

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

COMMONWEALTH EDISON COMPANY :  
: No. 11-0721  
Tariffs and charges submitted pursuant to Section :  
16-108.5 of the Public Utilities Act :

**COMMONWEALTH EDISON COMPANY’S**  
**REPLY TO RESPONSES TO MOTION FOR**  
**PROTECTIVE ORDER DEFINING SCOPE OF DISCOVERY**

Commonwealth Edison Company (“ComEd”), pursuant to Sections 200.190 of the Rules of Practice of the Illinois Commerce Commission (“Commission”), 83 Ill. Adm. Code § 200.190, and the Notice of Administrative Law Judges’ Ruling dated January 5, 2011, submits this reply to certain responses to ComEd’s Motion for Protective Order Defining Scope of Discovery.

**I. INTRODUCTION**

Responses to ComEd’s Motion for Protective Order Defining Scope of Discovery (“Motion”) were filed on January 4, 2012 by Staff (“Staff Resp.”), METRA and the Chicago Transit Authority (“CTA”), jointly (“RR Resp.”) the Building Owners and Managers Association of Chicago (“BOMA”) (“BOMA Resp.”), the Illinois Industrial Energy Consumers (“IIEC”) (“IIEC Resp.”), and the Commercial Group (“CG Resp.”). Only Staff and BOMA oppose the Motion, relying heavily on procedural grounds.

Addressing discovery directed to rate designs that are not consistent with the Commission’s order in Docket No. 10-0467 is, in fact, an issue particularly well suited to a protective order. Most parties acknowledge or do not contest that alternative rate designs and cost allocations are statutorily placed beyond the scope of this docket, yet the uncertainty they face as to whether others will also proceed consistent with that reasonable interpretation has driven them to engage in what can be labeled as protective discovery to prepare for or respond to

other parties' alternative rate design or cost allocations proposals – proposals that may never and should never come. A protective order establishing the scope of discovery is the only remedy that can resolve the issue in a manner that addresses everyone's uncertainty and prevents needless waste and "protective" discovery and objections. If the ALJs agree that alternative rate designs and cost allocations are beyond the statutory scope of this proceeding, and ComEd submits that is exactly what the law does, there is every reason to enter the requested protective order. As the Railroads and others point out, clarity is in everyone's interest, including parties serving discovery and preparing responsive testimony.

Only Staff and BOMA oppose the Motion.<sup>1</sup> Staff's opposition raises only the erroneous claim that the Motion is procedurally flawed, an assertion based on misunderstandings or misinterpretations of applicable law and rules. Moreover, seeking to defer resolution of the issue the Motion raises on procedural grounds is contrary to notions of judicial economy and would only serve to postpone the day when the Administrative Law Judges ("ALJs") will have to rule on those issues through piecemeal motions. As indicated in the RR Response, deferring ruling until there have been motions to compel serves no one's interest and promotes piecemeal rulings. *See* RR Resp. at 1. An approach that requires piecemeal motions and rulings would also threaten the carefully established schedule in this statutorily time-limited proceeding. Finally, BOMA's procedural opposition to the Motion is similarly mistaken, and its substantive opposition is internally contradictory and lacking in merit. The Motion should be granted.

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<sup>1</sup> Staff's and BOMA's opposition to the Motion is puzzling in that neither issued the data requests that drove the filing of the Motion. Further, ComEd has fully and timely responded to Staff's and BOMA's data requests, and their responses make no claim of a deficiency or concern in this regard. On the other hand, the parties that did issue those data requests find the approach suggested in the Motion for resolving the issue to be reasonable and acceptable.

## **II. REPLY TO STAFF**

Staff asserts that “ComEd’s Motion is a request for extraordinary relief” and should be denied.<sup>2</sup> Staff Resp. at 2. To the contrary, the relief is proper and expressly authorized by the Commission’s Rules of Practice and Illinois Supreme Court Rules. Motions for protective orders outside the context of confidential and proprietary information are not commonplace at the Commission, but that does not mean they seek “extraordinary relief” or are unauthorized. In fact, the procedural barriers Staff would interpose are inconsistent with the applicable rules and especially unreasonable in these unique circumstances where the legislature has specifically excluded certain rate design and inter-class cost allocation issues from this proceeding.

### **A. The Relief Sought by the Motion is Not Extraordinary; The Motion is Authorized Under the Commission’s Rules**

The Commission’s Rules of Practice specifically incorporate and allow the use of interrogatories, depositions, and “other discovery tools commonly utilized in civil actions in the Circuit Courts of the State of Illinois in the manner contemplated by the Code of Civil Procedure [735 ILCS 5] and the Rules of the Supreme Court of Illinois [S. Ct. Rules].” 83 Ill. Adm. Code § 200.360(c) (bracketed material in original). Supreme Court Rule 201(c)(1) expressly provides for the use of protective orders as a tool to regulate discovery. It provides:

(1) Protective Orders. The court may at any time on its own initiative, or on motion of any party or witness, make a protective order as justice requires, denying, limiting, conditioning, or regulating discovery to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or oppression.

Section 200.370(b) of the Commission’s rules uses language virtually identical to Supreme Court Rule 201(c)(1) with the substitution of “such rulings” for “a protective order”:

The Hearing Examiner may at any time on his or her own initiative, or on motion of any party or Staff, issue such rulings as justice requires, denying, limiting, conditioning or regulating discovery to prevent unreasonable annoyance, expense, disadvantage or oppression.

83 Ill. Adm. Code § 200.370(b). While proactive orders directed at confidentiality concerns are by far the most common, the rules in no way limit them to that circumstance.

Staff, moreover, has cited to no rule or case providing that protective orders are inappropriate if the discovery dispute could also be addressed through some other means – such as responding to a motion to compel. Indeed, the law in Illinois is that parties should seek protective orders rather than simply refuse to comply with objectionable discovery requests and wait for a motion to compel. *Fine Arts Distributors v. Hilton Hotel Corp.*, 89 Ill. App. 3d 881, 884 (1<sup>st</sup> Dist. 1980) (“[E]ven if defendants' demands were improper, ... [t]he correct remedy for improper discovery procedures is to seek a protective order ...”).

Staff's position is not only unsupported, it is also unreasonable, particularly for the situation involved here which concerns discovery on topics that are statutorily required to be addressed in other proceedings. Efficiency and fairness to all parties support addressing such an issue through a protective order rather than requiring individual objections, negotiations with specific individual parties, and motions to compel.<sup>3</sup> Illinois courts recognize that a tribunal has broad discretion under the Supreme Court Rule to enter protective orders, and have rejected arguments to impose requirements on that authority that are not specified in the rule. *Bush v. Catholic Diocese of Peoria*, 351 Ill.App.3d 588, 591 (3<sup>rd</sup> Dist. 2004) (“Under Rule 201(c), the court, or any party or witness must establish only that justice requires the protective order. The rule does not require the petitioner to establish or even assert standing to seek the order.”). Indeed, here the party that propounded the data requests at issue does not object to resolution of the issue in this manner.

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<sup>3</sup> ComEd has objected to such data requests and attempted to resolve those disputes, but ultimately was unable to fully resolve the disputes because nothing that ComEd or the requesting parties do could establish or confirm the appropriate scope of discovery for all parties. Only a protective order or ruling by the Administrative Law Judges (“ALJs”) could provide such relief.

**B. ComEd Has Established that a Protective Order is Warranted, and Staff’s Proposal to Interpose Requirements Not Contained in the Rule is Improper**

Staff cites to language in *Willeford v. Toys “R” Us-Delaware, Inc.*, 385 Ill. App. 3d 265, 274, 277 (5<sup>th</sup> Dist. 2008) indicating that a party seeking a protective order must demonstrate that such relief “is warranted.” Staff then leaps -- without explanation or citation -- to the assertion that a party must also show that a protective order is “necessary.” Staff Resp. at 5. Staff then interprets its own “necessary” standard to require far more than the court’s requirement that a protective order be “warranted,” asserting instead that a protective order can only be granted if other discovery protections are “insufficient or inadequate to address discovery issues in this instance.” *Id.* at 6. That claim has no basis in the law.

As discussed above, neither Supreme Court Rule 201(c) nor Sections 200.360 or 200.370 of the Commission’s rules contain such a requirement, and Illinois courts have refused to read unspecified requirements into the rule authorizing protective orders. Staff’s argument is especially odd given that Staff does not address or dispute the substantive issue that warrants issuance of a protective order, *i.e.*, that discovery has been issued on rate design and inter-class cost allocations issues that the law mandates be addressed only in other proceedings. *See* Staff Resp. at 3, fn. 2. The responses of other parties in support of the relief sought by the Motion – including the railroad parties who originally issued such discovery – confirm that ComEd has demonstrated that a protective order is warranted to bring clarity and avoid delay and prejudice.

**C. Staff’s Misinterpretation and Testimonial Arguments Are Also Misplaced**

Staff argues that a protective order could be misinterpreted to prevent discovery related to whether the rates in the instant docket are consistent with the rate design and cost allocations adopted in the Commission’s order in Docket 10-0467. Staff Resp. at 7. Staff’s argument is a

red herring. Nothing in the Motion seeks to bar discovery on whether the rate design or cost allocations proposed in this docket are consistent with the Commission's order in Docket 10-0467. The Motion is aimed only at discovery about rate designs or cost allocations across customer classes that are different from those adopted in Docket No. 10-0467.

Moreover, nothing in ComEd's Motion addresses testimony. Clearly, ComEd believes that testimony advocating rate designs inconsistent with those in compliance with the Order in Docket No. 10-0467 would be outside the scope of this proceeding, but that is not this motion either. This motion seeks a protective order directed to discovery. If improper testimony is filed, a motion to strike is one possible remedy.

### **III. REPLY TO BOMA**

BOMA acknowledges that "alternative rate designs are outside the purview of this proceeding." BOMA Resp. at ¶ 3. Yet, BOMA then argues that a protective order against discovery on those very issues may limit legitimate discovery. As explained above, the Motion does not seek to prohibit discovery on whether the proposed rates are, as required by law, consistent with the rate designs and cost allocations adopted in Docket No. 10-0467.

BOMA then appears to reverse position, and argue that although such rate designs are "outside the purview of this proceeding" (*id.*), discovery on those alternative rate designs should nonetheless be allowed. While the scope of permitted discovery is broader than what is admissible at trial – it includes information reasonably calculated to lead to admissible evidence – the law is clear that discovery concerning immaterial or excluded issues is improper. *Manns v. Briell*, 349 Ill.App.3d 358, 361 (4<sup>th</sup> Dist. 2004), appeal denied 211 Ill. 2d 581 (Finding discovery as to financial condition impermissible in negligence action.). Or, as the *Joanna-Western Mills* decision put it: "The right of discovery is limited to disclosure regarding matters relevant to the

subject matter involved in the pending action.” *Harris Trust & Savings Bank v. Joanna-Western Mills Co.*, 53 Ill App. 3d 542, 557 (1st Dist. 1977). There is no question that alternative rate designs are not at issue in this case, and BOMA’s argument must be rejected.

BOMA finally again contradicts its earlier statement that alternative rate designs are statutorily outside this docket’s scope by stating that “[t]he statute does not limit consideration of rate design or cost allocations in this proceeding.” BOMA Resp. at ¶ 5. BOMA had it right the first time. The actual statutory language is clear. Subsection (c) of Section 16-108.5 sets forth the process and requirements for approval of a performance-based formula rate tariff, and provides:

Until such time as the Commission approves a different rate design and cost allocation pursuant to subsection (e) of this Section, rate design and cost allocation across customer classes shall be consistent with the Commission's most recent order regarding the participating utility's request for a general increase in its delivery services rates.

220 ILCS 5/16-108.5(c). Subsection (e), in turn, refers to proceedings subsequent to and separate from the instant proceeding to approve ComEd’s performance-based formula rate tariff:

*Following approval of a participating utility's performance-based formula rate tariff pursuant to subsection (c) of this Section, the utility shall make a filing with the Commission within one year after the effective date of the performance-based formula rate tariff that proposes changes to the tariff to incorporate the findings of any final rate design orders of the Commission applicable to the participating utility and entered subsequent to the Commission's approval of the tariff.*

220 ILCS 5/16-108.5(e) (emphasis added). This language is clear on its face, and must be given its plain meaning. The rate design and cost allocations incorporated in the performance-based formula rate tariff presented for approval in this docket are required to be consistent with those adopted in Docket 10-0467, and any rate design or cost allocation not consistent with those adopted in Docket 10-0467 can only be implemented subsequent to approval of the performance-based formula rate tariff in the instant proceeding. Given these explicit directives, the statutory

language cannot reasonably be read to allow alternative rate designs and cost allocations to be adopted in this proceeding to approve the performance-based formula rate tariff.

BOMA's reliance on statutory construction principles applicable to ambiguous statutory language is misplaced and inapplicable. BOMA Resp. at ¶ 6. While BOMA correctly recognizes that the primary rule of statutory construction is to ascertain and give effect to the true intent of the legislature, it fails to acknowledge or follow the corollary principals that a determination of legislative intent "should first consider the statutory language ... [which] is the best means of expounding the legislative intent. Where the statutory language is clear, it will be given effect without resort to other aids for construction." *People v. Hickman*, 163 Ill.2d 250, 261 (1994). As discussed above, the relevant statutory language is clear and unambiguous that alternative rate designs and cost allocations are beyond the scope of this proceeding. BOMA's contrary argument is also unavailing, as the plain meaning of this language is also sensible.

#### **IV. REPLY TO COMMERCIAL GROUP**

The Commercial Group draws a distinction between the rate designs and inter-class cost allocations reflected in ComEd's existing rates filed pursuant to the Commission's order in Docket No. 10-0467 and the rate designs and inter-class cost allocations reflected in the Commission's Order. The Commercial Group quotes the statutory language correctly. However, the Commercial Group forgets that the current rates that ComEd's Motion referenced are rates filed pursuant to the Commission's order in Docket 10-0467. They have, in fact, *already* been accepted by the Commission as compliant with its Order under the provisions of 220 ILCS 5/9-201(b). There should be no remaining question on that issue.

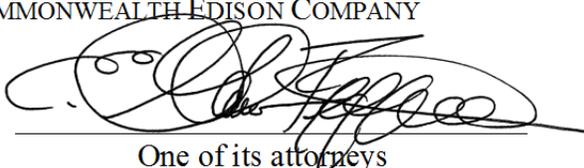
V. CONCLUSION

WHEREFORE, ComEd respectfully requests that the ALJs enter an order granting the protective order requested in the Motion consistent with the foregoing reply.

Dated: January 6, 2012

Respectfully submitted,

COMMONWEALTH EDISON COMPANY

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