Just so I'm clear here that I'm making
15 sure I understand you, it's the complainant's
16 position that ComEd doesn't have the right to come
17 on your property for fixing the utility -- ComEd's
18 infrastructure?

19 MR. LYNCH: The position of the complainant is
20 that ComEd had no property rights interest in the
21 subject property. That's the issue is that they
22 have no property rights.

1 And maybe this might help clarify -- and
2 I can talk to the complainant. If this body's
3 position is that ComEd doesn't have to have any
4 property rights and that they can come on a
5 property and do whatever they want when they want
6 without notice, then I will take that and have a
7 conference with my client and advise him that you
8 have no authority to determine what happens on your
9 property when it comes to ComEd.

10 I thought that the property --

11 JUDGE HAYNES: I haven't said that, just so you
12 know.

13 MR. LYNCH: I know, but you're saying he's
14 getting electric and couldn't they come on there;
15 why couldn't they come on there and, inherently, in
16 all property rights, you hold all of those -- to go
17 back to our law school, all those bundles of
18 sticks.

19 The only one that can take a stick out
20 of there is the government pursuant to the eminent
21 domain authority. So you own your property subject
22 to eminent domain authority of the government.

1 Barring that, you have all the rights to
2 it, unless there's been an agreement or you've
3 given away some of those sticks in the bundle.

4 JUDGE HAYNES: Okay.

5 MR. LYNCH: That has never occurred here. And
6 ComEd has not asserted that they have any of that
7 either.

8 MR. GOLDSTEIN: Could I make some comment,
9 Judge?

10 JUDGE HAYNES: Sure. Wait.

11 Before you do, I did not say the
12 Commission said the Commission's position is that
13 ComEd can go on whatever. I was just making sure I
14 understood what the complainant was saying.

15 MR. LYNCH: But if you can -- and maybe just a
16 point of clarification on the body of law for me to
17 be sure that the complainant understands exactly
18 what it is that this body believes or is asserting;
19 that by accepting --

20 JUDGE HAYNES: I -- I -- I don't know. I don't
21 know the answer to that question. How much -- what
22 authority -- or I don't know what ComEd can go on

1 your property and do at this point. I haven't
2 thought about it.

3 So I -- don't think that I've told you
4 what the Commission's ruling is on what ComEd can
5 do on your property.

6 So go ahead, Mr. Goldstein.

7 MR. GOLDSTEIN: First of all, when ComEd went on
8 the Lynch property back on November 24th, 2009,
9 they did so to replace an existing pole. That pole
10 predated Lynch ever owning the property. All
11 right? That's number one.

12 Number two, we have provided to
13 Bryan Lynch, the attorney, the applicable tariffs
14 here. And it's clear to me in the tariffs that in
15 order to service the poles on the property, ComEd
16 has an absolute right to do so, whether it has an
17 easement or not.

18 Now, I looked at the complaint late last
19 night again in preparation for today, and it just
20 seems to me that the complaint really does not
21 spell out in the various counts where there are
22 claimed violations of the Public Utilities Act,

1 what exactly the violations are. And so I'm in
2 total agreement with your proposal that Mr. Lynch
3 file another amended complaint.

4 But even if he does so, it also seems to
5 me, after looking at the amended complaint that he
6 filed, it was instructive to me in the sense that I
7 ended up saying to myself, this matter does not
8 belong before the Commission. This matter belongs
9 in the Circuit Court.

10 If Mr. Lynch believes that his rights
11 have been violated to his property -- he has
12 certain property rights -- let him go to chancery
13 court and have that court, wherever it is, whether
14 it's -- and -- or whatever court there is out in
15 Kane County that handles this, let that Court
16 determine who has what rights in the property.

17 It just seems to me that, you know,
18 we're just wasting a lot of time here in a matter
19 that I don't think the Commission can really
20 resolve.

21 Who has what property rights, you know,
22 is a matter that should be a chancery matter. And

1 I know that Bryan Lynch, the attorney, has had
2 substantial experience handling these kinds of
3 matters in court and I have not.

4 MR. LYNCH: Just to reply to that, the law is
5 clear: Whether an entity has taken property under
6 the current ownership or under prior ownership does
7 not obviate the need of that entity, whether it be
8 the United States Government, the State of
9 Illinois, City of Chicago or Commonwealth Edison.

10 If you have taken property under the
11 constitution of Illinois and the United States, you
12 have to compensate the property owner.

13 So the fact that what -- something might
14 predate the complainant's ownership is 100 percent
15 irrelevant to the facts of any case, and there's
16 case law up and down on that issue. So I don't --
17 I think that that's kind of a red herring.

18 As it relates to the tariffs, the
19 tariffs -- again, to say that the tariffs allow
20 them to do this is built upon the presumption that
21 they had the right to be there in the first place.

22 And all we are looking to do and what

1 we've been trying to do is to formalize an absolute
2 clarity to give guidance to ComEd as well as the
3 property owners on a going-forward basis what it is
4 that they can and cannot do on the property so that
5 there is not any confusion.

6 Typically, an easement exists. As we've
7 talked with ComEd, they own the multiple easements
8 in the area that define the limits so that both the
9 property owner and ComEd know how far to the east
10 and west may we go on this property, how far to the
11 north and south may we go on another property,
12 because they have utility easements in and around
13 the whole area.

14 Was there an omission here years ago?
15 Was there a mistake years ago when this went in? I
16 don't know. But what we do know right now is ComEd
17 has no easements here and they have easements in
18 the area.

19 Why they omitted this I don't know. But
20 to say that we looked to the tariffs now and ignore
21 any underlying property rights, I think, evades the
22 ultimate question, which is what's the basis for

1 ComEd to have their stuff -- their equipment there.

2 And all we want to do and hoped to do
3 was to formalize this. But to the extent that
4 there's not a willingness to do so, we have to look
5 to the Public Utility Act itself. They can
6 exercise their eminent domain authority.

7 They haven't done so. This property
8 owner's bearing a burden greater or
9 disproportionate than other people receiving
10 services because they placed it on his property.
11 Those are all matters properly before this body.

12 Now, if there's certain counts in there
13 that are not, well, then those counts -- and this
14 Court can decide if it has jurisdiction -- then
15 those counts should not be before this body.

16 JUDGE HAYNES: Mr. Goldstein, do you have a copy
17 of that tariff?

18 MS. MONICA MERINO: Yes, we do.

19 JUDGE HAYNES: You've gotten this tariff from --

20 MR. LYNCH: I don't know.

21 MS. MONICA MERINO: It says General Terms and
22 Conditions, Page 149.

1 JUDGE HAYNES: Have you ever provided that to
2 the complainant?

3 MR. GOLDSTEIN: Pardon me?

4 JUDGE HAYNES: Have you provided that --

5 MR. GOLDSTEIN: Yeah, I believe so. I believe I
6 sent the tariffs to Mr. Lynch months ago.

7 MR. LYNCH: I thought I had gotten a page of the
8 tariff, but I'm not sure -- I don't know if this is
9 the one. I'd be happy, you know, to go to my
10 office later today and look and see.

11 MS. MONICA MERINO: And there's --

12 MR. GOLDSTEIN: I believe I've provided the
13 tariffs, Judge, to Mr. Lynch months ago. I can't
14 tell you exactly -- I don't have my records with
15 me, but I know I've provided that to you.

16 MR. LYNCH: No. I mean, I got -- I mean, I'm
17 not going to a -- I mean, I know Mr. Goldstein
18 provided me documents that he called a tariff.

19 It looked like there were several pages
20 just handed up to ALJ Harris (sic), and I know I
21 only have one in my hand, and I think I only got
22 one. Maybe I got more than one. I don't know.

1 MR. GOLDSTEIN: And I also made the comment to
2 Mr. Lynch, when I talked to him on the phone prior
3 to providing the tariff, that, in my judgment,
4 tariffs are law.

5 I mean, these are the things that are
6 approved by the Commission. And if we don't have
7 that to go by, Judge, then we're certainly in the
8 wrong place. And I think that's exactly the reason
9 why we should --

10 MR. LYNCH: I know -- when we were dealing with
11 the settlement agreement, because we had worked out
12 some terms to say, fine, you can utilize this
13 property on a going-forward basis, kind of like a
14 licensing agreement, and this is subject to the --
15 subject to the tariffs. And I said at that point,
16 Well, what tariffs? And that's where this came
17 about.

18 So it wasn't kind of like, Hey, you
19 don't have a claim. It was in the context of
20 language that was going into a settlement document.

21 You know, the only thing I looked at
22 that I think would trouble many people and,

1 hopefully, the ICC as well is to say that the
2 existence of a tariff becomes law. And when you
3 read a statement that says, "Retail customer
4 or applicant must provide the Company with such
5 permits, easements, other rights that the Company
6 reasonably deems necessary," there's no discretion;
7 you must do this?

8 That seems to be somewhat Draconian of a
9 set of circumstances.

10 JUDGE HAYNES: Just so you know, this proceeding
11 won't change tariff language. That's way beyond
12 the --

13 MR. LYNCH: I'm not looking -- I'm not looking
14 at that.

15 But I think to say that -- again, that,
16 somehow, a property owner is -- if they -- if they
17 give this to the property owner and say, Hey, we're
18 going to need an easement here, and this is where
19 it's going to be if you want electrical service.
20 The property owner signs and says, yeah, that's
21 fine.

22 But when you sign up and someone comes

1 out and you have electrical service; to presume
2 that the average citizen believes that they are
3 going to be bound by all these things, I think, is
4 a leap without any underlying communication.

5 I don't believe that ComEd would even be
6 in a position to say, You took our service. You
7 agreed to all this and you agreed that we could
8 have an easement wherever we think is necessary and
9 do whatever we want.

10 I don't think that's -- I'd be surprised
11 if that's ComEd's position.

12 JUDGE HAYNES: Okay. So since, clearly, these
13 issues -- I didn't understand them before today.
14 And I don't think that this -- your amended
15 complaint has enough facts at all or -- and the
16 claims having to do with, like I said, for
17 instance, trespass, aren't within the Commission's
18 jurisdiction.

19 An amended complaint can be filed with
20 additional facts. And, also, I don't have the
21 power to issue an injunction. I don't have the
22 power to give you attorney's fees.

1 MR. LYNCH: I thought that there was a section
2 within the Public Utility Act that provided for
3 injunctive relief, but if not --

4 JUDGE HAYNES: Well, if it is, you certainly
5 didn't give me that section and I'm not aware of
6 it.

7 MR. LYNCH: I understand. I'll help the body to
8 make sure that I provide whatever statutory --

9 JUDGE HAYNES: And --

10 MR. GOLDSTEIN: Could I raise one other issue,
11 Judge?

12 JUDGE HAYNES: Hm-hmm.

13 Inverse condemnation? You'd have to
14 tell me more about that, how I'd have authority to
15 deal with that, but go ahead.

16 MR. GOLDSTEIN: There has recently arisen in the
17 Company a problem that the Company wants to go out
18 and do tree trimming there and we do not want to be
19 in a position where the Kane County Sheriff has to
20 be called out because of that.

21 You know, obviously, tree trimming is
22 necessary not only to provide service to Mr. Lynch,

1 but to the other entities that may be along the
2 line there.

3 MR. LYNCH: There are no other entities along
4 the line. That's the issue.

5 MR. GOLDSTEIN: And so I would like something on
6 the record from Mr. Lynch saying that if we give
7 notice to Mr. Lynch, his brother, that we're coming
8 out to tree-trim, that we will not be in a position
9 to have a problem which may necessitate law
10 enforcement.

11 MR. LYNCH: I mean, if Mr. Goldstein -- one,
12 this is obviously nothing that I've been --
13 received notice of; two, it's not part of my case.

14 So they're seeking relief from my client
15 without bringing any sort of claim and presenting
16 anything in writing. If they say they would need
17 to go ahead and do something, identify it.

18 I think that's part one of the concerns
19 is that ComEd is engaged in a practice here of
20 being -- running somewhat roughshod because they
21 think they can do what they want without consulting
22 anyone at this subject property.

1 And --

2 MR. GOLDSTEIN: Judge, they provided --

3 MR. LYNCH: If I could finish.

4 And they did not provide notice when
5 they came out there before. There are small
6 children at this property. And to come on the
7 property in the yard with equipment and start
8 drilling holes, highly, highly callous and I think
9 potentially dangerous if somebody were to get hurt.
10 That's an issue.

11 The other thing is to come along and to
12 just start clearing trees is an issue and I know is
13 a sensitive issue because we've had discussions
14 about that. If there's something that needs to be
15 done, I think there should be some conversation and
16 that's the concern.

17 If they don't have any rights or they're
18 not defined and they start going so far into the
19 property and just clear-cutting it because the
20 individual out there thought that they needed to do
21 it or thought that they should do it, but those
22 trees and limbs are outside any prescribed area

1 that would be within an easement, they couldn't do
2 that.

3 But in this situation, since there are
4 no limits to what they're saying they can do, it
5 becomes very concerning for the property owner that
6 they could come home one day and find all of the
7 trees cleared from their front yard, because
8 they've got some equipment there and they say they
9 needed to do it, and there's no input from the
10 property owner.

11 MR. GOLDSTEIN: All right.

12 Then is it my understanding then, Judge,
13 that if we're not allowed to tree-trim and there's
14 a problem with a tree limb striking one of the
15 wires serving Mr. Lynch's house, ComEd has no
16 obligation to go out there and remove the tree limb
17 or do anything in order to restore service?

18 Is that what Mr. Lynch is really
19 proposing?

20 MR. LYNCH: Well, I think --

21 MR. GOLDSTEIN: I mean, that's absurd.

22 JUDGE HAYNES: Let him answer.

1 MR. LYNCH: I think Mr. Goldstein is
2 obviously --

3 MR. GOLDSTEIN: I'm giving you worst-case
4 scenario, I agree, but you know --

5 JUDGE HAYNES: Hold on, Mr. Goldstein.

6 MR. GOLDSTEIN: Go ahead and finish --

7 MR. LYNCH: We --

8 MR. GOLDSTEIN: We have under our tariffs to go
9 out and trim, Judge. Our tariffs allow that. The
10 sheet I handed you, Tariff Sheet No. 152, allows
11 that.

12 I mean, if he's not going to allow us to
13 do that, that's all well and good, but he may have
14 to suffer the consequences of that.

15 MR. LYNCH: I would just -- and I'm somewhat
16 perplexed this is coming up in this way since I've
17 had --

18 MR. GOLDSTEIN: I've already discussed this with
19 you, Bryan. Come on. We've discussed this.

20 JUDGE HAYNES: Hey, Mr. Goldstein. Let him
21 answer.

22 MR. LYNCH: I'm somewhat perplexed that this is

1 coming up in the fashion it has.

2 Have we discussed trimming vegetation?

3 Yes. But Mr. Goldstein just said, It's come to my
4 attention that there needs to be some
5 tree-trimming.

6 Just this morning, it came to his
7 attention? I sent these documents to everybody
8 weeks ago. I called Mr. Goldstein to try to talk
9 about what we were going to do and none of this
10 came up.

11 Now, we're coming before the body and he
12 seems to be curiously raising issues that are --
13 they're trying to highlight their need to do
14 certain things on the subject property. This is
15 the concern. What they are raising are the exact
16 concerns.

17 All we want, truth be told, is a set
18 understanding for both parties to go forward to
19 know what will happen and what they can do. Right
20 now, there is nothing. And if ComEd's position is,
21 We don't get easements, then that's contrary to
22 everything they've provided us and discussed to

1 this point because they've identified easements.

2 There are easements across the street adjacent.

3 That's what we've -- we're trying to
4 work on in the settlement context was, This is
5 where you can be; and part of it was the tree
6 trimming, but now there seems to be some basis or
7 some rationale or motivation to raise tree-trimming
8 at, you know, 11:35 in the morning of a case
9 management hearing when this has never been -- come
10 up.

11 He could have asked me today, These are
12 the trees we got to come out and trim --

13 JUDGE HAYNES: Well, it kind of goes with your
14 amended complaint in that you say they can't go on
15 your property. And so I don't know --

16 MR. LYNCH: Well, that's not my property,
17 Judge --

18 MR. GOLDSTEIN: Perhaps, Judge --

19 JUDGE HAYNES: I'm sorry. The complainant's
20 property.

21 MR. LYNCH: It's complainant's property that I'm
22 representing, but...

1 MR. GOLDSTEIN: Perhaps, Judge, there's another
2 potential solution to this would be that ComEd
3 would remove all of its facilities that are serving
4 Mr. Lynch. We'll be happy to do that.

5 And that's -- obviously -- and to be
6 honest with you, that's one of the alternative
7 proposals that we've made in the past.

8 MR. LYNCH: And the dynamic, I think, is that to
9 say -- again, it's heavy-handed to say our way or
10 the highway. ComEd says you take what -- you take
11 our -- what we want or we will yank out all the
12 service. Well, they've got an underlying
13 obligation to provide service.

14 We're not talking about doing it per
15 Mr. Lynch's demands, but talking about trying to do
16 it in some reasonable way to give guidance to them
17 going forward in the future, so we're not before
18 the ICC because they've done something else.

19 JUDGE HAYNES: Okay.

20 MR. LYNCH: That's not helpful.

21 JUDGE HAYNES: So I don't have -- from this
22 complaint, I don't know how long Mr. Lynch has

1 owned it. I don't know how long -- if -- I don't
2 know if the infrastructure was on there when
3 Mr. Lynch bought it.

4 I don't -- there's no acknowledgement
5 that there might be an implied easement from the
6 previous owner who let the -- I don't know. I'm
7 not saying that there was or isn't.

8 MR. LYNCH: I'm concerned by those questions
9 because all those questions would presume that
10 they're relevant.

11 Whether or not it was there before -- an
12 implied easement? No, there's -- I mean, why would
13 we have to allege? That would be a defense.

14 JUDGE HAYNES: That's fine. But the facts -- I
15 don't even have any of the facts here, and it
16 wasn't at all clear to me that we were talking
17 about all of this infrastructure.

18 So it goes back to there needs to be an
19 amended complaint. And, clearly -- who knows what
20 defenses Mr. Goldstein will raise, but I will tell
21 you this:

22 That I can only enforce the tariffs and

1 I can't go beyond what the Public Utility Act says.
2 The Commission's a creature of statute. And so I
3 think rather than continuing this conversation, we
4 could set a date for filing an amended complaint
5 with an answer.

6 And as far as the tree trimming issue,
7 which -- although you're saying it's an 11th
8 hour -- 11:30th hour bringing it up, it is, I
9 think, an important safety concern.

10 And -- although you both got a little
11 heated, perhaps, if the Company could provide
12 notice to the complainant at what time they'll be
13 there so that any children aren't near the tree
14 trimming.

15 Is that --

16 MR. LYNCH: I would -- at this point in time, I
17 would say, again, it's not an issue if they want --
18 I think that it'd be highly appropriate (sic) for
19 Mr. Goldstein, since he's raising this and saying
20 it's such a -- it's a potentially emergent
21 situation -- or I don't know he said it's emergent.
22 I think he's looking at it from a hypothetical

1 scenario.

2 He's saying they need to come out there
3 and do this. Have him send me something saying
4 what it is that they need to do because they --
5 they don't right now have any right to go on the
6 property. I'm not saying you can't trim a tree;
7 but at the same time, if somebody were to say, Hey,
8 we need to trim this tree, then maybe it can be
9 done in a way that either the property owner can do
10 it so it never comes in contact. They can go -- on
11 a going-forward basis, they can take it on to
12 preserve the tree.

13 But ComEd is not going to be coming out
14 there and doing it in a way that's going to -- they
15 don't want to have large hundred-year Oak trees cut
16 down or damaged and then it falls on the house or
17 it's an expense that the property owner has to
18 incur to remove.

19 And I think it needs to be done in some
20 thoughtful way with communication on this until we
21 get these things ironed outgoing forward.

22 But, again, him raising this now? I

1 don't know. I don't know what the complainant's
2 schedule's going to be. I don't know -- are they
3 talking about removing a tree? Are they talking
4 about just cutting a tree back? Which tree?

5 MR. GOLDSTEIN: Well, this is absurd. We're
6 not -- forget about that. We're not going to go
7 out there and trim. Whatever happens happens.

8 I missed one of the tariffs that I --
9 another tariff that I actually provided to
10 Mr. Lynch. It was Tariff Sheets 149 and 152 and
11 156.

12 And I think that, let Mr. Lynch file his
13 amended complaint; we'll file an answer. And we'll
14 have another status hearing, see where we're at.

15 JUDGE HAYNES: Okay. And my feeling is that
16 this has been continued for so long and then to
17 suddenly be filing amended complaints, that,
18 hopefully, it wouldn't take that long for you to
19 file another amended complaint.

20 When do you think you could have that
21 with more specific facts is really my biggest
22 concern. And, obviously, if you allege things,

1 I'll just deal with that later, if it's beyond my
2 jurisdiction. But when do you think you could have
3 that filed?

4 MR. LYNCH: Is there a preference that you would
5 have? If I can comply with this body's preference.

6 JUDGE HAYNES: What -- you know, Mr. Goldstein
7 just filed with the extension of the deadline was
8 to June of 2012. So you'd have to have this whole
9 thing moving along.

10 MR. LYNCH: Sure. No, I understand.

11 JUDGE HAYNES: The sooner the better.

12 MR. LYNCH: I can probably file it December --
13 say December 6th? By December 6th? Is that a
14 reasonable --

15 JUDGE HAYNES: That's fine with me.

16 And Mr. Goldstein?

17 MR. GOLDSTEIN: I'll file my response by
18 December 30th.

19 JUDGE HAYNES: And then after that -- well, is
20 there still more discovery?

21 MR. LYNCH: I've issued data requests, but I
22 haven't gotten any responses to the data requests

1 yesterday -- or I haven't gotten any data responses
2 yet.

3 Mr. Goldstein indicated to me that they
4 were being worked on, but that we -- we wouldn't be
5 able to kind set any timetable because I think
6 they're -- he said it's outside their control and
7 that we couldn't do anything about that.

8 JUDGE HAYNES: What is the --

9 MR. GOLDSTEIN: Judge, there were extensive data
10 requests made of the Company. We would have those
11 data responses back to Mr. Lynch by December 1st.

12 JUDGE HAYNES: December 1st?

13 MR. LYNCH: Oh.

14 JUDGE HAYNES: Okay.

15 Okay. And then does it just leave a
16 date for an evidentiary hearing?

17 MR. LYNCH: I think from the property owner's
18 perspective, the complainant's perspective, we
19 would like to probably do oral discovery.

20 JUDGE HAYNES: Oral discovery of?

21 MR. LYNCH: Whoever.

22 MR. GOLDSTEIN: -- take depositions?

1 MR. LYNCH: Whoever's going to be testifying.

2 I know they're going to be providing
3 written testimony.

4 JUDGE HAYNES: Well --

5 MR. GOLDSTEIN: We're not going to provide
6 written testimony unless Mr. Lynch --

7 JUDGE HAYNES: Unless you want written
8 testimony.

9 How would you -- okay. Generally, we
10 don't do depositions at the Commission unless, you
11 know, some -- that you're -- for some reason, some
12 extreme circumstance, you're not getting the
13 information you need through data requests or
14 document discovery, and, yes, frequently, we do
15 prefile testimony here.

16 However, in complaint cases, I
17 personally find that live direct and cross is
18 preferable.

19 So that's --

20 MR. LYNCH: Maybe would it be helpful to kind of
21 see what the data request and document production
22 is and then we'll be able to gauge?

1 At some level, I would say that if there
2 isn't going to be written testimony --

3 JUDGE HAYNES: I mean, unless you want it. I
4 mean, I'm not saying -- I mean, if you both want
5 it, you can have it.

6 MR. LYNCH: Hm-hmm.

7 JUDGE HAYNES: But --

8 MR. GOLDSTEIN: Well, obviously, we're not going
9 to provide written testimony unless --

10 JUDGE HAYNES: Well, I said if you both want it.

11 MR. GOLDSTEIN: -- unless complainant does it
12 first.

13 JUDGE HAYNES: Yeah. But it's pretty rare not
14 to be able to do everything without a deposition
15 here.

16 MR. LYNCH: Well, I would think if we have
17 written testimony, then that would obviate the need
18 potentially for the oral -- for depositions and for
19 oral testimony.

20 If, however, there's an issue there --
21 all I want to do is make sure that we reserve the
22 right to be able to know in advance what it is

1 that -- who it is and what it is that their
2 witnesses will say.

3 Does it make sense to come back here for
4 a status sometime in the new year after the
5 response is filed?

6 I mean, I don't want to come back here
7 unnecessarily, but...

8 JUDGE HAYNES: And it's so frequently continued.
9 So the fewer dates we're probably putting on the
10 schedule for both of you to be available might be
11 better.

12 But -- when you receive the data
13 responses from Mr. Goldstein, you do have the right
14 to do follow-up data requests in case there's not
15 enough there.

16 And so if you want, we could have a
17 status hearing at the beginning of the year to see
18 if there's any outstanding discovery. But,
19 definitely, Mr. Goldstein should provide the
20 witnesses they're going to be bringing, same as
21 you.

22 So do we want to have a status hearing

1 at the beginning of the year?

2 MR. LYNCH: I think that would be helpful just
3 to kind of know what he's doing so that we don't
4 have a longer period of time out there where things
5 aren't getting done, and maybe we can identify, you
6 know, witnesses prior to that date as well.

7 JUDGE HAYNES: Okay. Can you provide a witness
8 list?

9 Can we get a date for a witness list?

10 MR. GOLDSTEIN: Sure. We'll be happy to do
11 that.

12 JUDGE HAYNES: Okay.

13 MS. MONICA MERINO: Yeah, right now, we actually
14 know their names. We'll be -- we can provide that
15 at a later date.

16 MR. GOLDSTEIN: Yeah, we may have a more...

17 JUDGE HAYNES: Okay. Maybe if you could get
18 that list with the December 1st response --

19 MR. GOLDSTEIN: We'll be happy to do that,
20 Judge.

21 JUDGE HAYNES: Okay. Thank you.

22 So in January, status hearing?

1 MR. LYNCH: Do you want --

2 MR. GOLDSTEIN: What date are you looking for?

3 MR. LYNCH: Could do -- what time would we be
4 able to --

5 JUDGE HAYNES: Depends on the day, but it
6 doesn't matter what time of the day, generally.

7 MR. LYNCH: Potentially, the 10th of January or
8 26th of January.

9 MR. GOLDSTEIN: That's fine, Judge.

10 JUDGE HAYNES: The 10th is fine.

11 What time?

12 MR. LYNCH: What's the earliest possible date --
13 or time? I'm sorry. Can we do 9:00?

14 MR. GOLDSTEIN: No.

15 MR. LYNCH: I've just got -- I've got a --

16 MR. GOLDSTEIN: You want to do it in the
17 afternoon on the 10th?

18 MR. LYNCH: I've got a condemnation hearing on
19 the 10th of January at 10:30 at the Daley Center.
20 So -- I'm not sure the scope of witnesses in that
21 case, so it could go into the afternoon. I mean, I
22 don't know how late -- you know, let's just pick another

1 date. It would probably be easier to do it that
2 way.

3 MR. GOLDSTEIN: Well, January 25th?

4 MR. LYNCH: Can you do the 26th?

5 MR. GOLDSTEIN: I've got an evidentiary hearing
6 on the 26th, Judge.

7 MR. LYNCH: What time?

8 JUDGE HAYNES: So this was what I was getting at
9 with the problem with status hearing.

10 How about we work it this way:

11 If -- well, let's set a date for an
12 evidentiary hearing. And then if there's some need
13 for us to get together, one of you can call me and
14 we'll set a status hearing.

15 MR. LYNCH: Okay.

16 MR. GOLDSTEIN: Why don't we set it sometime in
17 February, then everybody should be clear.

18 MR. LYNCH: I figured it'd probably be prudent
19 to set it further out than February because if
20 the --

21 JUDGE HAYNES: Well --

22 MR. LYNCH: If we get the response back at the

1 end of December --

2 MS. MONICA MERINO: December 1, that would be
3 the early December.

4 JUDGE HAYNES: He's talking about the response
5 to the complaint. December 30.

6 MR. LYNCH: So we get that in December and
7 there's things that are raised in there or there's
8 additional data requests that are issued when we
9 get -- a March date or an April date, I think,
10 might be more prudent.

11 MR. GOLDSTEIN: I like January -- I like
12 February 29th, actually, Judge.

13 I'd actually like a date earlier than
14 that, but that may sound a little facetious.

15 JUDGE HAYNES: All right. I'm sorry. I'm
16 working backwards from your June 12th extension of
17 the deadline.

18 Of course, I don't have the 2012
19 calendar yet, but I think anytime in March would be
20 fine for the evidentiary hearing, which would leave
21 plenty of time for parties to brief this.

22 MR. GOLDSTEIN: March 6th, Judge? Tuesday?

1 JUDGE HAYNES: As far as I know, I'm completely
2 free. So don't look at me.

3 MR. LYNCH: I mean, March 6th looks like an
4 agreeable date, Mark.

5 JUDGE HAYNES: Okay.

6 So we'll have the evidentiary hearing on
7 March 6th starting at 10:00 a.m.

8 March 6th is a Tuesday. Thank you.

9 MR. LYNCH: So when we -- how does -- how would
10 you propose that we deal with the issue of
11 testimony? Just we'll work it out, I mean. And if
12 there's some -- if we say we're going to be
13 exchanging written testimony, then we'll do that
14 and then we won't have any obviously need to do the
15 depositions.

16 And if, for some reason, there's
17 information that we're not getting then and we
18 needed to do oral, we'd come back and just -- or
19 we'd just communicate to try to schedule some sort
20 of status or resolve it through communication.

21 JUDGE HAYNES: I think that -- well, okay. Like
22 I said, generally, in complaint cases, it is oral

1 live testimony.

2 But if you both want to do prefiled
3 testimony, we can. There's nothing to stop you
4 from -- in your data request asking, you know,
5 ComEd what their position is on everything.

6 MR. GOLDSTEIN: Well, when we provide the
7 witness list, Judge --

8 JUDGE HAYNES: Hm-hmm.

9 MR. GOLDSTEIN: -- we will provide along with
10 that the general scope of that witness's testimony.

11 JUDGE HAYNES: Okay.

12 So I guess that it's -- I'm going to
13 assume today that it'll be live testimony. And if
14 you want to do prefiled testimony, if you both
15 agree to it, that's fine.

16 And maybe then, you could -- you could
17 file something jointly with what your dates for
18 filing prefiled testimony would be, just so I'm
19 aware of what you two have agreed to.

20 MR. LYNCH: Are you going to be amenable to
21 prefiled testimony?

22 MR. GOLDSTEIN: If you file first, sure.

1 MR. LYNCH: So is it incumbent upon the
2 complainant?

3 MR. GOLDSTEIN: You have the burden of proof.

4 JUDGE HAYNES: The burden is on you.

5 MR. LYNCH: I understand that. But, I mean, as
6 far as like -- as far as like --

7 JUDGE HAYNES: If we did it live, you'd get up
8 first. And so it's just the -- it's just in lieu
9 of that.

10 MR. LYNCH: Right. But witnesses typically
11 aren't able to hear what other witnesses say.
12 Parties are, but other witnesses are not.

13 JUDGE HAYNES: Which is why I said in complaint
14 cases -- you know, we have prefiled testimony in
15 rate cases where everybody knows what everyone's
16 going to say anyway because of all the discovery
17 that's gone on.

18 And so, yes, in complaint cases where
19 it's he said/she said, it is frequently live
20 testimony so that people don't know what they're
21 going to say ahead of time.

22 MR. LYNCH: Hm-hmm.

1 JUDGE HAYNES: So these are things for you to
2 weigh.

3 MR. LYNCH: Right. Well, that --

4 JUDGE HAYNES: And it would be you first, I'd
5 say.

6 MR. LYNCH: Right. And that's why I think just
7 maybe the potential for oral discovery makes sense,
8 because then it becomes incumbent upon the parties
9 to understand what it is that the other parties are
10 going to testify to as opposed to imposing an
11 obligation upon somebody to --

12 MR. GOLDSTEIN: Well --

13 JUDGE HAYNES: This --

14 MR. GOLDSTEIN: The bottom line is, Judge, what
15 is the complainant going to testify to other than
16 the fact that he owns the property and that they're
17 imposed -- ComEd facilities are on his property?
18 Other than that, what is he going to testify to?

19 He can't testify as to what the law is.
20 So, you know, I don't understand why we're dancing
21 around so much.

22 MR. LYNCH: I just want -- just trying to make

1 sure that we're all on the page about what we're
2 going to be doing.

3 MR. GOLDSTEIN: Well --

4 MR. LYNCH: And so that there's no surprises.

5 They were -- my understanding, Mark, is
6 you had testimony that you were going to file that
7 was already prepared before, and now that that's
8 something you're not going to do. I don't --

9 MR. GOLDSTEIN: I'm not going to file testimony
10 unless you file testimony. I mean --

11 MR. LYNCH: I didn't say that we wouldn't.

12 All I'm trying to do -- this is supposed
13 to be a process to make sure that we get the facts
14 out. There are no surprises --

15 JUDGE HAYNES: Hm-hmm.

16 MR. LYNCH: -- no, you know, shadows or
17 anything.

18 And all I wanted to do is make sure that
19 everybody knows what's going on going into this and
20 that's what I thought.

21 So I'll communicate with Mr. Goldstein.
22 I don't want to take up your entire morning --

1 JUDGE HAYNES: And if you can't agree, call me
2 and we'll have a status hearing.

3 MR. LYNCH: I understand.

4 JUDGE HAYNES: And so much of this from what
5 I've heard today seems to be legal. So I don't
6 even, you know --

7 MR. GOLDSTEIN: And that's exactly why I propose
8 that it just be briefed, Judge.

9 JUDGE HAYNES: I never heard that.

10 MR. LYNCH: Yeah, I didn't hear that either.

11 JUDGE HAYNES: You forgot to propose it to me.

12 MR. GOLDSTEIN: I thought I proposed it to
13 Mr. Lynch.

14 MR. LYNCH: You've never proposed it, Mark.

15 MR. GOLDSTEIN: I now propose it.

16 How's that?

17 JUDGE HAYNES: You now propose it.

18 Well -- so, you know, I'm going to have
19 to say that just depositions are not generally
20 looked on favorably here. So it's a lot of money
21 and something that, to me, sounds -- looks like
22 it's mostly legal.

1 And maybe you two want to talk about
2 briefing it or getting rid of some of these legal
3 issues ahead of time.

4 MR. GOLDSTEIN: We'll discuss this, Judge.

5 JUDGE HAYNES: You discuss it amongst
6 yourselves.

7 Otherwise, I'll see you March 6th at
8 10:00 a.m.

9 MR. GOLDSTEIN: Great.

10 Thank you, Judge.

11 JUDGE HAYNES: Thank you.

12 (Whereupon, said hearing was
13 continued to March 6, 2012,
14 at 10:00 a.m.)

15

16

17

18

19

20

21

22