

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

COMMONWEALTH EDISON COMPANY :  
: No. 11-0588  
Petition to determine the applicability of Section :  
16-125(e) liability to events caused by the :  
Summer 2011 storm systems. :

**COMMONWEALTH EDISON COMPANY’S RESPONSE  
TO THE ATTORNEY GENERAL’S MOTION TO STRIKE  
THE REBUTTAL TESTIMONY OF PHILIP R. O’CONNOR**

Commonwealth Edison Company (“ComEd”) objects to the Motion to Strike the rebuttal testimony of Philip R. O’Connor, Ph.D. (“Motion”) filed by the Illinois Attorney General (“AG”). The Motion is meritless and should be denied.

**I. INTRODUCTION AND BACKGROUND**

During June and July of 2011, northern Illinois was ravaged by a series of potent storm systems that caused widespread damage. In ComEd’s case, each system damaged or destroyed numerous pieces of equipment at hundreds of locations. The thousands of resulting interruptions started and ended at different times, and affected different customers, for different durations. No single, continuous interruption affected more than 30,000 customers. However, the aggregate number of customers who lost service for four hours or more did exceed 30,000.<sup>1</sup>

A key issue in this case is whether liability under Section 16-125(e) of the Public Utilities Act (“PUA”), 220 ILCS 5/16-125(e), applies under these circumstances. The law’s plain language says “no.” Section 16-125 provides for potential liability only when more than 30,000 customers “are subjected to a continuous power interruption of 4 hours or more ....” *Id.*

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<sup>1</sup> See Ver. Petition, ¶¶ 22-23; *see also* Guerra Dir., ComEd Ex. 1.0, 2:30-3:48; Guerra Reb., ComEd Ex. 5.0, 5:93-108. While the AG disputes whether the damage was unpreventable, these facts are undisputed.

(*emphasis added*). Its use of the singular “interruption” and its requirement that the loss of service be “a continuous” one unambiguously mean that more than 30,000 customers must be affected by one interruption – such as a substation failure – not an entire storm system. A person in Highland Park who experiences an interruption because a tree limb fell on a nearby wire cannot reasonably be part of the same “continuous power interruption” as a customer miles away in Skokie whose interruption started hours earlier when lightning struck a nearby transformer.

Yet the AG – and also Staff on a more limited basis – claim these words mean something else. The AG claims that “a continuous power interruption” can include outages starting at and spanning different times, affecting different places, and resulting from different damage to different pieces of equipment located anywhere across ComEd’s service territory. Four of the five AG witnesses,<sup>2</sup> and Staff’s only witness, each offer their own opinions about what “interruption” means, the context in which it is used, and/or opine on policy implications of its meaning.<sup>3</sup>

In response, ComEd offered rebuttal testimony, including Dr. O’Connor’s, which demonstrates: (a) what “interruption” means, both in the industry and in ordinary use; (b) how the history of interruptions, before and at the time of the statute’s passage, is consistent with that definition; and, (c) how the AG’s definition of interruption and its position would make cost recovery impossible and is bad public policy.

The AG now seeks to keep the entirety of Dr. O’Connor’s testimony from the Commission by confusing testimony about the meaning of the language, historical context, and policy, with subjective testimony about what individual legislators intended or thought. To do

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<sup>2</sup> Owens Dir., AG Ex. 1.0, 46:18-47:2; Rotering Dir., AG Ex. 2.0, 7:151; Vogt Dir., AG Ex. 4.0, 7:140-42; Walters Dir., AG Ex. 3.0, 7:124-126.

<sup>3</sup> *Id.*; *see, e.g.*, Rockrohr Dir., Staff Ex. 1.0, 9:185-10:200.

this, the AG miscasts Dr. O'Connor as a "lobbyist" or "bystander" offering speculative opinions about subjective intent and cites cases addressing that type of testimony.

The AG is wrong and its Motion entirely misses the mark. Dr. O'Connor is not a legislator, lobbyist or "bystander" who opines on what he feels legislators subjectively intended to do. Rather, Dr. O'Connor, who formerly served as Chairman of the Illinois Commerce Commission ("ICC"), has decades of unmatched experience in public and private energy regulation, business, and policy. He has important personal knowledge of the meaning of specialized terms such as "interruption," the history of electric service reliability and significant interruptions in Illinois, and ratemaking policies. Based on his significant regulatory and industry experience, he testifies to facts – dates, events, and the meaning and usage of words. The law requires that those very types of facts be considered in construing and applying Section 16-125(e). The AG's effort to silence this testimony is telling, and its effort to keep the Commission in the dark about those facts should be rejected.

**II. THE AG'S MOTION SHOULD BE DENIED BECAUSE DR. O'CONNOR'S TESTIMONY IS PROPER AND ADMISSIBLE UNDER CONTROLLING LAW.**

The meaning of Section 16-125(e) is a central dispute issue in this case. "The cardinal rule of statutory construction is to ascertain and give effect to the true intent of the legislature." *Paris v. Feder*, 179 Ill. 2d 173, 177 (1997). To ascertain that intent, the law looks first to the plain meaning of a statute's words; then, if that does not suffice, to other rules of statutory construction to determine the General Assembly's intent. *Krohe v. City of Bloomington*, 204 Ill. 2d 392, 394-95 (2003); see *People v. Holloway*, 177 Ill. 2d 1, 8 (1997) (a tribunal should utilize interpretive aids to construe an ambiguous statute and give effect to the intent of the legislature). As the Illinois Supreme Court explained, "[i]n giving effect to legislative intent for purposes of statutory interpretation, the court should consider, in addition to the statutory language, the

reason for the law, the problems to be remedied, and the objects and purposes sought.” *People v. Donoho*, 204 Ill. 2d 159, 171-72 (2003). *See also People v. Haywood*, 118 Ill.2d 263, 271 (1987); *Paris v. Feder*, 179 Ill.2d 173, 177 (1997); *Holloway*, 177 Ill.2d at 8. It is about those very facts that Dr. O’Connor testifies.

**A. DR. O’CONNOR TESTIFIES TO FACTS CENTRAL TO ESTABLISHED RULES OF STATUTORY CONSTRUCTION.**

The first and most important rule of legislative construction in Illinois is that, whenever possible, a statute should be interpreted according to the plain and ordinary meaning of the statutory language. *Paris v. Feder*, 179 Ill. 2d 173, 177 (1997). Here, as explained above, ComEd, Staff, and the AG have put forth varying interpretations of the “plain and ordinary” meanings of the terms of Section 16-125. That witnesses can properly testify to the ordinary, or specialized industry meanings, of words can hardly be denied by the AG, who offered testimony from multiple witnesses on the meaning of the term “interruption” and its use in Section 16-125:

- **Ms. Walters:** “My understanding [of an interruption] is that it doesn’t make sense to fragment the interruptions that way. I believe all the outages Lake Forest experienced during each of these storms are the result of the same interruption...” Walters Dir., AG Ex. 3.0, 7:124-126.
- **Ms. Roterig:** “I 100% disagree with ComEd’s interpretation of ‘interruption’.” Roterig Dir., AG Ex. 2.0, 7:151.<sup>4</sup>
- **Mr. Vogt:** “I look at the effect that an interruption of electric service has on the residents and businesses of Rolling Meadows irrespective of whether there is one or many sources of the outages.” Vogt Dir., AG Ex. 4.0, 7:140-42.

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<sup>4</sup> Contrary to Commission rule (83 Ill. Admin. Code § 200.110), this testimony contains no page numbers. ComEd considered page 1 to be the page containing the first line of narrative testimony.

- **Mr. Owens** aggregates all the interruptions for each storm as attributable to one cause. Owens Dir., AG Ex. 1.0, 46:18-47:2.<sup>5</sup>

Like the witnesses presented by the AG, Dr. O'Connor explains what "interruption" means on its own. But, unlike the AG's witnesses, Dr. O'Connor also offers actual facts that back up his testimony about the meaning and usage of the term "interruption" in the industry, among others. That only strengthens the relevance and reliability of his testimony.

If the Commission were to conclude, however, that the meaning of "a continuous power interruption" is ambiguous, then it must further consider "the reason for the law, the problems to be remedied, and the objects and purposes sought." *Haywood*, 118 Ill. 2d at 271. In so doing, the rules of construction require viewing the law in context, not in isolation.<sup>6</sup> The Illinois Supreme Court has made clear that a party may properly present testimony explaining the "real world activity" that a statute at issue was intended to regulate, especially where, as here, a proposed statutory interpretation would lead to an "absurd" result. *See People v. Hanna*, 207 Ill. 2d 486, 500-01 (2003). That is just what Dr. O'Connor does.

In the section of his rebuttal testimony entitled "Historical Context" (pp. 5-10), Dr. O'Connor testifies to *facts* about the meaning of interruption and facts – *i.e.*, what happened and who was affected – about major interruptions that occurred during the relevant time period.

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<sup>5</sup> Although this is the AG's Motion, ComEd notes that Staff witness Rockrohr also offers this type of testimony. He testifies that "[a]n interpretation of Section 16-125(e) of the Act that counts all customers who experience interruptions of four hours or more toward the "more than 30,000" would introduce potential disputes over the time period(s) to be considered for determining customer counts ... it is my opinion that counting customers who are simultaneously subjected to a four hour or longer interruption is the most logical and fairest method to determine the applicability of Section 16-125(e) of the Act." Rockrohr Dir., Staff Ex. 1.0, 9:185-10:200. He then goes on to compare his interpretation of Section 16-125 against ComEd's interpretation. *Id* at 11:231-14:300.

<sup>6</sup> Cases the AG cites, for example, *Sunstrand Corp. v. C.I.R.*, 17 F.3d 965, 967 (7<sup>th</sup> Cir. 1994), recognize this same fact. Indeed, the AG conveniently omits the *Sunstrand* court's affirmation that "[s]urrounding sentences are context for interpreting a sentence, but so is the history behind the sentence - where the sentence came from, who drafted it, who opposed its inclusion in the statute." *Sunstrand Corp. v. C.I.R.*, 17 F.3d 965, 967 (7<sup>th</sup> Cir. 1994).

These were the problems being faced, and in construing an ambiguous statute, a tribunal not only may, but should consider the “statutory language, the reason for the law, the problems to be remedied, and the objects and purposes sought.” *Donoho*, 204 Ill. 2d at 171-72. Moreover, Dr. O’Connor does not testify about what any legislator or legislators were thinking or meaning to vote for. Nowhere does he quote legislators, press releases, or comments by sponsors, as did much of the testimony criticized in cases the AG cites in its Motion. His testimony goes to the “real world activity” and historical view that the Commission must take under consideration – *i.e.*, a careful consideration of the context in which it was actually adopted and the consequences of that interpretation.

**B. DR. O’CONNOR TESTIFIES TO IMPORTANT MATTERS OF PUBLIC AND RATEMAKING POLICY.**

It is well-settled in Illinois that policy issues are frequently and properly considered in construing and applying statutes. *See, e.g., People ex rel. Sherman v. Cryns*, 203 Ill. 2d 264, 286 (2003) (“[T]he strong public policy considerations ... lend additional support for our conclusion.”). The Commission, too, regularly admits testimony regarding public policy and considers that testimony in reaching decisions. *See, e.g., Commonwealth Edison Co.*, Docket No. 05-0597, 2006 Ill. PUC 36 at 4, 13 (2006); *MidAmerican Energy Co.*, ICC Docket No. 01-0796, 2003 Ill. PUC LEXIS 229 at 27 (2003). The Commission has also noted the *absence* of public policy evidence in rejecting an AG position. *Commonwealth Edison Co.*, ICC Docket No. 10-0467 (2010) at 25. Notably, the AG has also historically offered public policy testimony. For example, in the same case, AG witness Rubin testified about policy considerations in rate design. *Id.* at 228 (summarizing Rubin testimony). That testimony is doubly proper where, as here, it also explains that in the “real world,” the AG’s reading of the

law would produce perverse results, contrary to the statute's purpose. *Hanna* 207 Ill. 2d at 500-01.

Yet, despite this well-established law and its own prior positions, the AG now seeks to strike Dr. O'Connor's entire testimony, including extensive portions of Dr. O'Connor's testimony that clearly relate to policy. (*See, e.g.*, O'Connor Reb., ComEd Ex. 6.0, pp. 10-14 (titled "Policy Considerations")) For example, Dr. O'Connor explains why the AG's proposed construction of Section 16-125 is poor public policy and will hurt consumers:

[S]torm-related damage and consequent interruptions are acts of God that, by their very nature, will recur irrespective of any utility effort that would be considered normal or within the bounds of reason. No utility is free of them. To apply liability like that created by Section 16-125 to such events would be poor ratemaking and regulatory policy and, ultimately, counterproductive. It would not promote reliability and would not treat utilities fairly. In the end, customers, too, would lose.

O'Connor Reb., ComEd Ex. 6.0, 2:33-38. Moreover, Dr. O'Connor's policy testimony directly responds to AG and Staff testimony offering policy opinions. O'Connor Reb., ComEd Ex. 6.0, 12:260 – 13:293 (citing specific policy testimony of Staff witness Rockrohr and AG witness Vogt). Having opened the door to questions of policy, the AG cannot complain when ComEd responds, even if such evidence were otherwise inadmissible – which it is not.<sup>7</sup>

Nor can the AG sidestep this law by recasting Dr. O'Connor's rebuttal as "testimony by an industry consultant or lobbyist as to past legislative intent." Motion at 1. As explained above, the AG is not correct. Even if the AG had not mischaracterized Dr. O'Connor's testimony and even if he did purport to testify about its legislative history and the relevant legislators' subjective intent, testimony by someone who was "centrally involved with the efforts

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<sup>7</sup> Counsel for ComEd orally reminded the AG's attorneys of this fact after the April 24, 2012 status hearing and asked the AG to at least limit its Motion to the portion of Dr. O'Connor's testimony to which it is actually directed. ComEd has received no reply.

culminating in the Illinois Electric Service, Customer Choice and Rate Relief Act of 1997” and who is “familiar with the circumstances that prompted” the adoption of the statute at issue would still be competent to offer such testimony.<sup>8</sup> O’Connor Reb., ComEd Ex. 6.0, 6:115-120; AG Motion at 2.

The AG points to *Bloomington v. Bloomington Township*, 233 Ill. App. 3d 724, 736 (4<sup>th</sup> Dist. 1992), stating that “[o]ne Illinois case is particularly on point here. In *Bloomington v. Bloomington Township*, the Illinois Appellate Court upheld the trial court’s exclusion of a lobbyist’s testimony as to the meaning of a relevant legislative amendment ... The Illinois Appellate Court excluded in *Bloomington* exactly what Mr. O’Connor attempts to suggest through his rebuttal testimony to this Commission.” Motion at 6. In *Bloomington*, the witness did exactly what Dr. O’Connor does *not* do: claim subjective knowledge of what the legislators thought and meant. In contrast, Dr. O’Connor says nothing about the subjective intent of the General Assembly or its members, nor does he pretend to “impute” understanding to members of the Illinois legislature when 16-125 passed. Rather, he properly sets forth historical facts that reflect the “problems to be remedied” when the legislature enacted Section 16-125.

ComEd notes that the AG omits from its brief that the “rule” they draw from *Bloomington v. Bloomington Township* was subsequently rejected by the Illinois Appellate Court in *Krohe v. City of Bloomington*, 329 Ill. App. 3d 1133, 1137 (4<sup>th</sup> Dist.) (2002) (“*Krohe*”), which was in turn affirmed by the Illinois Supreme Court in *Krohe v. City of Bloomington*, 20 Ill. 2d

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<sup>8</sup> Perhaps the AG’s intention in zeroing in on Dr. O’Connor’s involvement “with the efforts culminating in the Illinois Electric Service, Customer Choice and Rate Relief Act of 1997” and his familiarity “with the circumstances that prompted” the inclusion of the statute at issue in this proceeding – means to imply that someone close to the process could do nothing but speculate about subjective intent. If so, that implication is incorrect. Even a person with such unique subjective insight, which Dr. O’Connor does not himself claim to have, could still testify about the objective facts. Moreover, the qualifications and credibility of witnesses are matters for the Commission as trier of fact. *Illinois Bell Telephone Co. v. Ill. Comm. Comm’n*, 327 Ill. App. 3d 768 (2002); *Donaldson v. Central Illinois Public Service Co.*, 313 Ill. App. 3d 1061, 1078 (2000).

392 (2003). There, the court reiterated that “[a]s the fundamental purpose of statutory construction is to ascertain the intent of the legislature, the trial court’s review of the transcripts of the legislative debate was appropriate.” As the Appellate Court in *Krohe* stated, “[in] determining legislative intent, courts may consider relevant statements by legislators concerning the nature and effect of the proposed law.” *Krohe v. City of Bloomington*, 329 Ill. App. 3d 1133, 1137 (2002), *aff’d by Krohe*, 20 Ill. 2d 392. In short, while Dr. O’Connor does not rely on such statements, Illinois law allows consideration of even certain subjective evidence of legislative intent when proven by competent evidence.

That same principle is confirmed by *Exxon Mobil Corp. v. Allapattah*, 545 U.S. 546 (2005) (“*Exxon*”), a U.S. Supreme Court case applying federal law that the AG also cites. The AG mistakenly argues that *Exxon* bolsters its proposition that “the opinions of an industry lobbyist as to the intended meaning of a statute must be zealously barred.” Motion at 5. In fact, rather than barring evidence of legislative history or intent, “zealously” or otherwise, the *Exxon* Court actually focused on the *weight* that should be given to such evidence. Moreover, the *Exxon* Court specifically noted that extrinsic materials have a role in statutory interpretation to the extent they “shed a reliable light on the enacting legislature’s understanding of an otherwise unambiguous term.” *Exxon*, 545 U.S. at 568-69.

### **III. CONCLUSION**

This case has great importance, and the meaning of Section 16-125 lies at its core. The AG has failed to show that Dr. O’Connor’s rebuttal testimony is improper or inadmissible under controlling law. Dr. O’Connor testifies not to what legislators meant, but to squarely admissible policy issues and to the specific types of objective facts on which the recognized standards for construing and applying a statute rely. If granted, the Motion also would cut off ComEd’s right

to respond fully and fairly to the AG's own testimony, and leave the Commission in the dark.  
Thus, the Commission should deny the Motion to Strike the Testimony of Philip R. O'Connor.

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Respectfully submitted,

COMMONWEALTH EDISON COMPANY

By: \_\_\_\_\_



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