STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Malibu Condominium Association	:	
-vs-	:	
Commonwealth Edison Company	:	**08-0401**
	:	
Complaint as to refund overcharges/	:	
overpayments for electricity with interest in	:	
Chicago, Illinois.	:	

ORDER ON REHEARING OF INTERIM ORDER

I. Background:

On June 24, 2009, the Illinois Commerce Commission entered an Interim Order in this proceeding that was initiated by a formal complaint brought by Malibu Condominium Association ("Malibu"), and against Commonwealth Edison Company ("ComEd"). The Interim Order granted ComEd's motion to dismiss, in part, claims that were untimely brought under Section 9-252 of the Public Utilities Act ("Act").

On July 22, 2009, Malibu filed an application for rehearing. It alleged, among other things, that the Order erred in concluding, and without citing to any authority, that the limitations period under Section 9-252 relates back and accrues from the date of the Petitioner's formal complaint, and not the date of its original informal complaint.

The Commission considered the entirety of Malibu's application. On August 4, 2009, it voted to grant rehearing, in part, and solely on the issue of whether the Interim Order of June 24, 2009 offered sufficient analysis for its ruling that the filing of an informal complaint did not toll the statutes of limitation under Section 9-252 or Section 9-252.1. *See* Notice of Commission Action, August 6, 2009.

On August 13, 2009, the Administrative Law Judge ("ALJ") issued a Ruling that included proposed additional language to the Interim Order of June 24, 2009. The ALJ further invited the parties to file comments in these premises and to also provide other suggested language for this part of the Interim Order. On August 17, 2009, Malibu filed its Comments and Exceptions to the ALJ's proposed additional language. ComEd timely filed its Comments on September 3, 2009.

A Proposed Order on Rehearing was issued to the parties on October 1, 2009. No exceptions were filed by either party.

II. The Proposed Language

The language proposed in the ALJ's Ruling is set out in full below. As identified to the parties, it would be inserted at page 22 of the Interim Order (entered on June 24, 2009) by virtue of the Order on Rehearing.

> Malibu believes that the filing of the informal complaint would control for limitations purposes. For its part, ComEd contends that an informal complaint does not toll the statute of limitations period in Section 9-252 because it does not bring the matter in dispute before the Commission and does not invoke Commission action. We agree with this latter proposition owing to a study of certain key provisions in the Public Utilities Act.
>
> At the outset, we observe that the General Assembly set out limitations periods for the bringing of a customer billing complaint against a utility in both Sections 9-252 and 9-252.1 of the Public Utilities Act. 220 ILCS 5/9-252; 5/9-252.1. The General Assembly provides, in Section 10-108 of the Act, that a complaint involving rates, charges, classifications or services under Article IX, is to be concluded by order of the Commission "not later than one year after the filing of such complaint." 220 ILCS 5/10-108. All of the remaining provisions of this statute, in our view, speak of the "formal" complaint in that they define who can bring a complaint, what is to be alleged, how it shall be served, and even describe the earliest time for fixing a date for hearing thereon. Id. In reading these statutes together – as is required under the rules of statutory construction - it is clear to the Commission that the General Assembly intends the use of the filing date of the formal complaint to set the limitations period for actions that arise under either Section 9-252 or 9-252.1. Nothing in Malibu's arguments persuades us otherwise.

III. Malibu's Comments and Exceptions.

Malibu takes issue with the proposed language that, in its view, purports to analyze key provisions of the Act in support of the Commission's conclusion that the filing of an informal complaint does not toll the statute of limitations for purposes of Section 9-252 or Section 9-252.1 of the Act. Malibu observes that the proposed language is based on a reading of Sections 9-252, 9-252.1 and 5/10-108 of the Act from which is drawn the conclusion that the Illinois General Assembly intended that the date of filing of the formal complaint be used to fix the limitations period.

For its part, Malibu points out that that there is no case law or other authority cited in support of the analysis. Any reliance on the statutory language of Section 10-108 of the Act is misplaced, Malibu asserts, given that Section 10-108 simply refers to the date by which the commission must issue an order concluding a complaint, and in

no way refers or relates to the limitations period for bringing the complaint. Further, Malibu argues that this proposed interpretation of our General Assembly's intent is illogical, contrary to law, and would lead to the absurd and unjust result of negating the very purpose of 83 Illinois Administrative Code 200.160.

As a matter of law, Malibu contends, a pleading which brings a matter within the jurisdiction of the Commission tolls the statute of limitations. It points out that under Sec. 200.160 of the Commission's Rules of Practice, the informal complaint vests the Commission with the obligation to "investigate and attempt to resolve informal complaints" and further vests the Commission with the power to proceed on the basis thereof. 83 Illinois Administrative Code 200.160. In addition, Malibu asserts, the filing of the informal complaint also requires the Commission to assign a case number and requires the utility to respond. As such, Malibu argues, the filing of the informal complaint should be deemed to toll the limitations period.

According to Malibu, if the informal complaint does 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. Malibu asserts that the very consumers whose interests the Commission is entrusted to protect would, in effect, be placed in the peril of sacrificing their legal claims by utilizing the informal complaint process. And, it argues, the utility would have absolutely no incentive to participate in good faith in the informal complaint process since the utility can simply delay and dawdle in the expectation that the complainant, who believes the informal complaint process is "real" will unknowingly find that the time for filing a formal complaint has past.

Malibu believes it significant in this regard that nowhere in the Commission's formal or informal rules, policies or statements does it state that utilizing the informal complaint process will not toll the limitations period or invoke the Commission's jurisdiction; rather, consumers are encouraged to utilize informal complaints.

Moreover, Malibu contends, the express language of both Section 9-252 and 9-252.1, which prescribe limitations periods for billing and mis-measurement disputes, respectively, refers to *any* complaint, not just formal complaints. If, as the ALJ's proposed language suggests, informal complaints are not within the purview of Section 9-252 or 9-252.1, Malibu contends that a party would be free to file an informal complaint long after the limitations period set forth in such statutes had expired. Surely, Malibu argues, such an illogical result would not be intended by our legislature.

Malibu stands firm on its position that the Commission should amend the Interim Order in such a way as to provide that the limitations period applicable to the present case is tolled by the filing of the informal complaint.

IV. ComEd's Comments

ComEd agrees with the ALJ's proposed additional language in support of the Commission's conclusion that the filing of an informal complaint does not toll the

statutes of limitation under Section 9-252 or Section 9-252.1 of the Act. It also offers its own support for including the proposed additional language in the Interim Order.

The language of 220 ILCS 5/10-108 precludes tolling the statute of limitation based on the filing of an informal complaint.

ComEd observes that Section 10-108 of the Act outlines the statutorily-ordained complaint process before the Illinois Commerce Commission. With respect to reparations cases filed under Article IX of the Act, ComEd notes Section 10-108 to provide that:

> the Commission shall make and render findings concerning the subject matter and facts complained of and enter its order based thereon **not later than one year after filing of such complaint** unless all parties to the complaint proceeding under Article IX agree to a period greater than one year. 220 ILCS 5/10-108. (emphasis added).

Under the express and highlighted language of the statute, ComEd observes, complaints **require** formal commission action within one year of filing unless the parties agree otherwise.

ComEd also directs the Commission to the much different language that appears in 83 Ill. Admin. Code 200.160. This rule, ComEd observes, authorizes the filing of informal complaints and it provides, in relevant part, that:

> [s]uch complaints will not be docketed and will not initiate a formal proceeding. The Commission acting through its staff will investigate and attempt to resolve informal complaints **without formal action**. 83 Ill. Adm. Code 200.160 (emphasis added).

By its very terms, ComEd argues, 83 Ill. Admin. Code 200.160 *precludes* the formal Commission action for informal complaints that is required to be undertaken for complaints filed under Section 10-108 of the Act. 220 Ill. Adm. Code 5/10-108.

ComEd maintains that a tolling of the statute of limitation for informal complaints cannot be reconciled with the requirement under Section 10-108 that the Commission take formal action within 1 year. To make this point clear, ComEd asks the Commission to consider, for example, the particular events this case. ComEd points out that Malibu filed its informal complaint on October 25, 2007, and its formal complaint almost 8 months later on June 24, 2008. According to Malibu, ComEd notes, an informal complaint should toll the statutory limitations period, regardless of how long a petitioner delays in filing its formal complaint. This position, however, fails to take account that the Commission's time for issuing its order in a case would be reduced by the period between the filing of the initial complaint and the formal complaint. In this case at hand, ComEd observes, and under Malibu's view, the Commission would have been forced to issue its order by October 25, 2008 – or just 4 months after Malibu filed its formal complaint.

Continuing with its analysis, ComEd points out that for any cases where the formal complaint is filed one year or more after the informal complaint, it would be impossible for the Commission to comply with the statutory one-year requirement unless it gained the agreement of the parties. Yet, ComEd asserts, there is nothing in the Act to state or suggest that the Illinois General Assembly intended for the Commission's time in resolving reparations cases be restricted in such an illogical and impractical way.

Informal complaints as authorized by Commission rule, ComEd maintains, are plainly not within the scope of "complaints" as provided for and discussed in the Act. For this reason, ComEd agrees with the ALJ's proposed language for the Interim Order.

Under the time limits set out in 83 Ill. Admin. Code 280.170 for resolving informal complaints, customers face no risk from Utilities failing to timely respond.

ComEd further observes Malibu to contend that, by not tolling the statute of limitation upon filing the informal complaint, the utility would have absolutely "no incentive to participate in good faith in the informal complaint process," and can simply delay and dawdle in the expectation that the complainant, who believes the informal complaint process is 'real' will unknowingly find that the time for filing a formal complaint has past." Malibu's Comments and Exceptions at 2-3.

In setting out this assertion, ComEd argues, Malibu has failed to consider that Section 280.170(c) and (d) of the Commission's Rules of Procedure for Gas, Electric, Water and Sanitary Sewer Utilities Governing Eligibility for Service, Deposits, Payment Practices and Discontinuance of Service explicitly outline and limit the duration of the informal complaint process. 83 Ill. Adm. Code 280.170 (c)(d).

ComEd observes Rule 280.170(c) to provide, in part, that a public utility has 14 days to respond to an informal complaint and, further states that the Commission has 14 days thereafter to "advise the parties of the results of the investigation." 83 Ill. Adm. Code 280.170(c). In other words, ComEd notes, the rule states that the informal complaint process is to be completed with 28 days unless the parties agree to extend the deadlines. Moreover, ComEd points out, the rule further provides that if either the Commission fails to resolve the dispute to the parties' satisfaction, or the public utility fails to respond within 14 days after the informal complaint is filed, the customer may file a formal complaint before the Commission. *See* 83 Ill. Adm. Code 280.170(d). The express time limits for resolving informal complaints under 83 Ill. Admin. Code 280.170, ComEd argues, disprove entirely Malibu's claim that without tolling, a utility customer is at risk from a public utility's bad faith delay in responding to an informal complaint.

In summary, ComEd maintains that there is no plausible reading of the Act that can reconcile requirements of Section 10-108 with Malibu's claim that the filing of an informal complaint tolls the statute of limitation. Further, ComEd observes that nothing in the Act or the Illinois Administrative Code states or suggests that the statute of limitation be tolled upon filing an informal complaint. Absent such an explicit provision, ComEd argues, Malibu's position on this issue must be rejected.

V. Commission Analysis and Conclusion:

The issue on rehearing is whether the ALJ's Proposed Language, provided to the parties for comment, articulates a full, reasonable and lawful analysis in support of the Commission's determination that the filing of a formal complaint tolls the limitations period. ComEd maintains that the analysis is correct. Malibu disagrees. Neither party proffers any substitute language.

Addressing Malibu's Assertions.

Malibu takes no real exception to the analysis in the Proposed Language that construes Section 10-108 together with Sections 9-252 and 9-252.1 of the Act to find that the Illinois General Assembly intended the filing of a formal complaint to toll the limitations period. It does not directly challenge or show the Commission how the analysis is unreasonable or illogical or deficient. Instead, Malibu bases the whole of its disagreement on its firm belief that informal complaints are sufficient to toll the limitations period set out in Sections 9-252 and Section 9-252.1.

To support its position, Malibu directs the Commission's attention away from the statutory authority construed in the Proposed Language. It would have us focus instead, on select phrases set out in the Rules of Practice, i.e. 83 Ill. Adm. Code 160. As such, Malibu points out that Rule 200.160 obligates "the Commission to investigate and attempt" to resolve informal complaints. Malibu Comments at 2. So too, Malibu asserts, the filing of an informal complaint "requires the utility to respond." Id. It further claims that the Rule itself "vests the Commission with the power to proceed" on the basis of an informal complaint. Id. To properly consider Malibu's assertions, the Commission needs to observe the actual words and phrases of the Rule in a full context and construe their meaning in an objective and informed fashion. In other words, the construction of any agency rule is no different than the construction of a statute.

Rule 200.160 only deals with informal complaints and its language details the specifics and the meaning of the process. The language of Section 200.160 of the Commission's Rules of Practice provides, in full, that:

> An informal complaint **may be presented orally or in writing** and shall contain a concise statement of the facts involved, the specific relief requested, and the name, address and telephone of the complaining person and each person against whom complaint is made. **Such complaints will not be docketed and will not initiate a formal proceeding.** The Commission acting through its staff will investigate and attempt to resolve informal complaints without formal action. **The presentation of an informal complaint shall be without prejudice to the right to file a formal complaint.** Nothing in this Section shall prohibit the Commission from proceeding **on its own motion** on the basis of an informal complaint. 83 Illinois Administrative Code 200.160.

The relaxed nature of this informal process is shown by the terms stating that even "oral" complaints are acceptable. Id. Thus, there is lacking the formality in pleading that Malibu recognizes as essential to bringing a matter to the Commission's jurisdiction. The Rule further states that such complaints are "not" docketed and "will not initiate a formal proceeding." Id. This language is plain in telling the potential complainant that the informal process being invoked will not involve the rigid procedures set out in the Rules of Practice. The Rule also provides that the Commission's staff will investigate and attempt to resolve an informal complaint without "formal action." Id. This language again apprises the complainant that the actions being undertaken are not official or binding. Still further, the Rule states that the presentation of an informal complaint is "without prejudice to the right to file a formal complaint." Id. This language makes it known that the informal complaint process and the formal complaint are two different things. Finally, the Rule states that the Commission is not barred from proceeding "on its own motion" on the basis of an informal complaint. Id. This does not mean, however, that the Commission can simply inject itself into the informal complaint process and assume jurisdiction. The phrase "on its own motion" requires that a formal report or other pleading be brought before the Commission that supports its exercise of discretion in taking jurisdiction of a matter.

Reviewing Rule 200.160 as we do here, i.e., word by word, and line by line, leaves the Commission unable to accept Malibu's assertions that the informal complaint process is of the same nature or effect, as a formal complaint in bringing a matter before the Commission.

In further comments, we observe Malibu to suggest that if the informal complaint were not to toll the statutory limitations period, consumers utilizing this process would be subjected to utility delay tactics and thus put in peril of "sacrificing their legal claims." Malibu Comments at 2. In examining Rule 280.170, however, we find Malibu's claim to be without merit. While the informal complaint process is flexible in most respects, it most definitely requires the utility and the Consumer Services Division to meet certain deadlines. Rule 280.170 provides, in part, that a public utility has 14 days to respond to an informal complaint and, it further states that the Commission has 14 days thereafter to "advise the parties of the results of the investigation." 83 Ill. Adm. Code 280.170(c). By our calculation, the rule requires the informal complaint process to be completed with 28 days, unless the parties agree to extend the deadlines. Further, and as importantly, the rule provides that if either the Commission fails to resolve the dispute to the parties' satisfaction, or the public utility fails to respond within 14 days after the informal complaint is filed, the customer may file a formal complaint before the Commission. 83 Ill. Adm. Code 280.170(d). As such, both Rule 200.160 and Rule 280.170 inform an unsatisfied customer of the right to file a formal complaint with the Commission.

Assessing the Proposed Language

It is undisputed that the formal complaint (referred to in the Commission's rules) is defined, authorized, and directed under Section 10-108 of the Act. 220 ILCS 5/10-108. At the outset, Section 10-108 of the Act, defines who can bring a complaint.

Pursuant to the terms of the statute, the formal complaint must be in writing (unlike the oral complaint acceptable to the informal process). Id. Upon the filing of the complaint, the statute requires the Commission to "cause a copy thereof to be served" upon the person or corporation complained of. Id. This service function is handled by the Chief Clerk who will assign a formal docket number to the pleading. Under the law, the Commission is further required to provide a notice fixing a time and place where "a hearing will be held upon such complaint." Id. The formality of a hearing includes the right of each party to present evidence that is material and relevant to the issues before the fact-finding body, i.e., the Commission. Further, the statute directs that the time fixed for such hearing "shall not be less than ten days" after the date of the service of such notice and complaint. Id. This requirement surely aims to provide parties a reasonable opportunity for preparation and attendance at the hearing. Also within Section 10-108, a special direction is provided for complaints brought under Article IX of the Act regarding rates, charges, classifications, or services of a utility. In such matters, the statute requires the Commission to "make and render findings concerning the subject matter and facts complained of" and to "enter its order" not later than one year after the "filing of such complaint" unless all parties agree, in writing, to a period greater than one year. Id. Even at that, the written agreed extension period may not exceed 60 days (although more than one agreement is permitted).

It is on the basis of the statutory language in Section 10-108 and its description of the formal "complaint" that the Proposed Language at issue here evolved. Also considered in the analysis were the related provisions of Section 9-252 and 9-252.1 of the Act. 220 ILCS 9/252 and 9-252.1. While the language in Sections 9-252 and 9-252.1 is different in its particulars of its subject matter, each statute refers to complaints being filed before the Commission with two years of the respective triggering event. See Section 9-252 (stating that, "All complaints…shall be filed with the Commission within 2 years from…."), and Section 9-252.1 (stating that, "Any complaint… must be filed with the Commission no more than 2 years after…"). Id. The Proposed Language gives the term "complaint" as it appears in Section 9-252 and 9-252.1 the same meaning as the term "complaint" in Section 10-108.

It is well-settled that the language of the statute itself is the best evidence of the legislature's intent. Ultsch v. Illinois Municipal Retirement Board, 226 Ill. 2d 169 (2007). And, where the same, or substantially the same, words and phrases appear in different sections of a statute, they will be given a generally accepted and consistent meaning where the legislative intent is not expressed to the contrary. Baker v. Saloman, 334 N. E.2d 313 (1st. Dist. 1975); Mirabella v. Retirement Board, 556 N.E. 2d 686 (1st Dist. 1990). Also, courts will read a statute as a whole and in a manner that makes the provisions consistent with other statutes. In re Estate of Romanowski, 329 Ill. App.3d 769 (1st Dist. 2002). Under the sum of this authority, the Commission agrees that the term "complaint" as it appears in Section 9-252 and 9-252.1 of the Act, must be given the same meaning as the word "complaint" in Section 10-108. And, when taken together, the relevant provisions of the Act that outline the procedures of the formal complaint process (Section 10-108); that require complaints for reparations to be filed within 2 years of the specific and respective triggering events (Sections 9-252 and 9-

252.1); and that direct the Commission to take formal action on the complaint within one year (Section 10-108), lead the Commission to the inescapable conclusion that formal complaints as defined in Section 10-108 are the very same complaints that are referenced in the language of Sections 9-252 and 9-252.1. The Proposed language captures this very analysis in a succinct fashion, and is here adopted as an amendment to the Interim Order.

Further Corroborating Analysis

The soundness of our conclusion is borne out by further analysis in consideration of ComEd's arguments. To begin, we look to the law. Our Illinois Supreme Court has observed that, in the construction of statutes, the General Assembly is presumed to have enacted legislation that will not produce absurdity or inconvenience or injustice. McNamee v. Federated Equipment & Supply Company, Inc., 181 Ill.2d 415, 692 N.E.2d 1157 (1998). In this regard, considerations of practicality, and the provision for a properly-functioning hearing and decision-making process as required by law, make it abundantly clear to the Commission that having the informal complaint determine the time of filing is simply unworkable in meeting the requirements of Section 10-108 (where the law requires certain specific things to be done and done in a formal way).

It is important to note that the informal complaint process follows no evidentiary rules and results in no official action. Nor does it operate anyway near the same way that a formal complaint proceeding functions. Nothing said, or done, or produced, in the informal complaint process is ever considered or introduced in the formal complaint proceeding. In other words, a formal complaint begins with an empty record. It is only in the course of that formal proceeding that the parties bring in evidence to build the formal record. And, it is only on the basis of that formal evidentiary record that the Commission is authorized to make a decision.

As a practical matter, and as ComEd points out, having the informal complaint determine the date of filing would severely undercut the parties' rights and abilities to fully prosecute or defend claims. Just as egregiously, having the informal complaint determine the date of filing would take away from the Commission all control in the setting its own calendars and otherwise strain its finite resources. The record in this very proceeding illustrates these negative and even absurd consequences.

ComEd has demonstrated that an informal complaint, followed by a formal complaint eight months later (as happened in this case), would leave the Commission only four months under Section 10-108, to both hear and decide the matter. This is an insufficient time to allow for the activities that our Rules of Practice authorize and that parties regularly engage in, i.e., the filing of and responses to motions; amended pleadings; discovery requests; evidentiary hearings; the filing of the parties' initial and reply briefs; the issuance of a proposed order; and the filing of the parties' exceptions thereto. Also important to this process is giving sufficient time for the Commission's deliberations prior to the entry of an order. Thus, it is obvious that any shortening of the one-year Section 10-108 requirement would leave the rights of the parties' disadvantaged and the Commission's resources seriously stressed. Such an

abbreviation of a complaint proceeding, producing inconvenience and a likelihood of injustice, is surely not what the General Assembly intended.

For all the reasons discussed above, Malibu's arguments in favor of having the date of the filing of an informal complaint toll the limitations period of Sections 9-252 and 9-252.1, are rejected.[1] The analysis provided in the Proposed Language is reasonable in supporting the Commission's determination that the filing of the formal complaint is what the General Assembly intended for these premises. It is adopted, in full, as an amendment to the Interim Order of June 24, 2009.

IV. Findings and Orderings Paragraphs

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

(1) the Commission entered an Interim Order in this proceeding on June 24, 2009 setting out, among other things, its jurisdiction over the parties and subject matter of the proceeding;

(2) the Complainant filed an application for rehearing on July 22, 2009;

(3) the Commission voted to grant rehearing, in part, on August 4, 2009;

(4) rehearing was granted solely on the claim of insufficiency in analysis for the Interim Order's finding the formal complaint filing date to toll the limitations period under Section 9-252 of the Public Utilities Act;

(5) the ALJ provided Proposed Language to remedy the insufficiency, the parties had an opportunity to file written comments, and their respective comments have been considered above;

(6) the Proposed Language provides a legal analysis and ultimately supports the Commission's finding that the filing of the formal complaint is what tolls the limitations period on consumer complaints;

(7) the Proposed Language set out above is based on a reasonable construction of relevant provisions in the Public Utilities Act and should be adopted.

IT IS THEREFORE ORDERED that the Proposed Language provided to the parties on August 13, 2009 and reviewed in this order on rehearing together with the parties' comments, is hereby adopted.

[1] The question as to whether the pendency of the 28-day informal process might be counted if it would otherwise shorten a potential complainant's claim, is not a question raised under the facts of this case. It awaits another day.

IT IS FURTHER ORDERED that the Proposed Language is now made the language of the Commission.

IT IS FURTHER ORDERED that the Interim Order entered by the Commission on June 24, 2009, is amended as noted herein. In all other respects, the Interim Order remains the same and in full force and effect.

IT IS FURTHER ORDERED that this Order is not final; it is not subject to the Administrative Review Law.

By Order of the Commission this 2nd day of December, 2009.

(SIGNED) CHARLES E. BOX

Chairman