

**STATE OF ILLINOIS  
ILLINOIS COMMERCE COMMISSION**

MALIBU CONDOMINIUM	)	
ASSOCIATION,	)	
	)	
Petitioner,	)	
	)	
v.	)	Docket No. 08-0401
	)	
COMMONWEALTH EDISON	)	
COMPANY,	)	
	)	
Respondent.	)	

**RESPONDENT’S MOTION FOR PARTIAL SUMMARY JUDGMENT**

Respondent, Commonwealth Edison Company (“ComEd”), an Illinois corporation (“ComEd”), by its attorneys, pursuant to 83 Ill. Adm. Code 200.190 and 735 ILCS 5/2-1005, moves the Administrative Law Judge (“ALJ”) and the Illinois Commerce Commission (“Commission”) for partial summary judgment on Petitioner’s Amended Complaint. In support of its Motion, ComEd states as follows:

**I. Introduction**

Malibu Condominium Association (“Malibu”) makes claims, *inter alia*, for: 1) reparations for improper billing – that it was billed at Rate 6 (commercial service) rather than Rate 14 (residential service) from November 22, 1999 through December 31, 2006 (Counts I-V, VII, VIII, X-XII); and 2) credits under 220 ILCS 5/16-103.1 (“§ 103.1”) of \$403,000 for ComEd’s failure to provide Malibu with “all-electric discount applicable to unit owners associations” (Count VI).<sup>1</sup> ComEd is entitled to summary judgment on both of these claims for the following reasons. First, ComEd’s General Terms and Conditions provide that customers who qualify for two different applicable rates, and are charged the

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<sup>1</sup> In its Amended Complaint, Malibu also makes a claim for credits under Rider CABA (Count IX), which is not addressed in this Motion.

higher of the two rates, are not entitled to a refund of the difference. Until January 2, 2007, Malibu qualified for electric service under both Rate 6 and Rate 14, and therefore is not entitled to a refund for the difference between the two applicable rates. Second, § 103.1 required reinstatement of a residential rate discount only for eligible customers who were taking residential service on December 31, 2006. Malibu was not a residential customer on December 31, 2006, and therefore does not qualify for relief under § 103.1.

## **II. Procedural Background**

Malibu filed its first Formal Complaint (“First Complaint”) on June 24, 2008, alleging that on November 22, 1999, ComEd switched Malibu’s residential Rate 14 accounts to commercial Rate 6 accounts, and that ComEd has continued to charge Malibu at an incorrect commercial rate up to the date of its Amended Complaint. Based on these allegations, Malibu requests reparations for “overpayments for electricity, with interest, from the date of overpayment, which now totals \$403,282.34...” First Complaint, p. 2.

On August 1, 2008, ComEd moved for partial dismissal of Malibu’s First Complaint on the grounds that all of its claims related to service provided before June 24, 2006 were time-barred under § 9-252. After full briefing, the ALJ issued a Proposed Order on November 7, 2007, granting dismissal of all claims related to service provided before June 24, 2006 under § 9-252, finding that Malibu’s claims were not governed by § 9-252.1. Malibu filed its Amended Complaint on February 5, 2009.

On February 26, 2009, ComEd moved for partial dismissal of Malibu’s Amended Complaint on the grounds that all of its claims related to service provided before June 24, 2006 were time-barred under § 9-252. After full briefing, the ALJ issued a Proposed Interim Order on April 16, 2009, granting dismissal of all claims related to service

provided before June 24, 2006 under § 9-252, finding that Malibu's claims were not governed by § 9-252.1. On June 24, 2009, the Commission entered its Interim Order dismissing Malibu's claims related to service provided before June 24, 2006.

### **III. Factual Background**

Malibu is a condominium complex of 357 units, constructed in 1969. Amended Complaint, ¶¶ 1, 4. The heat for Malibu is supplied by electricity provided by ComEd. On November 22, 1999, Malibu was switched from Rate 14 to Rate 6. Amended Complaint, ¶ 11.<sup>2</sup> Malibu continued to take service under Rate 6 until January 2, 2007. Amended Complaint, ¶ 46. Malibu does not allege that at any time from November 22, 1999 through January 1, 2007 it requested to be placed back on Rate 14.

On January 2, 2007, ComEd discontinued Rate 6 and Rate 14. On February 9, 2007, SB 1592 was introduced before the Illinois General Assembly. SB 1592 stated in relevant part:

Tariffed service to Unit Owners' Association. An electric utility that serves at least 2,000,000 customers must provide tariffed service to Unit Owners' Association, as defined by Section 2 of the Condominium Property Act, for condominium properties that are not restricted to nonresidential use at rates that do not exceed on average the rates offered to residential customers on an annual basis. Within 10 days after the effective date of this amendatory Act, the electric utility shall provide the tariffed service to Unit Owners' Associations required by this Section and shall reinstate any residential all-electric discount applicable to any Unit Owners' Association that received such a discount on December 31, 2006. For purposes of this Section, "residential customers" means those retail customers of an electric utility that receive (i) electric utility service for household purposes distributed to a dwelling of 2 or fewer units that is billed under a residential rate or (ii) electric utility service for household purposes distributed to a dwelling unit or units that is billed under a residential rate and is registered by a separate meter for each dwelling unit.

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<sup>2</sup> Malibu contends that its reclassification from Rate 14 to Rate 6 was not requested and done without its consent. Amended Complaint, ¶ 11.

On February 27, 2007, Malibu elected to take electric supply service from an Alternate Retail Electric Supplier (“ARES”), and continued to take ARES supply service until July 28, 2008. See Affidavit of Toni Garza, attached hereto as Exhibit 1. While Malibu took supply from an ARES, ComEd billed Malibu under Rate RDS, which is the required service classification for customers taking ARES supply service. See attached Exhibit 2.

On April 27, 2007, in response to the issues addressed by SB 1592, then pending before the Illinois General Assembly, ComEd filed an amendment to its Rider CCP, Rider PPO-MVM and Rate BES-NRB, which offers tariffed service for condominium common areas that had been classified as residential users under Rate 14 as of January 1, 2007. See attached Exhibit 3.

On August 27, 2007, the Illinois Public Utilities Act (220 ILCS 5/1-101, et seq.) was amended by the addition of 220 ILCS 5/16-103.1, which provides as follows:

Tariffed service to Unit Owners’ Association. An electric utility that serves at least 2,000,000 customers must provide tariffed service to Unit Owners’ Association, as defined by Section 2 of the Condominium Property Act, for condominium properties that are not restricted to nonresidential use at rates that do not exceed on average the rates offered to residential customers on an annual basis. Within 10 days after the effective date of this amendatory Act, the electric utility shall provide the tariffed service to Unit Owners’ Associations required by this Section **and shall reinstate any residential all-electric discount applicable to any Unit Owners’ Association that received such a discount on December 31, 2006.** For purposes of this Section, “residential customers” means those retail customers of an electric utility that receive (i) electric utility service for household purposes distributed to a dwelling of 2 or fewer units that is billed under a residential rate or (ii) electric utility service for household purposes distributed to a dwelling unit or units that is billed under a

residential rate and is registered by a separate meter for each dwelling unit. (emphasis added).

#### **IV. Discussion**

##### **A. Legal Standard**

The Code of Civil Procedure applies to motions for summary judgment before the Commission. *See* 735 ILCS 5/1-108(b). When deciding a summary judgment motion, the court must construe the pleadings, depositions, admissions, and affidavits strictly against the movant and liberally in favor of the opponent. *Willett v. Cessna Aircraft Co.*, 366 Ill. App. 3d 360, 368, 851 N.E.2d 626, 636 (1<sup>st</sup> Dist. 2006). Summary judgment is appropriate if a party cannot establish an element of his claim. *Willett*, 366 Ill. App. 3d at 368. While a party opposing summary judgment is not required to prove its case, it is under a duty to present a factual basis which would arguably entitle it to judgment based upon the applicable law. *Soderlund Brothers, Inc. v. Carrier Corp.*, 278 Ill. App. 3d 606, 615, 663 N.E.2d 1, 7 (1<sup>st</sup> Dist. 1995).

Summary judgment is proper when the pleadings, depositions, and other matters of record establish there remains no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Robidoux v. Oliphant*, 201 Ill. 2d 324, 335, 775 N.E.2d 987, 993-94 (2002). Mere legal conclusions unsupported by facts do not create an issue of material fact sufficient to defeat a motion for summary judgment. *See Lackey & Lackey, P.C. v. Prior*, 228 Ill. App. 3d 397, 399-400, 591 N.E.2d 998, 1000 (5<sup>th</sup> Dist. 1992).

##### **B. ComEd Is Entitled To Summary Judgment On Malibu's Claims For Reparations For Improper Rate Classification And Credits Under § 103.1.**

**1. Because Malibu Was Eligible For Both Rate 6 And Rate 14, As A Matter of Law, It Is Not Entitled To A Refund Of The Difference Between The Rates.**

Malibu's relationship with ComEd is governed by ComEd's General Terms and Conditions, which in relevant part provide as follows:

For a situation in which there is or becomes a choice of tariffs under which electric service can be provided by the Company, the retail customer or applicant is responsible for tariff selection. The Company does not guarantee that the tariff or combination of tariffs selected by the retail customer or applicant is or will remain more or less advantageous than any other tariff combination, nor is the Company responsible for notifying the retail customer or applicant of the most advantageous tariff or combination of tariffs. **For a situation in which a retail customer or applicant is or becomes eligible for electric service under more than one tariff, no refunds are made for differences in the charges under such different tariffs.**

Ill. C. C. No. 4, 1<sup>st</sup> Revised Sheet No. 520. (emphasis added) (attached hereto as Exhibit 4).<sup>3</sup>

Under ComEd's General Terms and Conditions, a customer who is eligible for more than one rate and is charged the higher of the two rates is not eligible for a return of the difference. Although Malibu contends otherwise, without legal or factual support or explanation, it was eligible, as a matter of law, for Rate 6. The Commission has previously recognized that electricity for condominium common areas can fall under Rate 6. *See Heritage Manor Condominium Association v. Commonwealth Edison Company*, Docket No. 93-0242 (1995 WL 17200415) (dispute in which customer claims ComEd was required to bill common areas under residential rate rather than Rate 6 and the Commission held that applicable residential rate was optional, not mandatory, and that condominium common areas could be billed under Rate 6).

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<sup>3</sup> ComEd's General Terms and Conditions went into effect on September 10, 2006. The previous versions of this language from ComEd's Terms and Conditions, which were in effect from October 1, 1999 to September 9, 2006 are attached hereto as Exhibit 5.

Under ComEd's Terms and Conditions (in effect prior to September 10, 2006) and General Terms and Conditions (in effect September 10, 2006 and after), the customer is responsible for selecting its rate. Even if, as Malibu contends, Malibu did not authorize ComEd to switch its rate in 1999, Malibu knew or should have known of its rate classification. In its Interim Order of June 24, 2009 in this case, the Commission stated "[f]or [the] entire period of the alleged wrongdoing, Malibu had possession of the facts that would require a reasonable customer to inquire into the matter." Interim Order, p. 19. In *Manor Homes of Cambridge*, the Commission also addressed the question of whether ComEd had a duty to monitor a customer's account to determine if the customer was on the most beneficial of applicable rates for which the customer was eligible. The Commission stated that "[w]e must agree with Respondent [ComEd] that it owed no legal duty to Complainant to monitor its accounts and decide for the Complainant how and when to change rates to reduce its charges. Such a duty or burden when applied to millions of customers would be unreasonable and unfair to Respondent." *Manor Homes of Cambridge Chase Association v. Commonwealth Edison Company*, Docket No. 95-0310 (1998 WL 34302082).

## **2. Malibu Is Ineligible for Rate Reassignment under § 103.1.**

In Count VI of its Amended Complaint, Malibu alleges that ComEd violated § 103.1 by failing to provide "the tariffed service required by [§ 103.1] and failed to reinstate for Malibu the residential all-electric discount required thereunder." Amended Complaint ¶ 94. Moreover, Malibu alleges damages in excess of \$403,000 plus interest. Amended Complaint, ¶ 95. Malibu provides no explanation as to how it calculated its damages.

Count VI of Malibu's Amended Complaint alleges that it should have been placed on a residential rate rather than on Rate 6 and that it is entitled to a credit for the difference between what it has paid and what it should have been billed on a residential rate. § 103.1 provides:

Tariffed service to Unit Owners' Association. An electric utility that serves at least 2,000,000 customers must provide tariffed service to Unit Owners' Association, as defined by Section 2 of the Condominium Property Act, for condominium properties that are not restricted to nonresidential use at rates that do not exceed on average the rates offered to residential customers on an annual basis. Within 10 days after the effective date of this amendatory Act, the electric utility shall provide the tariffed service to Unit Owners' Associations required by this Section **and shall reinstate any residential all-electric discount applicable to any Unit Owners' Association that received such a discount on December 31, 2006.** For purposes of this Section, "residential customers" means those retail customers of an electric utility that receive (i) electric utility service for household purposes distributed to a dwelling of 2 or fewer units that is billed under a residential rate or (ii) electric utility service for household purposes distributed to a dwelling unit or units that is billed under a residential rate and is registered by a separate meter for each dwelling unit.

§ 103.1 required a rate reassignment only for customizers who were on a residential classification as of December 31, 2006, which Malibu was not. While Malibu contends that it was improperly switched from Rate 14 to Rate 6, Malibu knew or should have known of its rate classification and never requested that it be returned to Rate 14. Interim Order, p. 19.

Malibu fails to understand the requirements of § 103.1. Under § 103.1, ComEd was required to offer tariffed service that was on average no more expensive than residential service, which it did through tariff changes filed for Rider CCP, Rate BES-NRB and Rider PPO-MVM. ComEd was **not** required to transfer or reinstate all condominium customers to a residential classification.

Moreover, Malibu was taking electric service from an ARES at the time of the rate reassignment contemplated under § 103.1, which became effective in August 2007. Even if Malibu had otherwise been eligible for rate reassignment under § 103.1, ComEd had no authority to unilaterally cancel Malibu's ARES contract and compel Malibu to purchase supply service from ComEd at a residential rate.

For these reasons, Malibu's claim for credits under § 103.1 must be rejected.

**VI. Conclusion**

ComEd is entitled to partial summary judgment on Malibu's claims for reparations and for credits under § 103.1.

Respectfully submitted,  
Commonwealth Edison Company

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