

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

Robin HAWKINS, both individually )  
and d/b/a ROBIN'S NEST, a sole )  
proprietorship, Robert DILLON, an )  
individual, and GOT IT MAID, INC., )  
an Illinois business corporation, on behalf )  
of themselves and all others similarly )  
situated, )

Plaintiffs, )

v. )

COMMONWEALTH EDISON )  
COMPANY, an Illinois corporation, )

Defendant. )

Case No. 2013-CH-09126

Judge Mary L. Mikva

**PLAINTIFFS' MEMORANDUM OF LAW IN**  
**RESPONSE TO COMMONWEALTH EDISON COMPANY'S**  
**MOTION TO DISMISS**

**INTRODUCTION**

Plaintiffs brought this action on April 4, 2013 to recover actual and punitive damages caused by ComEd's blatant and wilful violation of the June 2012 Order (the "Smart Meter Deployment Order" or "June 2012 Order") of the Illinois Commerce Commission (the "ICC") in ICC Docket No. 12-0298 (the "Smart Meter Docket"). Specifically, Plaintiffs complain that ComEd wilfully failed to install smart meters beginning in September 2012 under the deployment schedule ordered by the ICC in the June 2012 Order.

Defendant does not dispute that it did not install the smart meters beginning in September 2012, nor does Defendant dispute that it did not obtain a stay of the Smart Meter Deployment Order. In fact, ComEd filed a Motion for Stay of the Smart Meter Deployment Order which the ICC denied. (Copies of ComEd's Motion for Stay and the ICC's Order denying the Stay in ICC

Docket No. 12-0298 are attached as Attachments A and B to this Memorandum.) Plaintiffs' Complaint alleges that they were damaged because ComEd's delay in smart meter deployment substantially reduced the value of the benefits of the installation of the smart meters to Plaintiffs and other ComEd consumers.

On June 10, 2013, ComEd filed a Motion to Dismiss and supporting Memorandum arguing that Plaintiffs' Complaint should be dismissed pursuant to Section 2-619 because (1) the Illinois legislature's recent enactment of Public Act 98-0015 ("P.A. 98-0015") establishes that ComEd is not in default of any ICC Order issued under the Energy Infrastructure and Modernization Act (the "EIMA"), including the June 2012 Order; (2) this Court does not have subject matter jurisdiction over this action; and (3) Plaintiffs lack standing. ComEd also moves for dismissal pursuant to Section 2-615 of the Illinois Code of Civil Procedure on grounds that the damages Plaintiffs seek are speculative and therefore not recoverable. ComEd's motion must be denied because none of its arguments survive scrutiny.

ComEd is arguing that the Illinois legislature can absolve ComEd for illegal acts that have already occurred. In making this argument, ComEd relies on the provision of P.A. 98-0015 which states that ComEd shall be deemed in full compliance with all ICC Orders entered pursuant to Sections 16-108.5 and 16-108.6 of the EIMA prior to P.A. 98-0015's effective date. 2013 Ill. Laws 15 (eff. May 22, 2013) (amending 220 ILCS 5/16-108.5 (2013)).

To the extent a provision of P.A. 98-0015 purports to absolve ComEd for prior illegal acts, that provision violates the Separation of Powers Clause of Article II, Section 1 of the Illinois Constitution. In issuing its Smart Meter Deployment Order, the ICC was acting in its judicial or quasi-judicial capacity in a contested case. 220 ILCS 5/10-101 (2013). Moreover, the ICC's Smart Meter Deployment Order was a final, non-appealable Order. Therefore, the legislature cannot

retroactively void the Smart Meter Deployment Order without violating the Separation of Powers Clause.

Moreover, as a retroactive statute which lacks a rational legislative purpose, the relevant provision of P.A. 98-0015 also violates the constitutional right to due process. While other provisions of P.A. 98-0015 that allow ComEd to charge higher rates that had been previously disallowed by the ICC may be objectionable to consumers, they arguably have a rational legislative purpose. P.A. 98-0015 (eff. May 22, 2013) (amending 220 ILCS 5/4-301 and 220 ILCS 5/16-108.5). Dissimilarly, the provisions of P.A. 98-0015 that grant amnesty to ComEd for its violation of prior ICC Orders lack any such rational legislative purpose and are therefore unconstitutional.

Just as ComEd cannot be absolved of its illegal act by the legislature, neither can ComEd avoid the consequences of its illegal act by arguing that this Court does not have subject matter jurisdiction over this case. The law is etched in concrete that the ICC has subject matter jurisdiction under Section 9-252 of the Public Utilities Act (“PUA”) over a claim that a public utility has charged an excessive amount for its service. 220 ILCS 5/9-252 (2013). However, it is likewise set in stone that this Court has subject matter jurisdiction under Section 5-201 of the PUA to award damages when a utility has damaged persons or corporations by violating an ICC order not involving the utility’s rates. 220 ILCS 5/5-201 (2013).

This is clearly a 5-201 case because ComEd’s failure to install the smart meters in direct violation of the ICC’s Smart Meter Deployment Order damaged Plaintiffs. When a utility omits to do any act required to be done by an ICC order, this Court has subject matter jurisdiction to award damages, including punitive damages if the Court finds the conduct wilful. 220 ILCS 5/5-201.

As ComEd correctly points out in its Memorandum in support of its Motion to Dismiss, the ICC has exclusive authority to oversee the implementation of the newly enacted EIMA. In fact,

the ICC was exercising its authority to implement the EIMA when it issued its Smart Meter Deployment Order. When ComEd violated that June 2012 Order by illegally refusing to install the smart meters beginning in September 2012, the ICC exercised its EIMA authority once again when it found on December 5, 2012 that ComEd had violated the June 2012 Order. ICC Docket No. 12-0298, Order on Rehearing, Complaint Ex. H, at p. 33. Since the ICC had already asserted jurisdiction under the EIMA and ComEd brazenly violated the ICC's June 2012 Order after the ICC denied ComEd's Motion for Stay, this Court acquired subject matter jurisdiction under Section 5-201 over Plaintiffs' claim that they were damaged by ComEd's illegal act.

Clearly, this Court, and neither the ICC nor the legislature, has subject matter jurisdiction to address ComEd's grossly illegal act. Moreover, Plaintiffs have standing to sue because they have been damaged by ComEd's illegal act.

Although ComEd also contends that this Court should dismiss this case under Section 2-615 because Plaintiffs' damages are speculative and therefore not recoverable, this simply is not true. ComEd argues that the only conceivable impact of its alleged failure to comply with any ICC Order is from the 131,000 meters ComEd failed to install in 2012. ComEd Memorandum at 12. ComEd bases this contention on grounds that the ICC's December 2012 Order on Rehearing in the Smart Meter Docket ("Rehearing Order" or "December 2012 Order") absolved ComEd of responsibility for the delay in smart meter deployment from that point on. ComEd Memorandum at 12. But ComEd's argument only emphasizes the truth that ComEd's blatantly illegal failure to install smart meters damaged the Plaintiffs, whether those damages are from the 131,000 meters not installed in 2012, as ComEd suggests, or the over 800,000 meters not being installed in 2012-

2014, as Plaintiffs contend.<sup>1</sup> Either way, the damages to Plaintiffs from ComEd's actions are not speculative and can be determined by this Court.

## ARGUMENT

### **I. The Provision of P.A. 98-0015 On Which ComEd Relies To Absolve Its Illegal Act Is Unconstitutional**

#### **A. The ICC Acts As a Judicial or Quasi-Judicial Body in Contested Cases**

The ICC acts in a judicial or quasi-judicial capacity when it hears “contested cases” pursuant to the PUA and the Administrative Procedure Act. 220 ILCS 5/10-101; 5 ILCS 100/1-30; *Business & Prof. People for the Public Interest et al. v. Barnich*, 244 Ill. App. 3d 291 (1<sup>st</sup> Dist. 1993). There is no doubt that the ICC is a tribunal which by law, though not expressly a court, exercises judicial functions. *See Parker v Kirkland*, 298 Ill. App. 340, 348 (1939) (county tax board considered judicial body); *see also Meadowlark Farms v. Pollution Control Board*, 17 Ill. App. 3d 851, 855-57 (5<sup>th</sup> Dist. 1974) (noting that many state agencies have powers that are judicial in nature). Appeals from ICC Orders in contested cases are made to the Illinois Appellate Court. 220 ILCS 5/10-201.

#### **B. The ICC Found In its December 2012 Rehearing Order in the Smart Meter Docket that ComEd Had Violated Its June 2012 Smart Meter Deployment Order, and both of the ICC's Orders are Final, Non-Appealable Orders**

The ICC found in its Rehearing Order in the Smart Meter Docket that ComEd was not in compliance with its Smart Meter Deployment Order because it did not install smart meters on the schedule required by that Order. The ICC's specific finding was: “Commonwealth Edison Company's conduct constitutes non-compliance with the Commission's [June 2012] Order.”

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<sup>1</sup> After the enactment of P.A. 98-0015, including its provision requiring ComEd to accelerate the commencement of its smart meter deployment, ComEd committed to install 220,000 smart meters in 2013 and 2014, far fewer than the 1,052,000 meters that were to be installed during 2012-2014 under the Smart Meter Deployment Order. P.A. 98-0015 (eff. May 22, 2013) (amending 220 ILCS 16-108.5); ICC Docket No. 13-0285, Order, June 5, 2013; ICC Docket No. 12-0298, ComEd Ex. 16.0 REV. Rehearing, Complaint Exhibit E, at p. 8.

Rehearing Order, Complaint Exhibit H, at p. 33. The ICC's Smart Meter Deployment Order and Rehearing Order both became final on January 9, 2013 because no appeals of these orders were filed within the statutorily prescribed time period for appeal. 220 ILCS 5/10-201.

**C. The Provision of P.A. 98-0015 On Which ComEd Relies Is Unconstitutional Because It Violates the Separations of Powers Doctrine**

The provision of P.A. 98-0015 on which ComEd relies to attempt to escape responsibility for its illegal actions states in part as follows: "Each participating utility shall be deemed to have been in full compliance with... all Commission orders entered pursuant to Sections 16-108.5 and 16-108.6 of this Act, up to and including the effective date of this amendatory Act..." 2013 Ill. Laws 15 (eff. May 22, 2013) (amending 220 ILCS 5/4-301 and 220 ILCS 5/16-108.5). Because this statutory provision purports to directly and retroactively void the ICC's final, non-appealable orders in the Smart Meter Docket, it violates Article II, Section 1 of the Illinois Constitution.

P.A. 98-0015 is not the first case of such legislative overreach in Illinois. In *Roth v. Yackley*, plaintiffs sought refunds of fines and costs paid as conditions of their probation because the Illinois Supreme Court had previously held in *People v. DuMontelle* that fines and costs were not reasonable conditions of probation under the Illinois Cannabis Control Act. *Roth v. Yackley*, 77 Ill. 2d 423, 424 - 425 (1979); *People v. DuMontelle*, 71 Ill. 2d 157 (1978). While the *Roth* case was pending, the Illinois legislature passed an amendatory act which provided that fines and costs were reasonable conditions of probation, and that the amendatory act applied retroactively to events that occurred before its effective date. *Roth*, 77 Ill. 2d at 427. Based on this amendatory act, the *Roth* defendants refused to refund costs and fines previously paid by the *Roth* plaintiffs. *Roth*, 77 Ill. 2d at 426.

Ruling in favor of the *Roth* plaintiffs, the Illinois Supreme Court stated:

The General Assembly's declaration that the amendatory act applies to events before the effective date of the amendatory statute represents a legislative attempt to retroactively apply new statutory language and to thereby annul a prior decision of this court. This is an assumption by the General Assembly of the role of a court of last resort in contravention of the principle of separation of powers embodied in article II, section 1 of the Illinois Constitution of 1970.

*Roth*, 77 Ill. 2d at 428-29.

Just like the statute held unconstitutional in *Roth*, P.A. 98-0015 is an amendatory act that contains a self-serving declaration that it merely restates and clarifies existing law. *Roth v. Yackley*, 77 Ill. 2d at 426; 2013 Ill. Laws 15, Section 1. Also just like the statute in the *Roth* case, the relevant provision of P.A. 98-0015 does not clarify existing law but instead purports to retroactively invalidate a final, non-appealable order of a judicial or quasi-judicial body.

As the Illinois Supreme Court proclaimed so well in *Roth*:

Although the General Assembly stated that the changes made by the amendatory act were merely a declaration of existing law, it is manifest that the amendatory act changed the statutory language and prior law...

*Roth*, 77 Ill. 2d at 428.

The *prior law* in this case was the deployment schedule ordered by the ICC in the Smart Meter Deployment Order. As in the *Roth* case, the legislature's attempt to annul prior law is an unconstitutional violation of the Separation of Powers Clause of the Illinois Constitution.

As the U.S. Supreme Court held in *Plaut v. Spendthrift Farm, Inc.*, it is a violation of the separation of powers doctrine when a legislature reopens final judgments. 514 U.S. 211, 240 (1995). No matter how noble the purpose of the legislature (which of course is irrelevant here) and how wrong the final determination may have been (also irrelevant here), the legislature cannot go back and change the final judgment or require it to be reopened. *Id.* Here, once the ICC's orders were final and non-appealable, the legislature could not retroactively void them without violating the Separation of Powers Clause of the Illinois Constitution. Therefore, ComEd's Motion to

Dismiss cannot be granted on grounds that the legislature has absolved ComEd of its prior violation of the ICC's Smart Meter Deployment Order because the statutory provision on which ComEd relies is unconstitutional under Article II, Section 1 of the Illinois Constitution.

**D. The Provision Of P.A. 98-0015 On Which ComEd Relies Also Violates the Constitutional Right to Due Process**

P.A. 98-0015 poses a grave problem not only under the separation of powers constitutional doctrine, but also under the due process clause of the Illinois Constitution. Ill. Const. Art. I, Section 2. If the Illinois legislature can retroactively vacate by legislative fiat a final order of the ICC, then the finality of judgments of all bodies with jurisdiction over contested cases (including this Court) will be brought into question. The legislature does not sit as a court of final resort. *Roth v. Yackley*, 77 Ill. 2d at 428-29.

As the U.S. Supreme Court stated in *Landgraf v. USI Film Products* when deciding that retroactive application of a newly enacted statute to a case pending on appeal violated the constitutional right to due process, "the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." *Landgraf*, 511 U.S. 244, 265 (1994).

In deciding whether a retroactive statute violates the constitutional right to due process, the courts have applied a test of whether there was a "rational legislative purpose" that goes beyond the due process test applied to non-retroactive legislation. *PBGC v. R.A. Gray & Co.*, 476 U.S. 717, 730 (1984). In this case, there is no rational legislative purpose for a statute which absolves ComEd for its violation of a prior ICC Order.

In *Brennan v. Kirby*, the Rhode Island Supreme Court quoted an analysis of U.S. Supreme Court cases on retroactive statutes and due process:



The two major factors to be weighed in determining the validity of a retroactive statute are the strength of the public interest it serves and the unfairness created by its retroactive operation, and the reliance of the parties on preexisting law is perhaps the most accurate gauge of the latter.

*Brennan v. Kirby*, 529 A.2d 633, 639 (1987) (quoting 73 Harvard L. Rev. 692 (1960)).

No public interest is served by the provision of P.A. 98-0015 that purports to absolve ComEd for its prior violation of the law. See *In Re Workers' Compensation Refund*, 46 F.3d 813 (1995). Moreover, the retroactive application of the statute creates gross unfairness because it means that ComEd would get away with its blatant, wilful violation of an ICC Order. Therefore, ComEd's Motion to Dismiss cannot be granted on the basis of the legislature's enactment of P.A. 98-0015.

## **II. The Circuit Court Has Subject Matter Jurisdiction Over this Cause Under Section 5-201 of the Public Utilities Act**

There is an unmistakable though inadvertent irony in ComEd's argument for dismissal of the Complaint on grounds that the ICC has exclusive subject matter jurisdiction over this cause. The utility's wilful violation of the Smart Meter Deployment Order demonstrates nothing if not naked contempt for ICC Orders. Yet through its subject matter jurisdiction argument, ComEd now seeks to hide behind the ICC's alleged exclusive jurisdiction over this cause in order to escape liability for its wrongful actions and establish a regime in which it can wilfully defy its regulator with impunity.

Section 5-201 of the PUA creates a statutory cause of action for civil damages, and expressly vests the circuit court with subject matter jurisdiction over such actions. 220 ILCS 5/5-201. The issue of subject matter jurisdiction turns on whether this is a civil damages case subject to the circuit court's exclusive jurisdiction under Section 5-201 of the PUA or a reparations case subject to exclusive ICC jurisdiction under Section 9-252 of the PUA. 220 ILCS 5/5-201 and 5/9-252.

ComEd relies on *Sheffler v. ComEd* in its attempt to avoid the jurisdiction of this Court on grounds that this is a Section 9-252 reparations case. *Sheffler*, 2011 IL 110166, 955 N.E. 2d 1110 (2011). Citing *Sheffler*, ComEd states that “the ICC has unquestioned authority to set rates charged and to oversee infrastructure investments made in accordance with EIMA by public utilities.” ComEd Memorandum at 5. Plaintiffs do not disagree with this statement. But ComEd goes on to say that “the allegations in the complaint make it clear that in order to grant the relief requested the Court would be required to invade space reserved to the ICC, including within the new and complex EIMA framework.” *Id.* This ComEd statement is dead wrong because it is ComEd’s own flouting of an ICC order under the EIMA that is at issue in this case. Clearly, this Court’s determination of damages caused by ComEd’s violation of an ICC Order implementing the EIMA would not invade any space reserved for the ICC in its EIMA implementation.

The case of *Gowdey v. Commonwealth Edison Co.* clarifies the critical distinction between a reparations case subject to ICC jurisdiction and a civil damages case subject to circuit court jurisdiction. *Gowdey*, 37 Ill. App. 3d 140 (1<sup>st</sup> Dist. 1976). In *Gowdey*, the utility wrongfully charged consumers for light bulb service even though the consumers had never agreed to purchase the light bulbs. *Gowdey*, 37 Ill. App. 3d at 142. The court in *Gowdey* made it clear that the decisive issue was whether “the propriety of the rate itself was challenged.” *Gowdey*, 37 Ill. App. 3d at 146.

In *Gowdey*, since the propriety of the rate was not being challenged and no ratemaking considerations were involved, the appellate court affirmed the circuit court’s decision that “the case was not for reparations but for damages for which, under Section 73 [now Section 5-201] of the Act, the court had subject matter jurisdiction.” *Gowdey*, 37 Ill. App. 3d at 146; *See also* *Flournoy v. Ameritech*, 351 Ill. App. 3d 583 (2004), app. denied, 213 Ill. 2d 557 (2005); *Sutherland v. Illinois Bell*, 245 Ill. App. 3d 983 (1993); *Consumers Guild of America v. Illinois Bell*, 103 Ill.

App. 3d 959 (1981); *Getto v. City of Chicago*, 77 Ill. 2d 346 (1979); *aff'd* after remand, 86 Ill. 2d 39 (1981); cert. denied, 456 U.S. 946 (1982).

As in *Gowdey*, Plaintiffs in the instant case are not challenging the propriety of any rate charged by ComEd. Rather, Plaintiffs' Complaint alleges that ComEd violated the PUA by failing to install the smart meters pursuant to the schedule set forth in the Smart Meter Deployment Order after ComEd failed in its attempt to stay that Order. When utility consumers have failed to obtain stays of ICC Orders they have paid a heavy price. *See Independent Voters of Illinois v. Illinois Commerce Commission*, 117 Ill. 2d 90 (1987).

In short, this simply is not a ratemaking matter, and this Court would not have to engage in ratemaking to award damages for this violation. In *Medusa Portland Cement v. Ill. Central RR*, the court found that a Plaintiff, having obtained a ruling from the ICC that rates are excessive, cannot then sue in court for damages due to the utility's violation of its statutory duty to not charge excessive rates. *Medusa*, 5 N.E.2d 782, 787 - 788 (1936). But in this case, the utility's transgression is not the charging of excessive rates, but rather the violation of a non-rates order of the ICC. Unlike *Sheffler*, the "essence" of Plaintiffs' claim is not that ComEd has charged too much for its service. Rather, the essence of Plaintiffs' claim is that ComEd has done something else to harm the Plaintiffs, specifically its wilful violation of an ICC Order requiring deployment of the smart meters. *See Flournoy v. Ameritech*, 351 Ill. App.3d 583, 585 (2004).

ComEd attempts to buttress its fallacious argument that this is a 9-252 case by claiming that rates are at the center of this dispute because "benefits allegedly lost through delayed implementation of smart meters would be lost (or, conversely realized) only through ComEd's rates." ComEd Memorandum at 6. ComEd goes on to say that for this Court "to enter any relief in favor of Plaintiffs on account of 'lost benefits,' it would need to find that the rates charged to

customers by ComEd at some indeterminate time – likely far in the future – will be excessive or unjust and unreasonable because of the alleged failure to comply with the ICC’s June 2012 AMI [Smart Meter Deployment] Order.” ComEd Memorandum at 7 - 8.

No matter how far ComEd twists itself into knots to argue that this Court would have to engage in ratemaking to determine damages, this is just not the case. Contrary to ComEd’s argument, this Court would not need to engage in any comprehensive review of all of the utility’s costs. According to Black & Veatch, ComEd’s own experts in the Smart Meter Case, the “lost benefits” from the smart meter delay were \$182 million. ICC Docket No. 12-0298, ComEd Ex. 17.0 REV. Rehearing, Complaint Ex. F, at p. 11. \$182 million is the amount that consumers cannot ever get back regardless of any change in utility costs and revenues in the future. Although ComEd tries to make a big deal out of the performance metrics and penalties set forth in the EIMA, the performance penalties do not even contemplate, much less address, the issue of ComEd’s violation of an ICC Order issued under the EIMA. 220 ILCS 5/16-108.5(f-5) (2013).

ComEd also argues that if Plaintiffs’ claim is that future rates may be excessive as a result of the smart meter delay, their remedy is at the ICC in future formula rate or Section 9-201 proceedings. ComEd Memorandum at 9. But this argument also fails because the ICC has no authority to adjust the rates to penalize ComEd for violating its Smart Meter Deployment Order. The bottom line is that Section 5-201 exists so that courts can address damages to persons or corporations caused by violations of non-rates orders of the ICC. Since that is the situation here, this Court should not dismiss Plaintiffs’ Complaint on grounds that the ICC has exclusive jurisdiction over this claim.

### **III. Plaintiffs Have Standing to Bring This Action**

ComEd argues that Plaintiffs somehow lack standing because as a group all of ComEd's customers are indistinguishable from the general public. ComEd Memorandum at 10. This argument doesn't pass the 'horse-sense test.' Under ComEd's logic, if a public utility violates the PUA and damages only some of its customers, those customers can sue, but if the utility's violation damages all of its customers, the utility can walk away whistling.

The doctrine of standing is designed to preclude persons who have no interest in a controversy from bringing suit. *Deutsche Bank Nat'l Trust Co. v. Gilbert*, No. 2-12-0164, 2012 Ill. App.2d at ¶15 (2<sup>nd</sup> Dist. 2012). In Illinois, standing is shown by demonstrating some injury to a legally cognizable interest. *Vill. of Chatham v. County of Sangamon*, 216 Ill. 2d 402, 419 (2005). Plaintiffs assert their claims because they have suffered direct damages and have the right to sue for these damages under Section 5-201 of the PUA. 220 ILCS 5-201.

ComEd attempts to rely on *Diamond v. GTE*, but this case actually supports Plaintiffs' position rather than ComEd's. *Diamond*, 211 Ill. App. 3d 37 (2<sup>nd</sup> Dist. 1991). In *Diamond*, the court dismissed the Diamonds' claim against GTE on grounds that GTE's violation of the PUA was not the proximate cause of the Diamonds' damages. *Diamond*, 211 Ill. App. 3d 37, 50. Here, there is no doubt that ComEd's violation of the PUA directly harmed Plaintiffs. Plaintiffs clearly have standing to sue for this harm, and therefore ComEd's argument that Plaintiffs' Complaint should be dismissed on grounds Plaintiffs lack standing must be rejected by this Court.

### **IV. The Complaint States Claims for Damages More Than Sufficient to Withstand ComEd's 2-615 Motion To Dismiss**

Finally, ComEd argues that the Complaint must be dismissed under 2-615 because the damages alleged in the Complaint are speculative and therefore not recoverable. This Court should deny ComEd's 2-615 motion because ComEd itself suggests that some damages could be recoverable.

ComEd Memorandum at 12. Moreover, the equitable common law doctrine of judicial estoppel bars ComEd's argument that Plaintiffs' damages are speculative because ComEd calculated the \$182 million amount of lost benefits from its smart meter delay in the Smart Meter Docket and therefore cannot contradict this calculation in the instant case.

**A. ComEd Suggests That Some Actual Damages Could Be Recoverable**

It is Plaintiffs' position that ComEd is liable for \$182 million in actual damages. ComEd disagrees but argues that its liability "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." ComEd Memorandum at 12. This argument alone shows that ComEd's 2-615 motion must be denied. Where the existence of damage is established, absolute certainty concerning the amount of damage is not necessary to justify a recovery. *Giammanco v. Giammanco*, 253 Ill. App. 3d. 750, 766 (2<sup>nd</sup> Dist. 1993); *see also Rajkovich v. Alfred Mossner Co.*, 199 Ill. App. 3d 655, 660 (1<sup>st</sup> Dist. 1990) (despite difficulty establishing replacement cost of damaged property, the allegation itself is sufficient to supply the requisite element of damages to withstand a motion to dismiss under 2-615).

**B. Judicial Estoppel Precludes ComEd From Prevailing On Its Argument That Actual Damages Are Speculative**

ComEd provided sworn evidence in the Smart Meter Docket of the costs and benefits of installing its smart meters that was the result of extensive study and calculation. ICC Docket No. 12-0298, ComEd Ex. 6.02 REV. and ComEd Ex. 17.01 REV. Rehearing, Complaint Ex. G, at p. 5. In fact, ComEd's Memorandum supporting its Motion to Dismiss even urges this Court to take judicial notice of ComEd's cost benefit analyses from the Smart Meter Docket. ComEd Memorandum at 6, Footnote 2. Nevertheless, ComEd also attempts to call these same cost benefit

analyses into question as imprecise quantifications and therefore speculative. ComEd Memorandum at 13 - 14.

The equitable common law doctrine of judicial estoppel prevents a party from asserting inconsistent positions in separate proceedings in order to receive favorable judgments in each proceeding. *U.S. v. McCaskey*, 9 F.3d 368 (5th Cir. 1993); *Giannini v. First National Bank of Des Plaines*, 136 Ill. App. 3d 971 (1985). At its heart, this doctrine prevents chameleonic litigants from "shifting positions to suit the exigencies of the moment," *Cashmore v. Builders Square, Inc.*, 211 Ill. App. 3d 13, 18 (1991), engaging in "cynical gamesmanship," *Teledyne Industries, Inc. v. N.L.R.B.*, 911 F.2d 1214, 1218 (6th Cir. 1990), or "hoodwinking" a court, *Kale v. Obuchowski*, 985 F.2d 360, 361 (7th Cir. 1993). This Court should prevent ComEd from engaging in this behavior by denying ComEd's Section 2-615 motion.

### CONCLUSION

WHEREFORE, Plaintiffs request that this Court deny Defendant's Motion to Dismiss the Complaint.

Respectfully submitted,  
**ROBIN HAWKINS,**  
**ROBIN HAWKINS d/b/a ROBIN'S NEST,**  
**ROBERT DILLON, AND**  
**GOT IT MAID, INC.**

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Attachments:

Att. A – ICC Docket No. 12-0298, ComEd  
Motion for a Post-Order Stay and Other Relief  
Att. B – ICC Docket No. 12-0298, Notice of  
Commission Action, June 22, 2012

**EXHIBIT A**

**TO**

**PLAINTIFFS' MEMORANDUM OF LAW IN RESPONSE TO  
COMMONWEALTH EDISON COMPANY'S MOTION TO DISMISS**

**Illinois Commerce Commission Docket No. 12-0298**

**ComEd Motion for a Post-Order Stay and Other Relief**



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

COMMONWEALTH EDISON COMPANY	:	
	:	No. 12-0298
Petition for Statutory Approval of a Smart Grid	:	
Advanced Metering Infrastructure Deployment Plan	:	
pursuant to Section 16-108.6 of the Public Utilities Act	:	

**COMMONWEALTH EDISON COMPANY'S VERIFIED MOTION  
FOR A POST-ORDER STAY AND OTHER RELIEF**

Commonwealth Edison Company ("ComEd"), pursuant to Sections 190 of the Rules of Practice of the Illinois Commerce Commission ("Commission" or "ICC"), 83 Ill. Admin. Code § 200.190, respectfully requests that the Commission stay its final order in this docket to permit the Commission to, on rehearing, consider updated evidence concerning the schedule for deploying AMI technology under ComEd's AMI Plan. In support, ComEd states:

1. The Energy Infrastructure Modernization Act<sup>1</sup> requires that a "participating utility" like ComEd file with the Commission a Smart Grid Advanced Metering Infrastructure Deployment Plan ("AMI Plan" or "Plan"). That requirement is just one part of the EIMA's multi-track approach to modernizing the electric delivery system in Illinois through unprecedented multi-billion dollar commitments by participating utilities to invest over a ten-year period in Smart Grid deployment, additional reliability improvements, job creating technologies and initiatives, and assistance for potentially vulnerable customers. The EIMA links those commitments to a fundamentally reformed and predictable model for setting rates, a formula ratemaking model that is to provide utilities with the certainty and full cost recovery they need to meet those investment commitments.

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<sup>1</sup> The Energy Infrastructure Modernization Act, or EIMA, is the name commonly given to Illinois Public Acts 97-0616 (eff. Oct. 26, 2011) and 97-0646 (eff. Dec. 30, 2011) and the revisions they made to the Illinois Public Utilities Act ("PUA"), 220 ILCS Act 5.

2. The EIMA establishes when participating utilities must file their original AMI Plans and the deadline for the Commission to enter an order after reviewing them. ComEd had to file its AMI Plan with the Commission “within 180 days after the effective date of [PA 97-0616] or by November 1, 2011, whichever is later.” 220 ILCS 5/16-108.6(b). The Commission must enter a final order approving, or approving with modifications, ComEd’s AMI Plan within 60 days of its filing, provided that the Plan meets the statutory informational, technical, and cost-benefit requirements. EIMA requires ComEd’s Plan to provide “for investment over a 10-year period that is sufficient to implement the AMI Plan across its entire service territory” and include a specific “deployment schedule and plan ....” 220 ILCS 5/16-108.6(c), (c)(3). The Plan must also meet specific statutory information and technical criteria and be cost-beneficial on a net present value basis, a determination necessarily tied to the schedule and plan for deployment. 220 ILCS 5/16-108.6(a), (c).

3. On April 23, 2012, ComEd timely filed its AMI Plan, a petition seeking its approval, and testimony and other evidence showing that the Plan met all of the statutory criteria. The Administrative Law Judge established a schedule that would satisfy the statutory mandate that a final order issue no later than Friday, June 22, 2012. Evidentiary hearings were held on May 21 and May 23, 2012 and, in addition to ComEd, Staff, the Citizens Utility Board, the Illinois Attorney General, the City of Chicago, the Environmental Law and Policy Center, AARP, and Comverge, Inc., all submitted testimony. That testimony and the evidence adduced at hearing addressed every one of the statutory criteria for Plan approval. *See Harris Dir., ComEd Ex. 1.0, 11:230 – 18:408; O’Toole Dir., ComEd Ex. 2.0 REV, 41:801 – 45:888; Trump Dir., ComEd Ex. 6.0, 5:99 – 6:111; see also Schlaf Dir., Staff Ex. 1.0, 7:146-160; Brightwell Dir., Staff Ex. 2.0, 2:30-32.*

4. ComEd's AMI Plan contained a detailed AMI deployment schedule that met the legal requirements. AMI Plan at 3, 21-23. ComEd also demonstrated the Plan was cost-beneficial through analyses prepared by Black & Veatch Corporation ("Black & Veatch") and Christensen Associates Energy Consulting ("CA"). ComEd Ex. 6.02 REV; ComEd Ex. 5.02. The results of those studies, and the supporting testimony of subject matter experts in meter operations, customer operations, customer education, and finance, confirmed the Plan was cost beneficial. The Black & Veatch Report, which reflects all costs other than those of the peak time rebate ("PTR") program and analogous benefits, showed that ComEd's AMI Plan results in benefits net of costs with a net present value ("NPV") of approximately \$1.25 billion. With the PTR program included, the NPV increases by at least an additional \$13 million and by as much as an additional \$292 million.

5. Regardless of the substantial benefits to customers, however, financing AMI deployment remains challenging for the utility. The EIMA provides the means to finance that deployment through the new formula rate mechanism, established by Section 16-108.5, under which ComEd's reasonable and prudent costs, including essentially all of the costs of deploying AMI, are to be recovered. In this Docket, ComEd witness Mr. Harris confirmed the importance of both the deployment schedule and the certainty of cost recovery to ComEd's ability to invest in AMI as described in the Plan. In response to requests by CUB, ELPC, and the City of Chicago to accelerate meter deployment, Mr. Harris confirmed that an "[a]ccelerated deployment accelerates the capital and O&M spending and creates budget and financing challenges over a shorter time period that ComEd cannot effectively consider until the open dockets in the 2011 Formula Rate Case (Docket No. 11-0721) and the 2012 Formula Rate Update and Reconciliation case (Docket No. 12-0321) are resolved." Harris Reb., ComEd Ex. 7.0, 19:414-22.

6. On May 29, 2012, the Commission issued its Final Order in ComEd's initial EIMA formula rate case, ICC Docket No. 11-0721. ComEd maintains that several rulings made in that Order are contrary to specific cost recovery provisions of the EIMA and to the basic principle that utilities should recover their reasonable and prudent costs.<sup>2</sup> The Order excludes from ComEd's revenue requirement recovery of a debt-cost return on the more than \$1 billion pension asset reflected on ComEd's FERC Form 1. Likewise, the Order's rulings on the measurement of the reconciliation rate base will delay the recovery of prudent and reasonable costs, a lag EIMA was designed to decrease, and the reconciliation interest rate the Order adopted will mean that the resulting delayed cost recovery can never be complete. The May 29 Order, if not corrected or revised, will significantly reduce ComEd's ability to fund new investments and eliminate the certainty that reasonable and prudent costs will be recovered.

7. ComEd's ability to recover its actual, reasonable, and prudent delivery services costs with certainty is the cornerstone of its ability to invest in and deploy AMI as proposed in ComEd's April 23 Plan. Regretfully, the uncertainty and loss of cost recovery resulting from the May 29 Order make it impractical for ComEd to continue to commit to the deployment schedule in its Plan. While ComEd currently remains committed to meeting the overall investment targets of the EIMA, the financial consequences of the May 29 Order mean that ComEd must explore new strategies to fund AMI investments and shift more of that investment to the later years of the ten-year timeframe.

8. ComEd is developing a contingent revised deployment schedule that defers investments and costs beyond 2012 in anticipation that greater clarity around cost recovery may

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<sup>2</sup> Whether those decisions are ultimately found to be erroneous or correct is not the subject of, nor relevant to, this motion. They are the Commission's decisions and, unless changed or reversed, will govern ComEd's rates.

be restored. These deferrals will, however, reduce the net present value of both costs and quantified benefits of the Plan. Because of the magnitude of the Plan's net benefits and because the deferrals will reduce the present value of its costs along with any impact on benefits, ComEd is extremely confident the Plan will remain cost-beneficial by a wide margin. However, ComEd is unable submit evidence of the details of the schedule changes and the effect on the cost-benefit studies – and the Commission and parties therefore cannot study and respond to that information – within the 60 day statutory mandate.

9. The relationship between the other statutory criteria and the ComEd's AMI Plan will be unchanged and no additional evidence or litigation regarding those criteria is necessary or appropriate. So long as the required funding is available, ComEd remains committed to AMI and to bringing to customers the benefits it offers. ComEd is not abandoning its vision of universal AMI deployment or of the customer applications, customer education, and capabilities of the AMI meters or the data network they will use. It proposes no weakening of the Plan's privacy and security protections.

10. This motion proposes a means of satisfying the statutory requirement that an order be entered by June 22, while both providing the Commission, Staff, and parties the time they need to review schedule modification and preserving for customers the ultimate benefits of AMI deployment. ComEd proposes that:

- a. The Commission enter a final order in this Docket, as required by the EIMA, based on the evidence in the record as marked "Heard and Taken," within the 60 day statutory time period. There is no basis in the record, or in this Motion justifying denial of approval. Most statutory criteria are unaffected, the margin of net benefit is large, and the EIMA itself contemplates that even

approved Plans will change and evolve. *See* 220 ILCS 5/16-108.6(e). The statutory timeline for AMI deployment will be satisfied, preserving the benefits to customer of AMI deployment under the Section 16-108.6 process.

- b. The Commission should provide in its Order, or in a second contemporaneous Order, that its approval of the Plan is stayed pending disposition of rehearing requests.
- c. The Commission also should, on its own motion, grant rehearing on the issues of (i) the deployment schedule and (ii) the cost-benefit analysis, and authorize the Administrative Law Judge to, on rehearing, take additional evidence concerning revisions to the Plan in those areas. The rehearing process provides adequate time to take and consider evidence without unfairness to any party. Alternatively, if the Commission does not order rehearing on its own Motion, ComEd's offers to promptly apply for Rehearing and seek such a stay.

11. ComEd, the parties, and the Commission are facing a unique circumstance in which statutory requirements, changed factual circumstances, and important customer benefits are all involved. While ComEd recognizes this Motion is unusual, it proposes lawful steps that: satisfy all statutory requirements, allow for a full examination of the effect of the changed circumstances on the economics of the AMI Plan, protect parties' procedural rights, and preserve the ability to proceed with the carefully developed and highly beneficial AMI strategy that ComEd proposed. While ComEd faces increasing severe cash and financial constraints, it remains committed to working hard – and working with stakeholders – to move forward. ComEd, therefore, asks that the Commission grant this Motion to meet those goals.

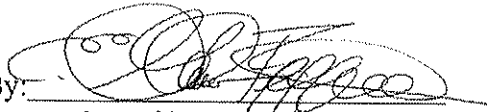
WHEREFORE, ComEd respectfully request that the Commission:

- a. Issue its order in this Docket by June 22, 2012, as required by Section 16-108.6(c) of the PUA, based on the evidence in the record and the statutory criteria set out in EIMA and discussed in the parties' briefs;
- b. Immediately thereafter stay its approval of ComEd's AMI Plan pending the outcome of proceedings on rehearing;
- c. Direct rehearing on the issues of (i) the proposed AMI deployment schedule and (ii) changes to the cost-benefit analysis resulting from any changes to the deployment schedule;
- d. Authorize the Administrative Law Judge to, on rehearing, take additional evidence concerning those subjects on a schedule to be determined by the Judge; and
- e. Authorize such other and further relief as is lawful and warranted.

Dated: June 7, 2012

Respectfully submitted,

COMMONWEALTH EDISON COMPANY

By:   
One of its attorneys

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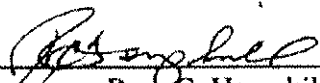
STATE OF ILLINOIS     )  
  )  
COUNTY OF COOK     )

**VERIFICATION OF ROSS C. HEMPHILL**

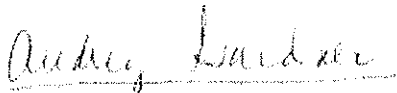
I, Ross C. Hemphill, having first been duly sworn, state and aver as follows:

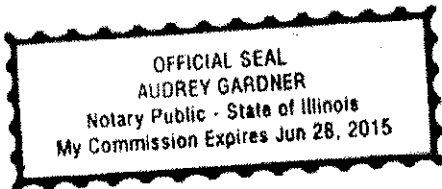
1. I am Vice President, Regulatory Policy & Strategy of Commonwealth Edison Company. I am an adult and if called to testify, could testify competently as a witness on the facts stated in the attached Verified Motion and this Verification.

2. I have read the foregoing Verified Motion for a Post-Order Stay and Other Relief. The facts stated therein are true and correct or, in information and belief, I verily state that I believe them to be true.

  
\_\_\_\_\_  
Ross C. Hemphill

**SUBSCRIBED AND SWORN to**  
Before me on this 7<sup>th</sup> day of  
June, 2012.







**EXHIBIT B**

**TO**

**PLAINTIFFS' MEMORANDUM OF LAW IN RESPONSE TO  
COMMONWEALTH EDISON COMPANY'S MOTION TO DISMISS**

**Illinois Commerce Commission Docket No. 12-0298**

**Notice of Commission Action, June 22, 2012**



ILLINOIS COMMERCE COMMISSION

June 22, 2012

Commonwealth Edison Company

Petition for Statutory Approval of a Smart Grid Advanced Metering Infrastructure Deployment Plan pursuant to Section 16-108.6 of the Public Utilities Act.

.....

12-0298

**SERVED ELECTRONICALLY**

NOTICE OF COMMISSION ACTION

TO ALL PARTIES OF INTEREST:

Notice is hereby given that the Commission in conference on June 22, 2012, **DENIED** the following:

Commonwealth Edison Company's Verified Motion for a Post-Order Stay and Other Relief, filed on June 7, 2012; and  
Oral Argument Request by AARP filed on June 12, 2012.

Related memoranda will be available on our web site ([www.icc.illinois.gov/e-docket](http://www.icc.illinois.gov/e-docket)) in the docket number referenced above.

Sincerely,

Elizabeth A. Rolando  
Chief Clerk

EAR:ikb  
Administrative Law Judge Haynes

cc: Mr. Zolnierek – Telecommunications

Mr. Brightwell – Engineering

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