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STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

INLAND PAPERBOARD AND PACKAGING,)
INC. f/k/a INLAND CONTAINER CORP.,)

Complainant,)

v.)

No. 00-0385

COMMONWEALTH EDISION COMPANY,)

Respondent.)

Complaint as to Municipal Taxes and)
Franchise Costs improperly charged to the)
complainant in Leyden Township, Illinois.)

**INLAND PAPERBOARD AND PACKAGING, INC.'S
MOTION FOR PARTIAL SUMMARY JUDGMENT**

Now comes the Complainant, Inland Paperborad and Packaging, Inc. ("Inland"), by and through its attorneys, Williams Montgomery & John Ltd., pursuant to Section 200.190 of the Illinois Commerce Commission's (the "Commission") Rules of Practice, and respectfully moves this Commission for an order granting partial summary judgment against Commonwealth Edison Company ("ComEd"). Inland seeks summary judgment on its claims made in its Amended Formal Complaint ("complaint") for recovery of Municipal Taxes collected by ComEd from September 15, 1996 through October 30, 1997 and for recovery of all Franchise Costs collected by ComEd from April 4, 1995 through October 30, 1997.

BACKGROUND

On September 15, 1999, Inland filed an Informal Complaint with the Commission seeking a refund of Village of Franklin Park Municipal Taxes and Franchise Costs which were improperly charged and collected by ComEd from December 5, 1989 through October 30, 1997. (See Inland's Informal Complaint attached hereto as Exhibit A.) On May 26, 2000, Inland filed its Formal Complaint with the Commission, seeking a refund of Village of Franklin Park Municipal Taxes and Franchise Costs, which were improperly charged and collected from December 5, 1989 through October 30, 1997. On June 21, 2000, Inland filed its Amended Formal Complaint with the Commission, correcting a typographical error. (See Inland's Amended Formal Complaint, attached hereto as Exhibit B.) On July 21, 2000, ComEd filed a Motion to Dismiss, seeking to dismiss only that portion of Inland's complaint, which sought reimbursement for improperly collected Municipal Taxes prior to September 15, 1996 on the grounds that such claims are barred by a certain statute of limitation. (See ComEd's Motion to Dismiss, attached hereto as Exhibit C.) Following oral arguments on October 5, 2000, before the Commission on ComEd's Motion to Dismiss, the Commission, on October 25, 2000, granted ComEd's Motion to Dismiss on only that portion of Inland's complaint regarding reimbursement of Municipal Taxes improperly charged prior to September 15, 1996. (See copy of transcript of October 25, 2000 hearing attached hereto as Exhibit D.) The Commission did not address the issue regarding a limitation on the recovery of Franchise Costs as ComEd admitted that there was no limitation regarding their refund. (See Ex. C, p. 3, FN 1; Ex. E, pp. 20-21, a copy of the October 5, 2000 hearing transcript.) In ruling on ComEd's Motion to Dismiss, the Hearing Examiner made clear that the Order granting the Motion to Dismiss was interlocutory and did not otherwise dispose of this case. (See generally Exhibit D, p. 41.)

FACTS

Inland operates a manufacturing facility located at 11600 W. Grand Avenue, Leyden Township. Inland is situated in an area, which has been unincorporated during all times referred to in its complaint. Inland was a customer of ComEd from December 5, 1989 through October 30, 1997. Each of the billing statements rendered by ComEd to Inland during this time period and thereafter identified Inland's service address as "at 11600 W. Grand Avenue, Leyden Township". (See Exhibit F, Copies of ComEd billing statements for the periods 8/30/96 through 10/30/97.) During this period, ComEd continuously charged and collected Village of Franklin Park Municipal Taxes and Franchise Costs against Inland. On October 30, 1997, ComEd unilaterally and without notice to Inland, removed these improper charges from their billing statements, hiding their error.

During the time period in question, an Ordinance Establishing A Municipal Utility Tax Within The Village Of Franklin Park No. 8990 G 12 (1989) was in effect. The ordinance permitted ComEd to impose a Municipal Tax upon those customers of electricity ". . . within the corporate limits of the Village of Franklin Park . . .". (Ordinance attached hereto as Exhibit G). ComEd was authorized to impose such taxes pursuant to 220 ILCS 5/9-221. Because Inland was not located within the incorporated limits of the Village of Franklin Park, ComEd was not authorized to collect such Municipal Taxes and Franchise Costs from Inland.

Upon learning that ComEd had wrongfully imposed charges for a Municipal Tax and Franchise Costs, Inland promptly filed an Informal Complaint on September 15, 1999 seeking a refund for these improper charges. Due to ComEd's inaction and denial of culpability, Inland was forced to file a Formal Complaint on May 26, 2000, which it subsequently amended on June 23, 2000 to correct a typographical error. ComEd has failed to answer Inland's Formal

Complaint or Amended Formal Complaint and as such has admitted all allegations contained in Inland's Complaint. Instead, ComEd moved to dismiss only a portion of Inland's complaint.

Inland is now seeking a refund, plus interest, for those payments made on Municipal Tax charges from September 15, 1996 through October 30, 1997 in the amount of \$22,005.88; and for payments made on Franchise Cost charges from April 4, 1995 through October 30, 1997 in the amount of \$2,165.65. (See Exhibit H.) Interest on these payments should be computed by the Commission pursuant to 83 Ill. Adm. Code § 280.70(e)(1).

ARGUMENT

I. Inland is entitled to recovery of all payments for Municipal Taxes paid from September 15, 1996 through October 30, 1997 and all Franchise Costs paid, plus interest, which were improperly charged by ComEd.

A motion for summary judgment is to be granted "if the pleadings, depositions, and admissions on file, together with affidavits, if any, show that there is no issue as to any material fact and that the moving party is entitled to summary judgment as a matter of Law." 735 ILCS 5/2-1005(c); Addison v. Whittenberg, 124 Ill.2d 287, 294, 529 N.E.2d 552 (Ill. 1988).

It is undisputed that Inland is located at 11600 W. Grand Avenue in Leyden Township, outside of the boundaries incorporated by the Village of Franklin Park. It is further undisputed that Inland was exempt from paying a Municipal Tax or a Franchise Cost pursuant to Village of Franklin Park ordinance No. 8990 G 12 (1989). (See Exhibit G.) It is also undisputed that ComEd removed these charges because they were improper. As such, any charges by ComEd for a Municipal Tax or Franchise Cost levied against Inland were improper and in violation of several statutes, codes and ordinances. Lastly, it is undisputed that Inland's refund claims for Municipal Taxes paid from September 15, 1996 through October 30, 1997 and Franchise Costs paid from April 4, 1995 through October 30, 1995 are not barred by any applicable statute of

limitation. (See Ex. C, p. 3, FN 1; Ex. E, pp. 20-21.) Therefore, Inland is entitled to a full refund of all payments made, plus interest, relating to these improper charges.

A. Commonwealth Edison admits to Inlands' allegations by failing to answer pursuant to Section 200.180 of the Illinois Administrative Code.

Inland properly filed its Formal Complaint on May 26, 2000 and its Amended Formal Complaint on June 21, 2000 pursuant to Section 200.150, which were subsequently served on Commonwealth Edison by the Commission.¹ Subsequent to these filings, Commonwealth Edison has failed to file any answer either admitting or denying the allegations complained of by Inland. Respondents in this action have only filed a Motion to Dismiss regarding a portion of Inland's claimed damages. Neither Section 200.180, regarding "Answers", or Section 200.190, regarding "Motions", of the Code either permits or allows motions to dismiss to substitute for a respondent's answer to a formal complaint.² As such, pursuant to the unequivocal language of the Code, it is clear that ComEd has failed to file an appropriate answer to Inland's complaint. Therefore, as a result of its failure to answer, and pursuant to Section 200.180, ComEd has admitted Inlands' allegations as true.

Section 200.180 states in relevant part:

Answers

(a) Whenever the Hearing Examiner issues a ruling that a complaint provides a clear statement of the subject matter, scope of complaint, and basis thereof, answers to formal complaints shall be filed with the Commission within 21 days after the date of which the Commission serves notice of the Hearing Examiner's ruling upon the respondent, unless otherwise ordered. If any respondent fails to file an answer when required under this section, allegations of fact as to such respondent will be considered admitted. If respondent does not file an answer when no filing requirement exists, issues as to such respondent will be considered joined. Answers shall contain an explicit admission or

¹ Section 200.150 of the Illinois Administrative Code instructs that all Formal Complaints will be served on the Commission; and accordingly, pursuant to 83 § 200.150(a), "Formal complaints will be served by the Commission only." 83 § 200.150(a) (1996).

² Section 200.180 governs the time and manner, which Formal Complaints are to be answered. This section of the Code does not allow for any type of motion to stand in the place of an "answer". Section 200.190 of the Code governs the type and manner which motions may be presented before the Commission. This section does not allow any type of motion to substitute as an answer to a Formal Complaint.

denial of each allegation of the pleading to which they relate and a concise statement of the nature of any defense. Ill. Admin. Code tit. 83 § 200.180 (1985).

As such, pursuant to Section 200.180, failing to answer or otherwise deny allegations as set forth by the complainant results in those allegations being admitted by the respondent. Consequently, there is no triable issue regarding ComEd's improper charging of Municipal Taxes and Franchise Costs and summary judgment is proper.

Alternatively, and without waiving Inland's above argument, even if ComEd were to argue that their Motion to Dismiss should be considered an alternative pleading and responsive to Inland's Formal Complaint, they have still failed to answer those remaining allegations in a timely fashion, pursuant to Section 200.180. Respondents, in arguing their Motion to Dismiss, clearly admit that they were not trying to dismiss the entire case. At the October 5, 2000 hearing on their motion, respondent's counsel stated: "I want to make it very clear that this is not a motion where we are trying to dismiss the entire case." (See Exhibit E, p. 15.) On October 25, 2000, the Commission ruled on ComEd's motion. As such, even if ComEd argues that the twenty-one (21) day period to answer all remaining allegations began tolling from the October 25, 2000 date, they have still failed to file a timely answer to Inland's complaint under the rules set forth in Section 200.180. Thus, even arguing the facts in the light most favorable to ComEd, they have failed to meet those pleading provisions set forth in the Illinois Administrative Code, therefore admitting all remaining allegations in Inland's complaint.

For the above reasons, pursuant to Section 200.180 of the Illinois Administrative Code, this Commission should find that all remaining allegations in Inland's Complaint are admitted by ComEd. As such, Inland is entitled to summary judgment regarding the refund of those Municipal Taxes collected by ComEd from September 15, 1996 through October 30, 1997 and regarding recovery of all Franchise Costs collected from April 4, 1995 through October 30, 1997.

B. Inland is entitled to a full refund of all payments plus interest for improper charges pursuant to Sections 280.75 and 280.76 of the Illinois Administrative Code.

Certain Municipal Taxes are imposed on sellers of electricity, such as ComEd, who are authorized to then pass those taxes on to customers. *See* 220 ILCS 5/9-221; ComEd Rider 23. The Village of Franklin Park established the collection of such taxes in Ordinance No. 8990 G 12 (1989); but only for businesses located within its area of incorporation. (See Ex. G.) Therefore, where a utility passed such taxes through to a customer located outside of the incorporated area, the utility has violated both the municipal ordinance as well as the statute authorizing the pass through of those taxes.

The Illinois Commerce Commission has provided a mechanism for the refund of all such charging errors pursuant to 83 Ill. Adm. Code § 280.75. Section 280.75, "REFUNDS", states:

"a) In the event that a customer pays a bill as submitted by the utility and the billing is later found to be incorrect due to an error either in charging more than the published rate, in measuring the quantity or volume of service provided, or in charging for the incorrect class of service, the utility shall refund the overcharge with interest from the date of overpayment by the customer.

b) The interest rate shall be the rate as established by the Commission to be paid on deposits in Section 280.70(e)(1) of this part.

c) The refund shall be accomplished by the Commission either by a credit on a subsequent bill for service or by a check if the account is final or if so requested by the customer."

83 Ill. Adm. Code 280.75 (Attached hereto as Exhibit I).

In this case, ComEd charged for the incorrect class of service because it classified Inland as being within the municipal boundaries of the Village of Franklin Park, which it clearly was not. As a consequence, Inland was improperly charged a Municipal Tax and a Franchise cost. As provided above, Inland is entitled to a refund with interest.

In addition, 83 Ill. Adm. Code 280.76 provides for refunds of incorrectly calculated charges pursuant to Section 9-221 or Section 9-222 of the Public Utilities Act. Section 280.76, "REFUNDS OF ADDITIONAL CHARGES", states:

"In the event that the Commission orders a public utility to refund incorrectly calculated additional charges made pursuant to Section 9-221 or Section 9-222 of the Public Utilities Act, the public utility shall pay interest on such refund and the rate established by the Commission to be paid on deposits in 83 Ill. Adm. Code 280.70(e)(1)."

83 Ill. Adm. Code 280.76 (Attached hereto as Exhibit J).

Section 280.76 directly addresses Section 9-221 where a public utility incorrectly levied additional charges upon a customer such as Inland. In such instances, the above administrative code mandates that the utility must refund all over-charged amounts, with interest.

Therefore, where a customer has established that it was improperly charged by a utility, the utility must fully refund all amounts relating to such charges plus interest as determined by the Commission. There is no issue of fact that Inland was improperly charged a Municipal Tax and Franchise Cost by ComEd when Inland was clearly exempt from such charges. ComEd, by unilaterally removing these improper charges from Inland's billing statement on 10/30/97, admitted that such charges were improper and in violation of the legislative scheme. As such, Inland is entitled to a full refund for payments made on these charges from the period September 15, 1996 through October 30, 1997 for Municipal Tax and the period April 4, 1995 through October 30, 1997 for Franchise Costs.

C. Inland is entitled to a full refund of all payments plus interest for improper charges pursuant to 220 ILCS 5/9-252 and 220 ILCS 5/9-252.1.

Section 220 ILCS 5/9-252 of the Public Utilities Act, which applies to actions for recovery of excessive or unjustly discriminatory amounts charged for its commodity, product or service, applies to Inland's claim as well and allows for a full refund with interest. Section 5/9-252 states:

When complaint is made to the Commission concerning any rate or other charge of any public utility and the Commission finds, after a hearing, that the public utility has charged an excessive or unjustly discriminatory amount for its product, commodity or service, the Commission may order that the public utility make due reparation to the complainant therefore, with interest at the legal rate from date of payment of such excessive or unjustly discriminatory amount.

220 ILCS 5/9-252 (Attached hereto as Exhibit K).

ComEd's collection of Municipal Taxes and Franchise Costs was both excessive and unjustly discriminatory. First, ComEd's collection of a Municipal Tax and a Franchise cost from Inland was excessive because such taxes only apply to businesses situated in incorporated areas. Collection of erroneous fees from a business situated in an unincorporated area result in an excessive amount being charged for the utility's service.

Secondly, ComEd's collection of a Municipal Tax and a Franchise Cost from Inland was unjustly discriminatory because other businesses similarly located in unincorporated Leyden Township were not subjected to such taxes. Norkol, Inc., a manufacturing facility, located at 11650 W. Grand Ave., Leyden Township, is situated directly north from Inland. Upon information and belief, no charges for a Municipal Tax or a Franchise cost were levied on this facility. In contrast, on information and belief, Norkol's corporate offices located across the street at 1240 and 1250 Garnet Drive, Northlake, Illinois, which were situated within the incorporated limits of Northlake, were properly charged a Municipal Tax and Franchise cost. ComEd therefore has shown that it knew that businesses located in unincorporated areas were not subject to a Municipal Tax or Franchise cost; and further that they were able to make such distinctions. It is clear that Inland was singled out from other similarly situated businesses in unincorporated Leyden Township, which is discriminatory on its face. Therefore, Section 5/9-252 applies to this action.

Similarly, 220 ILCS 5/9-252.1 of the Public Utilities Act also applies to this action. Section 5/9-252.1 states that:

When a customer pays a bill as submitted by a public utility and the billing is later found to be incorrect due to an error in either charging more than the published rate or in measuring the quantity or volume of service provided, the utility shall refund the overcharge with interest from the date of overpayment at the legal rate or the rate prescribed by rule of the Commission. . . . Any complaint relating to an incorrect billing must be filed with the Commission no more than 2 years after the date the customer first has knowledge of the incorrect billing.

220 ILCS 5/9-252.1 (Attached as Exhibit L).

Clearly, ComEd incorrectly charged Inland for erroneous taxes and costs due to an error in the billing process, which did not recognize Inland as being located in an unincorporated area. It is undisputed that Inland was located in an unincorporated area, which makes it exempt from paying a Municipal Tax and a Franchise Cost. As such, there is no issue of fact in dispute, thus Inland is entitled to a refund of payments made regarding these erroneous charges.

Both the Administrative Code of the Illinois Commerce Commission and the Public Utilities Act are symmetrical in that they both address actions where a utility has erroneously charged a customer and they both prescribe a full refund plus interest to be computed pursuant to Section 280.70(e)(1). ComEd has not disputed that charging Inland a Municipal Tax and a Franchise Cost was improper, thus, by statute Inland is entitled to a refund plus interest. Therefore, summary judgment in favor of Inland's claim should be granted.

Conclusion

It is undisputed that Inland was never located within the incorporated boundaries of the Village of Franklin Park. It is undisputed that Franklin Park Ordinance No. 899 G 12 (1989) does not permit ComEd to impose Municipal Taxes or Franchise Costs on those customers which are not located within its corporate limits. It is further undisputed that ComEd unilaterally removed these charges because they were improper. Henceforth, there is no triable issue of fact regarding whether ComEd must refund those Municipal Taxes paid from September 15, 1996 through October 30, 1997 and Franchise Costs paid from April 4, 1995 through October 30, 1997

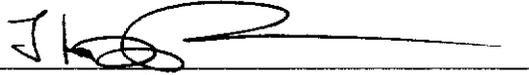
which were improperly charged by ComEd and paid by Inland. Furthermore, the Illinois Administrative Code as well as the Public Utilities Act mandates that refunds of improper charges must include payment of interest to be determined pursuant to Section 280.70(e)(1).

WHEREFORE, for the forgoing reasons, Complainant Inland Paperboard and Packaging, Inc. f/k/a Inland Container Corp. respectfully moves the Illinois Commerce Commission to grant summary judgment in its favor and against respondent, Commonwealth Edison Corporation for payments made on improper Municipal Tax charges from September 15, 1996 through October 30, 1997 and for payments made on improper Franchise Costs charges from April 4, 1995 through October 30, 1997; and to impose interest on these refunds pursuant to 83 Ill. Adm. Code § 280.70(e)(1).

Respectfully submitted,

INLAND PAPERBOARD AND PACKAGING, INC.
f/k/a INLAND CONTAINER CORP.

By: _____


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