



*Magee v. Huppin-Fleck*, 279 Ill. App. 3d 81, 86 (1st Dist. 1996). The reason is that the meaning of the law “is not a question of fact, to be resolved by the jury after a battle of experts,” but is instead “a question of law, to be resolved by the court.” *Bammerlin v. Navistar Int’l Transp. Corp.*, 30 F.3d 898, 900 (7th Cir.1994).

While “legal” testimony may be permissible in some circumstances, such as when a witness is called to testify on the probable meaning of an ambiguous contractual term rather than on the law that governs the case, the fact remains that only experts with the proper legal background may offer such testimony. *In re Ocean Bank*, 481 F. Supp. 2d 892, 898 (N.D. Ill. 2007), citing *Harbor Ins. Co. v. Continental Bank Corp.*, 922 F.2d 357, 365-66 (7th Cir.1990) (noting an example of potentially permissible legal opinion could come from a lawyer with experience regarding the type of contractual provisions at issue). However, a witness may not give testimony regarding statutory interpretation or testimony regarding legal conclusions, even if the witness is an attorney. *N. Moraine Wastewater Reclamation Dist. v. Ill. Commerce Comm’n*, 392 Ill. App. 3d 542, 573, 912 N.E.2d 204, 232 (2009), citing *ID Associates v. Dolan*, 324 Ill.App.3d 1047, 1058–59, 258 Ill.Dec. 592, 756 N.E.2d 866 (2001).

To determine when a question posed to an expert witness calls for an improper legal conclusion, the reviewing court should consider “first whether the question tracks the language of the legal principle at issue or of the applicable statute, and second, whether any terms employed have specialized legal meaning.” *Richman v. Sheahan*, 415 F. Supp. 2d 929, 947 (N.D. Ill. 2006), citing *United States v. Barile*, 286 F.3d 749, 760 (4th Cir.2002); *see also*, *United States v. Parris*, 243 F.3d at 289. In Illinois, trial courts have barred testimony that includes of simple legal conclusion, offers to interpret an agreement amongst parties, and purports to weigh the credibility of the parties' testimony. *Todd W. Musburger, Ltd. v. Meier*, 394 Ill. App. 3d 781, 800-01, 914 N.E.2d 1195, 1214-15 (2009).

Finally, “[a]n expert's opinion lacks probative value unless it is accompanied by foundational evidence establishing a witness' expertise or experience to form such an opinion.” *Stehlik v. Vill. of Orland Park*, 966 N.E.2d 428, 436 (1st Dist. 2012), citing *Harmon v. Patel*, 247 Ill.App.3d 32, 37–38, 617 N.E.2d 183 (1993). Illinois law requires that before an expert’s opinion is admitted, the court must

establish that the expert knows whereof he speaks. *Bammerlin v. Navistar Int'l Transp. Corp.*, 30 F.3d 898, 901 (7th Cir. 1994), citing *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

## **II. Argument**

Ms. Frederick's direct testimony contains statements that constitute improper expert testimony because they interpret the Public Utilities Act ("PUA"), offer an opinion without qualification on whether ComEd's proposed Peak Time Rebate ("PTR") program can be approved under the PUA by the ICC, and weigh the credibility of ComEd's arguments against her interpretation of what the PUA requires. Specifically, CUB moves to strike the following portions of Ms. Frederick's direct testimony as discussed below (a red-lined copy of ICEA Ex. 1.0 is attached to this Motion as Appendix A):

1. Lines 94-95: The statement that "ComEd must demonstrate, at an operational level, that its PTR program is competitively neutral between its customers and ARES customers" represents a legal conclusion on the showing ComEd must make before the ICC before the ICC can approve ComEd's tariff in this proceeding. ICEA Ex. 1.0 at 6. Legal conclusions are properly presented in brief, not testimony.

2. Lines 207-209: The statement that "[f]or both categories, the statute provides clear and unambiguous direction regarding recovery of all PTR costs from the applicable regional transmission organization" is statutory interpretation. ICEA Ex. 1.0 10-11. Ms. Frederick gives her unqualified opinion on ComEd's obligations under the PUA. Such statutory interpretation is legal interpretation, and as such, properly presented in brief.

3. Lines 261-301: Ms. Frederick's testimony here offers ICEA's legal arguments in support of ICEA's position that ComEd is directed to recover all of its PTR program costs from the applicable regional transmission organization ("RTO"). In support of this position, Ms. Frederick testifies that there is in fact a statutory directive for ComEd to solely recover costs from an RTO, that the legal authority cited by ComEd does not support ComEd's position that ComEd can recover costs from its customers, and that the intention of the General Assembly with respect to drafting Section 16-108.5(c) of the Public Utilities Act can be divined from the statutory scheme of the PUA. ICEA Ex. 1.0 at 13-15. All of these

arguments are legal arguments in support of ICEA's position that ComEd's PTR program violates the PUA. These are not factual statements regarding the impact of ComEd's PTR program upon a competitive market, any individual retail electric supplier or any individual retail customer. As a result, these arguments are properly presented in brief.

4. Lines 353-355: Ms. Frederick states that she is "not a PJM expert." ICEA Ex. 1.0 at 17. Despite this, she offers her opinion on what ComEd can do to prepare for PJM auctions. Without expertise in this specific RTO, Ms. Frederick's unqualified statement should be stricken as improper expert opinion. She offers no explanation for why her experience in the Electric Reliability Council of Texas ("ERCOT") RTO is appropriate or relevant for the ICC to consider with respect to operations in the PJM RTO nor why the Commission should overlook her own stated lack of expertise.

## CONCLUSION

WHEREFORE, for the reasons stated above CUB respectfully moves that the following portions of the Direct Testimony of Jennifer Frederick be stricken from the record: lines 94 through 95 at page 6; lines 207 through 209 at pages 10-11; lines 261 through 301 at pages 13-15; and lines 353-355 at page 17

Respectfully submitted,



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