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STATE OF ILLINOIS
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2012 OCT 29 A 11:15

EVANGER'S PET FOOD CO.)
)
vs.)
)
COMMONWEALTH EDISON COMPANY)

10-0591 CHIEF CLERK'S OFFICE

RESPONSE TO MOTION TO DISMISS SECOND AMENDED FORMAL COMPLAINT

Evanger's Dog and Cat Food Co, Inc. ("Evanger's"), by and through Gregory A. Bedell, of Knabe, Kroning & Bedell, its attorney, respectfully submits this response to the Respondent's Motion to Dismiss the Second Amended Formal Complaint.

ARGUMENT

1. The Respondent has waived its right to challenge the complaint.

This is the second motion that the Respondent directs at the Second Amended Formal Complaint. When Evanger's initially moved to file the Second Amended Formal Complaint, Evanger's attached a copy of it to its motion so that the Respondent and this tribunal would be able to see the nature of the amendment. The Respondent chose to oppose this pleading, claiming only that Evanger's was not diligent in pursuing its claims.

Although it had the opportunity to do so, the Respondent failed to raise any issue with respect to the sufficiency of the pleading. It now seeks to get a second bite at the apple, filing yet another procedural motion directed at the Second Amended Formal Complaint rather than get to the substance of Evanger's claim. The Respondent should not be permitted multiple motions directed at Evanger's pleadings.

2. Evanger's Second Amended Formal Complaint Sufficiently states its claims.

A court considering whether to grant or deny a motion to dismiss a complaint pursuant to section 2-615 of the Illinois Code of Civil Procedure, determine whether the allegations of the

complaint and all reasonable inferences therefrom, when considered in a light most favorable to the plaintiff, are sufficient to state a cause of action upon which relief can be granted. *Vitro v. Mihelcic*, 209 Ill. 2d 76, 81 (2004). The court does not consider nor does the motion raise any affirmative defenses. *Maxon v. Ottawa Publishing Co.*, 402 Ill. App. 3d 704, 712 (2010). A cause of action will not be dismissed on the pleadings unless it clearly appears that the plaintiff cannot prove any set of facts that will entitle it to relief. *Board of Directors of Bloomfield Club Recreation Ass'n v. Hoffman Group, Inc.*, 186 Ill. 2d 419, 424 (1999).

Based on these established criteria, Evanger's Second Amended Formal Complaint adequately and, for the purposes of a motion in the nature of section 2-615, sufficiently states its claim. Evanger's clearly pleads a specific event – the explosion of transformers– that occurred on specified date – May 3, 2010 – which implicated Respondent conduct – the care and maintenance of the transformers were under the Respondent's exclusive control. Evanger's also alleges the Respondent's statutory obligations under the Illinois Public Utilities Act, 220 ILCS 5/1-101, *et seq.* (the "Act"), alleging Respondent "violated section 5/8-101 of the Act and sections 305.30 and 411.100 of the Title 83 of the Illinois Administrative Code (the "Code"). Considering these allegations, and all the reasonable inferences drawn therefrom, and taking them in a light most favorable to Evanger's, the Second Amended Complaint states a claim under the requirements of Section 2-615.

It should be noted, here, that the Respondent found no issue with the form and sufficiency of the pleading in its response to the Formal Complaint and the Amended Complaint. Indeed the Respondent filed motions seeking to dismiss them; however, it never claimed the pleadings failed to state a claim. Although titled as a "Motion to Dismiss," the Respondents motion against the Amended Complaint was in form and substance a motion for summary

judgment, relying on the affidavit of a Commonwealth Edison employee to challenge the factual allegations of the Amended Complaint. Clearly there the Respondent had no difficulty in determining the nature of Evanger's claim and its factual basis, which is in fact the same basis alleged in the Second Amended Formal Complaint. The Respondent's first motion to dismiss argued, in bold capital letters, that it was based on a jurisdictional question, again demonstrating the Respondent was able to determine the nature of Evanger's claim. Therefore, the Respondent's current arguments ring hollow and should be ignored.

The Respondent notes that Evanger's Second Amended Formal Complaint is not verified. It is correct. However, it, and this tribunal, should recall that Evanger's sought leave to file it, attaching a copy of the proposed filing as is proper procedure in that instance. Respondent vigorously opposed this motion, to the extent of refusing to agree to continue the ICC's jurisdiction in this matter. At the last hearing on this matter, when the Respondent was ordered to respond to the Second Amended Formal Complaint, the Respondent failed to raise this issue; and, this tribunal placed no further requirement on Evanger's; it simply ordered the Respondents to file a responsive pleading. Evanger's will, however, file a verification, if this tribunal determines it is now necessary.

3. The Respondent misapprehends the pleading requirements.

Although the Illinois Code of Civil Procedure has applicability in these proceedings, a review of the instructions the ICC itself provides to complainants, especially the form "Formal Complaint," demonstrates that pleading standards for an ICC formal complaint are not as high as those set by the Code of Civil Procedure.

Attached as Group Exhibit 1 to this Response is a "sample" formal complaint and a letter transmitting it that the ICC provides. It is clear from the form that it requires only certain basic

information, such as the law or rules implicated and a “briefly” stated explanation of the complaint. The Second Amended Formal Complaint more than satisfies this standard in providing the nature, date, place and consequences of the event, as well as citing the Respondent’s legal obligations, on which it makes Evanger’s makes its claim.

4. The Respondent impermissibly seeks dismissal based on an affirmative defense.

As cited above, a court does not consider nor does the motion raise any affirmative factual defenses. *Maxon v. Ottawa Publishing Co.*, 402 Ill. App. 3d 704, 712 (2010). Yet, the Respondent seeks dismissal of the Second Amended Formal Complaint precisely on this basis when it raises as a bar the allegedly applicable tariff. However, the cited tariffs are not absolute bars but contain within themselves exception which are fact dependent. As with its prior motion, the Respondent wants to skip the fact finding stage, accept its view of the situation and apply the law as it deems correct. Once again, this is not a motion to dismiss (even accepting its being styled a “2-619” motion) but is rather a motion in the nature of summary judgment before the parties are even at issue. This is improper and does not support dismissal of the Second Amended Formal Complaint.

5. The Respondent relies on precedents that are wholly inapplicable.

The Respondent cites the Illinois Supreme Court case of *Sheffler v. Commonwealth Edison Company*, 353 Ill.Dec. 299, 955 N.E. 2d 1110 (2011). Yet, this case involved claims brought not before the ICC but in the Circuit Court. The plaintiffs, who sought class action status, sought *civil damages* for losses from a power outage *cause by the weather*. The court found that the plaintiffs’ claim required an adjudication of ComEd’s level of service, which the plaintiffs could only bring before the ICC. 9545 N.E.2d at 1126. In addition, the plaintiffs’ reliance on a weather caused equipment failure was fatal to its claim. 955 N.E.2d at 1122.

Evanger's Second Amended Formal Complaint seeks *reparations* in which case, as the Supreme Court noted, "jurisdiction is in the [ICC]." 955 N.E.2d at 1123. Furthermore, the outage was caused by an explosion of the equipment which was under the control of, and whose maintenance was the duty of, the Respondent. *Sheffler* simply does not support Respondent's motion.

Likewise, the Respondent's reliance on *In re Illinois Bell Switching Station Litigation*, 161 Ill.2d 233 (1994) is misplaced. That class action case, however, was based on a claim for economic damages brought properly in the circuit court under section 5-201 of the Act. As noted above, Evanger's Second Amended Formal Complaint properly seeks reparations.

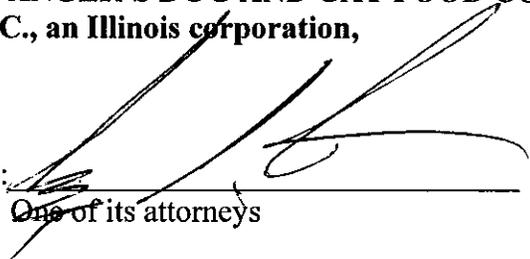
In addition, the court determined that the "Moorman Doctrine" barred the claims because the Act, being "in derogation of the common law," had to be strictly construed in favor of the utility. As a result, the language of 5-201 could not override the Moorman Doctrine limitations. The Respondent does not, and cannot, raise the Moorman Doctrine here as this applies only to claims for economic damages, which Evanger's does not make.

The court there also addressed the tariff issue in the context of a damage claim. However, the tariff applicable there and the tariff applicable to the Respondent are materially different. In *Illinois Bell*, the telephone company benefited from a blanket limitation of liability; in this case, the tariff does not preclude all liability but maintains liability for willful or negligent acts. The Respondent's proclamation that it is not required to provide "infallible service" is, therefore, wholly irrelevant to this case. Likewise the Respondent's arguments relating to the limitation of its liability to the charges paid. This again is in the nature of an affirmative defense, which cannot be considered here.

CONCLUSION

The Second Amended Formal Complaint sufficiently pleads its claim for reparations, a claim properly brought before the ICC. In addition, by their plain terms, the tariffs on which the Respondent relies in its motion do not bar Evanger's claim. Accordingly, the Respondent's second motion addressed to this pleading should be denied. In the event, however, that this court determines the Second Amended Formal Complaint contains a technical deficiency, Evanger's respectfully requests it be granted leave to amend.

**EVANGER'S DOG AND CAT FOOD CO.,
INC., an Illinois corporation,**

By: 
One of its attorneys

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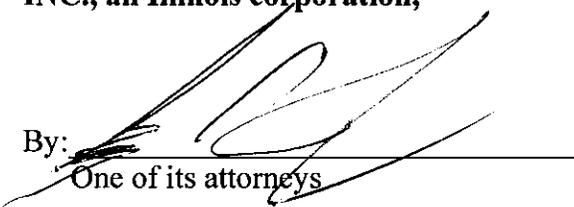
NOTICE OF FILING

To: Mark L. Goldstein
Mark L. Goldstein, P.C.
3019 Province Circle
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Thomas S. O'Neill
Sr. Vice President & General Counsel
Commonwealth Edison Company
440 S. LaSalle Street
Chicago, Illinois 60605

Please take notice that on October 25, 2012, we caused to be filed with the Clerk of the Illinois Commerce Commission the Response to Motion to Dismiss Second Amended Formal Complaint, a copy of which is attached and hereby served on you.

**EVANGER'S DOG AND CAT FOOD CO.,
INC., an Illinois corporation,**

By: 
One of its attorneys

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CERTIFICATE OF SERVICE

I, GREGORY A. BEDELL, an attorney, certify that I caused to be served a copy of the Response to Motion to Dismiss Second Amended Formal Complaint and this Notice of Filing and Certificate of Service to the above persons at the above addresses, by depositing same in the U.S. Mail at 20 South Clark Street, Chicago, Illinois 60603 with proper postage affixed before the hour of 5:00 p.m. on this 25th day of October, 2012.

A handwritten signature in black ink, appearing to read "G. A. Bedell", is written over a horizontal line. The signature is stylized and cursive.