THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

Robin HAWKINS, *et al.*,	)	
	)	
Plaintiffs,	)	Case No. 2013-CH-09126
	)	
v.	)	Judge Mary Lane Mikva
	)	
COMMONWEALTH EDISON COMPANY,	)	Calendar 6
	)	
Defendant.	)	

DEFENDANT COMMONWEALTH EDISON COMPANY'S
REPLY MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS

Public Act ("P.A.") 98-0015 eviscerated the basis for plaintiffs' claim. (*See* defendant Commonwealth Edison Company's ("ComEd") Memorandum in Support of Its Motion to Dismiss ("ComEd's Mem.") at 1-2.) Plaintiffs accordingly assert that P.A. 98-0015 is unconstitutional. Although their assertions have no merit, prevailing law requires that the Court first address the non-constitutional bases for dismissal. *See, e.g., People v. Jackson*, 2013 IL 113986, ¶14; S. Ct. R. 18(c). As set forth in ComEd's motion and herein, the exclusive jurisdiction of the Illinois Commerce Commission ("ICC"), plaintiffs' lack of standing, and the speculative and unrecoverable nature of the claimed damages, as well as P.A. 98-0015, each mandate dismissal.

I. P.A. 98-0015 ESTABLISHES THAT COMED IS NOT IN DEFAULT OF ANY ICC ORDER AND THUS REQUIRES DISMISSAL OF THIS ACTION PURSUANT TO SECTION 2-619.

Plaintiffs do not contest ComEd's position that the entire basis for their suit – that ComEd did not comply with a June 2012 Order of the ICC – has been removed by the enactment of P.A. 98-0015, which provides in part that ComEd should be deemed in compliance with that

Order.[1] Instead, they claim that P.A. 98-0015 is not a bar to their suit because that law is unconstitutional, as it purportedly violates the separation of powers doctrine and supposedly denies due process based on an alleged lack of any rational legislative purpose. The standard for consideration of these claims is well established: the legislation is presumed to be constitutional and plaintiffs have a "formidable" burden to demonstrate that it is not. The Court should "uphold a statute's validity whenever it is reasonably possible to do so." *Allegis Realty Investors v. Novak*, 223 Ill. 2d 318, 334 (2006); *Vuagniaux v. Dep't of Prof'l Regulation*, 208 Ill. 2d 173, 193 (2003).

Plaintiffs, however, lack standing to raise this claim of unconstitutionality: "In order to have standing to challenge the constitutionality of a statute, a party must have sustained, or be in immediate danger of sustaining, a direct injury as a result of the enforcement of the challenged statute. ... The claimed injury must be (1) distinct and palpable; (2) fairly traceable to defendant's actions; and (3) substantially likely to be prevented or redressed by the grant of the requested relief." *Carr v. Koch*, 2012 IL 113414, ¶ 28. As the ICC has not approved rates that reflect any impact of a delay in smart meter implementation, plaintiffs cannot show any injury, much less an injury that is "(1) distinct and palpable; (2) fairly traceable to [the enactment of P.A. 98-0015 and ComEd's actions]; and (3) substantially likely to be prevented or redressed by the grant of the requested relief [declaring P.A. 98-0015 unconstitutional]." *Id.* Aside from the validity of P.A. 98-0015, plaintiffs' constitutional challenges should be denied for lack of standing.

[1] The applicability of P.A. 98-0015 is not restricted to ComEd or to that particular Order.

A. P.A. 98-0015 Is Not A Legislative Infringement on the Judicial Branch.

Plaintiffs' claim that the language of P.A. 98-0015 that provides that parties will be "deemed in compliance" with all previous orders of the ICC entered under 220 ILCS 5/16-108.6 is in conflict with an ICC finding in its December 2012 Order in ICC Docket No. 12-0298, that ComEd was not in compliance with the June 2012 Order in that docket, and thus is a constitutionally impermissible infringement upon the judicial branch of state government. Pltfs' Mem. at 2-3, 5-8.[2] The argument lacks merit for many reasons, the most fundamental being that the ICC is simply not part of the judicial branch of Illinois government.

In Illinois, the basis for any separation of powers argument must be based on Article II, Section 1 of the Illinois Constitution, which provides that "[t]he legislative, executive and judicial branches are separate. No branch shall exercise powers properly belonging to another." Ill. Const. art. II, § 1. For any claimed violation of this provision to have even facial validity, the legislative branch must have exercised powers belonging to the judicial branch, which means that the ICC must be found to be part of the "judicial branch" of *state government*. The Illinois Constitution itself resolves this fundamental threshold issue: "The judicial power is vested in a Supreme Court, an Appellate Court and Circuit Courts." Ill. Const. art. VI, § 1.

1. That matters before the ICC are considered "contested cases" does not make the ICC a judicial body.

Despite the clear constitutional identification of the locus of the judicial power in Illinois, plaintiffs argue that because under the Public Utilities Act ("PUA") certain ICC proceedings are considered to be "contested cases" as defined by the Administrative Procedures Act ("APA"), the ICC exercises "judicial" or "quasi-judicial" powers. Pltfs' Mem. at 5. Plaintiffs erroneously

[2] "Pltfs' Mem." refers to Plaintiffs' Memorandum of Law in Response to ComEd's Motion to Dismiss.

cite *Bus. and Prof'l People for the Pub. Interest v. Barnich*, 244 Ill. App. 3d 291 (1st Dist. 1993), for this proposition. Nothing in *Barnich* so states and the outcome in *Barnich* was in no way based upon the conclusion that the ICC exercises any kind of judicial power. The issue in the case was whether an ICC Commissioner was subject to recusal based upon an appearance of impropriety arising out of a series of *ex parte* contacts. In holding that he was, the Court stated that "[t]he principle of jurisprudence that one with a personal interest in the subject matter of decision in a case may not act as judge in that case is applicable not just to judges but to administrative agents, commissioners, referees, masters in chancery, or other arbiters of questions of law or fact *not holding judicial office.*" *Barnich*, 244 Ill. App. 3d at 296 (emphasis added), citing *In re Heirich*, 10 Ill. 2d 357, 384, 140 N.E.2d 825 (1956). Although the opinion did recite that the Commissioner in question exercised "duties ... similar to those of a judge," *Barnich*, 244 Ill. App. 3d at 297, that is a far cry from holding that the ICC itself is a judicial body. [3]

Heirich and *Barnich* simply establish a rule that any adjudicator must observe certain fundamental principles of fairness and even-handedness, both in reality and perception. Neither case can possibly be understood as establishing a rule of constitutional dimension that any agency or body in which a decision maker must make findings of fact and conclusions of law

[3] Indeed, when the Commission has been observed to exercise "quasi-judicial" power, the issue usually is whether the exercise of that power is a violation of the separation of powers rule, not whether that exercise transforms the agency into the "judiciary." For example in *Alhambra-Grantfork Tel. Co. v. Illinois Commerce Comm'n*, 358 Ill. App. 3d 818 (5th Dist. 2005), the issue was whether the ICC's rules allowing out-of-state attorneys to appear *pro hac vice* was an improper legislative exercise of the judicial power. The Court, after observing that the ICC was the creation of the General Assembly (*id.* at 823), held that not every exercise of powers "conventionally" exercised by a different branch of government is a violation of the separation of powers rule. *Id.* at 824. Thus, the ICC's exercise of powers conventionally exercised by the judiciary did not violate separation of powers; implicit in that decision was the conclusion that the ICC itself was a legislative, not a "judicial," body.

ipso facto becomes a judicial body, especially for purposes of applying the rules relating to separation of powers.[4]

2. *Plaut* and *Roth* do not support plaintiffs' separation of powers claim.

Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995), and *Roth v. Yackley*, 77 Ill. 2d 423 (1979), relied upon by plaintiffs (Pltfs' Mem. at 6-8), involved legislation that required *courts* to reopen *judicial* judgments that had become final and non-appealable before the legislation was enacted. Both the United States and Illinois Supreme Courts condemned this legislative attempt to control the separate co-equal judicial branch. Further, in reaching its decision, *Plaut* explicitly distinguished legislation that interfered with final judicial judgments from legislation that reopened an administrative order – the situation here – citing *Paramino Lumber Co. v. Marshall*, 309 U.S. 370 (1940), which upheld legislation that altered rights fixed by an *administrative agency*. *Plaut*, 514 U.S. at 232; *Paramino*, 309 U.S. at 381, fn. 25 ("Nor can we say that this legislation is an excursion of the Congress into the judicial function. The state cases cited by appellants upon the question of the invasion of judicial authority involve statutes affecting judicial judgments rather than administrative orders and are therefore inapplicable").

In *Roth*, the General Assembly had attempted to "clarif[y]" the meaning of a statute after the Illinois Supreme Court had interpreted that statute to have a different meaning. The Court held it was improper for the legislative branch to change the law to mean something other than

[4] The sweeping interpretation of the APA urged by plaintiffs would transform literally every department, board or commission of state government into a judicial body. That this cannot be so is demonstrated conclusively by the fact that Section 1-20 of the Illinois Administrative Procedure Act provides that the APA applies to "every agency," and "agency" is defined as including "each officer, board, commission, and agency created by the Constitution, whether in the *executive*, *legislative*, *or judicial* branch of State government ... ." 5 ILCS 100/1-20 (emphasis added). In short, an agency to which the APA is applicable may be either executive, legislative or judicial, and thus nothing in the APA suggests than an agency subject thereto is "judicial" for *any* purpose.

what the Supreme Court had construed it to mean. *Roth*, 77 Ill. 2d at 429 ("The General Assembly cannot constitutionally overrule a decision of this court by declaring that an amendatory act applies retroactively to cases decided before its effective date").[5]

The present case is not like either *Plaut* or *Roth* in any relevant respect. Most obviously, P.A. 98-0015 does not interfere in any way with any interpretation of prior law by the Supreme Court or indeed by any court. In fact, P.A. 98-0015 does not even address any interpretation of law by the ICC.[6] And unlike the judgments of courts, such as the judgment that was legislatively "overruled" in *Roth*, orders of the ICC have no *res judicata* effect. *City of Chicago v. People of Cook County*, 133 Ill. App. 3d 435, 440 (1st Dist. 1985) (standard previously adopted by ICC ... not binding and need not be applied in subsequent case as commission must have power to "deal freely" with each situation that comes before it "regardless of how it may have dealt with a similar or the same situation in a previous proceeding."); *Cent. Illinois Light Co.dba AmerenCILCO*, ICC Docket Nos. 09-0306-09-0311 (Cons.), 2010 WL 1868345, *11 (April 29, 2010).

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[5] The basis for *Roth* was "the principle of separation of powers embodied" in the constitutional provision cited above, along with the precept that "[i]t is the function of the judiciary to determine what the law is and to apply statutes to cases." *Id; see also Sanelli v. Glenview State Bank*, 108 Ill. 2d 1, 14-15 (1985) ("The legislation considered in *Roth* violated the separation-of-powers doctrine in two respects. First, the legislature attempted, by subsequent legislation, to declare or construe the meaning of a prior statute and to do so contrary to the construction that had been placed on that statute by this court .... The second separation-of-powers violation ... involved the attempt by the legislature to, in effect, reverse decisions of this court by retroactive application of the amendment").

[6] At most, P.A. 98-0015 negates a "finding" in the December 2012 ICC Order that ComEd was not in compliance with the June 2012 Order. But that "finding" is not equivalent to a judicial judgment. It was not the result of any litigation of the issue; the administrative record reveals that ComEd had no prior notice that the ICC was intending to address the issue of non-compliance with the June Order and ComEd thus had no opportunity to contest that issue. The "finding" was in no way relevant to, and does not support resolution of, the only issue that was properly before the ICC: whether the meter deployment schedule should be modified. Elementary principles of fairness and equity require that "finding" be given no effect.

3. Legislative interference with even some judicial orders does not violate separation of powers.

Even were the December 2012 ICC Order to be deemed in some way equivalent to a judicial judgment, other relevant precedent shows that legislative interference with that Order does not violate the separation of powers restraint. In *Johnston v. Cigna Corp.*, the Tenth Circuit noted that in two early Supreme Court cases "the Court upheld legislation that deprived the litigants of their vested rights in final judgments." *Johnston v. Cigna Corp.*, 14 F.3d 486, 492 (10th Cir. 1993). The Tenth Circuit explained the rationale of those decisions in a way that is equally applicable here: "[T]he Court did so because the rights involved were *public rights* – as opposed to the private rights asserted [in *Johnston*] – and a judgment declaring a public right may be annulled by subsequent legislation." *Id.* (emphasis added) at 492, citing *State of Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. 421 (1855) and *Hodges v. Snyder*, 261 U.S. 600 (1923).[7]

That rule is applicable here because administrative proceedings of the type giving rise to the ICC orders involved here adjudicate public, not private, rights. Under the *Belmont Bridge* and *Hodges* precedent, the ICC's December 2012 Order was clearly susceptible to being overturned by the General Assembly despite the "separation of powers" principle. If any "rights" were created by the December 2012 Order (or the initial meter deployment order in June 2012) – and in reality none were, *infra* – they were not private rights held by the named plaintiffs or any other customer of ComEd, but rather were rights held by the public at large – as

[7] *See also Johannessen v. United States*, 225 U.S. 227 (1912) (judicially-approved issuance of certificate of citizenship may be reopened years later pursuant to a subsequently-enacted Act of Congress, inasmuch as the proceedings were *ex parte* in nature, not adversarial). As noted above, *supra*, the ICC's determination of non-compliance was *sua sponte* and not based on any adversarial proceedings, and in that sense was just like the *ex parte* judgment the Supreme Court found in *Johannessen* to be susceptible to subsequent legislation.

evidenced by plaintiffs' allegation that they are bringing suit on behalf of all ComEd customers.

Finally, the Illinois Supreme Court has held that the General Assembly does not violate separation of powers by enacting "retroactive legislation which changes the effect of a prior decision of a reviewing court with respect to cases which have not been finally decided." *Sanelli v. Glenview State Bank*, 108 Ill. 2d 1, 19 (1985). To the extent that the ICC's December 2012 Order is somehow considered a "decision of a reviewing court," the General Assembly thus did not violate separation of powers by changing the effect of that decision with respect to cases – such as plaintiffs' – which have not been fully decided (or decided at all).

B. P.A. 98-0015 Does Not Violate Due Process

The thrust of plaintiffs' due process argument is that the "deemed in compliance" provision in P.A. 98-0015 has no "rational legislative purpose." Pltfs' Mem. at 8, citing *PBGC v. R.A. Gray & Co.*, 467 U.S. 717, 730 (1984). Under *Gray*, "the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." *Id.* at 729. "[J]udgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches." *Id.* In addition to the words of the statute, it is appropriate to consider the legislative record leading up to the enactment of the statute in determining whether the statute has a rational legislative purpose. *Id.* at 730.

Here, the existence of a rational purpose is easily shown. The stated intent of P.A. 98-0015 was to "give binding effect to the legislative intent expressed in House Resolution 1157 ... and Senate Resolution 821" (both attached hereto), both adopted by the 97th General Assembly. P.A. 98-0015, Section 1; *see also* P.A. 98-0015, Section 5 (amending 220 ILCS 5/16-108.5(k)). Those resolutions given "binding effect" by P.A. 98-0015 recognized the need to correct certain ICC rate decisions that frustrated the objective of the Energy Infrastructure Modernization Act of

2011 ("EIMA") requirement to fully fund the deployment of smart meters, and to mitigate the effect that those decisions had on the feasibility of achieving the schedule set for meter deployment by the ICC's June 2012 Order: "The revenue deficiencies caused because of the errors in the [ICC] Orders ... may preclude the participating utilities from implementing their infrastructure investment plans, including, but not limited to, their advanced metering infrastructure deployment plans, according to the schedule set forth in subsection (b) of Section 16-108.5, Section 16-108.6, or in any [ICC] order entered thereunder." SR 821 at 5; *see also* HR1157 at 2. In that context, it was certainly rational for the General Assembly, while it was acting to remedy the ICC's improper interpretation of EIMA's rate making provisions, at the same time to remove any suggestion that ComEd was at fault or should be held responsible for not installing meters approved by the June 2012 Order – a delay that resulted from an ICC interpretations of the EIMA ratemaking provisions that the General Assembly felt compelled to correct.[8]

Finally, it is significant to the due process analysis that plaintiffs acquired no rights by reason of either the June or December 2012 ICC Orders. Because decisions of the ICC are not *res judicata,* nothing prevented the ICC from revising the June 2012 Order and the meter deployment schedule set forth in that Order at any time. *See City of Chicago v. People of Cook County, supra; see also New Heights Recovery and Power v. Bower,* 347 Ill. App. 3d 89 (1st

[8] Plaintiffs also rely on a 1987 Rhode Island case, *Brennan v. Kirby,* 529 A.2d 633 (1987) (but cite not a single Illinois case) as an exposition of the law of "retroactive statutes and due process." Pltfs' Mem. at 8-9. *Brennan* relied heavily on a 1960 law review article for its analysis of retroactivity cases. The law of retroactivity has evolved substantially since 1960, including with *Landgraff v. USI Film Products,* 511 U.S. 244 (1994), that plaintiffs cite (but incorrectly characterize as "deciding that retroactive application of a newly enacted statute to a case pending on appeal *violated the constitutional right to due process*" Pltfs' Mem. at 8 (emphasis added)). *Landgraff* did not involve any holding of a due process violation; it simply dealt with ascertaining Congressional intent.

Dist. 2004) (parties who invested in generating facilities in reliance on state law had no constitutionally protected interest in the continuation of that law). Just as "[n]obody has a vested right in the rate of taxation, which may be retroactively changed," *Commonwealth Edison Co. v. Will County Collector*, 196 Ill. 2d 27, 49 (2001) (upholding retroactive tax legislation and concluding that the statute did not violate vested rights), plaintiffs similarly have no vested right to a particular level of benefits associated with future rates and the installation of smart meters.

II. THE ICC'S EXCLUSIVE JURISDICTION OVER THIS ACTION MANDATES DISMISSAL PURSUANT TO SECTION 2-619.

Two fundamental points establish that the ICC has exclusive jurisdiction over the Complaint. *First*, the basis of the Complaint is that benefits to ComEd's customers allegedly will be reduced because ComEd did not install smart meters pursuant to an ICC order. Smart meters are part of the infrastructure through which ComEd delivers electricity. As a claim based on the failure to install infrastructure, the Complaint "goes directly to ComEd's service and infrastructure," and fits squarely within the ICC's exclusive jurisdiction. *Sheffler v. Commonwealth Edison Co.*, 2011 IL 110166, ¶ 50. In this case, as in *Sheffler*, "[a]lthough plaintiffs point to their request for damages as evincing the fact that their complaint falls outside the Commission's jurisdiction [Pltfs' Mem. at 3-4, 9-12], it is clear that the relief sought by plaintiffs goes directly to ComEd's service and infrastructure, which is within the Commission's original jurisdiction." *Sheffler*, 2011 IL 110166, ¶ 50.

Second, this is a case that squarely implicates ComEd's rates, as the benefits that plaintiffs claim that they have lost would be realized only through ComEd's rates. *See* the Black & Veatch analysis, upon which plaintiffs rely for their claim of reduced benefits (Compl., 31), cited at page 6 of ComEd's Mem. "This means that ComEd's customers are saving money over the 20 year period, *assuming that customer rates are adjusted to capture all savings.*" (B&V

Report (ComEd Ex. 6.02 REV) at 6-3, emphasis added). Thus, this case is unlike any of the cases cited by plaintiffs and in which the court held that it, and not the ICC, had jurisdiction. *Flournoy, Consumers Guild, Sutherland and Gowdey,* for example, did not claim ComEd's rates were "excessive" in any way. Instead, the claims were that plaintiffs should not have been required to pay the rates – at any level – because they had not requested or even received the services in question (*Sutherland, Gowdey*), plaintiff was forced to incur duplicate services by defendant's deliberate interruption of service (*Flournoy*), or plaintiff was misled by defendant's misrepresentations into using a more costly service than it needed (*Consumers Guild*). *Getto* did not involve a "rate" at all, but computation of a tax the utility was required to collect. There, a divided Supreme Court noted that the "sole issue" before it was one of statutory interpretation, and "no question which requires the [ICC's] expertise." 77 Ill. 2d at 356-57.

Here, by contrast, the gist of plaintiffs' claim is that the rate that they will pay is "excessive" because of an alleged failure to install infrastructure that would provide benefits in the form of lower rates to ComEd customers. Like utility infrastructure, whether utility rates are excessive is directly within the ICC's exclusive jurisdiction. *Sheffler*, 2011 IL 110166, ¶¶ 40-42, 50. The ICC's exclusive jurisdiction thus mandates dismissal pursuant to Section 2-619.

III. PLAINTIFFS' LACK OF STANDING TO BRING A CLAIM UNDER SECTION 5-201 REQUIRES DISMISSAL PURSUANT TO SECTION 2-619.

Under Section 5-201 of the Act, one is "a person 'affected' by a wrongful act," and thus has standing, only if the person "is one who shows a direct personal interest in the matter as opposed to one whose interest is merely in common with that of the general public." *Diamond v. Gen. Tel. Co. of Illinois*, 211 Ill. App. 3d 37, 49 (2d Dist. 1991); *Churchill v. Norfolk & Western Ry. Co.*, 73 Ill. 2d 127, 139 (1978). Plaintiffs neither dispute that *Diamond* and *Churchill* set forth this rule regarding standing under Section 5-201, nor cite authority for a different rule

regarding standing under Section 5-201. Plaintiffs instead only cite cases that generally concern standing, attempt to distinguish *Diamond* based on its facts, and baldly assert that it cannot be the law that standing does not exist if a utility's conduct harms all (rather than only some) of its customers. Pltfs' Mem. at 13. Plaintiffs ignore, however, that the ICC was created and exists in part to address utility conduct that impacts service and charges to all customers (over which the ICC has exclusive jurisdiction). As plaintiffs claim that their alleged interests are the same as those of ComEd's 3.8 million other delivery services customers (Compl. ¶¶ 34-36, 40-45), their lack of standing requires dismissal pursuant to Section 2-619.

As discussed in ComEd's Mem., the only consequence of the alleged non-compliance with the June 2012 Order is that 131,000 meters that were to be installed under that Order were not installed in 2012.[9] They will be installed at a later date. Not one of the named plaintiffs can or do allege that he, she or it was affected by reason of delayed installation of these 131,000 meters, in that they cannot show that they would have received one of those meters in 2012. As a result, plaintiffs cannot claim they were "affected" by any non-compliance with the June 2012 Order, as required by Section 5-201.

IV. THIS ACTION ALSO SHOULD BE DISMISSED PURSUANT TO SECTION 2-615 BECAUSE THE DAMAGES SOUGHT BY THE COMPLAINT ARE SPECULATIVE AND THUS UNRECOVERABLE.

Plaintiffs neither dispute the legal principles cited by ComEd that preclude recovery of speculative damages (ComEd's Mem. at 12, 14), nor dispute the facts cited by ComEd that establish the speculative nature of the damages sought. ComEd's Mem. at 11-15. Plaintiffs instead misuse a statement about a measure of maximum possible harm and rely on judicial

[9] As ComEd has argued, installation of other meters that were to have been installed pursuant to the June 2012 Order has been delayed not because of any actionable non-compliance with the June 2012 Order but because the ICC itself approved that delay.

estoppel principles that do not apply. Pltfs' Mem. at 13-15.

ComEd's statement about a measure of maximum *possible* harm neither supports the *existence* of *any* damages, nor suggests that damages sought are capable of reasonably accurate determination. (ComEd's Mem. at 12: "*Any* 'harm' suffered by ComEd customers due to alleged non-compliance *will be limited to at most* whatever 'lost benefits' *might* result from the delay in installing about 3.25% (131,000 ÷ 4,029,000) of the meters contemplated by the program." (emphasis added)) This statement about maximum possible harm – to demonstrate that plaintiffs' entire conception of damages based on the overall delay in the meter deployment is misplaced – has no connection to whether *any* damages are capable of reasonably accurate determination. To be clear: ComEd's position is that the determination of any loss resulting from the failure to install even the 131,000 meters in 2012 pursuant to the since superseded June 2012 Order would be too speculative to support an award of damages under Illinois law. Too many uncertainties, contingencies and unknowns make it impossible to determine whether *any* loss will result or has resulted from delay in installing these meters, which of ComEd's 3.8 million customers might have incurred that loss, and what the magnitude of any loss might be. Plaintiffs have not even hinted at any means by which they might address, much less overcome, these obstacles.

Judicial estoppel principles also cannot be used to convert the Black & Veatch report into an admission of damages. "In order to impose judicial estoppel upon a party, the court must find the following elements: ... the party successfully maintained the first position and received some benefit; and ... the positions taken were totally inconsistent." *See Byer Clinic and Chiropractic, Ltd. v. State Farm Fire and Casualty Co.*, 2013 IL App (1st) 113038, ¶ 20. These requirements cannot be established. As set forth in more detail in ComEd's Mem., ComEd neither prevailed

in the ICC proceeding on its position as to the amount by which customers would benefit, nor received any benefit in the ICC proceeding based on that position; the ICC did not determine that customers would benefit by the amount supported by ComEd (or by any other specific sum); and ComEd's position in the ICC proceeding as to the amount by which customers as a group would benefit in future years is not inconsistent with its position in this case that plaintiffs have not suffered, and will not suffer, any damages that can be calculated with the requisite degree of certainty. *See* ComEd's Mem. at 13 fn. 3; Ex. C to Compl. at 32-39; Dec. 2012 Order at 33, Conclusion (7). The Black & Veatch report reflected knowledge at a specific point in time; as more becomes known about implementation of the program and a myriad of other circumstances, the conclusions of that report are likely to change.

The Complaint thus also should be dismissed pursuant to Section 2-615.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, David M. Stahl, an attorney, state that on September 26, 2013, I caused Defendant Commonwealth Edison Company's Reply in Support of Its Motion to Dismiss to be delivered by hand, in court, to Paul G. Neilan.