

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

COMMONWEALTH EDISON COMPANY	:	
	:	No. 11-0662
Petition to Determine the Applicability of	:	
Section 16-125(e) Liability to Events Caused	:	
by the February 1, 2011 storm systems	:	

**REPLY BRIEF ON EXCEPTIONS OF
COMMONWEALTH EDISON COMPANY**

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Commonwealth Edison Company (“ComEd”) submits this Reply Brief on Exceptions (“RBOE”) under Section 10-111 of the Public Utilities Act (the “PUA”), 220 ILCS 5/10-111, Section 200.830 of the Rules of Practice of the Illinois Commerce Commission (the “Commission” or “ICC”), 83 Ill. Admin. Code § 200.830, and the schedule set by the Administrative Law Judge. As shown herein, the Exceptions to the Proposed Order (“PO”) filed the Illinois Attorney General’s office (“AG”) have no basis in fact, and accepting them would be unlawful, unfair and harmful to customers.

I. INTRODUCTION

The February 1, 2011 blizzard (the “Blizzard”) was one of the most powerful winter storms in history. It shut northern Illinois down cold, and destroyed or immobilized infrastructure far more weather-resistant than any electric system. Yet, ComEd’s electric system was sufficiently robust, and its employees sufficiently well trained and dedicated, that within 18 hours – while Lake Shore Drive remained quite literally, a drift – 90% of all interrupted customers were restored. The Proposed Order reaches accurate and supported conclusions about ComEd’s system, the Blizzard, and the restoration efforts that followed it.

In contrast, the AG’s efforts to paint the performance of ComEd’s system and people as less than exemplary, let alone deficient, cannot stand up to the facts. Its Brief on Exceptions

(“BOE”) laments that despite no indication of even negligence, “ComEd is not liable for *any* damages related to the storm outages,” as if it is somehow odd that utilities are not responsible for extreme acts of nature and the Proposed Order strains to let ComEd escape from expected liability. In fact, it is established law and policy essentially everywhere that utilities, absent proven misconduct, are not liable for weather losses.¹ The AG’s view is no doubt linked to its unlawful claim that Section 16-125(e) exposes ComEd to potentially crippling financial losses every time severe weather causes *as few as one percent of its customers* to lose power for four hours. The illegality of that view, however, is addressed in ComEd’s BOE and the AG’s particularly distorted view of Section 16-125 is also rejected by the PO and Staff.²

This Brief will largely focus on the AG’s complete disregard of the overwhelming and largely uncontradicted evidence of the Blizzard and its destructive force, its impact on ComEd’s system, and the successful efforts of ComEd personnel to restore service. In this, the AG stands alone. Staff supports ComEd’s right to a waiver (if Section 16-125(e) applies) and no other party, including the Citizens Utility Board (“CUB”) or the City of Chicago (“City”) opposes it.

The AG’s attempt to blame ComEd for Blizzard damage asks the Commission to ignore volumes of data and detailed testimony from weather experts, professional Navigant engineers who independently evaluated relevant system conditions and reported on them in great detail, and from the responsible ComEd executives and managers who showed that ComEd’s system

¹ See, e.g. *In Re Illinois Bell Switching Station Litigation*, 161 Ill. 2d 233, 243-44 (1994).

² ComEd respectfully submits, for the reasons stated in its Brief on Exceptions, that Section 16-125(e) does not apply at all when there is no single continuous power interruption meeting its criteria. However, both Staff and the PO do not accept the AG’s view of the law, thereby contradicting the law’s plain requirement of a single interruption. See Garcia Dir., ComEd Ex. 1.0, 4:74-7:142.

was designed, constructed and maintained prudently and in accord with applicable standards.³ The AG also ignores Staff's review and its conclusion that the Blizzard damage was unpreventable.⁴ The AG instead points to one witness, Mr. Owens, who analyzed not even one Blizzard-related interruption or its cause, and who waived away his failure with the outrageous claim that summer thunderstorms and winter blizzards have the same effects on electric systems.⁵ To counter the actual data on how the system is built and how it performed, the AG points to his sweeping and conclusory condemnations of systems and equipment he never even saw. As for the little that Mr. Owens did "inspect," those "inspections" were of locations and equipment unrelated to the Blizzard, lasted for no more than a few seconds per piece of equipment, occurred during "drive-through" tours guided by AG and other lawyers,⁶ purportedly supplemented by later snapshots taken after he penned instructions describing how to look for and take unfavorable pictures. Time and again during cross examination, his work was shown to be biased, shoddy, and incomplete, and his conclusions misleading and wrong.

The AG ignores not only testimony, but empirical evidence, too. Even during the severe 2011 storm season, ComEd's system withstood extreme weather and other stresses far better than its peers, and delivered top-quartile reliability performance.⁷ That is a fact, just as it is a fact that a "decrepit" system like AG describes could never have achieved that performance.⁸ The AG also points to annual Staff reports from other years and to Staff comments about equipment that

³ See, e.g. Navigant Report, ComEd Ex. 11.0 at 6-10; Shlatz Reb., ComEd Ex.9.0, 2:40-3:46; Gannon-Mehrtens Dir., ComEd Ex. 2.0.

⁴ Rockrohr Dir., Staff Ex. 1.0, 11:254-12:261

⁵ Owens Dir., AG Ex. 1.0, 5:19-21; Gannon-Mehrtens Reb., ComEd Ex. 7.0, 3:70-5:112.

⁶ Owens Tr. 555:14-21; 561:22-563:19; Schlatz Reb., ComEd Ex. 6:129-18:375.

⁷ Navigant Report, ComEd Ex. 11.0 at 33-40.

⁸ *Id.*

did not fail during the Blizzard. These reports do not show that ComEd's system is deficient, nor does that fact that Staff – or ComEd itself – can find things to improve further. Not surprisingly, Staff does not cite to or rely on them.

The AG then tries to attack the Proposed Order by wrongly asserting that ComEd “offered no evidence” of the pre-Blizzard condition of its damaged facilities. AG BOE at 2, 14-18. In part, this argument is a strawman: nothing in Section 16-125(e) requires ComEd to present its evidence pole by pole, or line by line. Indeed, that would be impossible. No utility can know what individual equipment will be damaged before the fact. The law instead requires that ComEd show the interruption was caused by “unpreventable damage due to weather events or conditions.” ComEd met that standard with extremely detailed evidence about the Blizzard and its impacts on ComEd's system⁹ as well as uncontradicted evidence of the cause and duration of each interruption. As the Proposed Order notes, ComEd also established the condition and relevant characteristics of its system. PO at 22-23. ComEd's witnesses did not need to testify about individual pieces of equipment to verify how ComEd constructs and maintains its system, nor must it discuss individual trees to confirm that ComEd's vegetation management program met all Staff and other standards. In contrast, the AG failed to present a shred of evidence about the causes of the actual service interruptions experienced during the Blizzard, individually or collectively.

Finally, the AG presents in its BOE, *for the first time* in any such proceeding an entirely new, procedural gambit that would make any ruling on waiver, and all the evidence presented here on that subject, a practical nullity. Although the statute and rules expressly contemplate it, the AG now says the Commission cannot grant a waiver without allowing every customer a

⁹ See, e.g. Piazza Dir., ComEd Ex. 4.0; Maletich Dir., ComEd Ex. 3.0, 5:90-9:188.

second opportunity to show in a complaint proceeding that the particular “outage” affecting them was preventable. AG BOE at 2, 18-19. This claim is legally wrong, contradictory, and unfair to ComEd, its customers and the Commission.

- Section 16-125 calls for *utilities* to seek a liability waiver from the Commission, and to do so rapidly after even one complaint is filed. It does not require or permit that waiver be litigated as a defense in tens of thousands of individual complaints.
- The Commission’s Rules also call for a proceeding just like this docket; 83 Ill. Admin. Code § 411.220. No one can sit on the sidelines, hoping ComEd will lose and then demand to relitigate if ComEd prevails. *Id.*
- Because the waiver is binding, any customer can intervene. *Id.* No customer was denied the right to present any evidence, and nothing in the Proposed Order undermines any individual customers’ rights.
- The AG’s vision is, practically, a nightmare of duplication, inefficiency, and cost. Does anyone seriously think customers are better off in a regime when tens of thousands of individual complaints -- in the case of the Blizzard, approximately 66,000 (AG BOE at 2) -- must be litigated on the issue of waiver? Moreover, under the AG’s novel theory, each of those complainant customers would have to prove, likely with expert testimony, that their individual interruption was preventable.
- Apart from customers, this could be nothing but disastrous for the Commission and its efforts to promote efficient and timely resolution of complaints. The sheer volume of complaints, let alone the demands on Staff, would swamp the system.

Finally, the AG’s procedural argument underscores the inconsistency inherent in its misinterpretation of Section 16-125(e). ComEd has been clear: the plain language of Section

16-125 speaks to interruptions, not storms, and ComEd has shown that unpreventable blizzard damage caused the actual interruptions at issue. The AG, in contrast, no longer even misconstrues Section 16-125 consistently. They insist that the statutory “continuous power interruption” refers to the collective effect of the storm, not any one interruption, yet claim that ComEd’s waiver of liability for that “interruption” cannot only be granted on an individual customer basis, a level of granularity even finer than the individual interruption. These inconsistencies underscore that the AG has no consistent view of Section 16-125 or of what an “interruption” is, but is simply arguing on each issue whatever position is worse for utilities. That is no principled basis for a Commission decision, and no way to interpret a law.

II. THE PROPOSED ORDER CORRECTLY FINDS THAT COMED’S SYSTEM WAS PROPERLY DESIGNED, CONSTRUCTED, AND MAINTAINED

The AGs first Exception claims that the Proposed Order accepted at “face value” ComEd’s evidence concerning the condition of its system prior to the Blizzard, while disregarding the AG’s testimony alleging deficiencies in ComEd’s system. AG BOE at 6. The AG errs. It also neglects to discuss Staff’s evidence, which mirrors ComEd’s. *Id.*

A. ComEd’s System on February 1, 2011

The Proposed Order details the evidence at length and arrives at conclusions not by ignoring the AG’s claims, but by properly weighing the evidence provided by ComEd and Staff, on the one hand, against the AG’s claims. That comparison is stark.

Evidence proving that ComEd’s system was designed, constructed and maintained consistent with good utility practice was provided by five witnesses¹⁰ who each had direct,

¹⁰ These witnesses included William J. Gannon, P.E., Director of Capacity Planning and Reliability Programs; John Mehtens, a Regional Operations Director; Cheryl M. Maletich, Director of Operations at ComEd’s Operations Control Center; Craig Chesley, Manager, Vegetation Management; and, Emily Kramer, Manager, Distribution Vegetation Management.

comprehensive, and personal knowledge of system and operating responsibility for the areas on which they testified. ComEd demonstrated that its electric distribution system as a whole is designed, constructed, and maintained in accordance with good utility practice, applicable standards, and applicable national and state rules and regulations. Gannon/Mehrtens Dir., ComEd Ex. 2.0, 6:113-25; Gannon/Mehrtens Reb., ComEd Ex. 7.0, 6:141-9:201. Finally, ComEd has shown that at the time the 2011 Blizzard hit, ComEd's distribution line and substation inspections, repair, and replacements were up to date, with all high priority work completed. Gannon/Mehrtens Dir., ComEd Ex. 2.0, 13:279-14:299. No party, including CUB and the City, took issue with this evidence other than the AG, which relied on a patently biased and flawed "investigation" of ComEd's system.

The evidence the Proposed Order relies on also includes a detailed evaluation by qualified, independent engineers who inspected and probed the system, including the areas and systems damaged by the Blizzard, and reported on their results top to bottom.¹¹ The evidence that ComEd's system was not deficient is also empirical: we know that ComEd's reliability performance remained in the first or at the top of the second quartile during the period 2007-2010. Navigant Report, ComEd Ex. 11.0 at 9-10; Artze/Duque Reb., ComEd Ex. 10.0, 7:140-143. The ICC's own Reliability Benchmarks reflected similar performance. *Id.* at 7:144-8:154. Staff's witness likewise found no pervasive system deficiencies. Rockrohr Dir., Staff Ex. 1.0, 12:252-13:271

The AG's claims, in contrast, remain unproven, as the Proposed Order rightly concludes. The sole AG engineering witness made claims about equipment and system he had never seen.

¹¹ Shlatz Reb., ComEd Ex. 9.0; Shlatz Sur., ComEd Ex. 15.0; Artze-Duque Reb., ComEd Ex. 10.0; Artze-Duque Sur., ComEd Ex. 16.0; Navigant Report, ComEd Ex. 11.0.

What equipment he did see, he was led to, and was not involved in the Blizzard interruptions. His “inspection” of what he did see was cursory at best, amounting to a few seconds on average for most of the equipment. In addition to not inspecting a representative, relevant, or unbiased set of equipment, he relied on materials he received after the fact and in response to directions he authored on how to create “evidence” that appeared damaging. His testimony was riddled with engineering errors and he described standards and conclusions by reference to marketing materials. *See, e.g.* Shlatz Reb., ComEd Ex. 9.0, 5:98-18:375.¹² No other party or witness supported the AG’s testimony or conclusions concerning the state of ComEd’s system.

B. AG Witness Owens’ “Review” Was Shoddy, Biased, and Inaccurate, and Was Properly Rejected by the Proposed Order

The keystone of the AG’s attack on the Proposed Order is the claim that it disregards the AG witness Owens’ investigation. AG BOE at 7-8. It does not. Rather, the evidence demonstrates that Mr. Owen’s investigation was incomplete, biased and flawed. In fact, Mr. Owens did not even attempt to conduct a review with regard to the 2011 Blizzard. Instead, he merely re-submitted the same testimony that was provided in the 2011 Summer Storms Docket (ICC Docket No. 11-0588), flippantly claiming that blizzards and winter storms, on the one hand, and summer thunderstorms, tornadoes, and derechos, on the other, pose the same threats to systems and need not be analyzed separately. Owens Dir., AG Ex. 1.0, 5:17-6:18. His assertion not only underscores his failure to study the winter storm but demonstrates startling ignorance of how storms actually affect systems. Gannon-Mehrtens Reb., ComEd Ex. 3:70-5:112. Indeed, it is patently obvious that conditions such as foliage on trees and snow and ice

¹² These errors fill literally dozens of pages of testimony (*e.g.*, and much of the transcript of his cross-examination (Tr. at 553:14-632:10)).

clearly affect a distribution system differently. Gannon-Mehrtens Reb., ComEd Ex. 7.0, 3:70-76; Shlatz Reb., ComEd Ex. 9.0, 9:185-10:214.

The evidence shows Mr. Owens’ “investigation” was pervasively flawed and biased. First, *Mr. Owens saw and knows very little*. He visited only a total of 12 municipalities of the more than 400 municipalities in the service territory – and excluded Chicago entirely. Tr. at 574:4-10, 558:22-563:4. What he did see, he did not select. Rather, he let the AG attorneys pick the municipalities to visit, select the routes taken during his driving tour and, apparently, where to stop. Tr. at 558:22-564:4; 574:4-10.¹³ The areas and equipment he “inspected” had no link to specific interruptions resulting from the 2011 Blizzard. Tr. at 575:21-576:17.

Even the “field inspection” Mr. Owens claimed to have performed were ephemeral. 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)

Yet, the whole process totaled about 800 minutes, including his driving time between sites and municipalities, leaving him (assuming instant travel) about 8 seconds per pole. And that 8 second assumes that he spent *zero time* looking at anything else. Tr. at 569:13-15, 554:6-555:11.

¹³In 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.

He also did not conduct a single performance or physical condition test on any piece of equipment anywhere on the system. Shlatz Reb., ComEd Ex. 9.0, 6:129-7:161. Not even one. It is based on this “inspection” that Mr. Owens assesses the totality of ComEd’s 11,400 square mile system.

Apart from that Mr. Owens never took the time to develop even the most basic independent knowledge of the attributes of the 2011 Blizzard, which are central to the matters at issue in this proceeding. Tr. at 584:1-14. As he admitted, he knows little about the specifics of ComEd’s system. Tr. at 555:22-558:21. And, he refused to consider, or even seek, ComEd records -- the best evidence of system design, age, or performance. For example, he never consulted ComEd about the nature, purpose, or design of any the equipment he saw, whether directly at the time nor later via discovery. Tr. at 555:22-558:21; 576:21-577:2. He 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 555:22-558:21. Nor did he even ask ComEd whether any of the purported system “failures” he claimed to identify related, in any way, to the 2011 Blizzard interruptions. Tr. at 576:13-17.

The evidence also uncovered pernicious bias in Mr. Owens’ gathering and manufacture of “evidence.” Apart from letting the counsel control the locations he “investigated,” Mr. Owens admitted that he only directed AG personnel to take pictures of ComEd equipment that suggested a problem existed. Tr. 580:12-18. Prior to submitting direct testimony he went so far as to author a document, issued in the AG’s name, entitled “Guidelines for Obtaining Photographs of ComEd’s Electric Distribution System.” ComEd Cross Ex. 5. These Guidelines instructed how pictures should be taken, not to obtain a fair or representative view of the system, but to depict

ComEd badly. Instead of depicting the system fairly or as a whole, and instead of seeking out equipment related to the Blizzard, his instructions included directions to:

- “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. It is clear that Mr. Owens 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.

Finally, Mr. Owens ignored ComEd’s actual system performance during the 2011 Blizzard. 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, no poles failed during this storm. Gannon-Mehrtens Reb., ComEd Ex. 7.0, 38:825-829. He similarly complains about the condition of distribution transformers, which accounted for less than 1% of the total interruptions experienced and customers affected during this storm. *Id.* at 43:931-935.

The evidence, in sum, demonstrates that *nothing* about AG witness Owens’ investigation and conclusions is objective or substantiated. Given this record, is it clear why the Proposed Order rejected the AG’s claims, and absolutely clear why that decision was correct. Indeed, the Proposed Order reached the only conclusion supported by the evidentiary record: ComEd’s system was properly designed, constructed and maintained at the time of the Blizzard.

C. AG Witness Owens’ Claims about Particular Aspects of ComEd’s System Were Baseless and Properly Rejected

The AG also makes several specific assertions about ComEd’s system that are equally wrong – including that it is not in compliance with NESC standards. The AG once again points to their discredited witness Mr. Owens, who the AG says “identified three major deficiencies in ComEd’s system: (1) vegetation management, (2) age of facilities, and (3) system modernization.” AG BOE at 9. As described below, those claims are no more accurate or supported than the AG’s generic aspersions. The AG’s added claim that these “conditions” are supported by annual reliability reports¹⁴ that even their witness did not cite, but that the AG “sprung” at hearing, but that, too, is simply incorrect.¹⁵

1. ComEd’s Vegetation Management Program

ComEd established that at the time the 2011 Blizzard hit, its distribution system was in compliance with its vegetation management program. That program includes a four-year tree-trimming cycle along distribution lines, and employs mid-cycle trimming where warranted, and was in compliance with its Commission-vetted vegetation management program. Chesley Reb., ComEd Ex. 8.0 Rev., 3:64-4:84; 8:166-68. However, even with strict adherence to a four-year trimming cycle it is impossible for a utility to avoid trees contacting its equipment during severe weather conditions. Kramer Sur., ComEd Ex. 14.0, 12:223-14:274. That is entirely consistent with what the AG told the Commission in its Initial Brief, where it concluded that “[v]egetation

¹⁴ ICC Assessment of Commonwealth Edison Co. Reliability Report and Reliability Performance for Calendar Year 2008, dated April 15, 2010, adopted in ICC Docket 10-0397 (June 23, 2010); ICC Assessment of Commonwealth Edison Co. Reliability Report and Reliability Performance for Calendar Year 2009, dated December 31, 2010, adopted in ICC Docket 11-0512 (July 7, 2011).

¹⁵ Given that no AG witness relied on these reports and the ComEd had no notice or opportunity to respond either in testimony or through discovery, ComEd respectfully continues to object to these documents’ admission, especially via “administrative notice.” ComEd’s legal argument is fully presented in its Response to the AG’s Motion to Admit. But, regardless, these reports do not prove that there was any systematic deficiency, let alone any deficiency that made the Blizzard damage “preventable,” on ComEd’s system as of the Blizzard.

management does not appear to have been a major factor for the February 1 outages.” AG Initial Br. at 14-15. There is no explanation for the flip-flop.

Nonetheless, the AG now claims that ComEd’s vegetation management program was not applied in a consistent and uniform matter and found areas of overgrown vegetation on primary lines along back property lines. AG BOE at 9. But, their evidence shows no such thing, and Mr. Owens largely relied on trees near customer-owned service drops without explaining or understanding the difference. The AG’s witness, Mr. Owens, did not even know that ComEd was on a four-year trimming cycle, not a five-year cycle as he first guessed.¹⁶ Indeed, Mr. Owens strongly endorsed the program ComEd, in fact, uses. He testified 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,” apparently without realizing that these best practices are exactly what ComEd uses. Owens Dir., AG Ex. 1.0, Attach A, 11:15-17 (emphasis added); Chesley Reb., ComEd Ex. 8.0 Rev., 3:64-4:84; 8:166-68.

The AG also cites to Staff’s 2008 Assessment Report regarding ComEd’s four-year tree trimming cycle. See AG BOE at 9-10. The AG’s reliance on that Report is quite misplaced. First off, that Assessment Report relates to ComEd’s system as of 2008. It says nothing about the status of ComEd’s vegetation management at the time of the Blizzard. In this regard, the AG failure to point out that in the Assessment of ComEd’s Reliability Report and Reliability performance for Calendar Year 2009 (“2009 Assessment Report”), Staff acknowledges that ComEd had two years before the storm already make significant improvements on tree-

¹⁶ See Owens Dir., AG Ex. 1.0, Attach A, 11:15-19; Chesley Reb., ComEd Ex. 8.0 Rev., 10:191-210; Tr. at 596:15-20.

trimming, and that report specifically acknowledges “ComEd’s successful efforts to execute existing and new reliability programs moderating weather-, tree-, overhead equipment- and underground equipment-related areas.” 2009 Assessment Report, p. 5. While those efforts achieved a 37% reduction in tree-related distribution system interruptions during 2009, Staff noted areas of concern that ComEd should continue to investigate. *Id* at 15. ComEd did and continues to work at improving its vegetation management program in 2011 and today, no matter how successful. The existence in 2009 of “problem areas” that continued to warrant such work supports no conclusion that ComEd’s vegetation management practices are flawed generally or led to even one preventable interruption.

The record on that point is clear. Even with aggressive vegetation management, trees cause interruptions during storms. And, the level of tree damage during this storm was not indicative of any vegetation management lapse. 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. 11.0 at 17. 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. 14.07.

The record makes clear that the AG’s claims about ComEd’s vegetation management program are baseless. The AG’s own inconsistent claims coupled with substantial evidence showing ComEd’s compliance with the program serve to undermine any notion that ComEd’s Commission-vetted vegetation management practices met or exceeded best utility practices.

2. Industry, Federal and State Standards.

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 Sur., ComEd Ex. 12.0, 10:221-11:230. These Rules expressly, and for good reason, incorporate a "grandfather clause" for older facilities, which recognizes that standards for construction anticipate that equipment will age. Likewise, when the NESC is revised, existing equipment is "grandfathered" as long as they are safe. 83 Ill. Admin. Code §305.40; *Id.*, 11:248-254. Thus, the appropriate version of the Code for any given installation depends upon the date of its original construction. *Id.*¹⁷ Except when safety is at issue, it would not be reasonable or prudent to replace or retrofit equipment every time standards are revised as it typically results in minimal impact to overall system reliability. Gannon-Mehrtens, Tr. at 456:16-457:6. The evidence "unequivocally indicates [ComEd's] system design and construction is consistent with prudent and common utility standards" and in fact, Navigant, ComEd's independent expert, concluded "[it] did not observe any violations or inconsistency with Title 83 of Illinois Administrative Code 305 and NESC requirements referenced within the Code." ComEd Ex. 11.0 at 6.

Absent any evidence of an actual code violation or any safety issue at all, the AG complains that the Proposed Order ignores Mr. Owens' assertions about the age and supposed condition of ComEd's wood poles and the number of fuses and fault detection devices. Further, the AG argues that yet another ICC Assessment of ComEd's Reliability Report and Reliability performance for Calendar Year 2010 ("2010 Assessment Report"), one which no witness relied

¹⁷ 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. Gannon/Mehrtens Sur., ComEd Ex. 12.0, 11:226-12:260.

on and is not in evidence, adopted by the Commission on December 19, 2012 in Docket No. 12-0682, supports Mr. Owens' conclusions.¹⁸ However, other than pointing to Staff's prior field inspections in the 2010 Assessment Report, the AG points to nothing in that report that supports Mr. Owens' claims. The record, in fact, once again exposes the flaws in Mr. Owen's conclusions.

3. The Condition of ComEd's Wood Poles

The AG argues that "half of ComEd's wood poles are 40 years or older" and are more susceptible to damage.¹⁹ AG BOE at 9. Again, the AG first cites not to Mr. Owens himself, but to the even-then two-year-old 2009 assessment report which contains pictures of damage to a handful of poles (*id.* at 9-10) which he did not rely on. The AG's arguments are at odds with both the evidence and its own witness' testimony. Age is not the sole determinant in deciding whether a pole should be replaced. Gannon/Mehrtens Reb., 7.0, 36:776-782. Staff agrees 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." 2009 Assessment Report, at 2. See also 2010 Assessment Report at 2. Moreover, there is no evidence that any of these poles had anything to do with even one of the interruptions caused by the Blizzard. That is not surprising, since all pole failure was not a significant cause of interruptions during the Blizzard. Gannon-Mehrtens Reb., ComEd Ex. 7.0, 38:825-829.

¹⁸ ComEd reiterates its objection to the AG's continued strategy of citing, as if they are evidence of facts, documents that are not in evidence and that ComEd cannot respond to. The Commission must decide this case on the record. 220 ILCS 5/10-103. This objection, however, while legally serious and while made in response to equally serious breaches by the AG, has less practical significance here when the document in question does not support the AG's argument either.

¹⁹ 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

The AG's later cites to Mr. Owens' claims and a few of his photographs fare no better. Not one of the depicted poles failed, let alone during the Blizzard, and these pictures and others like them was the "evidence" gathered as part of Mr. Owens' calculated effort to produce biased depictions. And, as noted above, any notion that Mr. Owens actually conducted a serious field "inspection" of ComEd's poles was thoroughly debunked. Owens, Tr. 562:22-623:3; Shlatz Reb., ComEd Ex. 9.0, 14:303-15:314. In the same vein, the only supposed "standard" Mr. Owens points to as supporting his own peculiar view of the significance of wood poles' age is a marketing pamphlet from the American Iron and Steel Institute (whose members make competing steel poles) and a report from the Oklahoma Corporation Commission that does not draw the claimed conclusion, even for poles in that very different climate. Gannon/Mehrtens Reb., 7.0, 36:783-37:801; Tr. 605:19-606:11.

The AG briefly touches on Mr. Owens' claims regarding loading and lightning protection as well. Those claims suffer from parallel flaws and biases, as ComEd explained in ComEd's Initial and Reply Briefs. They need not be repeated again in full. *See* ComEd Init. Br. at 30; ComEd Rep. Br. at 29-30. Suffice it to say that the Proposed Order did not ignore the AG on these issues, it rejected the AG's arguments, and for very good reason.

4. Fusing and Sectionalizing Equipment

The AG's arguments regarding fusing and sectionalizing equipment, such as reclosers, are also unsubstantiated and Mr. Owen's pronouncements on what ComEd "should have done" are imprudent and contrary to sound engineering. But, once again, apart from their particular flaws, the AG has failed to show that the supposed defects they complain about have anything to do with the Blizzard interruptions.

Turning to the particular claims, *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. That is a prudent practice. Mr. Owens' "automatic installation" recommendation neither recognizes that some taps have functions, length, or levels of exposure that do not warrant fusing. He also ignores that, 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, 19:416-429. Fusing without thinking is short-sighted and claiming that thinking first is a flaw is unsupported by evidence.

Second, ComEd is deploying Distribution Automation ("DA") carefully beginning where it is most beneficial from both a reliability and cost perspective. Gannon/Mehrtens Sur., ComEd Ex. 12.0, 23:489-24:498. And, as to reclosers, which the AG stresses, ComEd has moved well past Mr. Owens. ComEd's original approach had been to install a recloser at approximately the midpoint of feeders, as Mr. Owens recommended. However, beginning in 2007, ComEd began implementing loop schemes, which are superior to Mr. Owens' approach in improving reliability. *Id.* at 24:499-25:521. Nonetheless, where reclosers should be installed, ComEd has not skimped. 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 Energy Infrastructure Modernization Act build out. *Id.* at 25:520-523; Tr. at 421:2-7.

Third, the AG is unrebutted that ComEd's 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. Gannon/Mehrtens Reb., ComEd Ex. 7.0, 22:490-23:507. Finally, there is no evidence that any of Mr. Owens' sectionalizing recommendations would have prevented material numbers of interruptions.

III. THE PROPOSED ORDER CORRECTLY FINDS THAT UNPREVENTABLE WEATHER DAMAGE CAUSED THE BLIZZARD INTERRUPTIONS

The Proposed Order correctly finds that the interruptions that occurred during the Blizzard resulted from the unpreventable weather damage that storm caused. Again, that finding is based both on overwhelming evidence concerning ComEd's own system, and specific data on the causes of the interruption at issue.

The AG incorrectly asserts that "the current record does not provide sufficient evidence to show that any particular outage (1) was associated with equipment or maintenance that complied with appropriate standards or (2) was caused by lightning strikes, uprooted trees, wind and ice that affected parts of ComEd's system that complied with appropriate standards." AG BOE at 16. As detailed above, the evidence both established the causes of the specific interruptions and verifies that the damage was unpreventable. It also overwhelmingly establishes that ComEd system was designed, constructed, and maintained in accordance with good, prudent utility practices and all applicable NESC and Commission standards. Further, we know the AG has no contrary evidence, since Mr. Owens neither inspected nor evaluated the equipment and facilities involved in the Blizzard interruptions at issue.

The record also shows that interruptions caused by lightning strikes, uprooted trees, and wind and ice were unpreventable. The Blizzard delivered extreme winds, prolonged whiteout conditions, lightning strikes, record snow fall up to 24 inches, and snow drifts averaging 2 to 5 feet, with some drifts as high as 10 feet. Piazza Dir., ComEd Ex. 4.0, 2:40-3:64. No party disputes its extraordinary severity, nor the meteorological evidence confirming that it far exceeded the stresses utility facilities can be expected to withstand. That evidence clearly shows that the "interruptions that occurred during the winter 2011 storm were unavoidable, and the damage that occurred was due to events outside of ComEd's direct or indirect control." ComEd

Ex. 11.0 at 5. Staff engineer Greg Rockrohr also testified that ComEd was should be entitled to a complete waiver on the grounds that the interruptions were due to unpreventable storm damage. Rockrohr Dir., Staff Ex. 1.0, 11:252-12:271. In contrast, the AG’s witness did not independently assess either the storm’s strength or its capacity to cause damage. Owens, Tr. at 584:1-14. Accordingly, the Proposed Order correctly concludes that the damage to ComEd’s distribution system that occurred during the February 1, 2011 Storm System was a direct result of the weather conditions that were outside of ComEd’s control, and a full waiver should be granted. PO at 23.

The Proposed Order, moreover, does not rest on sworn testimony and meteorological data alone. Once again, we know how ComEd’s system actually behaved in the storm. And that objective data, and ComEd’s ability to restore as rapidly as it did, were not consistent with a deficient system. Navigant Report, ComEd Ex. 11.0 at 9-10. In contrast, the AG does not identify a single proposed recommendation 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. 15.0, 3:57-4:75.

IV. THE AG’S NOVEL CLAIM THAT WAIVERS CAN ONLY BE GRANTED IN THE CONTEXT OF “SPECIFIC CONDITIONS” PRESENTED BY INDIVIDUAL COMPLAINANTS IS BASELESS

Finally, the AG argues – for the first time ever – that regardless of whether the 30,000-plus customer threshold was met, the Commission “should reject the blanket waiver provisions ComEd seeks without prejudice and consider waivers from Section 16-125(e) liability in specific cases or claims brought by customers.” AG BOE at 20. This claim is flatly contrary to law, inconsistent with the AG’s other arguments, and advocates a harmful and unworkable policy.

A. The AG’s Argument Contradicts the Plain Language of the Act

Section 16-125 expressly authorized the utility to seek *a single waiver* and does not require it to wait until individual claims are eventually filed and litigated. 16-125(f) and (h) state, in relevant part:

Loss of revenue and expenses incurred in complying with this subsection may not be recovered from ratepayers. Customers with respect to whom a waiver has been granted by the Commission pursuant to subparagraphs (1)-(4) of subsections (e) and (f) shall not count toward the...30,000...total customers...required therein.

* * *

Remedies provided for under this Section may be sought exclusively through the Illinois Commerce Commission as provided under Section 10-109 of this Act. Damages awarded under this Section for a power interruption shall be limited to actual damages, which shall not include consequential damages, and litigation costs. A utilities’ request for *a waiver* of this Section shall be timely filed if no later than 30 days after the date on which *a claim* is filed with the Commission seeking damages or expense reimbursement under this Section. No utility shall be liable under this section while *a request for waiver* is pending. Damage awards may not be paid out of the utility rate funds.

220 ILCS 5/16-125(f) & (h), (emphasis added).

Nowhere does the Act provide that the General Assembly intended the Commission to evaluate tens of thousands of customer interruptions on a case-by-case basis in order to determine whether their individual outage was “preventable,” as the AG now suggests. Rather, the statute clearly and repeatedly refers to *a waiver*, in the singular, not the plural. For instance, 16-125(e) states:

A waiver of the requirements of this subsection may be granted by the Commission in instances in which the utility can show that the power interruption was the result of any one or more of the following causes:

- (1) Unpreventable damage due to weather events or conditions.

Indeed, the statute requires ComEd, at peril of its right to seek a waiver with respect to the entire interruption, to file that request within 30 days of the *first* claim being filed with the

Commission. Had the General Assembly intended the waiver to be like and affirmative defense that had to be raised on a case-by-case basis, it would have said so. But it did not. Indeed, what is requires cannot be squared with the AG's view that the utility can be granted a waiver only as to single customers and only in complaint cases.

B. The AG's Argument Contradicts the Relevant Commission Rules

The Commission's own Rules underscore how frivolous the AG's argument is. Section 411.220 provides, in pertinent part:

In the event that more than 30,000 customers of a utility are subjected to a power interruption that meets the conditions set forth in Section 16-125(e) of the Act and the utility or the Commission believes that such interruption is due to one or more of the causes set forth in Section 16-125(e)(1)-(4) of the Act, then **the utility may commence a proceeding before the Commission**, or the Commission may commence on its own motion a proceeding, **seeking a declaration that the subject interruption was due to one or more of such causes and that liability under Section 16-125(e) of the Act should be waived by the Commission**. Any such *proceeding* shall be commenced by the utility or the Commission no later than 30 days after such power interruption. The Commission's decision in such *proceeding* shall be appealable by any party thereto, and except as reversed or modified on appeal, **the determination of the cause of the interruption in this proceeding and the Commission's decision to grant or deny a waiver of liability in connection therewith shall be final and shall be binding on both the utility and claimants in actions before the Commission to recover damages under Section 16-125(e) of the Act...**

83 Ill. Admin. Code Section 411.220(a) (emphasis added). The PUA and Commission Rules unambiguously mandate and envision a single Commission waiver proceeding.

C. The AG's Argument Contradicts the Approved Claims Procedures

The Commission approved more than a decade ago administrative claims procedures for ComEd that apply once a determination has been made that Section 16-125 has been triggered by an interruption. Commonwealth Edison Co., Docket No. 99-0022, 1999 Ill. PUC LEXIS 333 (April 12, 1999). Those procedures were duly approved by the Commission and serve the

laudable goal of minimizing costs to customers and society, and encouraging settlement without litigation. They require affected customers to file claims and ComEd to act on them in good faith before customers resort to a litigated the resolution by the Commission in a formal proceeding. *Id.* This saves customers money and speeds the process.

Yet, under the AG's view, ComEd and every claimant is in a Catch-22. ComEd cannot know if it has Section 16-125 liability to any customer, under the AG's view, until the end of that customer's formal complaint case. This undoes the entire claims procedure and all but assures that every customer must go to trial.

D. The AG Advocates an Unworkable Policy That Would Be Harmful to Customers and the Commission, and Fundamentally Unfair to ComEd

The notion that the Commission must determine whether ComEd is entitled to a waiver for weather damage causing what the AG argues is a "continuous power interruption" (that is the premise the AG must adhere to, no matter how erroneous, if the statute is to apply at all) in up to 66,000 complaint cases is terrible public policy and would be a disaster for the Commission.

Assuming *arguendo* that even if the statute's waiver provisions were open to interpretation, the practical implications of the AG's recommendation defeat it. There is simply no practical way for the Commission to evaluate the waiver evidence and adjudicate the waiver issues in a meaningful way, time and again, in literally thousands of complaints. A detailed case on waiver, could require ComEd to put on numerous witnesses (ComEd put on ten in this case), virtually all experts, and presumably customers would have to respond or lose. The cost would be prohibitive, and the relevant ComEd witnesses would be doing nothing but testifying, continually. While ComEd might hire a staff solely for these cases, there are literally not enough ALJs and ICC Staff members to preside. And, all that effort would be supremely wasteful: In the case of the Blizzard alone, for instance, the AG's recommendation would subject the

Commission, its Staff, attorneys, and Administrative Law Judges to litigating potentially 66,000 individual customer complaint cases.²⁰ Why litigate this same fundamental issue 66,000+ times? Put another way, why require parties and the Commission to litigate an average of 180 storm cases *per day*, every single day of the year *for just this one storm*?

Not only does the Commission lack the resources to meaningfully effectuate anything remotely close such a scheme, but it would subject ratepayers to bearing the potentially staggering costs for litigating all cases where the outage was ultimately deemed “unpreventable.” Further, the AG’s approach would leave ratepayers responsible for the costs of litigating all outages deemed “unpreventable.” Quite simply, it is unthinkable that the General Assembly intended such an approach.

At the same time, the AG’s argument that granting a blanket waiver would somehow be “unfair to customers whose specific situations may demonstrate that their outage was preventable” is contrary to law and fact. The Commission rules allowed any potential claimant to intervene in this Docket. Moreover, the AG in Docket No. 11-0588 actively attempted to consolidate individual claims proceedings into the generic docket. That position simply cannot be squared with their current argument that everything must be separate.

E. The AG Waffles on the Meaning of “Interruption”

ComEd has, throughout this case, maintained that Section 16-125 does not apply because no single continuous power interruption affected more than 30,000 ComEd customers for at least

²⁰ Commission rules prohibit class actions. 83 Ill.Adm.Code 200.95.

4 hours.²¹ Central to the AG’s effort to avoid this plain reading of the statute has been the argument that all of the Blizzard-related interruptions should be looked at, for statutory purposes, like one giant amalgamated interruption that can satisfy the statute even if the individual component interruptions cannot.²²

The AG, however, now tells the Commission that the individual interruptions are separate, legally, and (although the deduction is invalid) waiver must be separately demonstrated not only as to each interruption, but as to each customer affected by the same interruption. ComEd respectfully submits the AG’s new-found view of what an “interruption” is for purposes of waiver cannot be sustained at the same time as the AG asserts it means something totally different. Accordingly, the statute does not apply and the Commission need not reach the AG’s newly-minted interpretation of 16-125’s waiver provisions.

V. THE PROPOSED ORDER CORRECTLY CONCLUDES THAT NO ADDITIONAL INVESTIGATION IS WARRANTED

Despite the overwhelming evidence, the AG continues to support the notion that the Commission should open an investigation into ComEd’s “baseline infrastructure investments and storm readiness.” AG BOE at 19. No other party supports this proposal and the evidence refutes any need for further proceedings.

²¹ The AG’s BOE discusses the burden of proof in a manner disconnected from the actual issues here. The law places the burden of proof regarding waiver on ComEd in this proceeding. As discussed herein, 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). In a complaint case, however, the burden of proof is on the complainants. And, statutory construction is a legal issue. It has no “burden of proof.”

²² At no time during the 2011 Blizzard 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. Garcia Dir., ComEd Ex. 1.0, 4:72-7:158; Garcia Reb., ComEd Ex. 5.0, 5:99-102; Maletich Dir., ComEd Ex. 3.0, 5:92-97; Petition, ¶ 10. Rather, ComEd’s un rebutted evidence shows that the largest single continuous power interruption lasting four hours or more affected 2,219 customers, roughly 7% of the 30,001 threshold contained in Section 16-125(e) of the PUA. Maletich Dir., ComEd Ex. 3.0, 5:94-96.

As the Proposed Order correctly concludes, the record demonstrates that ComEd's distribution system is designed, constructed and maintained in accordance with good utility practice, applicable design and construction standards, and applicable national and state rules and regulations; therefore there exists no basis on which to initiate an investigation. PO at 23. Additionally, while this request far exceeds the scope of a waiver request under Section 16-125(e), it also ignores the fact that the Commission can and does investigate ComEd's reliability on a continual basis.²³ Apart from speculation and innuendo, the AG offers no credible or reliable evidence that there is any systemic problem to investigate. The evidence demonstrates that ComEd's system performance is excellent, while (as shown above) the AG's conclusions have no reasonable support in the record. See Section II.A. *infra*. In short, there is neither a legal or factual basis to adopt the AG's request for an investigation. Accordingly, it should be rejected.

VI. CONCLUSION

ComEd respectfully requests that the Commission reject the AG's proposed amendments to the Proposed Order and, instead, adopt ComEd's suggested amendments as set forth in ComEd's Brief on Exceptions.

²³ Pursuant to 83 Ill. Admin. Code §411.140, Staff assesses each utility and its reliability performance. Staff's report addresses: (1) the utility's historical performance relative to established reliability targets; (2) trends in the utility's reliability performance; (3) the utility's plan to maintain or improve reliability; (4) Staff's recommendations regarding any potential reliability problems and risks; and (6) the utility's implementation of its plan for the previous reporting period. To prepare this report, Staff conducts a series of field inspections and considers the existence and prevalence of any poor tree trimming practices, broken or damaged equipment, rotten poles, and overly slack spans (low sagging lines). At substations, Staff looks for problems including low or leaking oil, load tap changers regularly operated at extreme positions, and poor maintenance practices. Staff also conducts field examinations of circuits taken from the list of worst performing circuits. Finally, Staff 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.

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Respectfully submitted,

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