STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

KING'S WALK CONDOMINIUM ASSOCIATION,	:	
	:	
Petitioner,	:	
	:	
v.	:	**Docket No. 08-0264**
	:	
COMMONWEALTH EDISON COMPANY,	:	
	:	
Respondent.	:	

PETITIONER'S VERIFIED RESPONSE TO RESPONDENT'S
MOTION FOR SUMMARY JUDGMENT

Petitioner, King's Walk Condominium Association ("King's Walk"), by its attorneys, Goldin, Hill & Associates, P.C., hereby respectfully submits its Response to Respondent's Motion for Summary Judgment filed on December 22, 2011. In support of this Response, King's Walk states as follows:

I. INTRODUCTION

This matter arises out of King's Walk's February 23, 2009, filing of its 13-count Verified Amended Formal Complaint (the "Complaint") with the Illinois Commerce Commission (the "Commission"). The Complaint asserted, among other things, that on November 14, 1996, Respondent Commonwealth Edison Company ("ComEd") improperly and without notice switched six of seven of King's Walk's electric accounts from the correct utility rate, Rate 14, to a higher and incorrect rate, Rate 6. (*See* Complaint at ¶ 16.) Further, the complaint alleged that ComEd made continuing billing errors and mismeasurements of service following these unauthorized switches, and, as a residential customer, King's Walk is legally ineligible for service under Rate 6. (*See id.* at ¶¶ 63, 98.) The complaint also stated that, on January 2, 2007,

ComEd improperly switched two of King's Walk accounts to an incorrect rate classification (i.e., Commercial Blended without Spaceheating) and improperly switched King's Walk's five other accounts to a different incorrect rate classification (i.e., Commercial Blended with Spaceheating). (*See id.* at ¶ 51.)

The Complaint further asserted, among other things, that ComEd :

(1) violated numerous provisions of the Illinois Public Utility Act (the "Act"), 220 ILCS 5, (*see, e.g.,* Complaint at ¶¶ 69, 73, 79, 85, 90);

(2) unlawfully breached the express terms of its own filed tariffs and riders, (*see, e.g., id.* at ¶¶ 94, 98, 102);

(3) improperly billed King's Walk for multiple accounts and for excessive meter rental and customer charges, (*see id.* at ¶¶ 64-65);

(4) improperly measured King's Walk demand and usage pursuant to Rate 6 by utilizing incorrect meters and imposing improper charges, (*see id.* at ¶ 98);

(5) breached its contract with King's Walk expressly created under the terms of Rate 6, (*see id.* at ¶ 116);

(6) breached the implied covenant of good faith and fair dealing imposed on ComEd as a matter of law in connection with the exercise of the power vested by its filed tariffs, (*see id.* at ¶ 109); and

(7) wrongfully retained and failed to return moneys lawfully owed to King's Walk, (*see id.* at ¶¶ 120, 125).

The Complaint went on to state that in July and September 2006, ComEd acknowledged in writing that it had billed the wrong tariff to King's Walk and refunded purported overcharges

for the period from January 22, 2005, to July 20, 2006. (*See id.* at ¶ 53.) According to the complaint, no other refunds have been made by ComEd. (*See id.* at ¶ 54.)

ComEd moved to dismiss the Complaint on limitations grounds. (*See* Interim Order at 1.) On July 27, 2011, the Commission entered an Interim Order ruling that it had proper jurisdiction over the allegations that occurred after April 11, 2006, but did not have jurisdiction for the preceding claims. (*Id.* at 16.) The Interim Order further ruled that the claims made by King's Walk arising after April 11, 2006, were, in fact, timely and, therefore, not dismissed.[1] (*Id.*)

On December 22, 2011, ComEd filed its Motion for Summary Judgment ("ComEd's Motion"), which asserts in substantial part that "ComEd reclassified condominium common areas from residential to non-residential, as approved in the final order in ICC Docket No. 05-0597." (ComEd's Motion at 3.) ComEd contends that, therefore, the claims made by King's Walk that it had been wrongfully charged at a commercial rate—including, presumably, the claims that ComEd made volumetric and measuring errors—are without merit. (*See id.* at 4.) As described in greater detail below, ComEd's Motion is fraught with outright factual misstatements. Further, the statements it does make are legally groundless, and therefore the Commission should deny ComEd's Motion and refuse to grant ComEd summary judgment.

II. LEGAL STANDARDS

Summary judgment is a drastic means of disposing of litigation and should be allowed only where the moving party's right is clear and free from any doubt. *Purtill v. Hess*, 111 Ill. 2d 229, 240 (1986). The purpose of summary judgment is not to try issues of fact; it is appropriate only where facts are undisputed and reasonable men could not draw divergent inferences from

[1] ComEd disingenuously suggests that the Commission "succinctly listed" only four remaining claims and thereby limited the claims after April 11, 2006, that King's Walk may pursue. (ComEd's Motion at 1-2.) In fact, the Interim Order contains no such limitation and expressly states that the "remaining claims are not untimely and are therefore not dismissed." (Interim Order at 16.)

the undisputed facts. *Jackson v. TLC Assocs.*, 185 Ill. 2d 418, 423-24 (1998). Further, because of the severe nature of summary judgment, the evidence must be construed strictly against the moving party and in favor of non-moving party. *Id.*

To determine whether a genuine issue of fact does indeed exist, the court must consider the pleadings and admissions on file, as well as the affidavits filed in support and opposition of the motion. *Joseph W. O'Brien Co. v. Highland Lakes Constr. Co.*, 9 Ill. App. 3d 408, 412 (1st Dist. 1972); 735 ILCS 5/2-1005. Allegations amounting to no more than conclusions are insufficient to create an issue of material fact for purposes of summary judgment. *Lackey & Lackey v. Prior*, 228 Ill. App. 3d 397, 399-400 (5th Dist. 1992).

III. DISCUSSION

A. All of the Causes of Action After April 11, 2006, Remain Extant and King's Walk is Entitled to Trial on the Merits of Such Claims.

Notwithstanding ComEd's wholly unsupportable contention that only four of King's Walk claims are remaining (*see* ComEd's Motion at 1-2),[2] the Interim Order is absolutely explicit that *all* of King's Walk allegations that occurred after April 11, 2006, are continuing and have not been dismissed. (Interim Order at 16.) King's Walk has alleged not just overcharging based on being improperly switched to the wrong rate, but improper measurement of quantity and volume, (*see* Complaint at ¶ 82), violation of Section 9-101 of the Act, (*see id.* at ¶ 69), violation of Section 9-241 of the Act, (*see id.* at ¶ 73), violation of Section 9-240 of the Act, (*see id.* at ¶ 79), submission of incorrect bills in contravention of Section 9-252.1 of the Act, (*see id.* at ¶ 85), violation of Section 1-103.1 of the Act, (*see id.* at ¶ 90), violation of the terms of Rider

[2] Specifically, ComEd contends that the only remaining claims are for: (1) wrongful billing at the commercial rate; (2) wrongful billing at Rate 6; (3) improper switching of three accounts to Rate 6; and (4) entitlement to Rider CABA credits. (ComEd's Motion at 1-2.)

CABA, (*see id.* at ¶ 102), as well as common counts for breach of contract, money received, and conversion, (*see id.* at ¶¶ 116, 120, 125).

The Complaint also alleges that, since 1975, ComEd has improperly provided service and collected excessive customer charges under seven separate accounts (rather than correctly billing under a single account). (*See id.* at ¶ 15.) Except to the extent that the Interim Order held these claims as time-barred for the period prior to April 11, 2006, all of these claims remain, and ComEd's Motion does not even address their validity.

B. Section 103.1 of the Act Requires ComEd to Reinstate the All-Electric Discount to King's Walk

According to the allegations of Paragraph 51 of the Complaint, which have not been factually disputed, on January 2, 2007, ComEd improperly switched two of King's Walk's accounts from the formerly applicable residential spaceheating rate, Rate 14, to a commercial non-spaceheating rate. (*See* Complaint at ¶ 51.) Furthermore, as alleged and not disputed, ComEd switched four other accounts to incorrect rates. (*See id.*) In its Motion for Summary Judgment, ComEd's blanket assertions gloss over this proceeding's facts by simply stating that ComEd had some right to switch all condominium rates on January 2, 2007. (*See* ComEd's Motion at 3.)

In its motion, ComEd states that it was allowed to transfer condominium buildings to a commercial rate but complied with Section 16-103.1, 220 ILCS 5/16-103.1, by providing all such all-electric buildings with a discounted "Residential Space Heat Supply Charge" instead of charging such customers the economically higher nonresidential supply rate. (ComEd's Motion at 4.) According to the Complaint, ComEd switched some of the King's Walk accounts to commercial rates (e.g., Commercial Blended) and not the non-residential spaceheating rate (i.e.,

BES-R). (Complaint at ¶ 51.) Other suspicious switching activity occurred soon after in 2007, (*see id.*), which was not addressed by ComEd.

Accordingly, ComEd is incorrect in stating that it charged all such spaceheating condominium buildings on the "Residential Space Heat Supply Charge" as asserted in its Motion for Summary Judgment. (*See* ComEd's Motion at 4.) There exists genuine issues of material fact as to King's Walk in particular that should not be dismissed by overarching statements of what ComEd did generally and to all condominium customers without the ability to cross-examine ComEd's witnesses or put forth evidence to prove its case. A quick review of the accounts on ComEd's Powerpath Web site disputes Mr. Geraghty's assertions. A copy of this site's summary is attached as Exhibit A.

The Orders in Commission Docket Nos. 05-0159 and 05-0597 provide for reclassification of certain condominium common area customer accounts. *See* Final Order, *Commonwealth Edison Co.*, No. 05-0159 (Ill. Commerce Comm'n January 24, 2006), at 237-38; Final Order, *Commonwealth Edison Co.*, No. 05-0597 (Ill. Commerce Comm'n July 26, 2006), at 8. According to the Complaint, King's Walk has seven separate ComEd accounts. (Complaint at ¶ 10.) The billings and invoices have allowed ComEd to consistently collect excessive customer and related separate billing charges for seven accounts for one customer. (*Id.* at ¶ 11.) Regardless of assertions that ComEd is over-collecting on its revenue requirement for King's Walk, none of these seven accounts have a peak demand of greater than 100 kilowatts (kW), and, accordingly, would be declared competitive. Among other things, ComEd has stifled competitive opportunities for King's Walk by billing seven accounts at this facility. (*See, cf.*, Motion at 4, fn.3.) More fundamentally, under Section 16-103.1, 220 ILCS 5/16-103.1, each of these seven

accounts should have been classified as residential and not commercial because none had the requisite peak demand.

ComEd's Motion fails to address the facts asserted by King's Walk and provides no justification as to why the seven accounts would not be considered residential in nature, or how Section 16-103.1 applies to the specific facts in this case. (*See, generally*, ComEd's Motion.) Furthermore, according to ComEd's general terms and conditions regarding retail customer classes:

> In accordance with Section 16-103.1 of the Act, in determining if a retail customer has electric power and energy requirements of at least 100 kW, the Company does not consider a retail customer that is a unit owners' association, as defined in Section 2 of the Condominium Property Act. In addition, in determining if a retail customer has electric power and energy requirements of at least 100 kW, the Company does not consider a retail customer for which the residential customer group is applicable.

ComEd, *Schedule of Rates for Electric Service,* 140 (June 1, 2011), *available at:* https://www.comed.com/Documents/CustomerService_RateInfo/Ratebook.pdf.

Moreover, even assuming that King's Walk's accounts were categorically eligible for some commercial rate after January 2, 2007, the Complaint clearly alleged that on January 2, 2007, ComEd improperly switched King's Walk to the wrong commercial rate (i.e., Commercial Blended without Spaceheating), which is wholly inapplicable to King's Walk, a spaceheating customer. (Complaint at ¶ 51.) In other words, even if King's Walk could have been on a commercial rate, ComEd applied the wrong commercial rate to King's Walk.

Accordingly, there exist multiple issues of material fact in the present case. Clearly, ComEd's Motion asserting that it can recategorize all electric condominium association accounts as commercial accounts, (ComEd's Motion at 3-4), is not consistent with Section 16-103.1 or its own tariffs. *See* 220 ILCS 5/16-103.1.

C. King's Walk Could Have Taken Service After January 2, 2007 on the Continuing Residential Rate, and Never Elected to be Placed on the Wrong Commercial Rates

ComEd's core contention, which alleges that the Commission somehow abrogated residential rates for residential condominiums after January 2, 2007, and was authorized to unilaterally switch condominium customers to a commercial rate, (ComEd's Motion at 3-4), is simply wrong. ComEd's Rate BES-R (Basic Electric Service-Residential) was in effect at the time and, by its express terms, applied to residential spaceheating customers such as King's Walk who were eligible on January 1, 2007, to take service under the former residential Rate 14.[3] A copy of Rate BES-R is attached as Exhibit B.

As set forth in ComEd's own standards and procedures, and as ComEd has repeatedly asserted before the Commission, rate selection is the customer's responsibility. (*See* Complaint Exs. C & D.) As alleged in the Complaint and as is undisputed by ComEd, King's Walk never applied for, requested, consented to, or authorized ComEd to switch any of its accounts to the Commercial Blended rates. (Complaint at ¶ 52.) King's Walk could have and should have been provided service under the residential rate (i.e., Rate BES-R) and is entitled to ascertain and recover reparations at trial resulting from the unauthorized switching.

D. A Genuine Issue of Material Fact Exists as to the Rider CABA Credits Given

ComEd's Motion also asserts, because ComEd has already credited King's Walk with (improperly established) Rider CABA credits for five of its seven accounts and is willing to apply an additional $1,830.86 credit, that the Commission should simply accept these ComEd-

[3] As alleged in the Complaint, King's Walk has conformed to and complied with ComEd's requirements as a residential customer under Rate 14 since 1975; in fact one of King's Walk seven accounts was correctly billed on Rate 14 through January 1, 2007. (Complaint at ¶¶ 9, 16.) It should also be noted that all of the individual condominium units at King's Walk continue to be billed at residential rates.

supplied figures as correct.[4] (*See* ComEd's Motion at 6.) The Complaint of King's Walk acknowledges that King's Walk received a credit on five of its seven accounts, but also alleges that the amount due on the remaining accounts is $4,000. (Complaint at ¶ 56.) Moreover, these allegations by King's Walk must, for purposes of ComEd's Motion, be construed in its favor and accepted as true. *See Jackson*, 185 Ill. 2d at 423-24. Because a genuine issue of fact exists as to the amount of credits due King's Walk (and as to any other reparations arising from ComEd's failure to provide such credits), summary judgment cannot be available to ComEd in this case.

IV. CONCLUSION

ComEd's core argument (i.e., that the Commission in a prior docket provided ostensible authority for ComEd to change its all-electric condominium customers to a commercial rate) is wholly misplaced. In fact, because ComEd improperly chose to bill King's Walk through seven separate accounts, none of which had peak demand greater than 100 kilowatts (kW), these accounts were required to be classified and should have been classified as residential. Even if King's Walk may have been categorically eligible for some commercial rate after January 2, 2007, it belies the fact that: (1) a correct residential rate (i.e., Rate BES-R (Basic Electric Service-Residential with Spaceheating)) remained available after January 2, 2007; (2) King's Walk was eligible for such residential rate; and (3) King's Walk never elected to be switched to the commercial rate. Moreover, even if ComEd was authorized to switch condominiums to some commercial rate, ComEd switched two of King's Walk, a spaceheating customer, to a flagrantly wrong commercial rate, Commercial Blended without Space Heating. ComEd's Motion does not even directly address the bulk of King's Walk's counts dealing in tort, mismeasurement, improper metering, contract, and statutory violations. Again, these claims all remain in existence

[4] ComEd does not explain why, if it acknowledges that additional CABA credits still remain due King's Walk, ComEd has not already provided such credits to King's Walk, as it is required to do.

for the period after April 11, 2006, and ComEd fails to establish that these counts were dismissed by the Interim Order, and fails to assert any reason why they should be dismissed.

Granting ComEd summary judgment at this point would be improper because the facts appropriately require more consideration from the Commission. ComEd's Motion fails to address key facts alleged in the Complaint and instead applies generalized propositions to justify its actions. For instance, it simply states that "ComEd refers to condominium common areas, multi-unit buildings, and condominium buildings interchangeably throughout this motion." (ComEd's Motion at 3.) ComEd's justification that Rate 14 was discontinued after January 1, 2007, (*see id.* at 4), as a basis for granting summary judgment is a non-sequitur. ComEd's assertion that it ceased offering a residential discount for all-electric multi-unit buildings on that date, and that it switched every all-electric condominium building to a commercial rate is, if true (despite the fact that such statement cannot be verified at this point in the case), contrary to law and fact.

WHEREFORE, for the reasons above stated, King's Walk respectfully requests that: (1) ComEd's Motion for Summary Judgment should be stricken and/or denied in its entirety and ComEd should be ordered to answer King's Walk's Complaint within twenty-eight (28) days; and (2) this Commission should order such further relief as may be warranted.

Respectfully submitted,

KING'S WALK CONDOMINIUM ASSOCIATION

By: _____
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Dated: January 23, 2012

STATE OF ILLINOIS)
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COUNTY OF COOK)

VERIFICATION

I, Jeremy Quathrody, being first duly sworn, on oath deposes and says that I am an officer for King's Walk Condominium Association, that I have read the above and foregoing Petitioner's Verified Response to Respondent's Motion for Summary Judgment, know of the contents thereof, and that the same is true to the best of my knowledge, information, and belief.

Jeremy Quathrody

Subscribed and sworn to me
this ~~20th~~ 22nd of January 2012.

Elizabeth E Gorski
Notary Public

OFFICIAL SEAL
ELIZABETH E GORSKI
NOTARY PUBLIC - STATE OF ILLINOIS
MY COMMISSION EXPIRES:02/23/15

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

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COMMONWEALTH EDISON COMPANY,	:	
	:	
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NOTICE OF FILING

Please take notice that on January 23, 2012, King's Walk Condominium Association filed its Verified Response to Respondent's Motion for Summary Judgment in the above-captioned proceeding with Elizabeth A. Rolando, Chief Clerk of the Illinois Commerce Commission via e-Docket.

Kenneth G. Goldin
One of its attorneys

CERTIFICATE OF SERVICE

I, Kenneth G. Goldin, hereby certify that a copy of the above-referenced filings was served on the persons on the following service list via electronic mail on January 23, 2012.

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