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.	:	

POST-HEARING REPLY BRIEF OF COMMONWEALTH EDISON COMPANY

TABLE OF CONTENTS

Section **Page**

I. INTRODUCTION 1

II. SECTION 16-125(E) APPLIES TO A CONTINUOUS INTERRUPTION, NOT THE NUMEROUS DISTINCT STORM-RELATED INTERRUPTIONS AT ISSUE. 5

A. ComEd Is The Only Party To Coherently Support The Plain Meaning and Language of Section 16-125(e). 5

B. Staff's and Intervenors' Attacks on the Plain Reading of Sec. 16-125(e) Fail. 6

1. The Plain Reading of Sec. 16-125(e) Is Not "Toothless." 6

2. The Plain Reading of Section 16-125(e) Has No Absurd Results 8

3. The Plain Reading of Section 16-125(e) Has No Unjust Results 9

4. The Plain Reading of Section 16-125(e) Does Not Conflict with Part 411 10

C. By Contrast, Staff and Intervenors' Constructions Are Contrary to the Plain Statutory Language And Fail As a Matter of Law and Policy 11

1. Staff and Intervenors' Constructions 12

2. Staff and Intervenors' Constructions Are Contrary to the Plain Statutory Language. 13

3. Staff and Intervenors' Constructions Create Conflicts Within Section 16-125 and Article XVI. 14

4. Their Constructions Pose Grave Constitutional Risks and Ultimately Hurt Sustained Grid Investment and Reliability for Customers. 15

III. THE DAMAGE AND RESULTING INTERRUPTIONS CAUSED BY THE 2011 SUMMER STORMS WERE DEMONSTRABLY UNPREVENTABLE 18

A. No Party Disputes the Severity of the Storms or the Quality and Speed of ComEd's Restoration Response 19

B. Staff Improperly Relies on Several Unsupportable Assumptions to Recommend Denying ComEd a Full Waiver for All Storm Damage 20

1. Tree Contact Interruptions Are Not All Unpreventable; ComEd Established that it Prudently Managed the Relevant Vegetation and that the Tree Contact Interruptions were Unpreventable 21

2. Broken Limbs / Branches Do Not Obey Utility Standards and Become Preventable When Winds Fall Below 59 MPH 23

3. Intentional Interruptions that Speed Restoration and Protects Safety Should Not Be Considered Preventable 24

C. The AG's Generic Attack on ComEd Dodges the Actual Waiver Issues and Is Factually Baseless 25

1. The AG's Investigation Was Wholly Inadequate 26

2. The AG's Investigation Is Permeated With Bias 28

3. The AG Witness' Attacks On ComEd Are Also Wrong In Substance. 29
a. Overall Design, Maintenance and System Performance..... 29
b. ComEd's Vegetation Management Program 31
c. The Condition of Wood Poles..... 34
d. ComEd's Lightning Protection 35
e. Fusing and Sectionalizing Equipment 36
4. The AG's Proposed "Remedies" Are Unreasonable and Imprudent..... 38
5. No Additional Investigation Is Warranted..... 39

IV. CONCLUSION..... 40

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.	:	

POST-HEARING REPLY BRIEF OF
COMMONWEALTH EDISON COMPANY

Commonwealth Edison Company ("ComEd") submits this Post-Hearing Reply Brief in accordance with the Rules of the Illinois Commerce Commission (the "Commission" or the "ICC") and the schedule established by the Administrative Law Judge ("ALJ").

I. INTRODUCTION

The post-hearing briefs filed by Staff and the Illinois Attorney General ("AG") advance a fundamentally distorted construction of Section 16-125(e) that, if adopted, would lead this Commission to the unprecedented step of punishing ComEd for the vagaries of severe weather, instead of the realities of system operations. The AG and Staff strive in their briefs to downplay the consequences of this unfair result, which would threaten a utility's financial integrity and hurt consumers by undermining investment. Imposing crippling sanctions on utilities in response to severe weather multiple times a year – year after year – cannot be sustained.

Such an unfair result cannot be presumed to have been the General Assembly's intent, particularly where no other jurisdiction in this country has taken such a counterproductive step. In the present case, no party disputes that the terms of Section 16-125(e) are clear and unambiguous. That law's plain language states that it applies only when more than 30,000 customers "are subjected to a continuous power interruption of 4 hours or more." 220 ILCS

5/16-125(e). ComEd is the only party that gives this plain language its plain meaning, as required by law. This ends the legal debate and arguments to the contrary should be rejected.

First, unable to controvert the plain reading of Section 16-125(e), Intervenors and Staff turn to a laundry list of misplaced criticisms, claiming that ComEd's plain reading makes Section 16-125(e) "toothless," and leads to "absurd" and "unjust" results. Their arguments distill to the objection that it is unfair for customers not to be paid for storm losses. While ComEd understands the frustration of customers who are without power for any period of time, Section 16-125(e) was not enacted to create a customer compensation scheme for bad weather. The unrebutted evidence proves that the General Assembly enacted Section 16-125(e) as a carefully targeted means of addressing and deterring large-scale failures of key system elements.

Second, any effort to use Section 16-125(e) to turn ComEd into an all-purpose insurer for the damage caused by Mother Nature would violate constitutional guarantees and hurt consumers who rely on a healthy utility capable of investing in the electrical grid. No state legislature or Commission subjects their utilities to unrecoverable penalties based on such strict liability. The AG demurs that concern over financial integrity is overblown and that at "most" 10,000 claims are at issue and $1,000/claim is "high." The reality is that the AG argues that *no* waiver should be given and proposes a misreading of Section 16-125(e) even broader than Staff. If its position is accepted, more than 1.25 million customers would potentially be impacted. At the AG's $1,000 figure, that could total over $1.25 billion, over 65% of ComEd's entire annual revenue requirement. And that is only for six storms in one year.

Finally, even if Section 16-125(e) were ambiguous, the competing constructions of Section 16-125(e) offered by Staff and Intervenors violate the rules of statutory interpretation and fundamental canons of construction. Instead of reading the words as written, they scratch

out terms, substitute new words, and generally edit the statute as drafted. Staff and Intervenors' efforts to ignore the carefully written language of Section 16-125(e) and to impose unprecedented liability on ComEd for weather damage beyond its control must be rejected.

Staff and Intervenors' positions on waiver underscore the paradoxical, unfair and unreasonable results that arise from their efforts to misapply Section 16-125(e) to these storms. For example, Staff acknowledges the unpreventable destructive force of severe weather. Of the series of six storms systems that pounded the region within days of each other in the Summer of 2011, Staff recommends waiver of all liability for every storm, except the biggest and most damaging: the July 11 derecho that devastated community after community across the Midwest. That Staff would deny a waiver for only this most extreme storm is proof positive that ComEd is being penalized for the size and severity of the storm, not its actions.

Indeed, Staff does not deny that ComEd designs, constructs, and maintains its system prudently and in accordance with accepted engineering standards. Instead, its opposition to a complete waiver rests on the assumption that entire categories of damage – including all tree contact (even if the winds are at hurricane-force speeds), broken limbs occurring at wind speeds below 60 mph, and interruptions intentionally initiated for safety or to speed restoration – are "preventable." As the unrebutted testimony of the only professional arborist who testified in the case makes clear, Staff's assumptions do not square with the biological reality of trees and other vegetation, and how they react in severe weather. A standard that does not acknowledge these scientific facts cannot be reasonably and prudently met by ComEd or any utility in this country.

The AG's waiver position is even more untenable. In the AG's view, even the most damaging summer storm in ComEd's history did not cause unpreventable damage. In fact, the AG does not believe a waiver should be granted for any of the summer storms. Its brief rests

instead on the mythical ideal of a utility that never has pending maintenance, operates spotless equipment that never leans or looks used, withstands 80-90 mph winds, deflects falling trees and limbs, repels branches and other debris hurled from all directions at all speeds, and is impervious to over 18,000 lightning strikes. No utility anywhere meets those unrealistic expectations. The derecho that devastated multiple East Coast utilities earlier this year highlighted this basic truth.

The AG's claim, through its expert witness, that "the singular root cause for the very large number and very long duration of [storm] outages experienced by ComEd's customers is clear and evident neglect of ComEd's distribution facilities over the past twenty years," is particularly astounding. Owens Dir., AG Ex. 1.0, 46:22-47:2. The AG has been involved in every ComEd rate case and reliability investigation in those 20 years. It has represented to the Commission in no uncertain words that "under traditional regulation and the incumbent regulatory lag, ComEd has successfully modernized its network, and generally speaking, maintained reliability over the years, without the benefit of an automatic rider mechanism for distribution system modernization projects." Docket No. 07-0566, AG Reply Brief at 16. Also, contrary to its position in this case, the AG bitterly fought against the Energy Infrastructure Modernization Act and the additional investment it promised.

The AG's arguments here are not credible. Nor should the purported expert evidence on which it relies be accepted. The AG's expert witness spent all of roughly 800 minutes observing a tiny fraction of ComEd's facilities while being driven around by the AG's office to a cherry-picked 12 out of ComEd's 400 communities. As the evidence proves, the AG's expert had a singular predetermined goal: conclude that ComEd's system is in disrepair. He developed a process to achieve that end, including the creation of written internal guidelines on how to target and take photos of only "bad" ComEd facilities. The results of his inadequate and biased review

reveal nothing more remarkable than the fact that anyone can snap unrepresentative pictures of equipment that may need to be fixed. The purpose of Staff's ongoing review is continuous further improvement. Neither pictures, Staff's reports, nor any other credible evidence proves that ComEd's extensive system is unreasonably and imprudently designed, constructed, and maintained. The testimony of Staff's engineering witness, ComEd's witnesses, and the testimony and assessment of Navigant Consulting all prove the AG wrong.

II. SECTION 16-125(E) APPLIES TO A CONTINUOUS INTERRUPTION, NOT THE NUMEROUS DISTINCT STORM-RELATED INTERRUPTIONS AT ISSUE.

Section 16-125 is written coherently and unambiguously, in specific and plain language. It applies to "a continuous power interruption" like those that occurred in the 1990s and drove the law's passage. Ignoring that language, Staff and Intervenors try to force the six severe summer 2001 storms into that statutory framework, where they do not fit. The Commission should respect the statute's language, and reject their effort to distort it.

A. ComEd Is The Only Party To Coherently Support The Plain Meaning and Language of Section 16-125(e).

Section 16-125(e) unambiguously applies to "a continuous power interruption." Both the noun "interruption" and the article "a" in the operative phrase "a continuous power interruption of 4 hours or more" are obviously singular. Read plainly, those words unambiguously refer to a *single* interruption of service – a single break in the flow of power to customers. *See* ComEd Initial Brief ("Br.") at 13. Likewise, the plain language requires the interruption to be "continuous," which dictionaries define as unbroken, and marked by an uninterrupted extension in space, time, or sequence. "Continuous" does not refer to things that are broken or disjoined, separated by different starting and ending times, or that occur in different locations. Indeed, those are the meanings of "*dis*continuous." *See* ComEd Br. at 13-14.

At no time during the Summer 2011 Storms was there a single interruption to the flow of power to customers that affected more than 30,000 customers for a continuous or unbroken period lasting at least four hours. Guerra Dir., ComEd Ex. 1.0, 2:23-29; Guerra Reb., ComEd Ex. 5.0, 5:93-95; Maletich Dir., ComEd Ex. 3.0 Rev., 4:87-5:94; Petition, ¶ 22. Not once, in either their testimony or in their briefs, do Staff or Intervenors dispute this fact. To the contrary, Staff's own engineering witness Greg Rockrohr agreed on cross examination that the July 11 derecho alone caused over *5,300* interruptions. (Tr. at 281:10-21) *See also* Owens, Tr. at 612:7-613:1, 633:5-10; Frank, Tr. at 313:6-13; Walters, Tr. at 479:13-482:11. Under these circumstances, it is straightforward and clear that Section 16-125(e) has not been triggered by its own terms. [1]

B. <u>Staff's and Intervenors' Attacks on the Plain Reading of Sec. 16-125(e) Fail.</u>

Staff and Intervenors attempt to undermine the plain and unambiguous language of Section 16-125(e) even though such language is the "most reliable indicator of the legislature's objectives….." *Michigan Ave. Nat. Bank v. County of Cook*, 191 Ill.2d 493, 504 (2000). Their unfounded arguments reflect a deep misunderstanding of the purpose, context, and history of Section 16-125(e).

1. <u>The Plain Reading of Sec. 16-125(e) Is Not "Toothless."</u>

ComEd's plain reading of Section 16-125(e) is not "toothless," as the AG and City-CUB claim. *E.g.*, City-CUB Br. at 6-7; AG Br. at 9-10. Their argument – which Staff does not join – rests on Staff witness Rockrohr's testimony that "[n]o single outage on individual *primary voltage distribution circuits* could result in an interruption of service to more than 30,000

[1] Staff's Brief discusses the burden of proof in a manner disconnected from the actual issues here. Waiver is in affirmative defense and the statute places the burden of proof regarding waiver on ComEd. As noted below, ComEd met that burden with evidence. The *burden of going forward* is on opponents once that prima facie case has been made. *People v. Washington*, 326 Ill. App. 3d 1089, 1092-93 (4th Dist.) (2002). Statutory construction is, however, a legal issue. Moreover, ComEd is aware of no substantive evidentiary dispute concerning that claim.

ComEd customers…."[2] They leap from this testimony to the conclusion that Section 16-125(e) "would apply to virtually no set of outages resulting from damage to [ComEd's] *distribution* system." AG Br. at 7-8.

Section 16-125(e) is *not*, however, limited to "primary voltage distribution circuits" (in lay terms, single 12 kV and 4kV feeders). Section 16-125 is entitled "Transmission and distribution reliability requirements" and begins by stating that it applies to both distribution *and* transmission systems. *See* 220 ILCS 5/16-125(a). The section applies, among other things, to 34 kV lines, 34 kV substations, substations that power groups of feeders, high-voltage and capacity distribution lines, and transmission substations and lines. The fact that a single feeder failure is unlikely by itself to trigger the statute does not render it "toothless" or "meaningless.

As further explained in ComEd's Initial Brief, the fact that Section 16-125(e) covers and addresses failures in substations and transmission lines fully comports with the record evidence of the historical context. *See, e.g.,* ComEd Br. at 9-10. At the time the 1997 Restructuring Act was enacted, a major reliability concern was large scale man-made failures of delivery equipment that left tens of thousands of customers out of service at one fell swoop. Guerra Dir., ComEd Ex. 1.0, 11:232-237; O'Connor Reb., ComEd Ex. 6.0 Rev., 6:121-134.[3]

---

[2] Rockrohr Dir., Staff Ex. 1.0, 14:297-300 (emphasis added). Mr. Rockrohr again uses the singular "interruption" correctly to refer to a single interruption in the flow of power to customers.

[3] Dr. O'Connor, former Chairman of the Commission, has acted in numerous regulatory roles throughout his career. Here, Dr. O'Connor testified on both the history of interruptions and the public policy implications of liability. The AG moved to hide that important evidence from view through a motion to strike. That motion was denied. Tr. at 731:17. *See also* ComEd's Response to AG's Motion to Strike. No party has offered any new argument or evidence showing why that ruling should be reconsidered. Neither CUB nor the City filed any opposition to that fully briefed motion when it was pending. Rather, the arguments raised by the AG, CUB-City, and Staff in their filed briefs underscore why the Motion to Strike was properly denied. The AG makes unsupported and incorrect claims about the purpose and intent of Section 16-125(e) without any evidence whatsoever. The evidence as to the actual legislative and historical context, properly admitted, undercuts the AG's misportrayal. *People v. Donoho*, 204 Ill. 2d 159, 171-72 (2003); *People v. Haywood*, 118 Ill.2d 263, 271 (1987); *Paris v. Feder*, 179 Ill.2d 173, 177 (1997); *People v. Holloway*, 177 Ill. 2d 1, 8 (1997).

For example, the very interruptions that spawned Section 16-125(e) demonstrate that single large scale interruptions occur. In December of 1993 a fire at ComEd's Pleasant Hill substation interrupted service to nearly 22,000 customers in Northwestern DuPage County. In July of 1996, six months before the General Assembly took up what became Article XVI, a fire-driven cable fault at a ComEd's substation in Bartlett interrupted between 29,000 and 30,000 customers. O'Connor Reb., ComEd Ex. 6.0 Rev., 6:115-8:170. Even during the June 30 storm, damage from wind-blown debris caused a single interruption of service to 26,524 customers. *See* Petition, ¶22; Maletich Dir., ComEd Ex. 3.0 Rev., 5:94; Maletich, Tr. at 76:21-78:21. Any such discrete interruption could leave more than 30,000 customers without service for four hours.

2. <u>The Plain Reading of Section 16-125(e) Has No Absurd Results</u>

Staff points to the fact that Section 16-125(f) permits a waiver for some but not all customers affected by a single interruption. Staff claims that if Section 16-125(e) meant what it says, this would create a conflict, because Staff cannot see how a waiver could "exclude only some [of] the customers who experience an interruption lasting four or more hours…." Staff Br. at 8-9. There is no conflict. A single continuous interruption could be the subject of a waiver for some customers affected by the same interruption, but not for others.

The plain language of Section 16-125(e) and (f) ask the Commission to consider the extent to which unpreventable damage *caused* the interruption of service to the customers affected. The specific language in Section 16-125(f) to which Staff points takes into account the possibility, in certain instances, that whether there is "a continuous power interruption" extends for four hours or more to 30,000 plus customers could be the result of multiple causes. For instance, the Commission might conclude – if the evidence supported it – that while the equipment damage that triggered the interruption was unpreventable, what actually caused some customers to be out of service for four hours or more was some *other* factor, such as a specific

imprudent system design not compliant with accepted practice. In this case, however, although Section 16-125(e) has no applicability to the thousands of small interruptions at issue, ComEd has proved that its system is designed, constructed, and maintained prudently and in accord with applicable standards, and that its restoration efforts were exemplary (*see* Section III, *infra*).

3. <u>The Plain Reading of Section 16-125(e) Has No Unjust Results</u>

The AG's argument that ComEd must be reading Section 16-125(e) incorrectly because ComEd has not, and will not here, be penalized is neither logically valid nor true to the statute. That argument rests on the incorrect premise, among others, that "the plain purpose of Section 16-125(e) [is] to compensate customers" for interruptions resulting from storms. AG Br. at 10. There is no evidence supporting that claim, and extensive evidence to the contrary.

Any argument that the General Assembly created Section 16-125(e) to serve as some type of "customer compensation scheme" is at odds with the actual historical facts. *See* ComEd Br. at 22-24. Section 16-125(e) was created in the wake of major events/failures at substations and other ComEd facilities that negatively impacted significant numbers of customers, and was designed to deter those types of failures. O'Connor Reb., ComEd Ex.6.0 Rev., 2:23-25; *see* Guerra Dir., ComEd Ex. 1.0, 11:232-237. ComEd in the late 1990s and early 2000s made structural revisions in its system topology, among other things, and those interruptions stopped. Section 16-125(e) succeeded. The AG's point proves nothing more than that the General Assembly was successful and Section 16-125(e) is working as designed. *See* O'Connor Reb., ComEd Ex.6.0 Rev., 12:273-13:275; *see also* Guerra Dir., ComEd Ex. 1.0, 11:242-244.

Far from creating a "customer compensation scheme" for the results of inevitable events such as storms, the General Assembly recognized the extraordinary nature of such a penalty and reaffirmed and strengthened the commitment to full cost recovery. The very same General Assembly that adopted Section 16-125(e) also adopted Section 16-108(c) in the same Public Act.

ComEd Br. at 24. Section 16-108(c) reinforces and codifies utilities right to delivery service rates set to fully recover their costs. 220 ILCS 5/16-108(c). It would be illogical to presume that the General Assembly that adopted Section 16-108(c) to assure cost recovery would in the same breath pass legislation that leaves ComEd open to paying potentially staggering and unrecoverable costs, even if ComEd acted prudently and reasonably. *See, e.g.,* O'Connor Reb., ComEd Ex. 6.0 Rev., 10:224-11:249; Shlatz Reb., ComEd Ex. 11.0, 3:46-49; ComEd Br. at 24. Nor would such a presumption make sense given the well-settled Illinois law holding that electric utilities are not generally liable to customers for damages resulting from service interruptions, either under common law or their tariffs. *See, e.g, In re Illinois Bell Switching Station Litigation*, 161 Ill. 2d, 233, 242-244 (1994); *Sheffler*, 2011 IL 110166 at 10.

4. <u>The Plain Reading of Section 16-125(e) Does Not Conflict with Part 411</u>

City-CUB and Staff witness Rockrohr mistakenly assume that the definition of "interruption" in Part 411.20 must be mutually exclusive with the definition of "interruption" in Section 16-125(e). As the Commission made clear, the definition of "interruption" in Part 411.20 is to be used for certain specific reliability *reporting* purposes. The Part 411.20 definition even adds technical detail and provisions to suit that specific purpose. For example, to facilitate meaningful reporting, Part 411.20 excludes interruptions not "requiring human intervention by the jurisdictional entity to restore electric service." 83 Ill. Admin. Code § 411.20.

Under these circumstances, and in an appropriate act of regulatory reserve, the Commission makes clear in Part 411.20 that it does not seek to overstep its powers and presume in its rulemaking that the Part 411.20 definition of "interruption" should be automatically *extended* to serve as the same definition of "interruption" as used by the General Assembly, simply because that term appeared in Part 411.210 and Part 411.220 when those provisions necessarily referred to Section 16-125(e) and (f). For that purpose, Part 411 does not presume,

without more, to substitute its definition for any statutory definition. *Id.* ("As used in Sections 411.210 and 411.220, 'Interruption' has the same meaning as when used in Section 16-125(e) of the Act.). But nothing in Part 411.20 proves that the Commission concluded that the Part 411.20 definition of "interruption" was wholly at odds, or *mutually exclusive,* with Section 16-125(e).

Indeed, although ComEd has never claimed to base the plain meaning of "interruption" solely on Part 411.20, it is telling that the Commission in its rulemaking defined "interruption" in a manner that is consistent in its key respects with how that term has been defined by every single engineer who has testified in this case – whether from ComEd, Staff, or the AG. *See, e.g.*, Shlatz Reb., ComEd Ex. 11.0, 19:438-42; Rockhohr Tr. at 233:11-235:22; Owens Tr. at 612:7-613:1. The AG's own lay witnesses testified to a similar definition of "interruption." Frank, Tr. 313:6-13; Walters, Tr. 479:13-482:11; ComEd Br. at 17-19.

Equally important, City-CUB do not offer a single contrary definition of the term "interruption." The conclusion advanced by City-CUB that somehow the General Assembly defined "interruption" in a manner that was dramatically at odds with how the Commission in its rulemaking, the industry, and lay people use that term is unreasonable and should be rejected.

C. <u>By Contrast, Staff and Intervenors' Constructions Are Contrary to the Plain Statutory Language And Fail As a Matter of Law and Policy</u>

Staff and Intervenors pay lip service to the "plain language" of Section 16-125(e), but promptly turn to what they call statutory "construction," rearranging and rewriting the actual words on the page. No rule of construction allows a court or agency to declare that the General Assembly did not intend the plain meaning of the words it used. *Bridgestone/Firestone, Inc. v. Aldridge*, 179 Ill. 2d 141, 149 (1997). Indeed, a court or agency can only look beyond the language where that language itself is ambiguous. *Gem Electrics v. Dep't of Revenue*, 183 Ill. 2d 470, 475 (1998); *County of DuPage v. Illinois Labor Relations Bd.*, 231 Ill. 2d 593, 604 (2008);

Krohe v. City of Bloomington, 204 Ill. 2d 392, 394-95 (2003); *Paris v. Feder*, 179 Ill. 2d 173, 177 (1997). Here, no Intervenor has claimed or established that Section 16-125(e) is ambiguous and, therefore, open to construction. As a result, Staff and Intervenors' constructions should be rejected. In the alternative, even if Section 16-125(e) were determined to be ambiguous in whole or part, Staff and Intervenors' proposed constructions fail because they violate the canons of statutory construction they claim to apply.[4]

1. Staff and Intervenors' Constructions

Staff and City-CUB's position in this case is that "in determining whether more than 30,000 customers have been interrupted for four hours or more," customers who are "simultaneously" out of power for a four-hour or longer period should be totaled together, even if the interruptions in the flow of power to those customers were entirely distinct, occurring at different times and places. Staff Br. at 7; City-CUB Br. at 4-7.

The AG departs even further from the text of Section 16-125(e). The AG claims that whenever "30,000 customers have been without power for four hours or more, liability attaches unless a waiver is approved." In the AG's view, the law does not even "condition[] liability on whether the same group of customers is out of service for the same four hour period." In the AG's view, no matter where in ComEd's 11,400 square mile service territory, and no matter when during a possible days-long storm system the hundreds or thousands of different

[4] If Section 16-125(e) is ambiguous, it must also be narrowly construed in ComEd's favor. Illinois law requires that "statutes in derogation of the common law," like Section 16-125, "are to be strictly construed in favor of persons sought to be subjected to their operation." *Nowak*, 2011 IL 111838, ¶ 19, *quoting Barthel v. Illinois Central Gulf R.R. Co*., 74 Ill. 2d 213, 220 (1978); *JPMorgan Chase Bank, N.A. v. Earth Foods, Inc*., 238 Ill. 2d 455, 462-63 (2010). This principle has been applied to the Public Utilities Act. *Buerkett v. Illinois Power Co.*, 384 Ill. App. 3d 418, 425 (4th Dist. 2008). Here, Section 16-125(e) is in derogation of the common law. That common law recognized that utilities cannot be insurers of customer damage and are not responsible for weather damage, at least absent extraordinary negligence. *See* ComEd Br. at 22-23; *see also* ILL. C.C. No. 10, 2nd Rev. Sheet No. 203 (allowing no payment or credit for malfunctions caused by weather). If Section 16-125(e) is read as broadly as Staff and Intervenors suggest, these limitations could be laid to waste.

interruptions occur, the 30,001 threshold and the four hour minimum can be met by simply adding everything together. All of these positions should be rejected.

2. **Staff and Intervenors' Constructions Are Contrary to the Plain Statutory Language.**

Section 16-125(e) refers to "a continuous power interruption" -- not multiple interruptions. Here, Staff asks the Commission to edit the General Assembly by erasing the words "a" and "interruption" and writing in the word "interruptions." Likewise, Staff suggests that the Commission scratch out the word "continuous" and replace it with the word "simultaneous." But those are different words with different meanings. The plain meaning of "continuous" is unbroken in space and time. That fundamental concept of an interruption not broken into disjointed pieces is reflected everywhere from the dictionary definition of the term to the testimony of ComEd, Staff, and AG witnesses alike. *See, e.g.*, Frank, Tr. 308:20-313:13; Owens, Tr. 612:7-613:1. *Accord* Guerra Reb., ComEd Ex. 5.0, 5:93-102.

While it is true that all customers affected by a continuous power interruption are simultaneously out of service, not all customers simultaneously out of service are necessarily affected by one continuous power interruption. Had the General Assembly intended to group together different scattered interruptions occurring only at the same time, it could have used the plural "interruptions" and called for "simultaneous power interruptions" affecting a total number of customers for a "common four hour period." It did not write that – or anything close.[5] In fact, the legislative history shows that the same General Assembly that passed Section 16-125(e) affirmatively *rejected* HB 43, a statute that addressed aggregate interruptions. O'Connor Reb.,

[5] Section 16-125(e) does not ask, as Staff suggests (Staff Br. at 7), whether "more than 30,000 customers have been interrupted for four hours or more." That question is faithful neither to the law's words nor even to its basic grammar. Section 16-125 it not triggered when the total number of interrupted customers exceed a threshold, but when that many customers "are subjected to" a single "continuous power interruption." 220 ILCS 5/16-125(e).

ComEd Ex. 6.0 Rev., 10:208-217. The General Assembly specified both a singular "interruption" and required that that single interruption be "continuous."

The AG's construction suffers from similar defects, and more. Like Staff, the AG cannot explain how different customers whose service is interrupted at different times and places are subject to a "continuous" interruption, when a continuous interruption cannot be broken or separated in space or time. *See* ComEd Br. at 14, n. 4, 5. The AG, however, stands alone in claiming that there is "nothing in the statute conditioning liability on whether the same group of customers is out of service." The statute states that "[i]n the event that more than... 30,000 ... of the total customers... *are subjected to a continuous power interruption of 4 hours or more... .*" 220 ILCS 5/16-125(e) (emphasis added). The statute pointedly describes and limits those 30,000+ customers as those customers who "are subjected to a continuous power interruption of 4 hours or more." The AG's attempt to sweep in customers who have not been out of power for 4 hours as the result of such an interruption is contradicted by the plain words in the statute.

Instead of actually reading the words as written by the General Assembly, the AG claims that the General Assembly could "have limited the language of [Section 16-125(e)] to certain circumstances or types of failures, but did not." AG Br. at 8. That is exactly what the General Assembly did. Section 16-125(e) focuses on a very specific and, indeed, extraordinary event: "a continuous power interruption" affecting more than 30,000 people for at least four hours. The AG's complaint that the General Assembly "could have said it better" does not change the actual language that the legislature used, and that must be respected here.

3. <u>Staff and Intervenors' Constructions Create Conflicts Within Section 16-125 and Article XVI.</u>

Staff and Intervenors' definition of "interruption" conflicts with the plain meaning of Section 16-125(j). Section 16-125(j) requires that, for each separate interruption, utilities record

"[t]he specific equipment involved" and "a description of measures taken to remedy the cause …." 220 ILCS 5/16-125(j)(7), (9). If "interruption" meant the entire collective consequences of a storm – including hundreds or thousands of incidents of damage and losses of power – there would be no specific data to record. The "specific equipment" would all be lumped together and the "root cause" would be nothing but "storm." Only by acknowledging that "interruption" is singular do those requirements gain meaning. *See also* ComEd's Br. at 13-14.

Staff and Intervenors' construction also conflicts with Section 16-108(c), which was enacted at the same time and as part of the same bill as Section 16-125. As discussed above, Section 16-108(c) assures Illinois utilities of the right to recover through rates their "costs of providing delivery services …" and ensures that those "costs shall include the costs of owning, operating and maintaining transmission and distribution facilities." 220 ILCS 5/16-108(c). ComEd's costs cannot be reliably recovered if Section 16-125(e) puts it in routine and repeated peril of crippling, potentially unrecoverable liabilities. ComEd Br. at 24.

4. Staff and Intervenors' Constructions Pose Grave Constitutional Risks and Ultimately Hurt Sustained Grid Investment and Reliability for Customers.

A cornerstone of statutory construction is that statutes are not to be construed so as to be inconsistent with the state and federal Constitutions. ComEd Br. at 21. Staff and Intervenors' constructions of Section 16-125(e), however, do just that. Severe storms occur every year, and often multiple times in a year. A regulatory framework that would apply Section 16-125(e) to such storms would put utilities in continual peril of crippling penalties without regard to prudence. No utility in such a situation has the opportunity to recover its overall costs that the Constitution guarantees. *See* ComEd Br. at 21-24.

Intervenors respond by attempting to downplay the size and scope of the potential financial impact to ComEd. *See, e.g.*, AG Br. at 9. Their arguments are simply not credible. For

instance, the AG demurs that ComEd's concern is overstated because the "most" claims there could be is roughly 10,000. *See* AG Br. at 9, n.3. Yet, in the very same brief and throughout this Docket, the AG has aggressively argued for an extreme and broad application of Section 16-125(e). If the AG's position were accepted, a combined total of up to 1.2 million customers could be covered.[6] That is only for six storms in one year. The AG's claim that a "very high" payout would be $1,000 is similarly unsupported, and appears to ignore commercial, industrial, and municipal claims. Simply taking the AG's $1,000 figure and multiplying it by the number of customers for whom a waiver would not be granted under the AG's theory yields a number that is over 65% of ComEd's entire annual revenue requirement.

While ComEd understands the frustration of its customers who are out of power for any reason, the testimony proffered by the AG in this case tells a disquieting story about what the AG thinks are "valid" claims. *See, e.g.,* Mordini Dir., AG Ex. 5.0. The AG has advanced the testimony of individuals who complain and seek recovery of money for items such as lost exotic fish or the cost of maintaining a swimming pool because the retractable cover failed. *Id.* at 1:15-3:67. As the very testimony advanced by the AG reflects, if Section 16-125(e) is lifted out of context and applied to these and other similar storms, the Commission, Staff, ComEd, and others should gird themselves for an onslaught of claims and litigation raising meritless assertions that they should recover even for the "psychological cost" of interrupted internet service. *Cf.* Mordini Dir., AG Ex. 5.0, 3:56. Instead of focusing time and valuable investment dollars on the grid itself, precious resources will be materially diverted to defending and adjudicating the cottage industry of litigation that the AG and Staff's positions will spawn. *See* Guerra Reb., ComEd Ex.5.0, 15:213-216; *see also* O'Connor Reb., ComEd Ex. 6.0 Rev., 13:283-293.

[6] This number is the sum of the customers identified in the record, on the schedules to the Verified Petition, associated with every interruption of more than four hours duration regardless, as the AG argues, of "whether the same group of customers is out of service for the same four hour period." AG Br. at 11.

Nor can AG and Staff backpedal from the significance of their positions by claiming that the waiver provision will save the day. The single most effective rebuttal to those arguments is the fact of this Docket. The time and expense diverted to this litigation because of both the AG and Staff's refusal to grant a full waiver for a storm as historic as the July 11 derecho is telling. The AG's blanket refusal to admit that a waiver is appropriate for any of the summer 2011 storms at issue, or even for the massive and record-breaking February 1, 2011, blizzard that turned our area roadways into a parking lot, belie the AG and Staffs' hollow reassurances that the "waiver provision" will somehow protect ComEd and its customers.

Fundamentally, the AG's misguided notion that its construction of 16-125(e) creates "an incentive to the utility to manage its investments and maintenance practices to assure reliable service even in severe weather conditions" is divorced from reality. AG Br. at 14. The Section 16-125(e) standard, as the AG reads to apply cumulatively, would require 99.2% perfection if applied to a storm system-wide. No utility, anywhere, no matter how "incented" can prevent interruptions affecting less than 1% of its customers during a severe storm. O'Connor Reb., ComEd Ex. 6.0 Rev., 11:249-12:252.

In the present case, the AG's argument that ComEd somehow needs to be "incented" to prevent interruptions is even less believable in light of its position on the waiver issues. Here, the AG has argued strenuously – and incorrectly – that evidence sufficient to defeat a waiver does not even need to be tied to the interruptions at issue. In the AG's view, all it takes is one engineer who looks over a fraction of the system for 800 minutes, conducts not a single objective test, but broadly concludes that ComEd's entire 90,000 mile system has been unreliable for the past 20 years. Owens Dir., AG Ex. 1.0, 46:22 – 47:2.

The AG's statement that Section 16-125(e) imposes liability only if a utility "fails to provide the reliable service that it has a duty to provide" (AG Br. at 9) is equally misleading. ComEd has no duty to prevent – and no utility could realistically prevent – damage like that from the extreme storms of 2011. Yet, under the 30,001 customer standard of Section 16-125 as the AG reads it, ComEd would be subject to ruinous penalties even if, during the most destructive storm of its history, it provided perfect service to over 99.2% of its customers. *See* O'Connor Reb., ComEd Ex. 6.0 Rev., 11:249-252; Guerra, Dir., ComEd Ex. 1.0, 11:249-253, applying Section 16-125 in this punitive manner, instead of how it is actually written, is a patently unjust result.

III. THE DAMAGE AND RESULTING INTERRUPTIONS CAUSED BY THE 2011 SUMMER STORMS WERE DEMONSTRABLY UNPREVENTABLE

The question governing waiver is whether ComEd has shown that any applicable "power interruption was a result of … (1) Unpreventable damage due to weather events or conditions." 220 ILCS 5/16-125(e). There is no dispute about the meaning of the applicable standard. Staff states it correctly: "unpreventable" damage is damage that could not reasonably have been prevented through the use of generally accepted engineering, construction, and maintenance practices. Staff Br. at 10; Rockrohr, Tr. 255:21-256:4. A utility always is constrained by its basic obligation to act prudently. *See* 220 ILCS 5/9-211, 16-108.5. The AG also acknowledges that a utility cannot gold-plate its system. As Mr. Owens testified, a utility must balance the benefits of deploying new technology with the costs to customers. Tr. 621:22-622:10.

Staff acknowledges this and the destructive force of the storms, but nonetheless argues that a portion of the damage, ironically only from *the most severe* of the storms, was preventable.

Conversely, the AG, despite conceding the fury of these storms, argues that *no* damage resulting from *any* of the six severe storm systems should be found unpreventable.[7]

Both efforts to unrealistically blame ComEd for damage attributable to natural fury should be rejected. The evidence shows that the "body of interruptions that occurred during the Summer 2011 Storms were unavoidable, and the damage that occurred was due to events outside of ComEd's direct or indirect control." ComEd Ex. 13.0 at 5. No preventable continuous power interruption – whether defined plainly or as Staff or the AG advocate – affected more than 30,000 customers for at least four hours.

A. No Party Disputes the Severity of the Storms or the Quality and Speed of ComEd's Restoration Response

No party disputes the extraordinary severity of the 2011 summer storm systems. Each delivered extreme winds, tens of thousands of lightning strikes, hail, and heavy rain to large areas of ComEd's service territory. ComEd Br. 7-9. The Staff and AG witnesses did not independently assess the storms' strength or capacity to deal damage. Owens, Tr. at 585:1-14; Rockrohr, Tr. at 263:10-264:6. But, no one disputes the widespread damage each caused not just to the electric grid, but to transportation and communication systems, trees, homes, and businesses.

Likewise, no party questions ComEd's efficient and effective restoration response. ComEd presented detailed testimony about those restoration efforts, including how it pre-staged and mobilized resources and executed and managed the restoration efforts across the region. ComEd Br. at 2. The efforts of ComEd's workers, engineers, and managers restored service to a total of more than 10,000 interruptions efficiently, safely, and without delay. Staff witness Mr. Rockrohr concurred that "Ms. Maletich's testimony and ComEd's responses to Staff discovery

[7] Neither the City nor CUB presented evidence or took any position on this question. City/CUB Br. at 2.

demonstrate that ComEd's individual restoration efforts with respect to each of the Summer 2011 Storm Systems were reasonable." Rockrohr Dir., Staff Ex. 1.0, 21:437-439; Staff Br. at 12-13. No party disputed any of this evidence.

B. Staff Improperly Relies on Several Unsupportable Assumptions to Recommend Denying ComEd a Full Waiver for All Storm Damage

Staff's analysis correctly focuses on the interruptions, which they break down by specific cause. Staff acknowledges that (a) lightning damage, (b) tornado damage, (c) damage from winds that exceeded 60 mph, and (d) damage caused by trees that were uprooted or limbs that were broken by high winds are "unpreventable" under Section 16-125(e) and subject to waiver. Rockrohr Dir., Staff Ex. 1.0, 21:447-450; Rockrohr Reb., Staff Ex. 2.0., 4:70-72. Because these types of damage caused the lion's share of the interruptions for five of the six storms (any remaining interruptions affected less than 30,000 customers), Staff concludes that all liability for those storms should be waived. Rockrohr, Tr, at 237:11-13.

Staff also considered ComEd's system and its condition. Staff identified no systematic defects in ComEd's system or its operations that would affect its conclusion. Indeed, Staff acknowledged the testimony of ComEd senior engineers William Gannon and Jack Mehrtens "that ComEd's distribution facilities that were damaged during the Summer of 2011 Storm Systems were originally designed and constructed to appropriate standards." Rockrohr Dir., Staff Ex. 1.0, 17:352-354; Staff Br. at 12.

Staff's analysis collapses when Mr. Rockrohr assumes, without evidence and contrary to the testimony of the only qualified arborist, that:

- All damaging tree contact is preventable no matter how extreme the storm and regardless of the vegetation management program ComEd did employ; and that

- Trees limbs breaking at wind speeds below those which utility facilities themselves must be built are somehow preventable by the utility, regardless of prior stress on the tree.

Mr. Rockrohr also assumes that interruptions which ComEd itself initiated to protect the public, or to speed overall restoration, are preventable, and counts them toward imposing penalties on ComEd. ComEd Br. at 34. Only as a result of these three assumptions – and not of any defect or failure in ComEd or its system – does Staff conclude that the service interruptions simultaneously affecting about 52,000 customers during the July 11 derecho were preventable. Because the total – in Staff's view, the trigger – exceeds 30,000, Staff recommends liability not be waived as to these customers. The evidence shows that Staff's conclusion is plainly wrong.

1. Tree Contact Interruptions Are Not All Unpreventable; ComEd Established that it Prudently Managed the Relevant Vegetation and the Tree Contact Interruptions were Unpreventable

Staff assumes that *all* tree contact during storms is preventable, no matter what the wind speed. Rockrohr Reb., Staff Ex. 2.0R, 5:92-104. It would effectively require ComEd to prevent all tree contact, even during hurricane force levels, which no utility could ever do. ComEd would also have to prevent contact not only by vegetation still in place, but by braches and other pieces of trees propelled by winds from well outside any clearance zone. Staff's assumption is unfounded and unscientific. It is disproven both by common sense and the testimony of the only qualified specialist to testify.

There is no doubt that ComEd was in compliance with the Staff-vetted Vegetation Management Program at the time of the 2011 Summer Storms. Chesley Reb., ComEd Ex. 8.0 Rev., 8:156-66. Staff is aware of ComEd's four-year tree trimming cycle and ComEd regularly provides the Commission with information concerning its ongoing vegetation management activities. Chesley Reb., ComEd Ex. 8.0R, 6:122-27. The record shows that "each of the distribution lines experiencing interruptions during these storms had been trimmed in accordance

with ICC standards" (ComEd Ex. 13.0 at 5) and "virtually all of the feeders that were impacted by these storms" had been trimmed "within the four year period prior to the storms in accordance with ICC targets and ComEd's documented procedures." Shlatz Reb., ComEd Ex 11.0, 7:149 - 56. Staff does not dispute these facts. *See, e.g.,* Staff Br. at 19. While the AG makes claims about ComEd's vegetation management practices, Staff witness Rockrohr neither adopted nor referenced such claims in his testimony.

ComEd also established that, "… during storms of this magnitude, limbs do not simply fall on energized conductors; instead, wind can and will carry the limbs and branches, sometimes for several blocks, gaining strength throughout the trajectory." Artze/Duque Reb., ComEd Ex. 12.0, 13:274-276. Clearly, that is not a situation the vegetation management zones and cycles can address. Also, ComEd has no "veto" power over when or where a customer may plant a tree on her property, or the species of the tree planted. Kramer Sur., ComEd Ex. 16.0, 18:344-56. No vegetation management program reasonably can account for trees planted in between trimming cycles to eliminate any encroachment. Again, Staff did not dispute the facts.

Yet, instead of concluding from these facts that the tree contact interruptions that occurred did so despite prudent utility action, as ComEd showed, and thus were unpreventable, Staff inexplicably assumed that all tree contact must be preventable. Staff then concludes that there must be some unexplained and undetected deficiency ComEd could have prevented. Not only is this completely unproven, the only certified arborist testifying, Ms. Emily Kramer, confirmed that vegetation management programs can only minimize interruptions, not eliminate them. Some tree-related contact interruptions can, will, and reasonably should be expected to occur on *any* utility's system, especially in extreme weather. Kramer Sur., ComEd Ex. 16.0, 17:325-34; Best Management Practices – Utility Pruning of Trees, ComEd Ex. 16.09.

To illustrate how unrealistic Staff's assumption truly is, the Commission should consider the recent experience of Delmarva Power and Light ("Delmarva"). Delmarva is the ***only*** utility in the United States the AG's witness concedes has a proper vegetation management scheme. ComEd Cross Ex. 6. Notably, Delmarva uses the same four-year vegetation management cycle as ComEd. Owens, Tr. at 591:17-18. When subjected to a derecho that was a virtual carbon copy of the July 11 storm at issue here, Delmarva's system was devastated. *Id* at 592:12-593:7.

Staff's unrealistic assumption has major consequences. It can support imposing liability for the July 11 Storm because of its assumption regarding tree contact. Otherwise, the July 11 derecho fall under the 30,001 threshold, even under Staff's interpretation of Section 16-125(e).

2. Broken Limbs / Branches Do Not Obey Utility Standards Or Become Preventable When Winds Fall Below 59 MPH

Staff acknowledges that tree limbs break and fail, and recognizes that this cannot be prevented. But, once again Staff makes an inexplicable assumption: that tree breakage is only unpreventable at wind speeds of 60 MPH or above. Staff Br. at 13-14. If a 59 MPH wind gust breaks a tree limb and throws it into a line causing an interruption, Staff treats such damage as preventable. Staff Br. at 10-14; Rockrohr Reb., Staff Ex. 2.0R, 2:38-44, 4:75-83.

This assumption is unfounded and unsustainable. The 60 MPH standard on which this all hinges applies not to trees but to manmade utility facilities. Rockrohr Reb., Staff Ex. 2.0R, 2:38-44, 4:75-83. The only certified arborist testifying, Emily Kramer, explained that trees do not react or behave in accordance with any manmade standard. Kramer Sur., ComEd Ex. 16.0, 5:98-6:129. Instead, unique and varying characteristics will materially impact a tree's ability to withstand the forces imposed on it. Ms. Kramer explained that many other factors distinctive to trees may individually or cumulatively impact whether a load will cause a tree or branch to fail. These factors include age, branch attachment, previous damage, pest damage, previous

prevailing winds, past abuse, twist, general health, size, location/exposure, and health of the root system. All these factors are entirely outside ComEd's control. *Id*. at 10:220-23.

Staff's position fails to acknowledge these factors, or that trees are simply not biologically adapted to withstand any and all winds up to 60 miles per hour (see *id*. at 10:220-13:265). Perhaps because Staff engineer Mr. Rockrohr is not an expert in trees or how they behave under stress, Staff's assumption also does not consider the cumulative impact of the six back-to-back storms, with winds up to 90+ miles per hour. Those storms placed loads "far in excess of what the trees in [ComEd's] service territory are adapted to withstand on an isolated basis, let alone the repeated basis presented last summer." *Id*. at 9:190-94.

The record shows that ComEd properly managed the relevant vegetation. ComEd cannot prevent branches and limbs that fall at wind speeds less than 60 MPH despite that fact.

3. Intentional Interruptions that Speed Restoration and Protects Safety Should Not Be Considered Preventable

Staff unfairly categorizes intentional interruptions with "preventable" damage. *See* Staff Br. at 14-15. Intentional interruptions are initiated to address an emergency situation, preserve safety, and make needed repairs. Maletich Reb., ComEd Ex. 10.0, 6:113-16.[8] For instance, a crew may initiate an intentional interruption where the crew determines it is unsafe to repair a live electric cable that was knocked down by an uprooted tree. Such interruptions are themselves the result of the underlying unpreventable weather damage. Labeling them as "preventable" for purposes of imposing Section 16-125(e) liability would unreasonably and unjustifiably penalize ComEd for prioritizing safety.

[8] When crews go into the field to repair and restore power, their first action is to make sure they safely restore customers. Tr. 113:2-4.

C. **The AG's Generic Attack on ComEd Dodges the Actual Waiver Issues and Is Factually Baseless**

The AG ignores the specific interruptions and the storm damage that caused them. Instead, based on inadequate and discredited testimony, and on distortions of inapplicable Staff documents from prior years, the AG tries to mount a broad-brush attack on ComEd and its system. Its position is not a reasoned examination of the interruptions at issue and its methods are not shared by Staff. Staff Br. at 19 ("Staff's position... is that this proceeding requires a detailed examination of ComEd evidence regarding specific customer outages. Staff has not addressed the Attorney General's evidence since it does not specifically focus on the actual customer outages for which ComEd seeks a Commission waiver."). Its posture is nothing more than a refusal to address the actual issues.

Importantly, the AG's broad-based attack on the state of ComEd's system is an about-face from its many prior positions seeking to block ComEd's proposals aimed at enhancing effective investment into the electric system. AG witness Owens now says that "the singular root cause for the very large number and very long duration of [storm] outages is clear and evident neglect of [ComEd's] distribution facilities over the past twenty years." Owens Dir., AG Ex. 1.0, 46:22-47:2. Yet, for example, the AG opposed rider recovery for additional infrastructure investment in 2008, and stated to the Commission that "ComEd has successfully modernized its network and, generally speaking, maintained reliability over the years... [and] has been investing hundreds of millions of dollars in new plant every year in the normal course of business." Docket No. 07-0566, Tr. at 444.

Similarly, the AG states in its brief here that "[t]o date, ComEd has not invested in storm hardening technology that could have both reduced the burden of service interruptions on consumers and saved the utility and consumers potentially hundreds of millions of dollars in

restoration costs." AG Br. at 34. Yet, the AG stated exactly the opposite when opposing ComEd just a few years ago: "ComEd's existing capital budget process has enabled it to prudently and efficiently invest in new technology that increased the reliability of the delivery system and offered new and innovative services without extraordinary rider recovery of the financing of those investments." Docket No. 07-0566, AG Br. at 48.

In stark contrast to its arguments here, the AG there emphasized that "[w]hat *is* clear is that the Company's traditional capital budget process and traditional rate case regulation has worked well to ensure that ComEd continues to invest in innovative technology in a prudent and reasonable manner." *Id.* Indeed, far from submitting testimony claiming to see over 20 years of "clear and evident neglect," in that case, the AG offered testimony that "[t]here is no apparent need to introduce expensive new spending solely to drive a shift in system reliability." Docket No. 07-0566, AG Ex. PJL-4.0, 21:448 – 22:450-451.

At bottom, any actual content in the AG's critique of ComEd's system boils down to the unremarkable claim that ComEd's system is not perfect. No utility or any other operational organization is. ComEd maintains over 90,000 power lines over 11,400 square miles in order to bring power to over 3 million customers on any given day. There is nothing unreasonable or imprudent in the fact that the AG or any party can snap pictures of equipment or facilities that appear to need repair, or that Staff in report designed to further continuous improvement identified certain "problem areas" that benefit from correction. None of this bears any relationship to the extreme weather and the unpreventable damage the evidence shows it caused.

1. <u>The AG's Investigation Was Wholly Inadequate</u>

Witness Owens' investigation, on which the AG principally relies, was revealed as woefully inadequate in substance, scope, and processes. From the outset, Mr. Owens relied upon the AG attorneys to set the itinerary for his field inspection of ComEd facilities. Tr. at 575:4-10.

He visited only a total of 12 municipalities of the more than 400 municipalities in the service territory – and excluded Chicago entirely. Tr. at 559:22-564:4.

The depth and duration of Mr. Owens' field inspection was equally shallow. Despite claiming to assess the totality of ComEd's 11,400 square mile system, his "field inspection" only totaled about 800 minutes, including his driving time between municipalities. During these 800 minutes, he claimed to have visually "inspected," among other things:

- ✓ 5,000-7,000 poles
- ✓ 1,000-1,500 lightning arrestors
- ✓ 1,000-1,500 primary transformers
- ✓ 150-200 pad-mounted primary transformers
- ✓ 20-25 occasions where underground switchgear is located
- ✓ 200-300 overhead service connections
- ✓ 100 feeders (approximately)

Tr. at 570:13-15, 555:6-556:11. He appears either to: 1) have viewed random facilities while driving, or 2) exited the car at different locations to view ComEd facilities that happened to be at that location, occasionally posing for pictures. He did not conduct a single performance or physical condition test.

Remarkably, Mr. Owens never once consulted ComEd about the nature, purpose, or design of the equipment he saw, nor sought that information in discovery. He also made no effort to inspect facilities with ComEd personnel, even though he lacked his own known information about the specifics of ComEd's system. Tr. at 556:22-559:21. Indeed, at the evidentiary hearings, and six months *after* the completion of his investigation, he admitted that he knows little about the specifics of ComEd's system. *Id*. Finally, none of his inspections had any link to specific interruptions resulting from the 2011 Summer Storms. Tr. at 576:21-577:17.

Such an investigation is clearly inadequate and cannot be reasonably used to assess the condition of ComEd's system, let alone assess responsibility for any particular interruption.[9]

2. The AG's Investigation Is Permeated With Bias

The record evidence further establishes that Mr. Owens' "investigation" was so biased that its results lack any credibility and should be rejected. The length to which AG witness Owens sought biased information was spotlighted during cross-examination. There, Mr. Owens admitted that he only directed AG personnel to take pictures of ComEd equipment that suggested a problem. Tr. at 581:12-18. Prior to submitting direct testimony he went so far as to prepare a document, issued in the AG's name, titled, "Guidelines for Obtaining Photographs of ComEd's Electric Distribution System." ComEd Cross Ex. 5. These Guidelines provided instructions on how pictures should be taken, and included instructions such as the following:

- "Look for structures that are aged and show signs of degradation."
- "Look for structures that show deterioration at the ground line and at the top of poles."
- "Look for leaning poles that are insufficiently guyed."
- "Look for transformers that have discoloration or rust spots on the exterior of the transformer tank."
- Look for "[s]ingle phase and three phase conductors with trees growing in or around them."

Id. Mr. Owens was not just indifferent to objective, unbiased data; he penned instructions on how to avoid them. He had a result in mind at the outset of his investigation – to conclude that ComEd's system was in disrepair – and listed what he needed to get there. His direction about

[9]In contrast to Owens' review, the team of Navigant engineers independently chose what and where to inspect; sent multiple experts into the field without counsel; reviewed a representative range of facilities; sought and received unfiltered access to ComEd data regarding system design, construction, performance and maintenance; consulted and referenced applicable national and local standards; reviewed inspection and maintenance records to compare ComEd equipment against other utilities; and reviewed maintenance policies regarding distribution equipment and vegetation management. *See, e.g.* ComEd Ex. 13.0 at 1-4.

pictures is not the only evidence of the bias pervading his investigation and conclusions. Other examples include:

- Mr. Owens did not select the areas of ComEd's service territory to review during his field inspection. He let the AG attorneys pick the municipalities to visit, the routes taken during his driving tour of 12 towns and, apparently, where to stop. Tr. at 559:22-564:4.

- Mr. Owens made no effort to inspect facilities with ComEd personnel in order to ask questions or obtain a better understanding of the system. Tr. 556:22-559:21. He refused to consider, or even seek, the best evidence of system design, age, or performance. Moreover, he never even asked ComEd whether any of the purported "failures" he portrays in his testimony relate, in any way, to the 2011 Summer Storm Systems interruptions. Tr. at 577:18-20.

- He never took the time to develop even the most basic independent knowledge of the attributes of any of the six 2011 Summer Storm Systems, which are central to the matters at issue in this proceeding. Tr. 585:1-14. His field visit was entirely divorced from any interruption experienced during the 2011 Summer Storms. Tr. at 576:21-577:17.

- He ignored ComEd's system performance during the 2011 Summer Storms. For example, he complains about the condition of ComEd's wood poles, yet he disregards the fact out of approximately 1.4 million poles in ComEd's system, only *12 poles* failed during all of these storms together. Gannon-Mehrtens Reb., ComEd Ex. 7.0, 37:801-07. He similarly complains about the condition of distribution transformers, but that equipment accounted for less than 1% of the interruptions experienced during these storms. *Id*. at 42:908-43:913.

The evidence demonstrates that *nothing* about AG witness Owens' investigation and conclusions is objective. As Mr. Owens' own actions and words prove, his investigation is so patently biased that his conclusions are not credible.

3. The AG Witness' Attacks On ComEd Are Also Wrong In Substance.

a. Overall Design, Maintenance and System Performance

The AG claims that ComEd witnesses Messrs. Gannon and Mehrtens admitted that ComEd's standards only conform to industry standards in effect when the system was built. AG Br. at 18. The AG argues "[a]s the ComEd system has sections that are more than 100 years old, some of ComEd's assertions that its facilities meet standards do not mean that they are being maintained to current standards." *Id.* The AG's implication that ComEd's system is not in

compliance with NESC standards, or not designed, constructed and maintained in accordance with good utility practice is misleading and completely without merit.

The Commission's Rules require electric utilities to adopt certain sections of the 2002 National Electric Safety Code ("NESC"). 83. Ill. Admin. Code §305.20. Gannon/Mehrtens Reb., ComEd Ex. 7.0, 11:229-250. These Rules expressly contain a "grandfather clause" for older facilities. This is not to excuse any deficiency, but a recognition that standards for construction anticipate that equipment will age. Thus, the appropriate version of the code for any given installation depends upon the date of its original construction. 83 Ill. Admin. Code §305.40; *Id.*, 11:251-253. When the code is revised to incorporate new rules, existing lines are "grandfathered" as long as they are safe. *Id.*, 12:254-257.[10]

As Mr. Mehrtens explained, it would also not be reasonable or prudent to replace or retrofit equipment every time standards are revised because it would typically result in minimal impact to overall system reliability. The exception, of course, is where safety is concerned. So, if equipment such as wood poles are built in accordance with previous standards that have been appropriately grandfathered in, it does not mean that ComEd's system fails to be designed, constructed and maintained in accordance with good utility practice. Tr. at 457:16-458:6. Indeed, the evidence, including Navigant's "review of ComEd's distribution design standards, confirmed by field observation," all "unequivocally indicates system design and construction is consistent with prudent and common utility standards" and "we [Navigant] did not observe any violations or inconsistency with Title 83 of Illinois Administrative Code 305 and NESC requirements referenced within the Code." ComEd Ex. 13.0 at 5.

[10] Although the Commission has not adopted the newer versions of the NESC, ComEd has been proactive in implementing new code requirements, unless they would be less stringent. References to the 2007 NESC can be found in ComEd Standards and ESPs and work is underway to incorporate the 2012 NESC. *Id.*, 12:258-263.

b. <u>ComEd's Vegetation Management Program</u>

The AG's assertions that ComEd's Vegetation Management Program is inadequate are flawed. AG Br. at 20-21. Remarkably, AG witness Owens did not even know that ComEd was on a four-year trimming cycle and not a five-year cycle as he had guessed. Owens Dir., AG Ex. 1.0, 11:15-19; Chesley Reb., ComEd Ex. 8.0R, 4:66-67; Tr. at 597:15-20. Moreover, despite criticizing ComEd, his sworn testimony was that "*[b]est utility practices* requires that electric utilities such as ComEd perform effective tree trimming on a regularly scheduled basis, usually on a three-to four-year cycle, with regular maintenance inspections in between." Owens Dir., AG Ex. 1.0, 11:15-17 (*emphasis added*). ComEd's Vegetation Management Program meets those conditions. Chesley Reb., ComEd Ex. 8.0R, 3:49-6:111. By the AG's own desired standards, ComEd's Vegetation Program meets "best utility practices."

Mr. Owens also attempted to criticize ComEd's clearances by applying the wrong NESC standard to tree-trimming activities. ComEd witness Shlatz explained that neither the plain language nor the intent of NESC minimum clearance requirements for *utility structures* covers vegetation growth. Shlatz Reb., ComEd Ex. 11.0, 8:175-9:211.

The AG also relies heavily on a handful of pictures depicting alleged vegetation issues. *See, e.g.* AG Ex. GEO-11. Yet, the AG presented no information as to where the locations depicted in these photos stood in the trimming cycle. Shlatz Reb., ComEd Ex. 11.0, 10:220-226. The fact that the AG could find spots where vegetation appeared near electric facilities is no surprise if it had nearly four years to grow since its last trimming. Moreover, none of these pictures had the slightest relationship to the storm interruptions at issue.

The AG also distorts Ms. Kramer's testimony, implying she testified that it is not ComEd's "goal" to maintain clearances in between cycle trims. AG Br. at 21-22. What Ms. Kramer actually said was:

> The clearance that's provided at the time of the cycle trim is only that clearance at that moment. Over the course of the next four years, any number of things can happen that could lead to branches getting closer to the wires than they were at the time when the crew made that trimming cut back to that clearance.

Tr. at 510:4-10. She added that the ComEd's goal is "to anticipate tree contact with conductors," although that goal is limited because "there are a lot of different reasons why trees can come into contact with the utility's facilities and we can't control all those." Tr. at 511:10-512:16. For example, customers, municipalities, or highway agencies may plant tall growing trees within the clearance zone or within our wire zone or within the area around power lines even during the course of a cycle. Tr. at 530:7-19. ComEd cannot control what a customer or municipality plants on their property near ComEd facilities, or when they plant it. Tr. at 530:20-531:1.

In contrast, if ComEd had to try to maintain clearance zones at all times, as the AG advocates, ComEd "would have to have somebody stand by every mile of wire and have them inspect it constantly throughout the -- throughout our entire service territory." Tr. at 531:5-11. Clearly, such an approach is unreasonable, not an accepted practice, and has not been adopted by any other utility. The only other way that ComEd could arguably ensure that no tree or limb failure occurred during wind events would be to clear-cut every tree that could potentially fall or blow into ComEd's electrical wires, which could mean cutting a radius of up to 80 feet from the power lines for an 80 foot tall tree. Kramer Sur., ComEd Ex. 16.0, 16:312-17:317. Such a measure would bring "predictable public outrage," and immense "time and cost." It would also run afoul of Best Management Practices, which states that "utility pruning operations should *only* remove those branches necessary to ensure the effective intended use of the utility space." Kramer Sur., ComEd Ex. 16.0, 16:1312-17:317; ComEd Ex. 16.09 (*emphasis added*). Unsurprisingly, the AG has failed to cite any standards or guidelines that would endorse such a practice. There are none. *Cf.* Kramer Sur., ComEd Ex. 16.0, 17:317-324 (testifying that

"nowhere in the [NESC] does it state or suggest specific trimming to account for the extreme summer 2011 weather conditions.")

The AG's reliance on the ICC Assessment of ComEd's Reliability Report and Reliability performance for Calendar Year 2009 ("Assessment Report") also should be rejected. See AG Br. at 19-21. The Assessment Report is almost two years old and speaks to ComEd's system as of 2009 – not 2011. AG also omits that in that document Staff acknowledges the significant *improvements* ComEd has made with respect to tree-trimming. Indeed, Staff acknowledges "ComEd's successful efforts to execute existing and new reliability programs moderating weather-, tree-, overhead equipment- and underground equipment-related areas." Assessment Report, p. 5. While noting that ComEd achieved a 37% reduction in tree-related distribution system interruptions during 2009, Staff stated that there were still problem areas, which ComEd should continue to investigate. *Id.* at 15. ComEd continues to work at improving its vegetation management program, like every utility. The existence of "problem areas" nowhere supports a blanket conclusion that ComEd's entire system is flawed.

The fact that trees caused interruptions during the storms, despite prudent vegetation management, is not surprising. As Navigant specifically concluded in its Report, "[t]he amount of damage ComEd's distribution system experienced is not unusual or inconsistent with damage reported by other utilities during major storms… Specifically, overhead distribution design standards are not intended to withstand uprooted, large trees that may fall onto the lines." ComEd Ex. 13.0 at 18-19. Likewise, industry-respected authorities and sources such as the *Best Management Practices – Utility Pruning of Trees* guide ("Best Management Practices") expressly acknowledge, trees are among the most common causes of interruptions for any utility. ComEd Ex. 16.09.

c. **The Condition of Wood Poles**

The AG argues that because the median age of ComEd's wood poles is 44 years, they are more susceptible to damage.[11] AG Br. at 26. The AG adds that poles that carry conductors that lack required and standard clearances or are overloaded, broken or show signs of deterioration can be expected to be more vulnerable to storms. *Id.* at 28-29. The AG's arguments are at odds with both the evidence and its own witness' testimony.

First, age is not the sole determinant in deciding whether a pole should be replaced. Gannon/Mehrtens Reb., 7.0, 35:757-758. Staff agrees. In its Assessment of ComEd's Reliability Report and Reliability Performance for 2009 (dated December 31, 2010) ("2009 Assessment Report"), Staff states:

> Staff believes that the increasing median age of the existing equipment in service does not provide, by itself, an indication of possible reduction in reliability performance of the distribution or transmission systems. Staff recognizes that, in some circumstances, older equipment can be more robust if it has been well maintained.

2009 Assessment Report, at 2 (emphasis added).[12]

The AG also cites to Mr. Owens and a few of his photographs. However, as explained above, Mr. Owens' field "inspection" was wholly inadequate, biased, and should be rejected. The only evidence Mr. Owens cites to support his divergent conclusion about wood poles' age are a marketing pamphlet from the American Iron and Steel Institute (whose members make competing steel poles) and a report from the Oklahoma Corporation Commission which does not even draw the conclusion he claims. Gannon/Mehrtens Reb., 7.0, 35:764-36:781

---

[11] ComEd notes that the median average age of its *distribution* poles is 43 years. *See* ComEd's 2011 Reliability Assessment Report and Customer Satisfaction Survey, p. G-4

[12] ComEd continues to oppose the admission of these reports by the AG and reserves its right to appeal their admission. ComEd's response to the AG's Motion to Admit is incorporated herein by reference.

The AG's claims about pole overloading and/or inappropriate clearances are equally without merit. Once again, it is impossible to determine whether a pole is overloaded by visual inspection alone. Such a determination requires a detailed computation and analysis, which Mr. Owens undisputedly did not undertake. Gannon/Mehrtens Reb., ComEd Ex. 7.0, 32:690-702, 36:782-800. Moreover, Mr. Owens' analysis of pole loading in his rebuttal testimony was flawed. He downgraded pole classes and kept loading the pole until it failed. There is no evidence that the hypothetical pole used in Mr. Owens' analysis actually exists anywhere in ComEd's system. Gannon/Mehrtens Sur., ComEd Ex. 14.0 Rev., 12:264-17:374.

d. <u>ComEd's Lightning Protection</u>

The AG incorrectly claims that ComEd has not maintained its lightning protection program, including its lightning arrestors or its grounding system. AG Br. at 27. In fact, ComEd construction standards require lightning arrestors every 600 feet and each lightning arrestor has a driven ground that is interconnected to the neutral, which exceeds NESC standards. Gannon/Mehrtens ComEd Ex. 7.0, 24:517-520; Tr., 398:6-15; *see also* ComEd Ex. 13.0 at. 25. In many cases, grounding is further supplemented by intermediately placed equipment, which also has ground rods installed. *Id.* at 24:520-523. In fact, the Electric Power Research Institute ("EPRI") concluded that ComEd's lightning protection and grounding standards are equal to or better than most of the industry distribution practices. *Id.* at 24:524-527.

ComEd's lightning inspection program, including arrestors and grounds, includes routine visual inspections every two years for 34kV circuits and every four years for 4kV and 12kV circuits. Gannon/Mehrtens Reb., ComEd Ex. 7.0, 25:547-549, 28:617-29:633. Contrary to the implications that ComEd is somehow behind in replacing arrestors, as Mr. Gannon explains, one blown arrestor on a circuit, which has multiple lightning arrestors installed, "does not compromise the performance of the transient voltage protection on that circuit." Tr. at 456:18-

457:8. ComEd also actively monitors and responded to the challenges facing its grounding system *Id.* at 24:531-25:545. Furthermore, ComEd targets the enhancement of lightning protection on 12kV and 34kV based on the number of lightning interruptions. *Id.* at 634-639.

The AG's attempt to rebut this evidence rests with a handful of pictures from Mr. Owens' "inspection" and extracts from the *2009* Staff Assessment Report are unavailing. ComEd already has detailed the problems with Mr. Owens' inspection and the pictures from Staff's report are almost two years old. There is no evidence that the equipment the Staff depicted was, in any way, related to interruptions that occurred in the Summer of 2011.

e. <u>Fusing and Sectionalizing Equipment</u>

The AG's arguments regarding fusing and sectionalizing equipment are unsubstantiated and contrary to sound engineering. *First*, with regard to tap fusing, ComEd identifies opportunities to install tap fuses during routine visual inspections performed every two years for 34kV circuits and every four years for 4kV and 12kV circuits. In order for tap fuses to be installed *effectively* they must be coordinated with other protective devices on the circuit. Gannon/Mehrtens Reb., ComEd Ex. 7.0, 18:402-413. The AG's one-size-fits-all recommendation to requiring that all three phase and single phase branch circuit conductors be fused is short-sighted.[13]

The AG's claim that ComEd witness Mr. Gannon "backpedalled" on whether ComEd's Engineering Standard Practice ("ESP") states that all taps be fused is also untrue. To the contrary, Mr. Gannon explained that an ESP is an internal document that provides guidance to engineers on the design of ComEd's distribution system. Tr. at 454:6-11. It is not a fixed

[13] For example, for the senior citizen complex mentioned on page 30 of the AG's Initial Brief, fusing the tap in this instance would not have prevented the interruption. While the complex it is served by a three phase tap, the tap is a total of three short spans of wire. Thus, if the damage was on the tap, the presence of a fuse would not have prevented the interruption. Also, if the damage de-energized the section of the feeder connected to the tap, fusing the tap would again not have prevented the interruption. *Id.*, 20:439-453.

rulebook meant to trump good engineering judgment. He added that the purpose of the ESP is to assess taps on the system that do not have fusing and install fusing based on good engineering judgment. For example, fusing would not be applied to cases where there could be a safety-related issue, where loading off the tap would preclude installation, and where from a reliability standpoint, it would not be practical. Tr. at 454:16-455:8.

Second, the AG's arguments and recommendations regarding reclosers ignore both best practices and ComEd's long-term sectionalizing strategy. ComEd has developed a strategy to deploy Distribution Automation ("DA") most beneficial from both a reliability and cost perspective. Gannon/Mehrtens Sur., ComEd Ex. 14.0 Rev., 23:491-497. ComEd began installing DA in 1992 and automated sectionalizing in 2001. Originally ComEd's approach was to install a recloser at approximately the midpoint circuits (or mid-circuit reclosers), as Mr. Owens slavishly recommended. However, in 2007 ComEd began installing loop schemes, which are more beneficial to improving reliability than Mr. Owens' approach. *Id.* at 24:511-25:521. Since 2007, over 1,400 reclosing devices have been installed on 4kV and 12kV distribution system with another 2,500 slated to be added as part of the EIMA build out. *Id.* at 25:521-529; Tr. at 422:17-22.

Third, with respect to switching devices, the AG's criticisms of ComEd's use of single-phase switches are uninformed and inaccurate. Single phase switching capabilities provide restoration benefits by enabling individual phases to be restored as they are cleared of faults rather than having to wait for all three phases to be cleared of faults. ComEd generally deploys gang operated switches on its 34kV system where ferroresonance is either anticipated or where extreme cases have been documents. Gannon/Mehrtens Reb., ComEd Ex. 7.0, 21:458-22:488. The AG does not rebut this evidence. Finally, the AG argues that hundreds of thousands of

customers were without service because of the storms; however, there is no evidence that any of the recommended sectionalizing equipment implemented in the manner that Owens suggests would have prevented material numbers of these interruptions. ComEd has a long term strategy in place in deploying DA and other sectionalizing equipment that weighs reliability and cost benefits. The AG arguments must be rejected.

4. <u>The AG's Proposed "Remedies" Are Unreasonable and Imprudent</u>

The AG proposes a series of remedies that are neither supported by the record nor grounded in reality. Based on the testimony of AG witness Owens, the AG stands alone in proposing that ComEd implement a variety of changes and install a multitude of facilities without regard to benefits or costs to customers. Owens Dir., AG Ex. 1.0, 48:5-49:12. This price tag is approximately $8 billion. Shlatz Sur., ComEd Ex. 19.0, 3:54-60, 16:348-17:364. For example, he proposes that all of ComEd's rear lot overhead lines should be placed underground, despite the "relatively tiny number customers that would benefit and the very large cost differential." *Id*., 16:349-52. Not only is the AG's ad-hoc approach inferior to ComEd's programmatic approach to system investment, its extraordinary cost underscores how far removed the AG is from the practical definition of what is "preventable." *Id*., 16:340-17:3; *see* Section III.B, *supra*; ComEd Br. at 27.

The scope of the AG's "remedies" also implies that the Commission has failed or been derelict in its oversight of ComEd's system. That implication is also untrue. ComEd regularly provides the Commission with a variety of reports detailing its operations and performance. As the AG's own prior statements to this Commission underscore, nothing remotely suggests that ComEd has a systemic reliability issue. *See* Section III.C, *supra.* To the contrary, ComEd's system performance is excellent compared to its peers. Objective, independently-developed data confirm that ComEd's reliability performance remained in the first or at the top of the second

quartile during the period 2007-2010. Artze/Duque Reb., ComEd Ex. 12.0, 6:128-7:132. The ICC's own Reliability Benchmarks reflected similar performance. *Id*., 7:133-43. The AG cannot reasonably dispute those facts.

The AG cannot identify a single proposed "remedy" articulated by Mr. Owens that would have, in the real world, eliminated, or reduced the duration of, an actual interruption during the storms at issue. Shlatz Sur., ComEd Ex. 19.0, 3:56-58. The AG's proposed "remedies" and its Monday-morning quarterbacking on how they should have been implemented prior to 2011 are contrary to how a prudent and reasonable utility invests in and designs its system.

5. <u>No Additional Investigation Is Warranted</u>

The AG's belated request that the Commission initiate an investigation into ComEd's "infrastructure and storm hardening investments" is a solution in search of a problem. AG Br. at 32. Legally, this request far exceeds the scope of a waiver request under Section 16-125(e). It also ignores that the Commission can and does investigate ComEd's reliability continually.[14] In fact, based on the current rigorous regulatory regime, Staff already has concluded that ComEd's "distribution facilities damaged during the Summer 2011 Storm Systems were originally designed and constructed to appropriate standards." Staff Br. at 12. Apart from speculation and innuendo, the AG offers no credible or reliable evidence that there is any systemic problem to

[14] Pursuant to 83 Ill. Admin. Code §411.140, assess each utility's annual reliability report and evaluates its reliability performance. Staff's report includes, in addition: (1) an assessment of the utility's historical performance relative to established reliability targets; (2) trends in the utility's reliability performance; (3) an evaluation of the utility's plan to maintain or improve reliability; (4) an assessment and recommendations re any potential reliability problems and risks that Staff identified; and (6) a review of the utility's implementation of its plan for the previous reporting period. In order to prepare its report, Staff performs a number of analyses. For example, Staff conducts a series of field inspections, wherein Staff looks for problems such as poor tree trimming practices, broken or damaged equipment, rotten poles, and overly slack spans (low sagging lines). At substations, Staff looks for problems such as low or leaking oil, load tap changers regularly operated at extreme positions, and poor maintenance practices. In its assessment of ComEd dated April 15, 2010, Staff conducted field examinations of 15 circuits which Staff drew from the list of 114 worst performing circuits in 2008. Staff also analyzes data that a utility provides with their annual report as required in Section 411.120 of the Commission's Rules, and engages in discovery before and after its field inspections.

investigate. The evidence demonstrates that ComEd's system performance is excellent, while (as shown above), the AG's conclusions are false and unsupportable. *See* Section III.D, *infra*.

To the extent the reference to "storm hardening" refers to the funds invested through the Energy Infrastructure Modernization Act (EIMA), the Commission is fully cognizant of that investment and EIMA spells out performance targets and how the process is to be monitored. EIMA does not authorize the AG's request. In short, there is neither a legal or factual basis to adopt the AG's request for an investigation. Accordingly, it should be rejected.

IV. CONCLUSION

For the reasons stated in the record and herein, the Commission should not find that ComEd can be held liable for damages under Section 16-125(e) of the Act because no interruption triggering liability under Section 16-125(e) occurred. In the alternative, ComEd seeks a determination that if Section 16-125(e) is deemed to apply, then any potential liability should be waived because the storm damage was unpreventable under Section 16-125(e)(1).

Dated: September 20, 2012

Respectfully submitted,

COMMONWEALTH EDISON COMPANY

By: _____
One of its attorneys

Thomas S. O'Neill
Senior Vice President & General Counsel
COMMONWEALTH EDISON COMPANY
440 S. LaSalle Street, Suite 3300
Chicago, Illinois 60605
(312) 394-5400
thomas.oneill@exeloncorp.com

Jane Park
440 S. LaSalle Street, Suite 3300
Chicago, IL 60605
(312) 394-4335
jane.park@exeloncorp.com

E. Glenn Rippie
John E. Rooney
Carla Scarsella
Caitlin M. Shields
ROONEY RIPPIE & RATNASWAMY LLP
350 W. Hubbard St., Suite 600
Chicago, Illinois 60654
(312) 447-2800
glenn.rippie@r3law.com
john.rooney@r3law.com
carla.scarsella@r3law.com
caitlin.shields@r3law.com

Attorneys for Commonwealth Edison Company