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ILLINOIS COMMERCE COMMISSION

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Recycling Services (RSI)	)	
	)	
-vs-	)	04-0614
	)	
The Peoples Gas Light and Coke	)	
Company	)	
	)	
Complaint as to People's refusing to	)	
supply natural gas service as requested	)	
by RSI in Chicago, Illinois	)	

**RESPONDENT'S REPLY TO COMPLAINANT'S RESPONSE**  
**TO RESPONDENT'S MOTION FOR SUMMARY JUDGMENT**

Now comes the Respondent, THE PEOPLES GAS LIGHT AND COKE COMPANY, by its counsel, MARK L. GOLDSTEIN, and files its Reply to Complainant's Response to Respondent's Motion for Summary Judgment and moves the Administrative Law Judge ("ALJ") and the Illinois Commerce Commission ("ICC") to grant Summary Judgment in the above-captioned matter.

Complainant's Response fails to address the most salient points raised by Respondent in the Motion for Summary Judgment. First, the Response fails to acknowledge that, as the ALJ is aware, Complainant is currently receiving gas service from Respondent and so its initial prayers for relief in its Verified Formal Complaint and Verified Amended Formal Complaint requesting that the ICC order Respondent to provide Complainant gas service, are moot. Second, the Response fails to provide any case law, ICC Order, ICC rule, regulation or approved tariff supporting Complainant's proposition that the ICC has jurisdiction to award monetary damages from Respondent.

Complainant cannot do so because there are none. Since Complainant is receiving gas service from Respondent, it has already obtained the remedy it requests in its prayers for relief that the ICC has authority under the Public Utilities Act to provide. Thus, as a matter of fact and law, Respondent's Motion for Summary Judgment should be granted.

Complainant uses the majority of its Response to argue, without statutory or case law support, that the ICC has jurisdiction to award Complainant damages. While Complainant responds that Respondent has only cited three old cases in support of the proposition that the ICC is without authority to award damages, importantly, Complainant cites no case where the ICC has awarded damages these are the only three cases addressing the ICC's authority to award damages. Like it or not, no one has challenged such a proposition since 1985 because the law is well settled concerning the ICC's authority to award damages. Somehow, Complainant is of the opinion that Section 5-201 of the Public Utilities Act (220 ILCS 5/5-201) sprung out of nowhere and now Complainant is entitled to monetary damages in this matter. This is absolutely not the case. The damages sections of the Public Utilities Act have remained substantively unchanged at least since 1939. Attached as Appendices A, B and C are the former Chapter 111 2/3, Section 77, Civil damages, of the Illinois Public Utilities Act, the current Section 5-201 of the Act, and a tracked text showing the changes between the two versions for comparison purposes. The documents show that the Illinois Legislature has not made a substantive change in the language in over 65 years.

It must be noted that the case of Barry v. Commonwealth Edison Company, 374 Ill. 473, 29 NE2d 1014 (1940) directly dealt with the issue of damages for the wrongful action of Commonwealth Edison Company in discontinuing service. This case, as well as

the other cases cited by Respondent in the Motion for Summary Judgment, is on point. See: Ferndale Heights Utility Company v. Illinois Commerce Commission, 112 Ill. App. 3d, 175, 445 NE2d 334 (1<sup>st</sup> Dist. 1982) and Moening v. Illinois Bell Telephone Company, 139 Ill. App. 3d 521, 487 NE2d 980 (1<sup>st</sup> Dist. 1985). The Appellate Court, First District, put it quite succinctly: "Ferndale is correct in its contention that the Commission has no general authority to fashion an award of damages." (Citation of Barry case omitted). Ferndale Heights Utility Company v. Illinois Commerce Commission, 112 Ill. App. 3d, 175, 181.

Complainant unwittingly cites Wernikoff v. RCN Telecom Services of Illinois, 341 Ill. App 3d 89, 791 N.E. 2d 1195 (1<sup>st</sup> Dist. 2003), a case far from point because it dealt with competitive telephone services under the Telecommunications Act of 1985 to support its proposition that the ICC can award damages. However, Wernikoff succinctly interprets the plain meaning of Section 5-201 refuting Complainant's position at page 3 of its Responses that Respondent's careful reading and interpretation of Section 5-201 are speculative. In fully citing Section 5-201, the court found that the general rule is the ICC's jurisdiction is not exclusive and that consumers can bring damage suits in court even where claims involve violations of the Public Utilities Act. Id., 341 Ill. App. 3d 94, 791 N.E. 2d 1200. The court highlighted the fact that Section 5-201 is the only section of the Public Utilities Act that addresses jurisdiction and does not mention exclusive jurisdiction. Id., 341 Ill. App. 3d 94-95, 791 N.E. 2d at 1200. The court concluded that the ICC had exclusive jurisdiction over utilities concerning rate reparation claims. (Id.), but that under Section 5-201 courts had jurisdiction over damages (Id., 341 Ill. App. 3d 102, 791 N.E. 2d at 1205-06.

Beginning at page 3 of its Response, Complainant contends that the ICC has broad powers and so can award monetary damages. This is not the case as the court takes a contrary position in the case Complainant cites for this proposition, Peoples Gas Light and Coke Company v. Illinois Commerce Commission, 222 Ill. App. 3d, 738, 383, 584 N.E. 2d 341 (1<sup>st</sup> Dist. 1991). The Appellate Court determined that the ICC had jurisdiction to interpret the Family Expense Act (“FEA”) and that Peoples Gas was entitled to bill the complainant for outstanding gas bills under the FEA. While this case is also not on point, Respondent agrees with several points raised by the Appellate Court. First, the court held that the ICC derives its power and authority from the Public Utilities Act. Id., 222 Ill. App. 2d at 742, 584 N.E. 2d at 344. Second, the court continued that Section 4-201 of the Public Utilities Act placed a duty on the ICC to enforce provisions of the Illinois Constitution and statutes affecting public utilities that are not enforce by other administrative bodies or state officers. Id. Third, the Court stated that: “Because the FEA is a State statute which clearly affects Peoples Gas’ ability to collect revenue for its service, the Commission was authorized by the provision to determine Peoples Gas’ right to bill the complainant for outstanding gas bills at issue.” Id. Finally, the Appellate Court stated: “The Commission also argues that under The Public Utilities Act, its jurisdiction does not extend to matter which are properly the subject of civil suits, citing *Barry v. Commonwealth Edison Co.* (1940), 374 Ill. 473, 29 N.E. 2d 1014. However, this argument is misplaced where the relief Peoples Gas sought was not damages but only payment for the service it provided.” Id., 222 Ill. App. 2d at 743, 584 N.E. 2d at 344. The converse of the court’s final conclusion, had Peoples Gas sought damages, the proper

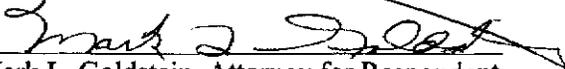
venue would have been civil court, is therefore contrary to Complainant's interpretation of Section 5-201, and in line with Respondent's position and the other case law cited.

The ICC is a creature of statute and its powers are strictly proscribed by the legislature. As Respondent has demonstrated from the foregoing discussion of the Peoples Gas and Wernikoff and other decisions, courts have narrowly defined the powers of the ICC. In every instance, where a party has asked the ICC to award damages, the ICC has either refused to award damages, or the courts would not permit the ICC to do so.

Finally, in Complainant's Response, Complainant requested the ICC to "order the parties to hearing on the questions of violation of the Act and appropriate remedy therefore." (p. 7). The request for hearing on violation of the Act was not part of the prayers for relief in the Verified Formal Complaint and the Verified Amended Formal Complaint. If Complainant wishes to go forward to hearing on Respondent's alleged violation of the Act, it should be required to amend its Complaint. Moreover, *assuming arguendo*, that the ALJ and the ICC do not grant Respondent's Motion for Summary Judgment, since Complainant has not made a request for specific damages, Complainant should also be required to amend its complaint to make a specified request for damages.

For all of the above reasons, The Peoples Gas Light and Coke Company requests that the Administrative Law Judge and the Illinois Commerce Commission issue an Order granting the aforesaid Motion for Summary Judgment.

Respectfully submitted,  
THE PEOPLES GAS LIGHT AND COKE  
COMPANY

  
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which complaint is made was furnished or performed, and a petition for the enforcement of an order of the Commission for the payment of money shall be filed in the proper court within one year from the date of the order.

The remedy provided in this section shall be cumulative, and in addition to any other remedy or remedies in this Act provided in case of failure of a public utility to obey a rule, regulation, order or decision of the Commission.

The Commission shall have power to receive complaints regarding loss or damage occasioned by a public utility, and to make inquiry as to the methods of adjusting such claims. All claims against any public utility for loss of, or damage to property, or for any other loss or damage, in connection with a public utility service, not covered by the preceding paragraphs of this section, if not acted upon within ninety days from the date of the filing of the claim with the public utility, may be investigated by the Commission, in its discretion, and the results of such investigation shall be embodied in a special report which shall be open to public inspection. [As amended by act approved July 9, 1935, L. 1935, p. 1093.]

S.H.A. 111½ § 76; J.A. 112,098.

Prior amendment: L. 1935, p. 509.

Where Illinois Supreme Court determined that public utility's lamp service charge was illegal and thereafter Illinois Commerce Commission approved revised schedules authorizing lamp service charge, statutory remedy of customer instituting proceeding before commission was exclusive and precluded maintenance of original suit in superior court for an injunction against lamp service charge and an accounting. *American Generator & Armature Co. v. Commonwealth Edison Co.*, 238 A. 192, 18 N.E.2d 725.

**77. Civil damages.] § 73.** In case any public utility shall do, cause to be done or permit to be done any act, matter or thing prohibited, forbidden or declared to be unlawful, or shall omit to do any act, matter or thing required to be done either by any provisions of this Act or any rule, regulation, order or decision of the Commission, issued under authority of this Act, such public utility shall be liable to the persons or corporations affected thereby for all loss, damages or injury caused thereby or resulting therefrom, and if the court shall find that the act or omission was wilful, the court may in addition to the actual damages, award damages for the sake of example and by the way of punishment. An action to recover for such loss, damage or injury may be brought in any court of competent jurisdiction by any person or corporation.

In every case of a recovery of damages by any person or corporation under the provision of this section, the plaintiff shall be entitled to a reasonable counsel's or attorney's fee to be fixed by the court, which fee shall be taxed and collected as part of the costs in the case.

No recovery as in this section provided shall in any manner affect a recovery by the State of the penalties in this Act provided.

S.H.A. 111½ § 77; J.A. 112,099.

**78. Remedies cumulative.] § 74.** This Act shall not have the effect to release or waive any right of action by the State, the Commission, or by any body politic, municipal corporation, person or corporation for any right or penalty which may have arisen or accrued or may hereafter arise or accrue under any law of this State.

All penalties accruing under this Act shall be cumulative of each other, and suit for the recovery of one penalty shall not be a bar to or affect the recovery of any other penalty or be a bar to any criminal prosecution against any public utility, or any officer, director, agent or employee thereof, or any other corporation or person.

S.H.A. 111½ § 78; J.A. 112,100.

**79. Mandamus or injunction proceedings at instance of commission.] § 75.** Whenever the Commission shall be of the opinion that any public utility is failing or omitting or about to fail or omit to do anything required of it by law, or by

any order, decision, rule, regulation, direction or requirement of the Commission, issued or made under authority of this Act, or is doing anything or about to do anything or permitting anything or about to permit anything to be done, contrary to or in violation of law or any order, decision, rule, regulation, direction or requirement of the Commission, issued or made under authority of this Act, the Commission shall commence an action or proceeding in the circuit or superior court or, in any other court of concurrent jurisdiction in and for the county in which the case or some part thereof arose or in which the person or corporation complained of, if any, has its principal place of business, or in which the person complained of, if any, resides, in the name of the People of the State of Illinois, for the purpose of having such violation or threatened violation stopped and prevented, either by mandamus or injunction. The Commission shall begin such action or proceeding by petition in such circuit or superior court, alleging the violation or threatened violation complained of, and praying for appropriate relief by way of mandamus or injunction. It shall thereupon be the duty of the court to specify a time, not exceeding thirty days after the service of the copy of the petition, within which the public utility complained of must answer the petition, and in the meantime said public utility may be restrained. In case of default in answer, or after answer, the court shall immediately inquire into the facts and circumstances of the case. Such corporations or persons as the court may deem necessary or proper to be joined as parties, in order to make its judgment, order or writ effective, may be joined as parties. The final judgment in any such action or proceeding shall either dismiss the action or proceeding or direct that the writ of mandamus or injunction issue or be made permanent as prayed for in the petition, or in such modified or other form as will afford appropriate relief. An appeal may be taken from such final judgment in the same manner and with the same effect, subject to the provisions of this Act as appeals are taken from judgments of the circuit or superior court in other actions for mandamus or injunction.

S.H.A. 111½ § 79; J.A. 112,101.

**80. Penalty for violation by public utility, or corporation other than a public utility, of act or orders—Separate offenses.] § 76.** Any public utility or any corporation other than a public utility, which violates or fails to comply with any provisions of this Act, or which fails to obey, observe or comply with any order, decision, rule, regulation, direction, or requirement or any part or provision thereof, of the Commission, made or issued under authority of this Act, in a case in which a penalty is not otherwise provided for in this Act, shall, upon conviction, be punished by a fine of not less than five hundred dollars nor more than two thousand dollars for each and every offense.

Every violation of the provisions of this Act or of any order, decision, rule, regulation, direction or requirement of the Commission, or any part or portion thereof by any corporation or person, is a separate and distinct offense and in case of a continuing violation each day's continuance thereof shall be a separate and distinct offense.

In construing and enforcing the provisions of this Act relating to penalties, the act, omission or failure of any officer, agent, or employee of any public utility acting within the scope of his official duties or employment, shall in every case be deemed to be the act, omission, or failure of such public utility.

S.H.A. 111½ § 80; J.A. 112,102.

Under this section imposing penalties of from \$50 to \$2,000 a day for noncompliance with order of State Commerce Commission, application of statute subjecting corporation to risk of penalties pending attempt to establish validity of order in courts, and for reasonable time after decision, would be denial of due process. *Natural Gas*

## Appendix B

LEXSTAT 220 ILCS 5/5-201

ILLINOIS COMPILED STATUTES ANNOTATED  
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\*\*\* THIS SECTION IS CURRENT THROUGH PUBLIC ACT 93-1064 \*\*\*  
\*\*\* DECEMBER 24, 2004 ANNOTATION SERVICE \*\*\*

CHAPTER 220. UTILITIES  
PUBLIC UTILITIES ACT  
ARTICLE V. DUTIES OF PUBLIC UTILITIES ACCOUNTS AND REPORTS

### GO TO THE CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

*220 ILCS 5/5-201 (2004)*

[Prior to 1/1/93 cited as: Ill. Rev. Stat., Ch. 111 2/3, para. 5-201]

§ 220 ILCS 5/5-201. [Liability of public utilities for acts or omissions]

Sec. 5-201. In case any public utility shall do, cause to be done or permit to be done any act, matter or thing prohibited, forbidden or declared to be unlawful, or shall omit to do any act, matter or thing required to be done either by any provisions of this Act or any rule, regulation, order or decision of the Commission, issued under authority of this Act, the public utility shall be liable to the persons or corporations affected thereby for all loss, damages or injury caused thereby or resulting therefrom, and if the court shall find that the act or omission was wilful, the court may in addition to the actual damages, award damages for the sake of example and by the way of punishment. An action to recover for such loss, damage or injury may be brought in the circuit court by any person or corporation.

In every case of a recovery of damages by any person or corporation under the provisions of this Section, the plaintiff shall be entitled to a reasonable attorney's fee to be fixed by the court, which fee shall be taxed and collected as part of the costs in the case.

No recovery as in this Section provided shall in any manner affect a recovery by the State of the penalties in this Act provided.

**HISTORY:** Source: P.A. 84-617.

#### NOTES:

##### NOTE.

This section was Ill.Rev.Stat., Ch. 111 2/3, para. 5-201.

#### CASE NOTES

#### ANALYSIS

##### In General

##### Actions

--Breach of Duty to Repair

--Jurisdiction

Appendix C

Changes Between Chapter 111 2/3, Section 77, Civil damages (1939) and the Current Section 5-201, Civil Damages (1986) of the Public Utilities Act

In case any public utility shall do, cause to be done or permit to be done any act, matter or thing prohibited, forbidden or declared to be unlawful, or shall omit to do any act, matter or thing required to be done either by any provisions of this Act or any rule, regulation, order or decision of the Commission, issued under authority of this Act, the public utility shall be liable to the persons or corporations affected thereby for all loss, damages or injury caused thereby or resulting therefrom, and if the court shall find that the act or omission was wilful, the court may in addition to the actual damages, award damages for the sake of example and by the way of punishment. An action to recover for such loss, damage or injury may be brought in the circuit court by any person or corporation.

In every case of a recovery of damages by any person or corporation under the provisions of this Section, the plaintiff shall be entitled to a reasonable attorney's fee to be fixed by the court, which fee shall be taxed and collected as part of the costs in the case.

No recovery as in this Section provided shall in any manner affect a recovery by the State of the penalties in this Act provided.

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