

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

LAZ PARKING LTD, LLC)	
)	
Petitioner,)	
)	
v.)	Docket No. 12-0324
)	
COMMONWEALTH EDISON COMPANY)	
)	
Respondent.)	
)	
Complaint pursuant to Sections 9-250 and)	
10-108 of the Illinois Public Utilities Act and)	
Section 200.170 of the Rules of Practice of the)	
Illinois Commerce Commission.)	

**Respondent’s Response to LAZ Parking’s Motion to Strike Portions of
ComEd’s Reply to LAZ Parking’s Response to the Motion for Summary Judgment**

Respondent, the Commonwealth Edison Company (“Respondent” or “ComEd”) respectfully sets before the Illinois Commerce Commission (“Commission”), its Response to the Motion filed by LAZ Parking LTD, LLC (“LAZ Parking” or “LAZ”) on October 23, 2015, that seeks to strike portions of ComEd’s Reply to LAZ’s Response to the pending Motion for Summary Judgment (“the Motion” or “Motion to Strike”). ComEd responds as follows:

I. PERTINENT BACKGROUND EVENTS

In order to effectively respond to the instant Motion, ComEd’s believes it necessary to outline key background events.

On February 13, 2014, an ALJ ruling establishes ten Sp. Ct. R. 216 admissions pursuant to a LAZ motion which asserted that ComEd’s objections, denials and explanations were in technical non-compliance with the court rule on requests to admit (although ComEd’s answers were compliant with Commission Rule 200.410(c) requests for admission). A subsequent ALJ Ruling on March 9, 2015, denies ComEd’s motion to reconsider.

On April 30, 2015, ComEd files its Amended Motion to Dismiss. Therein, ComEd addresses the Sp. Ct. R. 216 admissions which did not exist at the time its original motion to dismiss (with affidavits) was filed.

On **May 14, 2015**, LAZ files a Motion to Clarify, to Strike and to Continue Generally the Hearing on ComEd's Amended Motion to Dismiss. Therein, at pages 7-10, LAZ contends that ComEd impermissibly places its Rule 216 admissions into controversy and attempts to re-litigate the issues.

On June 30, 2015, ComEd files its Motion for Summary Judgment ("MSJ"). Therein, at pages 19-30, ComEd addresses the Sp. Ct. R. 216 admissions in context of the record, puts forth its actual responses on LAZ's Sp. Ct. R. 216 requests to admit, and, in doing so, discusses the Commission's discretionary powers in evidentiary matters as well as its interest in preserving the integrity of the record.

On **July 13, 2015**, LAZ files its Motion to Strike Portions of ComEd's MSJ. Therein again, at pages 5-9, LAZ claims that certain ComEd arguments attempt to re-litigate *its* Rule 216 admissions.

On August 5, 2015, (after full briefing on the matter), the ALJ denies LAZ's motion to strike. But, the ALJ expressly informs LAZ that it is free to re-assert all of its arguments in the proper course of a Response to the MSJ.

On September 25, 2015, LAZ files its Response to ComEd's MSJ. Once again, LAZ claims that ComEd's arguments are an attempt to re-litigate *its* Sp. Ct. R. 216 admissions. (Response at 11-12).

On October 19, 2015, ComEd files its Reply on the MSJ. Therein, ComEd responds to arguments and evidence set out in LAZ's Response.

On October 23, 2015, LAZ files the instant Motion to Strike Portions of ComEd's Reply. Here yet again, at page 1, LAZ claims that ComEd's arguments are an attempt to re-litigate its Rule 216 admissions.

The instant Motion rests on arguments presented in LAZ's filings on May 14, 2015 and July 13, 2015, as highlighted above. In the section below, ComEd may occasionally refer to these jointly as the "pre-existing arguments."

II. ARGUMENT

1. ***The Motion to Strike lacks substance.*** LAZ Parking is asking the Commission to strike certain portions of ComEd's Reply because, it summarily claims, these arguments attempt "to re-litigate the Sp. Ct. Rule 216 admissions" in this proceeding. (LAZ Motion at 2, Exhibit A). But, LAZ does not set out or explain the basis for its objections or address or analyze for the Commission any of the particular ComEd arguments that it asks to be stricken. (*Id.* at 1). Instead, it simply refers the Commission to a set of earlier motions to strike it had filed on July 13, 2015 and May 14, 2015. (*Id.*) Remarkably, LAZ does not bother to identify the particular pages or passages in these prior filings that it would have the Commission consider. As such, LAZ puts an onerous burden on both ComEd – and the Commission – to review stale filings in order to ferret out the basis for the instant Motion. LAZ asks too much. But, even a cursory reading of ComEd's Reply shows that what LAZ seeks to be stricken, fairly references and responds to the arguments and the evidence that LAZ set out in its Response on September 25, 2015. (See LAZ Motion, Exhibit A at pp. 10, 20-21).

It is fundamental that the party filing a motion has the burden of showing that the relief it is requesting from the Commission has merit. LAZ's Motion here fails this basic standard. On this basis alone, the Motion to Strike should be denied.

2. ***The Motion to Strike creates disorder.*** Once ComEd filed its Motion for Summary Judgment on September 30, 2015, LAZ had the right, and it fully exercised the right, to file a Response. Nothing prevented LAZ from including, in its Response, any and all of the pre-existing arguments that it now wants to press here. Indeed, at the status hearing on August 5, 2015, it was made clear to LAZ that:

I'm going to deny the motion to strike. But I'm not denying you the right to argue your position on the matters at issue in the motion to strike [in] your response to the summary judgment -- or cross motion for summary judgment or at a hearing. (Tr. 187; August 5, 2015).

The above-language shows that the ALJ invited LAZ to bring all of its “earlier” arguments to the Commission through the proper vehicle of a Response. ComEd agreed. (Tr. 187). Indeed, this is the standard and orderly process afforded to all parties. If LAZ did not set out every argument it wanted in these premises, it can only blame itself. But, it is highly improper for any party to do what LAZ attempts here, *i.e.*, to introduce additional arguments it may have overlooked under guise of a motion to strike. For this reason too, the Motion to Strike should be denied.

3. ***The Motion to Strike is mistaken on the treatment of the admissions.***

In the event that the Commission were to review any of the stale arguments on which the Motion relies, it will see that LAZ attempted there to challenge ComEd’s reliance on the opinions of *Roth v. Carbondale*, *Serrano v. Rothman* and *Smith v. Pavlovich* “as support for contesting *its* own judicial admissions.” (LAZ Motion to Strike Portions of ComEd’s Motion for Summary Judgment at 7, filed July 13, 2015; LAZ Motion to Clarify, to Strike, etc. at 10, filed May 14, 2015). LAZ had it all wrong. What each of these opinions prominently stand for, and what they make clear – is the court’s abundant discretion when dealing with evidentiary matters. And, that discretion extends to the way that a court may treat Rule 216 admissions at the evidentiary stage. *Serrano*, 406 Ill. App. 3d 900 (2011). At bottom, and contrary to LAZ’s oft-repeated and bald claims, ComEd is not seeking to re-litigate the Rule 216 admissions. (See MSJ at 21)¹. But, it is rightfully

¹ At page 21 of the Motion for Summary Judgment it is clearly stated that:

While ComEd may be constrained by the ALJ’s ruling from disputing the Rule 216 admissions established in this proceeding, the Commission itself is under no such compulsion.

informing the Commission that it has the power to decide for itself whether, and under what form of treatment, the Sp. Ct. R. 216 admissions serve the integrity of the record. 83 Ill. Admin. Code 200.25. Simply put, both the instant Motion, and the pre-existing arguments, rest on a complete misunderstanding of the law and ComEd's arguments. For this additional reason, the Motion should be denied.

4. ***The Motion to Strike wastes scarce judicial resources.*** It has been well-reasoned that “the judiciary has quite enough to do deciding cases on their merits.” *Custom Vehicles, Inc. v. Forest River, Inc.*, 464 F.3d 725 (2006). As such, “motions to strike sentences or sections out of briefs waste everyone’s time.” *Redwood v. Dobson*, 476 F.3d 462, 471 (2007). This is clearly the situation at hand. LAZ’s Motion could not be granted without a response. So now the Commission and ComEd are forced to expend significant resources to not only address the Motion, but, given LAZ’s highly unorthodox method of argument (*i.e.*, referencing, but not supplying, previously filed material), to hunt for LAZ’s argument. During what has now effectively turned into a research project, the Commission will have to set aside other pressing matters and, like ComEd, pour through each of these stale filings in a “guess” as to what arguments might still be relevant.² As it engages in this burdensome process, the Commission will be left to question, as did the *Customs* court, for what reason by what authority LAZ is asking for a “judicial blue pencil.” (*Id.* at 727). As it expends an inordinate amount of time reviewing old and tired arguments out of context, it will wonder why – if any of these earlier arguments mattered to LAZ – it did not just include them in its Response to the MSJ? After doing the heavy lifting, the Commission will see that LAZ’s pre-existing arguments say nothing to contradict ComEd’s reply. So too, the Commission will find

² For ComEd this is a distinctly unfair disadvantage because, if it guesses wrong, LAZ will make much of this in its reply on the Motion to Strike.

that that every pre-existing argument is basically a version of the same, singular and faulty premise that drives the instant Motion, *i.e.*, that ComEd arguments attempt to re-litigate the Sp. Ct. R. 216 admissions. Simply because ComEd disagrees with LAZ's assertion, is no good reason to strike its arguments.

5. **The Motion to Strike aims to upset a legal issue to be decided on the merits.** LAZ clearly believes that, by its having gained the Rule 216 admissions, it has tied the Commission's hands. Based on the totality of its arguments, LAZ views the Commission as having no discretion in the matter such that it must accept the Rule 216 admissions as true and final. This very proposition is at the crux of every pre-existing argument set out by LAZ. It lies at the heart of LAZ's Response. And it is the driving force behind the instant Motion to Strike. For its part, ComEd has asserted otherwise and set forth legal authority that support the broad discretion of the Commission to look closely at the Rule 216 admissions and, among other things, assess their value in terms of all the evidence and the agency's stated interests. Whether LAZ is right or whether ComEd is right is a legal issue to be decided when the Commission actually considers the Motion for Summary Judgment. But, LAZ wants to gain an unfair advantage beforehand by wiping out every ComEd reference to the Rule 216 admissions through the instant Motion to Strike. This is clearly wrong. Because the Commission need to be fully informed when it decides the MSJ, the instant Motion should be denied.

III. CONCLUSION

LAZ Parking's Motion to Strike is directed to the Commission's discretion. *i.e.*, its sound legal judgment. The standards for the exercise of discretion are set out in Section 200.25 of the Commission's Rules and include: integrity of the record, fairness; expedition; and cost-effectiveness. 83 Ill. Admin. Code 200.25

All of the points and arguments set out in this Response show that the instant Motion to Strike is irrelevant to its stated purposes. LAZ's objections – that it would have ComEd and the Commission research and divine from old and dated filings – fail to address or overcome any of the particulars that ComEd actually argued in its Reply. As such, ComEd's arguments remains unchallenged. Further, LAZ had unbridled opportunity to set out any and all of the pre-existing arguments, that it attempts to foist upon the Commission here, in its Response to the Motion for Summary Judgment. At bottom, however, none of these arguments give the Commission any legitimate reason to strike any portion of ComEd's Reply.

It cannot be emphasized enough that, motions which seek to strike arguments on brief disserve the interests of judicial economy. Such is plainly the case here where LAZ has additionally shifted the burden on ComEd and the Commission to seek out from state filings, and without any direction, arguments that would support *its* Motion to Strike. This type of tactic, and the waste it engenders, cannot be condoned. More to the point, as it has been well-reasoned, the very notion of striking portions of briefs is simply "pointless" from a judicial perspective. *Custom Vehicles, Inc. v. Forest River, Inc.*, 464 F.3d 725 (2006).

The reality here, uncovered from a burdensome search, is that all of its earlier arguments are essentially the *same* as those set out in LAZ's Response. Indeed, LAZ has been consistent throughout in pressing its view that the Rule 216 admissions must be flatly accepted by the Commission with no exercise of discretion. ComEd, however, takes a much different view of the Commission's powers and its stated interest in having a record of utmost integrity.

Clearly, this is a legal issue to be decided by the Commission when it is actually considering the Motion for Summary Judgment. But, in order to decide that issue, the Commission needs to be fully informed by the arguments of each of the parties (LAZ and ComEd) in support of their opposing views. This Motion, which aims to wipe out the entirety of ComEd's Reply arguments on the Rule 216 admissions, can only be perceived as a last-ditch and wrongful attempt by LAZ to interfere with, and unbalance the legal decision that the Commission needs to make.

For all the reasons set out in this Response, ComEd asks the Commission to deny the instant Motion to Strike filed by LAZ on October 23, 2015.

Dated: November 6, 2015

Respectfully submitted,

COMMONWEALTH EDISON COMPANY

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