

**STATE OF ILLINOIS**  
**ILLINOIS COMMERCE COMMISSION**

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

**BRIEF ON EXCEPTIONS OF COMMONWEALTH EDISON COMPANY**

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Commonwealth Edison Company (“ComEd”), by its counsel, in accordance with the Rules of Practice of the Illinois Commerce Commission (the “Commission” or “ICC”) and the scheduling order of the Administrative Law Judges (“ALJs”), submits this Brief on Exceptions (“BOE”) to the ALJ’s Proposed Order (“Proposed Order” or “PO”). ComEd’s proposed Exceptions language is set forth in its separate simultaneously filed Exceptions to the Proposed Order.

**I. INTRODUCTION**

The Attorney General of the State of Illinois (“AG”) proposed a disallowance regarding ComEd’s Telephone Consumer Protection Act (“TCPA”) litigation settlement, a proposal which the Citizens Utility Board (“CUB”) first endorsed at the briefing stage. The Proposed Order adopts this proposed disallowance. In so doing, the PO ignores the established three-part test for recovery of settlement amounts – a test that ComEd fully met. In its place, the PO adopts a new, fourth requirement not recognized in the law: review of the reasonableness of the activity giving rise to the underlying lawsuit. This requires the ICC to address complicated questions of fact and law that: (1) are outside of the Commission’s expertise, and (2) were not fully developed in the trial court. This approach is not workable and is in error. The PO provides no explanation for this departure from past practice.

Even if the Commission adopts this fourth requirement, ComEd’s decision to change its outage alert program from opt-in to opt-out – the activity giving rise to the underlying lawsuit – was prudent and reasonable. In 2013, ComEd reasonably moved away from the opt-in design because it was only reaching a small subset of customers. Also at that time, ComEd reviewed, analyzed, and reasonably relied on the existing Federal Communications Commission (“FCC”) guidance on this topic. ComEd therefore reasonably and prudently decided to expand its outage alert program, based on the facts and circumstances known at the time. This satisfies the prudence and reasonableness standard applicable to this case.

The PO’s conclusion rests on its incorrect interpretation that it was imprudent and unreasonable for ComEd to rely on that FCC guidance because it was allegedly outdated. Yet the FCC recently affirmed that guidance and it remains good law. Moreover, no facts in evidence show that ComEd acted imprudently or unreasonably in relying on that FCC guidance. The PO also engages in impermissible hindsight review when it uses ComEd’s decision to settle the TCPA litigation – a decision that the AG concedes was reasonable – as evidence of ComEd’s imprudence and unreasonableness in implementing the outage alert program. As explained in more detail herein, the Commission should reject the PO’s conclusion on the TCPA settlement and instead adopt ComEd’s Exceptions provided herewith.

## **II. TELEPHONE CONSUMER PROTECTION ACT (“TCPA”) SETTLEMENT**

### **A. The Commission Should Not Depart from the Well-Established Three-Part Test for Recovery of Settlement Amounts**

The Proposed Order misinterprets both the governing law and ComEd’s position regarding the recovery of settlement amounts. The Commission has an established three-part test for recovery of settlement amounts: (1) the decision to settle must be prudent; (2) the settlement amount must be reasonable; and (3) the underlying activity must relate to delivery service.

ComEd Init. Br. at 36; Polek-O'Brien Reb., ComEd Ex. 11.0, 2:42-3:53. The PO claims that "[p]ursuant to ComEd's theory, any settlement, regardless of the underlying cause of action, would be recoverable if it was reasonable to settle the case and if the settlement amount was reasonable." PO at 38-39. That is incorrect and ignores the third prong: the underlying activity must relate to delivery service. With that necessary addition, this is not just "ComEd's theory," it is the Commission's test.

The *Michael Grant v. Commonwealth Edison Co.*, Case No. 1:13-cv-08310 ("*Grant*") settlement clearly meets this standard of recovery. It is undisputed that the decision to settle was prudent and that the settlement amount was reasonable. ComEd Init. Br. at 36-37. It is also undisputed that the messaging program sought to improve the speed and efficiency of ComEd's communications with its customers concerning power outages. *Id.* at 36; Polek-O'Brien Reb., ComEd Ex. 11.0, 4:72-73. This is undoubtedly related to delivery service. ComEd Init. Br. at 36; Polek-O'Brien Reb., ComEd Ex. 11.0, 4:69-74. This should be the end of the inquiry and the Commission should allow recovery of the full amount at issue. Instead, the PO adds a fourth prong to the test: the reasonableness of the underlying activity giving rise to the lawsuit.

The Commission may not depart "from its usual rules of decision to reach a different, unexplained result in a single case." *Commonwealth Edison Co. v. Illinois Commerce Comm'n*, 180 Ill. App. 3d 899, 908-909 (1st Dist. 1988) (internal quotation marks omitted). *See also Bus. & Prof'l People for the Pub. Interest v. Illinois Commerce Comm'n*, 136 Ill. 2d 192, 228 (1989) (same). In adding this fourth prong, the PO unlawfully departs from past Commission practice and procedure without an explanation for that departure. The PO then delves into an analysis of whether ComEd's outage alert program potentially violated the TCPA and unreasonably exposed ComEd to costly litigation. PO at 39-40.

The PO's conclusion also creates a troubling precedent for both the Commission and utilities. It effectively makes the Commission the potential arbiter of the reasonableness of utility behavior with respect to factual and legal issues that are not within the Commission's area of expertise, such as breach of contract cases, antitrust disputes, or even TCPA litigation. It also forces the Commission to render decisions on factual records that are incomplete precisely because the parties settled the underlying case. This is a slippery slope that undermines the legal system and essentially reverses the burden of proof: when a utility is a defendant and settles a case, regardless of what would have happened in a court of law, the utility must prove to the Commission that it did not engage in wrongdoing. The Commission should reject the PO's conclusion on this topic.

**B. ComEd Prudently Designed its Outage Alert Program**

Even if the Commission embarks on this departure from its prior practice and assesses whether the underlying activity was reasonable or lawful, a further inquiry shows that ComEd prudently designed and implemented its outage alert program and the Commission should reject the Proposed Order's conclusion adopting the AG's proposed disallowance.

As a preliminary matter, the legal standard for prudence and reasonableness is clearly defined by Illinois courts and the Commission as the "standard of care which a reasonable person would be expected to exercise under the circumstances encountered by utility management at the time decisions had to be made." *E.g., Illinois Power Co. v. Illinois Commerce Comm'n*, 339 Ill. App. 3d 425, 435 (5th Dist. 2003) (internal quotation marks omitted); *Illinois Commerce Comm'n v. Commonwealth Edison Co.*, ICC Docket No. 84-0395, Order (Oct. 7, 1987) at 17. "When a court considers whether a judgment was prudently made, only those facts available at the time judgment was exercised can be considered. Hindsight review is impermissible." *Illinois Power Co.*, 339 Ill. App. 3d at 428.

Moreover, “the prudence standard recognizes that reasonable persons can have honest differences of opinion without one or the other necessarily being ‘imprudent’.” *Illinois Commerce Comm’n v. Commonwealth Edison Co.*, ICC Docket No. 84-0395, at 17 (emphasis added); accord *Illinois Power Co.*, 339 Ill. App. 3d at 435; *Bus. & Prof’l People for the Pub. Interest v. Illinois Commerce Comm’n*, 279 Ill. App. 3d 824, 828 (5th Dist. 1996). To be imprudent, an action or omission must not only be shown to have been wrong, but to have been outside the realm of reasoned disagreement based on the information available at the time it was made. There is no evidence of that here.

**1. ComEd’s Analysis of and Reliance on the Applicable Law was Prudent and Reasonable**

ComEd provided extensive evidence explaining why it changed its program from opt-in to opt-out. ComEd utilized an opt-in feature on ComEd’s website during the pilot stages of the program, and successfully enrolled a small group of customers. *Polek-O’Brien Reb.*, ComEd Ex. 11.0, 9:192-196. However, this required customers to affirmatively visit ComEd’s website, and as a result, many customers never became aware of this valuable safety service. *Id.*, 9:196-198. To make this emergency notification service available to a wide range of customers, ComEd designed an opt-out mechanism, under which all customers who had provided their cell phone numbers as a point of contact would learn that the program existed and could easily enjoy the benefits of the program. *Id.*, 9:198-10:201.

Prior to implementing the program, ComEd conducted an inquiry into whether the outage alert program, including the opt-out feature, was consistent with Federal requirements. *Id.*, 7:143-146. In conducting this inquiry, ComEd learned that the FCC plainly stated that outage-related communications by power companies are “within either the broad exemption for emergency calls, or the exemption for calls to which the called party has given prior express

consent.” *In the Matter of Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 7 FCC 8752, 8777-78 (Oct. 16, 1992) (“1992 FCC Order”). Polek-O’Brien Reb., ComEd Ex. 11.0, 7:146-8:150.

ComEd reviewed the applicable law and analyzed the change from opt-in to opt-out and reasonably believed that the change did not pose a substantial risk of liability. Polek-O’Brien Reb., ComEd Ex. 11.0, 10:201-203. Weighing the pros and cons, ComEd chose the path that would allow it to reach many more customers with this effective, desirable, and valuable emergency safety service. *Id.*, 10:203-205; ComEd Init. Br. at 39. The PO disagrees with ComEd’s analysis of the TCPA generally and the 1992 FCC Order specifically, stating that ComEd’s claim is “not persuasive” because the 1992 FCC Order is neither contemporaneous with nor factually identical to ComEd’s situation. Specifically, the PO unfairly criticizes ComEd for relying “upon a 20-year-old decision” that “predated cell phones and texting.” PO at 38-39. The PO’s logic is flawed.<sup>1</sup>

In 2013, the 1992 FCC Order was the best, most relevant guidance available to ComEd. If the situation were reversed and ComEd had failed to comply with the 1992 FCC Order, it could hardly defend itself by claiming that the order was twenty years old and therefore automatically inapplicable due to the passage of time. And importantly, that order has not been overruled – to the contrary, the FCC recently confirmed its efficacy and its applicability to cell phones and text messages. *See In re Rules and Regulations Implementing the Tel. Consumer*

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<sup>1</sup> The PO also appears to disapprove of the fact that ComEd “unilaterally” decided to make the outage alert program available to all customers “as part of its standard electric service on an ‘opt-out’ basis in the fall of 2013.” PO at 38. The Commission, however, does not encourage ComEd to seek pre-approval of every operations change. Thus, most operations decisions are “unilateral.” Likewise, it is unclear, and unexplained, why the PO disapproves of ComEd expanding its customer service offerings as part of its standard electric service at no additional charge and without further action on the part of customers.

*Prot. Act of 1991*, CG Docket No. 02-0278, Declaratory Ruling (Aug. 4, 2016) (“2016 FCC Order”). This is the same conclusion that ComEd reached in 2013.

Indeed, the 2016 FCC Order specifically states: “We emphasize that our clarification in no way alters the Commission’s prior statements regarding how the TCPA’s ‘emergency purpose’ exception applies to calls made by utility companies.” 2016 FCC Order at 13, ¶ 27.

The 2016 FCC Order then specifically cites to the 1992 FCC Order, stating:

*we clarify that consumers who provide their wireless telephone number to a utility company when they initially sign up to receive utility service, subsequently supply the wireless telephone number, or later update their contact information, have given prior express consent to be contacted by their utility company at that number with messages that are closely related to the utility service so long as the consumer has not provided “instructions to the contrary.”*

2016 FCC Order at 13, ¶ 29 (citing 1992 FCC Order at 8769, ¶ 31) (emphasis added). Clearly the 1992 FCC Order is still good law that was applicable in 2013 and remains applicable today.

The PO does not address the fact that the 2016 FCC Order affirms the 1992 FCC Order. PO at 39. Instead, the PO incorrectly claims that the 2016 FCC Order supports only the AG’s position because ComEd’s outage alert program allegedly did not meet the 2016 FCC Order’s “clear instructions” for obtaining customers’ prior express consent. *Id.* To the contrary, the FCC’s actual and clear instructions are quoted above: utility customers who “provide their wireless telephone number ... have given prior express consent.” 2016 FCC Order at 13, ¶ 29.

The PO (and the AG) actually incorrectly focus on recommended “additional safeguards.” 2016 FCC Order at 14, ¶ 31. Those additional safeguards were, however, enumerated for the first time in the 2016 FCC Order. 2016 FCC Order at 14, ¶ 31. They were not contained in the 1992 FCC Order on this topic that was available to ComEd in 2013. Obviously it would have been impossible for ComEd to incorporate those forward-looking 2016 additional safeguards when it implemented its revised outage alert program in 2013. And even

without those additional safeguards, ComEd did in fact obtain prior express consent pursuant to the 2016 FCC Order. 2016 FCC Order at 13, ¶ 29.

Moreover, taking the PO's own logic to its conclusion, if the 1992 FCC Order does not apply to ComEd's outage alert program because it pre-dated cell phones and texting, then the TCPA itself – adopted in 1991 – would not apply to ComEd's outage alert program because the TCPA predates the 1992 FCC Order as well as cell phones and texting.<sup>2</sup> By extension, the Commission would necessarily conclude that ComEd's actions in designing and implementing the outage alert program could not possibly have created an unreasonable risk of TCPA litigation. Of course, ComEd has not taken the position that the TCPA is inapplicable to the outage alert program. ComEd's point is that if the AG can use the 1991 TCPA to attack the outage alert program, certainly ComEd can use the 1992 FCC Order to defend the outage alert program. The PO cannot have it both ways: either both the 1991 TCPA and the 1992 FCC Order reasonably apply to ComEd's outage alert program, or neither of them reasonably apply to ComEd's outage alert program.

## **2. No Facts in Evidence Support the PO's Disallowance**

Even if the PO's analysis of the impact of the 1992 FCC Order and the 2016 FCC Order were correct – and it is not – the PO's finding of imprudence and unreasonableness must be based on some facts in evidence. *Bus. & Prof'l People for the Pub. Interest*, 136 Ill. 2d 192 at 217-218. When the Commission fails to “cite the testimony of any witness to support its finding,” it fails “to support its decision with any credible evidence ... .” *Id.* at 223 (Commission's reliance on circumstances of settlement between certain parties and the Commission's “own discretion” was not sufficient to support decision absent citation to

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<sup>2</sup> The TCPA has been amended since 1991, although the language as amended still does not specifically mention text messages. *See* 47 U.S.C. § 227.

testimony of any witness). In addition, “any finding, decision or order made by the Commission shall be based exclusively on the record for decision in the case, which shall include only the transcript of testimony and exhibits together with all papers and requests filed in the proceeding ... .” 220 ILCS 5/10-103.

No witness testified that ComEd’s reliance on the 1992 FCC Order was imprudent or unreasonable. *See generally* Brosch Dir., AG Ex. 1.0, Brosch Reb., AG Ex. 3.0. Indeed, while ComEd submitted evidence proving that its actions in 2013 were prudent and reasonable at that time, the PO does not point to a single fact in evidence showing that ComEd’s actions in 2013 were imprudent or unreasonable at that time.

The only facts recited in the PO purportedly in support of the TCPA disallowance are not actually in evidence. First, the PO states that the text message “would cause cell phone users to either pay their wireless service providers for each text message call they receive or incur a usage allocation deduction to their text messaging plan.” PO at 39. This fact is not in evidence – its truth or falsity cannot be verified – and it cannot be the basis of a disallowance. 220 ILCS 5/10-103. Moreover, this fact is not relevant to whether ComEd’s adoption of the outage alert program in reliance on the TCPA and the 1992 FCC Order was prudent and reasonable.

Similarly, the PO appears to adopt the AG’s suggestion that ComEd affirmatively misrepresented whether its program was opt-in or opt-out. *See* AG Init. Br. at 27, 30. The significance of the AG’s point, even if it were true, is unclear. The PO apparently believes it shows that ComEd’s customers did not provide consent to receive text messages. PO at 39. To be clear: the AG’s allegation is not true and the PO’s conclusion is mistaken. There is no evidence in the record that ComEd made any affirmative statements to customers regarding the opt-in status of the outage alert program. ComEd Reply Br. at 15. This assumed fact that is not

in evidence also cannot be the basis of a disallowance. 220 ILCS 5/10-103. Moreover, this fact is also not relevant to whether ComEd's adoption of the outage alert program in reliance on the TCPA and the 1992 FCC Order was prudent and reasonable.

**3. The PO Conflates the Prudence and Reasonableness of ComEd's Decision to Expand the Outage Alert Program in 2013 with ComEd's Decision to Settle *Grant* in 2015**

The PO impermissibly uses ComEd's reasonable apprehension about the outcome of the *Grant* litigation in 2015 (based on the inherent uncertainty and potential financial exposure involved in litigation in general and the facts of that case in particular) as evidence that ComEd's actions that gave rise to the lawsuit were imprudent and unreasonable in 2013. *See* PO at 38-39. This is contrary to the prudence and reasonableness standard, which prohibits this type of hindsight review. *See supra*, at 4-5. The mere fact that Mr. Grant sued ComEd – and that ComEd in turn settled the case – does not indicate that ComEd did something wrong. Indeed, by using the rationale ComEd applied in support of a decision to settle against ComEd in order to support a regulatory disallowance, the PO establishes a rule that will tend to discourage settlements. This contravenes the strong and long-standing public policy favoring and encouraging settlements. *See* ComEd Init. Br. at 35-36.

**II. TECHNICAL CORRECTION TO APPENDICES**

In reviewing the Appendices to the PO, both ComEd and Staff discovered an error related to the PO's cash working capital adjustment. Specifically, in both Appendices A and B, the PO's \$238,000 cash working capital adjustment is brought forward as a decrease to ComEd's rate base when it should be an increase. ComEd understands that Staff will submit revised Appendices with its BOE that correct this error.

### III. CONCLUSION

Based on the law, the record, and the arguments made herein, the Commission should issue a final Order consistent with ComEd's Brief on Exceptions and its separate Exceptions to the Proposed Order, approve ComEd's proposed 2017 Rate Year Net Revenue Requirement, and authorize and direct ComEd to make a compliance filing implementing the resulting rates and charges.

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Respectfully submitted,  
COMMONWEALTH EDISON COMPANY

By: /s/ Ronit C. Barrett  
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