

STATE OF ILLINOIS  
ILLINOIS COMMERCE COMMISSION

ORIGINAL  
ILLINOIS COMMERCE COMMISSION

2010 OCT 18 A 10:40

CLERK'S OFFICE

Joel Sher :  
Evangers Pet Food Co. :  
-vs- : 10-0591  
Commonwealth Edison Company :  
Complaint as to billing/charges in :  
Wheeling, Illinois. :

**RESPONDENT'S MOTION TO DISMISS**

Now comes the Respondent, Commonwealth Edison Company ("Respondent" or "ComEd"), by and through its attorney, Mark L. Goldstein, and moves to dismiss the captioned formal complaint ("Complaint") filed by Joel Sher for Evangers Pet Food Co. ("Complainant"), pursuant to 83 Ill. Adm. Code 200.190.

**NATURE OF COMPLAINT**

Complainant alleges that on May 3, 2010, the Complainant had an outage at its manufacturing facility in Wheeling, Illinois. Complainant alleges that the outage was caused either by willful or negligent actions of ComEd. As a result of the outage, Complainant suffered damages totaling \$35,448.80. Complainant noted that ComEd has denied the claim for damages. The Complainant seeks reimbursement for the loss related to the outage.

**THE COMPLAINT SHOULD BE DISMISSED BECAUSE THE COMMISSION LACKS JURISDICTION OVER THE SUBJECT MATTER OF THE COMPLAINT**

As noted above, Complainant seeks reimbursement for damages incurred in the amount of \$35,448.80.

In a complaint case that was previously before an Illinois Commerce Commission Administrative Law Judge in this matter, James Fransen v. Commonwealth Edison Company, Docket 06-0475, Order dated September 26, 2006, the Commission dismissed the claim for damages. The Commission relied upon Section 5-201 in stating the following on page 2 of its Order:

“Section 5-201 of the Act states that a ‘public utility shall be liable’ to affected persons for ‘all loss, damages or injury’ caused when the utility ‘shall do, cause to be done ore permit to be done any act, matter or thing prohibited, forbidden or declared to be unlawful. However, Section 5-201 does not provide that such matters shall be adjudicated by the Commission. Rather, Section 5-201 declares that ‘[a]n action to recover for such loss, damage or injury may be brought in the circuit court by any person or corporation.’”

The Commission concluded that Mr. Fransen could initiate an action to recover damages in the Circuit Court under Section 5-201. This Complainant could do likewise. The Commission has consistently dismissed complaints seeking money damages.

The Illinois Supreme Court as far back as 1940 found that the Illinois Commerce Commission lacks statutory authority to award money damages to the Complainant. The Commission’s statutory interpretation of Section 5-201 is based on longstanding Illinois judicial precedent. See e.g. Barry v. Commonwealth Edison Co., 374 Ill. 473, 29 N.E. 2d 1014 (1940). The Illinois First District Appellate Court has consistently followed the Barry decision. See e.g. Ferndale Heights Utility Company v. Illinois Commerce Commission, 112 Ill. App. 3d 175, 445 NE2d 334 (1st Dist. 1982) and, Moening v. Illinois Bell Telephone Company, 139 Ill. App. 3d 521, 487 NE2d 980 (1st Dist. 1985).

Finally, although the Complainant contends that ComEd's negligence is based on 83 Ill. Adm. Code 411 and the Illinois Public Utilities Act ("Ac"), 220 ILCS 5/, the

Complainant fails to cite to any specific section of the Commission's rules or the Act regarding ComEd's violation for negligence because there is none.

For all of the foregoing reasons, the Complaint is not subject to review under the Commission's complaint procedures and the Complaint should be dismissed.

WHEREFORE, Respondent, Commonwealth Edison Company respectfully requests the following:

- 1) the Complaint filed by Joel Sher for Evangers Pet Food Co. against Commonwealth Edison Company on October 12, 2010 be dismissed with prejudice;
- 2) Complainant should be given 14 days to respond to Respondent's Motion to Dismiss and Respondent given 7 days thereafter to reply;
- 3) for such other relief as the Commission deems just and proper.

Respectfully submitted,  
Commonwealth Edison Company

By:   
Mark L. Goldstein, Its Attorney

Mark L. Goldstein  
319 Province Circle  
Mundelein, IL 60060  
(847) 949-1340

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<b>Evangers Pet Food Co.</b>	)	
<b>-vs-</b>	)	<b>10-0591</b>
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<b>Complaint as to billing/charges in</b>	)	
<b>Wheeling, Illinois.</b>	)	

**NOTICE OF FILING**

TO: Parties on Certificate of Service

PLEASE TAKE NOTICE that on October 14, 2010, I filed with the Chief Clerk of the Illinois Commerce Commission my Appearance on behalf of the Respondent and Respondent's Motion to Dismiss, a copy of each is attached hereto, and are hereby served upon you.

  
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Mark L. Goldstein  
Attorney for Respondent  
3019 Province Circle  
Mundelein, IL 60060  
(847) 949-1340

**CERTIFICATE OF SERVICE**

I hereby certify that on October 14, 2010, I served a copy of the attached Appearance and Motion to Dismiss in the above-captioned docket, by causing a copy thereof to be placed in the U.S. Mail, first class postage affixed, addressed to each of the parties below:

Ms. Elizabeth A. Rolando  
Chief Clerk  
Illinois Commerce Commission  
527 East Capitol Avenue  
Springfield, IL 62701

Mr. Joel Sher  
Evangers Pet Food Co.  
221 S. Wheeling Rd.  
Wheeling, IL 60090

Ms. Sonya J. Teague  
Administrative Law Judge  
Illinois Commerce Commission  
160 N. LaSalle St., Ste. C-800  
Chicago, IL 60601



Mark L. Goldstein