

**STATE OF ILLINOIS  
ILLINOIS COMMERCE COMMISSION**

KING’S WALK CONDOMINIUM	)	
ASSOCIATION,	)	
	)	
Petitioner,	)	
	)	
v.	)	Docket No. 08-0264
	)	
COMMONWEALTH EDISON	)	
COMPANY,	)	
	)	
Respondent.	)	

**RESPONDENT’S MOTION TO DISMISS**

Respondent, Commonwealth Edison Company (“ComEd”), an Illinois corporation, by its attorneys, moves the Administrative Law Judge (“ALJ”) and the Illinois Commerce Commission (“Commission”), pursuant to 83 Ill. Admin. Code 200.190 and 735 ILCS 5/2-619 (“§ 2-619”), for dismissal of Petitioner’s Amended Complaint. In support of its Motion, ComEd states as follows:

**I. Introduction**

Petitioner, King’s Walk Condominium Association (“King’s Walk”), an Illinois corporation, alleges in its Amended Complaint that on November 14, 1996, ComEd improperly switched Petitioner’s accounts for common area space heating from Rate 14 (a residential rate) to Rate 6 (a commercial rate), resulting in overpayment, and that ComEd continued to bill Petitioner at an incorrect rate from November 14, 1996 through July 20, 2006, and from January 2, 2007 up to the present. Petitioner seeks recovery of the difference between the amount it was billed under Rate 6 and the amount it claims it should have been billed under Rate 14 from November 14, 1996 through January 22,

2005 and from January 2, 2007 to the present,<sup>1</sup> interest on the alleged overpayments, and pursuant to Rider CABA and 220 ILCS 5/16-103.1, a credit for alleged overpayments from January 2, 2007 to the present.

While not alleged as a separate count, King's Walk also claims that from 1975 through 2006, ComEd improperly billed each of its seven (7) accounts separately despite being entitled to combined billing, resulting in overcharges of over \$20,000.00.

King's Walk alleges its claims for reparations in thirteen (13) counts, citing myriad theories of recovery, but all seeking the same remedy – reparations for alleged overcharges.<sup>2</sup>

ComEd moves for dismissal of King's Walk's Amended Complaint. King's Walk's claims related to electric service provided before April 11, 2006 must be dismissed on the grounds that such claims are time-barred under 220 ILCS 5/9-252 (“§ 9-252”), which required Petitioner to have filed this action within two years of the date the service at issue was provided.

Hoping to avoid the time bar of § 9-252, King's Walk alleges 220 ILCS 5/9-252.1 (“§ 9-252.1”) as a basis for recovery of reparations. § 9-252.1 provides:

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 of interest prescribed by rule of the Commission. Refunds and interest for such overcharges may be paid by the utility without the need for a hearing and order of the Commission. Any complaint relating to an incorrect billing must be filed with the

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<sup>1</sup> King's Walk acknowledges receiving payment of over \$33,000.00 as refunds for alleged overpayments from January 2005 through July 2006 (Amended Complaint, ¶¶ 38, 39 and 53). ComEd's payments to King's Walk do not constitute an admission as to any overcharge claims in this case.

<sup>2</sup> Counts I, II, III, IV, V, VII, VIII, X, XI, XII and XIII all seek reparations for overcharges from November 14, 1996 totaling over \$250,000.00. Count VI seeks a credit under 220 ILCS 5/16-103.1 for an amount to be determined. Count IX seeks a credit under Rider CABA from January 2, 2007 through June 30, 2008 totaling \$4,000.00.

Commission no more than 2 years after the date the customer first has knowledge of the incorrect billing.

King's Walk's reparations claims are premised on the repeated and unsupported allegations that by applying Rate 6 instead of Rate 14, by using Watt-Hour Only Meters from November 14, 1996 to July 20, 1997 (Amended Complaint, ¶ 29), and applying "In Lieu of Demand" charges from November 14, 1996 through July 20, 2006 (Amended Complaint, ¶ 25), ComEd incorrectly measured the volume and quantity of electricity sold. King's Walk claims that it did not have actual knowledge of the alleged overbillings until August 2005, and that under § 9-252.1, its claims are timely. Amended Complaint, ¶ 46. ComEd at all times however correctly measured and supplied power according to the tariff being applied. King's Walk improperly seeks to characterize a dispute over rate classification into a claim over measurement of volume and quantity of service.

King's Walk has failed to attach any invoices in support of its Amended Complaint, in violation of 735 ILCS 5/2-606.<sup>3</sup> According to the invoices attached to its First Complaint however, King's Walk was billed for "In Lieu of Demand" charges from November 14, 1996 through July 20, 1997, contrary to its allegation in ¶ 25 of the Amended Complaint.<sup>4</sup>

King's Walk's claim for credits based on a right to combined billing must be dismissed because King's Walk alleges no legal basis at all as to why it would be entitled

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<sup>3</sup> King's Walk references the invoices attached as exhibits to its First Complaint, but inexplicably elected to not include them in its Amended Complaint.

<sup>4</sup> ComEd requests that the ALJ take administrative notice under 83 Ill. Admin. Code 200.640 of invoices attached to King's Walk's First Complaint (Attachments 1-7) as an admission against interest.

to combined billing. Moreover, King's Walk offers no factual detail whatever, and fails to attach or quote any of the invoices on which its claim is based.

## **II. Procedural Background**

King's Walk filed its first Formal Complaint ("First Complaint") on April 11, 2008, alleging that on November 14, 1996, ComEd switched King's Walk's residential Rate 14 accounts to commercial Rate 6 accounts, and that ComEd continued to charge King's Walk at an incorrect commercial rate from November 14, 1996 through July 20, 2006, and from January 2, 2007 up to the date of its Amended Complaint. Based on these allegations, King's Walk requests reparations for "overpayments for electricity, with interest, from the date of overpayment, which now totals over \$250,000.00..." First Complaint, p. 2.

On May 2, 2008, ComEd moved for dismissal of King's Walk's First Complaint on the grounds that all of its claims related to service provided before April 11, 2006 were time-barred under § 9-252.<sup>5</sup> After full briefing, the ALJ issued a Proposed Order on October 24, 2008, granting dismissal of all claims related to service provided before April 11, 2006 under § 9-252, finding that King's Walk's claims were not governed by § 9-252.1. King's Walk filed its Amended Complaint on February 23, 2009.

## **III. Discussion**

### **A. Legal Standard**

The Code of Civil Procedure applies to motions to dismiss before the Commission. *See* 735 ILCS 5/1-108(b). In considering a motion to dismiss, all well-pleaded facts in the complaint are taken as true with all inferences drawn in favor of

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<sup>5</sup> King's Walk admitted both in its First Complaint and in its Amended Complaint that ComEd had refunded \$33,000 for alleged overbillings from January 2005 through July 20, 2006. King's Walk filed its informal complaint on April 13, 2007.

the non-movant, but the pleadings are to be construed strictly against the pleader. *See, e.g., Knox College v. Celotex Corp.*, 88 Ill. 2d 407, 421-22, 430 N.E.2d 976, 983 (1981).

The complaint may not rest on factual conclusions not supported by allegations of specific facts, and the court must ignore legal conclusions, speculation and conjecture. *Id.* at 426, 430 N.E.2d at 985. If the complaint contains insufficient allegations of fact to state a cause of action, the court must grant the motion "regardless of whether [the conclusory pleadings] inform the defendant in a general way of the nature of the claim against him." *Id.* Moreover, the court is not required to reach unreasonable and unwarranted conclusions or to draw unreasonable or unwarranted inferences in order to sustain the sufficiency of the complaint; reasonable inferences must be viewed against the background of common sense and experience. *Butitta v. First Mortgage Corp.*, 218 Ill. App. 3d 12, 15, 578 N.E.2d 116, 118 (1<sup>st</sup> Dist. 1991).

**B. Counts I, II, III, IV, V, VII, VIII, X, XI, XII, and XIII of King's Walk's Amended Complaint Are In Part Time-Barred Under § 9-252.**

**1. Because King's Walk's Amended Complaint is Governed by § 9-252, Any Refund Claims Related to Service Provided Before April 11, 2006 Are Time-Barred.**

Although King's Walk cites various statutes and legal theories as bases for relief in its Amended Complaint, it primarily alleges that it was incorrectly reassigned to Rate 6 from Rate 14, and that it is entitled to a refund for the difference between the amount it was actually billed and the amount it would have been billed under Rate 14. § 9-252 provides, in part:

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 the date of payment of such excessive or unjustly discriminatory amount...

All complaints for the recovery of damages shall be filed with the Commission within 2 years from the time the produce, commodity or service as to which complaint is made was furnished or performed...

King's Walk's claim that it was improperly reassigned to Rate 6 falls within § 9-252 and its two-year limitation period. King's Walk filed its First Complaint on April 11, 2008. Thus, any claims related to service provided before April 11, 2006 are time-barred.

A claim is one for reparations, and thus falls under the Public Utilities Act ("PUA"), when the essence of the claim is that a utility has charged too much for a service. *Flournoy v. Ameritech*, 351 Ill.App.3d 583, 814 N.E.2d 585 (3<sup>rd</sup> Dist. 2004), *reh'g denied, appeal pending*. When the essence of the claim is not that the utility has excessively charged, but rather that the utility has done something else to wrong the plaintiff, then the claim is for ordinary civil damages. *Id.* Customers alleging they were overcharged by a utility and/or that a utility's rates were excessive must seek reparations under § 9-252 regarding reparations for the overcharges. *Id.* at 599, 587; *Citizens Utilities Co. of Illinois v. Illinois Commerce Com'n*, 157 Ill.App.3d 201, 510 N.E.2d 52 (1<sup>st</sup> Dist. 1987), *appeal denied*, 116 Ill.2d 549, 515 N.E.2d 103.

Although King's Walk alleges a wide variety of legal and equitable theories for recovery, each of its theories is governed by § 9-252. King's Walk's Amended Complaint includes claims under the Public Utilities Act for overcharge for electric service (Count I)<sup>6</sup>; 220 ILCS 5/9-101 ("§ 9-101") (Count II); 220 ILCS 5/9-241 ("§ 9-

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<sup>6</sup> King's Walk does not identify a specific provision of the PUA as the basis for Count I.

241”) (Count III); 220 ILCS 5/9-240 (“§ 9-240”) (Count IV); § 9-252.1 (Count V); Tariff 14 (Count VII); Tariff 6 (Count VIII); Covenant of Good Faith and Fair Dealing (Count X)<sup>7</sup>; Breach of Contract (Count XI); Money Received (Count XII); and Conversion (Count XIII). Each of these claims seeks reparations for overcharges from November 14, 1996 through January 22, 2005 and from January 2, 2007 to the present. The fact that King’s Walk has alleged that same claim for the same relief under eleven different theories does not change the nature of its claim or the fact that it is governed by § 9-252. As the court stated in *Klopp v. Commonwealth Edison*, 54 Ill.App.3d 671, 674, 370 N.E.2d 822, 824 (3<sup>rd</sup> Dist. 1977), it is “the essential nature of the relief requested and not the label attached to it [that] will determine whether the action falls under Section 252.”

**2. The Limitation Period of § 9-252.1 Does Not Govern This Case.**

**a. A Dispute of Rate Classification is Not Governed By § 9-252.1.**

Hoping to avoid the bar of § 9-252, King’s Walk wrongly asserts § 9-252.1 (*supra*, p. 2) as a basis for recovery in its Amended Complaint. King’s Walk’s claims fall outside the scope of § 9-252.1 because they are not based on either “charging more than the published rate or in measuring the quantity or volume of service provided....” As stated above, King’s Walk’s claims are based exclusively on whether it should have been billed at Rate 14 rather than Rate 6.

Because there is no properly alleged claim that ComEd either billed in excess of the published rate that was applied, or that ComEd overstated the volume or quantity of

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<sup>7</sup> Illinois courts repeatedly and explicitly have refused to recognize an independent tort action for breach of the covenant of good faith and fair dealing in dealing with a contract. *Voyles v. Sandia Mortgage Corp.*, 196 Ill. 2d 288, 293-94, 751 N.E.2d 1126, 1130-31 (2001).

electricity sold, King's Walk has no claim under § 9-252.1. Accordingly, the statute of limitations for § 9-252.1 does not apply to this case.

King's Walk repeatedly and wrongly asserts, without factual support, that ComEd incorrectly measured the volume and quantity of electric service it provided.<sup>8</sup> Each of

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<sup>8</sup> "On or about November 14, 1996 through on or about July 20, 2006, after improperly switching the rate classification for the Switched Accounts from Rate 14 to Rate 6, ComEd improperly and wrongfully measured the quantity and/or volume of electricity used by Petitioner and improperly and erroneously failed to properly bill Petitioner for electric service. ComEd continued again to improperly bill Petitioner beginning from January 2, 2007 until today." Amended Complaint, ¶ 19.

"Under the provisions of Rate 14, ComEd is permitted to charge and collect revenues from Petitioner based upon energy usage measured in kWh only. Rate 14 does not provide for the measurement of demands or set forth a demand charge or set forth in lieu of demand charges for providing service. In contrast, Rate 6 provides for ComEd to measure, bill and collect revenues based on a customer's demand through a specific demand charge, in addition to collecting additional revenues from an energy charge." Amended Complaint, ¶ 20.

"By unilaterally switching (i.e. "slamming") Petitioner's rate classification, ComEd wrongfully measured, charged and billed Petitioner incorrectly for public utility service under its published rates beginning on November 14, 1996 and continuing to date." Amended Complaint, ¶ 21.

"Beginning on November 14, 1996 and continuing until July 20, 2006, and in continuing contravention of the express terms of its own Rate 6 tariff, ComEd wrongfully and improperly measured, billed and collected revenues from Petitioner for "in lieu of demand" charges, which charges were not applicable to Petitioner as a residential all-electric customer of ComEd, nor were they applicable to any non-residential customer of ComEd whose monthly usage was at the same magnitude as the Petitioner's." Amended Complaint, ¶ 25.

"Rate 14 charges customers an energy charge per kWh for all kWh supplied in the billing period which is generally a month. Rate 14 does not permit the utility to charge customers demand or in lieu of demand charges. Rate 6 and its various applications are designed for ComEd to collect its revenue requirement through the application of both demand and energy usage charges. By introducing the in lieu of demand charge component to Petitioner's billings, ComEd erred in measuring service provided to Petitioner and violated their own Rate 6 tariff, by not providing the proper recording devices to record demands." Amended Complaint, ¶ 26.

"For each month from and after its construction in 1975, Petitioner's monthly electric usage was never less than 2,000 kWh. Furthermore, once demand was measured as a billing determinant, albeit improperly, Petitioner's average demand always exceeded the 10 kW threshold. Accordingly, ComEd's errors multiplied in orders of magnitude through switching Petitioner's residential rate classification to a commercial rate as ComEd (a) Incorrectly assessed and measured the volume and quantity of service and should not have billed and collected revenues from Petitioner for "in lieu of demand" charges, and (b) ComEd incorrectly measured the quantity of electric service and wrongfully and erroneously billed Petitioner for service at a cost of substantially more per kWh than for, upon information and belief, any other similarly situated customer with a similar load factor taking service under either Rate 14 or Rate 6. Other damages incurred by Petitioner may be ascertained through discovery." Amended Complaint, ¶ 28.

"For the period from November 14, 1996 through on or about July 20, 1997, in contravention of the express terms and conditions of ComEd's Rate 6 tariff, ComEd continued to use watt-hour only ("WHR only")

these allegations is a transparent effort to mischaracterize a dispute over rate classification, and to claim that the application of the alleged improper rate in itself constituted an error in measurement of the volume or quantity of the power sold.

King's Walk fails to attach any invoices in support of its Amended Complaint, and it does not specifically identify a single example in which ComEd incorrectly measured the volume or quantity of power delivered to King's Walk, instead choosing to repeatedly allege without factual support that ComEd incorrectly measured the quantity and volume of electric service. While King's Walk's well pleaded factual assertions are taken as true for purposes of a motion to dismiss, its unsupported conclusions are not. *St. Joseph Data Service, Inc. v. Thomas Jefferson Life Ins. Co. of America*, 73 Ill.App.3d 935, 943, 393 N.E.2d 611, 618 (4<sup>th</sup> Dist. 1979). “[A]n actionable wrong cannot be made out merely by characterizing acts as having been wrongfully done; the pleading of conclusions alone will not suffice for the factual allegations upon which a cause of action must be based.” *Salaymeh v. Interqual, Inc.*, 155 Ill.App.3d 1040, 1044, 508 N.E.2d

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meters for measurement of service for the Switched Accounts, resulting in further ComEd errors in measuring the quantity and volume of electricity used and demanded by Petitioner, and correspondingly wrongfully billing Petitioner and improperly collecting revenues from Petitioner for erroneous volumes and quantities of electric usage and demand.” Amended Complaint, ¶ 29.

“Consequently, even if ComEd's switching of the Switched Account's rate classification from Rate 14 to Rate 6 had been proper, ComEd still erred in measuring the quantity and volume of electricity demanded and used by Petitioner under the provisions of Rate 6 for the billing period beginning on November 14, 1996 to July 20, 2006 and from January 2, 2007 to date.” Amended Complaint, ¶ 31.

“For all relevant periods of time, Petitioner duly paid ComEd for all the electric service billed by ComEd to Petitioner, despite ComEd's improper measurement and billing of inapplicable charges in accordance with rates corresponding to inappropriate service classifications.” Amended Complaint, ¶ 33.

“In contravention of its own rates, tariffs and the PUA, ComEd improperly switched Petitioner's rate classifications without consent and detrimentally measured Petitioner's quantity and volume of electric service in a variety of ways resulting in significant overcharges. Since 1975, Petitioner has fully complied with all its obligations as a customer residing in ComEd's service territory under all applicable contracts, laws, regulations and tariffs and remains eligible to receive service as a residential space heating customer with respect to its residential units and common areas.” Amended Complaint, ¶ 34.

1155 (1987). Illinois is a fact pleading state, and King's Walk has failed to allege facts to support its claims. Those claims must therefore be dismissed.

**b. King's Walk's Claim That It Was Improperly Billed Under Rate 6 is Not Governed by § 9-252.1.**

King's Walk alleges, *inter alia*, that: (1) it had been improperly switched from Rate 14 to Rate 6; (2) ComEd continued to use Watt-Hour Only Meters from November 14, 1996 to July 20, 1997 (Amended Complaint, ¶ 29); and (3) ComEd billed King's Walk for "In Lieu of Demand" charges from November 14, 1997 through July 20, 2006. Amended Complaint, ¶ 25.<sup>9</sup> King's Walk claims that each of these allegations is an example of ComEd either incorrectly measuring the quantity or volume of service supplied to King's Walk, or of billing in excess of the published rate.

King's Walk's claims are unsupported and erroneous. King's Walk fails to allege or show that it was in any way billed in excess of the published Tariff for Rate 6, or that

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<sup>9</sup> ComEd's Rate 6 Tariff provides as follows:

**APPLICATION OF DEMAND CHARGE**

The Company shall provide a demand meter and the demand charge shall apply when a customer's monthly kilowatt-hour use exceeds 2,000 kilowatt-hours in three of the twelve months preceding the billing month; or if either his Maximum Demand or monthly kilowatt-hour use is estimated to exceed 10 kilowatts or 2,000 kilowatt-hours, respectively, for at least three months of the next 12-month period. Any customer to whom the demand charge would not ordinarily apply under the preceding sentence may, at his request and upon payment of appropriate meter rentals, be provided with a demand meter and be billed the demand charge rather than the charge in lieu thereof. In such case, meter rentals shall be payable for the period during which the customer elects to retain the meter, but not less than twelve months, unless he becomes entitled to a demand meter prior to the end of the twelve month period. A customer who is entitled to a demand meter shall not be required to pay rental or other separate charges for such meter.

Where a demand meter is installed, the demand charge shall apply when the customer's monthly use exceeds 2,000 kilowatt-hours or his demand exceeds 10 kilowatts in three of the twelve months preceding the billing month. The demand charge shall continue to apply until the customer's monthly use has not exceeded 2,000 kilowatt-hours and his Maximum Demand has not exceeded 10 kilowatts in any month of the preceding 16-month period, at which time the in lieu of demand charge shall apply, except for a customer who has requested a demand meter and has elected to be billed the demand charge.

Prior to the application of the demand charge, the customer being billed in lieu of demand charges will receive notification on the customer's bill each time the above 2,000 kilowatt-hours or 10 kilowatt requirement has been exceeded and the significance of it.

there had been an error in calculating the quantity or volume of service provided by ComEd. While a motion for dismissal admits well pleaded facts by the non-moving party, it does not admit conclusions unsupported by allegations of specific facts on which such conclusions rest. *St. Joseph Data Service, Inc.* 73 Ill.App.3d at 943, 393 N.E.2d at 618. Accordingly, the claims asserted by King's Walk in this proceeding are governed by § 9-252 and should be dismissed as untimely.

King's Walk repeatedly claims that it had been improperly switched from Rate 14 to Rate 6. § 9-252.1 and its tolling provision do not apply to claims based on an improperly applied rate classification. The relevant part of § 9-252.1 states that it applies when a ratepayer has been "charged more than the published rate." The claim here is not that King's Walk has been charged more than the published rate, but rather, that the incorrect rate was applied.

King's Walk wishes for a construction of § 9-252.1 that is contrary to the plain meaning of the statute. § 9-252.1 must be understood to apply to cases in which a customer is billed in excess of the amount authorized under the rate actually being applied to that customer. Applying § 9-252.1 to cases in which a customer is being billed as authorized under the rate actually being applied, but the customer claims that it should have been billed at a different, lower rate ignores the plain meaning of the statute. If the Illinois legislature had intended for § 9-252.1 to include billing claims related to disputes over a customer's rate class, it could have included such a provision. Accordingly, King's Walk's claims based on the alleged improper application of Rate 6 must be rejected.

**c. ComEd's Tariff for Rate 6 Specifically Authorizes Application of "In Lieu Of Demand" Charges Until a Customer Has Had Three (3) Months of Service in Excess of 2,000 Kilowatts.**

King's Walk claims that ComEd used "Watt-Hour Only" ("WHR") meters, which allegedly cannot measure "Demand" charges, resulting in ComEd applying "In Lieu of Demand" charges in violation of the Rate 6 Tariff. Amended Complaint, ¶¶ 24-25. Although King's Walk alleges that ComEd billed for "In Lieu of Demand" charges from November 14, 1996 through July 20, 2006, the invoices for this period show that "In Lieu of Demand" charges were billed only from November 14, 1996 through July 20, 1997.<sup>10</sup>

ComEd's use of WHR meters was authorized under the Rate 6 Tariff. ComEd's Rate 6 Tariff provides: "The Company shall provide a demand meter and the demand charge shall apply when a customer's monthly kilowatt-hour use exceeds 2,000 kilowatt-hours in three months preceding the billing month...." (Rate 6 Tariff, Ill. C. C. No. 4, 37<sup>th</sup> Revised Sheet No. 25 (Cancelling 36<sup>th</sup> Revised Sheet No. 25), attached hereto as Exhibit A). In other words, ComEd is **not** required to install a "Demand" Meter for an account on Rate 6 until the customer has had three months of use in excess of 2000 kilowatt-hours. Until then, the "In Lieu of Demand" rate is applied. Accordingly, the billings alleged by King's Walk are exactly what the Rate 6 Tariff authorizes, and in no way constitute a violation of the Rate 6 Tariff.

King's Walk also alleges that ComEd billed at the "In Lieu of Demand" rate for 8 months, in violation of the Rate 6 Tariff. King's Walk, however, fails to allege or to show that any of its bills based on the "In Lieu of Demand" rate were higher than they

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<sup>10</sup> According to King's Walk's invoices, Account No. 49936 93015 was also billed for "In Lieu of Demand Charges" from May 20, 2003 through March 22, 2005. See First Complaint, Attachments 1-7. Three (3) of King's Walk's accounts were billed for "In Lieu of Demand" charges only from November 14, 1996 through March 20, 1997. See First Complaint, Attachments 1-7.

would have been if based on Demand charges. Because there are no specific factually supported allegations that application of the “In Lieu of Demand” rate ever resulted in higher bills to King’s Walk, its argument on this point fails.

Accordingly, ComEd’s application of “In Lieu of Demand” charges on King’s Walk’s invoices did not violate the Rate 6 Tariff, and provides no basis for applying § 252.1 to this case.

**3. King’s Walk’s Amended Complaint Must Be Dismissed Because Of Its Failure To Attach The Invoices On Which Its Claims Are Based.**

While King’s Walk alleges a right to recovery under thirteen (13) counts, it failed to provide the invoices under which these alleged billing errors, overcharges, improper rate classifications, and errors in measuring the quantity or volume of power sold occurred. Under 735 ILCS 5/2-606, “If a claim or defense is founded upon a written instrument, a copy thereof, or of so much of the same as is relevant, must be attached to the pleading as an exhibit or recited therein, unless the pleader attaches to his or her pleading an affidavit stating facts showing that the instrument is not accessible to him or her.” King’s Walk inexplicably chose not to attach any of the invoices on which its claims are based, thereby omitting the factual detail essential to properly alleging its claims. For these reasons, King’s Walk’s Amended Complaint must be dismissed. *See Plocar v. Dunkin’ Donuts of America, Inc.*, 103 Ill.App.3d 740, 748, 430 N.E.2d 1175, 1182 (1<sup>st</sup> Dist. 1981) (affirming dismissal of amended complaint for failure to attach document upon which claim was based in violation of § 2-606).

**IV. Conclusion**

King’s Walk has failed to show that there has ever been an error in calculating the quantity or volume of service provided, or that it has been charged more than allowed

under the Tariff for Rate 6. For these reasons, King's Walk's Complaint is not governed by § 9-252.1, and its claims not brought by April 11, 2006 should be dismissed under § 9-252. ComEd is entitled to partial dismissal of King's Walk's Complaint under § 9-252 as to claims related to electric service provided more than two years prior to the date of King's Walk's Complaint. The remainder of the Amended Complaint should be dismissed under § 2-606 because of King's Walk's failure to attach the invoices on which its claims are based.

Respectfully submitted,  
Commonwealth Edison Company

By: /s/Jerry Brown  
One of its attorneys

Edward C. Hurley  
Jerry D. Brown  
CHICO & NUNES, P.C.  
333 West Wacker Drive, Suite 1800  
Chicago, Illinois 60606  
Telephone: (312) 463-1000  
Facsimile: (312) 463-1001  
[ehurley@chiconunes.com](mailto:ehurley@chiconunes.com)  
[jbrown@chiconunes.com](mailto:jbrown@chiconunes.com)