

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

KING’S WALK CONDOMINIUM)	
)	
Petitioner,)	
)	
v.)	Docket No. 08-0264
)	
COMMONWEALTH EDISON COMPANY,)	
)	
Respondent.)	
)	
Complaint as to refund the balance of)	
overcharges/overpayments for electricity in)	
Rolling Meadows, Illinois)	

COMMONWEALTH EDISON COMPANY’S MOTION *IN LIMINE*

Respondent Commonwealth Edison Company (“ComEd”), by its counsel, submits this Motion *in Limine* to exclude Petitioner King’s Walk Condominium’s (“King’s Walk”) expert witness, Mr. Charles O. Prettyman, from presenting at the evidentiary hearing any testimony, opinions, or exhibits related to claims and issues that King’s Walk has previously litigated and lost in this case or that are otherwise no longer contested, that are irrelevant, that relate to matters about which Mr. Prettyman is unqualified to opine, or that are otherwise not properly before the Illinois Commerce Commission (“Commission”).

On July 27, 2011, the Commission issued an Interim Order holding that all of King’s Walk’s claims prior to April 11, 2006 are barred by the statute of limitations set forth in Section 9-252 of the Public Utilities Act (the “Act”). The Interim Order also specified that the remaining claims not barred by the above limitations period are as follows:

(1) that from September 7, 2007 to the present, King’s Walk has been billed at a commercial rate instead of a residential rate in violation of Section 16-103.1 of the Act;

(2) that on January 2, 2007, ComEd improperly switched King's Walk's accounts to commercial rates¹; and

(3) that King's Walk is entitled to a Rider CABA credit from January 2, 2007 to the present. *See* Interim Order at 15-16.²

Also, to the extent that King's Walk claims that after April 11, 2006 ComEd wrongfully billed it on seven separate accounts, those claims also ostensibly remain at issue. *See* Interim Order at 16 (ordering that claims that are not untimely are not dismissed).

Despite the narrowing of the remaining allegations, King's Walk seeks to introduce testimony and exhibits through Mr. Prettyman that relate to claims that have been dismissed or that otherwise are simply irrelevant to the instant proceeding. The Commission should limit Mr. Prettyman's testimony to those issues identified in the Interim Order that remain for trial and to only those matters about which he is qualified to opine.

I. PROCEDURAL BACKGROUND

A. Rulings on Matters Already Before the Commission.

On April 11, 2008, King's Walk filed a Formal Complaint with the Commission. King's Walk then filed a Verified Amended Formal Complaint ("Complaint") on February 23, 2009

¹ The Interim Order specifically states that on January 2, 2007, ComEd improperly switched three King's Walk accounts to commercial rates. In fact, the switching of all seven King's Walk accounts in three categories are at issue. Category 1 concerns the switching of two of the six accounts previously switched to Rate 14 to the Commercial Blended Without Space Heating rate; Category 2 concerns the switching of the remaining four of the six accounts to the Commercial Blended With Space Heating rate and; Category 3 concerns the switching of the seventh account that was never previously switched from Rate 14 to the Commercial Blended With Space Heating rate. Interim Order at 3-4, 15.

² The Interim Order also stated that claims that ComEd wrongfully billed King's Walk at Rate 6 fell outside of the limitations period. Interim Order at 15. However, as the ALJ clarified by Notice dated March 21, 2012, the parties agreed that imposition of Rate 6 upon any of King's Walk's accounts after January 2, 2007 is not an issue in this docket. Notice of ALJ Ruling, March 21, 2012.

which contained 13 purported counts against ComEd. Compl. at 17-30. In its Interim Order, the Commission determined that the statute of limitations of Section 9-252 of the Public Utilities Act, 220 ILCS 5/9-252, applied to all of King's Walk claims. Interim Order at 9-10. Accordingly, the Commission dismissed all claims relating to allegations prior to April 11, 2006, two years before the Complaint was filed and clarified those claims that remain. *Id.* at 10, 15-16.

On March 5, 2012, Administrative Law Judge ("ALJ") Sainsot issued a ruling denying ComEd's motion for summary judgment but affirming that the claims at issue are limited to those in the Interim Order. *See* March 5, 2012 Ruling at 1-2. Though the Interim Order and ALJ Sainsot's March 5, 2012 Ruling indicated that there still existed a question as to whether ComEd wrongfully billed King's Walk at Rate 6 (Interim Order at 15; March 5, 2012 Ruling at 4-5), on March 21, 2012 ALJ Sainsot issued a clarifying ruling stating that the parties now agree that imposition of Rate 6 upon any King's Walk account after January 2, 2007 is no longer at issue in this docket. *See* March 21, 2012, Notice of ALJ's Ruling. Because all other Rate 6 related claims are time-barred, Interim Order at 15-16, all Rate 6 issues are now out of this case.

B. King's Walk's Responses to Expert Discovery.

On July 6, 2012, King's Walk identified Mr. Prettyman as its expert witness. On July 10, 2012, ComEd sent King's Walk its Third Set of Data Requests ("Requests"), seeking information regarding the opinions and qualifications of Mr. Prettyman. On July 30, 2012, King's Walk served its Response to Third Set of Data Requests ("Response"), attached hereto as Exhibit ("Ex.") A. King's Walk provided a "complete statement of all opinions" that Mr. Prettyman has formed in the case and "the basis and reasons for them," in Exhibit A to the Response ("Ex. A. to King's Walk's Response").

Exhibit A to King's Walk's Response states nine purported "expert" opinions of Mr. Prettyman. This list includes opinions pertaining to topics such as whether King's Walk paid its bills on time, whether ComEd appears to prefer trial over settlement negotiations, and the duties ComEd owes to its stockholders and others to act "in good faith when dealing with customers." For the reasons explained below, ComEd believes that King's Walk should not be allowed to present Mr. Prettyman's testimony on the majority of these opinions as they address issues that are barred by the statute of limitations, relate to matters no longer at issue in this proceeding, are wholly irrelevant to the remaining issues in this case, or state opinions on matters about which Mr. Prettyman has no expertise. Only one of Mr. Prettyman's opinions could possibly be relevant, and then only if it is properly limited to the relevant time period.

II. ARGUMENT

In complete disregard of the Interim Order and ALJ Sainsot's rulings, King's Walk now seeks, through its purported expert witness, to re-litigate issues in the evidentiary hearing that have already been decided in this docket, are irrelevant, or are not otherwise not properly before the Commission. The Illinois Rules of Evidence relating to expert testimony and the Commission Rules of Practice ("Commission Rules"), however, explicitly bar the admission of such improper evidence.³

³ As a preliminary matter, the Illinois discovery rules and Rules of Evidence are applicable in the instant Commission proceeding. *See* 83 Ill. Admin. Code § 200.335 ("Any party may utilized [sic]... discovery tools commonly utilized in civil actions in the circuit courts in the State of Illinois in the manner contemplated by the code of civil procedure and the rules of the Supreme Court of Illinois."); *see also* 83 Ill. Admin. Code § 200.610(b) ("In contested cases...the rules of evidence...applied in civil cases in the Circuit Courts of the State of Illinois shall be followed.").

A. Most of Mr. Prettyman’s Opinions Should Be Excluded As Irrelevant.

Irrelevant evidence is not admissible. Ill. R. Evid. 402 (“[e]vidence which is not relevant is not admissible.”); 83 Ill. Admin. Code § 200.610(a) (“irrelevant, immaterial or unduly repetitious evidence shall be excluded” from Commission hearings.) (citation omitted). Several of Mr. Prettyman’s opinions contravene this well-settled rule of evidence, because they are completely unrelated to whether ComEd charged King’s Walk the proper rate for electric delivery service since September 7, 2007, what amount of Rider CABA credit King’s Walk is owed, or whether ComEd should have billed King’s Walk under one account rather than seven accounts. Although Mr. Prettyman provides “reasons” and “bases” for his opinions in Exhibit A, his “reasons” tend to underscore how irrelevant the opinions are, and his “bases” tend to underscore how unqualified he is to give them.

Specifically, Mr. Prettyman offers the following irrelevant opinions:

- *“Starting in 1996 ComEd, at various time [sic], submitted incorrect bills resulting in billing errors.”* To the extent that this opinion purports to introduce evidence regarding claims prior to April 11, 2006, the opinion must be excluded. Interim Order, at 15-16.
- *“Petitioner paid the bills rendered by ComEd that were incorrect.”* Mr. Prettyman indicates that the reason for this opinion is to establish that King’s Walk “paid its bills in a timely manner.” But whether King’s Walk paid the bills ComEd issued in a timely manner has never been disputed in this case and is not relevant to King’s Walk’s claims. Because this issue has nothing to do with whether King’s Walk was charged the proper rate, or any other remaining issue, this opinion is irrelevant.
- *“ComEd does not refund customer overcharges in a timely manner.”* The list of active issues in this case is limited to whether ComEd charged the correct rate for service after September 7, 2007, the amount ComEd owes in CABA credits, and whether King’s Walk was properly billed on seven accounts. The timeliness of ComEd’s remittance of

customer overcharges has no bearing on these issues. Moreover, to the extent that Mr. Prettyman seeks to opine on ComEd's general practices as a whole, his opinions provide no basis to find that such general statements have any relevance to the specific facts and issues at hand.

- “*A trial (as the last resort) appears to be the venue preferred in lieu of reasoned negotiations.*” Whether a trial is preferred – by ComEd, the Commission, or anyone else – is irrelevant to resolution of remaining issues in this case. So, too, are the “basis” and “reason” for this opinion, which are both merely further opinions. As a “basis,” Mr. Prettyman states that, “the decisions made in prior hearing seem to lack rational interpretation.” As discussed below, Mr. Prettyman is not qualified to offer this legal opinion, *see infra* Section B., and his thoughts on the Commission's or ALJ Sainsot's decisions are not relevant to the outcome of this case.
- “*Rate 6 was improperly applied to a residential account in 1996. Rate 6 was not properly administered had the account actually been nonresidential in 1996. Watt-hour meters were no [sic] capable of recording demand use which was required for rate 6 accounts using in excess of 2,000 kilowatt-hours of energy in a billing period.*” This opinion relates solely to Rate 6, which is no longer at issue because it is barred by the statute of limitations and because the parties agreed that it is no longer part of this case. *See* March 21, 2012, Notice of ALJ's Ruling.
- “*As a matter of law, good business practice and fair administration of it's [sic] tariffs ComEd has an obligation to the customer, stockholders, and itself to act in a reasonable manner, in good faith when dealing with customers.*” As a preliminary matter, and as is discussed further below, Mr. Prettyman is not qualified to offer this legal opinion. *See infra* Section C. Furthermore, while ComEd agrees that good business practices and fair administration of tariffs are important, Mr. Prettyman's opinion on these matters is wholly irrelevant to the resolution of the remaining issues of the case: whether ComEd charged the correct rate after September 7, 2007, what it owes in CABA credit, and whether it rightfully billed King's Walk on seven accounts.

- *“ComEd dropped the ball.”* This bald statement is utterly inadequate as an “expert” opinion and void of probative value on its face. In any case, Mr. Prettyman’s general opinions about acceptable business practices have no bearing on the contested issues. Nor is this opinion any way salvaged by its purported reason, which clarifies that Mr. Prettyman intends the opinion to relate to time-barred claims pertaining to Rate 6 billing issues. As a reason for this opinion, Mr. Prettyman provides that “limiting refunds to 18 months without a reasonable documented explanation is in the same category as ‘should have known.’” Mr. Prettyman is here referring to ComEd’s July 20, 2006 payment to King’s Walk of billing adjustment credits dating back September 2005 (the first bill after King’s Walk’s first complaint to ComEd that it should not be billed at Rate 6). King’s Walk has argued that the billing credits should have dated back to December 1996. The Interim Order and subsequent rulings from Judge Sainsot, however, have left absolutely no question that this issue, which relates entirely to events occurring prior to April 11, 2006, is no longer relevant.
- *“Refusal to explain or justify limiting the over-payments for billing errors in violation of the tariff would seem to be intentional and malicious.”* As with the preceding opinion, Mr. Prettyman again refers to Rate 6 billing disputes that occurred prior to April 11, 2006. Because this opinion relates to issues barred by the statute of limitations, the opinion is not relevant here.

Ex. A. to King’s Walk’s Response.

For the above reasons, any testimony or exhibits proffered by Mr. Prettyman relating to these irrelevant opinions should be excluded by the Commission.

B. Mr. Prettyman’s Legal Opinions, Which Are Beyond The Scope Of His Expertise, Should Be Excluded.

Mr. Prettyman also attempts to provide “expert” opinions about matters for which King’s Walk has failed to establish that he is qualified to opine. Illinois Rule of Evidence 702 explicitly provides that, “a witness qualified as an expert by *knowledge, skill, experience, training, or education*, may testify thereto in the form of an opinion or otherwise.” Ill. R. Evid. 702.

(emphasis added). Based on Mr. Prettyman’s *curriculum vitae*, he has no legal knowledge, skill, experience training or education. See Ex. A. Nor could Mr. Prettyman offer these opinions even if he did have relevant legal experience. Because legal issues are to be decided by the court, “no expert can opine as to the law.” *Todd W. Musburger, Ltd. v. Meier*, 394 Ill. App. 3d 781, 800-01, 914 N.E.2d 1195, 1214 (Ill. Ct. App. 2009). Yet, in contravention of Rule 702 and Illinois law, he attempts to offer at least three legal opinions.

First, Mr. Prettyman offers at least one opinion that is nothing more than a flat disagreement with prior orders of the Commission and the ALJ. See Ex. A. at 91 (“The decisions made in prior hearings seem to lack rational interpretation.”). He is not qualified to offer legal analysis of these Orders, and this type of legal opinion does not “assist the trier of fact to understand the evidence or determine a fact in issue.” Ill. R. Evid. 702. It must be excluded.

Mr. Prettyman also claims that, “as a matter of law,” ComEd has an obligation to act in a reasonable manner and in good faith when dealing with customers. He also claims, ostensibly in an effort to “clear[] the ambiguity in previous interpretations of the available rates,” that King’s Walk as a condominium unit owner association and all-electric customer is “entitled to all-electric residential rates for service” based on Section 16-103.1 of the Act. This legal analysis of ComEd’s obligations *vis-a-vis* its customers and statutory interpretation of Section 16-103.1 is not helpful to the trier of fact – the only legal expert in this case – and also requires legal expertise that Mr. Prettyman does not have. To the extent that any of Mr. Prettyman’s opinions reflect or require a legal analysis, they must be excluded. In any event, ComEd reserves the right to conduct a *voir dire* of Mr. Prettyman regarding his expertise and opinions on these issues at the hearing.

C. Mr. Prettyman Offers One Relevant Opinion.

Given that most of Mr. Prettyman's opinions are not relevant or are not based in proper qualifications, or both, this Court should exclude those opinions. Mr. Prettyman should be limited to expressing the following opinion, although with one restriction:

- “*Starting in 1996, ComEd...submitted incorrect bills resulting in billing errors.*” This opinion is relevant, but only to the extent it pertains to events occurring after September 7, 2007. Accordingly, this Court should restrict the opinion to events after that date.

Exhibit A, which contains Mr. Prettyman's purported expert opinions, is peppered throughout with opinions that are irrelevant and for which Mr. Prettyman is unqualified to opine. Accordingly, if this Court should deny this motion, ComEd reserves the right to *voir dire* Mr. Prettyman before he offers any testimony.

III. CONCLUSION

For the foregoing reasons, ComEd requests an order granting this Motion *in Limine* to exclude King's Walk from presenting at the evidentiary hearing any testimony or exhibit through Mr. Prettyman that is time-barred or that is no longer contested. ComEd also requests that any testimony or exhibit offered by King's Walk through Mr. Prettyman that is irrelevant to the instant proceeding, that concerns a matter about which Mr. Prettyman is not an expert or that is not otherwise properly before the Commission also be excluded.

Dated: September 25, 2012

Respectfully submitted,
Commonwealth Edison Company

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