

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Cottonwood Farm, Inc.	:	
-vs-	:	
Exelon Corporation and	:	
Commonwealth Edison Company	:	02-0662
	:	
Complaint pursuant to 220 ILCS 5/9-252,	:	
220 ILCS 5/9-252.1 and 220 ILCS 5/9-253.	:	

ADMINISTRATIVE LAW JUDGE'S PROPOSED ORDER

By the Commission:

On October 7, 2002, Cottonwood Farm, Inc. ("Cottonwood" or "Complainant") filed a Complaint against Commonwealth Edison Company ("ComEd" or "Respondent") and Exelon Corporation ("Exelon"), seeking reimbursement of over \$18,000 for payments made for electric service that was provided to a third party, but billed to, and paid for by, Cottonwood, pursuant to Section 9-252 and 9-252.1 of the Public Utilities Act (the "Act").

Pursuant to notice given in accordance with the law and the rules and regulations of the Commission, status hearings were held on various dates from October 30, 2002 to May 1, 2003, before a duly authorized Administrative Law Judge ("ALJ") at the Commission's offices in Chicago, Illinois.

On August 19, 2003, Cottonwood and ComEd filed stipulated facts. On August 20, 2003, both the Complainant and Respondent filed Motions for Summary Judgment, affidavits, and exhibits in support of those motions. On September 9, 2003, ComEd responded to Cottonwood's Motion and on September 11, 2003, Cottonwood responded to ComEd's Motion. On September 22, 2003, ComEd filed a reply in support of its Motion Summary Judgment.

Exelon's Motion to Dismiss

On August 20, 2003, Exelon filed a Motion to Dismiss based on its contention that it does not provide electric service and that it did not bill or collect any of the charges that are the subject of Cottonwood's Complaint. Complainant did not respond to Exelon's Motion to Dismiss.

We grant Exelon's Motion to Dismiss Cottonwood's Complaint against it for the reasons stated in the motion. At all times relevant to this Complaint, Exelon was not an



electric utility in the State of Illinois and did not bill or collect any of the charges for which Cottonwood seeks reimbursement.

The Stipulated Facts

The relevant facts in this case are not in dispute. The bills in question involve electric service provided by ComEd to the premises currently known as 5S338 Davis Road, Big Rock Township, Illinois, ("Davis Road House").

At all times relevant to this proceeding, the Davis Road House was owned by Ricky and Dorothy Gum (the "Gums") and Cottonwood had no ownership interest in that property. Electric service provided by ComEd to the Davis Road House was used by the Gums as owners, occupants and users of that property and not by Cottonwood.

From April 1990 until March 2002, ComEd billed Cottonwood for electric service provided to the Davis Road House, initially under account number HR77-XK-6270-C through the October 1996 bill, then under account number HU36-XK-6126-C through the June 1998 bill, and thereafter under account number 18153213007.

Cottonwood paid ComEd in a timely manner for electric service provided to the Davis Road House reflected on bills from April 1990 to and including February 25, 2002. Cottonwood paid ComEd a total of \$18,182.03 for service provided to the Davis Road House.

ComEd's records reflect that, on July 24, 1989, new service was ordered by or on behalf of the Gums, for the property on Davis Road on which a residence was going to be constructed beginning in August 15, 1989. The mailing address for the account was given as 48W492 Wheeler Rd., Big Rock, Illinois ("Wheeler Road House") where the Gums were living at the time. Ricky Gum's uncle, Dwayne Anderson, owned this house.

On or about November 6, 1989, ComEd mailed to Ricky Gum, at the Wheeler Road House, a "Residential Underground Agreement" which was to be executed and returned to ComEd with a payment of \$312.31 in order for underground service to be installed at the premises noted as "460092A9 in Big Rock Twp". Ricky Gum promptly executed the agreement and returned it to ComEd with the appropriate payment.

Before the Gums' Davis Road home was completed, the Andersons sold a large tract of property, which included the Wheeler Road House, to Cottonwood.

After the sale of the Anderson property and the Wheeler Road House to Cottonwood, and for several months until construction on their Davis Road House was completed, the Gums lived with Mrs. Gum's mother in Hinckley. ComEd was contacted and told that future billings for service to the Wheeler Road House should not be sent to the Gums.

Service was installed by ComEd at the Davis Road House in December 1989. At that time, residential service meter 997934674 (hereinafter "Meter 674"), originally designated as W934674, was installed by ComEd.

For some time after the beginning of ComEd's provision of electric service to the Davis Road House in December of 1989, the Gums received bills for electric service from ComEd. Then the bills stopped. Mrs. Gum called ComEd to inquire about the lack of billing. The Gums received bills again for a short while and then the bills stopped.

From April 1990 until August 1997, the bills from ComEd for electric service provided to the Davis Road House listed the service address as "460 092 A9, Big Rock Twp." 460092A9 is the number of the transformer serving the Davis Road House. Beginning September 1997, the bills from ComEd for electric service provided to the Davis Road House listed the service address as "5S338 Davis Rd., Big Rock Twp." All bills from ComEd for electric service provided to the Davis Road House listed the number of the meter on the Davis Road House but were addressed to Cottonwood.

On or about April 1, 2002, Peter Barenie of Cottonwood contacted ComEd claiming that Cottonwood should not be billed for service rendered to 5S338 Davis Rd., Big Rock Twp., Illinois. Following Mr. Barenie's contact, ComEd conducted an account inquiry. This inquiry determined that the Gums were the owners of the Davis Road House and users of electric service provided to that location. It also resulted in the creation of a new account in the name of Ricky Gum under a new account number for electric service provided to the Davis Road House. The initial bill on that account was issued on May 24, 2002, and covered service from March 20, 2002, to May 24, 2002.

The affidavit of Peter Barenie, offered by Cottonwood, established that 1) the Davis Road House is owned by Ricky and Dorothy Gum; 2) meter number 997934674 was, and is, located on property owned by the Gums; 3) all of the payments in question were made in a timely manner by Cottonwood and were submitted to ComEd pursuant to monthly statements that were received by Cottonwood Farm from ComEd; 4) Cottonwood is billed for service by ComEd on a total of eight meters on the property owned by Cottonwood; and 5) ComEd was contacted when the charges billed in error to Cottonwood were discovered.

In addition to the affidavit, the following uncontested representations were made by Cottonwood in its Motion for Summary Judgment: 1) Peter Barenie, General Manager of Cottonwood, decided to match the meters and bills for all of the billing and meters on the Cottonwood property; after reviewing its March, 2002 billing; 2) there are a total of eight meters serviced by ComEd on property owned by Cottonwood; 3) Mr. Barenie discovered the incorrect payments by Cottonwood to ComEd; 4) that meter number 997934674 was not on Cottonwood property, but rather was located on the west side of the residence located at 5S338 Davis Road, Big Rock, Illinois owned by Mr. and Mrs. Ricky Gum; and 5) the property has been owned by them since 1989.

The affidavit of Robert Jacobs, offered by ComEd, established that ComEd's records with respect to the account in question reflect a call received on April 10, 1990, from a Mrs. Anderson requesting that the account be placed in the name of Cottonwood Farm. Mrs. Anderson was believed to be the owner of Cottonwood Farm. ComEd's records also reflect, with respect to that same account, a call received on June 9, 1992, from someone named Bonnie requesting that the account be placed in a summary billing arrangement with four or more other Cottonwood Farm accounts allowing them to have a common due date.

Mr. Jacobs' affidavit also established that listing the number of the serving transformer as the service address on the bill, as had occurred here, was a common practice in ComEd's billing system prior to July 1998 for rural accounts that didn't often have street addresses. Rural customers tended to be familiar with this designation and often used the transformer number as the service location when calling in a trouble report to ComEd. The meter number that appears on a customer's bill also appears prominently on the meter located at the service location.

Cottonwood's Motion for Summary Judgment

Cottonwood alleges that its claim is one for reparations for the payment of unjust charges and that this Commission has jurisdiction over its claim. It claims that because it never owned the property to which service was provided and did not receive benefit of the service that ComEd provided, ComEd was unjustly enriched by Cottonwood's payments. It also seeks interest on its payments.

ComEd's Response

ComEd claims that it was not unjustly enriched. Rather, it claims that it merely collected the lawful tariff rate for service that it provided. It claims that the equitable principle of unjust enrichment cannot be grounds upon which to grant Cottonwood's request because ComEd would be left without just compensation for the service it provided. ComEd argues that this is especially true in this case because Cottonwood's delay in bringing the matter to ComEd's attention has left ComEd without the ability to bill the proper party (the Gums) for the service – because of the Commission's rule prohibiting the billing of residential customers more than a year after service has been rendered.

ComEd argues Cottonwood's General Manager, Peter Barenie, discovered the incorrect billing by ComEd when he reviewed the March 2002 bills and "decided to match the meters and bills for all of the billing and meters on the Cottonwood property." ComEd claims this same review could have been performed much earlier. ComEd argues that it would be inequitable for Cottonwood to recover its 12 years' of payments from ComEd when its own 12-year delay in conducting the review of its bills for electric service resulted in its making those payments in the first place, while at the same time making it impossible for ComEd to bill the correct party for the service.

ComEd suggests that Cottonwood's unjust enrichment claim would be on firmer ground if it were made against the Gums.

ComEd's Motion for Summary Judgment

ComEd argues that Cottonwood must be deemed to have had actual or constructive knowledge that it was being billed for service to the Davis Road Property. It claims that the facts show that from the time ComEd began billing Cottonwood for service to the Davis Road Property in April 1990, Cottonwood had sufficient information from which it should have reasonably concluded that it was being billed for someone else's service. In support of this contention, it points out that, at the beginning, Cottonwood was receiving a separate bill for this service, which should have caused it to question what the service was for. Instead, ComEd claims that its records reflect that someone named Bonnie called from Cottonwood and requested that the bill for this service be placed in a summary billing arrangement with 4 or more other accounts with a common due date. This request, however, ComEd claims demonstrates that Cottonwood had to at least look at the bills. Cottonwood had all the information it needed to determine whether the number of meters reflected on its bills exceeded the number of meters on its property. ComEd argues that Cottonwood was in a better position to know if a certain meter was not on its property than ComEd – who had no knowledge of who owned the Davis Road Property.

In addition, ComEd claims that the meter number associated with the service was plainly printed on each bill and that the same meter number also appears prominently on the meter at the customer's premises, so Cottonwood could have easily determined that these bills were not for service delivered to its property simply by checking the number(s) on the meter(s) on its property.

ComEd argues that the service address was listed on each bill. It claims that, initially, the number of the transformer serving the location was listed as the service address. This was a common practice for rural accounts that didn't often have street addresses. Rural customers tended to be familiar with this designation and often used the transformer number as the service location when calling in a trouble report to ComEd. ComEd points out that, beginning with the September 1997 bill, the geographically descriptive address "5S338 Davis Road" appeared on every ComEd bill for service to the Davis Road Property.

ComEd further argues that, pursuant to the principle of "account stated", Cottonwood must be deemed to have conceded to being billed by ComEd for service provided to the Davis Road Property. In support of this claim, ComEd argues that Cottonwood's "acquiescence or assent" to being billed for service rendered to the Davis Road Property must be implied from its conduct. It claims that Cottonwood not only retained the "accounts" (bills) beyond a reasonable time without objection, with an implied promise to pay, it actually paid the bills for 12 years. ComEd argues that Cottonwood should be barred from now claiming that it should not have been billed for the service for which it paid for so long.

ComEd next argues that Cottonwood's claim is barred by the doctrine of laches. In support of its claim, ComEd argues that there is no evidence that it acted in bad faith or that it knew that Cottonwood did not own the Davis Road Property. Moreover, it claims that it provided Cottonwood with all the information it need to discover that the bills in question were for service rendered to another party.

Finally, ComEd argues that Cottonwood's claim is barred by the statute of limitations because Cottonwood waited to bring this claim for 12 years after it had information sufficient to impute it with knowledge of the incorrect billing.

Cottonwood's Response

Cottonwood argues that it received no actual or constructive notice of the incorrect billing and that it is disingenuous for ComEd to argue that Cottonwood is under an obligation to check all of its bills against all of its meters. Further Cottonwood argues that ComEd took money belonging to Cottonwood but provided no service or benefit to Cottonwood and, therefore, that ComEd hold Cottonwood's payments in constructive trust for Cottonwood's benefit.

Cottonwood contends that ComEd's reliance on the doctrine of account stated is misplaced because the doctrine can only be used to determine the amount of the debt where liability previously existed and cannot be used to create a liability where none existed before. Because Cottonwood never agreed to be liable for service provided to the Gum property, the account stated theory cannot be used to create that liability.

With respect to ComEd's reliance on the doctrine of laches, Cottonwood argues that ComEd fails to fulfill the requirement that it was prejudiced or injured by the delay because it possesses the money paid by Cottonwood.

Finally, with respect to ComEd's reliance on the statute of limitations, Cottonwood argues that the limitations period starts to run only from the time that injured party knew or should have known of its injury.

ComEd's Reply

ComEd repeats its claim that Cottonwood had constructive knowledge that it was being billed for electric service provided to the Gums. It argues that, from the very beginning, Cottonwood was in possession of information sufficient for it to conclude that it was being billed for service to a meter that was not on its property, presented to it every month on its electric bills, and that, therefore, Cottonwood must not be absolved from responsibility for ignoring that information.

ComEd next argues that the doctrine of constructive trust does not apply to Cottonwood's claim because the bases required for the finding of a constructive trust are lacking. ComEd claims that it had no fiduciary relationship with Cottonwood, nor did

it engage in any fraudulent behavior. The constructive trust theory requires acting with intent to deceive. While ComEd concedes that Illinois courts have also applied the doctrine of constructive trust in situations that are not limited to cases involving fiduciary relationships or fraud, ComEd claims that those cases involved nothing more than an application of the doctrine to provide a remedy in a case of unjust enrichment. Because the doctrine of unjust enrichment has no application against it in this case, ComEd asserts that neither does this expanded concept of constructive trust.

With respect to unjust enrichment, ComEd reiterates its argument that it was not unjustly enriched in this case, or enriched at all. Rather, ComEd claims that it rendered electric service and collected the lawful tariff rate for that service. It argues that the equitable principle of unjust enrichment cannot be grounds upon which to grant Cottonwood's request for restitution from ComEd, because to do so would leave ComEd in an inequitable position of being without just compensation for the service it provided.

ComEd then takes issue with Cottonwood's claim that the doctrine of account stated does not apply in this case. ComEd claims that Cottonwood is looking at the situation too narrowly when it contends that there must be an original agreement by Cottonwood to pay for electrical service to the Gums in order for the principle to apply. ComEd maintains that the relationship between Cottonwood and ComEd making Cottonwood liable for the payment for electric service had been established separately. Cottonwood is estopped from contesting that it owed for service to the Gums' meter when it failed to object to the inclusion of those amounts on its bills for so long. Moreover, according to ComEd's records, a Cottonwood representative even requested that those amounts appear on a combined bill with the usage from its other meters. ComEd argues that, in this case, the mutual consent of both creditor and debtor (required for application of the doctrine) is established by the fact that ComEd billed the service in question on Cottonwood's account and Cottonwood paid those amounts faithfully for 12 years.

Finally, ComEd argues that Cottonwood's knowledge is sufficient to trigger the application of the statute of limitations discovery rule. Because the discovery rule embedded in the statute starts the limitations period when the injured party knows or reasonably should have known of its injury, ComEd maintains that the correct application of the rule in this case only works to defeat Cottonwood's claim. Because Cottonwood must be deemed to have had constructive knowledge of facts sufficient for it to know that it was being billed for service provided to the another party, ComEd argues that Cottonwood reasonably should have known that there was a problem 12 years earlier and that, therefore, the limitations period commenced at that time and has long since expired.

Commission Analysis and Conclusion

The only question for us to decide here is whether ComEd should be required to refund to Cottonwood over \$18,000 that Cottonwood paid for services ComEd provided to a third party over the course of twelve years.

The Complainant bases its claims on Sections 9-252 and 9-252.1 and requests a refund with interest, pursuant to Section 9-253. Additionally, Complainant asserts that ComEd was unjustly enriched. The Commission, however, is a creature of statute. Therefore, equitable actions such as unjust enrichment are beyond our purview.

Clearly Cottonwood should not have been billed for service provided to the Gums. This claim involves billings for services not actually provided. Section 9-252.1 states:

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.

Therefore, Section 9-252.1, rather than Section 9-252 concerning billing at an improper rate, applies.

ComEd maintains that Cottonwood's claims are barred by the discovery rule in Section 9-252.1. ComEd argues that, at the very least, Cottonwood reasonably should have known of this billing since September 1997 when Cottonwood's bills began to state the actual service address for this meter (rather than the transformer number) as the Davis Road House where the Gums resided. It is not necessary for us to reach a decision on this issue, however, because we find the "continuing violation doctrine" applicable. This doctrine permits us to consider billing errors dating back to 1990.

The Commission adopted the continuing violation doctrine in *Time Warner Cable v. Commonwealth Edison Company*, Docket 99-0388, and applied it again in *Consolidated Communications Consultant Services, Inc. for the Chicago Housing Authority v. Illinois Bell Telephone Company*, Docket 99-0429. Under the continuing violation doctrine, the statute of limitations does not begin to run until the date of the last violation in a series of related wrongs. *Field v. First National Bank of Harrisburg*, 249 Ill.App.3d 822, 619 N.E.2d 1296, 189 Ill.Dec. 247 (1993). Here, ComEd presented a series of monthly billings to Cottonwood, which Cottonwood paid in full for twelve years, for service provided to the Gums. In each month, the same meter was incorrectly charged to Cottonwood for the same apparent reason (a ComEd mistake). This is the sort of circumstance to which the continuing violation doctrine applies. Consequently, the limitations period under Section 9-252.1 would not begin until ComEd presented its

last erroneous billing (March, 2002). Cottonwood's Complaint, filed in October 2002, was, therefore, timely filed under Section 9-252.1.

Accordingly, we find in favor of the Complainant and direct ComEd to refund to Cottonwood the amount paid for service to the Davis Road House for the period from May 1990 to February 2002. ComEd shall also refund all taxes applied each month for the service provided to the Gums' residence. In addition, pursuant to the authority of Section 9-252.1, we will require ComEd to add interest to the refund, to be compounded at the applicable rate of interest established by the Commission for the intervening years. Interest shall be applied until the date of refund. ComEd shall make the refund within sixty days of the entry of this Order or within sixty days of the completion of any judicial review of this Order, whichever is later.

Findings and Ordering Paragraphs

The Commission, having considered the entire record in this proceeding and being duly advised in the premises, is of the opinion and finds that:

- (1) Commonwealth Edison Company is an Illinois corporation engaged in the transmission, sale and distribution of electricity to the public in Illinois, and as such is a public utility within the meaning of Section 3-105 of the Public Utilities Act;
- (2) the Commission has jurisdiction over Respondent and the subject matter herein;
- (3) the recitals of fact in the prefatory portion of this Order are supported by the record and are hereby adopted as findings of fact;
- (4) the Complaint, as it pertains to Exelon, should be dismissed;
- (5) ComEd improperly billed Cottonwood for service provided to a third party for the period from May 1990 to February 2002;
- (6) pursuant to Section 9-252.1, Respondent is directed to refund to Cottonwood the amount paid for service to the third party for the period from May 1990 to February 2002; in addition, Respondent should also refund to Complainant an amount equal to all taxes previously paid by Complainant to Respondent for service provided to the third party. In addition, Respondent should pay Complainant interest, compounded at the applicable rate of interest established by the Commission for the intervening years, on the cumulative overcharge (including taxes) for the period described in Finding (5) above; such refund shall be paid by Respondent to Complainant within sixty days of the entry of this Order or within sixty days of the completion of any judicial review of this Order, whichever is later.

IT IS THEREFORE ORDERED that the Complaint filed by Cottonwood Farm, Inc., is granted, and Commonwealth Edison Company is hereby directed to provide to Cottonwood a refund as described in Finding (6) hereinabove.

IT IS FURTHER ORDERED that the Complaint as it pertains to Exelon Corporation is hereby dismissed.

IT IS FURTHER ORDERED that subject to the provisions of Section 10-113 of the Public Utilities Act and 83 Ill. Adm. Code Section 200.880, this Order is final; it is not subject to the Administrative Review Law.

Dated:
BRIEFS ON EXCEPTIONS DUE:
REPLIES TO EXCEPTIONS DUE:

October 3, 2003,
October 17, 2003
October 24, 2003

Terrance Hilliard,
Administrative Law Judge