

ICC Docket No. 16-0259

**Commonwealth Edison Company's Response to
The People of the State of Illinois ("AG") Data Requests
AG 5.01 - 5.06**

Date Received: May 17, 2016

Date Initial Response Served: June 6, 2016

Date Revised Response Served: June 8, 2016

Date Supplemental Response Served: June 27, 2016

REQUEST NO. AG 5.03:

Ref: ComEd 2015 FERC Form 1, page 123.44 (Telephone Consumer Protection Act Lawsuit). According to the Form 1, "ComEd and the plaintiff agreed in principle to settlement the suit for \$5 million, with payments to the class commencing in the fourth quarter 2015." Please respond to the following:

- a. Provide the amounts by FERC Account that were recorded on ComEd's books in connection with this lawsuit, including but not limited to any accruals for the settlement amount.
- b. Explain and quantify any amounts ComEd has included within its asserted delivery service revenue requirements in connection with this litigation.
- c. If any costs of this litigation are included in revenue requirements, provide the following documents:
 1. A copy of the initial complaint
 2. A copy of ComEd's response to the initial complaint
 3. A copy of the settlement agreement.

SUPPLEMENTAL RESPONSE:

- a. Please see the attachment to ComEd's Data Request Response to AG 5.03 labeled as AG 5.03 REV_Attach 1 for the amounts, by FERC Account, that were recorded on ComEd's books in 2015 related to the Telephone Consumer Protection Act ("TCPA") lawsuit.

Also, see the attachment to ComEd's Data Request Response to AG 13.02 labeled as AG 13.02_Attach 1.

- b. The total jurisdictional amount related to the settlement accrual included in the instant Distribution Formula Rate Update proceeding filing was \$2,143,015. The total jurisdictional amount related to the other expenses included in the instant Distribution Formula Rate Update proceeding filing was \$138,441.
- c. Please see the attachments to ComEd's Initial Data Request Response to AG 5.03 labeled as AG 5.03_Attach 2 for a copy of the initial Complaint, the attachment labeled as AG 5.03_Attach 3 for a copy of ComEd's response to the initial Complaint, and the attachment labeled as AG 5.03_Attach 4 for a copy of the Settlement Agreement.

REVISED RESPONSE:

- a. Please see the attachment labeled as AG 5.03 REV_Attach 1 for the amounts, by FERC Account, that were recorded on ComEd's books in 2015 related to the Telephone Consumer Protection Act lawsuit.
- b. The total jurisdictional amount included in the Distribution Formula Rate Update filing is \$2,143,015.
- c. Please see the attachment labeled as AG 5.03_Attach 2 for a copy of the initial Complaint, the attachment labeled as AG 5.03_Attach 3 for a copy of ComEd's response to the initial Complaint, and the attachment labeled as AG 5.03_Attach 4 for a copy of the Settlement Agreement.

RESPONSE:

- a. Please see the attachment labeled as AG 5.03_Attach 1 for the amounts, by FERC Account, that were recorded on ComEd's books in 2015 related to the Telephone Consumer Protection Act lawsuit.
- b. The total jurisdictional amount included in the Distribution Formula Rate Update filing is \$2,143,015.
- c. Please see the attachment labeled as AG 5.03_Attach 2 for a copy of the initial Complaint, the attachment labeled as AG 5.03_Attach 3 for a copy of ComEd's response to the initial Complaint, and the attachment labeled as AG 5.03_Attach 4 for a copy of the Settlement Agreement.

Commonwealth Edison Company
2015 Transactions for TCPA Lawsuit
(In Dollars)

FERC Account	Amount	Description
925000	\$ 2,450,000	Record accrual for TCPA damage claim
242000	\$ (2,450,000)	Record accrual for TCPA damage claim

FERC Account	Amount	Description
242000	\$ 4,950,000	Reclass accrual to accounts payable for payment
232000	\$ (4,950,000)	Reclass accrual to accounts payable for payment

FERC Account	Amount	Description
131000	\$ (4,950,000)	Process payment for TCPA lawsuit
232000	\$ 4,950,000	Process payment for TCPA lawsuit

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**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION**

MICHAEL GRANT, individually and on
behalf of all others similarly situated,

Plaintiff,

v.

COMMONWEALTH EDISON COMPANY,
an Illinois corporation,

Defendant.

Case No. 1:13-cv-8310

JURY TRIAL DEMANDED

CLASS ACTION COMPLAINT

Plaintiff Michael Grant (“Grant” or “Plaintiff”) brings this class action complaint against Defendant Commonwealth Edison Company (“ComEd” or “Defendant”) to stop Defendant’s practice of sending unsolicited text messages to the cellular telephones of consumers and to obtain redress for all persons injured by its conduct. Plaintiff, for his class action complaint, alleges as follows upon personal knowledge as to himself and his own acts and experiences, and, as to all other matters, upon information and belief, including investigation conducted by his attorneys.

NATURE OF THE ACTION

1. Defendant ComEd is the largest electric utility company in Illinois and provides electricity to nearly 4 million consumers.
2. In an effort to promote its brand, Defendant ComEd sent (or directed to be sent on its behalf) unsolicited text message advertisements to Plaintiff’s and the putative Class members’ cell phones in violation of the Telephone Consumer Protection Act, 47 U.S.C. § 227 (“TCPA”).
3. Neither Plaintiff Grant, nor the other members of the Class, ever consented to

have Defendant send the text messages at issue to their cell phones.

4. By sending the text messages at issue, Defendant caused Plaintiff and the members of the Class actual harm, including the aggravation and nuisance that necessarily accompanies the receipt of unsolicited text messages and the monies paid to their wireless carriers for the receipt of such messages.

5. In response to Defendant's unlawful conduct, Plaintiff filed the instant lawsuit and seeks an injunction requiring Defendant to cease all unsolicited text message activities and an award of statutory damages to the members of the Class under the TCPA, together with costs and reasonable attorneys' fees.

PARTIES

6. Plaintiff Michael Grant is a natural person and citizen of the State of Illinois.

7. Defendant Commonwealth Edison Company is a corporation organized and existing under the laws of the State of Illinois with its principal place of business located at 440 S. LaSalle Street, Chicago, Illinois. Defendant ComEd regularly does business throughout the State of Illinois and in this District.

JURISDICTION AND VENUE

8. This Court has original jurisdiction over the claims in this action pursuant to 28 U.S.C. § 1331 because they arise under the Telephone Consumer Protection Act, 47 U.S.C. § 227, which is a federal statute.

9. The Court has personal jurisdiction over Defendant and venue is proper in this District because Defendant is incorporated in the State of Illinois and headquartered in this District, Defendant transacts significant amounts of business within this District, and the conduct and events giving rise to Plaintiff's claims arose in this District. Venue is additionally proper

because Plaintiff resides here.

COMMON FACTUAL ALLEGATIONS

10. In recent years, companies who have often felt stymied by federal laws limiting solicitation by telephone, fax machine, and e-mail have increasingly looked to alternative technologies through which to send bulk solicitations cheaply.

11. One of the most prevalent alternatives is through so-called Short Message Services. Short Message Services or “SMS” is a messaging system that allows for the transmission and receipt of short text message calls (usually no more than 160 characters) to and from cellular telephones.

12. SMS message calls are directed to a wireless device using the telephone number assigned to the device. When an SMS message call is successfully made, the recipient’s cell phone rings, alerting him or her that a call is being received. As cellular telephones are inherently mobile and are frequently carried on their owner’s person, SMS messages may be received by the called party virtually anywhere in the world.

13. According to a recent study conducted by the Pew Research Center, “Spam isn’t just for email anymore; it comes in the form of unwanted text messages of all kinds—from coupons to phishing schemes—sent directly to user’s cell phones.” In fact, “57% of adults with cell phones have received unwanted or spam text messages on their phone.” Amanda Lenhart, *Cell Phones and American Adults: They Make Just as Many Calls, but Text Less than Teens*, Pew Research Center (2010), <http://www.pewinternet.org/Reports/2010/Cell-Phones-and-American-Adults.aspx> (last visited November 18, 2013).

14. Unlike more conventional messaging systems, SMS message advertisements can actually cost their recipients money because cell phone users must pay their wireless service

providers either for each text message call they receive or incur a usage allocation deduction to their text messaging plan, regardless of whether the message is authorized.

15. In or around January 2012, ComEd created the “Outage Alert” mobile messaging program.

16. According to ComEd’s website, individuals who opt in to the Outage Alert program will receive text messages regarding power outages in their area.

17. There are two ways to opt in to ComEd’s Outage Alert program: online or via text message.

18. To opt in online, individuals must navigate to www.ComEd.com/text and enroll by (1) entering either their ComEd account number, social security number, or phone number associated with their ComEd account, and (2) clicking the “Enroll” button.¹

19. To opt in via text message, customers must text the phrase “ADD OUTAGE” to “26633.”²

20. Rather than wait for individuals like Plaintiff Grant to subscribe to its Outage Alert program, ComEd unilaterally enrolled thousands of Illinois residents without their consent or permission and transmitted, or had transmitted on its behalf, the same or substantially the same text messages to them *en masse*.

21. For example, and notwithstanding that Plaintiff Grant never opted into the Outage Alert program (either online or via text message), he received the following text message from ComEd on his cell phone on or around November 7, 2013:

¹ See *Receive Outage Alerts on Your Mobile Phone*, ComEd, ComEd.com/text (last visited

² See *Get ComEd’s Outage Alerts on Your Mobile Phone*, YouTube, http://www.youtube.com/watch?v=-PLcztDLf_I&list=UU4zkrEplqmoNCo32RW-Btmg&feature=player_detailpage (last visited November 18, 2013).

You are now subscribed to ComEd outage alerts. Up to 21 msgs/mo. Visit ComEd.com/text for details. T&C:agent511.com/tandc. STOP to unsubscribe. HELP for info.

22. The “from” field of the text message was identified cryptically as “26633”, which is an abbreviated telephone number known as an SMS short code.

23. However, Plaintiff Grant never enrolled in the Outage Alert program and never consented to receive text messages sent from or on behalf of ComEd. To be clear, at no time did Plaintiff Grant subscribe to the Outage Alert program online or send any text message to “26633” (or any other short code owned or associated with ComEd).

24. The text messages at issue were not sent for emergency purposes. Indeed, the text messages didn’t provide notification of an outage or emergency of any kind.

25. Instead, the text messages at issue were sent to “maximize subscriber satisfaction.”³

26. Defendant sent the text messages at issue to Plaintiff and thousands of putative Class members using equipment that had the capacity to store or produce telephone numbers to be called using a random or sequential number generator, and to dial such numbers.

CLASS ALLEGATIONS

27. Plaintiff brings this action pursuant to Federal Rule of Civil Procedure 23(b)(2) and 23(b)(3) on behalf of himself and a class (the “Class”) defined as follows: All individuals in the United States who received the following text message without providing their prior express consent:

You are now subscribed to ComEd outage alerts. Up to 21 msgs/mo. Visit ComEd.com/text for details. T&C:agent511.com/tandc. STOP to unsubscribe. HELP for info.

3 See <http://agent511.com/utility.htm> (last accessed November 19, 2013).

28. **Numerosity:** The exact number of Class members is unknown and not available to Plaintiff, but it is clear that individual joinder is impracticable. On information and belief, Defendant has sent text messages to tens of thousands of consumers who fall into the definition of the Class. Class members can be identified through Defendant's records.

29. **Typicality:** Plaintiff's claims are typical of the claims of other members of the Class, in that Plaintiff and the Class members sustained damages arising out of Defendant's uniform wrongful conduct and unsolicited text messages.

30. **Adequate Representation:** Plaintiff will fairly and adequately represent and protect the interests of the Class, and has retained counsel competent and experienced in complex class actions. Plaintiff has no interests antagonistic to those of the Class, and Defendant has no defenses unique to Plaintiff.

31. **Commonality and Predominance:** There are many questions of law and fact common to the claims of Plaintiff and the Class, and those questions predominate over any questions that may affect individual members of the Class. Common questions for the Class include, but are not necessarily limited to the following:

- (a) whether Defendant's conduct constitutes a violation of the TCPA;
- (b) whether the equipment Defendant used to transmit the text messages in question was an automatic telephone dialing system as contemplated by the TCPA; and
- (c) whether Class members are entitled to treble damages based on the willfulness of Defendant's conduct.

32. **Superiority:** This case is also appropriate for class certification because class proceedings are superior to all other available methods for the fair and efficient adjudication of

this controversy as joinder of all parties is impracticable. The damages suffered by the individual members of the Class will likely be relatively small, especially given the burden and expense of individual prosecution of the complex litigation necessitated by Defendant's actions. Thus, it would be virtually impossible for the individual members of the Class to obtain effective relief from Defendant's misconduct. Even if members of the Class could sustain such individual litigation, it would still not be preferable to a class action, because individual litigation would increase the delay and expense to all parties due to the complex legal and factual controversies presented in this Complaint. By contrast, a class action presents far fewer management difficulties and provides the benefits of single adjudication, economy of scale, and comprehensive supervision by a single Court. Economies of time, effort and expense will be fostered and uniformity of decisions ensured.

COUNT I
Violation of the TCPA, 47 U.S.C. § 227
(On behalf of Plaintiff and the Class)

33. Plaintiff incorporates by reference the foregoing allegations as if fully set forth herein.

34. Defendant and/or its agents sent unsolicited text messages to cellular telephone numbers belonging to Plaintiff and the other members of the Class *en masse* without their prior express consent.

35. Defendant sent the text messages, or had them sent on its behalf, using equipment that had the capacity to store or produce telephone numbers to be called using a random or sequential number generator, and to dial such numbers.

36. Defendant utilized equipment that sent the text messages to Plaintiff and other members of the Class simultaneously and without human intervention.

37. By sending the unsolicited text messages to Plaintiff and the Class, Defendant has violated 47 U.S.C. § 227(b)(1)(A)(iii). As a result of Defendant's unlawful conduct, the members of the Class suffered actual damages in the form of monies paid to receive the unsolicited text messages on their cellular phones and under section 227(b)(3)(B) are each entitled to, *inter alia*, a minimum of \$500.00 in damages for each such violation of the TCPA.

38. Should the Court determine that Defendant's conduct was willful and knowing, the Court may, pursuant to section 227(b)(3)(C), treble the amount of statutory damages recoverable by Plaintiff and the other members of the Class.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff Michael Grant, individually and on behalf of the Class, prays for the following relief:

1. An order certifying the Class as defined above, appointing Plaintiff Michael Grant as the representative of the Class, and appointing his counsel as Class Counsel;
2. An award of actual and statutory damages;
3. An injunction requiring Defendant to cease all unsolicited text message activities, and otherwise protecting the interests of the Class;
4. An award of reasonable attorneys' fees and costs; and
5. Such other and further relief that the Court deems reasonable and just.

JURY DEMAND

Plaintiff requests a trial by jury of all claims that can be so tried.

Respectfully submitted,

Dated: November 19, 2013

MICHAEL GRANT, individually and on behalf of
all others similarly situated,

By: /s/ Ari J. Scharg
One of Plaintiff's Attorneys

Jay Edelson
jedelson@edelson.com
Rafey S. Balabanian
rbalabanian@edelson.com
Ari J. Scharg
ascharg@edelson.com
EDELSON LLC
350 North LaSalle Street, Suite 1300
Chicago, Illinois 60654
Tel: (312) 589-6370

Counsel for Plaintiff and the Putative Class

CERTIFICATE OF SERVICE

I, Ari J. Scharg, an attorney, certify that on November 19, 2013, I served the above and foregoing ***Class Action Complaint*** by causing true and accurate copies of such paper to be filed and transmitted to all counsel of record via the Court's CM/ECF electronic filing system, on this 19th day of November, 2013.

/s/ Ari J. Scharg _____

JS 44 (Rev 3/13)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM)

<p>I. (a) PLAINTIFFS</p> <p>Michael Grant, individually and on behalf of all others similarly situated,</p> <p>(b) County of Residence of First Listed Plaintiff <u>COOK</u> <i>(EXCEPT IN U.S. PLAINTIFF CASES)</i></p> <p>(c) Attorneys (Firm Name, Address, and Telephone Number)</p> <p>Edelson LLC, 350 N. LaSalle, Suite 1300, Chicago, Illinois, 60654</p>	<p>DEFENDANTS</p> <p>COMMONWEALTH EDISON COMPANY, an Illinois corporation,</p> <p>County of Residence of First Listed Defendant <u>Cook</u> <i>(IN U.S. PLAINTIFF CASES ONLY)</i></p> <p>NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.</p> <p>Attorneys (If Known)</p>
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<p>II. BASIS OF JURISDICTION (Place an "X" in One Box Only)</p> <p>1 U.S. Government Plaintiff <input type="checkbox"/> 3 Federal Question (U.S. Government Not a Party) <input checked="" type="checkbox"/></p> <p>2 U.S. Government Defendant <input type="checkbox"/> 4 Diversity (Indicate Citizenship of Parties in Item III) <input type="checkbox"/></p>	<p>III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)</p> <table border="1" style="width:100%; border-collapse: collapse;"> <tr> <td></td> <td>PTF</td> <td>DEF</td> <td></td> <td>PTF</td> <td>DEF</td> </tr> <tr> <td>Citizen of This State</td> <td>1</td> <td>1</td> <td>Incorporated or Principal Place of Business In This State</td> <td>4</td> <td>4</td> </tr> <tr> <td>Citizen of Another State</td> <td>2</td> <td>2</td> <td>Incorporated and Principal Place of Business In Another State</td> <td>5</td> <td>5</td> </tr> <tr> <td>Citizen or Subject of a Foreign Country</td> <td>3</td> <td>3</td> <td>Foreign Nation</td> <td>6</td> <td>6</td> </tr> </table>		PTF	DEF		PTF	DEF	Citizen of This State	1	1	Incorporated or Principal Place of Business In This State	4	4	Citizen of Another State	2	2	Incorporated and Principal Place of Business In Another State	5	5	Citizen or Subject of a Foreign Country	3	3	Foreign Nation	6	6
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Citizen of Another State	2	2	Incorporated and Principal Place of Business In Another State	5	5																				
Citizen or Subject of a Foreign Country	3	3	Foreign Nation	6	6																				

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES	
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans) <input type="checkbox"/> 153 Recovery of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	<p>PERSONAL INJURY</p> <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Medical Malpractice	<input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability <p>PERSONAL PROPERTY</p> <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other <p>LABOR</p> <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act <p>IMMIGRATION</p> <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 463 Habeas Corpus - Alien Detainee (Prisoner Petition) <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 <p>PROPERTY RIGHTS</p> <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark <p>SOCIAL SECURITY</p> <input type="checkbox"/> 861 HIA (1395f) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) <p>FEDERAL TAX SUITS</p> <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY	CIVIL RIGHTS	PRISONER PETITIONS			
<input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	<input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 445 Amer. w/Disabilities Employment <input type="checkbox"/> 446 Amer. w/Disabilities Other <input type="checkbox"/> 448 Education	<input type="checkbox"/> 510 Motions to Vacate Sentence <p>Habeas Corpus:</p> <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement			

V. ORIGIN (Place an "X" in One Box Only)

1 Original Proceeding 2 Removed from State Court 3 Remanded from Appellate Court 4 Reinstated or Reopened 5 Transferred from Another District (specify) 6 Multidistrict Litigation

VI. CAUSE OF ACTION (Enter U.S. Civil Statute under which you are filing and write a brief statement of cause)

Violation of the Telephone Consumer Protection Act, 47 U.S.C. § 227

VII. Previous Bankruptcy Matters (For nature of suit 422 and 423, enter the case number and judge for any associated bankruptcy matter previously adjudicated by a judge of this Court. Use a separate attachment if necessary)

VIII. REQUESTED IN COMPLAINT: CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. **DEMAND \$** _____ **JURY DEMAND:** Yes No

IX. RELATED CASE(S) IF ANY (See instructions). **JUDGE** _____ **DOCKET NUMBER** _____

X. This case (check one box) Is not a refiling of a previously dismissed action is a refiling of case number _____ previously dismissed by Judge _____

DATE **November 19, 2013** SIGNATURE OF ATTORNEY OF RECORD **Ari J. Scharg**

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

MICHAEL GRANT, individually and on behalf of
all others similarly situated,

Plaintiff,

v.

COMMONWEALTH EDISON COMPANY, an
Illinois Corporation,

Defendant.

Case No. 1:13-cv-8310

Honorable Gary Feinerman,
District Judge

**DEFENDANT COMMONWEALTH EDISON COMPANY'S
ANSWER AND AFFIRMATIVE DEFENSES TO PLAINTIFF'S COMPLAINT**

Defendant Commonwealth Edison Company ("ComEd"), by and through its undersigned counsel and pursuant to Federal Rule of Civil Procedure 8(b), answers the Complaint of Plaintiff Michael Grant ("Plaintiff") as follows. Any allegations that are not specifically admitted herein are denied.

NATURE OF THE ACTION

1. Defendant ComEd is the largest electric utility company in Illinois and provides electricity to nearly 4 million consumers.

ANSWER: ComEd admits the allegations contained in paragraph 1.

2. In an effort to promote its brand, Defendant ComEd sent (or directed to be sent on its behalf) unsolicited text message advertisements to Plaintiff's and the putative Class members' cell phones in violation of the Telephone Consumer Protection Act, 47 U.S.C. § 227 ("TCPA").

ANSWER: ComEd denies the allegations contained in paragraph 2.

3. Neither Plaintiff Grant, nor the other members of the Class, ever consented to have Defendant send the text messages at issue to their cell phones.

ANSWER: ComEd denies the allegations contained in paragraph 3.

4. By sending the text messages at issue, Defendant caused Plaintiff and the members of the Class actual harm, including the aggravation and nuisance that necessarily accompanies the receipt of unsolicited text messages and monies paid to their wireless carriers for the receipt of such messages.

ANSWER: ComEd denies the allegations contained in paragraph 4.

5. In response to Defendant's unlawful conduct, Plaintiff filed the instant lawsuit and seeks an injunction requiring Defendant to cease all unsolicited text message activities and an award of statutory damages to the members of the Class under the TCPA, together with costs and reasonably attorneys' fees.

ANSWER: ComEd lacks knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 5 and therefore denies the same.

PARTIES

6. Plaintiff Michael Grant is a natural person and a citizen of the State of Illinois.

ANSWER: ComEd lacks knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 6 and therefore denies the same.

7. Defendant Commonwealth Edison Company is a corporation organized and existing under the laws of the State of Illinois with its principal place of business located at 440 S. LaSalle Street, Chicago, Illinois.

ANSWER: ComEd admits the allegations contained in paragraph 7.

JURISDICTION AND VENUE

8. This Court has original jurisdiction over the claims in this action pursuant to 28 U.S.C. § 1331 because they arise under the Telephone Consumer Protection Act, 47 U.S.C. § 227, which is a federal statute.

ANSWER: Paragraph 8 contains conclusions of law to which no response is required. To the extent a response is required, the allegations set forth in Paragraph 8 are denied.

9. The Court has personal jurisdiction over Defendant and venue is proper in this District because Defendant is incorporated in the State of Illinois and headquartered in this District, Defendant transacts significant amounts of business within this District, and the conduct and events giving rise to Plaintiff's claims arose in this District. Venue is additionally proper because Plaintiff resides here.

ANSWER: ComEd admits that it is incorporated in the State of Illinois and headquartered in Chicago, IL, it transacts business within the State of Illinois, and the conduct and events giving rise to Plaintiff's claims arose in the State of Illinois. The remaining allegations in Paragraph 9 are conclusions of law to which no response is required and ComEd therefore denies the same.

COMMON FACTUAL ALLEGATIONS

10. In recent years, companies who have often felt stymied by federal laws limiting solicitation by telephone, fax machine, and e-mail have increasingly looked to alternative technologies through which to send bulk solicitations cheaply.

ANSWER: ComEd lacks knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 10 and therefore denies the same.

11. One of the most prevalent alternatives is through so-called Short Message Services. Short Message Service or “SMS” is a messaging system that allows for the transmission and receipt of short text message calls (usually no more than 160 characters) to and from cellular telephones.

ANSWER: ComEd lacks knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 11 and therefore denies the same.

12. SMS message calls are directed to a wireless device using the telephone number assigned to the device. When an SMS message call is successfully made, the recipient’s cell phone rings, alerting him or her that a call is being received. As cellular telephones are inherently mobile and are frequently carried on their owner’s person, SMS messages may be received by the called party virtually anywhere in the world.

ANSWER: ComEd lacks knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 12 and therefore denies the same.

13. According to a recent study conducted by the Pew Research Center, “Spam isn’t just for email anymore; it comes in the form of unwanted text messages of all kinds – from coupons to phishing schemes – sent directly to user’s cell phones.” In fact, “57% of adults with cell phones have received unwanted or spam text messages on their phone.” Amanda Lenhart, Cell Phones and American Adults: They Make Just as Many Calls, but Text Less than Teens, Pew Research Center (2010), <http://pewinternet.org/Reports/2010/Cell-Phones-and-American-Adults.aspx> (last visited November 18, 2013).

ANSWER: ComEd lacks knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 13 and therefore denies the same.

14. Unlike more conventional messaging systems, SMS message advertisements can actually cost their recipients money because cell phone users must pay their wireless service providers either for each text message call they receive or incur a usage allocation deduction to their text messaging plan, regardless of whether the message is authorized.

ANSWER: ComEd lacks knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 14 and therefore denies the same.

15. In or around January 2012, ComEd created the “Outage Alert” mobile messaging program.

ANSWER: ComEd denies the allegations contained in paragraph 15.

16. According to ComEd’s website, individuals who opt in to the Outage Alert program will receive text messages regarding power outages in their area.

ANSWER: ComEd admits the allegations contained in paragraph 16.

17. There are two ways to opt in to ComEd’s Outage Alert program: online or via text message.

ANSWER: ComEd admits that customers can opt in online or via text to the Outage Alert program.

18. To opt in online, individuals must navigate to www.ComEd.com/text and enroll by (1) entering either their ComEd account number, social security number, or phone number associated with their ComEd account, and (2) clicking the “Enroll” button.

ANSWER: ComEd admits that to opt in online, ComEd customers must navigate to www.ComEd.com/text and follow the directions.

19. To opt in via text message, customers must text the phrase “ADD OUTAGE” to “26633.”

ANSWER: ComEd admits the allegations contained in paragraph 19.

20. Rather than wait for individuals like Plaintiff Grant to subscribe to its Outage Alert program, ComEd unilaterally enrolled thousands of Illinois residents without their consent or permission and transmitted, or had transmitted on its behalf, the same or substantially the same text messages to them *en masse*.

ANSWER: ComEd denies the allegations contained in paragraph 20. By way of further response, ComEd customers who previously provided ComEd with their cell phone numbers as a point of contact were automatically enrolled in the Outage Alert program on September 20 and 21, 2013 and November 7 and 8, 2013.

21. For example, and notwithstanding that Plaintiff Grant never opted into the Outage Alert program (either online or via text message), he received the following text message from ComEd on his cell phone on or around November 7, 2013:

You are now subscribed to ComEd outage alerts. Up to 21 msgs/mo. Visit ComEd.com/text for details. T&C:agent511.com/tandc. STOP to unsubscribe. HELP for info.

ANSWER: ComEd admits that Plaintiff did receive the stated text message on his phone on or around November 7, 2013, but denies that it was without his consent.

22. The “from” field of the text message was identified cryptically as “26633,” which is an abbreviated telephone number known as an SMS short code.

ANSWER: ComEd lacks knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 22 and therefore denies the same.

23. However, Plaintiff Grant was never enrolled in the Outage Alert program and never consented to receive text messages sent from or on behalf of ComEd. To be clear, at no

time did Plaintiff Grant subscribe to the Outage Alert program online or send any text message to “26633” (or any other short code owned or associated with ComEd).

ANSWER: ComEd denies the allegations in Paragraph 23. By way of further response, Plaintiff consented to receive text messages on his cell phone sent from or on behalf of ComEd.

24. The text messages at issue were not sent for emergency purposes. Indeed, the text messages didn’t provide notification of an outage or emergency of any kind.

ANSWER: ComEd denies the allegations contained in paragraph 24. By way of further response, the text messages at issue were sent as part of ComEd’s Outage Alert program designed to alert customers to emergency situations.

25. Instead, the text messages at issue were sent to “maximize subscriber satisfaction.”

ANSWER: ComEd denies the allegations contained in paragraph 25.

26. Defendant sent the text messages at issue to Plaintiff and thousands of putative Class members using equipment that had the capacity to store or produce telephone numbers to be called using a random or sequential number generator, and to dial such numbers.

ANSWER: Paragraph 26 contains conclusions of law to which no response is required. To the extent a response is required, the allegations set forth in Paragraph 26 are denied.

CLASS ALLEGATIONS

27. Plaintiff brings this action pursuant to Federal Rule of Civil Procedure 23(b)(2) and 23(b)(3) on behalf of himself and a class (the “Class”) defined as follows: All individuals in the United States who received the following text message without providing their prior express consent:

You are now subscribed to ComEd outage alerts. Up to 21 msgs/mo. Visit ComEd.com/text for details. T&C:agent511.com/tandc. STOP to unsubscribe. HELP for info.

ANSWER: Paragraph 27 contains conclusions of law to which no response is required.

To the extent a response is required, the allegations set forth in Paragraph 27 are denied.

28. **Numerosity:** The exact number of Class members is unknown and not available to Plaintiff, but it is clear that individual joinder is impracticable. On information and belief, Defendant has sent text messages to tens of thousands of consumers who fall into the definition of the Class. Class members can be identified through Defendant's records.

ANSWER: Paragraph 28 contains conclusions of law to which no response is required.

To the extent a response is required, the allegations set forth in Paragraph 28 are denied.

29. **Typicality:** Plaintiff's claims are typical of the claims of other members of the Class, in that Plaintiff and the Class members sustained damages arising out of Defendant's uniform wrongful conduct and unsolicited text messages.

ANSWER: Paragraph 29 contains conclusions of law to which no response is required.

To the extent a response is required, the allegations set forth in Paragraph 29 are denied.

30. **Adequate Representation:** Plaintiff will fairly and adequately represent and protect the interests of the Class, and has retained counsel competent and experienced in complex class actions. Plaintiff has no interests antagonistic to those of the Class, and Defendant has no defenses unique to Plaintiff.

ANSWER: Paragraph 30 contains conclusions of law to which no response is required.

To the extent a response is required, the allegations set forth in Paragraph 30 are denied.

31. **Commonality and Predominance:** There are many questions of law and fact common to the claims of Plaintiff and the Class, and those questions predominate over any

questions that may affect individual members of the Class. Common questions for the Class include, but are not necessarily limited to the following:

- (a) whether Defendant's conduct constitutes a violation of the TCPA;
- (b) whether the equipment Defendant used to transmit the text messages in question was an automatic telephone dialing system as contemplated by the TCPA; and
- (c) whether Class members are entitled to treble damages based on the willfulness of Defendant's conduct.

ANSWER: Paragraph 31 contains conclusions of law to which no response is required. To the extent a response is required, the allegations set forth in Paragraph 31 are denied.

32. **Superiority:** The case is also appropriate for class certification because class proceedings are superior to all other available methods for the fair and efficient adjudication of this controversy as joinder of all parties is impracticable. The damages suffered by the individual members of the Class will likely be relatively small, especially given the burden and expense of individual prosecution of the complex litigation necessitated by Defendant's actions. Thus, it would be virtually impossible for the individual members of the Class to obtain effective relief from Defendant's misconduct. Even if members of the Class could sustain such individual litigation, it would still not be preferable to a class action, because individual litigation would increase the delay and expense to all parties due to the complex legal and factual controversies presented in this Complaint. By contrast, a class action presents far fewer management difficulties and provides the benefits of single adjudication, economy of scale, and comprehensive supervision by a single Court. Economies of time, effort and expense will be fostered and uniformity of decisions ensured.

ANSWER: Paragraph 32 contains conclusions of law to which no response is required.

To the extent a response is required, the allegations set forth in Paragraph 32 are denied.

COUNT I
Violation of the TCPA, 47 U.S.C. § 227
(On behalf of Plaintiff and the Class)

33. Plaintiff incorporates by reference the foregoing allegations as if fully set forth herein.

ANSWER: ComEd incorporates the proceeding paragraphs of this Answer as if set forth herein at length.

34. Defendant and/or its agents sent unsolicited text messages to cellular telephone numbers belonging to Plaintiff and the other members of the Class *en masse* without their prior express consent.

ANSWER: ComEd denies the allegations contained in paragraph 34.

35. Defendant sent the text messages, or had them sent on its behalf, using equipment that had the capacity to store or produce telephone numbers to be called using a random or sequential number generator, or to dial such numbers.

ANSWER: ComEd denies the allegations contained in paragraph 35.

36. Defendant utilized equipment that sent the text messages to Plaintiff and other members of the Class simultaneously and without human intervention.

ANSWER: ComEd denies the allegations contained in paragraph 36.

37. By sending the unsolicited text messages to Plaintiff and the Class, Defendant has violated 47 U.S.C. § 227(b)(1)(A)(iii). As a result of Defendant's unlawful conduct, the members of the Class suffered actual damages in the form of monies paid to receive the

unsolicited text messages on their cellular phones and under section 227(b)(3)(B) are each entitled to, inter alia, a minimum of \$500.00 in damages for each such violation of the TCPA.

ANSWER: ComEd denies the allegations contained in paragraph 37.

38. Should the Court determine that Defendant's conduct was willful and knowing, the Court may, pursuant to section 227(b)(3)(C), treble the amount of statutory damages recoverable by Plaintiff and the other members of the Class.

ANSWER: ComEd denies the allegations contained in paragraph 38.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff Michael Grant, individually and on behalf of the Class, prays for the following relief:

1. An order certifying the Class as defined above, appointing Plaintiff Michael Grant as the representative of the Class, and appointing his counsel as Class Counsel;
2. An award of actual and statutory damages;
3. An injunction requiring Defendant to cease all unsolicited text message activities, and otherwise protecting the interests of the Class;
4. An award of reasonable attorneys' fees and costs; and
5. Such other and further relief that the Court deems reasonable and just.

ANSWER: ComEd denies that Plaintiff is entitled to the relief requested in the "wherefore" clause in the "Prayer for Relief" section of the Complaint, including all subparts thereof.

AFFIRMATIVE DEFENSES

Pursuant to Federal Rule of Civil Procedure 8(c), and without assuming any burdens of proof or persuasion that would otherwise rest on Plaintiff, ComEd asserts the following

affirmative defenses to Plaintiff's claims. ComEd reserves the right to amend or supplement the following affirmative defenses, including without limitation, the right to amend as information is gathered through discovery regarding Plaintiff and/or putative Class members, and/or in the event any of the claims set forth in the Complaint are certified for class treatment.

1. The Complaint, and each cause of action and allegation therein, fail to state facts sufficient to constitute a cause of action upon which relief can be granted.

2. Plaintiff's claims, as well as those of putative Class members, are barred, in whole or in part, because they consented to any text messages on their cellular telephones.

3. Plaintiff's claims, as well as those of putative Class members, are barred, in whole or in part, because they were not charged for any text messages.

4. Plaintiff's claims, as well as those of putative Class members, are barred, in whole or in part, because the text messages were not sent using an automatic telephone dialing system.

5. Plaintiff's claims, as well as those of putative Class members, are barred in whole or in part, based on the emergency purpose exemption of the TCPA.

6. Plaintiff's claims, as well as those of putative Class members, are barred, in whole or in part, by the primary jurisdiction doctrine.

7. Plaintiff's claims, as well as those of putative Class members, are barred, in whole or in part, by the doctrine of laches and are otherwise time barred.

8. Plaintiff's claims, as well as those of putative Class members, are barred, in whole or in part, by the doctrine of release.

9. Plaintiff's claims, as well as those of putative Class members, are barred, in whole or in part, by the doctrines of estoppel and equitable estoppel.

10. Plaintiff's claims, as well as those of putative Class members, are barred, in whole or in part, by the doctrine of waiver and/or ratification.

11. Plaintiff's claims, as well as those of putative Class members, are barred, in whole or in part, for lack of standing.

12. Plaintiff's claims, as well as those of putative Class members, are barred, in whole or in part, by the doctrine of recoupment and/or set-off. ComEd is entitled to offset and recoup against any judgment that may be entered for Plaintiff and/or any member of the putative Class for all obligations owing to ComEd, including but not limited to any unpaid account balances and/or any damages incurred in connection with any termination of contracts between ComEd and Plaintiff and/or any member of the putative Class.

13. Any award to Plaintiff and/or putative Class members in this action would constitute unjust enrichment.

14. Plaintiff's claims, as well as those of putative Class members, are barred, in whole or in part, by the terms and conditions and/or limitations of liability contained in applicable agreements with ComEd or set forth in applicable tariffs.

15. Plaintiff's claims, as well as those of putative Class members, are barred, in whole or in part, because any alleged damages were not caused by ComEd but instead by intervening and superseding causes or circumstances, or by the acts or omissions of third parties for which ComEd is not responsible. To the extent Plaintiff and/or putative Class members claim they suffered any injury or damages, which ComEd denies, their claims are barred, in whole or in part, because they failed to mitigate their damages, if any.

16. Plaintiff's claims are barred, in whole or in part, because this case is not maintainable as a class action under Federal Rule of Civil Procedure 23 because the proposed

class does not satisfy the requirements described therein, including, but not limited to, class definition, ascertainability, numerosity, commonality, typicality, adequacy of representation, superiority, and manageability.

17. Plaintiff's claims are barred, in whole or in part, because Plaintiff is not a proper representative to bring this action on behalf of any proposed class.

18. Plaintiff's claims, as well as those of putative Class members, are barred, in whole or in part, because ComEd did not willfully or knowingly violate the Telephone Consumer Protection Act of 1991 or any of its regulations.

19. To the extent Plaintiff or the putative Class seek recovery of attorney's fees, such fees are not recoverable under the Telephone Consumer Protection Act of 1991.

20. Defendant expressly reserves the right to assert additional affirmative defenses or counterclaims that may come to light as the action progresses.

PRAYER FOR RELIEF

WHEREFORE, ComEd respectfully prays for judgment as follows:

1. That Plaintiff's Complaint be dismissed with prejudice and judgment entered in favor of ComEd;
2. That Plaintiff and any member of the putative class take nothing by the Complaint;
and
3. That ComEd be awarded such other and further relief as the Court deems just and proper.

Dated: June 25, 2014

/s/ Leslie D. Davis
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CERTIFICATE OF SERVICE

I, Leslie D. Davis, hereby certify that, on the date set forth above, I caused a true and correct copy of the foregoing *Answer and Affirmative Defenses* to be served via ECF filing upon the following parties and counsel of record:

Jay Edelson
Ari J. Scharg
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Chicago, IL 60654

/s/ Leslie D. Davis

ACTIVE/ 75936074.3