

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

Illinois Commerce Commission On Its Own)	
Motion)	
v.)	
Commonwealth Edison Company)	
)	Docket No. 12-0321
Annual formula rate update and revenue)	
requirement reconciliation authorized by)	
Section 16-108.5 of the Public Utilities Act)	

**RESPONSE OF THE CITIZENS UTILITY BOARD AND THE PEOPLE OF THE
STATE OF ILLINOIS TO COMMONWEALTH EDISON’S MOTION TO
SUPPLEMENT THE RECORD**

The Citizens Utility Board (“CUB”), by and through one of its attorneys and the People of the State of Illinois, by Attorney General Lisa Madigan (“AG” or “the People”), pursuant to Section 200.190 of the Administrative Rules of the Illinois Commerce Commission (“Commission” or “ICC”), 83 Ill. Admin. § 200.190, hereby files this Response to the Motion of Commonwealth Edison Company (“ComEd” or “the Company”) to Supplement the Record filed on November 29, 2012 (“Motion”). ComEd’s request to include additional discovery responses at the close of the proceedings in this case – after the evidentiary hearing, briefing, and filing of final compliance papers – should be denied.

ComEd failed to produce an evidentiary record in support of its 2011 rate case expenses that the Administrative Law Judges (“ALJs”) found sufficient to allow recovery of those expenses. ComEd had ample opportunity to produce this evidence – as the party with the burden of proof, ComEd had three rounds of testimony totaling 24 separate exhibits. It should not now be allowed to add to the record in this case 61 days after the hearing ends, and a full 25 days after its Compliance Filing (the sole reason the record was not marked heard and taken at the end of hearing). ComEd Motion at ¶ 5.

Should ComEd’s request be granted, Staff and other Intervenors, such as movants, will be prejudiced by the inability to conduct cross-examination of Company witnesses, or

send any additional discovery requests. In support of this Response, movants state the following.

Argument

In 2009, Section 9-229 of the Public Utilities Act (“PUA” or “the Act”) became law, providing that:

Consideration of attorney and expert compensation as an expense

The Commission shall *specifically assess* the justness and reasonableness of any amount expended by a public utility to compensate attorneys or technical experts to prepare and litigate a general rate case filing. This issue *shall be expressly addressed* in the Commission’s final order.

Proposed Order at 48, citing 220 ILCS 5/9-229 (emphasis added). In order for the Commission to be able to specifically assess and expressly address the compensation for attorneys and expert witness fees, there must be some evidence of record as to what services these persons or entities did in the rate case at issue. *Id.* Indeed, as the Appellate Court has noted, this Commission must make findings in support of its decisions and those findings must be supported by the record. *Id.*, citing *Commonwealth Edison Co. v. Ill Commerce Commission*, 398 Ill. App. 3d 510, 551-52, 924 N.E. 2d 1065 (2nd Dist. 2010) (“ComEd I”). As the Proposed Order concludes, there can be no express finding of justness and reasonableness that is supported by the record, unless there is evidence in the record as to what the Commission is finding to be just and reasonable. *Id.*

In this case, ComEd proposed to include in its formula rate update and revenue requirement reconciliation amortized 2011 formula rate case expenses. Motion at ¶ 1-2. However, ComEd failed to create an evidentiary record sufficient for the ALJs to find in the Company’s favor on this request, and the Proposed Order in this case rejects \$448,000 of the proposed annual expenses:

From the scant information provided in the record, it is not possible to do so. The fact that inclusion of these items may be contrary to the applicable law

only highlights the fact that evidence must be provided in the evidentiary record as to what expenditures were made, and the nature of, the need for, and reasonableness of, those expenditures. Otherwise, this Commission runs the risk, in a proceeding that will raise electric rates for the general public, of passing on unnecessary fees in those rates. It should again be noted that the general public pays those fees, as they are included in any rate increase. Without evidence establishing what the entities listed on that spreadsheet did and establishing that what they did was reasonable, this Commission cannot approve any item in rate case expense. Doing so would be ignoring the statutory requisite to expressly address the reasonableness of the fees involved and also ignoring the fact that all findings must be supported by the record.

Proposed Order at 50.

ComEd now claims that the exclusion was in error because ComEd had additional evidence to support its position – it simply did not introduce this evidence because the Company believed “its direct testimony regarding the 2011 rate case expenses was reasonable and that the evidence in the record is sufficient to support these costs.” Motion at ¶ 4. However, rather than simply take exception to the Proposed Order’s conclusion, ComEd now seeks to supplement the evidentiary record with additional “extensive, detailed discovery responses that it produced, and an authenticating affidavit.” Motion at ¶ 4.

While ComEd is correct that the record in this case has not been marked “heard and taken,” ComEd’s request is inappropriate. It overlooks the fact that the utility bears the burden of proving its requested rates – including any element from which those rates are derived –are just and reasonable. *Commonwealth Edison Co. v. Illinois Commerce Comm’n*, 405 Ill. App. 3d 389, 394, 937 N.E.2d 685, 695 (2010), reh’g denied (Nov. 16, 2010), appeal denied, 949 N.E.2d 657 (2011) and appeal denied, 949 N.E.2d 657 (2011) (“ComEd II”). It overlooks the fact that the ICC is an active participant in rate litigation, and not merely an arbitrator between a utility seeking a rate increase and any parties who happen

to oppose it. *People ex rel. Hartigan v. Illinois Commerce Comm'n*, 117 Ill. 2d 120, 135, 510 N.E.2d 865, 871 (1987) (“Hartigan”).

The Illinois Appellate Court, as the Proposed Order correctly noted, is clear on what is needed to satisfy Section 9-229 of the Act: the party seeking attorney’s fees and expert witness fees must provide evidence that specifies: (1) the services performed; (2) by whom they were performed, (3) the time expended; and (4) the hourly rate charged. Proposed Order at 49, citing *People ex rel. Madigan v. Illinois Commerce Comm.*, 2011 Ill. App. (1st) 101776, at 24-26, 964 N.E.2d 510 (1st Dist. 2011).

The ALJs Proposed Order reviewed evidence with that criteria in mind, and noted its concerns with ComEd’s evidence supporting its requested 2011 rate case expenses:

Nevertheless, the evidence that ComEd presented regarding the amount of rate case expense that it is requesting, \$1,979,83, is a scant one-page spreadsheet that merely lists totals and various entities.¹ *See*, ComEd. Ex. 3.9. There is no proof as to what these entities did to earn their fees, and no proof as to what time was expended, or as to the rates charged consumers for various persons or entities, not to mention the reasonableness of those rates. In fact, this document does not even establish that the services were performed in conjunction with any particular proceeding.² *Id.*, Tr. 128-29.

The Commission additionally notes that it appears that several of the items listed on that page appear to be improperly-included overhead expenses. *See, e.g., Losurdo Bros. v. Arkin Distributing Co.*, 125 Ill. App. 3d 139-144, 465 N.E.2d 139 (2nd Dist. 1984). These items are: “Beeline” for unspecified schedule and discovery response preparation in the amount of \$67,646; “Ikon Office Solutions” for unspecified office supplies in the amount of \$210; “Lakeview Energy Resource Consultants” for unspecified rate case preparation and consulting in the amount of \$31,968; “PRDC,” for capital project review in the amount of \$266,880; “SFIO” for unspecified rate case preparation in the amount of \$34,700 and finally “Other” for miscellaneous unspecified travel, meals, postage and shipping in the amount of \$3,940.

¹ This amount was reduced to \$1,544,161. Attachment A (ST6.01 Attachment 1) to ComEd’s Motion to Supplement Record (November 29, 2012). The total amortized expense recorded as of December 2011 was listed as \$524,000. Attachment A (ST2.03) to ComEd’s Motion to Supplement Record (November 29, 2012).

² However, the amounts listed in ComEd Ex. 3.9 were all paid. Tr. 128.

ComEd Ex. 3.9. Overhead costs, generally, are not recoverable under the body of case law concerning expert witness fees and attorney's fees that govern here. *Johnson v. Thomas*, 342 Ill. App. 3d 382, 402-04, 749 N.E.2d 9 (1st Dist. 2003), noting that routine charges are included in overhead and therefore not recoverable as a cost of litigation; *see also Harris Trust & Savings Bank v. American National Bank & Trust Co.*, 230 Ill. App. 3d 591, 599, 594 N.E.2d 1308 (1st Dist. 1992).

Proposed Order at 49-50.

The Proposed Order makes the specific factual findings necessary to support its conclusions under the law because those findings are specific enough to enable a reviewing court to make an informed and intelligent review of the order. In making adequate findings, the Commission is not required to provide findings on each evidentiary claim; its findings are sufficient if they are specific enough to enable the court to make an informed and intelligent review of its order. *ComEd II*, 405 Ill. App. 3d at 398, 937 N.E.2d at 697-98, citing *City of Chicago v. Illinois Commerce Comm'n*, 281 Ill. App.3d 617, 623-24, 666 N.E.2d 1212 (1996). In other words, it must state the facts essential to its ruling so that the court can properly review the basis for the decision. *Id.* citing *Business & Professional People for the Public Interest v. Illinois Commerce Commission*, 279 Ill.App.3d 824, 833, 665 N.E.2d 553 (1996). What the courts require is evidence that a "reasoning mind would accept as sufficient to support a particular conclusion." *Id.*, citing *ComEd I*, 398 Ill. App. 3d at 514, 924 N.E.2d at 1074, quoting *Citizens Utility Board v. Illinois Commerce Comm'n*, 291 Ill.App.3d 300, 304, 683 N.E.2d 938 (1997).

ComEd had ample opportunity to produce evidence in support of its request, and in fact filed three rounds of testimony (direct, rebuttal and Surrebuttal) totaling 24 separate exhibits. ComEd bears the burden of proof and can be presumed to know the requirements of the PUA, including Section 9-229. The Company should not be allowed to avoid its error by blaming Staff and Intervenors for not objecting to ComEd's evidence. Evidently ComEd concluded that these expenses were "just and reasonable in accordance with Section 9-229

by virtue of the combination of ComEd's direct testimony and the discovery responses", ComEd Motion at ¶ 12, because it simply accepted Staff's silence and failure to direct ComEd to file additional documents on rate case expense as an affirmative proof of reasonableness. Since any participation by persons or groups opposing an increase is voluntary and purely fortuitous, requiring intervenors to establish unreasonableness is no substitute for requiring proof of reasonableness. *Hartigan*, 117 Ill. 2d at 135-36, 510 N.E.2d at 871.

Even if the Commission were to allow costs that are uncontested into rates, Section 9-229, clearly created a different standard for rate case expenses. ComEd did not make the affirmative showing Section 9-229 requires, and it is not other parties' responsibility to direct or request it to do so. ComEd's Motion, if granted, would in fact prejudice intervenors who would now lack the opportunity to cross examine any ComEd witness regarding the response or submit any additional or follow-up discovery. ComEd attached 25 exhibits to its motion constituting 251 non-confidential pages, in addition to at least two exhibits designated confidential in their entirety. A cursory review of the attachments labeled ST 6.01 highlight the absence of meaningful information. For example, Attachment 2 of ComEd's Motion, part 2 contains several pages with the name Charles Dunn, and "week ending", but does not identify who that individual is, what services he provided for the hours billed, or what matter the invoice related to. It is impossible to understand the significance of these documents without further explanation and discovery. A true and correct copy of Attachment A (ST 6.01-Attachment 2, Part1) is attached as an example.

The bottom line is that in order for the Commission to be able to "specifically assess" and "expressly address" the compensation for attorneys and expert witnesses, there must be some evidence of record as to what services these persons or entities did in the rate case at issue. Indeed, as the Appellate Court has noted, this Commission must make findings in

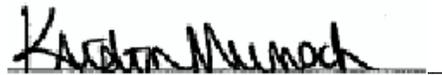
support of its decisions and those findings must be supported by the record. *ComEd I*, 398 Ill. App. 3d at 551-52, 924 N.E. 2d 1065. The Commission is an investigator and regulator of the utilities, and it may not rely on intervening parties to contest a rate increase or to challenge the evidence offered by the utility. *Hartigan*, 117 Ill. 2d at 135, 510 N.E.2d at 871. The evidence ComEd attached to its Motion is far too rough to satisfy its evidentiary burden under Section 9-229.

The ALJs in this case had no choice but to conclude that ComEd's evidence was insufficient to establish reasonableness. It is up to ComEd to avail itself of the proper avenue afforded it under the PUA to challenge that conclusion. Should the ICC ultimately agree with the ALJs, ComEd can request rehearing on the issue, and at that time, request that its additional evidence be considered. At that time, Staff and all other intervenors who choose to participate in rehearing can properly evaluate the additional evidence without prejudice, and a full and complete record can be built on the issue.

WHEREFORE ComEd's request to supplement the record should be denied.

Dated: December 5, 2012

CITIZENS UTILITY BOARD



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A rectangular box containing a handwritten signature in cursive script, which appears to read "Susan Satter".

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