STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

KINGS' WALK CONDOMINIUM Petitioner, vs. COMMONWEALTH EDISON COMPANY Respondent. Complaint as to refund the balance of overcharges/overpayments for electricity in Rolling Meadows, Illinois	))))))))))	Docket No. 08-0264

VERIFIED REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Respondent, Commonwealth Edison Company ("ComEd"), hereby submits its reply in support of its motion for partial summary judgment pursuant to 83 Ill. Admin. Code § 200.190 and 735 ILCS 5/2-1005 ("Motion"). In further support of its Motion, ComEd states as follows:

I. Introduction

Petitioner King's Walk Condominium Association ("Petitioner" or "King's Walk") misconstrues the July 27, 2011 Illinois Commerce Commission ("ICC" or "Commission") Interim Order in this case ("Interim Order"). As stated in ComEd's Motion, the Interim Order succinctly listed King's Walk's four claims that survived ComEd's Motion to Dismiss. *See* Interim Order at 15. ComEd also noted that King's Walk did not dispute the characterization of the remaining claims in its petition for rehearing. *See generally* King's Walk Petition for Rehearing and Reconsideration. Now, however, King's Walk argues that it has several additional claims that survived the motion to dismiss. There are two main problems with this argument. First, it is contrary to the plain language of the Interim Order. Second, it is irrelevant, because even if King's Walk's tortured interpretation of the Interim Order were accurate, it ignores the relevant allegations in its own Amended Complaint, which are interpreted by the

Interim Order and are either (1) limited to the time-barred period (or have already been addressed by the refund that ComEd undisputedly provided in 2006) or (2) governed by ComEd's Motion.

In short, all of the arguments raised in Petitioner's response to ComEd's Motion ("Response") are either misinterpretations of the law or facts, or red herrings to make it appear as if there is an issue of material fact that remains. As explained in ComEd's Motion, three of King's Walk's four remaining claims are entirely without merit and must be dismissed as a matter of law, and King's Walk's fourth claim misconstrues Rider CABA and ignores the undisputed fact that Petitioner has already received Rider CABA credits for all but two of its accounts. ComEd reiterates that the two remaining Rider CABA credits total less than $2,000, and ComEd is prepared to issue those credits to King's Walk immediately.

As discussed further below, King's Walk's response also raises a new issue that is not included in its Amended Complaint – that two of its accounts are on the wrong *commercial* rate. Even though Petitioner has never formally discussed this issue with ComEd nor included it in its Amended Complaint in this case, ComEd is also willing to switch these two accounts to the commercial rate that King's Walk now appears to request: Rate BES with Residential Electric Space Heat Supply Charges.

II. Argument

A. Legal Standard

Petitioner misunderstands the burden it bears in opposing a motion for summary judgment. It may not rely solely upon its pleadings to refute evidence presented in support of a motion for summary judgment. As King's Walk acknowledges, the purpose of summary judgment is to determine whether there is a disputed issue of material fact. *See* Response at 3-4.

The moving party must introduce "evidence that, if uncontroverted, would entitle [it] to judgment as matter of law" or establish "that the nonmovant lacks sufficient evidence to prove an element of the cause of action." *Williams v. Covenant Med. Ctr.*, 316 Ill. App. 3d 682, 688, 737 N.E.2d 662, 668, 250 Ill. Dec. 40, 46 (4th Dist. 2000).

Once the moving party meets this initial burden, however, the burden shifts to the nonmovant to present "a factual basis that would entitle it to judgment." *Vickers v. Abbott Labs.*, 308 Ill. App. 3d 393, 407, 719 N.E.2d 1101, 1112, 241 Ill. Dec. 698, 709 (1st Dist. 1999). Importantly, the nonmovant may not rely only on its pleadings to refute facts presented in support of a motion for summary judgment. *Purtill v. J.H. Hess*, 111 Ill. 2d 229, 240-41, 489 N.E.2d 867, 871, 95 Ill. Dec. 305, 309 (Ill. 1986).[1]

Therefore, if a moving party presents an affidavit containing facts in support of its motion, those facts are taken as true unless the nonmovant contradicts them through its own affidavit. *Purtill*, 111 Ill. 2d at 240-41. ComEd has submitted evidence in the form of the affidavits of Mr. David Geraghty and Mr. John Leick. King's Walk has not submitted any affidavits of its own or presented any evidence to refute ComEd's affidavits, it simply refers back to and relies upon the allegations in its Amended Complaint. The facts in ComEd's affidavits, therefore, must be taken as true for purposes of ComEd's Motion.

---

[1] A verified complaint may be relied upon to support or refute a motion for summary judgment, but only if it meets the requirements of Supreme Court Rule 191, which among other things, requires that it is based upon personal knowledge. *See N. Am. Old Roman Catholic Church by Rematt v. Bernadette*, 253 Ill. App. 3d 278, 286, 627 N.E.2d 1094, 1098-99 (Ill. App. Ct. 1992). However, "even 'the allegations of the verified complaint of plaintiffs cannot prevail over the uncontradicted facts set forth in the affidavits presented by defendants in support of their motion for summary judgment.'" *LaMonte v. City of Belleville*, 41 Ill. App. 3d 697, 702-703, 355 N.E.2d 70, 76 (Ill. App. Ct. 1976), quoting *Janes v. First Fed. Sav. & Loan Ass'n of Berwyn*, 11 Ill. App. 3d 631, 640-41, 297 N.E.2d 255, 262 (Ill. App. Ct. 1973). Moreover, if the allegations in a verified complaint are nothing more than conclusions of fact, they will not be enough to contradict facts set forth in defendant's affidavit. *Id.* The verifications provided by King's Walk in this case are provided on information and belief or to the best of the verifier's knowledge, are nothing more than conclusions of fact, and do not otherwise meet the standards of Rule 191.

B. The Interim Order Clearly Enumerates Petitioner's Remaining Claims.

Petitioner claims that "the Interim Order is absolutely explicit that *all* of King's Walk['s] allegations that occurred after April 11, 2006" have not been dismissed. Response at 4. This argument is both misleading and irrelevant. First, this argument is misleading because it completely ignores page 15 of the Interim Order. The ALJ and the Commission took the time to carefully analyze and parse the allegations in Petitioner's Amended Complaint, and then took the time to draft a lengthy and comprehensive Interim Order that specifically and clearly enumerates King's Walk's remaining claims. Petitioner's argument eviscerates all of that and renders page 15 of the Interim Order superfluous.

Second, this argument is irrelevant because the Interim Order correctly concludes that the claims enumerated on page 15 are the only viable claims that allegedly arose after the statute of limitations cut-off of April 11, 2006. Although the Amended Complaint is somewhat confusing to navigate, the ALJ and the Commission accurately found that the factual allegations fall into two categories: those concerning actions prior to April 11, 2006 (or after April 11, 2006 but covered by the refund ComEd provided in 2006), and those concerning actions on or after January 2, 2007. *See generally* Amended Complaint at pp. 2-17; Interim Order at 13-15. Only those claims in the second category remain, and those are the claims that the Commission addressed on page 15 of the Interim Order and that ComEd addressed in its Motion.

C. King's Walk Ignores the Undisputed Evidence Offered by ComEd and Misinterprets ComEd's Tariffs.

King's Walk's Response ignores the specific and detailed evidence that ComEd provided in support of its Motion, and relies solely on its pleadings to continue its argument that on January 2, 2007, ComEd should have switched King's Walk to a residential rate. *See* Response at 5-7. But ComEd has offered clear and uncontroverted evidence that King's Walk was not

eligible for a residential rate after January 2, 2007. *See generally* Affidavit of David Geraghty, Exhibit A to Motion. Ignoring this evidence, King's Walk baldy asserts that each of its seven accounts should have been classified as residential instead of commercial because none had a peak demand high enough to qualify them as commercial – 100 kW or more according to King's Walk. Response at 6-7. This argument completely ignores the undisputed factual evidence that ComEd has offered regarding the tariff change that switched **all** condominium common area accounts from residential to commercial rates regardless of peak demand. *See generally* Affidavit of David Geraghty, Exhibit A to Motion.

King's Walk appears to equate competitive declarations with commercial designations, as evidenced by its citation to an excerpt from ComEd's operative General Terms and Conditions for competitive declarations. The full text of this portion of ComEd's General Terms and Conditions, sheet number 140, is attached hereto as Exhibit C. A review of this document shows that King's Walk's excerpt is completely out of context and has nothing to do with this case generally or residential versus commercial designations specifically.[2] Likewise, King's Walk's reference to a Power Path print out for one of its accounts (number 4993692018), is of no avail. All that print out shows is that this account is on a commercial rate, as evidenced by the rate legend showing "B93 = Comm Demand – 0 to 100kw w/space heat," that there are commercial accounts with demand of less than 100 kW, and that this account enjoys the residential space heat supply rate available to certain commercial condominium common area accounts, as

[2] King's Walk also puts forth the contrary arguments that ComEd has over-collected from King's Walk and stifled competition because it has billed King's Walk on seven separate accounts instead of combining them into one account with a higher peak demand. Response at 6-7. This is irrelevant to the question of whether King's Walk should be on a commercial or a residential rate, and outside the scope of this case as set forth by the Interim Order. It is also factually incorrect, and ComEd is happy to bring a separate motion on this issue if the ALJ deems it within the scope of this case as limited by the Interim Order. In any event, this issue has no bearing on the instant Motion.

evidenced by the "RES DMND SP HT SUPPLY GROUP" designation. This does nothing to further Plaintiff's allegations and indeed it confirms the evidence put forth in ComEd's Motion.

Similarly, King's Walk's claim that it could have taken service after January 2, 2007, on Rate BES-R, a residential rate, is of no avail. As ComEd has explained *ad nauseum*, condominium common area accounts were no longer eligible for residential rates after January 2, 2007. In further support of this already factually undisputed argument, ComEd attaches hereto as Exhibit D, all versions of its General Terms and Conditions regarding Retail Customer Categorizations that were in effect from 2006 through the present (sheet numbers 503 and 504 effective 2006 and 2007, and sheet numbers 134 and 135 effective 2009). As evidenced therein, a retail customer is categorized in the residential sector only if it is an "individual residential occupancy premises." Condominium *common areas* are by definition not *individual* residential occupancy premises.

King's Walk then goes on to argue – for the first time in this case – that two of its accounts are on the wrong commercial rate and should be on a different *commercial* rate: Rate BES with Residential Space Heat Supply Charges. Response at 7. ComEd has confirmed that these two accounts appear to be eligible for both the rate that they are currently on as well as Rate BES with Residential Space Heat Supply Charges, and ComEd is willing to switch these accounts pursuant to a clear and formal request from King's Walk.

None of this, however, creates a disputed issue of material fact in this case. Despite Petitioner's exhaustive and creative attempts to argue to the contrary, ComEd was authorized to change its tariffs and switch all condominium common area accounts from residential to commercial rates on January 2, 2007. *See generally* Motion and ComEd Exhibit A. This was

consistent with the relevant Commission orders and all of ComEd's tariffs. *Id.* Whether or not King's Walk requested, agreed with, or was dissatisfied with this tariff change is irrelevant.

D. ComEd's Evidence Regarding Rider CABA is Uncontroverted.

ComEd has explained the Rider CABA credit issue in detail, and has provided uncontroverted evidence as to the calculations of King's Walk's Rider CABA credits. In response, King's Walk simply states that ComEd is wrong and points to its Amended Complaint. Response at 8-9. As discussed in Section II.A. above, this is not enough to withstand a motion for summary judgment supported by affidavit. The Commission must therefore accept ComEd's Rider CABA calculations as true and correct and find that the amount of reparations owed on the Rider CABA claims is $1,830.86. *See generally* Motion and Exhibit B.

III. Conclusion

In conclusion, ComEd respectfully requests that the Commission grant summary judgment in ComEd's favor on the first three of Petitioner's four remaining claims. ComEd also respectfully requests that the Commission find that the amount of reparations owed on the fourth and final claim is $1,830.86.

Dated: February 7, 2012

Respectfully submitted,
COMMONWEALTH EDISON COMPANY

By:
/s/ Ronit Barrett

Ronit Barrett
Eimer Stahl Klevorn & Solberg LLP
224 South Michigan Avenue, Suite 1100
Chicago, Illinois 60604
312.660.7600 (telephone)
312.660.1718 (facsimile)
rbarrett@eimerstahl.com