

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

COMMONWEALTH EDISON COMPANY

Application for a Certificate of Public Convenience and Necessity, pursuant to Section 8-406.1 of the Illinois Public Utilities Act, and an Order pursuant to Section 8-503 of the Illinois Public Utilities Act, to Construct, Operate, and Maintain a new 345 kilovolt transmission line in Ogle, DeKalb, Kane and DuPage Counties, Illinois

Docket 13-0657

**RESPONSE MEMORANDUM IN OPPOSITION TO:
COMMONWEALTH EDISON COMPANY'S MOTION TO STRIKE PORTIONS OF PRE-FILED
INTERVENOR DIRECT AND REBUTTAL TESTIMONY**

I. INTRODUCTION

Commonwealth Edison Company ("ComEd") filed its Motion to Strike Portions of Pre-filed Intervenor Direct and Rebuttal Testimony on April 4, 2014 (the "Motion"). The Motion is fatally flawed as brought against the testimony of individuals within SKP Group.¹ For one, ComEd ignores the experience and knowledge of an expert in his field. Further, ComEd's Motion is flawed in that it inappropriately assumes to know why testimony was put forth. The testimony sought to be stricken is either able to be relied upon by an expert, or is not being used for the truth of the matter that ComEd, erroneously, assumes it is. Accordingly, the Motion should be denied.

II. GOVERNING LAWS & REGULATIONS

While the rules of evidence apply to Commission proceedings, the rules are considered more flexible than in Circuit Courts. See, 83 Ill. Admin. Code § 200.610(b). This more flexible approach to evidence is a result, and mirrors the language of, the Administrative Procedure Act. 5 ILCS 100/10-40(a). Additionally, this Commission can take notice "of generally recognized

¹ Namely Intervenor William Lenschow, Thomas Pienkowski, Kristine Pienkowski, John Tomasiewicz, and Robert Mason.

technical or scientific facts within the agency's specialized knowledge.” 5 ILCS 100/10-40(c). For example, when hearsay is reliable, it is admissible. *Metro Utility v. Illinois Commerce Comm’n.*, 193 Ill. App. 3d 178, 185 (2d Dist. 1990).

Testimony is only hearsay when it is an out-of-hearing statement “offered into evidence to prove the truth of the matter asserted.” Ill. R. Evid. 801(c). Testimony about an out-of-hearing statement that is used for a purpose other than the truth of the matter asserted is not hearsay. *People v. Burney*, 2011 IL App (4th) 100343, ¶ 80. When determining whether a statement constitutes hearsay, the Commission should focus on the purpose for which the statement is being used, not its substance. *Id.* at ¶ 81, citing, *People v. Williams*, 181 Ill. 2d 297, 313 (Ill. 1998).

Expert testimony can be based upon information not in evidence, so long as others in the field rely upon such information. *Metro Utility v. Illinois Commerce Comm’n.*, 193 Ill. App. 3d at 185; Ill. R. Evid. 703. Expert opinion testimony is appropriate when the expert’s specialized knowledge may assist the trier of fact in understanding evidence or determining a factual issue. Ill. R. Evid. 702. The definition of an expert is not limited to educational degrees; it includes any individual with requisite “knowledge, skill, experience, training, or education.” *Id.*, see also, *Cannell v. State Farm Fire & Casualty Co.*, 25 Ill.App.3d 907 (2d Dist. 1975) (holding that the knowledge and experience can be from study, experience, or a combination of both). A mere lack of education only affects the weight of expert testimony, not its admissibility. *In interest of V.Z. v. M.Z.*, 287 Ill.App.3d 552, 554 (1st Cir. 1997). The discretion to qualify an individual as an expert is very broad. *Baley v. Fed. Signal Corp.*, 2012 IL App (1st) 093312, ¶ 75 (2012). Experts are qualified when (i) their opinion relates to their profession, business, or occupation; (ii) their knowledge is sufficient to assist the trier of fact; (iii) and the state of the art permits reasonable opinions to be formed. *Id.* at ¶ 76.

III. Application

ComEd's Motion relies on either (i) belittling the knowledge and experience of a well-qualified expert in his field or (ii) its unfounded presumptions as to the purposes of witnesses' testimony.² Mr. Lenschow is an expert, and the other witnesses put forth their testimony for reasons other than proving what ComEd postulates they do; therefore, the Motion should be denied.

- A. ComEd's dismissive treatment of Lenschow's specialized knowledge in dairy production & cattle care provides no reason to exclude his expert testimony

ComEd takes issue with the following testimony of William Lenschow, "Many studies have indicated that stray voltage from high-voltage transmission lines adversely affects dairy cow health, reduced, lower quality, milk output" and seeks to have it stricken from the record. Lenschow Exh. 1.0, ll 48 – 49, Motion, p. 5. However, ComEd is either ignoring, or inappropriately discounting and belittling, the decades of experience of a fifth-generation dairy farmer who serves as a representative and officer in marketing co-ops and relies upon trade journals and studies to run his business. *Id.*, ll. 16 – 18, 42 -45. ComEd ignores that Mr. Lenschow is an expert in dairy cows and their dairy production, and is qualified to opine, and rely upon hearsay, to generate his testimony. *Metro Utility v. Illinois Commerce Comm'n.*, 193 Ill. App. 3d at 185; Ill. R. Evid. 703. Further, a point not contested by ComEd, his testimony will assist the Commission in understanding his concern about transmission line routing near his dairy cattle.

ComEd attempts to convince this Commission ignore the fact that the Rules of Evidence plainly state that education is not necessary to be an expert. Ill. R. Evid. 701; *Cannell*, 25 Ill.App.3d 907. As mentioned above, Lenschow is a dairy farming expert; just as a tire mechanic can opine as to the cause of a tire explosion, Lenschow can testify as to reasons for the decline in

² Without reason, ComEd states that the SKP witnesses "assertions . . . are the exact type of out-of-court statements offered to prove the truth of the matter asserted . . ." Motion, p. 6.

health and production of the animals he raises, cares for, and uses for his livelihood. See, *Nowakowski v. Hoppe Tire Co.*, 39 Ill.App.3d 155 (1st Cir. 1976); see also, *Hagerman v. Nat. Food Stores, Inc.*, 5 Ill.App.3d 439 (2d Cir. 1972) (allowing opinion testimony of vending machine serviceman as to the tensile strength of glass globes).

Apparently, ComEd would have any person who testifies about stray voltage and dairy production to hold degrees in medicine/veterinary sciences, *and* electrical engineering. Motion, p. 7. While speaking out of one side of its mouth to have this Commission ignore the knowledgeable dairy farmer speak about dairy production factors, it talks out of the other by submitting the testimony of a lawyer/appraiser, not a horse-breeder/trainer, containing an unqualified opinion that the undefined “Bluegrass Region” is a premier horse training area. ComEd Exh. 19.0, ll. 600 – 601.

Simply put, Mr. Lenschow is a dairy production expert who is qualified to opine as to the causes of reduced dairy production and dairy cow health. In doing so, as an expert, he is allowed to base his opinions on hearsay. To grant the Motion would deny the Commission the opportunity to review a full and complete record and provide weight to testimony as it sees fit. ComEd’s Motion should be denied as to his testimony.

- B. Pienkowski’s testimony is not for ComEd’s incorrectly presumed purpose of proving the truth of an EMF to adverse health effect link

After belittling the specialized knowledge of Mr. Lenschow, ComEd next attacks the testimony of Mr. Thomas Pienkowski. Here, ComEd is seeking to strike Mr. Pienkowski’s testimony that merely expresses his perception and his mental state of concern. Motion, p. 8 (seeking to strike Pienkowski Exh. 1.0, ll 39 – 43). ComEd, however, unjustifiably assumes that Mr. Pienkowski is discussing his concern regarding EMF, and his review of studies as an electrical engineer, in order to prove the truth of the matter asserted. ComEd’s assumption is wrong.

As noted by ComEd, hearsay only occurs when a statement is used to prove the truth of the matter asserted. Ill. R. Evid.801(c). However, when this Commission looks to the purpose of the testimony, rather than the substance, as it must, it will find that Mr. Pienkowski's testimony is admissible for the purpose of explaining why his wife's business could be affected due to public perception of a correlation between EMF and adverse health impacts – regardless of whether or not such correlation is true. See, *People v. Burney*, 2011 IL App (4th) 100343, ¶ 81. A review of his testimony indicates that he never attempts to opine that there is such a correlation, just that he is concerned. See, e.g. Pienkowski Exh. 19.0, ll. 39 – 44 (using the word concern twice while stating that the studies are inconclusive). This Commission cannot rely upon ComEd's presumptuous assertions as to what it believes Mr. Pienkowski is going to use his testimony for. Not only is it premature – *i.e.* ComEd can make arguments in briefing about the use of testimony in inappropriate ways – but it flies in the face of ComEd's own testimony.

Even ComEd's own, less qualified to testify, lawyer/appraiser, witness testifies and summarizes similar, if not the same, studies. ComEd Exh. 19.0, ll. 556 – 578. Arguably, ComEd is using the studies not for the truth of the matters asserted, but rather, to help explain a perception/value cycle of some sort. ComEd Exh. 19.0, *generally*. Similarly, Mr. Pienkowski's testimony is admissible for the purposes of providing evidence of the public's perception of such transmission lines, which affects his wife's business. His testimony does not fit the definition of hearsay. As Mr. Pienkowski's statement is not hearsay; it should not be stricken.

- C. Kristine Pienkowski puts forth testimony admissible for the purpose of explaining concerns about potential decline in business due to client perceptions

While not putting words into witnesses' mouths, ComEd does try to put thoughts in their heads. After dismissing Mrs. Pienkowski's experience, education, and credentialing and, further,

ignoring the fact she provides therapeutic services, not psychological services,³ ComEd goes on to presume that Mrs. Pienkowski is putting forth testimony for the purpose of showing that high-voltage lines will have a psychological impact on her clients. However, even a cursory review of Mrs. Pienkowski's testimony will show that the totality of her testimony is admissible for the purpose of explaining how her businesses will be affected by ComEd's proposed route, including the perceptions, correct or incorrect, that her clients may have regarding the proposed transmission line. This admissible purpose is more evident when the Commission views her, her husband's, and Ms. Hirschberg's testimony in conjunction with each other.

Just as before, the purported hearsay is admissible for purposes other than supporting the truth of the matter asserted. Thus, under Illinois Rule of Evidence 801(c), her testimony is admissible, and should not be stricken.

D. Mason and Tomasiewicz testimony should also not be stricken due to ComEd's unfounded presumptions

Finally, ComEd attempts to strike the testimony of Robert Mason and John Tomasiewicz by, again, assuming that they are testifying that electromagnetic fields do, in fact, cause adverse health effects. Again, ComEd's assumption is dead wrong.

Even a cursory review of their testimonies will show that the devaluation of their property is a great, if not primary, concern. Tomasiewicz Exh. 1.0, ll. 47, 50 – 100, Mason Exh. 1.0, ll 36 – 40. In fact, it is the first concern listed by Mr. Tomasiewicz, and the second – after visual impact – listed by Mr. Mason. Tomasiewicz Exh. 1.0, ll. 47; Mason Exh. 1.0, ll. 36 – 40, *see also*, Tomasiewicz Exh. 1.1. As ComEd's very own witness put forth, perceived concerns, correct or not, about health effects can drive down property values. ComEd Exh. 19.0, *generally*. Thus, it is completely appropriate for Mr. Mason and Mr. Tomasiewicz to discuss their, or their wives', health

³ Motion, p. 8.

concerns as part of the support for their property value position, and their testimony is admissible for such a purpose, even if other purposes are purportedly barred.

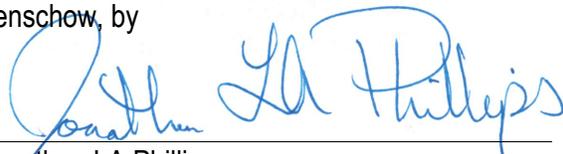
Additionally, such testimony would properly include Mr. Tomasiewicz's request that the Commission consider the Benevento Resolution – which, the Commission can take notice of as part of its specialized and technical knowledge. 5 ILCS 100/10-40(c).

IV. Conclusion

As indicated above, ComEd's Motion is fatally flawed, and should be denied as to the SKP Group witnesses. It ignores the fact that Mr. Lenschow is a qualified expert in dairy production, and thus able to opine – and rely upon hearsay for such opinions – as to the causes of decreased dairy production. As for the other SKP Group witnesses, ComEd's motion fails because it presumes to know why the witnesses put forth testimony. The testimony is admissible for relevant purposes that are not hearsay, and, therefore, should not be stricken.

Respectfully submitted,

Thomas Pienkowski, Kristin Pienkowski, Robert
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