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 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)

COMMONWEALTH EDISON COMPANY'S
DRAFT PROPOSED ORDER ON REHEARING

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Commonwealth Edison Company ("ComEd") hereby submits its Draft of the Administrative Law Judges' Proposed Order on Rehearing.[1]

* * * * *

By the Commission:

I. PROCEDURAL HISTORY

On December 2, 2013, Commonwealth Edison Company ("ComEd") filed with the Illinois Commerce Commission ("Commission") a Verified Petition seeking a Certificate of Public Convenience and Necessity ("CPCN") pursuant to Section 8-406.1 of the Public Utilities Act ("PUA" or "Act"), authorizing ComEd to install, operate, and maintain an overhead 345kV high-voltage electric transmission line and associated facilities, referred to as the Grand Prairie Gateway ("GPG") Project ("Project"). ComEd also sought an order authorizing or directing ComEd to construct the Project and related facilities pursuant to Section 8-503 of the Act.

On October 22, 2014, the Commission entered an Order ("October Order") finding that ComEd possessed the managerial and financial resources to complete the proposed Project. The Order also found that the Project proposed by ComEd is necessary and appropriate under Section 8-406.1(f)(1) of the Act. The Commission generally approved the route proposed by ComEd incorporating an intra-parcel adjustment proposed by Kenyon Brothers Company ("Approved Route"). The

[1] This Draft Proposed Order contains, in each substantive section, a section addressing ComEd's position and a recommended Analysis & Conclusion section. In addition, proposed Findings and Orderings are provided. However, in keeping with Commission practice, no summaries of other parties' arguments are included.

Commission further issued a CPCN authorizing and directing ComEd to construct the Project and related facilities pursuant to Section 8-503 of the Act.

On November 12, 2014, the Commission received the first of several applications for rehearing pursuant to Section 200.880 of 83 Illinois Administrative Code Part 200, "Rules of Practice." The "Muirhead Group," an ad hoc coalition of landowners consisting of John Cash, Mary Lewis, Wayne Muirhead, Dean Muirhead, Dennis Muirhead, and Arlene Watermann, filed the instant Motion for Rehearing pertaining to a segment of the Approved Route between the western edge of the Muirhead Springs Forest Preserve and the eastern boundary of Plato Center, Illinois. On November 25, 2014, the Commission granted the Muirhead Group's Motion for Rehearing, and denied a request for rehearing filed by the Forest Preserve District of Kane County ("FPDKC"). The Commission subsequently denied applications for rehearing of the October Order filed by (1) Jerry Drexler, Kristine Drexler, William Lenschow, Thomas Pienkowski, Kristin Pienkowski, Robert and Diane Mason, John Tomasiewicz, Ellen Roberts Vogel, Sharon Payne, Charles Payne, Jeffrey Payne, and Utility Risk Management Corporation; and (2) the City of Elgin, Illinois.

On December 31, 2014, Michael and Sarah Petersdorf (the "Petersdorfs," and together with Ellen Roberts Vogel, the "Vogel-Petersdorf Intervenors") filed a Petition for Leave to Intervene, which was granted on January 29, 2015.

Pursuant to due notice, and the Administrative Law Judges' December 23, 2014 Ruling, an evidentiary hearing was held on February 19, 2015.

The following witnesses testified on behalf of ComEd: Steven T. Naumann (ComEd Ex. 35.0, ComEd Ex. 35.01, ComEd Ex. 35.02, ComEd Ex. 37.0, ComEd Ex. 37.01, ComEd Ex. 37.02, ComEd Ex. 37.03, and ComEd Ex. 39.0); Donnell Murphy (ComEd Ex. 36.0, ComEd Ex. 40.0, and ComEd Ex. 40.01); and Susan E. Woods (ComEd Ex. 38.0 CORR., ComEd Ex. 38.01, ComEd Ex. 38.02, and ComEd Ex. 38.03). At hearing, the following ComEd Group Cross Exhibits were admitted into the record: ComEd Cross Group Ex. 5, ComEd Group Cross Ex. 6, ComEd Group Cross Ex. 7, ComEd Group Cross Ex. 9, and ComEd Group Cross Ex. 10.

Yassir Rashid testified on behalf of Staff (Staff Ex. 5.0).

John F. Cash testified on behalf of the Muirhead Group (Direct Testimony of John F. Cash; Response Testimony of John F. Cash).

Monica Meyers testified on behalf of FPDKC (Direct Testimony of Monica Meyers on Rehearing).

Michael Petersdorf testified on behalf of the Petersdorfs (Petersdorf Ex. 1.0, Petersdorf Ex. 1.1, Petersdorf Ex. 1.2, Petersdorf Ex. 2.0, and Petersdorf Ex. 2.1). Ellen Roberts Vogel testified on her own behalf (Vogel Ex. 2.0, Vogel Ex. 2.1, and Vogel

Ex. 3.0). The following Cross Exhibits were entered on behalf of the Vogel-Petersdorf Intervenors: SP Cross Ex. 2, SP Cross Ex. 6, and SP Cross Ex. 7.[2]

The record was marked "Heard and Taken" at the close of the proceedings on February 19, 2015, subject to the post-hearing evidentiary filings for which leave to file had already been granted.

Initial Briefs were filed on March 3, 2015 by ComEd, Staff, the Muirhead Group, and the Vogel-Petersdorf Intervenors. Reply Briefs and draft Proposed Orders were filed on March 10, 2015 by ComEd, _____.

On March 24, 2015, the ALJs issued their Proposed Order.

On March 31, 2015, Briefs on Exceptions ("BOE") were filed by _____.

On April 6, 2015, Reply Briefs on Exception ("RBOE") and Exceptions were filed by _____.

This Order considers all the positions and arguments set out in the exceptions, briefs and reply briefs listed above.

II. BACKGROUND

ComEd is a corporation organized and existing under the laws of the State of Illinois. ComEd is engaged in delivering electricity to the public in the northern portion of Illinois, and is a public utility within the meaning of Section 3-105 of the Act.

In the October Order, the Commission authorized ComEd to construct a 345kV transmission line from its existing substation in Byron, Illinois to its substation in Wayne, Illinois. ComEd plans to install one 345kV circuit breaker and associated equipment at the Byron Substation and two 345kV circuit breakers and associated equipment at the Wayne Substation. The Approved Route spans approximately 60 miles in length. The statutes and authorities governing the Commission's action on rehearing remain unchanged from those governing our original decision.

As relevant with respect to the proceedings on rehearing, the Approved Route approaches the western edge of the Muirhead Springs Forest Preserve along an existing railroad corridor utilized by the CN Railroad. Upon reaching the western edge of the forest preserve, the Approved Route turns due south until it reaches a point parallel to the forest preserve's southern-most point. The Approved Route then turns due east, passing to the south of the forest preserve and Plato Center until it reconnects

[2] SP Cross Ex. 7 is comprised of ComEd's data request responses to Vogel-Petersdorf→ComEd 1.06, 2.09, 2.13, 3.05, 3.06, 3.07, and 3.08, all of which were admitted into the record (*see* Tr. 205:20 – 206:7), but not assigned an exhibit number at the evidentiary hearing in this Docket. Nonetheless, the Vogel-Petersdorf Intervenors filed this exhibit as "SP Cross Ex. 7" on eDocket and we will adopt that designation for the sake of convenience.

with the CN Railroad on the eastern edge of Plato Center. At that point, the Approved Route proceeds along the railroad tracks towards the Wayne Substation.

III. MUIRHEAD GROUP REHEARING ALTERNATIVE AND THE COMED CONDITIONAL REHEARING ALTERNATIVE

In its Motion for Rehearing, the Muirhead Group asks the Commission to reconsider the Approved Route in favor of what the parties have generally referred to as the "Muirhead Group Rehearing Alternative." According to the Muirhead Group, the Muirhead Group Rehearing Alternative would adhere to the existing railroad corridor from the western edge of the Muirhead Springs Forest Preserve to the eastern edge of Plato Center and then continue along the railroad tracks along the Approved Route towards ComEd's Wayne Substation.

In ComEd Witness Naumann's Direct Testimony on Rehearing, ComEd also identifies a potential alternative to the Muirhead Group Rehearing Alternative that uses Muirhead Springs Forest Preserve but does not run through Plato Center, subject to the caveat that ComEd would be able to obtain sufficient land rights across the Muirhead Springs Forest Preserve. Like the Muirhead Group Rehearing Alternative, the ComEd Conditional Rehearing Alternative would extend through the Muirhead Springs Forest Preserve parallel to the existing railroad tracks. After emerging from the eastern edge of the forest preserve, the ComEd Conditional Rehearing Alternative would continue approximately one-half mile along the railroad tracks until proceeding south for a distance of approximately 1,500 feet until it intersects with the Approved Route. The ComEd Conditional Rehearing Alternative would then pass to the south of Plato Center until it reconnects with the CN Railroad on the eastern edge of Plato Center. At that point, the ComEd Conditional Rehearing Alternative would proceed along the railroad tracks towards the Wayne Substation.

A. Muirhead Group Position

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B. ComEd Position

In its Initial Brief on Rehearing, ComEd points out that the evidence supporting the Approved Route remains unchanged. ComEd IBoR at 2-4. Despite extensive proceedings on rehearing, ComEd asserts that no party presented evidence that called the Commission's original conclusion that the Approved Route "is, in comparison, superior to any of the alternate proposals" into question. ComEd IBoR at 2-3. Further ComEd argues that the Muirhead Group's assertion that the Muirhead Group Rehearing Alternative is shorter and cheaper assumes that the FPDKC is willing, ready, and able to convey to ComEd all the necessary real estate rights. *Id.* at 3. ComEd explains that the evidence disproves this claim and shows that routes running through the Muirhead Springs Forest Preserve are not viable. *Id.*

In particular, ComEd argues that the FPDKC has no authority to grant the land rights required to construct the Project through the Muirhead Springs Forest Preserve. *Id.* at 4-6. ComEd explains that a property owner may generally transfer only their own interests in land, and that any transfer will be subject to applicable restrictive covenants. *Id.* at 4 (citing *Hays v. St. Paul M.E. Church*, 196 Ill. 633, 635 (1902)). As ComEd makes clear, the evidence on rehearing, including testimony and the applicable deeds themselves, shows that the FPDKC parcels that the Project would cross if the Project is built through the forest preserve are subject to restrictive covenants that, on their face, prohibit construction of a transmission line. ComEd recalls that the two most significant FPDKC parcels at issue were originally conveyed in 2003 subject to the limitation that the properties would be maintained for public outdoor recreation use purposes only. *Id.* at 5 (citing Woods Reh. Supp. Dir., ComEd Ex. 38.0 CORR., 3:50-60 (quoting ComEd Ex. 38.02)). Ms. Woods further explains that the deeds for all three FPDKC parcels were later re-recorded and established restrictive covenants that would be similarly inconsistent with the Project. *Id.* at 5-6 (citing ComEd Ex. 38.0 CORR at 3:61 – 4:92).

ComEd additionally contends that despite extensive good faith efforts by ComEd and FPDKC, it is clear that the FPDKC is unable to obtain the requisite releases. As ComEd points out, the grantors of the applicable deeds, some of whom are represented in this proceeding, maintain their right to enforce the pertinent restrictions and have made clear in this proceeding and elsewhere that they would not release those restrictions to accommodate the Project. *Id.* at 6.

ComEd points out that the Commission should not impose added risk, cost, and uncertainty on the Project by approving a route across the Muirhead Springs Forest Preserve. *Id.* First, ComEd recounts that the parties (other than the Muirhead Group) generally agree that the aforementioned deed restrictions preclude constructing the Project across the properties at issue. Second, ComEd asserts that title insurance would not resolve the dilemma posed in this case. *Id.* at 7. ComEd states that the title insurance commitments covering these parcels list the pertinent deed restrictions as "exceptions" to the FPDKC's title, i.e., risk matters for which the title insurance company will not assume coverage. *See* Woods Reh. Supp. Dir., ComEd Ex. 38.0 CORR., 5:118-20. Moreover, ComEd contends that title insurance would not cover the risk that some entity might seek to enforce the applicable restrictions sometime after the Project is substantially complete. ComEd additionally points out that any title insurance coverage would be contractually limited and it would be near impossible for ComEd to acquire a policy sufficient to cover the Project's $277 million cost of construction, let alone the Project's proven customer benefits.

ComEd also points out that land rights across a forest preserve district in Illinois can only be obtained through mutual agreement of the parties and cannot be condemned through the exercise of eminent domain authority. ComEd IBoR at 8. ComEd explains that Section 8-509 of the PUA only applies to private properties and that Section 70 ILCS 805/5e specifically exempts forest preserve districts from eminent domain or condemnation proceedings.

ComEd notes that the question of whether a court would ultimately find that the deed restrictions could be voided or unilaterally released is beside the point. *Id.* ComEd states that it does not now have clear title to the FPDKC properties, and cannot obtain such title until the original grantors, and several other parties all execute releases. *Id.* ComEd argues that the risk is far too great for ComEd to proceed under these circumstances. *Id.* at 9.

Moreover, ComEd notes that even if it could ultimately gain the necessary land rights, the additional time that would be required to obtain clear title could make a route across the Muirhead Springs Forest Preserve more expensive and not least-cost. *Id.* ComEd states that the ComEd Conditional Rehearing Alternative would theoretically cost only $1.4 million less than the Approved Route, but that figure excludes the cost of acquiring the necessary land rights. ComEd adds that delays to the Project's in-service date cost Illinois customers about $70 million in benefits annually. Consequently, ComEd concludes that a delay of just over a week exhausts all of the theoretical construction-cost savings, even setting aside the cost of acquiring land rights on those parcels. *Id.* In sum, ComEd asserts that ordering ComEd to construct the Project across the MSFP would saddle the Project with uncertainty, imperil its constructability, and threaten to deprive ComEd's customers of the Project's demonstrated benefits. *Id.* at 9-10. In its Reply Brief on Rehearing, ComEd refutes the Muirhead Group's claims that the Muirhead Rehearing Alternative is superior to the Approved Route, clarifying the record in several respects. First, ComEd points out that restrictions that would bar use of the properties in question for electric transmission were included in the deeds at the time that the FPDKC first acquired the properties in 2003. ComEd Reply Brief on Rehearing at 3-4. The fact that the deeds were subsequently re-recorded does not prevent the deeds' beneficiaries from seeking to enforce those restrictions.

ComEd also argues that there is no evidence that any of the deed restrictions were mistakenly established. *Id.* at 4-5. To the contrary, ComEd explains that the restrictions first applied to the properties in 2003 precisely reflect the grantors' intent. ComEd further asserts that FPDKC intentionally applied the 2005 restrictions to all three properties in their entirety, but only later sought to modify the OSLAD-related project boundaries after deciding that there were insufficient funds to restore all 525 acres at once. Additionally, ComEd points out that FPDKC witness Monica Meyers never testified that any of the deed restrictions were recorded in error. *Id.* at 5.

ComEd moreover disputes the Muirhead Group's claim that the Illinois Department of Natural Resources ("IDNR") has released the restrictions governing the FPDKC properties. *Id.* 5-6. ComEd explains that the 2006 letter described by Monica Meyers and the Muirhead Group merely approved the FPDKC's proposed modification of the OSLAD "project boundaries" but made no reference to the recorded deed restrictions or purported to release the applicable deed restrictions. Lastly, assuming *arguendo* that the aforementioned letter released the applicable restrictions, ComEd argues that such a release would be subject to the conditions described in Meyers' August 2005 letter to IDNR, in which FPDKC committed to expand the restoration to include the entire parcel and keep all of the land as public open space as restored forest preserve. *Id.* at 9.

In addition, ComEd asserts that overcoming the barriers to use of the Muirhead Springs Forest Preserve is not simply a matter of time, as the Muirhead Group claims. *Id.* at 6-7. ComEd further observes that the grantors of those restrictions have already refused to release the deed restrictions and will continue to do so. Moreover, ComEd points out that Monica Meyers testified that FPDKC has no plans to initiate a legal action to quiet title. And, even if FPDKC did initiate such a legal action, ComEd warns that such litigation could be prolonged and is inconsistent with its immediate need for clear title.

ComEd also argues that the delay suggested by the Muirhead Group is inconsistent with the PUA, which requires rehearing proceedings to be resolved within 150 days. *Id.* at 7.

ComEd further avers that the risks and costs of a route across the Muirhead Springs Forest Preserve weigh heavily against the Muirhead Group Rehearing Alternative and the ComEd Conditional Rehearing Alternative. *Id.* at 8. Regardless of whether FPDKC may at some point overcome the deed restrictions, or whether the Muirhead Group has a stronger legal argument, ComEd argues that it cannot build a permanent transmission line on property for which it may be unable to obtain clear title.

However, even if ComEd could acquire rights across the Muirhead Springs Forest Preserve, ComEd contends that the Muirhead Group cannot show that such a route should otherwise be approved. *Id.* at 9-10. First, ComEd contends that a route across the Muirhead Springs Forest Preserve is not least cost. In particular, ComEd points out that the Commission's least-cost analysis includes more than just construction-cost. ComEd further asserts that the purported construction savings cited by the Muirhead Group do not include the cost of acquiring the necessary land rights, which in this case would likely include the cost of lengthy litigation. Even then, ComEd notes that there can be no guarantee that such litigation would be successful, but those costs would inevitably be passed on to customers. Furthermore, ComEd points to the cost of delaying the Project's in-service date, which ComEd suggests must also be taken into consideration. As ComEd explains, the record shows that the Project will save customers roughly a quarter-billion dollars and, in the interim, customers are losing out on nearly $70 million annually in credits. Thus, ComEd concludes that the losses attributable to even a short delay would far exceed the construction-cost savings cited by the Muirhead Group.

Furthermore, ComEd contends that the Muirhead Group has no answer for the considerations that led ComEd to conclude that a route through Plato Center is unsuitable in the first place. *Id.* at 10-11. For instance, ComEd first argues that it is sound and accepted utility and planning practice to consider the demonstrated future needs for transmission development in a sitting case where that future development will occur within the planning horizon. In this case, ComEd points out that the Commission has already recognized the need for additional lines in the future. As ComEd explains, these needs cannot be ignored. ComEd similarly asserts that a route through Plato Center would necessarily require ComEd to either condemn and demolish buildings in Plato Center to accommodate those additional lines or to acquire a separate right of

way to the south and west of Plato Center. Moreover, ComEd states that the routes available at that time would likely be the same routes as those now before the Commission. In this respect, ComEd observes that the Muirhead Group Rehearing Alternative would merely delay the inevitable course of installing a future transmission line to the south and west of Plato Center, but only after ComEd constructs the Project through the middle of Plato Center.

Lastly, ComEd refutes the Muirhead Group's claim that a route through Plato Center would have a lower impact on the surrounding area than the Approved Route or the ComEd Conditional Rehearing Alternative. *Id.* at 11-12. ComEd recalls that a route through Plato Center would impact the community in ways that a route across undeveloped land would not. For example, ComEd notes that a route through Plato Center would run closer to numerous homes, a youth baseball park, a fire station, town hall and a day-care center. ComEd concludes that a route through Plato Center "is clearly inferior to the Approved Route which can be built at reasonable cost and without such impacts, can accommodate future expansion, and in relevant part traverses 'undeveloped land' occupied by no more than two homes." *Id.* at 12 (citations omitted).

C. Staff Position

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D. Vogel-Petersdorf Intervenors' Position

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E. Commission Conclusion

Based on a thorough review of the evidence on rehearing, the Commission finds that the Project should be constructed along the Approved Route.

The record shows that the relevant parcels that comprise the Muirhead Springs Forest Preserve are governed by a series of deed restrictions that appear to preclude use of those properties for the Project. All parties seem to agree that FPDKC acquired two of the three relevant parcels in 2003 subject to restrictive covenants that purport to require that the properties be maintained only for public outdoor recreation use. In 2005, in connection with FPDKC's pursuit of OSLAD funding, all three parcels were subjected to an additional series of restrictive covenants, which require, among other things, that the properties be maintained for public outdoor recreation use purposes only. Moreover, at least some of the parties that may be entitled to enforce those requirements have already refused to grant FPDKC a release and have made that intent clear in this proceeding. Thus, the weight of the evidence, confirmed by Staff, strongly suggests that ComEd cannot obtain sufficient land rights to construct the Project across the Muirhead Springs Forest Preserve. And, were the Commission to approve such a route notwithstanding that likelihood, it would impose a significant risk that any rights conveyed do not permit the construction of the Project. The Commission has previously expressed "grave reservations" with ordering ComEd to construct a

transmission line across forest preserve district properties "in light of the fact that ComEd may be unable to obtain necessary easements even with eminent domain authority." *Commonwealth Edison Co.*, Docket No. 07-0310 (Order, Oct. 8, 2008). Therefore, the Commission concludes that the Approved Route remains least-cost and, in comparison, superior to any of the alternatives.

As the Commission found its October Order, the Project "represents an opportunity to achieve numerous uncontested benefits and will be directly cost beneficial to customers." October Order at 24. In particular, Staff estimated that the Project's net benefits will range between $121.1 million to $324.6 million, and ComEd's analyses suggested that the Project's benefits would be even greater. The Project will also substantially increase transmission capability between the eastern and western portions of the ComEd zone, which is currently transmission constrained, and reduce the cost to serve load in the ComEd zone.

Moreover, regardless of whether the deed restrictions in question are enforceable by any entity, the projected savings of a route across the Muirhead Springs Forest Preserve do not warrant the additional risk that such a route poses to the Project and its proven customer benefits. The evidence shows that the theoretical cost savings of a route across the Muirhead Springs Forest Preserve are slight and could easily be overcome by, for instance, the cost to customers of even a few weeks delay of the Project's in-service date. Further, the Approved Route would traverse undeveloped farm land and have less impact on Plato Center than the Muirhead Group Rehearing Alternative, which would run through that community. Moreover, the Muirhead Group Rehearing Alternative would preclude the possibility of expanding the right-of-way at issue in this proceeding to accommodate future transmission expansion that will soon be necessary. The added cost of now approving a route that is incapable of meeting identified future needs exceeds any short-term construction-cost savings.

IV. FINDINGS AND ORDERINGS PARAGRAPH

Having considered the entire record herein and being fully advised in the premises, the Commission is of the opinion and finds that:

(1) ComEd is a public utility pursuant to the Act;

(2) the Commission has jurisdiction over ComEd and the subject matter of this proceeding;

(2) the facts recited and conclusions reached in the prefatory portion of this Order are supported by the evidence and are hereby adopted as findings herein;

(3) the Approved Route between the western edge of the Muirhead Springs Forest Preserve and the eastern edge of Plato Center, Illinois should be approved, as discussed in the prefatory portion of this Order;

(4) all other findings and conclusions contained in the October Order should remain unchanged; and

(5) all motions, petitions, objections, and other matters in this proceeding which remain unresolved should be disposed of consistent with the conclusions herein.

IT IS THEREFORE ORDERED by the Illinois Commerce Commission that the Certificate of Public Convenience and Necessity issued in this docket to Commonwealth Edison Company pursuant to Section 8-406.1 of the Public Utilities Act on October 22, 2014 shall not be modified to reflect the modification sought by the Muirhead Group.

IT IS FURTHER ORDERED that all other findings and conclusions contained in the October 2014 Order remain unchanged.

IT IS FURTHER ORDERED that all motions, petitions, objections, and other matters in this proceedings which remain unresolved are disposed of consistent with the conclusions herein.

IT IS FURTHER ORDERED that, subject to the provisions of Section 10-113 of the Public Utilities Act and 83 Ill. Adm. Code 200.880, this Order is final; it is not subject to the Administrative Review Law.

By Order of the Commission this __ day of _____, 2015.

* * * * *

Dated: March 10, 2015

Respectfully submitted,

COMMONWEALTH EDISON COMPANY

By:_____

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