STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

North Shore Sanitary District, an Illinois Municipal Corporation, Complainant, vs. Commonwealth Edison Company, Respondent.	))))))))))	Docket No. 11-0722

COMMONWEALTH EDISON COMPANY'S REPLY BRIEF IN
<u>FURTHER SUPPORT OF ITS MOTION TO DISMISS</u>

Commonwealth Edison Company ("ComEd") brought this motion to dismiss (1) to challenge the legal sufficiency of the complaint based on facial defects (the basis for a 2-615 motion) and (2) because Rider NS controls as an affirmative matter to defeat North Shore Sanitary District's ("NSSD") contract claim (the basis for a 2-619 motion). In its response to ComEd's Motion to Dismiss, NSSD makes three arguments. First, NSSD spends most of its response attempting (albeit unsuccessfully) to discredit the Illinois Commerce Commission's ("Commission") well-established practice of following the Illinois Code of Civil Procedure in considering motions to dismiss. Contrary to the Commission's orders and rulings, NSSD argues that pleadings before the Commission need only satisfy some undefined standard known only to NSSD, which NSSD claims is something far below that required by the Illinois Code of Civil Procedure. Second, NSSD contends that – under its fictional pleading standards – it has adequately pled a claim for "unjust and unreasonable charges" despite having made only factually unsupported conclusory allegations. Finally, contrary to applicable Illinois law, NSSD attempts to argue that Rider NS does not affirmatively defeat its contract claim. NSSD addresses

this argument last and devotes just five paragraphs to it in an attempt to defeat this dispositive argument. None of the arguments raised by NSSD's response have any basis in the governing law, and its complaint should be dismissed.

I. NSSD Ignores the Well-Established Commission Practice and Standards Relating to Pleadings Before the Commission

Conceding that its complaint cannot meet the "strict standards of the Code of Civil Procedure," NSSD contends that the Commission requires far less of its complainants and only requires that a complaint "provide a clear statement on the subject matter, scope of complaint, and basis thereof…." NSSD Resp. at ¶¶ 1-2 (citing 83 Ill Admin. Code 200.180, entitled "Answers"). While 83 Ill. Admin. Code 200.180 may provide a standard that guides the Commission as to when to direct a party to provide an answer to a complaint, the Commission's orders and rulings leave no doubt that pleadings before the Commission are generally held to the standards of Sections 2-615 and 2-619 of the Code of Civil Procedure. The following excerpt makes this abundantly clear:

> Although motions before the Commission are generally governed by 83 Ill. Adm. Code [200.]190, the Commission has adopted **principles and rules developed for dismissal motions by the judiciary**. Principles relevant to this dispute are recited in *Michael Reese Hosp. v. Chicago HMO, Ltd.*, 196 Ill. App. 3d 832, 835-36, 554 N.E. 2d 472, 474 (1990) [(discussing Section 2-615 standard for dismissal)]…

BlueStar Energy Services, Inc. v. American Energy Solutions, Inc., et al., ICC Docket No. 08-0364, ALJ's Ruling (November 7, 2008) at 15 (emphasis added); *Jackson v. Peoples Gas Light and Coke Company*, ICC Docket No. 05-0545, ALJ's Ruling (October 11, 2005) ("As a general matter, the Commission evaluates [motions to dismiss] under the **principles established in the**

Illinois courts. Dismissal motions in those courts are made under either 735 ILCS 5/2-615 and 5/2-619.") (emphasis added).[1]

There can be no question that the Section 2-615 and 2-619 standards and principles for a motion to dismiss are applicable here and should be applied by the Commission. Tellingly, NSSD cites to no authority for the proposition that the Illinois Commerce Commission has rejected the standards of Sections 2-615 or 2-619 and, in its place, substituted a far more lax standard; nor has NSSD cited to any case law in which a court held that the Illinois Code of Civil Procedure pleading requirements are not applicable to the Commission.

II. NSSD Has Failed to Plead Unjust and Unreasonable Charges

Applying the standard of Section 2-615 or the lenient standard NSSD contends applies before the Commission, NSSD has in either case failed to plead unjust and unreasonable charges under Section 9-101 of the Public Utilities Act (the "Act"). In fact, NSSD has pled nothing to suggest that charges that it would incur in the event that it makes the decision to replace the ATO switch are in any way unjust or unreasonable, only that the charges are higher than NSSD would prefer. Conclusory allegations such as these that are devoid of factual support are insufficient to withstand a motion to dismiss. *Treister v. American Acad. of Orth. Surgeons*, 78 Ill. App. 3d 746, 757 (1st Dist. 1979).

In order to survive a motion to dismiss, NSSD must allege "the substantial averments of fact necessary to state a cause of action." *Fanning v. LeMay*, 38 Ill. 2d 209, 211 (1967). Aside

[1] *See also Kings Walk Condominium Ass'n v. Commonwealth Edison Co.*, 2011 WL 3796787 (Ill. C.C. July 27, 2011) ("Essentially, ComEd's Motion is one that is brought pursuant to Section 2-619 of the Illinois Code of Procedure, in that, it raises an 'affirmative matter' which could defeat the Association's action" and "ComEd's Motion is akin to one that is brought pursuant to Section 2-619 of the Illinois Code of Procedure…"); *Schmidt v. Ameren Ill. Co. d/b/a Ameren Illinois*, ICC Docket No. 10-0724, Order (May 4, 2011) (granting respondent's motion to dismiss based on 735 ILCS 5/2-619(a)(3)); *Illinois Commerce Comm'n v. Apple Canyon Utility Co.*, 2007 WL 2822378 at *6 (Ill. C.C. March 21, 2007) (advising the attorneys that in future situations like the one presented to consider "resource-saving procedures, such as, motions brought pursuant to Sections 2-615(e) or 2-1005 of the Illinois Code of Civil Procedure."); *Jeffrey Mandalis Copyright MMVIII v. Peoples Gas Light and Coke Company*, ICC Docket No. 08-0310, Order (July 30, 2008) (applying the standards of Section 2-615 in dismissing complaint).

from its factually unsupported allegations that the labor costs "far exceed" the labor costs to replace an ATO switch (Compl. ¶ 28) and that its engineers "were alarmed at ComEd demands" (Compl. ¶ 25), NSSD has provided neither facts nor an affidavit to substantiate its claim. Rider NS sets forth an equation ComEd must use in calculating costs for nonstandard services and facilities (ComEd Motion, Ex. A at Ill. C.C. No. 10, Orig. Sheet Nos. 278-280); NSSD has provided no facts indicating or even suggesting that ComEd deviated in any manner from this equation. Absent any allegations that ComEd departed from the mandate of Rider NS – and there are none – a claim that the charges are unjust or unreasonable cannot be sustained.[2]

NSSD in fact acknowledges that its complaint is deficient but attempts to blame ComEd for its inability to support its claim. NSSD argues that if ComEd has no obligation to provide specifics as to the work and charges, "it appears that no challenge could be made against Respondent's charges as a compliant (*sic*) could never allege sufficient facts to challenge the charges since the specifics would only be known to Respondent." NSSD Resp. at ¶ 21. Under NSSD's standard, however, a complaint could be brought under any and all circumstances without any support for the complainant's assertion that the charges are in some way unjust or unreasonable.

III. NSSD Has Provided No Response to ComEd's Argument and Supporting Affidavit That its Contract Claim is Defeated by Rider NS

NSSD gives short shrift to ComEd's paramount legal argument that Rider NS defeats its contract claim. NSSD Resp. at ¶¶ 22-26. Furthermore, the section of NSSD's brief addressing this pivotal argument is laden with irrelevant information and inaccuracies. *Id.* Most importantly, NSSD claims that ComEd has "fail[ed] to cite any case" that Rider NS would defeat

[2] Perhaps NSSD contends that the equation set forth in Rider NS in somehow unjust or unreasonable, but of course this is not the proper proceeding to make such a claim.

a contract claim. *Id.* at ¶ 24. This is simply not true. ComEd cited ample authority for the proposition that a tariff/rider has the effect of statute, and that a tariff/rider controls over what any contract alleged may provide. *See* ComEd Motion at 7. Rather than "an attempt to deny an allegation" (NSSD Resp. at ¶ 25), Rider NS does more than "touch upon a contract claim", it is an affirmative matter that defeats NSSD's contract claim.

NSSD cites to *Kaufman, Litwin & Feinstein v. Edgar*, 301 Ill. App. 3d 826, 837 (1st Dist. 1998) to respond to ComEd's well-supported argument that Rider NS defeats its contract claim. That case involved a challenge to provisions of the Illinois Marriage and Dissolution of Marriage Act on the grounds that they violate the contract clauses of the Illinois and United States Constitutions. *Id.* Aside from being wholly inapplicable here, *Kaufman* does nothing to assist NSSD, especially in light of the fact that Rider 6 (Rider NS's predecessor) was in effect in 1974 – the year in which NSSD alleges that it entered into an agreement with ComEd for "emergency power" with automatic switching feed to its facility in the event the normal power feed failed. Compl. ¶¶ 10, 12. Accordingly, there can be no impairment of the alleged contract.

Perhaps the most remarkable assertion in NSSD's response is that ComEd has failed to attach an affidavit in support of its motion. NSSD Resp. at ¶ 23. This assertion is patently false. Exhibit C to ComEd's Motion is the notarized Affidavit of William M. Mueller which makes clear that the ATO switch service at NSSD's Pump Station 4 is not standard service; Rider NS therefore clearly applies to defeat a contract claim. ComEd Motion, Exhibit C. NSSD has provided nothing – not a single cite to its complaint, not a single case on point, and certainly no responsive sworn testimony – to defeat ComEd's motion to dismiss.

CONCLUSION

For the reasons stated in its motion and above, and pursuant to 735 ILCS 5/2-615 and 2-619, ComEd respectfully requests that this Court dismiss the Complainant's Verified Complaint.

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Respectfully submitted,

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