

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

COMMONWEALTH EDISON COMPANY	:	
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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 Illinois Public Utilities Act, to Construct, Operate and Maintain a new 345 kilovolt transmission line in Ogle, DeKalb, Kane and DuPage Counties, Illinois	:	No. 13-0657 (On Rehearing)

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

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Commonwealth Edison Company (“ComEd”) submits its Reply Brief on Rehearing under the Rules of Practice of the Illinois Commerce Commission (the “Commission” or “ICC”), the Administrative Law Judges’ (“ALJs”) December 23, 2014 ruling.

I. INTRODUCTION

Routing the GPG Project¹ through the Muirhead Springs Forest Preserve (“MSFP”) is not feasible, while the route already approved by the Commission in October is feasible and remains least-cost. The rehearing briefs filed by Staff, the Petersdorf-Vogel intervenors, and ComEd all recognize those facts. They are confirmed by the testimony of every witness with expertise in transmission design, siting, and real estate title examination, as well by the documentary evidence. The evidence shows that necessary land rights for either of the two alternate routes are not available, that title to the land is cloudy at best, and that the required permissions and releases cannot be obtained. These obstacles will not and cannot be solved by just a little more time, as the Muirhead Group’s brief claims. ComEd and the FPDKC have worked diligently and

¹ Capitalized terms have the same meanings as defined in ComEd’s Initial Post-Hearing Brief on Rehearing.

in good faith for more than a year to see if a route through the MSFP could be made feasible, but it cannot. Further delay will not change that. It will just add costs and risks, including for customers who will benefit from timely completion of the Project.

ComEd's goal is to put the Project into service on time at the least cost. ComEd has no private interest in opposing the use of the MSFP and is not seeking to divert the route away from its own land. But, ultimately ComEd, like Staff, found that the MSFP routes are not practical and not least-cost. For those reasons, ComEd urges the Commission to re-affirm the route that it approved on October 22, 2014.

II. NO ROUTE ACROSS THE MSFP IS VIABLE

Only the Muirhead Group asks to change the Approved Route. They do not and cannot dispute the Commission's findings that the Approved Route is feasible and suitable. They claim, rather, that Muirhead Group Rehearing Alternative is better and that despite deed restrictions facially barring the use of MSFP land for electric transmission, ComEd can nonetheless use that property without putting the Project at risk. MG IBoR at 3-9. Those claims offer no specific solution and are otherwise unsubstantiated, and the arguments supporting them misstate the record. As ComEd showed in its Initial Brief on Rehearing, those deed restrictions prevent ComEd from building a transmission line on the property: (1) deed restrictions, by their terms, prohibit a transmission line across the MSFP, (2) those restrictions will not be voluntarily released, and (3) an Order directing ComEd to ignore those restrictions and construct the Project across the MSFP based on the Muirhead Group's questionable claims of invalidity would jeopardize the Project and its proven customer benefits. ComEd IBoR at 4-6.

A. Required Land Rights Are Not Available

The Muirhead Group's core claim is that ComEd and the District "simply need more time." MG IBoR at 5-6.

In support, the Muirhead Group first claims that the deed restrictions were applied only after the fact. But, the evidence shows otherwise. Restrictions that, on their face, would bar use of the property for electric transmission were included in the original landowners' deeds when the property was originally sold to the FPDKC in 2003. The deeds themselves show that fact. ComEd Ex. 38.02 at 4-5, 18-19. And, Ms. Susan Woods, the only qualified title examiner to testify, confirmed that "[t]he two most significant parcels ... were *originally conveyed* subject to the limitation that: 'The real property described herein must be maintained for public outdoor recreation use purposes only[.]'" Woods Supp. Reh. Dir., ComEd Ex 38.0 CORR., 3:50-54 (emphasis added). ComEd witness Naumann likewise testified that "the deeds pursuant to which FPDKC *acquired* the affected parcels contain restrictive covenants that require those properties to be maintained for public outdoor recreational purposes only." Naumann Supp. Reh. Dir., ComEd Ex. 37.0, 3:62-64 (emphasis added). Mr. Petersdorf, whose extended family conveyed the properties to the FPDKC in the first place, independently corroborated this fact. Petersdorf, Tr. 161:1-9. The testimony the Muirhead Group cites does not contradict this fact, and any claim that there were no contemporaneous restrictions is disproven by the documents themselves.

Moreover, the Muirhead Group's claim that *some restrictions* were added later is beside the point. All parties agree that those deeds were subsequently *re-recorded* in January of 2005 to impose additional restrictions associated with an Open Space Land Acquisition and Development ("OSLAD") grant sought by FPDKC. See ComEd Ex. 38.02 at 2, 15, 33; Woods Reh. Supp. Dir., ComEd Ex. 38.0 CORR., 3:61 – 4:92; MG IBoR at 5-6. Each of these restrictions, by its terms, remains in effect today. And, contrary to the Muirhead Group's

implication, the fact that some of those restrictions were recorded after the original grant does not make them unenforceable by their beneficiaries. *See, e.g., Streams Sports Club, Ltd. v. Richmond*, 109 Ill. App. 3d 689, 694 (2d Dist. 1982) (recognizing that third-party beneficiaries and successors may enforce a restrictive covenant); *Mearida v. Murphy*, 87 Ill. App. 3d 87, 90 (4th Dist. 1980) (citing *Chicago Title & Trust Co. v. Wabash-Randolph Corp.*, 384 Ill. 78 (1943)). That is a far more nuanced legal question that could alone mire any route across the MSFP in costly litigation for years to come, regardless of the ultimate outcome.

The Muirhead Group's claim that the restrictions were established "by mistake" is equally erroneous and unsupported. *See* MG IBoR at 5-6 (citing Meyers Reh. Dir. at 2). In fact, the evidence shows that the 2003 restrictions, imposed when the properties were originally sold to the FPDKC, precisely embody the grantors' intent. Mr. Petersdorf confirmed that it was the intent of the original grantors "to keep [the properties] as open space used for the [FPDKC] to return it back to the prairie and to leave the land as the family had found it." Petersdorf, Tr. 161:3-9. Likewise, there was no mistake when the additional OSLAD-related covenants were added in 2005. Those restrictions were first applied to all three FPDKC parcels that the MSFP routes would cross, in their entirety, with the intent of restoring them to native prairie. Meyers, Tr. 94:1-6; *see also* Woods Reh. Supp. Dir., ComEd Ex. 38.0 CORR., 3:61 – 4:92. The FPDKC later decided that there were insufficient funds to simultaneously restore the entire 525 acres² and sought to modify the OSLAD-related "project boundaries." *See* ComEd Ex. 38.02 at 12, 30, 44. But, a subsequent decision to try to scale back those restrictions does not make the

² *See* Meyers Reh. Dir. at 2 (testifying that "the property involved in the ComEd Conditional [Rehearing Alternative] was not ultimately included in the OSLAD grant program, due to funding limitations[.]"); ComEd Ex. 38.02 at 12, 30, 44 ("However, we must approach restoration ... with a realistic approach to insure that ... financial resources are in balance. ... To that end we request that you allow us to modify the project boundaries from the original 500 acres to the 200 acres as indicated on the attached map."); *see also id.* at 10, 28, 42 ("The sponsor is unable to remove the entire 525 acre site from agricultural production at once.").

unmodified restrictions a mistake. To the contrary, the recorded documents themselves confirm otherwise. ComEd Ex. 38.02 at 9-13, 27-31, 41-45. Moreover, Ms. Meyers – the only witness cited by the Muirhead Group – never testified that any of the deed restrictions were filed in error. *See* Meyers Reh. Dir. at 2. Rather, Ms. Meyers stated that the applicable deed restrictions “should be formally released” because “the property involved ... was not ultimately included in the OSLAD grant program, due to funding limitations[.]” *Id.* Once again, what the record actually substantiates is not a mistake, but a claim by the FPDKC – certain to be contested by other parties – that the District can unilaterally scale back a recorded restriction after the fact and without the consent of the grantors’ beneficiaries.

The Muirhead Group also claims that the Illinois Department of Natural Resources (“IDNR”) has “provided a letter to FPDKC releasing the restrictions upon any property beyond the 200 acres acquired with OSLAD funds.” MG IBoR at 6 (describing ComEd Ex. 38.02 at 9-13, 27-31, 41-45). The March 2006 letter described by Meyers (*see* Meyers Tr. 94:14-19), which is attached to the deeds themselves (ComEd Ex. 38.02 at 9-13, 27-31, 41-45), tells a very different story. It makes no reference to the recorded deed restrictions whatsoever, let alone states that they are released, but merely describes an enclosed copy “of the amendment to reduce the project boundary for the above referenced project.” ComEd Ex. 38.02 at 9, 27, 41. Once again, what the Muirhead Group calls a fact is, at best, a claim they are making about the effect of a project definition on previously recorded restrictions, a claim sure to be disputed by others even if ComEd were inclined to give it any weight.

Furthermore, even assuming *arguendo* that the March 2006 letter from IDNR to Meyers was a “release,” it would be subject to the conditions described in Meyers’ own August 14, 2005 letter to IDNR, wherein the FPDKC sought to modify the OSLAD “project boundaries.” ComEd

Ex. 28.02 at 12-13, 30-31, 44-45. In that August 14, 2005 letter, FPDKC committed to “over subsequent years expand the restoration to include the entire parcel.” *Id.* The letter further provides that, despite the Project redefinition, “*all of the land* will remain public open space and will be utilized as restored forest preserve.” *Id.* (emphasis added). Given this representation, the Muirhead Group cannot credibly claim that the IDNR’s letter was intended to release any open space restriction on the MSFP land.

B. The Barriers to Use of the MSFP Are Not a Matter of Time

The Muirhead Group claims that all the obstacles preventing ComEd from building the line through the MSFP can be overcome with “more time[.]” MG IBoR at 6. They offer no solution to the problem. No evidence supports this claim. They instead point to the fact that ComEd and FPDKC have negotiated an Option Agreement, whereby ComEd can acquire an easement to use whatever rights the District has (ComEd Ex. 37.02) as support for their claim. But, that neither proves nor implies such a conclusion. Rather, the Option Agreement shows that ComEd and the FPDKC have already worked to resolve what they can. But, what they cannot resolve, and what no Option Agreement between ComEd and the FPDKC can do, is empower the District to convey rights that it does not have even after all of its efforts.

The evidence shows, moreover, that more time will not remove the serious clouds on the District’s title before ComEd could ever build a transmission line on the route. *See* Naumann Reh. Supp. Dir., ComEd Ex. 27.0, 2:31 – 4:77. Indeed, it proves that the grantors have already refused to release the deed restrictions, and will continue to refuse. *See* Meyers Reh. Dir. at 2; Petersdorf Reh. Response, Petersdorf Ex. 2.0, 3:42-43; Petersdorf, Reh. Tr. 153:1-6; ComEd Group Cross-Ex. 5 at 1 (Response to Vogel/Petersdorf→FPDKC 1.19 REH); *id.* at 2 (Dec. 29, 2014 4:16 pm email stating that releases will not be signed). No additional delay will change those facts.

Of course, the District might try to litigate against the parties who could enforce the restrictions. But, there is no evidence that the District will shoulder that burden. It does prove that there will be committed opposition, including from the Petersdorf-Vogel intervenors, who have steadfastly opposed the District. Petersdorf Reh. Response, Petersdorf Ex. 2.0, 3:42-43; Petersdorf, Reh. Tr. 153:1-6. And, Ms. Woods, who has extensive actual experience with such matters, warns that such litigation is often prolonged. Woods Reh. Supp. Dir., ComEd Ex. 38.0 CORR., 5:125-26. In short, no resolution lies close on the horizon. The Project must be placed in service in 2017.

Finally, the Muirhead Group cannot explain how their suggestion to delay approval of a final route is lawful. The General Assembly specified the period in which a decision has to be made on a CPCN filing under Section 8-406.1. And the Public Utilities Act clearly requires this rehearing to be resolved within 150 days. A request to hold the route for the Project open beyond that period, *i.e.*, to defer approving a final route, cannot be squared with those requirements.

C. The Risks and Costs of Using MSFP Property Alone Prevents Its Use

The unstated premise of the Muirhead Group's argument is that if the FPDKC may at some point be able to overcome the deed restrictions, including the restrictions imposed by the original grantors apart from the OSLAD, then the use of MSFP property should be considered viable now. That premise is wrong, and refuted by the record. ComEd must at the time a route is selected have – or be able to acquire, *e.g.*, by condemnation – sound and clean title to the property on which a transmission line is to be built. Woods Reh. Supp. Dir., ComEd Ex. 38.0 CORR., 4:98 – 5:108; Naumann Reh. Supp. Dir., ComEd Ex. 37, 3:64 – 4:69. ComEd cannot build transmission lines on property with disputed title, let alone title so clouded that title companies will not even insure it. Woods Reh. Supp. Dir., ComEd Ex. 38.0 CORR., 5:116 –

6:139. And, the risks that the Project would face do not end with land acquisition. If ComEd were to attempt to construct the Project through the MSFP without clear title, ComEd and customers would face the added risk that the grantors, their successors in interest, the IDNR, the National Park Service, or some other party might then seek to enforce the deed restrictions, when the Project is under construction, or thereafter. *See* Woods Reh. Supp. Dir., ComEd Ex. 38.0 CORR., 6:132-36. The issue is not whether the Muirhead group has the better of legal argument about the restriction – and the record here says that they do not. It is whether ComEd can acquire the level of certainty required for a transmission right-of-way to run through the MSFP. The record shows ComEd cannot.

III. A MSFP ROUTE SHOULD NOT BE APPROVED, EVEN IF THE LAND COULD BE MADE AVAILABLE

Even if routes running through the MSFP were viable, which they are not, the Muirhead Group cannot show that they *should* be used. The Muirhead Group assumes that a route across FPDKC property is less costly than the Approved Route, because it would be shorter and thus theoretically have a slightly lower construction cost *all other things being equal*. And, the Muirhead Group claims that paralleling the existing railroad outweighs virtually all other route considerations. They are wrong on both counts.

A. MSFP Routes Cannot be Shown to be Least-Cost

Routing the Project through the MSFP will not be least-cost. Both Staff and ComEd concluded that the Approved Route will cost less overall than any route across the MSFP. There is no evidence to the contrary. ComEd IBoR at 3-4, 9; Staff IBoR at 4-5; ComEd Group Cross Ex. 10 at 1, 4 (Staff Responses to Data Requests Vogel/Petersdorf→Staff 2.2 REH and Vogel/Petersdorf→Staff 2.5 REH). The Muirhead Group points only to evidence showing that, because routes through the MSFP are shorter, they *should* cost less to construct. *See* MG IBoR

at 3-4. But, the least-cost test looks at more than just construction. And, the evidence shows that the construction savings do not include the costs of attempting to obtain required land rights, including from FPDKC. *See* Naumann Reh. Dir., ComEd Ex. 35.0, 8:161-62; ComEd Ex. 37.02; Meyers Reh. Dir. at 1; Meyers Tr., 74:4-8.

In this case, any potential construction advantage would be slight. The theoretical construction cost difference is less than \$1.5 million for the ComEd Conditional Rehearing Alternative and about \$3 million (in the short term) for the even more problematic Muirhead Group Rehearing Alternative. Naumann Reh. Dir., ComEd Ex. 35.0, 8:154-62. Offsetting those difference are real estate costs. Here, the costs of attempting to release or void the restrictive covenants would be especially large – and would be incurred with no promise of ultimate success. Indeed, the record shows that if the Commission were to approve a route through the MSFP, the result would likely be lengthy and costly additional litigation. Naumann Reh. Dir., ComEd Ex. 35.0, 8:161-62; Woods Reh. Supp. Dir., ComEd Ex. 38.0 CORR., 5:125-26. Those real estate and litigation costs would increase the Project's total cost, and be passed on to customers.

Furthermore, the total cost to customers must take into consideration the cost of Project delay. The Commission approved the GPG Project because of the tangible savings it will deliver to customers. *October Order* at 24. The record shows it will save customers about a quarter billion dollars net of all costs, and also shows that so long as the Project is not in service, Illinois customers in the short term are losing out on nearly \$70 million in annual credits. *See, e.g.*, Naumann Reb., ComEd Ex. 9.0 CORR., 14:306 – 15:317. Given that, the significance of meeting the in-service date without risk and delay dwarfs any construction-cost differential. At \$70 million per year, even the \$3 million differential attributed to the Muirhead Group Rehearing

Alternative represents only 15 days of delay – and that assumes there are no real estate costs, litigation costs, or subsequent construction-cost increases already cancelling out that difference. Applying the least-cost test realistically simply confirms that the risks associated with a MSFP route are far too great.

B. Routing the Project Through Plato Center Cannot Be Justified

The Muirhead Group continues to advocate not only for a route through the MSFP, but for a route directly through Plato Center. They have no answer for the route considerations that led ComEd to conclude that such a route is unsuitable, and their effort to argue that running through Plato Center is less costly misstates and ignores the evidence. *See* MG IBoR at 4.

The Muirhead Group also asks the Commission to ignore both the costs and difficulties of building the Project through Plato Center and the substantial added costs of requiring additional right-of-way acquisition in the future. The Muirhead Group claims this development is unproven and should be ignored. Their position is contrary to the evidence, and to the Commission's precedent, and is short-sighted.

It is sound and accepted utility and planning practice to consider the demonstrated future needs in siting a project, especially where, as here, that development will occur within the planning horizon. *Naumann Reh. Dir., ComEd Ex. 35.0, 6:108-11.* ComEd proved the future need is real. *Leeming Reb., ComEd Ex. 15.0, 6:116 – 8:159.* There was no contrary evidence. The Commission, in approving the Project, recognized that this right-of-way will carry additional transmission lines. *October Order at 40-41.* In this proceeding, it already approved poles to accommodate some of those lines. *Id.* at 41. The Muirhead Group's argument that because future lines are not included in the CPCN issues in this Docket they can be ignored, is not only disproven, it is a non-sequitur. The need to obtain a separate CPCN in the future has nothing to do with the certainty of the future need.

The record also shows that routing the Project through Plato Center will force ComEd to acquire a separate parallel right-of-way in the future, while both the Approved Route and the ComEd Conditional Rehearing Alternative avoid that cost and added impact. As Mr. Naumann testified, the space available through Plato Center “is barely wide enough” to accommodate the first set of poles. Tr. 202:11-14; Naumann Reh. Dir., ComEd Ex. 35.0 at 6:111-13. The evidence also specifically confirms that a right-of-way through Plato Center cannot be expanded “without condemning and demolishing buildings.” Naumann Reh. Dir., ComEd Ex. 35.0 at 6:113. Future lines would have to be built on new rights-of-way to the south and west of Plato Center. Moreover, “[t]he routes available at that time would likely be the same routes as those now before the Commission[.]” *Id.* at 6:120-23. As Mr. Naumann concluded, “all the Muirhead Group’s route would accomplish is to delay the need to build on those other routes around Plato Center and only at the cost of first building through the middle of Plato Center.” *Id.* at 124-26.

Of course, in advocating a route through Plato Center, the Muirhead Group also fails to reasonably balance the Commission’s routing factors. *See* MG IBoR at 6-9. The Muirhead Group claims that because their favored route parallels an existing railroad, it must have lower impact. But no evidence supports that claim and it ignores that none of the Commission’s 12 routing factors are to be given such priority. *See, e.g., October Order* at 35. Indeed, while alleged impacts (*e.g.*, concerning electromagnetic fields and communications interference) have been refuted, there can be no doubt that a line through Plato Center will run closer “to numerous homes, a youth baseball park, a fire station, town hall and a day-care center.” Vogel Reh. Dir., Vogel Ex. 2.0, 5:72-73. In addition, construction activities would impact the town in ways that open space construction do not. Naumann Reh. Dir., ComEd Ex. 35.0, 5:97-107. As Mr. Naumann testified, those facts do not make a route *per se* unsuitable, as does the infeasible

MSFP route segment. But, passing through Plato Center is clearly inferior to the Approved Route, which can be built at reasonable costs and without such impacts, can accommodate future expansion, and in relevant part traverses “undeveloped land” (MG IBoR at 7) occupied by no more than two homes. Cash Tr. 117:22 – 118:12. Shoehorning the Project through developed, congested Plato Center is clearly inferior under the Commission’s routing factors as a whole to use of open agricultural land. Naumann Reh. Dir., ComEd Ex. 35.0, 5:99-107.

IV. CONCLUSION

The Commission should reaffirm its conclusion that the Approved Route is “in comparison, superior to any of the alternate proposals.” *October Order* at 35. It is suitable, buildable, and has the lowest total proven cost. Moreover, no reasonable balancing of the Commission’s routing factors can prioritize limited construction-cost savings over the various risks, costs, and shortcomings of the Muirhead Group’s preferred routes across the MSFP. The Commission should not imperil the Project and its tangible customer benefits by altering the Approved Route.

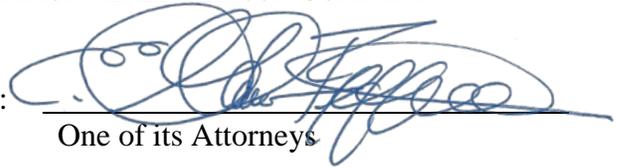
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Respectfully submitted,

COMMONWEALTH EDISON COMPANY

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