

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMISSION**

Chet DeKing :
--vs-- : **13-0186**
Commonwealth Edison Company :
: :
Complaint as to non-emergency :
vegetation management activities :
in Sugar Grove, Illinois :

RESPONDENT’S MOTION TO DISMISS AMENDED FORMAL COMPLAINT

Now comes the Respondent, Commonwealth Edison Company (“Respondent” or “ComEd”) by and through its attorney, Peter J. Thornton, and files Respondent’s Motion to Dismiss the Amended Formal Complaint (“Complaint”) filed by the Complainant, Chet DeKing (“Complainant”).

On April 18, 2013, Complainant filed the Complaint,¹ alleging that on November 21, 2012, ComEd cut down certain trees on Complainant’s property in violation of tree care and maintenance standards specified in Section 8-505.1 of the Public Utilities Act (the “Act”) and without providing proper notice under that section of the Act. (Compl., ¶¶ 15-23.)² Complainant seeks monetary damages for diminution in value of his property, loss of enjoyment of his property, cost of removing tree stumps and cost of planting new trees. (Compl., ¶ 26.) Complainant also “requests that the Commission enjoin ComEd from interfering with [Complainant’s] rights and the rights of its customers,” including the issuance of an injunction stopping all of ComEd’s vegetation management activities until the Commission is satisfied that citizens’ rights will be properly respected. (Compl., ¶ 28.) The Complaint should be dismissed

¹ Complainant followed this with a verified copy of the amended complaint on April 25.

² ComEd does not controvert the factual allegations of the Complaint in this Motion because a motion to dismiss takes well-pleaded factual allegations as true. *Perkaus v. Chicago Catholic High Sch. Athletic League*, 140 Ill. App. 3d 127, 134 (1st Dist. 1986).

because the Commission lacks authority to grant the money damages and injunctive relief that Complainant requests.

The Commission Lacks Jurisdiction to Grant Money Damages or Injunctive Relief.

The Commission does not possess general jurisdiction like a court. “The Commission derives its power solely from the statute [*i.e.*, the Public Utilities Act] and has none except it be by statute expressly conferred upon it.” *Illinois Commerce Comm’n ex rel. East St. Louis, C&W Ry. v. East St. Louis & C. Ry. Co.*, 361 Ill. 606, 611 (1935); *Lambdin v. Illinois Commerce Comm’n*, 352 Ill. 104 (1933). A general power to award money damages or injunctive relief is not expressly conferred on the Commission by the Act and therefore does not exist. “Plaintiff urges that he was entitled to ‘costs and damages,’ but the Commission has no general authority to fashion an award of damages.” *Moening v. Illinois Bell Tel. Co.*, 139 Ill. App. 3d 521, 528 (1985), *citing Barry v. Commonwealth Edison Co.*, 374 Ill. 473 (1940), and *Ferndale Heights Utility Co. v. Illinois Commerce Comm’n*, 112 Ill. App. 3d 175 (1982).³ The Commission has likewise found that it cannot fashion injunctive relief. “[T]he Complainant’s request for relief for damages and injunctive relief is beyond the Commission’s statutory authority.” *Ottenweiler v. Central Illinois Light Co. dba Ameren CILCO*, Dkt. No. 10-0249, 2010 WL 3405438 (July 14, 2010) (complaint for wrongful tree-cutting).

Although the Commission thus lacks authority to grant the relief requested in the Complaint, it can direct a utility to take corrective action to assure compliance with the law. In *Illinois Commerce Comm’n v. Central Illinois Light Co.*, Dkt. No. 00-0699, 2001 WL 946394, (May 9, 2001) at *5 (“*Central Illinois Light Co.*”), the Commission Staff presented a report

³ By contrast with this lack of general authority in the Commission, Section 16-125(e) of the Act expressly makes ComEd liable for actual damages to customers in the event of certain types of widespread outages of lengthy duration, subject to Commission jurisdiction.

finding that Central Illinois Light Company (CILCO) was not adequately trimming trees. The Commission found that it had jurisdiction over the matter because “[t]he Act and Commission rules promulgated thereunder require electric public utilities to provide safe, reliable, and efficient service. Interference by trees with electric conductors impacts an electric utility’s ability to provide service.” The Commission went on to conclude: “If it is determined that an electric utility is not meeting its tree trimming obligations, it is also within the Commission’s authority to issue an order requiring that corrective action be taken, and in some instances outline the steps that are to be taken to achieve compliance with the Act and the Commission’s rules.”

In *Illinois Power Company dba AmerenIP*, Dkt. No. 06-0706, 2009 WL 3191528 (March 11, 2009), the utility sought a Certificate of Public Convenience and Necessity for a transmission line extension. The Commission granted the Certificate, but as part of its environmental impact analysis it concluded that the utility must replace the trees that were removed when plotting the area to be clear-cut.

This Complaint is Nonetheless Properly Before the Commission.

The fact that the requested relief is not available from the Commission does not mean that Complainant has chosen the wrong forum. It is clear that this Complaint cannot be brought in the circuit court. The Complaint alleges violations of subsection (a) of Section 8-505.1 of the Act, which requires utilities, in performing vegetation management activities, to follow applicable tree care and maintenance standard practices and provide notice to affected customers. That statutory provision expressly grants the Commission exclusive jurisdiction over complaints brought under it: “The Commission shall have sole authority to investigate, issue, and hear complaints against the utility under this subsection (a).”

The Act thus makes it clear that Complainant cannot bring this Complaint in the circuit court under Section 5-201 of the Act or otherwise. This express statutory provision is consistent with judicial constructions of other provisions of the Act. ComEd must perform vegetation management around its transmission and distribution facilities in order to provide “service and facilities which are in all respects adequate, efficient, reliable and environmentally safe. . . .” (Section 8-401 of the Act.) This makes vegetation management an inextricable part of ComEd’s provision of electric service to its customers. *See Central Illinois Light Co., supra*. It has long been held that complaints for inadequate provision of service are not properly brought before the courts. *In re Illinois Bell Switching Station Litig.*, 161 Ill. 2d 233 (1994); *Scheffler v. Commonwealth Edison Co.*, , 955 N.E.2d 1110, 353 Ill. Dec. 299 (2011).

The utility must file with the Commission tariffs that govern its provision of service. The tariff not only sets forth the rates for such services but also “the governing rules, regulations and practices relating to those services.” *Adams v. Northern Illinois Gas Co.*, 211 Ill. 2d 32, 55 (2004). “Once the Commission approves a tariff, it ‘is a law, not a contract, and has the force and effect of a statute.’” *Id., citation omitted*. The applicable provision of ComEd’s tariff on file with the Commission is contained in its General Terms and Conditions (ILL.C.C. No. 10, 2d Revised Sheet No. 152).⁴ The requirement for required access to customer premises includes the following:

“. . . the Company has the right to trim, remove, or separate trees, vegetation, or any structures therein [*i.e.*, on customer premises], which, in the judgment of the Company, interfere with the electric delivery system located in the Company’s service territory in a manner that may pose a threat to public safety or system reliability.”

⁴ Attached hereto as Attachment A.

Complainant is free to argue to the Commission that ComEd has not complied with this provision of the tariff, but he is not free to bring a complaint for actions alleged to constitute non-compliance in the circuit court.

Conclusion

For the reasons given above, the Commission should dismiss the Amended Formal Complaint in this proceeding for lack of authority to grant the relief requested.

Dated: May 1, 2013

Respectfully submitted,

Commonwealth Edison Company

By: /s/ Mark L. Goldstein
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