

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

CITIZENS UTILITY BOARD,	§	
CITIZEN ACTION/ILLINOIS AND	§	
AARP	§	
	§	DOCKET NO. 08-0175
-VS-	§	
ILLINOIS ENERGY SAVINGS CORP.	§	
D/B/A U.S. ENERGY SAVINGS CORP.	§	
	§	
COMPLAINT PURSUANT TO	§	
220 ILCS 5/19-110 OR 19-115.	§	

**AARP’S AND CITIZEN ACTION/ILLINOIS’
RESPONSE TO RESPONDENT’S MOTION TO DISMISS**

I. USESC’s Motion to Dismiss Is Legally Flawed.

Illinois Energy Savings Corp., d/b/a U.S. Energy Savings Corp.’s (USESC) Motion to Dismiss AARP and Citizen Action/Illinois (Motion) must be denied for three legal reasons:

1. The requested dismissal is contrary to the Public Utilities Act (PUA), 220 ILCS 5/10-108, provision concerning the filing and prosecution of complaints before the Illinois Commerce Commission (ICC or Commission).
2. As an Ill. Code of Civ. Proc. 5/2-619 motion for involuntary dismissal, USESC’s Motion is untimely filed and thus any relief has been waived.
3. Even if the Motion were timely filed, there are no affidavits in support as required by both Ill. Code of Civ. Proc. 5/2-619 and 85 Ill. Adm. Code 200.190(c).

II. The PUA Prohibits the Commission from Dismissing AARP and Citizen Action/Illinois as Complainants in This Proceeding.

A. USESC fails to cite controlling provision of PUA.

USESC's 5/2-619 Motion seeks to have the Commission dismiss AARP and Citizen Action/Illinois as complainants in this complaint docket. In support of its Motion, USESC cites several cases dealing with the issue of standing in federal and state courts for associations representing their members. Remarkably, USESC fails to cite as support for its Motion either the Public Utilities Act or in any way reference the provision under which the complaint case was docketed by the ICC.

USESC's aversion to the controlling statute is understandable—but inappropriate—since the statute specifically *prohibits* the Commission from dismissing a complaint due to the lack of direct damages to the complainant before the Commission. USESC's entire argument for dismissal is based on the erroneous assumption that AARP and Citizen Action/Illinois must show direct damage to themselves to have standing to bring this Complaint.

The Complaint in the instant docket was brought under the Public Utilities Act Sec. 5/10-108, which states in part:

Sec. 10-108. Complaints; notice; parties. Complaint may be made by the Commission, of its own motion or by *any person or corporation*, chamber of commerce, board of trade, or any industrial, commercial, mercantile, agricultural or manufacturing society, or any body politic or municipal corporation by petition or complaint in writing, setting forth any act or things done or omitted to be done in violation, or claimed to be in violation, of any provision of this Act, or of any order or rule of the Commission. . . . *No complaint shall be dismissed because of the absence of direct damage to the complainant.*

220 ILCS 5/10-108 (emphasis added).

The purpose of this provision is to allow anyone to bring to the Commission's attention any potential violation of the PUA or the Commission's rules whether or not the complainant is

directly affected by the actions of the regulated entity. It is then up to the Commission to investigate and pursue the complaint and render a decision based on the evidence presented. In other words, any person or corporation or association can file a complaint with the Commission that sets out what act or thing done is in violation of the PUA or Commission rules. There is no requirement that the complainant either suffer damage or be the object of the improper action. In fact, the statute states the opposite: “No complaint shall be dismissed because of the absence of direct damage to the complainant.” Yet, this is precisely what USESC wants this Commission to do—dismiss AARP and Citizen Action/Illinois as complainants because they have not pled direct damages as the result of USESC’s actions that are the basis of the Complaint. For this reason, USESC’s Motion to dismiss must be denied.

B. Associational standing analysis does not apply under PUA.

USESC attempts to avoid the direct meaning of the PUA by citing cases concerning the requirements for standing by associations in state or federal court actions not brought under the PUA. This analysis is irrelevant to the Motion in this docket.

The analysis of standing under the PUA and of standing in a court proceeding are not interchangeable. In *Cable Television and Communications Assn. of Illinois v. Ameritech Corp. et al*, 288 Ill. App. 3d 354 (2nd Dist. 1997), the court explained that the requirements for standing in court are not the same as for a complaint case before the ICC. In *Cable Television*, the association had filed a case against Ameritech in DuPage County court. The case was dismissed based upon the association’s lack of standing and the appellate court agreed. As part of its argument, the association cited to cases before the ICC where it had participated to show it “has been recognized and accepted as an appropriate party in litigation involving the interests of its

members” and therefore supported the association’s claim of standing. The appellate court stated that the ICC cases:

are all distinguishable from this case because the cited cases involve appeals from the Illinois Commerce Commission (the Commission) proceedings under the Public Utilities Act (Act) (220 ILCS 5/1-101 *et seq.* (West 1994)). The Act provides that “any person or corporation” may bring a complaint before the Commission and that “no complaint shall be dismissed because of the absence of direct damage to the complainant.” 220 ILCS 5/10-108 (West 1994).

288 Ill App. 3d at 359. As a result, under the Act, the association “may properly bring a complaint before the Commission,” and such standing does not conflict with the court’s holding that representative capacity alone is insufficient to bring a declaratory judgment action in a court of law as contrasted with the requirements under PUA. *Id.* at 359.

The same law applies in this case. AARP and Citizen Action are each corporations and thus both have standing to bring a complaint before the ICC, whether or not they demonstrate direct damages. USESC’s motion must be denied as being contrary to PUA Sec. 10-108.

III. USESC Failed to File Motion Prior to Filing Answer, Waiving Any 5/2-619 Relief.

Even if there were a colorable argument under PUA concerning standing, which there is not, USESC’s Motion must be denied as being late filed. Although USESC did not plead its Motion this way, a motion to dismiss parties from a proceeding for lack of standing properly falls under Ill. Code of Civ. Proc. 5/2-619 and any motion to dismiss on that ground must be brought under that provision. Perhaps USESC’s failure to plead its Motion as a 2-619 Motion was intentional since it failed to timely file its motion under 5/2-619 and therefore must be dismissed. The rule states in part:

- (a) Defendant may, within the time for pleading, file a motion for dismissal of the action or for other appropriate relief upon any of the following

grounds. If the grounds do not appear on the face of the pleading attacked the motion shall be supported by affidavit:

* * *

(2) That the plaintiff does not have legal capacity to sue or that the defendant does not have legal capacity to be sued.

* * *

(9) That the claim asserted against defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim.

USESC's motion to dismiss was filed on September 18, 2008. USESC filed its verified answer in this docket on April 24, 2008. The issue of standing was not raised in USESC's answer. A 5/2-619 motion must be brought "within the time for pleading." "[T]he question of . . . standing . . . is an affirmative defense that must be raised by the petitioner in a timely fashion." *Dunham v. Naperville Township Officers Electoral Board*, 265 Ill. App. 3d 719, 724 (2nd Dist. 1994). In other words, USESC's Motion had to be filed prior to USESC's filing its answer on April 24, 2008, so the Motion is untimely by over four months and thus barred. USESC's request must be denied since it has waived its rights to bring a motion for involuntary dismissal.

IV. USESC's Motion Violates Both Court and Commission Rules by Failing to Include Required Affidavits.

Even if the Motion were not waived because it was not timely brought, USESC failed to support its Motion with an affidavit as required under 5/2-619 and the Commission's own rules and therefore must be denied.

The Supreme Court rule requires that "if the grounds do not appear on the face of the pleading attacked the motion shall be supported by affidavit." 5/2-619(a). The Commission's own rule 200.190(c) in a similar manner requires that "[m]otions based on matter which does not appear of record shall be supported by affidavit." 83 Ill. Adm. Code 200.190(c). USESC's Motion references matters not in the record in this Docket without being supported by affidavit.

Thus, the Motion is improper under both court rules and the Commission's rules. USESC has not pled and proved a lack of standing but rather has merely filed an unverified motion with no affidavits. The unverified Motion does not comport with either the Supreme Court or the Commission's rules. The Motion must be denied on this basis alone.

V. The USESC Motion Fails to Meet Burden to Prove that AARP and Citizens Action Lack Standing.

USESC in its Motion also fails to meet its burden of proof. As to the question of standing, "initially the plaintiff has no burden to plead and prove standing. Rather the defendant must plead and prove lack of standing as a defense to the claim." *Dominic Senese v. Climatemp, Inc. et al.*, 222 Ill. App. 3d 302, 317 (1st Dist. 1991). (It is the defendants' burden to plead and prove that plaintiffs lack standing. *Concepcion Noyola v. Board of Education of the City of Chicago*, 227 Ill. App. 3d 429, 433 (1st Dist. 1992)).

As noted above, USESC did not file any affidavits with its Motion and therefore it has submitted no factual basis for granting the Motion as required by the rules.

USESC's lack of proof is in contrast to the statements in the verified Complaint that states that AARP is a non-profit, nonpartisan membership organization that advocates for people age 50 and over and that Citizen Action/Illinois is a statewide coalition comprised of 90 community, senior citizen, environmental groups as well as the major labor unions in Illinois. Complaint at Paras. 2 and 3. The Complaint further states that Citizen Action/Illinois has received telephone calls concerning USESC's activities and referred such calls to the Citizens Utility Board (CUB). The Complaint further states that some of the complaints received by CUB that are referenced in the complaint "are by members of Citizen Action/Illinois or are callers that Citizen Action/Illinois referred to CUB." Complaint Para. 17. The Complaint further states that

USESC “targets its door-to-door marketing efforts to non-English speakers and senior citizens.” Complaint at 20. These non-English speakers and senior citizens are the very type of citizens that both AARP and Citizen Action/Illinois seek to protect from predatory practices such as alleged in the Complaint.

In its Motion, USESC references only the responses to the data requests from AARP. Citizen Action/Illinois served a separate answer to USESC’s data request on August 27, 2008. This response was not attached to USESC’s motion and the motion leaves the erroneous impression that Citizen Action/Illinois did not answer USESC’s data request.

It also should be noted that AARP’s and Citizen Action/Illinois’ objections as to relevancy of USESC’s data requests are firmly based on PUA Sec. 5/10-108 as is more fully set forth above. Nonetheless, USESC requests dismissal of AARP and Citizen Action/Illinois based on their respective answers to data requests¹, not simply on the face of the Complaint, and therefore requires that the Motion be verified and with proper affidavits attached.

USESC did not file any affidavits with the motion as required by 5/2-619. For this reason, the pleading is defective and the motion must be denied.

¹ The data responses are not part of the record in this case and cannot be considered in ruling upon USESC’s Motion.

VI. Administrative Law Judge Must Reject USESC's Request.

AARP and Citizen Action/Illinois request that the Administrative Law Judge deny USESC's Motion to Dismiss.

By: _____/rcb/_____

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CERTIFICATE OF SERVICE

I, Richard C. Balough, do certify that AARP's and Citizen Action/Illinois Response to USESC's Motion to Dismiss was sent to the service list via electronic means on this 30th day of September 2008.

_____/rcb/_____
Richard C. Balough