

STATE OF ILLINOIS  
ILLINOIS COMMERCE COMMISSION

Commonwealth Edison Company	)	
	)	Docket No. 13-0495
Approval of the Energy Efficiency and	)	
Demand Response Plan Pursuant to Section 8-103(f) of	)	
the Public Utilities Act	)	

**STAFF’S REPLY TO THE COMMONWEALTH EDISON COMPANY’S RESPONSE  
TO STAFF’S MOTION TO ADMIT COM ED’S RESPONSETO STAFF DATA  
REQUEST NO. JLH 4.04 AND ATTACHMENTS INTO EVIDENCE**

NOW COME the Staff witnesses (“Staff”) of the Illinois Commerce Commission (“Commission”) by and through its undersigned counsel, and, pursuant to 83 Ill. Adm. Code 200.190, states for its Reply to the Commonwealth Edison Company’s Response to Staff’s Motion to admit Commonwealth Edison Company’s Response to Staff Data Request JLH 4.04 and attachments into evidence, as follows:

1. In its Response, ComEd, perhaps cognizant of the tenuousness of its own position, accuses the Staff of “desperate[ion]” in attempting to place the subject e-mail into evidence. Response. 1. In point of fact, ComEd’s Response smacks of desperation; the company *really, really* does not want the e-mail into evidence, and for reasons that are obvious. ComEd’s reasons for excluding it are, however, legally bootless and should be disregarded.

2. Treating ComEd’s objections out of order, ComEd argues, risibly, that in advancing the “reasonable prudent persons ... [conducting] ... their affairs” standard established in 83 Ill. Adm. Code 200.510 (and indeed in Section 10-40 of the Illinois Administrative Procedure Act, 5 ILCS 100/10-40), Staff is required to identify a

reasonable prudent person and demonstrate that such a person has, in the past relied on such information in the conduct of their affairs. See, generally Response at 4-5.

3. Needless to say, this is not the standard. It is a first-semester-of-law-school proposition that the reasonable person standard is an objective one. See, e.g., Nelson v. Quarles and Brady, LLP, 2013 IL App (1st) 123122, ¶72; -- N.E.2d. -- ; 2013 WL 5475267, \*20 (1<sup>st</sup> Dist. 2013) (reasonable person standard is an objective standard). Further, Staff does not have to demonstrate that a reasonable person did rely on the evidence, but merely that a reasonable, prudent person would rely on such evidence in the management of his or her affairs.

4. Cases decided under Section 10-40 of the Administrative Procedure Act are enlightening with respect to what constitutes evidence upon which a reasonable person would rely. In Discovery South Group, Ltd. v. Pollution Control Bd., 275 Ill.App.3d 547, 656 N.E.2d 51 (1<sup>st</sup> Dist. 1995), the Appellate Court determined that: “a reasonably prudent person would find a tabulation of the local police department's log regarding telephone complaints trustworthy and reliable[.]” and thus properly not excluded on the basis of hearsay in an administrative proceeding regarding allegations of noise pollution. Discovery South Group at 553, 656 N.E.2d at 56. In contrast, in July Q. v. Dept. of Children and Family Services, 2011 IL App (2d) 100643, 963 N.E.2d 401 (2<sup>nd</sup> Dist. 2011), the court observed that hearsay is admissible in Illinois administrative proceedings if it is of the type commonly relied upon by reasonably prudent persons in the conduct of their affairs, July Q., ¶48; 963 N.E.2d at 414, but determined that notes of a non-testifying former DCFS employee reporting the statements of a nine-year-old

child with a history of untruthfulness did not constitute the type commonly relied upon by reasonably prudent persons in the conduct of their affairs. Id.

5. Here, of course, the situation is analogous to that obtaining in Discovery South and not at all to that obtaining in July Q. The ostensible hearsay in question is a statement by a managing consultant employed by the evaluator, who, Staff assumes, ComEd concedes to be a person of reliability and probity. ComEd itself has offered testimony in this docket that: “ComEd’s proposal places the **independent evaluator and its findings as the central reference point** for setting the NTG values for the upcoming Plan year[.]” ComEd Ex. 3.0, 57. Thus, it is obvious that ComEd wants the Commission to repose trust in the evaluator, which renders its attempts to suppress statements by senior employees of the evaluator which it feels compromises its position to be particularly disingenuous. The e-mail is precisely the sort of thing that a reasonable prudent person would in fact rely upon in the management of his or her own affairs.

6. ComEd further suggests, without citation to authority, that the reasonable and prudent person standard should be applied “cautiously because it lowers the standards for admissibility of evidence in Commission proceedings.” Response, 4. ComEd does not cite to authority, because there is none; as a matter of statute, 5 ILCS 100/10-40(b), and rule, 83 Ill. Adm. Code 200.610(b), the rules of evidence are in fact relaxed insofar as they allow a tribunal to admit otherwise reliable evidence, where appropriate. This is an appropriate instance.

7. ComEd further argues that the evidence in question is irrelevant. Response, 3-4. If this is indeed the case – and it is not – then ComEd has offered a fair

amount of utterly irrelevant testimony in this proceeding. See, e.g., ComEd Ex. 3.0, 73-75 (ComEd witness, Michael S. Brandt testifies at some length regarding the general subject matter of the e-mail). Further, as Staff has previously noted the matters asserted in the e-mail are relevant, in that they make the existence of any fact that is of consequence to the determination of the proceeding more or less probable than it would be without the evidence. Staff Motion, ¶16; see *a/so* Ill. R. Evid. 401.

8. Staff further notes that, in the event the ComEd continues to interpose hearsay objections where communications with the evaluator is concerned, there is a simple solution, which is to join the evaluator to these proceedings. Staff has declined to do so in past proceedings in order to save costs to the evaluator and ultimately ComEd. In light of ComEd's views, Staff will obviously be compelled to reconsider its position in future

WHEREFORE, Staff respectfully requests that the ALJ grant relief consistent with the arguments set forth herein.

Respectfully submitted,

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December 6, 2013

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