

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 RESPONSE
TO THE CITIZENS UTILITY BOARD’S MOTION TO RECONSIDER
THE ADMINISTRATIVE LAW JUDGES’ RULING STRIKING
PORTIONS OF THE DIRECT TESTIMONY OF SCOTT HEMPLING**

Commonwealth Edison Company (“ComEd”) objects to the Motion (“Motion”) to Reconsider the Administrative Law Judges’ (“ALJs”) Ruling of January 31, 2012 (“ALJ Ruling”) filed by the Citizens Utility Board (“CUB”). The Motion should be denied. It states no valid grounds for reconsideration, and the testimony was properly stricken on the merits.

I. PROCEDURAL BACKGROUND

ComEd moved to strike much of the Hempling testimony both because it was legal opinion and because it disputed the law, advocating actions and policies that were not just extraneous, but contrary to law. The ALJs granted that Motion “in its entirety.” ALJ Ruling at 1. The decision cites both the fact that Mr. Hempling testified about the law and that he argued against it, testifying instead about what policies and structures he favors. The decision states:

Generally, Mr. Hempling is testifying, in a very broad sense, as to a perceived tension between the general policy in the Public Utilities Act and the statute giving rise to the instant docket, 220 ILCS 5/16-108.5. Since this Commission’s policies must stem from the Public Utilities Act, as that is the sole source of this Commission’s ability to act, this testimony is what the law is, or what Mr. Hempling feels the law should be.

Id. The fact that a witness can neither argue about or with the law is part of the “well-settled” rule that “a witness may not give testimony regarding statutory interpretation.” *Id.*

CUB seeks reconsideration on two grounds. First, CUB briefly argues the ALJ Ruling misapplied a single case among many concerning the impropriety of legal opinion testimony. The majority of the Motion is devoted, however, to a new strategy. CUB claims that, even if much of Mr. Hempling's testimony *is* improper legal opinion, his advocacy of metrics, penalties, standards, proceedings, and plans contrary to those established by law and his prolix discussion of utility ownership and competitive entry, topics not within the statutory purposes of this docket, should nonetheless remain. CUB seriously errs, procedurally and substantively.

**II. CUB ERRS ON THE SUBSTANTIVE LEGAL STANDARD:
OPINION INTERPRETING AND CONTESTING THE LAW IS IMPROPER**

Legal opinion testimony is improper, whether it purports to say what the law means or to argue what law *should* have been passed. The ALJs noted that this is “well settled” and ComEd cited no fewer than eight cases, including cases CUB also cites, standing for that same principle. CUB, however, claims (at 2-3) that “the ALJ Ruling errs in applying *Northern Moraine* because the facts” relating to the underlying testimony “are distinguishable.” CUB misses the point. *Northern Moraine* is particularly relevant only because it applies that rule in a Commission case. The odd facts of that case – the witness was also counsel to a party – do not drive the result, nor are they a predicate for legal opinion being improper. The testimony in *Northern Moraine* was stricken not because of who the witness was, but because he “testified to legal conclusions and statutory interpretation,” just as Mr. Hempling did. 392 Ill. App. 3d at 573-74.

**III. CUB ERRS IN SEEKING RECONSIDERATION:
CHANGING STRATEGY DOES NOT JUSTIFY RECONSIDERATION**

In response to ComEd's Motion to Strike portions of the Hempling testimony, CUB argued that not a line of Mr. Hempling's proposed testimony was improper. That strategy failed. Now, CUB reverses strategies and tries to isolate sections of that testimony and characterize

them as being “policy suggestions” or discussing “issues the Commission should ‘consider.’” Motion at 3. This is not only meritless (see Section IV, below), it is improper.

A proper motion for reconsideration addresses “newly discovered evidence not available at the time of the first hearing, changes in the law, or errors in the previous application of existing law to the facts at hand.” *River Village I, LLC v. Cent. Ins. Cos.*, 396 Ill. App. 3d 480, 492 (1st Dist. 2009) (emphasis added). “[M]otions to reconsider are not appropriate vehicles to advance ... new legal theories not argued before the ruling.” *Schilke v. Wachovia Mortgage, FSB*, 758 F.Supp.2d 549, 554 (N.D. Ill. 2010), quoting *Zurich Capital Mkts., Inc. v. Coglianese*, 383 F.Supp.2d 1041, 1045 (N.D.Ill.2005). *River Village* clearly emphasizes that a party seeking reconsideration cannot advance a new strategy that it could have originally argued, explaining:

Plaintiffs had at least three opportunities in which to submit the Harleystown policy, but consistently chose not to present it. The Harleystown policy can hardly be considered newly discovered or previously unavailable evidence. ... Plaintiffs had control of this evidence but decided, pursuant to their strategy, not to submit it; unfortunately, this backfired on them as they chose to remove from the record the evidence they later sought to have the court analyze in their motion to reconsider. It would have been erroneous for the trial court to have allowed them, after standing mute and losing their motion, to then present the Harleystown policy and argue upon reconsideration that the court’s decision to grant summary judgment in favor of Central was incorrect because the court did not consider the provisions of the Harleystown policy.

396 Ill. App. 3d at 494.

Here, although ComEd’s Motion to Strike identified very specific portions of the Hempling testimony, CUB made a deliberate strategic decision to go “all in” and to only defend that testimony as whole. CUB cannot now change strategy and seek reconsideration based on an approach it could have taken before, but chose to eschew.

**IV. CUB ERRS IN APPLYING THE STANDARD:
THE HEMPLING TESTIMONY IS IMPROPER**

CUB's arguments on the merits are equally unsound. The Hempling testimony disputes the law and argues that the Commission should entertain issues and take actions that are at odds with its requirements. His improper opinions extend not just to what the law is, but to what he "feels the law should be." ALJ Ruling at 1. As the ALJs put it, "[g]enerally, Mr. Hempling is testifying, in a very broad sense, as to a perceived tension between the general policy in the Public Utilities Act and the statute giving rise to the instant docket, 220 ILCS 5/16-108.5." *Id.* Illinois law bars not only bars "expert opinion" testimony interpreting the law, but also opinions *contrary* to the law. *Rogers v. Envirodyne Industries*, 214 Ill.App.3d 1025, 1031 (1st Dist. 1991) (deposition and affidavit containing an "'expert opinion' [that] was contrary to established law" was stricken).

The Act defines this proceeding. As the ALJs note, "the Commission's policies must stem from the Public Utilities Act, as that is the sole source of this Commission's ability to act" ALJ Ruling at 1. Section 16-108.5(c) clearly provides that a "performance-based formula rate shall be implemented through a tariff filed with the Commission ...," and also requires the utility to file specified cost data with its filing "that shall populate the performance-based formula rate and set the initial delivery services rates under the formula" 220 ILCS 5/16-108.5(c). Subsection (c) also requires the Commission to "initiate a docket to review the filing" that must be conducted "consistent with the provisions of ... subsection (c) and the provisions of Article IX ..." not conflicting with subsection (c). *Id.* The Commission must thereafter "enter an order approving, or approving as modified, the performance-based formula rate, including the initial rates, as just and reasonable ... by May 31, 2012." *Id.* This is not, as CUB wrongly claims, ComEd defining the docket's scope. The General Assembly defined its scope.

None of the stricken testimony has anything to do with the tariff or the costs it would recover and none of it bears on the approval of a performance-based formula rate tariff meeting those criteria. That is no more starkly illustrated than in Mr. Hempling's six page summary of recommendations, not a single one of which addresses either Rate DSPP or ComEd's costs. The portions of his testimony CUB tries to defend in the Motion underscore that fact.

CUB first argues that Mr. Hempling's testimony is relevant to "how the various portions of Section 16-108.5(f) laid out by ComEd in its testimony, and the associated fact and policy issues, operate together." Motion at 5. Section 16-108.5(f) deals with performance metrics. Those metrics and how they affect rates are expressly the subject of a different docket, Docket No. 11-0772. The law requires them to be separately filed and to take effect "through a separate tariff mechanism, which shall be filed by the utility" not with its formula rate, but "together with its metrics...." 220 ILCS 5/16-108.5(f), (f-5). Moreover, even if the metrics actually established by Section 16-108.5(f) were within the scope of this docket, Mr. Hempling, proceeding from his premise that the law is "useful but requires supplementation," proposes performance metrics and standards at odds with those in the law (*id.*, 41:949 - 45:1029) and invents his own additional set of penalties for non-compliance (*id.*, 45:1030 *et seq.*).

CUB then argues that pages 13 through 19 of Mr. Hempling's testimony are an "expert opinion on ... policy issues the Commission should consider" Motion at 5. In fact, this testimony features argument about what the prudence and reasonableness standards legally mean. CUB would restore his (incorrect) arguments that the legal prudence standard is the equivalent of the absence of negligence (Motion, App. A., 14:265-67, 269-70), and also leave untouched equally erroneous legal opinions 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, CUB would restore testimony opining that this legal

standard allows “a regulator [to] disallow otherwise prudent costs” based on regulator’s allocations of risk. *Id.*, 14:270-73. Those pages still include Mr. Hempling’s rejection of the law’s use of a long-term AMI plan, arguing instead that the Commission should move “in small steps” (*id.*, 16:324 – 17:331). Finally, CUB would strike only one paragraph summarizing Mr. Hempling’s odd legal opinion that the Commission is empowered to “assign economic risk” and “can ‘disallow’ costs before they are incurred ...” (*id.*, 17:343-45) is deleted, while the lengthy exposition of that same theory remains (*id.*, 18:365 – 29:651).

Moreover, without express mention, CUB’s Appendix A would also restore every word of the lengthy chunks of testimony that complain about Exelon owning ComEd and that discuss Mr. Hempling’s theories concerning competitive entry. *Id.*, 33:737 – 41:937. CUB would likewise restore testimony that ComEd pointed out in detail was improper, including testimony complaining 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). Expressing still more dissatisfaction with the law, the testimony that would be restored postulates that there “is a conflict between the Act’s directives and the customers’ needs” and offers recipes for resolving the author’s imagined conflict. *Id.*, 51:1185 - 52:1213. Testimony CUB would add back advocates that a variety of requirements be added on top of those permitted by the law, and not just for rate cases (*id.*, 15:281-83), 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 different from those established by the law, as well as review processes not authorized or permitted. *Id.*, 25:552- 26:565. If still more examples are required, ComEd refers to Appendix A to its Motion to Strike

Finally, CUB tries to recast ComEd’s objection to all this testimony as having been only about relevance, but that is plainly wrong. ComEd’s argument is not that the Hempling

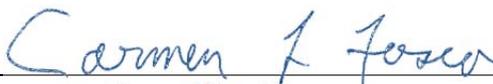
testimony is of no consequence, like, for example, a dispute over a cost so small that it cannot affect any rate. Rather, by arguing for actions, proceedings, and policies that are contrary to law, and by insisting on debating questions expressly committed to other proceedings, Mr. Hempling goes beyond irrelevance and proposes incompetent testimony challenging the law itself. That testimony was correctly stricken.

The ALJ Ruling of January 31, 2012 should stand, as issued.

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Respectfully submitted,

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