
THE VILLAGE OF BURR RIDGE,)	
An Illinois municipal corporation,)	
)	
Complainant,)	Docket No. 09-0320
)	
v.)	
)	
COMMONWEALTH EDISON)	
COMPANY, an Illinois corporation,)	
)	
Respondent.)	

**STAFF’S REPLY TO BRIEFS IN RESPONSE TO THE
ADMINISTRATIVE LAW JUDGE’S AUGUST 10, 2009 RULING**

NOW COMES the Staff of the Illinois Commerce Commission (“Staff”), through its undersigned counsel, and pursuant to the Administrative Law Judge’s (“ALJ”) Ruling of August 10, 2009 (“ALJ Ruling”) and 83 Ill. Admin. Code Part 200.800(a), respectfully submits the following Reply to Briefs In Response to the Administrative Law Judge’s August 10, 2009 Ruling (“Staff’s Reply Brief”) filed by Commonwealth Edison Company (“ComEd”) and the Village of Burr Ridge (the “Village” or “Burr Ridge”).

I. INTRODUCTION

Initial briefs in Response to the ALJ Ruling of August 10, 2009, were filed on August 14, 2009, by Staff (“Staff IB” or “Staff’s Initial Brief”), ComEd (“ComEd IB” or “ComEd’s Initial Brief”), and Burr Ridge (“Burr Ridge IB” or “Burr Ridge’s Initial Brief”). Staff found nothing in either party’s initial brief that would change Staff’s position that the Village’s Motion for Temporary Restraining Order and Preliminary Injunction (“Motion”) should be denied and that the Complaint for Declaratory Ruling should be dismissed without prejudice and with leave to refile.

The following summarizes Staff's position as contained in Staff's Initial Brief and this Reply Brief:

- The Commission has not been granted **general** authority under the Public Utilities Act ("PUA"), 220 ILCS 5/1-101 et seq., to issue injunctive relief.
- The specific grant of authority to hear complaints under Section 10-108 of the PUA for violations of the PUA or of any order or rule of the Commission includes the authority to order a utility to cease and desist from any violation found to exist.
- While the Commission is authorized to issue a cease and desist order, the Commission has no equitable authority to enforce compliance with such an order but must instead seek such relief in the appropriate Circuit Court.
- While the Commission is generally authorized to provide interim relief, Section 10-108 of the PUA requires a hearing and the Commission is therefore without authority to provide interim relief under Section 10-108 of the PUA without a hearing.
- Whatever authority the Commission has to provide injunctive relief, Burr Ridge has neither plead nor established irreparable harm and may not, therefore, receive any type of injunctive relief (e.g., cease and desist order) on a temporary or preliminary basis.
- The Commission does not have general authority to resolve contract disputes, but may interpret a contract if necessary in connection with some other authorized Commission conduct (e.g., application and enforcement of an existing tariff).
- Rider LGC is a cost recovery tariff that only applies to additional or incremental costs incurred as a result of requirements that ComEd is directly or indirectly compelled to meet by a local governmental unit through an ordinance or exercise of its constitutional or statutory powers.
- The record does not contain sufficient information to determine if ComEd was compelled to meet certain vegetation management requirements by Burr Ridge under the ComEd/Burr Ridge contract so as to trigger application of Rider LGC, therefore preventing granting of any relief without further development of an evidentiary record.
- Even if Burr Ridge could establish that ComEd was not compelled to meet certain vegetation management practices, thus preventing application of Rider LGC under the circumstances alleged in the Complaint, Burr Ridge has sought a declaratory ruling that is beyond the Commission's authority to grant.

II. Commission Authority To Issue Injunctive Relief (Issues (1) and (2))

A. Staff Reply to ComEd

In response to issues (1) and (2) in the ALJ's Ruling, ComEd contends that because a temporary restraining order or preliminary injunction is "distinctly an equitable remedy" and the Commission has "no inherent authority" to issue such relief. ComEd IB, at 1. Staff agrees that the PUA does not provide the Commission explicit authority to issue injunctive relief. Staff IB, at 4-5. Thus, Staff would agree that the Commission does not have general authority to issue injunctive relief. However, as explained in Staff's Initial Brief, Illinois courts have also long held that an express statutory grant of authority to an administrative agency also includes the authority to do what is "reasonably necessary" to accomplish the legislature's objective, and that implied authority would include cease and desist orders for purposes of complaints under Section 10-108 of the PUA. *Id.*, at 5-6. Staff agrees with ComEd that Section 4-202 of the PUA, 220 ILCS 5/4-202, provides the Commission with authority to seek injunctive relief in a circuit court, but does not provide the Commission itself with authority to provide injunctive relief. However, that fact does not diminish the Commission's authority to issue cease and desist orders. Rather, Section 4-202 simply indicates that if a utility fails to comply with a cease and desist order issued by the Commission, the Commission does not have the full panoply of equitable powers available to a circuit court to enforce such an order and must instead seek specific enforcement of such an order, if needed, from a circuit court.

B. Staff Response To The Village

Burr Ridge, on the other hand, characterizes the issue as one of the Commission's authority to issue interim relief under Section 200.190 of the Commission's rules. Burr Ridge IB, at 3-4. As Staff pointed out in its Initial Brief (at 4), Section 200.190 only provides the Commission with the authority to grant interim relief that it has otherwise been authorized to grant by the Illinois General Assembly in the PUA. The Village also argues that "nothing in the Commission's rules or the [PUA] expressly prohibits the Commission from issuing such relief." *Id.* While it appears correct that no rule or statute expressly prohibits the Commission from issuing the injunctive relief sought by Burr Ridge, the absence of an express prohibition is irrelevant and not sufficient to support Burr Ridge's position that the Commission is authorized to grant such relief. "The Commission is a creature of the legislature deriving its power and authority solely from the statute creating it The fact that no statute precludes an agency from taking a particular action does not mean that the authority to do so has been given by the legislature." *Ill. Bell Tel. Co. v. Ill. Commerce Comm'n*, 203 Ill. App. 3d 424, 438 (2nd Dist. 1990) (citations omitted).

Burr Ridge similarly cites to *Z-Tel Communications, Inc. v. Illinois Bell Tel. Co.*, ICC Docket No. 02-0160, 2002 Ill PUC LEXIS 223 (Feb. 27, 2002) ("Z-Tel Order") to support its claim. However, as Staff noted in its Initial Brief (at 4-5), Section 5/13-515 does provide express authority for the Commission to issue an order granting emergency relief without a hearing, but only to "protect the provision of competitive [telecommunications] service offerings to customers." 220 ILCS 5/13-515(e). Z-Tel requested the emergency relief under Section 5\13-515(e). Z-Tel Order, at 1 ("Included in the Complaint was a Petition for Emergency Relief pursuant to 220 ILCS 5/13-

515(e).”). Consequently, the Village’s citation to Z-Tel as support for its request for injunctive relief is entirely misplaced.

Staff does not necessarily disagree with the Village’s claim that “[t]he main issue in this case involves ComEd’s ability to access Rider LGC in order to bill residential customers for certain vegetation management costs.” Burr Ridge IB, at 4. The two major issues appear to be (1) whether ComEd was “compelled” to undertake certain vegetation management practices so as to make any incremental costs incurred by virtue of those requirements subject to recovery under Rider LGC and, if so, (2) whether any costs that ComEd has or will seek to recover pursuant to Rider LGC represent additional or incremental costs incurred as a result of those requirements. While these issues may be billing issues, that fact does not impact the Commission’s authority to provide injunctive relief. As explained elsewhere, Burr Ridge cannot cite to any grant of **general** authority to provide injunctive relief and the only specific authority that Staff can identify is the authority to order a utility to cease and desist from any violation found to exist.

The Village cites *Kruger v. Menard Elec. Coop.*, 169 ILL. App. 3d 861, 864 (4th Dist. 1988) (“*Kruger*”) for the proposition that the Commission “had primary jurisdiction over a customer’s count seeking preliminary and permanent injunction requiring electric cooperative to relinquish its rights to provide customer with electric service due to the Commission’s expert knowledge in the area.” Burr Ridge Initial Brief, at 4. The Village got it half right. The Plaintiff, Kruger, went to the Menard County circuit court seeking the injunctive relief, not to the Commission. *Kruger*, 169 Ill App 3d 861, 862. Kruger wanted to be provided electric service by Central Illinois Public Service Company

("CIPS") rather than by the electric cooperative. Kruger alleged that under a service-area agreement dividing the service areas in Menard County between CIPS and the cooperative, that he could be provided electric service by CIPS rather than the cooperative. *Kruger*, 169 Ill App 3d at 863. The service-area agreements are entered into by electric service providers pursuant to the Electric Supplier Act in the PUA. 220 ILCS 30/1 *et. seq.* Kruger also brought counts of tortious interference with a business relationship and breach of contract. *Id.* The *Kruger* court holding is simply that the "Commission is the proper forum for decisions on the validity and extent of service-area agreements between electric suppliers." *Kruger*, at 864. The *Kruger* court explained: "The rationale behind giving primary jurisdiction to an administrative agency can be seen where that agency has been granted authority by the legislature over areas requiring the development of expertise and specialized knowledge." *Id.* The *Kruger* court did not address whether the Commission had a general grant of authority to issue injunctive relief. In fact, it does not reference any provision of the PUA, but rather the Electric Supplier Act.

Moreover, the Electric Supplier Act provides the Commission with its own specific grant of authority to "enforce compliance with this Act on complaint made by the electric supplier or customer or prospective customer aggrieved by any non-compliance with this Act and shall make such orders and take such action by appropriate court proceedings or otherwise which will secure compliance with this Act." 220 ILCS 30/11. Since the Electric Supplier Act is not at issue in this proceeding, the Commission's authority provided under it is of no benefit to the Village in this proceeding.

Staff also takes issue with the Village's assertion that its alleged need to maintain the status quo supports its request. Being billed simply does not reach the level of irreparable harm required for the injunctive relief sought by Burr Ridge. These issues should be decided on their merits following discovery, expert testimony and an evidentiary hearing; not in the form of temporary or preliminary injunctive relief.

III. Commission Authority To Address The Contract and The Rider (Issues (3) and (4))

Regarding issue number (4),¹ ComEd explains that "Rider LGC does not itself govern the conduct of vegetation management activities but rather applies to the recovery of certain of the costs of those activities in instances contemplated by the rider." ComEd IB, at 2. ComEd also states that "Rider LGC applies in this case . . . by its own terms because the Village . . . has **required** ComEd to 'maintain its facilities in a manner that imposes additional requirements'" on ComEd. *Id.* (emphasis added). The Village contends, in addressing issue numbers (3) and (4), that it is the use of Rider LGC that is at issue and whether the additional costs "are proper costs to trigger the use of Rider LGC." Burr Ridge IB, at 5. The Village also argues that it did not "**compel**" ComEd to take any actions that would have incurred additional costs, which again raises the issue of whether Rider LGC was properly utilized by ComEd. *Id.*, at 6-8. Staff raised the issue of whether the Village compelled ComEd to perform certain vegetation management requirements pursuant to its constitutional or statutory powers so as to bring these costs within Rider LGC. Staff IB, at 9. The issue of whether the Village has forced ComEd to maintain its facilities in a manner that imposes additional

¹ ComEd chose not to address issue number (3) for reasons it explained on page 2 of its Initial Brief.

costs is clearly a contested issue that requires an evidentiary hearing to resolve. These are fact driven issues and any resolution should not be resolved on a Motion For Injunctive Relief. The broad issue of whether Rider LGC is properly utilized to recover additional costs is again a fact-driven issue that warrants an evidentiary hearing to properly resolve.

Finally, the Village refers to “ComEd’s own Standard Vegetation Management Plan” (Burr Ridge IB, at 7), but to the best of Staff’s knowledge this standard plan is not in the record -- which leaves Staff and the Commission to speculate on its contents. Also, the Village notes that there “is no state or federal statute or regulation that outlines the specific requirements for vegetation management . . .” *Id.* Section 8-505.1 of the PUA, however, does provide general guidance on non-emergency vegetation management activities. 220 ILCS 5/8-505.1. However, due to the paucity of the record at this stage of the proceeding, it is impossible for Staff or the Commission to arrive at a reasoned determination of whether section 8-505.1 is being properly adhered to by ComEd absent discovery and an evidentiary hearing.

IV. Conclusion

WHEREFORE, for the reasons set forth above, the Staff of the Illinois Commerce Commission respectfully recommends that the Commission grant relief and take action consistent with Staff's recommendations in its Initial and Reply Briefs .

Respectfully submitted,

/s/
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of the Illinois Commerce Commission

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