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 MOTION TO STRIKE
PORTIONS OF THE PRE-FILED DIRECT TESTIMONY OF SCOTT HEMPLING

Commonwealth Edison Company ("ComEd"), pursuant to Sections 200.190 and 200.680 of the Rules of Practice of the Illinois Commerce Commission ("Commission"), 83 Ill. Adm. Code §§ 200.190, 200.680, moves to strike portions of the direct testimony of Citizens Utility Board ("CUB") witness Scott Hempling. In support of its Motion, ComEd states:

I. INTRODUCTION

Public Acts 97-0616 and 97-0646 significantly changed Illinois electric utility ratemaking. Now, utilities that undertake specific statutory investment, performance, and job creation obligations may recover their delivery costs through formula rates. 220 ILCS 5/16-108.5(a), (c). How those rates are structured, how they adjust and reconcile annually, what costs they recover, and the processes for Commission review and approval of both rates and costs are also established by those statutory provisions. *Id.*

ComEd elected to participate in this statutory process and timely filed a formula rate tariff, Rate DSPP – Delivery Service Pricing and Performance ("Rate DSPP"), along with testimony and data supporting that tariff and documenting the initial costs that populate it, all as called for by the law. 220 ILCS 5/16-108.5(c). As also specified by law, the Commission duly

initiated this proceeding for one purpose: to investigate ComEd's filing[1] and to issue an order "approving, or approving as modified, the performance-based formula rate, including the initial rates …." *Id.*

On January 13, 2012, Staff and Intervenors submitted 18 testimonies in response to ComEd's filing. 17 of those 18 testimonies focused on ComEd's proposed tariff, the formulae it includes, and/or the costs that it would recover. The testimony of Scott Hempling (CUB Ex. 2.0) did not.[2] Mr. Hempling, an attorney, but not one licensed in Illinois, argues with the statute; offers his own legal opinions about prudence, reasonableness, and the Commission's authority to take actions not authorized by law; and testifies at great length on issues having nothing to do with Rate DSPP or the costs ComEd seeks to recover in this case. Major portions of his testimony are, therefore, improper and should be stricken.

II. THE LEGAL STANDARDS

A. Expert Legal Opinion Testimony Is Impermissible

The rules of evidence, with limited exceptions not applicable here (*e.g.*, foreign law), prohibit expert legal opinion testimony:

> Because expert opinions on purely legal questions of American law are not admissible for any purpose, Professor First's declaration is hereby stricken. *See In re Initial Public Offering Sec. Litig.*, 174 F. Supp. 2d 61, 63 (S.D.N.Y. 2001) ("The rule prohibiting experts from providing their legal opinions or conclusions is 'so well-established that it is often deemed a basic premise or assumption of evidence law -- a kind of axiomatic principle.'" (*quoting* Thomas Baker, *The Impropriety of Expert Witness Testimony on the Law*, 40 U. Kan. L. Rev. 325, 352 (1992)).

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[1] *See Commonwealth Edison Co.*, Docket No. 11-0721 (Order, Nov. 8, 2011) (purpose of suspension is to conduct a "hearing concerning the propriety of [ComEd's] proposed general increase in electric rates filed pursuant to Public Act 97-0616."). ComEd notes that, on the day of the filing when this order was entered, the Clerk's office presumed that ComEd proposed increased electric rates. In fact, the filing proposes a modest rate decrease.

[2] CUB filed a corrected version of this testimony, which made no material changes. For brevity, ComEd will cite to the corrected testimony as CUB Ex. 2.0.

United States v. Bodmer, 342 F. Supp. 2d 176, 182, fn. 7 (S.D.N.Y. 2004). Illinois courts follow this rule. In *Mache v. Mache*, 218 Ill. App. 3d 1069 (1st Dist. 1991), the Court explained:

> The modern standard of admissibility of expert testimony is whether the testimony will aid the trier of fact in its understanding of the facts presented at trial. (*Johnson v. Commonwealth Edison Co.* (1985), 133 Ill. App. 3d 472, 482, 478 N.E.2d 1057.) While an expert may express an opinion on an ultimate issue, expert opinions are generally not admissible on matters of which the trier of fact is knowledgeable unless the subject is difficult of comprehension and the testimony will aid the trier of fact in understanding it. (*McCormick v. McCormick* (1988), 180 Ill. App. 3d 184, 205, 536 N.E.2d 419.)

Id. at 1077. Applying this standard, the Court in *Mache* held that proposed testimony, which applied facts to the relevant law, constituted a legal opinion that did not touch upon matters beyond the understanding or comprehension of the trial court and was properly excluded. *Id*.

Similarly, testimony construing or interpreting the meaning of a statute has long been recognized to violate the prohibition against expert legal opinion testimony:

> Expert testimony concerning statutory interpretation is not proper, even if the witness is an attorney. *See Christou v. Arlington Park-Washington Park Race Tracks Corp., 104 Ill. App. 3d 257, 432 N.E.2d 920, 60 Ill. Dec. 21 (1982).* Therefore, we agree with the defendants that it was not necessary or proper for the court to allow expert testimony concerning the proper interpretation of Oregon law.

Magee v. Huppin-Fleck, 279 Ill. App. 3d 81, 86 (1st Dist. 1996).

B. <u>Irrelevant Testimony Is Inadmissible</u>

The Commission's rules require that "irrelevant, immaterial or unduly repetitious evidence shall be excluded" in contested cases. 83 Ill. Adm. Code § 200.610(a); *see also* Ill. R. Evid. 402 ("Evidence which is not relevant is not admissible."). "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Ill. R. Evid. 401; *see also In re A. W.*, 231 Ill.2d 241, 256 (2008) ("Evidence is relevant if it tends to prove a fact in controversy or render a matter in issue more or less

probable."). *See also Manns v. Briell*, 349 Ill.App.3d 358, 361 (4th Dist. 2004), *appeal denied*, 211 Ill. 2d 581 (While the scope of permitted discovery is broader than what is admissible at trial, even discovery is not proper when it does not meet the threshold requirement of relevance to matters actually at issue.).

This proceeding, as noted above, concerns ComEd proposed Rate DSPP and the costs to be recovered under it. That is its purpose under the law as reflected in the Commission's suspension order. The Administrative Law Judges also have provided guidance to the parties emphasizing the defined scope of this proceeding and the importance of those limits, stating:

> While we do not define here the scope of the proceeding at bar, we do note that, in addition to the statutory provisions cited by ComEd, a conclusion that alternative rate designs are not the subject of this docket, but, are the subject of another subsequent docket, is consistent with due process, as otherwise, the General Assembly would have intended to litigate many, many topics in a very short period of time, which would have severely limited the parties' and Staff's ability to litigate these issues in a manner that may be inconsistent with the ability of those parties, and Staff, to obtain information on discovery in a manner that conforms with due process requirements.

Notice of Administrative Law Judges' Ruling, Docket 11-0721 (Jan. 6, 2012), at 1.

Mr. Hempling's testimony concerning performance metrics, long-term infrastructure investment plans, ComEd's ownership by Exelon and other such issues are not relevant to the determination in this docket of whether Rate DSPP complies with the law or whether the initial inputs for Rate DSPP result in just and reasonable rates. Such testimony is not simply background or brief context; it makes substantive claims about issues unrelated to the rates proposed in this Docket. There is ample precedent for striking such testimony from the dockets where it is not germane. In ComEd's 2010 general delivery services rate case, for example, the Administrative Law Judges struck testimony that was found not relevant because "it [was] not related to whether Commonwealth Edison Company should receive a rate increase or rate-related issues." Notice of Administrative Law Judges' Ruling, Docket No. 10-0467 (Sept. 17, 2010).

III. THE HEMPLING TESTIMONY IS IMPROPER

Despite its 52 pages, the Hempling testimony is remarkable in its failure to address the issues in this Docket. This testimony:

- Does not once discuss a single operating expense or capital investment cost included in ComEd's revenue requirement.
- Does not once cite or discuss any term or condition of ComEd's proposed formula rate tariff or any of the proposed formulae it contains.
- Does not quote, cite, or address a single piece of ComEd testimony. No ComEd witness is even *mentioned* in the testimony.[3]
- Sponsors an additional six single-spaced page addendum, entitled "Summary of Recommendations." Not a single one of these "recommendations" is either a tariff revision or a cost adjustment.

Instead of addressing ComEd's proposed tariff and costs, the testimony expresses dissatisfaction with the law in general, with the specific annual formula rate process it establishes, with the particular performance goals and investment programs the General Assembly mandated, and with the regulatory proceedings and time schedules the law allows. The testimony advocates for its own inaccurate legal standards and for unauthorized Commission proceedings, planning processes, enforcement mechanisms, and schedules.[4] The testimony's

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[3] The only reference to any ComEd exhibit of any type is to a single paragraph of the whitepaper (ComEd Ex. 1.2) providing background on performance metrics the substance of which are the subject Docket No. 11-0722, not this docket. CUB Ex. 2.0, 41:943 – 42:950. Mr. Hempling's testimony does, however, selectively quote and ham-handedly characterize testimony in the Exelon / Constellation merger proceeding, to which ComEd is not party, on issues having nothing to do with ComEd's proposed delivery rates. *Id.*, 37:853 – 38:880.

[4] By way of illustration only – and there are many more examples – the testimony complains that "the Act creates a risk of utility over-spending" (*id*., 10:190), is not "expert-driven", and will "consume regulatory resources" (*id*., 8:126-138). It rejects the law's approval of a long-term AMI plan, arguing instead that the Commission should move "in small steps" (*id*., 16:324 – 17:330). Labeling the law "useful but require[ing] supplementation," it proposes numerous performance metrics and standards different from those established by the Illinois law. *Id*., 41:949 - 45:1029. It similarly invents its own additional set of penalties for non-compliance. *Id.*, 45:1030 *et seq.*

Expressing still more dissatisfaction with the law, the testimony postulates that there "is a conflict between the Act's directives and the customers' needs" and offers still more outside-the law recipes for resolving the author's imagined conflict. *Id*., 51:1185 - 52:1213. It advocates that a variety of requirements be added on top of those permitted by the law, and not just for rates case (*id*., 15:281-3), but also for investment in the system (*id*., 19:375-86, and "the next six subsections" elaborating on the author's own rules). It advocates planning requirements far

(footnote cont'd)

own statement of purpose sets this tone from the start. Giving but lip service to the Commission "carry[ing] out its responsibilities under the Act's new sections," the testimony's "chief recommendation" has nothing to do with the proposed tariffs or costs, but rather that the Commission strike out on its own and

> … focus not only on cost recovery but on performance: by setting standards and requiring plans; by ensuring sufficient regulatory resources in terms of time, personnel, and expertise to set those standards and enforce those plans; and by creating procedural schedules with sufficient space to allow for credible assessment of costs and performance.

Id. at 7:116-8:120. That tone having been set, major portions of the testimony depart entirely from issues of formula ratemaking, and veer off into speculation about "Exelon interfering with ComEd's activities" and ComEd trying to "block" unspecified plans of "competitors" and inventing "remedies" for these off-topic issues. *Id*., 7:108-111; 10:176-78; §§ II.B and C. Lack of merit aside, the discussions are far beyond the scope of this docket.

Finally, the testimony is liberally salted with legal opinion. These are not opinions of a regulatory expert describing how a process works in the real world – a kind of testimony which, as a practical matter, is accepted at the Commission. Rather, the author, for example, testifies about what the prudence and reasonableness standards are– and gets them both quite wrong. *Id*.,

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(footnote cont'd)

different from those established by the law, as well as review processes not authorized or permitted. *Id*., 25:552 – 26:565. It argues by (flawed) implication that the Commission has the authority to impose in advance "caps" and "collars" on future ComEd costs, powers nowhere granted by the law. *Id*., 13:239 – 47. It argues that the legal prudence standard is the equivalent of the absence of negligence (*id*., 14:265-73) and a few pages later that prudence must be measured against the "best performing utilities" (*id*., 22:470-84) and, still later, against the "lowest feasible cost" (*id.*, 31:690). As for reasonableness, the testimony opines that this legal standard allows "a regulator [to] disallow otherwise prudent costs" based on regulator's allocations of risk. *Id.*, 14:265-73. It also presents odd views of seminal Supreme Court cases. *Id*., 14:fn3.

Further, while the author acknowledges that he is "not an Illinois lawyer," he opines that the Commission is free to "assign economic risk" and "can 'disallow' costs before they are incurred …." *Id.*, 17:343-45. In this same vein, he proposes a concept of "reconciliation" not to actual prudent and reasonable cost, as provided by law, but to some other share of costs allowed by his proposed "risk assignment." *Id.*, 13:247-61. And, he creates a variety of "generic actions" concerning ComEd's relationship with potential competitors (*id.*, 35:792 *et seq.*), actions both unauthorized by the new law and unrelated to this docket.

14:262 – 15:298. The testimony also opines that because the Commission can, on review, allow or disallow costs when the evidence warrants, the Commission *ipso facto* has the implied power to set cost caps and collars in advance and to disallow costs in advance. *Id*., 13:242-61. If these are seriously CUB's legal views, they can and should be addressed in briefing. But, they are not competent or proper testimony.

All these are, of course, only examples. Identifying every improper conclusion, every attempt to reargue the statute, and every claim that falls outside of the scope of this proceeding in the text of this motion would itself take pages. However, in addition to the examples of improper legal testimony listed in footnote 4, attached hereto as Appendix A is a more detailed description of many of the individual examples of improper testimony contained in CUB Ex. 2.0. The improper testimony included in CUB Ex. 2.0 can also be seen in context. ComEd therefore attaches hereto, as Appendix B, a copy of CUB Ex. 2.0 with those portions stricken.

Given the prevalence of improper testimony and the complete lack of any discussion of Rate DSPP or of ComEd's proposed costs, ComEd could have sought to strike CUB Ex. 2.0 in its entirety. However, striking the testimony designated in Appendix B is a reasonable and conservative alternative. Anything less, however, would be improper.

IV. CONCLUSION

WHEREFORE, ComEd respectfully requests that the Administrative Law Judges strike portions of the direct testimony of Scott Hempling as indicated in Appendix B to this Motion.

Dated: January 20, 2012

Respectfully submitted,

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APPENDIX A
<u>Key Examples of Improper Testimony by Subject</u>

1. Subsection A.1 of Part II of Mr. Hempling's testimony is entitled "The Act creates a risk of utility over-spending." CUB Ex. 2.0, 10:190. The subject of this subsection is the statutorily required commitment to invest an estimated $2.6 billion to upgrade and modernize ComEd's transmission and distribution infrastructure and to install Smart Grid electric system upgrades specified in parts (A) and (B) of Section 16-108.5(b)(1) of the Act. CUB Ex. 2.0 at 11:192-193; *see also* 220 ILCS 5/16-105.8(b)(1)(A) and (B). While the cost of such investments will be recovered through Rate DSPP when made or projected for the year following a filing, there are no such costs projected for 2011 and they are not a part of this docket. Hemphill Direct, ComEd Ex. 1.0, 6:108-11. Moreover, as the testimony heading makes clear, the testimony focuses not on any behavior or claim of ComEd, but on the author's disagreement with the formula rate structure adopted by law, which is based on a fundamental misunderstanding of that structure. In fact, the General Assembly has prohibited ComEd from incurring more than $3 billion in capital investment costs absent approval by the General Assembly. *See* 220 ILCS 5/16-108.5(b-5). Any disagreement by Mr. Hempling with the formula rate structure adopted by the General Assembly is not germane to this, or any, Commission proceeding.

2. Mr. Hempling testifies about another risk he feels results from new statutory provisions "authorizing the utility to seek prudence decisions prior to expenditures …." CUB Ex. 2.0, 11:201-210. However, Mr. Hempling does not provide a cite to any of the statutory provisions to which he refers, and the legislation is clear that "[n]othing in this Section shall prohibit the Commission from investigating the prudence and reasonableness of the expenditures made under the infrastructure investment program during the annual review required by subsection (d) … and shall, as part of such investigation, determine whether the utility's actual

costs under the program are prudent and reasonable." 220 ILCS 5/16-108.5(b-5). Perhaps he meant the approval of a utility's Smart Grid Advanced Metering Infrastructure Deployment Plan ("AMI Plan") pursuant to new Section 16-108.6(c) of the PUA, 220 ILCS 5/16-108.6(c)), which provides a statutorily limited pre-approval as follows: "[a] participating utility's decision to invest pursuant to an AMI Plan approved by the Commission shall not be subject to prudence reviews in subsequent Commission proceedings."[5] *Id*. However, even had the testimony recognized that fact, the approval of an AMI Plan has nothing to with the issues in this docket.

3. Mr. Hempling testifies that the Commission should re-allocate risks between ratepayers and shareholders. CUB Ex. 2.0, 12:230-18:364. He asserts that the Commission can "assign the risk of results varying from proposed costs" and "plac[e] caps or collars on specific costs …." *Id.* at 13:239-245. However, the law does not authorize the Commission to impose caps and collars on infrastructure investment program costs. His inference that since the Commission, on review of actual costs, has the authority to disallow imprudent or unreasonable costs it must also have authority to cap, collar, or disallow costs in advance is both spurious and ignores the complete absence of authority in the Act for any such prospective limitations. But, in any event, testimony as to the meaning of the new statutory provisions or concerning inferred Commission legal authority is also impermissible legal opinion testimony.

4. Mr. Hempling testifies about "how the Commission should determine ComEd's non-eligibility for a formula rate." CUB Ex. 2.0, 46:1062-48:1117. These recommendations are not only outside the scope of this Docket, they are contrary to law. As such, this testimony seeking to impose new eligibility requirements contravenes the statutory parameters of this

[5] The complete process for filing the AMI plan and for the Commission to review and rule on it is specified in Section 16-108.6(c). The statute also makes clear that the Commission retains the "ability to review the reasonableness of the costs incurred under the AMI Plan." *Id.*

proceeding and is inadmissible. Section 16-108.5(c) of the PUA specifically provides that a performance-based formula rate "shall remain in effect at the *discretion of the utility*" except "where the Commission finds, after notice and hearing, that a participating utility is not satisfying its investment amount commitments under subsection (b) …." 220 ILCS 5/16-108.5(c) (emphasis added). The process and procedure for the Commission to determine whether a utility is meeting its investment amount commitments is established by statute.[6] 220 ILCS 5/16-108.5(b). Mr. Hempling also testifies that "[t]o remain eligible to have its rates set pursuant to the formula rate, a 'participating utility' must meet certain performance metrics, including defined job creation goals." CUB Ex. 2.0 6:74-5. To the contrary, the law specifically provides that the remedy for failing to meet the specified performance metrics is the imposition of financial penalties:

> Whenever a participating utility does not satisfy the metrics required pursuant to subsection (f) of this Section, the Commission shall, after notice and hearing, enter an order approving financial penalties in accordance with this subsection (f-5). The Commission-approved financial penalties shall be applied beginning with the next rate year.

220 ILCS 5/16-108.5(f-5).

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[6] A utility must submit its investment plan to the Commission. 220 ILCS 5/16-108.5(b). "Within 60 days after filing a tariff under subsection (c) of this Section, a participating utility shall submit to the Commission its plan, including scope, schedule, and staffing, for satisfying its infrastructure investment program commitments pursuant to this subsection (b)." *Id*. It must also update that information. "No later than April 1 of each subsequent year, the utility shall submit to the Commission a report that includes any updates to the plan, a schedule for the next calendar year, the expenditures made for the prior calendar year and cumulatively, and the number of full-time equivalent jobs created for the prior calendar year and cumulatively. If the utility is materially deficient in satisfying a schedule or staffing plan, then the report must also include a corrective action plan to address the deficiency. The fact that the plan, implementation of the plan, or a schedule changes shall not imply the imprudence or unreasonableness of the infrastructure investment program, plan, or schedule." *Id*. Participating utilities must also provide quarterly reports, including certain specified information on jobs created, employees, and contractors, and allows the Commission to require the submission of "any other information *that the Commission may require by rule*." *Id*. (emphasis added). Only after considering these submissions and finding the utility still deficient, may the Commission, after notice and hearing, determine that a participating utility is not satisfying its investment commitments. *Id*.

5. Mr. Hempling testifies about a perceived risk of "the utility blocking competitors." CUB Ex. 2.0, 33:737-36:835. Mr. Hempling focuses on smart grid and advanced metering infrastructure issues as an example, identifying last mile infrastructure, meter data, and interoperability as issues to address. *Id*. at 33:737-35:789. He then recommends six generic actions to address these asserted issues. *Id*. at 35:792-36:835. These issues are simply not germane to the matters to be addressed in this statutorily prescribed docket; namely, whether Rate DSPP complies with the law and whether the initial inputs for Rate DSPP result in just and reasonable rates. 220 ILCS 5/16-108.5(c). Moreover, the new legislation establishes a detailed process and requirements related to the statutorily mandated Smart Grid Advanced Metering Infrastructure Deployment Plan ("AMI Plan"). 220 ILCS 5/16-108.6. The law provides for the creation of a Smart Grid Advisory Council representing a wide range of stakeholder interests including residential utility consumers. 220 ILCS 5/16-108.6(b). ComEd must consult with the Advisory Council and file its AMI Plan with the Commission by April 23, 2012. 220 ILCS 5/16-108.6(c).

6. The statute requires that the AMI Plan "shall be fully consistent with the standards of the National Institute of Standard and Technology (NIST) for Smart Grid interoperability that are in effect at the time the participating utility files its AMI Plan …." *Id.* It also provides that the Commission shall "issue its order approving, or approving with modification, the AMI Plan if the Commission finds that the AMI Plan contains the information required in paragraphs (1) through (5) of this subsection (c) and further finds that the implementation of the AMI Plan will be cost-beneficial consistent with the principles established through the Illinois Smart Grid Collaborative, giving weight to the results of any Commission-approved pilot designed to examine the benefits and costs of AMI deployment." *Id.* The

advanced metering infrastructure issues addressed by Mr. Hempling may be relevant in the context of the proceeding to approve the AMI Plan pursuant to Section 16-108.6 of the PUA, but they are not related to any issue in this Docket.

7. Mr. Hempling's testimony expresses at great length concerns about "the Exelon-ComEd relationship." CUB Ex. 2.0, 37:839-41:936. This concern is, however, completely unconnected in any way to any issue in the instant docket. The only specific claims made by Mr. Hempling relate to smart meters and transmission. *Id*. at 39:887-904. As discussed above, the statute establishes a process and proceeding separate from the instant docket to consider the AMI Plan. 220 ILCS 5/16-108.6. Similarly, neither this proceeding nor any Commission proceeding address transmission rates or transmission investments. The testimony also mentions the "Exelon-ComEd" relationship in regard to ComEd's long term investment commitment. *Id*. at 40:905-913. He further opines that "[b]ecause the General Assembly's spending goals are 'estimates,'" confusing the question of precision with the question of optionality, "ComEd could petition the Commission for a reduction in spending authority." *Id*. Yet again, this is a complaint about the law and one not relevant to this docket. The law creates a specific process and proceeding to address the possibility of satisfying the infrastructure investment program commitments at a cost below the estimated amounts in the statute:

> If the participating utility finds that it is implementing its plan for satisfying the infrastructure investment program commitments described in subsection (b) of this Section at a cost below the estimated amounts specified in subsection (b) of this Section, then the utility may file a petition with the Commission requesting that it be permitted to satisfy its commitments by spending less than the estimated amounts specified in subsection (b) of this Section.

220 ILCS 5/16-108.5(b-5). The issues raised by Mr. Hempling might be relevant to a hypothetical request to satisfy ComEd's investment commitments by spending less than the estimated amounts, but that has nothing to do with this docket or with Rate DSPP.