STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

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

NOTICE OF FILING

Please take notice that on September 9, 2009 Malibu Condominium filed its Response to Respondent's Motion for Partial Summary Judgment in the above-captioned proceeding with Elizabeth A. Rolando, Chief Clerk of the Illinois Commerce Commission via electronic mail.

One of Petitioner's Attorneys

CERTIFICATE OF SERVICE

I, Kenneth G. Goldin, hereby certify that a copy of the foregoing instrument was served on the persons on the attached service list by electronic mail on September 9, 2009.

Kenneth G. Goldin

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RESPONSE TO RESPONDENT'S MOTION TO DISMISS

The Petitioner, Malibu Condominium ("Malibu"), by its attorneys, Goldin, Hill & Associates, P.C., hereby respond to Plaintiff's Motion for Partial Summary Judgment (the "Motion") pursuant to 735 ILCS 5/2-1005. In support of this response, Malibu states as follows:

I. INTRODUCTION

1. This matter arises out of the filing of its 13 count verified Amended Complaint (the "Complaint") with the Illinois Commerce Commission (the "Commission"), which Complaint asserts that, on November 22, 1999, Commonwealth Edison Company ("ComEd") improperly and without notice switched Malibu from the correct utility rate, Rate 14 to higher, incorrect rates, Rate 6 and 6T, and made continuing billing errors and mis-measurements of service following the unauthorized switches. Malibu is and always has been legally ineligible for service under either Rate 6 or Rate 6T. The Complaint further asserts, that ComEd (a) violated numerous provisions of the Illinois Public Utility Act (the "Act"), (b) unlawfully breached the express terms of its own filed tariffs and Riders; (c) breached the written contract with Malibu expressly created under the express

terms of Rate 6, (d) breached the implied covenant of good faith and fair dealing imposed on ComEd as a matter of law in connection with the exercise of the power vested by its filed tariffs; and (e) wrongfully retained and failed to return moneys lawfully due Malibu.

2. ComEd moved for partial dismissal of the Complaint, and on June 24, 2009, the Commission entered an order (the "Dismissal Order") dismissing claims accruing before June 24, 2006. The Dismissal Order provided that claims accruing after June 24, 2006 are continued for hearing.

3. Malibu has asserted that the Commission erred as a matter of law in entering such Dismissal Order, and has filed a petition for review of such Dismissal Order with the Appellate Court of Illinois, First District, which petition for review is pending.

4. On July 23, 2009, ComEd filed its Motion seeking summary judgment on Malibu's remaining claims. To the extent cognizable, the Motion alleges that (a) although the express terms of ComEd's own Rate 6 tariff categorically excludes residential customers such as Malibu, Malibu was somehow eligible to take service under Rate 6 until January 2, 2007, and (b) because ComEd had (unlawfully and unilaterally) switched Malibu to an improper non-residential rate, Malibu was therefore not a residential customer on December 31, 2006 and therefore does not qualify for relief under 220 ILCS 5/16-103.1.

5. As hereinbelow set forth, ComEd's motion is absurd, factually and legally erroneous and patently frivolous.

6. In support of this Response, Malibu hereby attaches hereto as **Exhibits A, B** and **C**, respectively, the Affidavit of Lynn Cohen, the Affidavit of Brian Kelly and the Affidavit of Irma Ruiz Collins and hereby incorporates herein all of the allegations set forth in its Complaint.

II. APPLICABLE LEGAL STANDARDS

7. Summary judgment is a drastic means of disposing of litigation and should allowed only where the right of the moving party is free from any doubt. *Son v. Taylor*, 219 Ill.App.3d 923 (1991). The purpose of summary judgment is not to try issues of fact; it is appropriate only where facts are undisputed and reasonable men could not draw divergent inferences from undisputed facts. *Century Display Mfg. Corp. v. D.R. Wager Construction Co., Inc.*, 48 Ill. App.3d 643 (1977). In determining whether a triable issue of fact exists, the court must consider all evidence strictly against movant and in favor of nonmovant. *Colvin v. Hobart Bros.*, 156 Ill.2d 166 (1993).

8. In ruling on a motion for summary judgment, the court must disregard conclusions of the pleader and consider only evidentiary facts. *Kubik v. CNA Financial Corp.*, 96 Ill.App.3d 715 (1981). Where, as in the present case the plaintiff's complaint is verified, the court is required to examine and consider the allegations of such complaint in determining whether triable issues of fact exist, *Donart v. Board of Governors*, 39 Ill.App.3d 484 (1976), and such pleadings must be construed strictly against the party moving for summary judgment. *Kolakowski v. Voris*, 83 Ill.2d 388 (1980).

III. DISCUSSION

A. Malibu Has Never Been Eligible to take service under Rate 6 or Rate 6T and Never Elected to Switch from its Proper Rate Classification

9. ComEd's first assertion is that Malibu was somehow eligible to take service under Rate 6 and that therefore Malibu is not entitled to any refund under Ill.C.C No.4, 1st Rev. Sheet No. 520 of ComEd's General Terms and Conditions (the "General Terms"). Motion at p. 5-6. As expressly set forth in the General Terms, for a situation in which a

choice of tariffs under which ComEd can supply service, "**...the retail customer or applicant is responsible for tariff selection**." Emphasis added.

10. ComEd's assertions that Malibu is eligible "as a matter of law" to take service under Rate 6 are flagrantly wrong and are expressly contradicted both by its General Terms and by the express provisions of its own Rate 6 tariff. By the express terms of Rate 6, such Rate 6 is applicable only to any commercial, industrial, or governmental customer with a maximum demand of less than 1,000 kilowatts for all service requirements. Rate 6 is not available to residential customers such as Malibu. (See p.1 of Rate 6 attached as **Exhibit D** hereto), Malibu is not and has never been a commercial, industrial or governmental customer. (Complaint par. 5, 13). As a matter of law, ComEd's tariff has the force of law and ComEd is legally obligated to comply with its provisions in a good faith and reasonable manner. *Perez v. Citicorp Mortgage Inc.*, 301 Ill.App.3d 413 (1998). Malibu has alleged in its Complaint that ComEd has failed to so comply with its tariffs, which allegations must, for purposes of the Motion be taken as true by the Commission.

11. Even assuming arguendo that the express terms of Rate 6 did not expressly exclude customers such as Malibu, the General Terms expressly provide that the choice of tariffs under which electric service can be provided is to be made by the **customer;** ComEd is in no way permitted to make the selection for the customer and expressly disclaims responsibility for the selection. See General Terms, first par., attached as **Exhibit E** hereto.

12. In the present case, as set forth in the attached Affidavits, neither Malibu nor anyone acting on its behalf ever expressly, impliedly or otherwise selected Rate 6 or Rate 6T or (during the time in question) ever elected to be switched from its correct Rate, Rate 14. Such Affidavits also unequivocally allege that no one at Malibu knew that it had been switched from the proper rate until August 2007. The factual allegations in these

Affidavits are wholly unrebutted by ComEd and must, as a matter of law, be taken as true by the Commission for purposes of the Motion. ComEd does not and cannot, assert that Malibu in fact selected Rate 6 or 6T, as is required under the very General Terms on which ComEd's Motion relies. Rather, ComEd concludes, without any factual support, that Malibu "knew or should have known of its rate classification." (Motion at p.7). Once again, these conclusions are expressly contradicted by Malibu, and for purposes of the Motion, Malibu's factual assertions are controlling. Moreover, whether Malibu could have or should have known about the improper switching earlier is simply irrelevant, since Malibu never selected or consented to be switched from its proper tariff, Rate 14 as is required under the General Terms.

13. ComEd's purported reliance on *Heritage Manor Condominium Association vs. Commonwealth Edison Company*, Docket No. 93-0242, is wholly misplaced. Aside from the obvious fact that Commission decisions cannot be relied on for precedent, the facts in *Heritage* are wholly distinguishable from those in the present case. In *Heritage*, a condominium association consisting of 98 buildings, each containing 4 to 6 units, had elected to have 30 of its public meters billed at the then-applicable residential rate, Rate 1, and 55 of its public meters billed at the then-applicable general rate, Rate 6. Subsequently, in 1994, the association filed a complaint against ComEd alleging, among other things that all of the public meters should have been billed at the lower residential rate. The Commission ruled against the association, holding that (a) under ComEd's then-current rates, buildings containing six or fewer units are eligible for service under either the residential or the general rate, and (b) a customer such as the association, can therefore elect to be charged under either rate. Simply stated, *Heritage* is no way bolsters ComEd's MTD. In the present case Malibu is a 357-unit building, not a building of six units or less; no argument can conceivably be made that Malibu is entitled to take service

under the express terms of Rate 6. Even more compellingly, unlike the association in *Heritage*, Malibu never elected to take service under Rate 6, as is expressly required thereunder; the very crux of its claim is that ComEd unlawfully switched Malibu without Malibu's knowledge or consent.

14. Moreover, the Rate 6 tariff referred to in the subject Complaint was effective as law on January 1, 1999—almost four years after the *Heritage* case was decided—and such applicable Rate 6 tariff is expressly limited to a "commercial, industrial or government customer with a maximum demand of less than 1,000 kilowatts…" (Exh. B p.1). Nowhere does the relevant Rate 6 tariff permit, expressly or impliedly, any other class of customer to take service thereunder. ComEd's inference that the **obsolete** Rate 6 tariff reviewed in *Heritage* is somehow relevant, or that Malibu is somehow eligible under the actual, applicable Rate 6 tariff, is wholly disingenuous.

15. Similarly, ComEd's argument that ComEd should somehow escape liability for the wrongful switching because it doesn't have a "duty to monitor a customer's accounts" (Motion at p.7) is both disingenuous and irrelevant. While, as a matter of law, the utility may not have the duty to see if its customers have selected the lowest rates, neither does the utility have any legal right to switch the customer to a higher rate without the customer's consent. The indisputable fact is that Malibu never elected to switch rates; in fact the very case ComEd relies on, *Heritage*, makes it explicit that it is the customer who must decide how and when to change its rates.

B. ComEd's Assertion that it is Ineligible for Rate Classification Under Sec. 103.1 of the Act is Factually and Legally Incorrect and Absurd.

16. ComEd next contends that since (because of the unauthorized and unlawful switch to a nonresidential rate), Malibu was not on a residential classification on December 31, 2006 and is somehow ineligible for service required to be provided under Sec. 103.1. Motion p.8. In effect, ComEd argues, ComEd can unilaterally and without

authorization switch every one of its residential condominium customers to a non-residential rate on December 31, 2006 and thereby avoid the legislatively mandated requirement that ComEd provide the rates and discounts provided under Section 103.1. Such argument is both patently absurd and belied by the applicable facts.

17. Section 103.1 of the Act is explicit that ComEd **must** provide tariffed service to unit owners associations not restricted to nonresidential use at rates that do not exceed average annual residential rates. It is beyond dispute that at all times in question, (a) Malibu was a residential unit owners association within the meaning of the Sec. 103.1 (b) ComEd did not provide tariffed service to Malibu at the average annual rates offered to other residential customers. Complaint at par. 44-46. ComEd then concludes that "Malibu knew or should have known" of its incorrect rate classification. Motion at p.8. Such conclusion is essentially a non-sequitor; whether or not Malibu should have known its rate classification is simply irrelevant to Section 103.1, which mandates that ComEd should have provided tariffed service at the favorable residential rates. Moreover, Malibu's Affidavits and Complaint directly rebut the assertion that it knew or should have known that it had been improperly switched to a higher, nonresidential rate; for purposes of the Motion Malibu's assertions must be taken as true.

C. ComEd Ignores Malibu's Other Causes of Action, and Such Causes of Action Remain Extant

18. Most fundamentally, ComEd nowhere challenges the veracity or sufficiency of Malibu's other causes of action, specifically that (a) ComEd violated Sections 9-10, 9-240 and 9-241 of the Act, (Counts II-V of Complaint) and that ComEd mismeasured the quantity or volume of service provided (Count V of Complaint), (b) ComEd violated the express terms of its own Rate 14 tariff and failed to comply with the express requirements thereunder (Count VII of Complaint), (c) ComEd violated the express terms of its own Rate 6 tariff and failed to comply the express requirements thereunder (Count

VIII of Complaint), (d) ComEd breached the express terms of Rider CABA (Count IX of Complaint), (e) ComEd breached the express terms of its own contract for electric service under Rate 6 and breached its covenant of good faith and fair dealing in connection therewith (Counts X and XI of Complaint, and (f) ComEd received and wrongfully retained and converted Malibu's moneys (Counts XII and XIII of Complaint). Nothing in the Dismissal Order negates or dismisses these causes of action to the same extent accrue after June 24, 2006, all of these causes of action remain extant and essentially unrebutted by ComEd. Ergo, even if Malibu had elected to switch from Rate 14 to Rate 6, the Complaint alleges that ComEd's billings and charges to Malibu were still incorrect, since ComEd mismeasured quantity of service, utilized incorrect meters, imposed incorrect demand and in lieu of demand charges, and otherwise breached the provisions of its own tariffs. These facts are material and controverted and therefore preclude summary judgment. See, e.g. *Hernandez v. Trimarc Corp.*, 38 Ill.App.3d 1004 (1976) (where there is disagreement as to any material fact, the court must deny motion for summary judgment and set cause for trial).

IV. CONCLUSION

The crux of ComEd's Motion—i.e. that Malibu was somehow entitled to take service under Rate 6—is expressly belied by the express language of its ComEd's own tariff. Even if Malibu was not categorically ineligible to take service under Rate 6, ComEd's Motion must be denied since, as unequivocally alleged by Malibu, Malibu never elected or consented to switch rates, and, as expressly stated in the very General Terms propounded by ComEd in support of the Motion, it is the customer who must elect the tariff under which it takes service.

ComEd's additional argument, that Malibu is not entitled to relief under Sec. 103.1 of the Act because it was not "on a residential classification" as of December 31, 2006 is

absurd and contrary to the express terms of Sec. 103.1. Malibu was inarguably a unit owners association that was not restricted to nonresidential use and was inarguably eligible under Sec 103.1; the fact that ComEd unilaterally and unlawfully switched Malibu to a nonresidential classification on its billing record does not alter Malibu's entitlement.

ComEd does not otherwise contest Malibu's other causes of action, including counts that ComEd violated both provisions of the Act and the terms of its own filed tariffs, and such causes of action remain extant and continuing for the period after June 24, 2006.

WHEREFORE, for the reasons above stated, ComEd's Motion should be denied in its entirety.

Respectfully submitted,

MALIBU CONDOMINIUM

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One of its attorneys

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CERTIFICATE OF SERVICE

I, Kenneth Goldin, one of the attorneys for Malibu Condominium, hereby certify that copies of the foregoing RESPONSE TO RESPONDENT'S MOTION and Notice of Filing thereof were served upon the parties listed below, via e-mail, on Wednesday September 9, 2009, before 5:00 P.M.

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Dated September 9, 2009

By: _____
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