

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

COMMONWEALTH EDISON COMPANY :
 :
Annual formula rate update and revenue : Docket No. 16-0259
requirement reconciliation authorized by Section :
16-108.5 of the Public Utilities Act. :

Rebuttal Testimony of
ANASTASIA M. POLEK-O'BRIEN
Vice President and Deputy General Counsel
Commonwealth Edison Company

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1 **I. INTRODUCTION**

2 **A. Witness Identification**

3 **Q. What is your name and business address?**

4 A. My name is Anastasia M. Polek-O'Brien. My business address is 10 S. Dearborn Street,
5 49th Floor, Chicago, Illinois 60603.

6 **Q. What is your position?**

7 A. I am Vice President and Deputy General Counsel responsible for the regulatory legal
8 work for Commonwealth Edison Company ("ComEd").

9 **B. Summary of Rebuttal Testimony and Attachments**

10 **Q. What is the purpose of your rebuttal testimony?**

11 A. I respond to Attorney General ("AG") witness Mr. Michael L. Brosch concerning his
12 recommendation to disallow amounts associated with ComEd's settlement of *Michael*
13 *Grant v. Commonwealth Edison Co.*, Case No. 1:13-cv-08310 ("*Grant*"). *Grant* was a
14 Telephone Consumer Protection Act ("TCPA") class action lawsuit.

15 **Q. What are the attachments to your direct testimony?**

16 A. The attachments to my rebuttal testimony are:

17 (1) ComEd Exhibit ("Ex.") 11.01, ComEd's Motion to Dismiss the *Grant* case and
18 Memorandum in Support thereof.

19 (2) ComEd Ex. 11.02, Plaintiff's Response to ComEd's Motion to Dismiss the *Grant*
20 case.

21 (3) ComEd Ex. 11.03, ComEd's Reply in Support of its Motion to Dismiss the *Grant*
22 case.

23 (4) ComEd Ex. 11.04, Judge Feinerman’s June 4, 2014 Notification of Docket Entry
24 denying ComEd’s Motion to Dismiss and the transcript of the status hearing held
25 on that date.

26 **C. Qualifications and Professional Background**

27 **Q. What is your professional experience?**

28 A. I have been employed by Exelon Business Services Company (“BSC”) and ComEd since
29 2000. Prior to that, I was a partner at the law firm of Sidley & Austin in Chicago.

30 **Q. Have you had experience as a lawyer with rate cases?**

31 A. Yes. I have been involved in various capacities in every ComEd rate case at the Illinois
32 Commerce Commission (“Commission” or “ICC”) in the last 29 years. I have been
33 involved in numerous rate cases at the Federal Energy Regulatory Commission (“FERC”)
34 for ComEd and others. I have represented various other utilities and telecommunication
35 carriers in rate cases before the ICC and other state regulatory commissions. I have also
36 represented ComEd and a variety of other utilities and telecommunication carriers before
37 a wide range of trial and appellate courts as well as other federal and state regulatory
38 bodies.

39 **Q. What is your educational background?**

40 A. I received a B.A. from Roosevelt University with high honors in 1985, and a Juris Doctor
41 with high distinction from the John Marshall Law School in 1988.

42 **II. RECOVERY OF SETTLEMENT AMOUNTS IN RATE CASES IS A WELL-**
43 **ESTABLISHED AND SOUND POLICY**

44 **Q. Are you familiar with litigation settlements and business practices related to them?**

45 A. Yes.

46 **Q. Are litigation settlements an ordinary cost of doing business?**

47 A. Yes.

48 **Q. In your experience, how does the Commission treat recovery of settlement amounts**
49 **incurred by utilities?**

50 A. In my experience, litigation settlement costs are analyzed exactly the same as other utility
51 costs, *i.e.*, subject to a “prudence and reasonableness” standard. That is, the Commission
52 has allowed recovery of settlement costs as long as the underlying activity relates to
53 delivery service, the decision to settle is prudent, and the settlement amount is reasonable.

54 **Q. Doesn’t the fact that a company pays a settlement imply that it thinks it did**
55 **something wrong?**

56 A. No, absolutely not. Litigation is very expensive and time consuming. It drains resources.
57 In many cases, as here, settlement is the most expedient and economical means of
58 resolving a pending issue, even where the company thinks it acted strictly in accordance
59 with the law.

60 **Q. Does ComEd’s revenue requirement usually contain litigation-related settlements?**

61 A. Yes. Virtually every rate case ComEd files includes litigation-related settlements in the
62 revenue requirement. Indeed, there is a specific filing requirement related to these costs
63 *See, e.g.*, Part 285.150(f) (requiring a list of included settlements).

64 **III. THE EXPENSE ASSOCIATED WITH THE *GRANT* SETTLEMENT IS**
65 **RECOVERABLE**

66 **Q. What was the nature of the *Grant* lawsuit that ComEd ultimately decided to settle?**

67 A. The *Grant* case was a TCPA class action lawsuit alleging that ComEd sent impermissible
68 unsolicited text messages to customers' cell phones without their prior express consent.

69 **Q. Was the underlying activity upon which the *Grant* case was premised closely related**
70 **to the provision of delivery service?**

71 A. Yes. The underlying activity was a text message related to an outage alert messaging
72 program. The messaging program sought to improve the speed and efficiency of
73 ComEd's communications with its customers concerning power outages. This is
74 undoubtedly related to delivery service.

75 **Q. Did ComEd have valid legal defenses to the Plaintiff's claims?**

76 A. Yes. As shown in the attached Motion, there were two strong and independent bases
77 upon which ComEd planned to defend the *Grant* case: consent and emergency purpose.
78 *See e.g.* ComEd Exs. 11.01 and 11.03. In brief, with regard to the consent defense, by
79 providing their cell numbers in connection with establishing or maintaining their electric
80 service, customers consented to be contacted at that number with informational text
81 messages such as the ones at issue in the suit. The text messages at issue – which were
82 part of an outage alert program – also fall under the emergency purpose exemption of the
83 TCPA. However, despite ComEd's conviction that it had not violated the law and that
84 the *Grant* lawsuit was meritless, the manner in which the court would interpret the
85 consent argument was uncertain and no binding legal precedent addressed the emergency
86 purpose defense.

87 **Q. Does Mr. Brosch challenge whether it was prudent for ComEd to settle the potential**
88 **liability?**

89 A. No, he does not. And the prudence of a decision to settle a large claim cannot seriously
90 be questioned. This was certainly a large claim, with a range of exposure of
91 approximately \$600 million to \$1.8 billion. Although ComEd was prepared to fully and
92 vigorously defend this matter because it believed that its defenses were strong and that
93 Plaintiff's claim was flawed and ultimately meritless, proceeding to a decision or
94 judgment was not without risk. Moreover, a loss of this magnitude would have been
95 catastrophic. Faced with this legal uncertainty, it was a prudent business decision to
96 settle the *Grant* case. Indeed, literature indicates that any TCPA lawsuit is "a destructive
97 force" that can threaten a company with "annihilation" for actions that caused no real
98 harm to consumers. *See* Becca J. Wahlquist, *The Juggernaut of TCPA Litigation: The*
99 *Problems with Uncapped Statutory Damages*, U.S. CHAMBER INSTITUTE FOR LEGAL
100 REFORM (Oct. 2013) at 1.

101 **Q. Does Mr. Brosch challenge whether the amount ComEd paid in settlement was**
102 **reasonable?**

103 A. No, he does not. Nor could he reasonably do so. The aggregate statutory damages that
104 ComEd potentially faced were \$600 million with a possibility of those damages trebling
105 to \$1.8 million. A settlement of \$4.95 million – less than 1% of the potential exposure –
106 is quite small in relation to the maximum exposure and is undoubtedly reasonable in
107 amount. Moreover, TCPA cases frequently involve settlements ranging from \$6 million

108 to as much as \$47 million. *Id.* at 3. ComEd's *Grant* settlement is at the very low end of
109 this range.

110 **Q. Mr. Brosch attacks the underlying activity giving rise to the *Grant* case: the design**
111 **of ComEd's outage alert program. Is there merit to his claims?**

112 A. No. ComEd acted reasonably when it designed the outage alert program, including the
113 opt-out aspect of the program.

114 **Q. Why did ComEd implement an outage alert program?**

115 A. With the wave in recent years of extreme weather conditions across the country leading
116 to mass, prolonged power outages, ComEd sought to harness emerging communications
117 technologies and practices to improve the speed and efficiency of its communications
118 with its customers, particularly those concerning power outages. Therefore, in the fall of
119 2013, and in advance of what turned out to be an unprecedented winter storm season,
120 ComEd rolled the program out as part of its standard electric service to all of its
121 customers who provided cell phone numbers as a point of contact.

122 **Q. How did ComEd implement the outage alert program?**

123 A. ComEd sent the following text message to those customers, which provided simple
124 instructions on how to unsubscribe: "You are now subscribed to ComEd outage alerts.
125 Up to 21 msgs/mo. Visit ComEd.com/text for details. T&C:agent511.com/tandc. STOP
126 to unsubscribe. HELP for info."

127 **Q. What service did the outage alert program provide?**

128 A. The program provided an efficient two-way means of delivering emergency power-
129 outage related information. Enrolling customers in the text messaging program allowed
130 ComEd to provide customers with critical updates regarding power outages and provided
131 customers with the ability to report power outages using a distinctly efficient and
132 effective means. Indeed, federal agencies like the Federal Communications Commission
133 (“FCC”) (which administers the TCPA) and Federal Emergency Management Agency
134 (“FEMA”) encourage text messaging as a preferred method of communication in
135 emergencies. *See, e.g., FCC, Tips for Communicating in an Emergency, available at*
136 <http://www.fcc.gov/guides/tips-communicating-emergency> (“Try text messaging, also
137 known as short messaging service (SMS) when using your wireless phone. In many cases
138 text messages will go through when your call may not. It will also help free up more
139 “space” for emergency communications on the telephone network.”); FEMA, *Twitter*
140 *Post Regarding Hurricane Sandy* (Oct. 29, 2012), available at
141 <https://twitter.com/fema/status/262894013630263296> (“Phone lines may be congested
142 during/after #Sandy. Let loved ones know you’re OK by sending a text . . .”).

143 **Q. Did ComEd conduct any inquiry into whether the outage alert program, including**
144 **the opt-out feature, was consistent with Federal requirements before disseminating**
145 **the text messages?**

146 A. Yes. In conducting this inquiry, ComEd learned that the FCC plainly stated that outage-
147 related communications by power companies are “within either the broad exemption for
148 emergency calls, or the exemption for calls to which the called party has given prior
149 express consent.” *In the Matter of Rules and Regulations Implementing the Tel.*

150 *Consumer Prot. Act of 1991*, 7 FCC 8752, 8777-78 (Oct. 16, 1992). This comported with
151 ComEd’s understanding that the TCPA was designed to address telemarketing calls, not
152 informational text messages that alert customers who voluntarily provide their cell phone
153 numbers to an outage alert program, particularly when the text message provides an
154 opportunity to opt-out of the program. Indeed, it was ComEd’s understanding that
155 Congress enacted the TCPA to address telephone marketing calls and telemarketing
156 practices that were an invasion of consumer privacy and even a risk to public safety. The
157 statute therefore restricts unsolicited advertisements – messages sent for commercial
158 gain. In contrast, ComEd had no commercial motive to send text messages: ComEd sent
159 the text messages in an effort to enhance public safety during electric power outages.

160 **Q. Mr. Brosch claims that ComEd’s “unexplained decision to switch the program from**
161 **an opt-in basis to an opt-out basis imprudently risked ratepayer and shareholder**
162 **exposure under the TCPA.” Brosch Dir., AG Ex. 1.0, at 5:93-95. Is this accurate?**

163 A. No. First, Mr. Brosch is assuming that ComEd’s outage alert program violated the
164 TCPA. To be clear: ComEd maintains that its program did not violate the TCPA.
165 Because ComEd believed that it was not violating the TCPA and was in fact providing a
166 valuable service to customers, ComEd did not reasonably foresee a substantial risk of
167 TCPA litigation. Indeed, the very notion that a text alerting consenting customers to such
168 a program could be the basis for a lawsuit seeking between \$600 million and \$1.8 billion
169 in statutory damages turns the statute and its purpose upside down.

170 Second, Mr. Brosch’s suggestion is particularly misplaced here, in light of the
171 district court’s statements regarding the merits of the *Grant* case. While denying

172 ComEd’s motion to dismiss based on the pleading standard, the court stated: “That’s not
173 to say that the arguments, either or both of the arguments that Com. Ed. [*sic*] made
174 wouldn’t succeed in another setting like a motion for summary judgment or at a trial, but
175 on the pleadings, on a Rule 12(b)(6), the motion just can’t be granted. ...” ComEd
176 Ex. 11.04, Tr. at 2:15-20 (June 4, 2014). Regarding ComEd’s prior express consent
177 defense, the court went on to state:

178 Now, when we step back into reality land as opposed to 12(b)(6) land, it’s
179 probably the case that Grant gave the number to Com. Ed. [*sic*] I’m not
180 quite so sure whether Grant identified that as the number at which he
181 wished to be called. But in order to indulge – indulge those suspicions, I’d
182 have to draw inferences in favor of the defendant, and I can’t do that under
183 12(b)(6).”

184 *Id.* at 3:12-18. Regarding ComEd’s emergency purpose defense, the court further stated:

185 The message was just saying, “in the event that something like this
186 happens, Com. Ed. [*sic*] may send you – will send you a text,” hardly a
187 war crime [*sic*]. ... what the defendant argues is the message saying, “in
188 the event of an actual emergency, we’re going to text you,” was a
189 necessary and logical first step in the communication chain. Kind of
190 makes sense. I could see Com. Ed. [*sic*] possibly prevailing on that.

191 *Id.* at 4:21-5:6.

192 Third, the explanation for switching the program from an opt-in basis to an opt-
193 out basis is simple: ComEd sought to provide this cost-effective and efficient emergency
194 communication service to more customers. ComEd utilized the opt-in feature on
195 ComEd’s website during the early stages of the program, and successfully enrolled a
196 small group of customers. However, this required customers to affirmatively visit
197 ComEd’s website, and as such, many customers were unaware of this valuable safety
198 service. To make this emergency notification service available to a wide range of
199 customers, ComEd switched to an opt-out mechanism, under which all customers who

200 had provided their cell phone numbers as a point of contact would learn that the program
201 existed and could easily enjoy the benefits of the program. ComEd had reviewed the
202 applicable law and analyzed the change from opt-in to opt-out and reasonably believed
203 that the change did not pose a substantial risk of liability. Weighing the pros and cons,
204 ComEd chose the path that would allow it to reach many more customers with this
205 effective, desirable, and valuable emergency safety service.

206 **Q. Mr. Brosch claims that a disallowance “is appropriate because ComEd could and**
207 **should have designed its Outage Alert Program to [sic] in such a way as to avoid**
208 **potential litigation and liability under the TCPA.” Brosch Dir., AG Ex. 1.0, at 5:87-**
209 **89. Is his analysis correct?**

210 A. No, certainly not. Based on ComEd’s diligent inquiry and good faith understanding of
211 the law and its exemptions, ComEd acted reasonably when it implemented the outage
212 alert program and disseminated the text messages.

213 **Q. Is there any other reason why Mr. Brosch’s analysis should be rejected?**

214 A. Yes. His analysis also runs counter to the well-settled principle that evidence of remedial
215 measures that make an earlier injury or harm less likely to occur are not admissible.
216 Mr. Brosch should not be permitted to use the prospective relief measures that ComEd
217 agreed to implement in the settlement agreement to allege imprudence on the part of
218 ComEd.

219 **IV. CONCLUSION**

220 **Q. Does this complete your rebuttal testimony?**

221 A. Yes.