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Illinois Power Company -vs- Town of Normal
Complaint as to Respondent's cease and desist order in Normal, Illinois

98-0329

ILLINOIS COMMERCE COMMISSION

1998 Ill. PUC LEXIS 969

November 5, 1998

OPINION: [*1]

ORDER

By the Commission:

On April 29, 1998, Illinois Power Company ("IP" or "the Company") filed a verified complaint and request for declaratory relief relating to a letter received from the Town of Normal ("Normal" or "the town") which ordered IP to cease and desist all tree trimming operations on trees located within all public rights-of-way under the jurisdiction of the town. On June 2, 1998, the town filed a verified answer and motion to dismiss. On June 26, 1998, IP filed an amended verified complaint and request for declaratory relief. On July 13, 1998, the town filed a motion to dismiss the amended complaint. There followed the submission of numerous pleadings from the town, IP and the Staff of the Illinois Commerce Commission ("Staff"). A Hearing Examiner's Proposed Order was served on the parties. Exceptions and Replies as filed have been duly considered in arriving at the conclusions herein. The Commission, having reviewed the amended complaint, the second motion to dismiss and the pleadings associated with the amended complaint and the motion, has concluded that this cause ought to be dismissed.

Discussion

IP's amended complaint notes first that the town [*2] has now replaced the original cease and desist order with a municipal ordinance which purports to regulate tree trimming near utility lines. IP alleges that the ordinance will result in adverse consequences to safety and reliability and in its amended complaint sought the following relief:

- (a) a declaratory judgment that the town's cease and desist order violated the Public Utilities Act;
- (b) a declaratory judgment that the trimming ordinance violates the Public Utilities Act and exceeds the town's constitutional authority;
- (c) a declaratory judgment that the town's cease and desist order breached a franchise agreement between IP and the town, as modified by and construed in light of a 1996 commitment letter such that the town could not unreasonably withhold consent to IP's tree trimming practices which judgment would further specify that the withholding of consent would be deemed unreasonable where IP's tree trimming is consistent with certain standards set out in the amended complaint;
- (d) a declaratory judgment that the trimming ordinance is a breach of the franchise agreement as modified and construed in light of a commitment letter such that the town may not impose standards [*3] on IP's tree trimming activities that are in conflict with or in excess of the standards set out in the authorities identified in the amended complaint;
- (e) a final order authorizing IP to trim trees near power lines in the Town of Normal in accordance with guidelines contained in authorities attached to the amended complaint;

(f) a final order authorizing IP to pass through to customers in the Town of Normal any fines, penalties or other charges that may be imposed by the town in connection with its current ordinance or any future cease and desist orders, identifying on any future bills the source of said additional charge or pass throughs; and

(g) an order expressly revising the existing franchise agreement to contain, and requiring to be included in any future franchise agreements between IP and the town, the terms of tree trimming as authorized in this action, subject to any tariff hereafter approved by the ICC.

While a plethora of pleadings have been filed in this docket, the Commission relies primarily upon Staff's response to the Town of Normal's motion to dismiss the amended complaint in arriving at its conclusions that this docket should be dismissed. Staff first [*4] note that because the cease and desist order of April 21, 1998 is no longer in effect, IP's complaint is moot as it relates to the cease and desist order. The Commission agrees and finds that the relief requested in subparagraph (a) of the amended complaint is moot.

Staff then notes that Section 200.220 of the Commission's Rules of Practice which is authorized by Section 5-150 of the Illinois Administrative Procedure Act (83 Ill. Adm. Code 200.220; 5 ILCS 100/5-150) is the only provision which authorizes the Commission to issue declaratory rulings. That section states, in pertinent part:

Section 200.220 Declaratory Rulings

a) When requested by the affected person, the Commission may in its sole discretion issue a declaratory ruling with respect to:

1) the applicability of any statutory provision enforced by the Commission or of any Commission rule to the person(s) requesting a declaratory ruling; and

Our review of Section 200.220 (a) convinces us that the relief requested in subsections (b) (c) and (d), all of which call for a declaration of the rights and responsibilities of the two parties to this docket, are beyond the scope of the authority granted the Commission [*5] in Section 200.220, which is limited to a declaration of the applicability of any statutory provision enforced by the Commission or of any Commission rule to the person or persons requesting the declaratory ruling. To the extent that IP has argued that its amended complaint requests a ruling on the applicability of the Act to IP, the Commission finds that, in the absence of an additional ruling upon the rights and responsibilities of the parties, such a ruling would amount to a tautology (IP is subject to the Act). The Commission sees no purpose in allowing this matter to continue to the evidentiary stage in order to allow it to enter a tautological order.

The next issue involves IP's request that the Commission enter a final order authorizing IP to trim trees near power lines in the Town of Normal in accordance with guidelines contained in an exhibit to the complaint. In its reply brief, Normal argues that the Supreme Court, in *Village of Bolingbrook v. Citizens Util. (Ill. 1994) 158 Ill2d 133, 198 Ill. Dec. 389, 632 N.E.2d 1000* ("*Bolingbrook*") has conclusively settled the authority of home rule units (such as Normal) to establish guidelines for the manner in which individuals [*6] may conduct business on municipal rights-of-way. The applicability of this case to the instant proceeding was the subject of extensive briefing and argument. The Commission concludes that it need not at this time reach a decision on this issue. IP's complaint requests a final order authorizing it to trim trees near power lines in the Town of Normal but contains no recitation of authority to any specific statute or rule which contemplates such an order. The Commission is aware that recently enacted rules on service reliability (Docket Nos.98-0005/98-0036 cons.), include a provision which would allow utilities to file vegetation management tariffs. In the event that such a vegetation management tariff is filed by IP or any other utility, the issue of the applicability of *Bolingbrook* to the Commission's rule will likely be fully addressed at that time.

In terms of IP's request for relief (f), involving the pass through of any fines, penalties or other charges imposed on IP in connection with the current or any future tariff, Staff takes the position, and the Commission agrees, that the request is one for rate relief, which must be filed under Section 9-250 of the Act. Staff notes [*7] that IP has failed to include any tariff language that would address the flow through of the funds, nor any proposed accounting treatment, in the event the pass through were allowed. Under these circumstances, request for relief (f) should be dismissed.

In terms of IP's request for relief (g), involving the rescission and reformation of the franchise agreement between it and the town, Staff notes that while this may be construed as a request for an order imposing reasonable "rates" (as that term has been more fully defined by the courts) under Section 9-250 of the Public Utilities Act, there is no allegation that the franchise agreement effects the "rates" of IP. In addition to the above, it is well settled that the Commission is an administrative agency and not a judicial body, and has no jurisdiction to adjudicate controverted individual contract rights. (see *Mitchell v. Illinois Central Railroad Company*, 317 Ill.App. 541, 47 N.E.2d 115 (1943) reversed on other grounds at 384 Ill. 258, 51 N.E.2d 271 (1943)). Because of this, the Commission has no authority to rescind and reform the franchise agreement as requested by IP, thereby providing yet another ground for dismissing subparagraph [*8] (g) of IP's request for relief.

For all of the above reasons, the Commission has concluded that this cause ought to be dismissed.

The Commission, having considered the entire record and being fully advised of the premises, is of the opinion and finds that:

- (1) on April 29, 1998, a formal complaint and request for declaratory ruling was filed by Illinois Power against the town of Normal, Illinois, concerning a cease and desist letter relating to tree trimming activities of the utility on public rights-of-way, sent to the utility by the town;
- (2) on June 2, 1998, the town filed a verified answer and motion to dismiss;
- (3) on June 26, 1998, the Illinois Power filed and amended complaint and request for declaratory ruling, noting that the cease and desist letter had been supplanted by a municipal ordinance which regulated tree trimming activities on public rights-of-way in the town;
- (4) On July 13, 1998, the Town of Normal filed a motion to dismiss the amended pleadings;
- (5) the parties to this docket, as well as Staff of the Commission have filed briefs and replies relating to all issues;
- (6) the Commission finds that this complaint must be dismissed because: request [*9] for relief (a) is moot due to the town's having rescinded the cease and desist letter; the Commission is without statutory or administrative authority to enter the type of declaratory ruling requested in IP requests for relief (b), (c), (d) and (g) and requests for relief (e) and (f) are unsupported by sufficient factual allegations or recitations to statutory authority to allow the Commission to make a determination as its authority to enter the type of order requested.

IT IS THEREFORE ORDERED that the Town of Normal's Motion to Dismiss the Amended Complaint of Illinois Power is granted the Amended Complaint is Dismisses without prejudice.

IT IS FURTHER ORDERED that, subject to the provisions of Section 10-113 of the Public Utilities Act and 83 Ill. Adm. Code 200.880, this Order is final; it is not subject to the Administrative Review Law.

By order of the Commission this 5th day of November, 1998.

(SIGNED) RICHARD L. MATHIAS

Chairman