

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

KING'S WALK CONDOMINIUM)
Petitioner,)
)
v.)
)
COMMONWEALTH EDISON COMPANY,)
)
Respondent.)

Docket No. 08-0264

NOTICE OF FILING

Please Take Notice that on February 23, 2010 King's Walk Condominium Association caused to be filed their BRIEF ON EXCEPTIONS, filed in the above captioned proceeding with Elizabeth A. Rolando, Chief Clerk of the Illinois Commerce Commission via e-docket.



One of Complainant's Attorneys

CERTIFICATE OF SERVICE

I, Kenneth G. Goldin, hereby certify that a copy of PETITIONER'S BRIEF ON EXCEPTIONS was served on the persons on the attached service list by depositing same in the United States Mail depository with proper postage prepaid thereon, by Federal Express, by facsimile, by hand-delivery or by electronic mail on February 23, 2010.



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**STATE OF ILLINOIS
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**KING'S WALK
CONDOMINIUM ASSOCIATION,**)
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 Respondent.)

Docket No. 08-0264

**BRIEF ON EXCEPTIONS OF PETITIONER
KING'S WALK CONDOMINIUM ASSOCIATION**

The Petitioner, King's Walk Condominium Association ("Petitioner"), by its attorneys, Goldin, Hill & Associates, P.C., hereby files its Brief on Exceptions to the Proposed Order ("PO") dated February 16, 2010 and received by Petitioner on February 22, 2010.

In support of its Brief on Exceptions, Petitioner states as follows:

INTRODUCTION

The crux of the Commission's ruling in the PO is that (a) Section 9-252 of the Public Utility Act (the "Act"), rather than Section 9-252.1 of the Act governs the billing errors alleged in Petitioner's Verified Amended Complaint (the "Complaint"); (b) that even if Section 9-252.1 were applicable, Petitioner's claims would be time-barred since the date of discovery of the erroneous billings would be the date upon which certain bills were received by Petitioner (as opposed to the date that Petitioner alleges it actually discovered the billing errors), and (c) that because Petitioner filed its original formal

complaint on April 11, 2008, many of its claims would nonetheless be time barred pursuant to Section 9-252.1, since, according to the PO, it is the filing of the original complaint and not the filing of Petitioner's informal complaint, that is determinative for limitations purposes. PO at 9-10. Petitioner respectfully submits that the PO errs in its most fundamental respect in construing the plain meaning of 220 ILCS 5/9-252.1, in imputing a "constructive knowledge" rather than an actual knowledge standard therein, and in holding that the filing of the informal complaint does not toll the applicable limitations period. Finally, the PO errs to the extent it concludes that the Commission does not have authority over allegations in the Amended Complaint which occurred before April 11, 2006. Accordingly, Petitioner is hereby submits this Brief on Exceptions to the PO, without limiting its right to request leave to file an amended complaint and/or to seek appellate review on the issues herein presented.

EXCEPTION 1: THE PROPOSED ORDER ERRS IN CONSTRUING THE PLAIN LANGUAGE OF SECTION 9-251.1, AND MALIBU'S CLAIMS ARE NOT TIME-BARRED THEREUNDER

Petitioner's claims are clearly governed by Section 9-252.1, and not by Section 9-252 of the Act. Under Section 9-252, a complaint for "excessive or unjust" charges must be filed within 2 years from the time the service as to which the complaint is made was furnished. 220 ILCS 5/9-252. Such limitation, however, has no application to the situation where there was an error in measuring the quantity of the service or the billing for the same. *Illinois Power Co. v. Champaign Asphalt Co.*, 19 Ill.App.3d 74 (4th Dist. 1974). In contrast, Section 9-252.1 expressly provides that: 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 either in 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 or at a rate 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 Commission no more than 2 years after the date the customer first has knowledge of the incorrect billing. 220 ILCS 5/9-252.1.

In the present case, Petitioner has made explicit allegations in its Complaint that not only did ComEd charge more than the published rate, Rate 14, for which Petitioner applied, but that by mis-metering, utilizing incorrect watt-hour meters and imposing incorrect charges ComEd mismeasured the quantity and volume of electricity provided to Petitioner. Specifically, the Complaint alleges that: (a) ComEd incorrectly measured demand and wrongfully introduced a demand charge component to Petitioner's billings (par. 23, 25, 26); (b) ComEd improperly measured and collected "in lieu of demand charges" from November 14, 2006 through July 20, 2006 (par. 25, 26, 27); (c) ComEd failed to provide the proper recording devices for measuring demand (par. 26); (d) ComEd wrongly used watt-hour only meters from November 14, 1996 to on or about July 20, 1997, which resulted in further errors in measuring (par. 29, 30); and (e) ComEd improperly measured and billed for electric service following installation of cumulative demand meters on or about November 13, 2001 by using kW of demand for measurement of volume and quantity (par. 28). Thus, even if ComEd had properly switched Petitioner's rate classification to Rate 6, Petitioner was still charged at rates different than what the published Rate 6 provided and the volume of electric service was nonetheless mismeasured by ComEd.

Neither the express language of Section 9-252.1 nor the cases cited by the Commission in the PO (e.g. *Village of Evergreen Park v. Commonwealth Edison company*, 296 Ill.App.3d. 816 (3d Dist. 1998)) support the proposition alleged by the Commission that only metering errors resulting in “volumetric” billing errors are covered by Section 9-252.1; rather Section 9-252.1 expressly refers to “any complaint relating to an incorrect billing.” *Village of Evergreen Park v. Commonwealth Edison*, 296 Ill. App. 3d 810 (1st Dist. 1998), cited in the Order, precisely supports Petitioner’s position that its claims are viable. In *Evergreen Park*, a municipality contracted to pay for street lights under a filed tariff (Rate 23); subsequently, the municipality alleged that the utility had disconnected and removed certain of the street lights and thereupon overcharged the municipality under Rate 23. Id. at 811-12. The municipality filed suit in circuit court seeking recovery of the overcharges on various tort and statutory violation theories. Id. at 811. The circuit court dismissed the action on the basis that since in essence the municipality was seeking reparations for the overcharges, notwithstanding the municipality’s characterization of its claims, jurisdiction was vested with the Commission. Id. at 812.

The Appellate Court concurred, holding that the municipality’s claims were within the purview of section 9-252.1. Id. at 817-18. The Appellate Court stated that: [T]he plaintiff’s claim in the instant case is not one of contract formation and misrepresentation and does not require inquiry into the nature of the parties’ bargain or, more specifically, whether the plaintiff had contracted with the public utility to purchase certain services. . . . The plaintiff’s claim deals with the application of those rates and the charges incurred for lights cancelled by the

plaintiff and disconnected or taken out of service by the defendant. Plaintiff's claim seeks recovery for overcharges based upon alleged errors by the defendant in quantifying the number of lights in service. ***Refunds for such overcharges are within the original jurisdiction of the Commission pursuant to section 9-252.1 of the Act.*** Id. at 815-16 (emphasis added).

Thus in Mehroo Patel v. Commonwealth Edison, ICC Docket No. 98-0208, (Interim Order, June 24, 2009, the complainant alleged that he was incorrectly billed for service actually provided to a neighbor. He did not allege that his own meters were defective or other mismeasurement of volume. The Commission held that the complainant's incorrect billing claims were governed by Section 9-252.1.

The PO's proposed interpretation of the relevant statutes erroneously limits all customer complaints for overcharges to two years from the date of service error (Section 9-252) with a narrow, limited exception for errors resulting from specific metering malfunctions. Under such narrow interpretation, ComEd could charge any of its published rates for any customer, charge the customer for service not applicable or received, and escape liability because improperly installed meters presumably counted electric pulses within acceptable parameters. In all probability, the legislature would have expressly limited Section 9-252.1 to simply metering errors were that its intent. Rather, it is logical and appropriate that the legislature intended to provide customers like Petitioner the ability to recover for incorrect billings after first acquiring knowledge of the incorrect billings, or exactly as Section 9-252.1 provides. However, even if Section 9-252.1 were limited strictly to metering errors, Petitioner's Complaint would be within its purview since it alleges that volume and quantity were both measured incorrectly by

application of a previously non-existent demand charge associated with improperly installed demand meters at Petitioner's facilities. *See* Complaint at par. 26-31.

The PO also errs in concluding that "Section 9-252 concerns "excessive" or discriminatory" rates, which includes situations like the one here, where a utility is alleged to have charged the wrong Rate." (PO at p.12). In fact, Petitioner has not asserted a claim under Section 9-252; it has not alleged discriminatory rate treatment. Rather, the Complaint inarguably alleges, among other things that ComEd charged more than the published Rate 14 by charging and applying the incorrect rate, and applying the incorrect published Rate 6 incorrectly. In fact, Rate 6 is expressly limited to commercial, governmental or industrial customers and is categorically unavailable to residential customers such as Petitioner. While these facts alone establish a cause of action under Section 9-252.1 (since ComEd charged more for service than under the applicable published rate), applying the express provisions and billing determinants of Rate 6 instead of Rate 14 electric service results in errors of measuring the quantity *and* volume of service provided to Petitioner. Thus, even assuming *arguendo* that the limitations period in Section 9-252.1 applies solely to claims of charging more than the published rate or errors in measurement of quantity or volume of service (and not, as the plain language of the statute states, to *any* complaints relating to an incorrect billing), the Complaint still falls within the express provisions of Section 9-252.1

EXCEPTION 2: THE PROPOSED ORDER ERRS AS A MATTER OF LAW BY CONCLUDING THAT AN ACTION UNDER SECTION 9-252.1 WOULD BE BARRED BECAUSE PETITIONER SHOULD HAVE EARLIER DISCOVERED COMED'S MISCONDUCT

The PO further errs in holding that even if Section 9-252.1 were applicable, the date of issuance of Petitioner's bills should be deemed the date Petitioner acquired

knowledge of the incorrect billing for purposes of Section 9-252.1 (PO at p.11), Section 9-251.1 does not include a “should have known” standard for complaints before the Commission; and neither the Commission nor ComEd presents any relevant authority for the proposition that a duty to know, rather than actual knowledge, is contemplated by the statute, nor does either evidence any such knowledge other than a marking on a billing statement that has no other contextual meaning on a billing statement. The cases cited at page 11 relate to the statutes governing legal and accounting malpractice actions, 735 ILCS 5/13-214.2 and 214.3. Unlike Section 9-252.1, each of these statutes expressly state that actions against accountants or attorneys must be brought within two years of time the complainant “knew or should have known of the injury...” and have absolutely no bearing on the case at hand). Had the legislature intended that the limitations period would be triggered by the date that the complainant should have had knowledge, the statute would expressly so provide, as it did in the malpractice statutes. When construing the meaning of a statute, all omissions should be understood as exclusions. Bridgestone/Firestone v. Aldridge, 179 Ill. 2d 141, 152 (1997); see also Americana Towers v. Commonwealth Edison Company, ICC Docket No. 05-0415, Administrative Law Judge’s Ruling, Jan. 19, 2006 (holding that under Section 9-252.1, the actual discovery by the complainant is contemplated, not whether the complainant could have or should discovered the errors). Moreover, it should be noted that contrary to the assertions set forth at page 11 of the PO, ComEd’s bills do not make ComEd’s numerous errors and mismeasurements “clearly evident”. While the bills do refer to Rate 6 and state kilowatt-hour charge, there is no indication among the minutae of the bills that Petitioner was unilaterally switched to a non-commercial rate or that the demand and other charges

listed on the bills were, in fact, not permitted under the tariff for the stated rate. In view of the ambiguity of the bills, the alleged failure by ComEd over a ten-month period to cooperate with Petitioner's efforts to redress the overcharges ComEd's failure to provide any written documentation evidencing the unauthorized switch, give required notifications required under the applicable tariffs and ongoing billing mistakes by ComEd it is unreasonable and to charge that the unpaid, ordinary, non-expert people managing Petitioner should have known not only that ComEd had erroneously switched their service class, but that every bill they received from ComEd was wrong. At best the bills suggests that Petitioner was afforded some opportunity to question the accuracy of the bills. This falls far short of actual knowledge that the earlier billings were, in fact, incorrect. Whether Petitioner could have, or should have discovered the overbilling sooner is, as hereinabove stated, neither clear nor legally germane, since Section 9-252.1 clearly provides that actual discovery triggers the limitations period therein provided.

EXCEPTION 3: THE PROPOSED ORDER ERRS BY CONCLUDING THAT EVEN IF SECTION 9-252 PETITIONER'S COMPLAINT WAS UNTIMELY FILED AND THEREFORRE PETITIONER'S CLAIMS ARE TIME BARRED

Additionally, the PO errs as a matter of law in concluding that even if the Commission applied Petitioner's alleged date of discovery, most of the allegations in Petitioner's Amended Complaint would still be untimely filed. PO at 11-12. As hereinabove stated, Section 9-252.1 expressly provides that "...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 Commission no more than 2 years after the date the customer first has knowledge of the incorrect billing." In the present case, Petitioner did exactly what the statute requires; it

attempted for a ten-month period to obtain appropriate refunds of the overcharges from ComEd WITHOUT RESORT TO A HEARING OR commission order, only to be stymied in these efforts by ComEd. Complaint at p. 12-13. The Association then filed an Informal Complaint against ComEd on April 13, 2007, within two years of August of 2005.

The PO cites no authority for the proposition that the filing of Petitioner's informal complaint should not toll the limitations period. Respectfully, such conclusion in the PO is illogical, contrary to law and would lead to the absurd and unjust result of negating the very purpose of Section 200.160 of the Illinois Administrative Code.

As a matter of law, a pleading which brings a matter within the jurisdiction of the Commission tolls the statute of limitations. Since under Sec. 200.160 of the Illinois Administrative Code, the informal complaint vests the Commission with the obligation to "investigate and attempt to resolve informal complaints" and vests the Commission with the power to proceed on the basis thereof, the filing of the informal complaint should be deemed to toll the limitations period. The filing of the informal complaint also requires the Commission to assign a case number and requires the utility to respond. If in fact the informal complaint did not toll the applicable statute of limitations, the very purpose of Section 200.160—i.e. to facilitate the resolution of consumers' disputes without resort to the expense and complexity of formal litigation—would be frustrated.

Moreover, the express language of both Section 9-252 and 9-252.1, which prescribe limitations periods for billing and mismeasurement disputes, refers to *any* complaint, not just formal complaints. If, as the proposed language in the PO suggests, informal complaints are not within the purview of Section 9-252 or 9-252.1, a party

would be free to file and prosecute an informal complaint long after the limitations period set forth in such statutes had expired. Such illogical result is surely not intended by our legislature.

Because Petitioner's informal complaint was timely filed, therefore the Association's claim falls within the two year statute of limitations, the PO is erroneous and ComEd's Motion to Dismiss must be denied.

EXCEPTION IV: THE PROPOSED ORDER ERRS BY CONCLUDING THAT THE COMMISSION DOES NOT HAVE JURISDICTION OVER CLAIMS AND ALLEGATIONS IN THE COMPLAINT THAT OCCURRED BEFORE APRIL 11, 2006

Somewhat confusingly, the PO appears to conclude that all of Petitioner's claims, howsoever pleaded or styled, are "...essentially that ComEd ... was charging the wrong rate" and that therefore the two-year limitations period in Section 9-252 applies to bar such claims. PO at p.12. Such conclusion is contrary to law and specifically to the express provisions of Section 9-252.

Under Illinois law, a party has the right to plead and to introduce proof on all possible theories of recovery, even if the theories are inconsistent. *Rome v. Commonwealth Edison Co.*, 81 Ill.App.3d 776 (1980). In the present case, in addition to its overbilling, mismeasurement and unjust and excessive rate counts, Petitioner has alleged numerous tariff violations (Counts IV, VI, VII, IX), violations of the Act (Counts IV, VI) and contract and tort claims (Counts IX, XII and XIII). Each of these counts alleges different elements as a basis of recovery, and in many instances allege wrongs independent of whether ComEd properly switched Petitioner's rate classification. Illinois law is explicit that breach by utility of the terms of its tariff, or failure to exercise good

faith in connection with the power vested by such tariffs are actionable wrongs. See, e.g. Bloom Township High School et al. v. Illinois Commerce Commission, 309 Ill.App.3d 163 (1999). The express language of Section 9-252 provides that a remedy under such Section—i.e. for excess or unjust charges—is cumulative and does not preclude a complainant from recovering from other wrongs by a utility. Specifically, the fourth paragraph of Section 9-252 states that: “The remedy provided in this section **shall be cumulative and in addition to any other remedy** in this Act provided in case of a failure of a public utility to obey a rule, regulation, order or decision of the Commission.” (*emphasis added*).

The statutory intent of Section 9-252 is clear—the maintenance of an action for excessive or unjust charges under such section is not the exclusive remedy of the customer and does not absolve the utility from liability for other violations of law or regulations. In the present case, Petitioner seeks reparations for not just the imposition of excessive charges, but for numerous other violations—e.g. failure to secure required authorization prior to switching rates (Complaint, par. 38, 47, 55), failure to provide required service contract (Complaint, par. 43), failure to give Rider CABA credits and refunds (Complaint, par. 53, 94) and improperly metering Petitioner and improperly measuring the demand component of Petitioner’s service (Complaint, par. 18-29). Petitioner’s claims arising from such violations are cumulative, and in addition to any claims arising under Section 9-252. Moreover, since by its express terms Section 9-252 is limited to complaints “that the utility has charged an excessive or unjustly discriminatory amount”, those of Petitioner’s claims which do not allege and are not governed by the limitations period of Section 9-252.

None of the cases cited in the PO support the proposition that any claims in any way relating to a utility's charges are subject to the limitations period of Section 9-252. *Flournoy v. Ameritech*, 351 Ill.App.3d 583 (3rd dist. 2004), cited at p. 12 of the PO, merely holds that where a claim against a public utility seeks ordinary civil damages (e.g. damages arising from the alleged fraudulent practice of prematurely terminating an inmates telephone calls), and did not challenge the actual rates charged as surcharges or claim that such rates were excessive or otherwise implicate matters within the special expertise of the Commission, that jurisdiction was proper in the circuit court. In the present case, Petitioner does not seek ordinary civil damages; rather it seeks reparations for statutory and tariff violations which are within the express purview of the Commission's jurisdiction and which, by the express terms of Section 9-252, are cumulative of any claims governed by Section 9-252. See, e.g. *Village of Roselle v. Commonwealth Edison Company*, (claim for accounting of related to tax owed by utility is not a claim for excessive or unjustly discriminatory charges and is not subject to Section 9-252). See also *Village of Itasca v. Village of Lisle*, 352 Ill. App. 3d 847, 853-54 (2004) (where enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body, the judicial process is suspended pending referral of such issues to the administrative body).

Ferndale Heights Utility District v. Illinois Commerce Commission, 112 Ill.App.3d 175 (1982) is instructive. In *Ferndale*, a municipality brought a complaint alleging that a utility violated procedures for reimbursement set forth in the utility's filed tariffs and sought repayment of money paid to the utility. The court held that

notwithstanding that payment of money was made necessary by the effect of order that the utility cease violating the tariff procedures, the Complaint was not time-barred under Sec. 76 of Chapter 1112/3 of the Act (now Section 9-252), which required complaints for excessive charges to be brought within one year of time the service was provided.

By its express terms, Section 9-252, and the limitations period therein provided governs only complaints for excessive or discriminatory charges, and the remedy therein provided is cumulative of any other alleged failure by a utility. In the present case, each of Petitioner's causes of action is legally cognizable, and as a matter of law Petitioner is entitled to recover on each such cause of action. Had the legislature intended to limit such claims to the shorter limitations period set forth in section 9-252, it would have expressly so provided.

**PROPOSED LANGUAGE TO BE ADOPTED IN THE COMMISSION'S FINAL
ORDER**

Accordingly, Petitioner respectfully requests that in lieu of the Analysis and Conclusions set forth at pages 9-14 of the PO, the Commission adopt the following language:

The Applicable Legal Standards

ComEd's Motion is akin to one that is brought pursuant to Section 2-619 of the Illinois Code of Civil Procedure, as ComEd is asserting an "affirmative matter," which, if established, require dismissal of the Association's' claim. (See, 735 ILCS 5/2-619). When such a motion is made, all well-pled facts and the reasonable inferences therefrom in a complaint are taken as true. (Sweis v. Sweet, 269 Ill. App. 3d 1, 10, 645 N.E.2d 972 (1st Dist. 1995). Upon such a motion, the movant has the burden to establish the affirmative matter. (Papers Unlimited v. Park, 253 Ill. App. 3d 150, 153, 625 N.E.2d 373 (1st Dist. 1993).

This agency, like any other state agency, is a creature of statute. As such, its power and authority is derived from the statutory scheme that created it. (Granite City Steel v. Pollution Control Board, 155 Ill. 2d 149, 171, 613 N.E.2d 719 (1993); Illinois Bell

Telephone Co. v. Illinois Commerce Com., 362 Ill. App. 3d 652, 655-56, 840 N.E.2d 704 (4th Dist. 2006)). This Commission has authority over the Association's Complaint, only if a statute allows it. (See, e.g., Gilchrist v. Human Rights Comm., 312 Ill. App. 3d 597, 601, 728 N.E.2d 566 (1st Dist. 2000); Aero Services Int'l v. Human Rights Comm., 291 Ill. App. 3d 740, 752, 684 N.E.2d 446 (4th Dist. 1997)).

For the reasons stated below, we conclude that Section 9-252.1 applies with respect to Petitioner's allegations of billing errors, including those allegations that ComEd made errors in charging more than the published rate and erred in measuring the quantity of volume of service provided.

Application of the Correct Statute of Limitations

King's Walk points this Commission to many portions of the Public Utilities Act (the "Act"). However, there are only two statutes of limitations in that Act, Sections 9-252 and 9-252.1. Therefore, for purposes of ComEd's Section 2-619 Motion, the allegations in the Amended Complaint must fit within one of these two statutes. King's Walk contends that Section 9-252.1 of the Public Utilities Act applies to the allegations concerning wrongful application of Rate 14, as, according to King's Walk, Rate 6 should have been applied from November 14, 1996, to January 22, 2005, and, from January of 2007, to the present time. ComEd, on the other hand, contends that Section 9-252 applies. Section 9-252.1 of the Act has the following limitation period: "Any complaint relating to an incorrect billing must be filed with the Commission no more than 2 years after the date the customer first has knowledge of the incorrect billing." (220 ILCS 5/9-252.1). It provides that: 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 either in 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 with interest from the date of overpayment at the legal rate or at a rate 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 Commission no more than 2 years after the date the customer first has knowledge of the incorrect billing. (220 ILCS 5/9-252.1).

Section 9-252 provides, in pertinent part, that: 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 therefor, 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... The remedy provided in this Section shall be cumulative and in addition to any other remedy provided in this Act in the case of failure of a public utility to obey a rule, regulation, order or decision of the commission. 220 ILCS 5/9-252.

In the Commission's examination of these provisions, it is guided by the well-settled principles of statutory construction. The most fundamental and primary rule in statutory construction is that the intention of the legislature should be ascertained and given effect. *Phoenix Bond & Indem.Co. v. Pappas*, 741 N.E. 2d 248 (2000). This is to be done primarily from a consideration of the legislative language itself and if the legislative intent can be ascertained therefrom it must prevail and will be given effect without resorting to other aids for construction. *Envirite Corp. v. Illinois Protection Agency*, 632 N.E.2d 1070 (1993).

As seen from the plain language of these statutes, Section 9-252 has a 2-year limitations period for the bringing of a complaint as calculated from the time that the "product, commodity or service was furnished or performed." 220 ILCS 5/9-252. On the other hand, Section 9-252.1 allows the bringing of a complaint within 2 years of the time that the customer first has knowledge of the incorrect billing." 220 ILCS 5/9-252.1. The limitations period in both statutes is jurisdictional. The difference in the limitations period between the two provisions is owing to the difference in the subject matter of the complaints being brought. Section 9-252 speaks of a complaint concerning an excessive or unjustly discriminatory rate or other charge of any public utility to be recognizable under its provisions; however, by its express terms the remedy provided in Section 9-252 is cumulative, and not exclusive, of other remedies provided in the Act. 220 ILCS 5/9-252.. In contrast, according to its terms Section 9-252.1 is broader in its scope and governs any complaints relating to an incorrect billing. 220 ILCS 5/9-252.1. Because the remedy provided under Section 9-252 is, by its express terms, cumulative and non-exclusive of other remedies, a claim barred by the limitations period set forth in Section 9-252 would not *ipso facto* prevent a complainant from seeking relief under other provisions of the Act.

As the Commission has previously opined, the limitations period set forth in Section 9-252.1 is triggered by the actual knowledge of the complainant; Section 9-251.1 does not include a "should have known" standard for complaints before the Commission; and no relevant authority for the proposition that a duty to know, rather than actual knowledge, is contemplated by the statute. *see also Americana Towers v. Commonwealth Edison Company*, ICC Docket No. 05-0415, Administrative Law Judge's Ruling, Jan. 19, 2006 (holding that under Section 9-252.1, the actual discovery by the complainant is contemplated, not whether the complainant could have or should discovered the errors).

In the present case, had Petitioner's complaint alleges that it has been charged an excessive or unjustly discriminatory charge in contravention of Section 9-252, Petitioner would be barred from obtaining relief under Section 9-252 for damages alleged to occur more than two years prior to the furnishing of the subject electric service. However, Petitioner has not alleged discriminatory charges or otherwise brought a cause of action under Section 9-252 is by its express terms cumulative, and Petitioner's claims are not within the purview or barred by the limitations period set forth in Section 9-252. Because in substance Petitioner's complaint also allege incorrect billings, and because Petitioner further alleges that due to its failure to utilize correct meters, imposition of incorrect

demand and other charges and mis-measured the quantity or volume of the service provided, Petitioner's complaint falls within the purview of Section 9-252.1. Moreover, since Petitioner's complaint alleges that the incorrect billing and consequent mismeasurement of quantity and volume of service provided was not discovered by the complainant until less than two years prior to the filing of its informal complaint, which allegations must, for purposes of ComEd's motion, be accepted as true, the complaint is not time-barred. We find no authority for the proposition that Petitioner's claims of mismeasurement of quantity or volume arising specifically from ComEd's alleged utilization of incorrect watt-hour meters, imposition of incorrect demand and in-lieu of demand charges and incorrect measurement of demand, are not governed by Section 9-252.1 or that Section 9-252.1 should apply solely to claims arising from meter malfunctions resulting in volumetric mismeasurement.

In holding that the filing by Petitioner of its informal complaint, as opposed to its filing of its original formal complaint, should operate to toll the applicable limitations period set forth in Section 9-252.1, we refer to the express language of Section 200.160 of the Illinois Administrative Code. Sec. 200.160 of the Illinois Administrative Code, the informal complaint vests the Commission with the obligation to "investigate and attempt to resolve informal complaints" and vests the Commission with the power to proceed on the basis thereof, the filing of the informal complaint should be deemed to toll the limitations period. The filing of the informal complaint also requires the Commission to assign a case number and requires the utility to respond. As a matter of law, a pleading which brings a matter within the jurisdiction of the Commission tolls the statute of limitations. If in fact the informal complaint did not toll the applicable statute of limitations, the very purpose of Section 200.160—i.e. to facilitate the resolution of consumers' disputes without resort to the expense and complexity of formal litigation—would be frustrated.

The Commission further holds that since Petitioner has also alleged in its complaint that ComEd has failed to comply with its electric service contracts, other tariff procedures, regulations and provisions of the Act, Section 9-252 would not serve as a bar to such claims inasmuch as by the express terms of Section 9-252 such claims are cumulative, and not exclusive of the remedy provided in Section 9-252. Illinois law is clear that a party may allege multiple causes of action upon proof can recover under each of these counts. See *Gironda v. Paulsen*, 238 Ill. App. 3d 1081, 1084 (2d Dist. 1998). Our courts have held that when a utility violates the terms of its own tariffs, it the claim is not subject to the limitations of Section 9-252. See *Ferndale Heights Util. Co. v. Ill. Commerce Comm'n*, 112 Ill. App. 3d 175 (1st Dist. 1982). See also *Bloom Twp. High Sch. v. Ill. Commerce Comm'n*, 309 Ill. App. 3d 163 (1st Dist. 1999) (breach by the utility of the terms of its tariff, or its failure to exercise good faith in connection with the power vested by such tariff, are actionable wrongs before the Commission).

We observe ComEd to cite *Flournoy v. Ameritech*, 351 Ill.App.3d 583 (3rd dist. 2004) to support its argument that all of Petitioner's claims are nonetheless governed and barred by Section 9-252. In *Flournoy*, an inmate filed suit against Ameritech for consumer fraud, which suit sought civil damages arising from the premature termination by

Ameritech of his telephone calls. Ameritech sought to dismiss such suit on the basis that the circuit court lacked jurisdiction. The Appellate Court, noting that such suit sought civil damages and did not challenge the actual rates charged as surcharges or claim that such rates were excessive, ruled that jurisdiction was proper in the circuit court. ComEd's reliance on *Flournoy* is misplaced. Nowhere does *Flournoy* hold that all claims in any way relating to overcharges and mismeasurements of electricity must be governed by Section 9-252; it essentially holds that claims seeking ordinary civil damages which do not invoke the special expertise of the Commission are appropriately brought in civil court. In contrast, the viability of Petitioner's common law claims before the Commission is further bolstered by the oft-cited doctrine of primary jurisdiction, which holds that notwithstanding a court's jurisdiction over a matter, in appropriate circumstances such matter should be ruled on by the administrative agency having expertise in the area. *Employers Mut. Cos. v. Skilling*, 163 Ill. 2d 284, 288 (1994). Such circumstances are present when, as in the present case, an agency possesses specialized expertise that would aid in the resolution of a controversy or when a need exists for uniform administrative standards. *Kellerman v. MCI Telecomms. Corp.*, 112 Ill. 2d 428, 455 (1986).

Since Petitioner's complaint alleges that the incorrect billing and consequent mismeasurement was not discovered by the complainant until less than two years prior to the filing of its informal complaint, which allegations must, for purposes of ComEd's motion, be accepted as true, the complaint is not time-barred. The Commission further holds that since Petitioner has also alleged in its complaint that ComEd has failed to comply with its electric service contracts, other tariff procedures, regulations and provisions of the Act, as well as common law counts, neither Section 9-252 nor 9-252.1 would not serve as a bar to such claims, and ComEd's motion to dismiss must be denied. To be sure, Petitioner's allegations regarding this time period, if proven, would establish unfair conduct. We encourage all utilities to engage in conduct that is fair to consumers and to refrain from illegal rate "switching."

Allegations Regarding Billing the Wrong Rate Due to Enactment of Section 16-103.1 of the Public Utilities Act

Petitioner also has alleged that it is currently not being billed the proper residential rate. Instead, allegedly, it is being billed at a commercial rate. (Amended Complaint at 23-24). King's Walk argues that when Section 16-103.1 of the Act became effective, it should have been billed in accordance with this statute, but, it was not. (*Id.*).

At the outset it is important to note that while Petitioner alleges that this change should have taken place beginning on January 2, 2007, in fact, Section 16-103.1 of the Act became effective on August 28, 2007. (220 ILCS 5/16-103.1). Additionally, this statute provides that utilities must provide the service described therein "[w]ithin 10 days after the effective date of this amendatory Act." (*Id.*). Therefore, it appears that any incorrect billing due to the enactment of this statute would commence no earlier than September 7, 2007.

Section 103.1 requires large electric utilities to provide tariffed service to condominium associations for certain types of condominium properties that are defined therein. (220 ILCS 5/16-103.1). This service is to be provided at rates that do not exceed, on average, the rates that are offered to residential customers on an annual basis. (Id.). These allegations are timely filed by Petitioner.. Therefore, this portion of the Association's Amended Complaint is not dismissed.

Other Allegations

King's Walk has also alleged that, from January 2, 2007, until the present time, ComEd wrongfully billed it at Rate 6. (Amended Complaint at 5-7). Further, on January 2, 2007, ComEd allegedly improperly switched three of the six accounts to commercial rates.

Finally, King's Walk asserts that it is entitled to reimbursement under ComEd's Rider CABA from January 2, 2007, to the present time. Id. at 14-15. All of these allegations occurred during the two-year period before Petitioner filed its informal complaint and its original formal Complaint and are timely filed by Petitioner. Therefore, these allegations, as well, are not dismissed.

However, as ComEd has noted, with respect to the King's Walk's allegations concerning Rider CABA and Section 103.1 of the Act, King's Walk has failed to furnish this Commission with the applicable bills. King's Walk has 10 days from the date, upon which, this Order becomes final, to submit all of the bills in question regarding these claims, and, any other claims that are found to be timely filed.

Since Petitioner's complaint alleges that the incorrect billing and consequent mismeasurement was not discovered by the complainant until less than two years prior to the filing of its informal complaint, which allegations must, for purposes of ComEd's motion, be accepted as true, the complaint is not time-barred. The Commission further holds that since Petitioner has also alleged in its complaint that ComEd has failed to comply with its electric service contracts, other tariff procedures, regulations and provisions of the Act, as well as common law counts, neither Section 9-252 nor 9-252.1 would not serve as a bar to such claims.

THE FINDINGS AND ORDERING PARAGRAPHS OF THE PROPOSED ORDER SHOULD BE REVISED TO CONFORM TO THE EXCEPTIONS TAKEN BY PETITIONER

To conform to the foregoing exceptions taken by Petitioner, Petitioner respectfully submits that in lieu of the Findings and Orderings Paragraph set forth in the PO (PO at p.14), the following Findings and Orderings Paragraph be substituted therefor:

FINDINGS AND ORDERING PARAGRAPHS

Having considered the record and being fully advised in the premises, the Commission is of the opinion and finds that:

(1) Commonwealth Edison Company is a public utility within the meaning of the Public Utility Act;

(2) This Commission has jurisdiction over the parties;

(3) The Commission has subject matter jurisdiction over the allegations and causes of action set forth in the instant Complaint

(4) The Motion to Dismiss the instant Complaint brought by Commonwealth Edison is denied in its entirety;

(5) The matter is not ready for decision and will continue for hearings before the Administrative Law Judge.

IT IS THEREFORE ORDERED that the Verified Amended Complaint filed by Petitioner and against ComEd shall, except to the extent hereinafter provided, remain extant and ComEd shall answer the allegations set forth in the Complaint within 28 days of the date hereof.

CONCLUSION

As correctly noted in the PO, Petitioner's allegations, if proven, would establish unfair conduct, and utilities should be discouraged from illegal rate switching. In the present case, it remains undisputed that without the authorization or consent of its ComEd switched Petitioner to inapplicable commercial rates and has been overcharging Petitioner for its electric service since November 1996. As alleged in the Complaint, even if Petitioner had properly been placed on Rate 6, for which Petitioner is categorically ineligible, ComEd violated the express terms of its own tariffs and operating procedures and made errors in measuring the quantity or volume of service provided, and ComEd's electric bills would still be incorrect. Dismissal of Petitioner's claims without the

opportunity to ascertain the scope of ComEd's liability is both premature and unwarranted.

Respectfully submitted,

KING'S WALK CONDOMINIUM ASSOCIATION



By: _____
One of its attorneys

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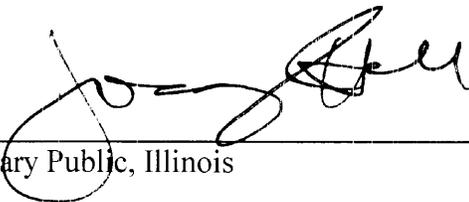
VERIFICATION

I, Kenneth Goldin, for Petitioner, first being duly sworn, say that I have read the above Amended Complaint and know what it says. The contents of the Amended Complaint are true to the best of my knowledge.



By: _____

Subscribed and sworn to before me on: February 23, 2010



Notary Public, Illinois

