

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

COMMONWEALTH EDISON COMPANY	:	
	:	No. 13-0318
Annual formula rate update and revenue	:	
requirement reconciliation under	:	
Section 16-108.5 of the Public Utilities Act	:	

Surrebuttal Testimony of
ANASTASIA M. POLEK-O'BRIEN
Vice President and Deputy General Counsel

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1 **I. INTRODUCTION**

2 **A. Witness Identification**

3 **Q. What is your name and business address?**

4 A. My name is Anastasia M. Polek-O'Brien. My business address is 10 S. Dearborn Street,
5 49th Floor, Chicago, Illinois 60603.

6 **Q. Are you the same Anastasia M. Polek-O'Brien who provided direct and rebuttal
7 testimony in this Docket?**

8 A. Yes.

9 **B. Purpose of Testimony**

10 **Q. What is the purpose of your surrebuttal testimony?**

11 A. I respond to Staff of the Illinois Commerce Commission ("Staff") witness Richard
12 Bridal's proposed disallowances regarding certain Commonwealth Edison Company
13 ("ComEd") rate case, appeal, and remand expenses.

14 **C. Summary of Conclusions**

15 **Q. Does your testimony reflect any changes from ComEd's rebuttal position?**

16 A. Yes. As set forth in my rebuttal testimony, ComEd has voluntarily removed from its
17 requested revenue requirement certain costs related to services provided by Mr. Salvatore
18 Fiorella of SFIO Consulting ("SFIO") in connection with Docket No. 11-0721. In
19 addition to that, ComEd will not oppose removing the same types of costs for services
20 provided by Mr. Fiorella in connection with Docket No. 12-0321. *See e.g.*, ComEd Ex.
21 15.04 in conjunction with ComEd Ex. 15.05.

22 **Q. Are the proposed disallowances to rate case expenses reasonable?**

23 A. No, they are not reasonable and apart from the compromises that ComEd offered on
24 certain specific issues in my rebuttal testimony (*see* ComEd Ex. 14.07, page 2) and
25 above, each proposed disallowance should be rejected by the Commission.

26 **D. Itemized Attachments to Surrebuttal Testimony**

27 **Q. What are the attachments to your surrebuttal testimony?**

28 A. The attachments to my surrebuttal testimony are:

29 (1) **ComEd Ex. 19.01** is ComEd's Responses to Staff Data Requests RWB 20.01
30 through 20.04 and it contains additional evidentiary support for ComEd's
31 expenses relating to SFIO.

32 (2) **ComEd Ex. 19.02** is a report generated by Eimer Stahl LLP's ("Eimer Stahl")
33 accounting department supporting the 1,233.7 figure for total hours billed to
34 ComEd/Exelon in Mr. Bridal's sample invoice date range.

35 **II. RATE CASE APPELLATE EXPENSES ARE RECOVERABLE AND THE**
36 **EXPENSES INCURRED IN 2012 FOR DOCKET NOS. 07-0566 AND 10-0467 ARE**
37 **JUST AND REASONABLE**

38 **Q. Mr. Bridal continues to suggest that it is not reasonable to require customers to pay**
39 **appeal costs associated with rate cases because the "Commission's final order**
40 **represents the Commission's attempt to balance the needs of shareholders and**
41 **ratepayers, and Company management's decision to appeal is the Company's**
42 **attempt to alter that balance in favor of shareholders." Bridal Reb., Staff Ex. 7.0,**
43 **34:732-35. Do you agree?**

44 A. No. It is well established that litigation expenses associated with rate cases – whether it
45 is for appeals, litigating before the Commission, or otherwise – are operating expenses
46 that are recoverable subject to prudence and reasonableness. Appeals are a normal part

47 of the legal and regulatory framework that is designed to foster financially healthy
48 utilities that provide safe and reliable electric service. Like ComEd's initial rate case
49 filings and the expenses associated with litigating those cases, appellate proceedings are
50 pursued to ensure a determination of a just and reasonable rate.

51 **Q. Mr. Bridal disputes this position, and analogizes rate case appeal expenses to certain**
52 **types of incentive compensation that are not recoverable. Does this analogy support**
53 **a disallowance?**

54 A. No. Mr. Bridal's position is contrary to the existing legal and regulatory framework, and
55 his analogy has nothing to do with this issue. Incentive compensation is an exception to
56 the general rule that operating expenses of a utility are recoverable subject only to
57 prudence and reasonableness. I agree with Mr. Bridal that this exception is supported by
58 long standing Commission practice and now codification in the Public Utilities Act (the
59 "Act"). But there is no such long standing Commission practice or codification
60 prohibiting recovery of expenses associated with rate case appeals. To the contrary, the
61 case law and the Act provide that prudent and reasonable (or just and reasonable) rate
62 case expense is recoverable.

63 **Q. Mr. Bridal disputes that the appellate expenses incurred in Docket No. 10-0467 were**
64 **incurred in responding to other parties' appeals, and states that ComEd should**
65 **have provided an estimate of the portion of those expenses that were devoted to**
66 **responding to other parties appeals. Is this a reasonable position?**

67 A. No. As I stated in my rebuttal testimony, ComEd was a respondent/appellee in Docket
68 No. 10-0467. The actual dollar amount of these expenses is \$133,542, approximately

69 \$117,358 of which were incurred in compliance with the underlying Commission order,
70 for activity related to the record on appeal which was utilized by all parties, and in
71 responding to other parties' appeals. Specifically, the Citizens Utility Board ("CUB"),
72 Attorney General ("AG"), and the Coalition to Request Equitable Allocation of Costs
73 Together ("REACT") appealed from the Commission's Order in ComEd's 2010 rate
74 case. The appellants filed their opening appellate briefs on January 25, 2012. ComEd,
75 together with the Commission, filed responsive briefs on April 24, 2012. The appellants
76 filed reply briefs on May 23, 2012. During the fall of 2012, ComEd began to consider
77 whether the appeal should be dismissed as moot in light of the fact that new rates had
78 come into effect, and ComEd drafted a pleading that would seek to dismiss the case as
79 moot. In April 2013, the Commission filed its own motion to dismiss the appeal as moot,
80 and ComEd filed its pleading in response to and in support of the Commission's motion.
81 The court dismissed the case as moot. Mr. Bridal's blanket disallowance would unjustly
82 prohibit ComEd from recovering these costs incurred to respond to other parties' appeals.

83 **Q. Does Mr. Bridal say whether he has an opinion on whether there is adequate**
84 **support in the evidentiary record for ComEd's rate case expenses in the appeal in**
85 **Docket No. 10-0467 and the remand in Docket No. 07-0566?**

86 **A.** Yes. Mr. Bridal agrees that if expenses associated with appeals are allowable, ComEd
87 has provided adequate support for these expenses in this docket. Bridal Reb., Staff Ex.
88 7.0, 36:777-82.

89 **III. THE COMMISSION SHOULD REJECT THE REMAINING PROPOSED**
90 **DISALLOWANCES REGARDING DOCKET NOS. 11-0721 AND 12-0321**

91 **A. SFIO Consulting**

92 **Q. Did ComEd provide additional evidence regarding SFIO?**

93 A. Yes, in addition to the information included in my direct testimony, information was
94 provided in response to discovery and included in my rebuttal testimony. First, Mr.
95 Bridal's seventh set of data requests inquired into SFIO costs incurred in 2012 related to
96 Docket No. 11-0721. ComEd answered those data requests in a timely fashion and I
97 attached them to my rebuttal testimony. Second, Mr. Bridal's twentieth set of data
98 requests inquired into SFIO costs incurred in 2012 related to Docket No. 12-0321.
99 ComEd answered those data requests in a timely fashion, and they are attached here as
100 ComEd Ex. 19.01. I agree with those answers, which demonstrate that the subject costs
101 are recoverable.

102 **Q. Does Mr. Bridal provide any new arguments regarding why Mr. Fiorella's services**
103 **should not be recoverable?**

104 A. Yes. Mr. Bridal now appears to take the position that ComEd has not shown that Mr.
105 Fiorella's services were "necessary." "Necessary" is not the standard for recovery of rate
106 case expense – rate case expense is recoverable if it is just and reasonable. The work that
107 was undertaken was prudent and the charges for it were just and reasonable in amount.
108 Therefore, they should be recoverable. Mr. Bridal also states that there should be
109 evidence of detailed reporting by Mr. Fiorella, particularly after each "Commission
110 Bench or Open Meeting." To clarify, ComEd does request and receive both oral and
111 written reports from Mr. Fiorella on a regular basis. ComEd has, however, voluntarily
112 removed the amounts associated with Mr. Fiorella's attendance at and reporting of

113 Commission bench sessions and open meetings. *See* ComEd Ex. 15.04 in conjunction
114 with ComEd Ex. 15.05.

115 **B. Attorney Billing over 10 Hours Per Day**

116 Q. **Does Mr. Bridal continue to oppose recovery of fees for more than ten hours per**
117 **day?**

118 A. Yes.

119 Q. **Does Mr. Bridal’s proposed disallowance make economic sense?**

120 A. No. From a financial perspective, Mr. Bridal’s proposal to limit recoverable work to 10
121 hours per day per timekeeper is counterintuitive and inefficient. For example, if one
122 attorney is working on a project and needs to bill for more than 10 hours to complete it, it
123 is more efficient for that attorney to complete the project than to get a second attorney up
124 to speed on the issues and have the first attorney “clock out” simply because the first
125 attorney is over the 10 hour threshold.

126 Q. **Do attorneys charge more per hour for hours in excess of 10 per day?**

127 A. No. This is not like overtime or holiday pay where individuals may receive some level of
128 increased compensation (*e.g.* time-and-a-half). With regard to outside counsel who are
129 billing on hourly rates, hour 11 is billed at the same rate as hour 1.

130 Q. **Has Mr. Bridal adequately explained the derivation of the 5% figure?**

131 A. No. First of all, Mr. Bridal admits that the calculation that resulted in the 5% figure is
132 incorrect. The revised calculation that Mr. Bridal provides with his rebuttal testimony
133 results in a 4.3% proposed disallowance. *See* Staff WP 7.13b. Yet Mr. Bridal continues

134 to advocate for a 5% disallowance. A 5% disallowance is not supported by the record
135 evidence and is not reasonable.

136 Q. **Would a 4.3% disallowance be reasonable?**

137 A. No. It is undisputed that sometimes billing in excess of 10 hours per day per timekeeper
138 is reasonable – Mr. Bridal’s own discovery responses and testimony indicate this. *See*
139 *Bridal Reb.*, Staff Ex. 7.0, 28:609-12. A 4.3% disallowance would, however, treat every
140 billing in excess of 10 hours per day per timekeeper as *per se* unreasonable. Indeed, Mr.
141 Bridal’s initial disallowance calculation was 14.4%, but “[i]n acknowledgement that
142 billing in excess of 10 hours per day may not always be unreasonable, Mr. Bridal used a
143 more conservative 5% figure for his proposed disallowance instead of using the
144 calculated 14.4% figure.” *Id.* Applying that same logic and math to Mr. Bridal’s
145 calculated 4.3% figure results in a proposed disallowance of 1.49%.

146 Q. **Does Mr. Bridal’s methodology result in a reasonable approximation of the relevant
147 costs?**

148 A. No. As I showed in my rebuttal testimony, even if you focus only on the very busy
149 period Mr. Bridal was looking at (which I do not believe would be appropriate), only
150 1.7% of the hours fall into the “over 10 per day” category.

151 Q. **What is the problem with Mr. Bridal’s methodology?**

152 A. As I explained in my rebuttal testimony, Mr. Bridal bases his entire disallowance on one
153 invoice from one law firm during an extremely busy period. It is not appropriate to
154 extrapolate from this limited sample to an entire year’s worth of billings.

155 Q. **Mr. Bridal suggests that the reason his sample is limited is because ComEd objected**
156 **to providing a larger sample. Is this accurate?**

157 A. Yes and no. ComEd did object to the extensive and burdensome work that would be
158 needed to provide the narrative time entries. After conferring about the discovery
159 request, it was agreed that sample data would be provided. However, it now seems that
160 Mr. Bridal simply wanted numerical data to calculate a percentage and his plan was to
161 glean that numerical data from the narrative time entries. If Mr. Bridal had simply asked
162 for the numerical data directly, or at least explained the purpose of his request, ComEd
163 could have provided him with the information he needed to produce a more accurate
164 number.

165 Q. **Were there other problems with the calculation, in addition to being based on a**
166 **limited and unrepresentative period?**

167 A. Yes. The calculation originally used both an *incorrect numerator* and an *incorrect*
168 *denominator*. The calculation included in rebuttal testimony included the correct
169 numerator (the number of hours billed over 10 per day per Eimer Stahl timekeeper in the
170 invoice period) but still used an *incorrect denominator* (the hours billed by Eimer Stahl to
171 ComEd in only the 8 days that Eimer Stahl billed over 10 hours per day per timekeeper).
172 Instead, the total number of hours billed by Eimer Stahl during the period should have
173 been used.

174 Q. **In a footnote, Mr. Bridal states that the calculation in your rebuttal testimony is in**
175 **error. Is it?**

176 A. No. I calculated the percentage of hours billed by Eimer Stahl that were over 10 per day
177 per timekeeper during the invoice period used in Mr. Bridal's sample. I used the correct
178 numerator (as described above) *and the correct denominator* (the total hours billed by
179 Eimer Stahl in the invoice period). Only use of a denominator that equals total hours
180 facilitates the calculation that Mr. Bridal was trying to accomplish – the percentage of
181 total hours billed in the invoice period in excess of 10 per day per timekeeper.

182 Q. **Mr. Bridal claims the 1,233.7 denominator figure is unsupported. How do you**
183 **respond?**

184 A. The figure is supported by my rebuttal testimony. In the interest of transparency, I have
185 also attached a report generated by Eimer Stahl's accounting department supporting the
186 1,233.7 figure. *See* ComEd Ex. 19.02

187 **C. Miscellaneous Charges**

188 Q. **Mr. Bridal states: "The Company argument [on electronic research] can be**
189 **summarized as stating that outside attorneys are always authorized to perform**
190 **electronic research, and that charges for that research are an ordinary cost of**
191 **litigating rate cases." Is that accurate?**

192 A. No. I did not say, and it is not correct, that "outside attorneys are always authorized to
193 perform electronic research." It is true, however, that when outside attorneys are tasked
194 with projects that we know will require them to perform legal research, they are
195 authorized to perform that research. It is also true that legal research is undoubtedly an
196 ordinary cost that is necessary and appropriate when drafting briefs and other legal
197 documents or providing legal advice. Requiring issue by issue approval to conduct
198 research would be unnecessary and has never been required.

199 Q. **Does this render the Billing Guidelines superfluous?**

200 A. No. The Billing Guidelines protect ComEd from electronic research done without
201 implicit or explicit approval – as the Guidelines say, ComEd will not pay for charges
202 incurred if outside counsel takes it upon themselves to research an issue. But if we
203 instruct outside counsel to write a brief for example, we know that brief will require
204 research, and that research is authorized.

205 **IV. CONCLUSION**

206 Q. **What is your overall conclusion regarding ComEd’s expenses for Docket Nos.**
207 **07-0566 and 10-0467 and rate case expenses incurred in 2012?**

208 A. They all meet the “justness and reasonableness” standard set forth in Section 9-229.

209 Q. **Does this complete your surrebuttal testimony?**

210 A. Yes.