

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.	:	

**COMMONWEALTH EDISON COMPANY'S
EXCEPTIONS TO THE PROPOSED ORDER**

October 28, 2016

C. Contested Issue

1. Telephone Consumer Protection Act (“TCPA”) Settlement

a) ComEd’s Position

ComEd contests AG witness Brosch’s recommendation disallowing \$2,281,456 associated with ComEd’s settlement of *Michael Grant v. Commonwealth Edison Co.*, Case No. 1:13-cv-08310 (“*Grant*”). AG Ex. 1.0 at 2-3, 6. *Grant* was a TCPA class action lawsuit alleging that ComEd, through its outage alert program, sent unsolicited text messages to customers’ cell phones without those customers’ prior express consent. ComEd Ex. 11.0 at 4; ComEd Init. Br. at 33-34.

ComEd contends that the recommended disallowance is based on Mr. Brosch’s after-the-fact opinion that “ComEd could and should have designed its Outage Alert Program to [sic] in such a way as to avoid *potential* litigation and liability under the TCPA.” AG Ex. 1.0 at 5 (emphasis added). ComEd clarifies that Mr. Brosch does not claim that ComEd acted imprudently or unreasonably in settling the *Grant* case. AG Ex. 1.0 at 5. Indeed, as ComEd argues and explains further below, the undisputed evidence shows that ComEd’s decision to settle the case was prudent and the amount for which ComEd settled the case was reasonable. ComEd Ex. 11.0 at 5-6; ComEd Init. Br. at 34.

Likewise, ComEd further clarifies, Mr. Brosch does not claim that ComEd’s outage alert program actually violated the TCPA. See generally AG Ex. 1.0. To the contrary, as ComEd also explains below, the undisputed evidence shows that ComEd’s outage alert program complied with the rules and regulations promulgated by the Federal Communications Commission (“FCC”), the federal administrative agency charged with administrative oversight and interpretation of the TCPA and authorized to make rules and to render decisions interpreting and applying the TCPA. See generally *In the Matter of Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 7 FCC 8752, (Oct. 16, 1992) (“1992 FCC Order”); *In re Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991*, CG Docket No. 02-0278, Declaratory Ruling (Aug. 4, 2016) (“2016 FCC Order”). ComEd Init. Br. at 34.

ComEd states that Mr. Brosch does not even opine that based on circumstances known or knowable at the time ComEd designed the outage alert program, if ComEd had incorporated certain features or designed the program in a certain way, ComEd would have avoided litigation similar to *Grant*. ComEd further states that even had he so opined – and he did not – there is nothing in his training or experience that remotely qualifies him to express that opinion. See AG Ex. 1.0 at 2-3. In short, ComEd argues, Mr. Brosch offers nothing in the way of facts or evidence showing imprudent design or implementation at the time ComEd rolled out the program. According to ComEd, he brings to bear no knowledge or expertise regarding the state of the art of utility outage alert programs in 2013. ComEd Init. Br. at 34-35.

ComEd states that what Mr. Brosch does claim is that based on present knowledge, ComEd should have known that someone would eventually file a claim that would incorrectly but artfully allege that ComEd’s outage alert program violated the TCPA. See AG Ex. 1.0 at 5. ComEd further states that Mr. Brosch asks the Commission to substitute his view – an impermissible hindsight review – that ComEd’s program should

have been “designed” to avoid “potential litigation and liability under the TCPA” for the relevant historical view of the FCC that programs like ComEd’s were appropriate. Compare AG Ex. 1.0 at 5 with *In the Matter of Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 7 FCC 8752, (Oct. 16, 1992) (“1992 FCC Order”); *In re Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991*, CG Docket No. 02-0278, Declaratory Ruling (Aug. 4, 2016) (“and 2016 FCC Order”). According to ComEd, the Commission should reject Mr. Brosch’s theory. ComEd Init. Br. at 35.

i) The Grant Settlement

ComEd notes that the Commission has long encouraged settlements and allows recovery of prudent and reasonable settlement amounts included in a utility’s revenue requirement. See, e.g., Nat’l Cas. Co. v. White Mountain Reinsurance Co. of Am., 735 F.3d 549, 556 (7th Cir. 2013) (American legal system favors the compromise and settlement of disputes); Advanced Bodycare Sols., LLC v. Thione Int’l, Inc., 524 F.3d 1235, 1241 (11th Cir. 2008) (adjudicatory bodies are often empowered to encourage settlements, thereby discouraging litigation and its associated expense); ComEd Ex. 11.0 at 2-3. To do otherwise would discourage settlements as non-recoverable and encourage litigation expenses that are recoverable. According to ComEd, virtually every rate case ComEd files includes litigation-related settlements in the revenue requirement. *Id.* ComEd Init. Br. at 35-36.

Therefore, the Commission analyzes litigation settlement costs exactly the same as other utility costs, i.e., subject to a prudence and reasonableness standard: actual prudent and reasonable costs of providing delivery service are recoverable through a utility’s formula rate. 220 ILCS 5/16-108.5(c)(1). See also 220 ILCS 5/1-102 (a)(iv) (applying same standard to traditional rate cases). ComEd asserts that the Commission allows recovery of settlement costs as long as the underlying activity relates to delivery service, the decision to settle is prudent, and the settlement amount is reasonable. ComEd Ex. 11.0 at 2-3; ComEd Init. Br. at 36. ComEd argues that the *Grant* settlement clearly meets these standards of recovery.

First, as ComEd states, the messaging program sought to improve the speed and efficiency of ComEd’s communications with its customers concerning power outages. ComEd Ex. 11.0 at 4. According to ComEd, this is undoubtedly related to delivery service. *Id.* Mr. Brosch does not contend otherwise. See generally AG Ex. 1.0; ComEd Init. Br. at 36.

Second, Mr. Brosch does not challenge whether it was prudent for ComEd to settle the potential liability. AG Ex. 1.0 at 5. Again, ComEd argues that the evidence affirmatively shows the decision to settle was prudent. This was a large claim, with a range of exposure of approximately \$600 million to \$1.8 billion. ComEd Ex. 11.0 at 5. ComEd states that although it was prepared to fully and vigorously defend this matter because it believed that it had two defenses that were strong and that Plaintiff’s claim was flawed, proceeding to a decision or judgment was not without risk. *Id.* Despite ComEd’s conviction that it had not violated the law, the manner in which the court would interpret ComEd’s first defense, ComEd states, was uncertain and no binding legal precedent

addressed ComEd's second defense. Moreover, according to ComEd, a loss of this magnitude would have been catastrophic. *Id.* Therefore, faced with this legal uncertainty, ComEd argues that it was a prudent business decision to settle the *Grant* case. *Id.* Indeed, ComEd explains that literature indicates that any TCPA lawsuit is "a destructive force" that can threaten a company with "annihilation" for actions that caused no real harm to consumers. See Becca J. Wahlquist, *The Juggernaut of TCPA Litigation: The Problems with Uncapped Statutory Damages*, U.S. CHAMBER INSTITUTE FOR LEGAL REFORM (Oct. 2013) at 1; ComEd Ex. 11.0 at 5. ComEd Init. Br. at 36-37.

Third, as also stated above, ComEd states that the settlement amount was reasonable. And again, ComEd argues that Mr. Brosch does not challenge this, nor could he. AG Ex. 1.0 at 5. ComEd notes that a settlement of \$4.95 million – less than 1% of the potential exposure – is quite small in relation to the maximum exposure and is undoubtedly reasonable in amount. ComEd Ex. 11.0 at 5. Moreover, ComEd finds it noteworthy that TCPA cases frequently involve settlements ranging from \$6 million to as much as \$47 million. *The Juggernaut of TCPA Litigation* at 3. ComEd's *Grant* settlement is at the very low end of this range. ComEd Ex. 11.0 at 5-6. ComEd Init. Br. at 37.

According to ComEd, this should be the end of the inquiry and the Commission should allow recovery of the full amount at issue. Mr. Brosch, however, argues that the Commission should continue its review and analyze the design of ComEd's outage alert program. While ComEd disagrees as to whether this is necessary or appropriate, as explained below, ComEd contends that a further inquiry shows that ComEd prudently designed its outage alert program and that the Commission should reject Mr. Brosch's proposed disallowance. ComEd Init. Br. at 37.

ii) Outage Alert Program Design

ComEd states that Mr. Brosch presumes that the mere fact that Mr. Grant sued ComEd – and that ComEd in turn settled the case – indicates that ComEd did something wrong. ComEd argues that is an invalid after-the-fact inference and a factually incorrect conclusion. According to ComEd, it acted reasonably when it designed the outage alert program, including the opt-out aspect of the program. ComEd Ex. 11.0 at 6. Mr. Brosch does not suggest an alternative program design that – based on the facts and evidence known in 2013 – would have avoided similar litigation. ComEd contends that his analysis is nothing more than an impermissible hindsight review and that even had he so opined, nothing in his training or experience remotely qualifies him to express that opinion. ComEd Init. Br. at 38.

ComEd explains that with the wave in recent years of extreme weather conditions across the country leading to mass, prolonged power outages, ComEd sought to harness emerging communications technologies and practices to improve the speed and efficiency of its communications with its customers, particularly those concerning power outages. ComEd Ex. 11.0 at 6. ComEd explains that the program provided an efficient two-way means of delivering emergency power-outage related information. ComEd Ex. 11.0-*Id.* at 6-7. Enrolling customers in the text messaging program allowed ComEd to provide customers with critical updates regarding power outages and with the ability to

report power outages using a distinctly efficient and effective means. *Id.* at 7; ComEd Init. Br. at 38.

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 for disseminating text messages. ComEd Ex. 11.0 at 7. ComEd explains that 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.” 1992 FCC Order at 8777-78. This comported with ComEd’s understanding that the TCPA was designed to address telemarketing calls, not informational text messages that alert customers to an outage alert program, particularly when the customers voluntarily provide their cell phone numbers and the text message provides an opportunity to opt-out of the program. ComEd Ex. 11.0 at 8. The statute therefore restricts unsolicited advertisements – messages sent for commercial gain. In contrast, as ComEd states, ComEd had no commercial motive to send text messages. ComEd sent the text messages in an effort to enhance public safety during electric power outages. *Id.*; ComEd Init. Br. at 38-39.

ComEd states that it utilized an opt-in feature on ComEd’s website during the pilot stages of the program, and successfully enrolled a small group of customers. ComEd Ex. 11.0 at 9. 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.* To make this emergency notification service available to a wide range of customers, ComEd switched to 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.* at 9-10. ComEd states that it had 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. *Id.* at 10. 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.* ComEd Init. Br. at 39.

In the fall of 2013, ComEd explains that as a result, in the fall of 2013, and in advance of what turned out to be an unprecedented winter storm season, ComEd rolled the program out as part of its standard electric service to all of its customers who provided cell phone numbers as a point of contact. ComEd Ex. 11.0 at 6. ComEd implemented the program by sending the following text message to those customers, which provided simple instructions on how to unsubscribe: “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.” *Id.* ComEd argues that based on its diligent inquiry and good faith understanding of the law and its exemptions, ComEd acted reasonably when it implemented the outage alert program and disseminated the text messages. ComEd Init. Br. at 39-40.

According to ComEd, the FCC further validated ComEd’s design and implementation of the program earlier this summer, when the FCC issued a ruling restating and clarifying that programs like ComEd’s outage alert program are in fact lawful and desirable. In the 2016 FCC Order, the FCC stated:

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). ComEd Init. Br. at 40.

ComEd notes that the FCC went on to state that the types of communications that were the subject of the *Grant* case are “critical to providing safe, efficient and reliable service” and that “customers would welcome” these types of communications. 2016 FCC Order at 14, ¶ 30. ComEd further explains that the FCC went on to note that “low-income households -- especially those in urban and minority communities more reliant upon wireless phones as their primary source of communications -- are particularly vulnerable to service interruptions, making it even more imperative that they receive appropriate notice, especially before, during and after emergency situations.” *Id.* (emphasis added). ComEd Init. Br. at 40.

ComEd contends that as shown in both the 1992 FCC Order and the 2016 FCC Order, as well as in the motion to dismiss the *Grant* case attached to Ms. Polek-O’Brien’s testimony, two strong and independent bases supported the design of the program: consent and emergency purpose. *See generally* 1992 FCC Order; 2016 FCC Order; ComEd Exs. 11.01 and 11.03. ComEd argues, with regard to the consent defense, by providing their cell numbers in connection with establishing or maintaining their electric service, customers consented to be contacted at that number with informational text messages such as the ones at issue in the suit. The text messages at issue – which were part of an outage alert program – also fall under the emergency purpose exemption of the TCPA. Thus, ComEd posits that it acted reasonably when it designed and implemented the program. ComEd Init. Br. at 41.

Mr. Brosch, however, asks the Commission to substitute his contention that ComEd’s program should have been “designed” to avoid what, in his view, was “potential litigation and liability under the TCPA” for the view clearly articulated by the FCC that the program was appropriate – the view that ComEd relied on in designing and implementing its outage alert program. Compare AG Ex. 1.0 at 5 with 1992 FCC Order; 2016 FCC Order. ComEd argues that Mr. Brosch offers no evidence in support of his proposed disallowance. According to ComEd, there is nothing in the record indicating that he performed any kind of comparison or analysis of outage alert programs designed circa 2013. ComEd argues that it is one thing to state that given the facts known at the time, and the behavior of other similarly situated companies, ComEd acted imprudently. It is quite another to state that given the facts that we know now, ComEd should have made a different choice. ComEd notes that Mr. Brosch does the latter, claiming that despite ComEd’s reasonable and diligent actions, ComEd should have known that Mr. Grant would institute his class action lawsuit against ComEd and that ComEd should have incorporated the “prospective relief” that ComEd included in the settlement agreement in its initial design of the outage alert program. AG Ex. 1.0 at 5; ComEd Init. Br. at 41-42.

ComEd claims that Mr. Brosch's contention is unlawful. As ComEd notes, states that the Commission is not permitted to engage in this type of hindsight review. *Illinois Power Co.*, 339 Ill.App.3d 425, 428. "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." *Id.* And, ComEd states, "The prudence standard recognizes that reasonable persons can have honest differences of opinion without one or the other necessarily being 'imprudent.'" *Id.* at 435 (citation omitted). At a minimum, ComEd argues, Mr. Brosch's views do not supplant those of the FCC. ComEd Init. Br. at 42.

ComEd contends that Mr. Brosch's argument also runs counter to the well-settled principle in the context of cases alleging negligence that evidence of remedial measures that make an earlier injury or harm less likely to occur are not admissible to show a prior failure of due care. See, e.g., Fed. R. Evid. 407 ("When measures are taken that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove ... negligence."); *Schaffner v. Chicago & N.W. Transp. Co.*, 541 N.E.2d 643, 647-48 (Ill. 1989). ("The rationale for this long-standing rule is twofold: correction of unsafe conditions should not be deterred by the possibility that such an act will constitute an admission of negligence, and, more fundamentally, a post-occurrence change is insufficiently probative of prior negligence, because later carefulness does not necessarily imply prior neglect.") (internal citations and quotation marks omitted). ComEd argues that Mr. Brosch should not be permitted to use vague references to changes that ComEd subsequently implemented to prove prior imprudence on the part of ComEd. AG Ex. 1.0 at 5. ComEd further argues that it should be permitted to continually update the services it provides to customers without fear that the AG will claim that the prior service was imprudently designed. ComEd Init. Br. at 42-43.

Moreover as ComEd states, in support of his proposed disallowance, Mr. Brosch relies on his "prior experience with the regulation of public utilities over the past 38 years, including significant experience with alternative forms of regulation for energy utilities in Illinois and other states." AG Ex. 1.0 at 2-3. ComEd notes that his experience has nothing to do with the design of an effective outage alert program. According to ComEd, Mr. Brosch is simply not qualified to testify as an expert witness on the prudence and reasonableness of an outage alert program designed in 2013. ComEd argues that the Commission should reject Mr. Brosch's proposed disallowance in its entirety. ComEd Init. Br. at 43.

In reply, ComEd argues that the AG's and CUB's Initial Briefs show in sharp relief that the AG and CUB offer nothing more than an impermissible hindsight analysis and a misinterpretation of both the substance and the impact of the Federal Communications Commission ("FCC") orders at issue. ComEd Reply Br. at 12-13.

First, ComEd states that the AG misunderstands the import of the FCC's recent decision. See 2016 FCC Order. The AG argues that ComEd engages in impermissible hindsight review in citing the 2016 FCC Order because it "was issued more than three years after ComEd altered its opt-in program, and has no retroactive application." AG Init. Br. at 29. But, as ComEd clarifies, the portion of the 2016 FCC Order that ComEd cites is simply a clarification of the pre-existing FCC position on this issue. See 1992

FCC Order. ComEd explains that it is that pre-existing position as expressed in the 1992 FCC Order that ComEd relied on in designing its outage alert program. ComEd Ex. 11.0 at 7-8; ComEd Init. Br. at 34-35, 38-43. ComEd Reply Br. at 13.

ComEd then explains that the 2016 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 (emphasis added). The 2016 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). As ComEd argues, it is clear that ComEd cited to the 2016 FCC Order only to show that what ComEd understood the FCC’s position to be – as stated in 1992 and relied on by ComEd in designing its outage alert program in 2013 – was in fact the FCC’s position. According to ComEd, this is not a hindsight application. ComEd Reply Br. at 13.

Second, the AG then does precisely what it complains ComEd is doing: it attempts to apply a prospective portion of the 2016 FCC Order retrospectively. ComEd explains that the AG characterizes this prospective FCC guidance as “clarifying” when in fact that part of the guidance discusses completely new findings. ComEd contends that in contrast to when the FCC used the word “clarify” or “clarification” in the portion of the 2016 FCC Order that ComEd has cited, the portion of the 2016 FCC Order the AG cites uses the prospective words: “we conclude that the utility company should be responsible ... the utility company will bear the burden ... we strongly encourage ... [t]his additional safeguard” 2016 FCC Order at 14, ¶ 31; AG Init. Br. at 29-30. ComEd posits that these are forward looking additional safeguards that do not in any way reflect the FCC’s position in 1992 or even in 2013. ComEd also argues that they are also clearly suggestions as opposed to mandates or binding interpretations. ComEd Reply Br. at 14.

Third, ComEd states that the AG misapplies the October 2013 article that ComEd cites regarding the destructive force of TCPA litigation. See AG Init. Br. at 27. As Ms. Polek-O’Brien testified, ComEd relied on that article only when deciding whether to settle the TCPA claim in 2015. ComEd Ex. 11.0 at 5. In any event, ComEd explains that the evidence shows that ComEd could not have been aware of that October 2013 article when it designed and approved its program because ComEd was already implementing its outage alert program with the opt-out feature in September 2013, prior to the October 2013 article’s publication. AG Ex. 1.4 at 2016FRU 001477, ComEd’s Answer and Affirmative Defenses to PI’s Compl. at ¶ 20 (“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.”). There is no evidence that ComEd immediately became aware of the article and its contents once it was published. ComEd argues that the AG’s attempt to institute hindsight review is unavailing. ComEd Reply Br. at 14-15.

Fourth, ComEd contends that the AG obfuscates the facts by insinuating – without citation – that ComEd affirmatively misrepresented whether its program was opt-in or opt-out. See AG Init. Br. at 27, 30. According to ComEd, the significance of the AG’s point, even if it were true, is unclear. ComEd argues that the AG makes no showing that this is in any way related to the prudence or reasonableness of ComEd’s design and implementation of the program. Moreover, according to ComEd, the AG’s point is not true. ComEd states that there is no evidence in the record that it made any affirmative statements to customers regarding the opt-in status of the outage alert program. It is likely that customers who visited ComEd’s website when the program was opt-in would have seen that at that time, it was opt-in. AG Ex. 1.3 at 2016FRU 0003343; ComEd Ex. 11.0 at 9. ComEd further states that when it switched to an opt-out mechanism, there is no doubt that it correctly informed customers who received texts that the program was opt-out. ComEd Init. Br. at 39-40; ComEd Ex. 11.0 at 6. According to ComEd, it never misrepresented the status of its program. ComEd Reply Br. at 15.

Fifth, ComEd argues that the AG attempts to make something out of the fact that the program is presently opt-in “notwithstanding the FCC’s decision.” AG Init. Br. at 30. ComEd freely admitted that it had not changed the opt-in status of its program in the 14 days between when the FCC issued the 2016 FCC Order and when ComEd responded to the AG’s data request on this topic. 2016 FCC Order (Released August 4, 2016); AG Cross Exs. 5 and 6 (Data Request Response served August 17, 2016). According to ComEd, however, this is not relevant to anything and it is certainly not evidence of imprudence or unreasonableness in ComEd’s original design and implementation of its outage alert program in 2013. ComEd Reply Br. at 15.

Sixth, ComEd states that CUB also misinterprets the 2016 FCC Order. CUB states that the 2016 FCC Order “relates to the ‘emergency purpose’ exception of the TCPA.” CUB Init. Br. at 3. CUB further states: “‘That Order relates to school systems that make automated calls and send automated text messages for an emergency purpose,’ and finds such messages are outside the requirements of the TCPA.” *Id.* ComEd explains that is true of the first eleven pages of the 2016 FCC Order. Those pages contain the findings related to school systems and the emergency purpose defense. ComEd Reply Br. at 16.

With regard to the portion of the 2016 FCC Order related to utilities – the portion that ComEd draws the Commission’s attention to – ComEd argues that CUB could not be further from the truth. Beginning on page 12, the 2016 FCC Order specifically states:

Because we grant in part the Edison Petition as modified on other grounds, we do not reach the question of whether the communications sent by utility companies to their customers would fall within the TCPA’s “emergency-purpose” exception, which Edison has requested that we forego, and, as requested, do not rule at this time on the other remaining calls.

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 12-13 (footnotes omitted). As ComEd explains, the 2016 FCC Order goes on to clarify that calls from utilities that are closely related to utility service have been and remain within the prior express consent exception to the TCPA. 2016 FCC Order at 12-14. As ComEd also explains at length, that exception is separate and distinct from the emergency purpose exception and provides a complete defense to a TCPA action. ComEd Init. Br. at 38-39, 40; ComEd Reply Br. at 16.

Seventh, ComEd argues that despite not filing any testimony or issuing any data requests in this proceeding, CUB mirrors the AG and attempts to improperly use the changes ComEd prospectively agreed to make in the 2015 *Grant* settlement to infer that ComEd imprudently designed the outage alert program in 2013. CUB Init. Br. at 4; AG Ex. 1.4 at 2016FRU 0001502, ¶ 2.2. As ComEd explains in its Initial Brief, this is contrary to the well-settled rule against using prospective relief measures to argue initial imprudence. ComEd Init. Br. at 42-43. Moreover, ComEd argues that there is no evidence that those prospective measures would have made the *Grant* lawsuit less likely. There is however, as ComEd claims, much evidence that ComEd's program was already TCPA compliant, even without those prospective relief measures. See, e.g., 2016 FCC Order; 1992 FCC Order; ComEd Ex. 11.0 at 4-10; ComEd Init. Br. at 38-43; ComEd Reply Br. at 16-17.

In conclusion, ComEd argues that the AG's and CUB's proposed disallowance is ill-founded; there are no legal or evidentiary bases that support their position. For all of those reasons, ComEd argues that the Commission should reject the AG's and CUB's proposed disallowance.

* * *

d) Commission Analysis and Conclusion

The Commission agrees with ComEd and declines to adopt the AG's proposed disallowance, adopted by CUB, associated with ComEd's settlement of the *Grant* TCPA class action. The Commission finds that: (1) the underlying activity relates to delivery service; (2) the decision to settle was prudent; and (3) the settlement amount was reasonable. First, the evidence shows that the outage alert program sought to improve the speed and efficiency of ComEd's communications with its customers concerning power outages. This is undoubtedly related to delivery service. Second, faced with the legal uncertainty surrounding TCPA litigation and the magnitude of the potential liability, it was a prudent business decision to settle the *Grant* case. Third, a settlement of \$4.95 million – less than 1% of the potential exposure – is quite small in relation to the maximum exposure and is undoubtedly reasonable in amount. The Commission finds that it is not necessary to analyze the underlying activity – the outage alert program – further.

Nonetheless, the Commission finds that a further inquiry shows that ComEd prudently designed its outage alert program. ComEd conducted an inquiry into whether the outage alert program, including the opt-out feature, was consistent with Federal requirements. ComEd reasonably relied on FCC statements 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.” 1992 FCC Order at 8777-78. The Commission also finds that the FCC affirmed its prior position earlier this summer, when the FCC issued a ruling restating and clarifying that its position has been and continues to be that programs like ComEd’s outage alert program are in fact lawful and desirable. 2016 FCC Order at 13, ¶ 29 (citing 1992 FCC Order). Moreover, the Commission agrees with the FCC that embracing emerging technologies like outage alert text messaging programs provides a valuable and worthwhile service to utility customers.

In contrast to the fulsome and persuasive evidence concerning the circumstances in 2013 that ComEd provided, the AG did not provide any evidence of the state of the art of utility outage alert programs in 2013. And the AG does not suggest an alternative program design that – based on the facts and evidence known in 2013 – would have avoided similar litigation. The AG and CUB appear to argue that the mere fact that Mr. Grant sued ComEd proves that ComEd imprudently designed its outage alert program. The Commission finds that this is an impermissible hindsight review, which the Commission must reject.

~~In 2015 ComEd recorded expenses in connection with the settlement of a lawsuit alleging the Company violated provisions of the TCPA. ComEd and the plaintiff agreed in principle to settlement of the suit for approximately \$5 million, with payments to the class commencing in the fourth quarter 2015.” AG Ex. 1.0 at 3. In addition to the 2015 expenses, a prior-year provision for \$2.5 million of anticipated claims cost plus \$0.7 million of litigation expenses were recorded as expense in 2014. Because no party challenged recovery of those costs in that docket, these expenses have already flowed into formula rates in the filing submitted by the Company last year.—~~

~~—The AG and CUB urge the Commission to reduce ComEd’s expenses by removing expenses incurred in connection with this lawsuit. ComEd asserts that while it did not violate the TCPA, it incurred costs to settle the lawsuit. AG Ex. 1.0 at 5. While a portion of those costs have already been recovered from ratepayers, about half of the settlement amount was accrued in 2015. The AG and CUB argue that ComEd’s expenses should be reduced by \$2,143,015 for the 2015 settlement accrual, plus \$138,441, in related outside legal expenses, for a total adjustment of \$2,281,456.~~

~~In support of its argument, ComEd estimated its exposure for the TCPA lawsuit, ranging from \$600 million to \$1.8 billion, was potentially catastrophic. ComEd’s argues that it was a prudent business decision to settle the case. CUB and the AG contend that the issue here is not whether it was prudent to settle the case, or whether the \$4.95 settlement was a reasonable settlement in relation to the liability. Rather, CUB and the AG argue the issue is whether ComEd acted imprudently in sending texts potentially in violation of the TCPA thus creating the exposure, and thus whether it is appropriate to recover the settlement from ratepayers.~~

~~Pursuant 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. Although ComEd focuses on the prudence of settling the case as opposed to litigating it, the Commission believes that the real issue is whether ComEd's shift from an opt-in outage alert program to an opt-out program, and sending text messages potentially violating the TCPA, unreasonably exposed the Company to costly litigation.~~

~~In evaluating whether ComEd should be permitted to recover the TCPA settlement expense in customer rates, the Commission is guided by Section 16-108.5(c) of the Act, which applies the ratemaking provisions of Article IX of the Act to the formula ratemaking process, to the extent they do not conflict with Section 16-108.5(c). 220 ILCS 5/16-108.5(c). Section 9-201 of Article IX requires that all utility rates be just and reasonable. The burden of proving the justness and reasonableness of its claimed expenses is on the utility. 220 ILCS 9-201(c). In utility ratemaking, costs are recoverable if they are reasonable and prudent. *Business and Professional People for the Public Interest v. Illinois Commerce Comm'n*, 146 Ill.2d 175, 247 (1991).~~

~~The Company originally designed its program in January 2012 as an opt-in service, whereby customers could register their cell phone numbers in the program via ComEd's website. The evidence shows that ComEd unilaterally decided to include subscription into the program as part of its standard electric service on an 'opt-out' basis in the fall of 2013. The litigation was triggered when ComEd sent customers a text message informing them that the program was now structured as an opt-out service.~~

~~ComEd witness Polek-O'Brien acknowledged that "the manner in which the court would interpret the consent argument was uncertain and no binding legal precedent addressed the emergency purpose defense." ComEd Ex. 11.0 at 4. ComEd's claim that it "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" is not persuasive. ComEd Init. Br. at 39. ComEd's purported basis for its understanding of the law related to sending a cell phone text predated cell phones and texting. ComEd simply should not have relied upon a 20-year-old decision that did not address the fact that sending a 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, regardless of whether the message is authorized, as a basis for sending the texts.~~

~~Moreover, the 1992 decision that ComEd states formed the basis of their assumption that sending the texts was prudent was a ruling that clearly states "amended rules and regulations to establish procedures for avoiding unwanted telephone solicitations to residences, and to regulate the use of automatic telephone dialing systems, prerecorded or artificial voice messages, and telephone facsimile machines." 1992 FCC Order at 1. There is no indication that the decision applies to cell phone text messages or that it addressed the financial implications of sending such texts. In addition, the emergency purpose utility exemption that ComEd asserts the Order clarifies also specifically references calls made to residences — not customer cell phones. *Id.* at ¶ 51.~~

~~ComEd argues that it believed the TCPA was designed to address telemarketing calls, and that the decision to switch to an opt-out protocol was prudent because customers voluntarily provide their cell phone numbers. However, ComEd customers had been specifically told by ComEd that the program was an *opt-in* program. Clearly, customers had not provided consent under these circumstances. Relying on a 1992 decision in 2013 that did not address the financial implications of text messaging as a basis for switching a previously identified opt-in program to an opt-out program, and sending millions of customers a text message notifying them of that change, thereby exposing the Company to significant financial liability, did not constitute prudent action such that the ramifications of that action should be paid for by customers.~~

~~Finally, ComEd asserts in its briefs that another FCC decision from August 5, 2016 supports its decision to alter the program and send the texts. ComEd Init. Br. at 40, citing 2016 FCC Order. The Commission notes that the decision was issued more than three years after ComEd altered its opt-in program, and has no retroactive application. Applying a June 2016 FCC Order to action taken in the fall of 2013 is impermissible hindsight review. *Ill. Power Co.*, 245 Ill.App.3d at 371. Even if it did carry weight in the Commission's analysis, the ruling in fact supports Mr. Brosch's conclusion that the program change and subsequent texting needlessly exposed ComEd shareholders and customers to financial risk.~~

~~Specifically, the FCC ruling provided clear instructions to utilities on the issue of ensuring consent concluding that the utility company should be responsible for demonstrating that the consumer provided prior express consent. 2016 FCC Order at 14, ¶ 31. Applying this guidance to the facts at issue, ComEd not only cannot show such express consent but also admits that its customers who supplied phone numbers prior to the change in program were informed by the company that the program was an opt-in service. In this regard, ComEd would likely have failed to demonstrate express consent to a court. Moreover, the 2016 FCC Order is clear that the emergency exception is narrow and does not apply to all automated calls or categories of utility calls. As the AG and GUB point out, ComEd's text message was not in fact an emergency communication.~~

~~For these reasons, ComEd's reliance on the 1992 and 2016 FCC decisions as a basis for concluding that ComEd acted prudently at the time it altered the enrollment protocol and sent the texts, and that ratepayers should pay for the resulting settlement expense, is not persuasive. Altering the program as ComEd did and sending millions of texts to customers who had been told that the program was an opt-in program, without a clear understanding of the implications of that action relative to the TCPA, was imprudent. By its actions the Company risked substantial shareholder and ratepayer damages. The Commission therefore disallows the accrued 2015 TCPA litigation expense.~~