



how [the federal statute at issue's] requirements worked and how they were implemented" because it "constituted statutory interpretation." 392 Ill. App. 3d 573-573. The appellate court affirmed the Commission's conclusion and noted that "a witness may not give testimony regarding statutory interpretation." *Id.* at 573. The appellate court also held that a witness may not "give testimony regarding legal conclusions." *Id.* Here, lines 207-209 and 261-301 of the Testimony improperly interpret the Public Utilities Act ("Act"), and lines 94-95 and 261-301 contain improper legal conclusions. These statements should be stricken. *See* Motion at 3-4.

At lines 94-95, Ms. Frederick testifies that "ComEd must demonstrate, at an operational level, that its PTR program is competitively neutral between its customers and ARES customers." Motion Appendix A at 6. At lines 207-209, Ms. Frederick testifies that "[f]or both categories, the statute provides clear and unambiguous direction regarding recovery of all PTR costs from the 'applicable regional transmission organization.'" Motion Appendix A at 10-11. These sentences represent Ms. Frederick's unqualified legal opinion of the "clear and unambiguous" meaning of the PUA regarding what ComEd "must demonstrate," just like the testimony regarding federal statutes that was barred by the Commission and affirmed by the court in *Northern*. At lines 261-301, Ms. Frederick testifies as to the intention of the General Assembly. Motion Appendix A at 13-15. This language improperly interprets the PUA by offering ICEA's legal argument that "ComEd ignores [the] statutory directive," and stating that "the statute directs ComEd to" do what ICEA believes the law requires. *Id.* at 13. Ms. Frederick's testimony offers the improper legal conclusion and improper statutory interpretation that "ICEA believes that the intent of the General Assembly is clear" and that portions of the PUA "trump" other portions, opining on the "reason for the General Assembly to include" certain provisions. *Id.* at 14.

Instead, ICEA claims that there is no interpretation provided and that “[t]he language of the PUA is plain on its face.” Response at 2 (citing *Crittenden v. Cook County Comm’n on Human Rights*, 2012 IL App (1<sup>st</sup>) 112437, ¶ 81). If the language of the PUA were plain on its face, there would be no need for Ms. Frederick to claim it was “clear and unambiguous” in what ComEd “must demonstrate.” In *Crittendon*, the appellate court affirmed the party’s *legal arguments* regarding the “statutory interpretation” of an ordinance, the court did not consider the *testimony* of any witness. 2012 IL App (1<sup>st</sup>) 112437, ¶¶ 81-83. The identified lines of Ms. Frederick’s testimony, instead of ICEA’s arguments to-be-briefed, improperly interpret the PUA and should be stricken.

ICEA also argues that its due process rights require an opportunity to respond to other parties’ testimony. Response at 3-5. However, none of the identified portions of ComEd witness Mr. Robert Garcia’s testimony provide his interpretation of whether any statutory provision is “clear and unambiguous,” what the General Assembly intended, or what provisions of the PUA trump others, unlike Ms. Frederick’s testimony. *See* Response at 3-4. Even if Mr. Garcia’s testimony did improperly interpret the PUA, ICEA fails to explain why that would make Ms. Frederick’s improper statutory interpretation somehow proper under the law. Nevertheless, CUB does not seek to limit ICEA’s due process rights. The Motion, if granted in full, would leave 87 percent of the lines of Ms. Frederick’s testimony intact, including Ms. Frederick’s discussion of competitive neutrality and cost recovery. *See* Motion Appendix A; Response at 4-5. ICEA’s counsel will still be able to offer an interpretation of the PUA through its briefs, ensuring that ICEA’s due process rights will not, in fact, be harmed by granting CUB’s Motion.

ICEA also claims that Ms. Frederick’s testimony offers “concrete information against which to measure abstract legal concepts,” and is thus proper. Response at 2 (citing *U.S. v.*

*Blount*, 502 F.3d 674, 680 (7th Cir. 2007)). In *Blount*, the Seventh Circuit Court of Appeals affirmed the district court’s decision to allow the expert opinion testimony of a police officer regarding the link between drugs and guns to present to the jury the general trend linking those two activities. 502 F.3d 679-680. The Seventh Circuit expressly noted that the expert testimony was allowable since the witness “did not couch his testimony in legal terms.” *Id.* at 680. Unlike the witness in *Blount*, however, Ms. Frederick, in the identified sentences, does not present factual statements regarding the impact of ComEd’s proposal upon the competitive market, any individual retail supplier, or any individual retail customer. *See* Motion at 4. Rather, she improperly couches ICEA’s interpretation of the PUA in legal terms, including legal conclusions regarding the General Assembly’s intent, the clarity of the PUA, and how the PUA’s provisions interact in a *legal* manner. *See* Motion Appendix A at line 94 (“must demonstrate”); 264 (“statutory directive”); 269 (“the statute directs”); 272 (“ICEA takes issue with ComEd’s position”); 273 (“statutory requirement”); 276 (“statutory requirement also directs”); 284 (“ICEA believes that the intent of the General Assembly is clear”); 284-291 (regarding the General Assembly’s intent based on multiple provisions of the PUA); 292 (regarding ComEd’s position lacking statutory support); 300 (“direct and unambiguous language”). ICEA’s counsel remains free to discuss these bald legal conclusions and interpretations of law in briefs, but Illinois law does not allow witnesses to testify as Ms. Frederick does.

Finally, ICEA claims that data requests propounded by CUB render its Motion “curious.” Response at 5. As noted above, 87 percent of Ms. Frederick’s Testimony would remain intact even if CUB’s Motion were granted in full, including factual assertions about competitive neutrality that CUB has the right to ask data requests regarding. CUB must continue preparing its case while its Motion is pending, including preparing rebuttal testimony to Ms. Frederick and

other parties. The Commission's Rules do not require a ruling on CUB's Motion before its rebuttal testimony is due. Tr. at 5 (Sept. 12, 2012); 83 Ill. Admin. Code § 200. Even if the Commission was required to rule on CUB's Motion before CUB's rebuttal testimony was due, ICEA cites no legal authority as to why this is grounds for denying CUB's Motion. ICEA would have the Commission believe that arguing in the alternative somehow invalidates one of the alternative arguments, even though ICEA argues in the alternative in its own Response. *See* Response at 6.

### **III. CUB's Motion Should be Granted Because the Testimony is Improper Expert Opinion**

ICEA does not contest that an expert opinion is improper where the expert is not qualified. ICEA also does not contest that "[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." Motion at 2 (citing *Stehlik v. Vill. of Orland Park*, 966 N.E.2d 428, 436 (1st Dist. 2012)). This is precisely why Ms. Frederick's opinion on the structure of PJM's markets must be stricken, unless ICEA revises its Testimony to explain her statement that she is not a PJM expert. *See* Motion Appendix A at 17.

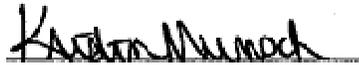
Lines 353-355 of the Testimony offer Ms. Frederick's opinion regarding the circumstances under which ComEd can prepare for an auction within PJM. *See* Motion Appendix A at 17. ICEA does not offer any foundational evidence establishing Ms. Frederick's expertise to form such an opinion, as is required under Illinois law. ICEA simply pleads that Ms. Frederick "is not required to be an expert in all aspects of PJM markets to form her conclusion." Response at 5. CUB does not argue that Ms. Frederick must be an expert "in all aspect of PJM markets," only that she be an expert about what she testifies. By her own admission, Ms.

Frederick lacks expertise in PJM market preparation. *See* Motion Appendix A at 17. A review of Ms. Frederick's qualifications establishes that she lacks any expertise in utility planning for PJM auctions. *See* Motion Appendix A at 2-3.

#### **IV. Conclusion**

CUB has established why portions of the Testimony contain improper statutory interpretation and legal conclusions, therefore the Commission should strike lines 94-95, 207-209, and 261-301 of the Testimony. ICEA has not provided the foundational evidence required to establish Ms. Frederick's expertise regarding PJM auction planning, therefore CUB's Motion to strike lines 353-355 of the Testimony should be granted. For the reasons stated above and in CUB's Motion, the Commission should grant CUB's Motion in full.

Respectfully submitted,



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