

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

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

COMMONWEALTH EDISON COMPANY’S REPLY BRIEF IN FURTHER SUPPORT OF ITS MOTION TO DISMISS THE FIRST AMENDED VERIFIED COMPLAINT

Commonwealth Edison Company (“ComEd”) brought this motion to dismiss (1) 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) and (2) to challenge the legal sufficiency of the First Amended Verified Complaint based on facial defects (the basis for a 2-615 motion). In its Response to ComEd’s Motion to Dismiss, NSSD makes three arguments. First, NSSD improperly criticizes ComEd for the manner in which it brought its combined motion to dismiss under Sections 2-615 and 2-619 of the Illinois Code of Civil Procedure (provisions it previously argued did not apply here). Second, contrary to applicable Illinois law, NSSD attempts to argue that Rider NS does not affirmatively defeat its contract claim. Finally, NSSD contends that it has now satisfied the pleading standard “required before administrative tribunals” and, to the extent that it has not, it is because it doesn’t have access to the information despite failing to undertake the discovery outlined in the Administrative Law Judge’s Ruling dismissing NSSD’s initial complaint. None of the arguments raised by NSSD’s response have any basis in the governing law, and its First Amended Verified Complaint should be dismissed.

I. There is Nothing Improper About ComEd’s Combined Motion to Dismiss the Amended Complaint Because it is Defeated by an Affirmative Matter (Section 2-619) and its Allegations are Deficient (Section 2-615).

NSSD criticizes ComEd for bringing its combined motion to dismiss under two provisions of the Code of Civil Procedure (the “Code”).¹ As a preliminary matter, NSSD complains that “the court [*sic*] and opposing party must make assumptions as to what portion or portions of the Amended Complaint is being challenged pursuant to Section 2-615 and 2-619.” NSSD Response at ¶ 4. However, no such speculation is required because, as made clear by ComEd’s motion to dismiss, application of *either* section results in a *full dismissal* of NSSD’s First Amended Complaint. Should the Commission determine that Rider NS governs, then dismissal of the First Amended Complaint is appropriate under Section 2-619 of the Code. And, should the Commission find yet again that NSSD has failed to sufficiently allege the required specific facts consistent with its theory of the case, then dismissal of the Amended Complaint is appropriate under Section 2-615 of the Code.

NSSD then misconstrues Section 2-619.1 of the Code and complains that ComEd had failed to state the (sub)section of 2-619 that ComEd relied upon for its motion to dismiss. Section 2-619.1 simply requires that where a party is bringing a combined motion, it must specify which part of its motion is based upon Section 2-615, 2-619, or 2-1005. 735 ILCS 5/2-619.1. As clearly evidenced by the headings in ComEd’s motion to dismiss (Section IV.A. brought pursuant to Section 2-619, Section IV.B. brought pursuant to Section 2-615), ComEd has complied with this requirement. In any event, the affirmative matter (that Rider NS controls) defeats NSSD’s entire First Amended Complaint.

¹ This argument is surprising given that NSSD has previously contended that the Code’s provisions are inapplicable before the Illinois Commerce Commission (“Commission”). Of course, this contention is incorrect as recognized by the dismissal of the initial complaint pursuant to Section 2-615 of the Code. *See* Notice of Administrative Law Judge’s Ruling (March 30, 2012).

Next, NSSD contends that ComEd has “violated Section 2-615(b)” because it has failed to “properly specify wherein the pleading or division thereof is insufficient.” NSSD Response at ¶ 3. Even a cursory review of ComEd’s Motion to Dismiss demonstrates that this argument is without merit. ComEd very clearly set forth the deficiencies in the Amended Complaint, and those deficiencies warrant dismissal. *See* ComEd Motion at Section IV.B.1. (NSSD failed to allege any deviation from the equation for calculating the cost of nonstandard services and facilities); *id.* at Section IV.B.2. (the “estimates” provided by NSSD fail to show that ComEd departed from the Rider NS calculation).

Again, the Commission should disregard the procedural matters raised by NSSD because they are raised incorrectly and do nothing to save its Amended Complaint from dismissal.

II. ComEd Has Provided Both Legal Authority and a Supporting Affidavit to Establish That NSSD’s Contract Claim is Defeated by Rider NS.

NSSD contends that ComEd has somehow failed in making its paramount legal argument that Rider NS defeats its contract claim. NSSD Response at ¶¶ 5-13. Yet, NSSD has failed to provide any relevant legal authority to contradict the authorities cited by ComEd nor has it provided any sworn testimony to counter the supporting affidavit of William Mueller. 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 authority” that Rider NS would defeat a contract claim. *Id.* at ¶ 6. 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 to Dismiss at 6-10. ComEd’s reliance on Rider NS is more than “an attempt to deny an allegation” (NSSD Response at ¶ 7) and it does more than “touch upon a contract claim” (*id.* at ¶ 8); rather, 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. NSSD Response at ¶ 8. That case involved a challenge to provisions of the Illinois Marriage and Dissolution of Marriage Act on the grounds that the provisions violate the contract clauses of the Illinois and United States Constitutions. *Kaufman* at 837. 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 electrical feed” with automatic switching to its facility in the event the normal power feed failed. Am. Compl. at ¶¶ 27, 33. 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 Response at ¶ 5. 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. *See* ComEd Motion to Dismiss, Exhibit C. NSSD has provided nothing – not a single citation to its First Amended Complaint, not a single case on point, and certainly no responsive sworn testimony – to defeat ComEd's Motion to Dismiss.

Finally, NSSD argues that Rider NS only applies to new or different service and that the Rider would have expressly referred to “existing” service if the scenario here were to fall within its provisions. NSSD Response at ¶ 11. Yet, the very language of Rider NS cited by NSSD belies this claim. Rider NS states that it applies to nonstandard facilities that are “*in place, required or requested*” by a retail customer. ComEd Motion to Dismiss, Ex. A at Original Sheet

No. 277 (emphasis added). Rider NS further provides that the “Company furnishes, installs, owns, operates, replaces, *and maintains* nonstandard services and facilities, subject to the following conditions...” *Id.* at 278 (emphasis added). NSSD provides no explanation as to how it reaches the illogical conclusion that facilities “in place” are not “existing” facilities. Nor does NSSD explain why maintenance and replacement would be addressed by the tariff if it only applied to new service. It is well-accepted that courts and the Commission should not adopt an overly narrow interpretation of a statute or tariff or accept a construction that leads to an absurd result. *Lerna v. Rockford Blacktop Const. Co.*, 247 Ill. App. 3d 567, 571 (2d Dist. 1993). NSSD’s unsupported interpretation of Rider NS should be rejected.

III. NSSD Has Failed to Plead Unjust and Unreasonable Charges

Applying the appropriate standard of Section 2-615 of the Code, NSSD has failed to plead unjust and unreasonable charges under Section 9-101 of the Public Utilities Act (the “Act”). As ComEd pointed out in its opening brief, Rider NS sets forth an equation that ComEd must follow in calculating costs for nonstandard services and facilities. ComEd Motion to Dismiss at 10; Exhibit A at Original Sheet Nos. 278-80. ComEd cited to the decision in *Commonwealth Edison Co. v. Ill. Comm. Comm’n.*, 924 N.E.2d 1065, 1091 (2d Dist. 2009) in which the court held that ComEd “has virtually no unguided discretion” in applying the Rider NS formula. To this, NSSD has provided no response. Rather, NSSD contends that it has no “obligation to plead more than the ultimate fact that the charges were improperly calculated...” NSSD Response at 7. This is not nor could it be the standard or else any customer could bring a complaint before the Commission based on nothing more than a hunch or a general feeling that it was being overcharged. The law is clear (and contrary to NSSD’s position): conclusory allegations 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). Aside from its factually unsupported allegations that the labor costs “far exceed” the labor costs to replace an ATO switch (Am. Compl. ¶ 22) and that its engineers “were alarmed at ComEd’s demands” (Am. Compl. ¶ 19), NSSD has provided neither facts nor an affidavit to substantiate its claim.²

It was NSSD’s burden to allege facts indicating or even suggesting that ComEd deviated in any manner from the Rider NS equation. NSSD attempts to shirk this obligation by alleging that ComEd has “sole knowledge” of this matter. NSSD Response at ¶ 17. This argument should be flatly rejected in light of the March 30, 2012 Notice of Administrative Law Judge’s Ruling granting ComEd’s first motion to dismiss. That ruling made clear that despite the dismissal, NSSD could do the following:

Complainant may use written data requests to ComEd, pursuant to the Commission’s Rules of Practice, or other sources to allege specific facts in support of its Complaint consistent with its theory of the case.

NSSD chose not to undertake such discovery and, as a result, it is not surprising that it has no allegations to support its claim against ComEd. Having had an opportunity to acquire information from ComEd (to the extent any supporting information exists) and failing to seize upon it, NSSD cannot now be heard to complain that it should be excused from making the required allegations to support its claim.

² NSSD’s allegation that ComEd’s calculation is improper because it is based on other installations is misplaced absent an allegation that those calculations did not comply with Rider NS. NSSD Response at ¶ 18.

CONCLUSION

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

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Respectfully submitted,

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