

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

COMMONWEALTH EDISON COMPANY :
 : Docket No. 11-0588
Petition to determine the applicability of :
Section 16-125(e) liability to events caused :
by the Summer 2011 storm systems. :

REPLY TO BRIEFS ON EXCEPTIONS OF THE
STAFF OF THE ILLINOIS COMMERCE COMMISSION

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The Staff of the Illinois Commerce Commission (“Staff”), by and through its counsel, and pursuant to Section 200.830 of the Commission’s Rules of Practice, 83 Ill. Adm. Code 200.830, respectfully submits its Reply to Briefs on Exceptions in the above-captioned matter.

I. Procedural History

On August 18, 2011, Commonwealth Edison Company (“ComEd” or “the Company”) filed a Petition to Determine (1) the applicability of Section 16-125(e) of the Public Utilities Act (“Act”), for damages resulting from interruptions that occurred when six separate storm systems affected its electric distribution system during June and July of 2011 (“Summer 2011 Storm Systems”), and (2) whether liability for damages should attach or be waived because the interruptions were caused by unpreventable damage due to weather events or conditions. Petition at 1-2. Initial Briefs (“IBs”) were filed in this matter on August 31, 2012 by Staff, Commonwealth Edison Company (“ComEd” or “Company”), The People of the State of Illinois (“AG”), and collectively the City of Chicago

("City") and the Citizens Utility Board ("CUB") (together "City/CUB"). Reply briefs ("RB") were filed by the respective parties on September 20, 2012. The ALJ issued a Proposed Order ("PO or Proposed Order") on January 25, 2013. Staff, the AG and ComEd filed Briefs on Exception ("BOEs") on February 13, 2013. Staff's Reply Brief on Exceptions follows.

II. Argument

A. Reply to the Attorney General's Exceptions

1. The ALJPO did not err in concluding that ComEd's system was appropriately designed and constructed

While Staff generally does not object to the AG's recommendations in its first exception that the Commission's Final Order include a more comprehensive description of Staff and AG witnesses' testimony regarding the condition of ComEd's system, AG BOE at 13-20, Staff does not agree with the AG's conclusion that the Commission needs to consider individual claims for damages to determine if a waiver for "unpreventable" damage is appropriate. AG BOE at 20-21. The AG takes exception to the ALJPO's conclusion that ComEd's entire system was appropriately designed, constructed, and maintained at the time the Summer 2011 storm systems occurred. AG BOE at 9-26. ComEd provided adequate evidence that facilities that were damaged during the Summer 2011 Storm Systems were originally designed and constructed to appropriate standards, but ComEd has not shown it had appropriately maintained all of those facilities. Staff Ex. 1.0 at 17-19. Section 16-125(e) of the Act allows the Commission to grant a utility a waiver of liability regarding a customer if the utility

shows that the interruption affecting the customer was unpreventable. Section 16-125(e) of the Act is shown below, in relevant part:

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 a result of any one or more of the following causes:

- (1) Unpreventable damage due to weather events or conditions.
- (2) Customer tampering.
- (3) Unpreventable damage due to civil or international unrest or animals.
- (4) Damage to utility equipment or other actions by a party other than the utility, its employees, agents, or contractors. (emphasis added)

Since ComEd did not show that it had properly maintained its facilities that were damaged during the summer storm systems, Staff crafted its waiver recommendation to include interruption causes that likely would have resulted in interruptions to ComEd's customers regardless of how well ComEd had maintained its system. Staff Ex. 1.0 at 18-19; Staff Ex. 2.0 at 3-5; Tr. at 79-80. ComEd's "showing" included (1) causes listed in its outage report and (2) wind speed information near the location of interruptions. Based upon ComEd's showing, Staff included customers affected by unpreventable interruptions in its waiver recommendation. Staff Ex. 2.0 (R) at 8-9.

The AG's recommendation that the Commission consider waivers from Section 16-125(e) liability not in the aggregate, but rather in specific cases or claims brought by customers should be rejected for several reasons. First, the AG's recommendation is in direct conflict with 83 Ill. Adm. Code 411.220(a), which permits utilities to seek blanket waivers from liability under Section 16-125(e). Second, requiring utilities to defend separate complaint proceedings to

determine whether a waiver should be granted ignores the fact that the customers included in a waiver are those customers whose interruption the utility has already shown was the result of unpreventable damage due to weather events or conditions. There would be no reason for any customer, the utility or the Commission to dedicate resources to resolving complaint proceedings that must inevitably end in the complaint being denied because the utility has already demonstrated and the Commission has already determined that the interruption was unpreventable. Third, holding multiple proceedings implicating precisely the same issues and evidence would be extremely inefficient and completely unnecessary. Staff does not support the AG's conclusion in its first exception that a blanket waiver is inappropriate.

Finally, Staff was unable to find the underlined paragraph that the AG recites on page 26 of its BOE within the AG's "PEOPLE OF THE STATE OF ILLINOIS EXCEPTIONS TO THE JANUARY 25, 2013 PROPOSED ORDER." In any case, with the underlined language on page 26 of its BOE, the AG appears to suggest that the Commission open an investigation into ComEd's investment in storm readiness. Staff continues to believe that this proceeding is not the proper forum for the Commission to commence such an investigation.

2. The ALJPO properly excluded outages based on ComEd's outage codes

In its second exception, the AG argues that the Commission should not include interruptions associated with specific outage codes within its waiver because there is no evidence that equipment or conditions associated with the

specific outage codes were appropriately designed, constructed and maintained. Instead the Commission should decide whether utility liability exists by reviewing each and every individual customer claim. AG BOE at 27-31.

Staff's objection to the AG's second exception is similar to Staff's objection to the AG's first exception. If brand-new, well-engineered facilities will fail when a tree is uprooted and falls on them, it scarcely matters whether the actual facilities in question are older or in a less-than-perfect state of repair. As previously noted, Staff crafted its waiver recommendation to include causes that likely would have resulted in interruptions of service to ComEd's customers regardless of how well ComEd had maintained its system. Staff Ex. 1.0 at 18-19; Staff Ex. 2.0 at 3-5; Tr. at 79-80. Holding multiple separate complaint proceedings implicating precisely the same issues and evidence would be extremely inefficient and completely unnecessary.

3. The Commission should not determine liability based upon multiple separate customer complaint proceedings

In its third exception, the AG again argues that the Commission's determination regarding liability should be based upon each customer's individual claim. AG BOE at 32-34. Again, the AG's arguments should be rejected for reasons previously discussed, specifically: (a) the waiver Staff recommends includes only interruptions that would have likely occurred regardless of the condition of ComEd's maintenance, Staff Ex. 1.0 at 18-19; Staff Ex. 2.0 at 3-5; Tr. at 79-80, and (b) holding multiple separate complaint proceedings implicating precisely the same issues and evidence would be extremely inefficient and

completely unnecessary, and contrary to administrative rules. Further, implicit in this argument is the proposition that, regardless of a utility's showing that a particular interruption was unpreventable such that a waiver should properly be granted, the utility must defend, and the Commission must investigate, every claim brought by customers. The AG's proposal would turn the statutory waiver into an affirmative defense, which has to be reasserted, and re-proven in every complaint case.

4. Elimination of confidential treatment for customer count

The AG's fifth exception eliminates the confidential treatment of the list of customers provided by ComEd. Staff does not object to the AG's fifth exception.

B. Reply to ComEd's Exceptions

ComEd takes exception to: (1) the ALJPO's allegedly improper construction and application of Section 16-125(e) to all six of the summer storm systems at issue in this proceeding; and (2) the ALJPO's finding that ComEd has failed to demonstrate that it is entitled to, and should not be granted a waiver of liability under Section 16-125(e) for the July 11, 2011 storm system,¹ such that the customers identified as experiencing a simultaneous four-hour interruption of service during the July 11, 2011 storm system, and those customers alone are entitled to file for compensation under Section 16-125(e). Staff will address each of these exceptions in turn.

¹ The ALJPO mistakenly refers to the July 22 storm in its Findings And Ordering paragraph (10). The Commission Analysis and Conclusion preceding the Findings And Ordering paragraphs indicates that the correct reference is to the July 11 storm.

1. The ALJPO Correctly Construes and Applies Section 16-125(e) to the six Summer 2011 Storms Systems

With reference to ComEd's assertion that the ALJPO improperly construes and applies Section 16-125(e), these arguments are little more than a rehash of the same arguments ComEd raised, without success, in its Initial and Reply Briefs in this proceeding, see ComEd RBOE, *generally*; see also ComEd IB at 10-24; ComEd RB at 5-17, as well as its BOE in the corresponding winter storm proceeding, ICC Docket No. 11-0662. The Staff has rebutted these in detail in its Reply Brief, see Staff RB at 2-12, and will not reprise those arguments in any great detail here. Suffice it to say that the ALJ has recognized ComEd's attempt to: (a) rewrite the statute to include the words "single" and "discrete", while (b) attempting to impute to Staff a rewriting of the statute.

One matter raised by ComEd however, warrants a more detailed response. Specifically, ComEd protests the ALJPO's alleged imposition of what it characterizes as "extraordinary strict liability" upon it, asserting that: "[n]o network service provider, from the 'telephone company' to railroads to electric utilities, has been held strictly liable for damages from service disruptions caused by weather on the theory that it "could have done something different," when they did nothing wrong..." ComEd BOE at 2, 5. This assertion grossly mischaracterizes the ALJPO, and for that matter the statute.

That liability is limited under the statute is plain on the face of the statute. Section 16-125(e) provides that customers affected by an interruption not covered by a waiver are entitled to: "compensat[ion] ... for all actual damages, which shall not include consequential damages, suffered as a result of the ...

interruption[.]” 220 ILCS 5/16-125(e). Under the same provision, “affected municipalit[ies], count[ies] [and] unit[s] of local government” are entitled to recover: “emergency and contingency expenses incurred by [them] ... as a result of the interruption[.]” Id.

Likewise, a utility’s liability under Section 16-125(e) as correctly interpreted by the Proposed Order is not strict. As Staff noted in its Reply Brief:

Strict liability ... is a concept that most often applies either to ultrahazardous activities or in products-liability cases, and is used to describe liability that does not depend on actual negligence or intent to harm, but that is based on the breach of *an absolute duty* to make something safe. [citation] Negligence is not an element of strict liability. [citation].

Staff RB at 10-11 (emphasis in original; citations omitted)

Here, of course, the Proposed Order has determined that:

This Commission views the language of Section 16-125(e) as plain and unambiguous. Specifically, this Commission finds that Section 16-125(e) applies when 30,000 or more of ComEd’s customers have their service interrupted during the same four-hour period, excluding those customers whose interruptions were the result of unpreventable damage.

ALJPO at 20 (emphasis added).

In other words, the ALJPO does not impose strict liability; instead, it imposes liability where, and only where, a utility fails to show that an interruption is caused by unpreventable damage due to weather events or conditions. Since “preventable damage” is that damage that could have been prevented through the adequate design, construction and maintenance of facilities and equipment, this is, as Staff has argued, a negligence standard.

ComEd takes particular issue with the last sentence of Section 16-125(e) of the Act, which states that: “[l]oss of revenue and expenses incurred in complying with this subsection may not be recovered from ratepayers.” 220 ILCS 5/16-125(e). ComEd opines that the General Assembly could not possibly have “intended to have adopted Section 16-108(c) to assure utilities the right to recover their costs and, in the same breath, put utilities at risks of staggering and unrecoverable damages whenever severe weather damaged their system.” ComEd BOE at 19. Regardless of how Section 16-125(e) is applied, given the utter clarity of this provision, ComEd’s assertions regarding legislative intent must be disregarded. Clearly the last sentence of Section 16-125(e) provides that costs associated with complying with Section 16-125(e) may not be recovered from ratepayers.

ComEd’s assertion that the ALJPO’s interpretation of Section 16-125(e) creates a “constitutional risk” because it potentially could lead to imposition of costs unrecoverable from ratepayers, ComEd BOE at 19-20, should likewise be disregarded. While ComEd is no doubt entitled to pursue constitutional claims in a forum authorized to hear such claims, the Commission is not such a forum. Administrative agencies lack judicial authority to determine the constitutionality of a statute. Dombrowski v. City of Chicago, 363 Ill.App.3d 420, 425: 842 N.E.2d 302, 307 (1st Dist. 2005). Accordingly, ComEd cannot obtain a declaration of the statute’s constitutionality – or lack thereof – from the Commission.

2. The ALJPO properly determines that ComEd is not entitled to a waiver for the July 11 storm system

In arguing its position, ComEd claims that any tree contact that occurred was “unpreventable[.]” ComEd BOE at 24-25. ComEd then proceeds to completely, distort the ALJPO’s analysis by asserting that the only way to meet the standards articulated in the ALJPO, “would be to clear-cut every tree that could potentially fall or blow into ComEd’s electrical wires.” ComEd BOE at 26. This is not the standard that Staff articulated, nor the standard adopted by the AJLPO.

ComEd’s only support of its claim that tree contact was unpreventable is its contention that it has a vegetation management plan which is generally consistent with national standards, state law and best utility practices, ComEd RBOE at 23-24, and that it “was in compliance with its Commission-vetted vegetation management program.” Id. While ComEd may well have had an adequate and Commission-approved vegetation management plan in place, the company’s problem is that it failed to carry out that plan; the company’s own witnesses conceded that the plan had not been fully completed at the time of the summer storm events. ComEd Ex. 2.0 at 13-14. ComEd attempts to bolster its argument that tree contact was unpreventable by asserting that Staff and intervenors: “did not present any evidence to refute ComEd’s expert arborist testimony on these points.” ComEd BOE at 21. However, this argument must fail; ComEd cannot shift the burden of proof in this proceeding from itself to Staff and intervenors. ComEd did not explain why it would leave limbs overhanging its distribution lines that would break and damage its facilities under windy conditions. ComEd did not explain why an attached tree limb that momentarily

blows into its distribution lines should cause an outage of four or more hours. ComEd did not show that the outages involving debris blowing into and damaging its lines were not identified as “wind/tornado”, and already included in the waiver. ComEd did not explain or show why any of its intentional interruptions, which occur with ComEd personnel already on-site, lasted for four or more hours. In short, ComEd did not meet its burden of proof in this proceeding.² Neither Staff nor the ALJPO requires ComEd to clear cut every tree, as the company suggests, but rather require ComEd to show why the outages should have been included in the waiver. The Company made no showing that additional interruptions caused by trees, or anything else, could reasonably be considered to be unpreventable or that additional customers should be included in a waiver for the July 11, 2011 storm event. Thus, the ALJPO’s finding that ComEd failed to demonstrate that it is entitled to, and should not be granted a waiver of liability under Section 16-125(e) for the July 11, 2011 storm system, such that the customers identified as experiencing a simultaneous four-hour interruption of service during the July 11, 2011 storm system are entitled to file for compensation under Section 16-125(e), is correct and should be adopted in the Final Order.

² As Staff noted in its IB, Staff IB at 5-6, and RB, Staff RB at 15-16, ComEd bears the burden of proof in this proceeding. Section 16-125(e) specifically states that a waiver of liability will be granted: “in instances in which the utility can show that the power interruption was a result of any one or more of” the causes enumerated in Section 16-125(e)(1)-(4).” (220 ILCS 5/16-125(e) (emphasis added))

C. Oral Argument

The AG requests oral argument. The Staff recommends that the Commission decline to grant oral argument in this proceeding. The threshold question before the Commission is, on a basic level, one of statutory construction: how Section 16-125(e) should be interpreted by the Commission. Questions of statutory interpretation or construction of statutes is a question of law, to be decided by the court or tribunal. See, e.g., Matsuda v. Cook County Employees and Officers Annuity and Benefit Fund, 178 Ill. 2d 360, 364; 687 N.E. 2d 866 (1997); Bruso v. Alexian Brothers Hospital, 178 Ill. 2d 445, 452; 687 N.E. 2d 1014 (1997); Branson v. Dept. of Revenue, 168 Ill. 2d 247, 254; 659 N.E. 2d 961 (1995). The primary rule of statutory construction is to give effect to the legislature's intent in enacting the statute. Bruso, 178 Ill. 2d at 451. Legislative intent should be sought primarily from the language of the statute, People v. Beam, 55 Ill. App. 3d 943, 946; 370 N.E. 2d 857 (5th Dist. 1977), since the language of the statute is the best evidence of legislative intent, Bruso at 451, and provides the best means of deciphering it. Matsuda, 178 Ill. 2d at 365. If the legislature's intent can be determined from the plain language of the statute, that intent must be given effect, without further resort to other aids to statutory construction. Bruso at 452.

The ALJ has correctly determined that:

This Commission views the language of Section 16-125(e) as plain and unambiguous. Specifically, this Commission finds that Section 16-125(e) applies when 30,000 or more of ComEd's customers have their service interrupted during the same four-hour period, excluding those customers whose interruptions were the result of unpreventable damage.

ALJPO at 20.

The Staff concurs. There is no ambiguity in the statute, and the General Assembly's intent can be determined from its face. Hence, there is no basis to convene oral argument, since oral argument can add nothing as a matter of law.

The AG further states, in its request for oral argument, that: "[a] key decision [that the Commission must make] is whether waiver issues are considered only in response to individual claims, or whether individual claims can be precluded by complaints such as the one filed in this docket." AG BOE at 39. This, however, is not a "key decision" at all. The Commission's administrative rules specifically, and preemptively³, foreclose the AG's argument. 83 Ill. Adm. Code 411.220. In short, the AG seeks to use oral argument as a vehicle to advance its bootless recommendation that the Commission ignore its own rules. It is difficult to see how this would do anything but waste the Commission's time.

ComEd's BOE does not make it clear where ComEd stands on the question of oral argument. While ComEd includes in its BOE a section entitled "Request for Oral Argument," ComEd BOE at 27, it further states that it: "requests that the Commission oral argument [sic] in this Docket[.]" omitting the word "grant" or "deny". *Id.* ComEd's request, furthermore, appears not to comply with Rule of Practice 200.850(a)(3), in that it fails to include: "a statement in support of such request in the body of the brief." 83 Ill. Adm. Code 200.850(a)(3). This leaves the Staff, parties and Commission in the dark as to which, if any

³ The rules in question were adopted in June of 1998, see 22 Ill. Reg. 11177, and, accordingly, the issue appears to be well settled.

issues ComEd considers ripe for oral argument. Its request, insofar as it has made one, should therefore be denied.

III. Conclusion

WHEREFORE, the Staff of the Illinois Commerce Commission respectfully requests that the Commission reject ComEd's exceptions and adopt the ALJPO in its entirety, subject to the very modest revisions proposed in this Reply to Briefs on Exceptions.

Respectfully submitted,

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