

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

WRPV, XI SENECA CHICAGO, LLC	:	
d/b/a The Seneca	:	
	:	No. 13-0060
v.	:	
	:	
COMMONWEALTH EDISON COMPANY	:	
	:	
Petition for Waiver to Allow Redistribution	:	
of Electricity for Multi-Family Building	:	

**COMMONWEALTH EDISON COMPANY’S
MOTION FOR JUDGMENT ON THE PLEADINGS**

Commonwealth Edison Company (“ComEd”) moves for judgment on the pleadings in its favor under Section 200.190 of the Illinois Commerce Commission’s (“Commission”) Rules of Practice, 83 Ill. Adm. Code § 200.190, and Section 2-615 of the Illinois Code of Civil Procedure, 735 ILCS 5/2-615. There is no legal basis upon which the legally applicable bar on the resale of electricity can be “waived.” Moreover, Petitioner’s request is contrary to established Illinois policy and would thwart the rights of customers. The Petition should be denied as a matter of law.

In support of its Motion, ComEd states:

I. FACTUAL BACKGROUND AND ALLEGATIONS

The Petitioner, WRPV, XI SENECA CHICAGO, LLC d/b/a The Seneca (“Seneca”), asserts that it recently purchased a building located at 200 E. Chestnut Street in Chicago, Illinois (the “Property”). Petition at 1. The Property was constructed in 1929 and was operated as a hotel prior to its purchase by Seneca. *Id.* After purchasing the Property, Seneca began modifications to “turn this hotel into a multifamily apartment community” and currently operates

the Property as a multi-family apartment building.¹ *Id.* Seneca states that it “requests a waiver of the prohibition of multifamily housing from rebilling electricity to their residents for their multi-family building” and further states that it “wish[es] to pursue using submeters to rebill (or redistribute) electricity to [its] residents.” *Id.* According to Seneca, it “should be permitted to submeter its residents based on the existing exemptions ...” *Id.* at 2.

Seneca asserts that “General Tariff Part 3E and the RESALE Rider detail the rules which must be followed when rebilling electricity.” Petition at 2. According to Seneca, ComEd’s tariffs establish a rule that “prohibits the resale of electricity to residents unless two conditions are met: (1) the building was built prior to 1957 and (2) the community had been continuously been [*sic*] reselling their electricity since that time.” *Id.* ComEd’s General Terms and Conditions provide that “[t]he resale or redistribution of electric power and energy is prohibited. It is necessary that each retail customer located in the Company’s service territory is provided with separate meter-related facilities and designated as a separate retail customer.” General Terms and Conditions, ILL. C.C. No. 10, Orig. Sheet No. 144.² ComEd’s Rider Resale -- Allowance for Resale or Redistribution of Electricity (“Rider Resale”), ILL. C.C. No. 10, Orig. Sheet Nos. 282 – 283, provides limited exceptions to the prohibition against resale or redistribution, and the relevant exception in the instant case applies “only in a building for which such resale or redistribution is an uninterrupted continuation of resale or redistribution practices

¹ The Petition was originally filed in the name of “The Seneca,” which is a building, not a customer, by counsel employed by a “utility billing and management services” consultant who is also not a customer, in the apparent belief that a consultant can be authorized to bring complaints. *See* Amendment to Petition (April 1, 2013) at 1. While this led to serious standing concerns, Petitioner’s counsel subsequently sought to proceed in the name of the customer, WRPV, XI SENECA CHICAGO, LLC, and has represented that he is a lawyer for that entity. Per the May 2, 2013 Notice of Administrative Law Judge’s Ruling, “The Seneca’s April 16, 2013 motion ... to have its full and correct business name of ‘WRPV, XI Seneca Chicago, LLC d/b/a The Seneca’ properly replace ‘The Seneca’ as the petitioner in the caption of this case and elsewhere” was granted. This Motion, therefore, addresses the merits of the Petition.

² A copy of the portion of ComEd’s General Terms and Conditions addressing resale and redistribution is attached hereto as Attachment A.

followed in accordance with previously applicable riders that were in effect from time to time since prior to January 2, 1957.” Rider Resale, Orig. Sheet No. 282.³

Seneca asserts that it “should be permitted to fall under this exemption given the unique status of the dwelling.” Petition at 2. In support, Seneca alleges that the building was built in 1929, designed to be operated as either a hotel or an apartment community, was operated as a hotel prior to its purchase by Seneca, and as a hotel presented no need for owners to rebill utility charges. *Id.* Seneca further alleges that “ComEd’s tariffs relate to resale of electricity for apartment communities, not hotels.” *Id.* at 3. Seneca requests a tolling of the requirement for “continuous resale of electricity for the purposes of determining eligibility for the exemption.” *Id.*

Seneca also asserts that rebilling via submeters would result in improved conservation. Petition at 3. According to Seneca, ComEd is “denying permission to the Seneca to submeter its residents” based solely on its tariff and not “on a code or regulation.” *Id.* These legal assertions are not accurate. First, the Illinois Public Utilities Act (“PUA”), 220 ILCS 5/1-101 et seq., defines “retail customer” such that an entity reselling or redistributing electricity can only be a retail customer if they have been conducting the resale and redistribution of such electricity within a building prior to January 2, 1957 as allowed by a utility’s tariffs:

“Retail customer” means a single entity using electric power or energy at a single premises and that (A) either (i) is receiving or is eligible to receive tariffed services from an electric utility, or (ii) that is served by a municipal system or electric cooperative within any area in which the municipal system or electric cooperative is or would be entitled to provide service under the law in effect immediately prior to the effective date of this amendatory Act of 1997, or (B) an entity which on the effective date of this Act was receiving electric service from a public utility and (i) was engaged in the practice of resale and redistribution of such electricity within a building prior to January 2, 1957, or (ii) was providing lighting services to tenants in a multi-occupancy building, but only to the extent

³ A copy of Rider Resale is attached hereto as Attachment B.

such resale, redistribution or lighting service is authorized by the electric utility's tariffs that were on file with the Commission on the effective date of this Act.

220 ILCS 5/16-102 (emphasis added). Similarly, Section 410.130 of the Commission's rules requires separate meters for utility service with certain exceptions not applicable here:

- a) Except as otherwise provided in subsection (c), a separate meter shall be used to measure the electricity that is consumed within, and controlled by the occupant of, each individual unit contained in any new building, newly remodeled portion of an existing building, or new mobile home park for which a building permit was obtained on or after November 1, 1981, or, if no permit was required, for which construction was commenced on or after November 1, 1981. Separately metered consumption shall be used as the basis for billing the occupant of the individual unit as a separate customer.

83 Ill. Adm. Code 410.130(a). The reselling and redistribution proposed by Seneca is not only generally prohibited by ComEd's tariffs, but also by the PUA and the Commission's rules.

Seneca further alleges that a 2004 National Multiple Family Submetering and Allocation Billing Program Study ("Study") by the Environmental Protection Agency states that "supporting the installation of submeters represents an opportunity for utilities to capture cost-effective savings." Petition at 3. The study Seneca cites is a water service study, and the actual language in the report is about water utilities and water service: "Supporting the installation of submeters represents an opportunity for water utilities to capture cost-effective water savings." Study at 183, 256 (emphasis added); See <http://www.nmhc.org/files/ContentFiles/General/noapp.pdf>.

Seneca also argues that although allowing rebilling of electricity "appears to limit customer choice, it would have no effect on the options currently available to residents." Petition at 4. Moreover, Seneca asserts that "installing individual meters for the provider would be cost prohibitive for an owner to undertake" and that "there are times when the prohibition on rebilling is waived under certain circumstances." *Id.* The exception Seneca believes should

apply is “the age of the building and continuous rebilling, which continuous rebilling only is not present as a result of the premise being used as a hotel previously.” *Id.*

II. LEGAL STANDARD

Under Section 200.190(a) of the Commission’s Rules of Practice and Sections 2-615 of the Illinois Code of Civil Procedure, a party may file dispositive motions based on the facts pled. A motion for judgment on the pleadings pursuant to §2-615(e) tests the sufficiency of the pleadings by determining whether the plaintiff is entitled to the relief sought by its complaint. *Pekin Insurance Co. v. Allstate Insurance Co.*, 329 Ill. App. 3d 46, 49 (1st Dist. 2002). It raises the question of whether the allegations are sufficient to state a cause of action upon which relief can be granted in light of the facts pled. *Jordan v. Knafel*, 355 Ill. App. 3d 534, 539 (1st Dist. 2005). While the Commission, like any tribunal, must take all well-pled facts as true and construe the evidence strictly against the movant, it must also disregard all conclusory allegations. *Parkway Bank & Trust Co. v. Meseljevic*, 406 Ill. App. 3d 435, 442 (1st Dist. 2010). A complainant cannot rely on conclusions of fact or law unsupported by factual allegations. *Gore v. Indiana Ins. Co.*, 376 Ill. App. 3d 282, 285 (1st Dist. 2007). Because Illinois is a fact pleading jurisdiction, a complainant must allege facts sufficient to bring its claim within the scope of the cause of action asserted. *Turner v. Memorial Medical Center*, 233 Ill. 2d 494, 499 (2009). Thus, assertions concerning the law, state policy, and the supposed meaning of ComEd’s tariffs are entitled to no deference.

III. SENECA MUST COMPLY WITH APPLICABLE TARIFFS AND THE LAW

ComEd is entitled to judgment on the pleadings for several independent reasons. Seneca’s Petition acknowledges that ComEd has tariffs in force that address resale and redistribution of electricity by customers. Although Seneca avers that it “materially meets” the

requirements for resale under ComEd's tariffs (Petition at 4), the very facts Seneca pleads negate that assertion. Seneca does not and cannot plead facts placing it within the limited class of grandfathered customers and buildings authorized to resell or redistribute electricity by Rider Resale. Seneca claims it is entitled to a "waiver" of ComEd's tariff, implicitly – and correctly – acknowledging that the tariff as written bars its redistribution or resale of the retail electric service provided by ComEd to Seneca. Seneca, however, cites no tariff, regulation, statute, or decision of an Illinois court that would permit it to disregard ComEd's tariffs, or permit ComEd to provide service for resale in contravention of its own tariffs. Seneca's request to somehow toll the applicable prohibitions is contrary to the applicable language of Rider Resale, which requires uninterrupted resale or redistribution and does not provide for any other exceptions to the resale prohibition.

Seneca's request is also contrary to the similar PUA limitation on resale and redistribution to buildings where that practice has existed since 1957 in accordance with utility tariffs. Seneca's request similarly contravenes the requirement for separate meters and individual billing in the Commission's rules. Seneca's request for "submetering" also provides no basis for its requested relief and simply serves to confuse the record (ComEd does not object to individual metering in accordance with the Commission's rules) and the applicable legal requirements (Seneca does not seek individual metering in accordance with the Commission's rules). Nor does Seneca's Petition properly acknowledge customers or their rights, including the right to select the legally-qualified energy supplier of their choice – a right which Seneca would subvert. Petitioner is not entitled to resell or redistribute the retail electric service it purchases from ComEd, and does not meet any defined exceptions to the relevant rules.

A. Seneca’s Petition Alleges No Jurisdictional Basis

Seneca requests a “resolution which would bring ComEd’s tariff in line with public policy and under the ICC’s granted authority.” Petition at 2. However, Seneca fails to allege any violation of a statute, regulation, order, or tariff that would support its Complaint. Whatever the Commission’s authority over tariffs in the first instance, this is a not a rate case where the Commission is addressing the issue anew. Seneca is, by complaint, collaterally attacking a filed, Commission-approved rate. It is Seneca’s burden to do more than just argue about how it thinks the Commission should have handled the issue. The Commission’s complaint jurisdiction requires that ComEd have violated a tariff, statute, or regulation. *Bluestar Energy Services, Inc.*, 2005 Ill. PUC Lexis 363, Docket No. 04-0692 at *4 (July 13, 2005) (Finding that where a complaint failed to allege any violation of any statute, order or rule of the Commission it did not meet the threshold requirements of the Public Utilities Act or the Commission’s Rules of Practice for a complaint); 220 ILCS 5/10-108 (“Complaint may be made by...any person or corporation...setting forth any act or things done or omitted to be done in violation, or claimed to be in violation, of any provision of this Act, or of any order or rule of the Commission”); 83 Ill. Adm. Code 200.170(c) (“A formal complaint shall set forth the following... a plain and concise statement of the nature of each complainant’s interest and the acts or things done or omitted to be done in violation, or claimed to be in violation, of any statute, or of any order or rule of the Commission”). No such claim has or can be made.

B. Seneca Cannot Disregard the Applicable Tariffs Under the Guise of a “Waiver”

In accordance with the basic principal that entities that sell electricity and delivery services to the public are utilities, ComEd’s Tariffs generally prohibit the resale or redistribution of electric power and energy. General Terms and Conditions, ILL. C.C. No. 10, Orig. Sheet No.

144. In order to vindicate both customers' rights to select a qualified energy provider and to ensure that the delivery company remains regulated, ComEd's tariffs also mandate that every retail customer is provided with a separate meter and is designated as a separate retail customer.

Id.

An unregulated retail customer – who is not a utility, not an Alternative Retail Energy Supplier, and not a buyer of wholesale power – can lawfully resell or redistribute the energy it buys only under highly limited exceptions, which ComEd's tariffs describe. Rider Resale, Orig. Sheet No. 282. In order to qualify under the very limited “grandfather” exceptions the resale or redistribution must occur “in a building for which such resale or redistribution is an uninterrupted continuation of resale or redistribution practices followed in accordance with previously applicable riders that were in effect from time to time since prior to January 2, 1957.”

Id. Rider Resale also permits redistribution where ComEd “has permitted, on a continuous basis since prior to July 13, 1970, more than one residential occupancy unit in a building in the former Central Illinois Electric and Gas Company service territory to be served through one meter as a single residential retail customer.” *Id.* The Seneca qualifies under neither of these exemptions.

Indeed, although the Seneca was allegedly built in 1929, its use as a hotel fits within the category of actions (furnishing electric power and energy to units within a multiple-unit building normally considered to be a temporary domicile such as a motel) that do not constitute the resale or redistribution of electric power and energy under ComEd's tariffs. General Terms and Conditions, ILL. C.C. No. 10, Orig. Sheet No. 145. Contrary to Seneca's assertions, ComEd's tariffs fully contemplated the operation of a building as a hotel and do not provide an exemption for owners changing that use, as is the case here. Moreover, Seneca acknowledges that the Property was operated as a hotel and was not engaged in the resale or redistribution of electric

power and energy. Petition at 2. This specific allegation negates any possibility that there has been the continuous or uninterrupted resale or redistribution at the Property since prior to January 2, 1957. Seneca also requests that the Commission “toll” the period during which the building was operated as a hotel. Petition at 3. ComEd’s Rider Resale specifies that the requirement for continuous, uninterrupted resale or redistribution is not waived or tolled due to periods of inapplicability: “if a retail customer discontinues resale or redistribution of electric power and energy in any such building, resale or redistribution is not subsequently permitted in such building.”⁴ Rider Resale, Orig. Sheet No. 282. As such, Seneca has failed to plead a case for which relief can be granted.

Seneca claims that the age of the building and its prior use as a hotel – the very factors that *exclude* it from the small group of customers who are authorized to resell or redistribute electricity – entitle it to a “waiver” of the tariff requirements. There is no basis for this claim. Nothing in the tariff or the PUA allows for a tariff to simply be “waived.” Indeed, Section 9-240 of the PUA makes clear that there shall not be special, unique exceptions to general terms and conditions of service, and that ComEd may not treat a customer – including Seneca -- other than in accordance with its tariff. *See City of Elmhurst v. W. United Gas & Elec. Co.*, 363 Ill. 144, 146, 1 N.E.2d 489, 490 (1936) (“[The Public Utilities Act] prohibits a public utility from charging for its service, commodity or product any sum other than that set forth in its schedule of rates filed with the [C]ommission”). There is no basis upon which ComEd’s tariffs can be “waived”.

⁴ There is also no authority to toll this requirement in the tariff. Moreover, even assuming, *arguendo*, that tolling could apply, all it would do is put Seneca in the position of a new building, and new buildings must be individually metered. 83 Ill. Adm. Code 410.130.

C. Seneca's Requested Relief is Contrary to the PUA

Seneca's Petition ignores that Section 16-102 of the PUA codifies ComEd's longstanding tariff provisions limiting resale and redistribution for retail customers to situations where customers were engaged in the practice of resale and redistribution of electricity within a building prior to January 2, 1957, and such resale or redistribution was authorized by the electric utility's tariffs. 220 ILCS 5/16-102. Seneca's request fails to state a claim for relief that is not contrary to Section 16-102 of the PUA for the same reasons that its request is contrary to the comparable provisions in ComEd's Rider Resale. Moreover, while there is no basis to waive or toll ComEd's applicable tariff provisions, Seneca's requests also seeks to have the Commission act beyond the scope of its authority by asking the Commission to act in a manner that is contrary to the PUA. *See Business & Professional People for the Public Interest v. Illinois Commerce Comm'n*, 136 Ill. 2d 192, 201 (1989) ("BPI I") ("The Commission only has those powers given it by the legislature through the Act."); *see also People ex rel. Ryan v. Illinois Commerce Comm'n*, 298 Ill. App. 3d 483, 487 (2nd Dist. 1998) ("The Commission derives its power from the statute and only has the authority that is expressly conferred upon it.").

D. Seneca's Submetering Request Fails to State a Claim

Seneca's request for "submetering" provides no basis for its requested relief and confuses the applicable legal issues and requirements. Seneca does not allege that ComEd has done anything to prevent Seneca from installing individual meters so that tenants of each dwelling unit would become individual ComEd customers. Indeed, ComEd has no objection to Seneca taking such action consistent with applicable rules and building codes. Rather, it is Seneca who refuses to install individual meters because it believes it "would be cost prohibitive" to do so. Petition at 4. Seneca repeatedly refers to reselling or rebilling through submeters. Petition at 1, 2, and 3. Reselling and submetering each individual unit are separate issues. Seneca has no submetering

claim as the only relief allowed by an exception to the individual metering requirement is the provision of service by a master meter. Seneca has failed to allege facts entitling it to any relief as a matter of law.

Part 410 of the Commission's Rules sets forth minimum requirements that apply to any entity. 83 Ill. Adm. Code, Ch. 1, Section 410.10; Section 410.20. The Rules require that "a separate meter shall be used to measure the electricity that is consumed within, and controlled by the occupant of, each individual unit contained in any new building, newly remodeled portion of an existing building, or new mobile home park for which a building permit was obtained on or after November 1, 1981, or, if no permit was required, for which construction was commenced on or after November 1, 1981." 83 Ill. Adm. Code 410.130(a). Pursuant to this Section, "separately metered consumption shall be used as the basis for billing the occupant of the individual unit as a separate customer." *Id.* The Petition pleads that the Seneca has recently been renovated to operate as an apartment building. This brings the Property directly within the requirement for separate metering for the "newly remodeled portion of an existing building." 83 Ill. Adm. Code 410.130(a). The Rules enumerate a number of exceptions not applicable here, mirroring the language contained in ComEd's tariffs as to uses that do not constitute resale or redistribution. *See* 83 Ill. Adm. Code 410.130(c)(1)-(5); General Terms and Conditions, ILL. C.C. No. 10, Orig. Sheet No. 145.

Unlike in the case of resale and redistribution, a provision exists for waiver of the separate metering requirement. In order to seek a waiver, the code clearly states that "the complaint shall allege that the long-run benefits of separate metering are outweighed by the associated costs or that separate metering would otherwise be impractical or unreasonable." *See* Section 410.130(e). The only potential issue presented under Part 410 with respect to waiver of

the separate metering requirement is whether an “applicant for electric service [was] refused master metered service....” 83 Ill. Adm. Code 410.130(e). The Seneca is not requesting that ComEd allow the Property to be master metered – the dwelling units at the Property are already served through a master meter. Rather, Seneca apparently wants to install “submeters” that allow it to rebill based on usage but do not constitute or qualify as meters meeting Commission requirements for utility meters.⁵ There is no basis under the PUA or the Commission’s Rules for rebilling via “submeters” and Seneca has failed to state a sustainable claim for relief based on submetering.

In addition, at no point does the Petition allege that ComEd has denied Seneca the use of a master meter, nor does it contain any allegations that the benefits of separate metering are outweighed by other factors; instead, it simply states that “failure to allow *rebilling* [that is, resale] *through submetering* would discourage the efforts of conservation in this building.” Petition at 4 (emphasis added). The Petition also states, without any evidentiary support, that “given the age of the building, installing individual meters for the provider would be cost prohibitive for an owner to undertake.” *Id.* However, as noted above, Seneca pleads no facts in support of that conclusion. Further, any loss of conservation is due to Seneca’s decision not to install individual meters.

E. Seneca’s Request is Contrary to ARES Certification Requirements

The PUA is clear that an entity desiring to provide electric power and energy to retail customers must obtain certification as an Alternative Retail Electric Supplier (“ARES”). 220

⁵ The reasons Seneca does not qualify for resale or redistribution were addressed earlier. While no basis exists for Seneca’s contention that it fits within the exception for resale or redistribution, even assuming, *arguendo*, that the Commission declined to grant judgment on the pleadings, judgment for Seneca would not be appropriate because the exception to the exception would apply. Rider Resale expressly provides that even a customer within a qualifying group (which Seneca never was) would lose that status if “all or substantially all” of the electrical wiring in the building has been replaced through remodeling or renovation (which ComEd asserts has occurred). Rider Resale, Orig. Sheet No. 282.

ILCS 5/16-115. Indeed, if Petitioner was granted an exemption to ComEd's tariffs and was permitted to resell electricity to the residents of the Seneca it would, in effect, operate as an illegal ARES, would deprive its residents of the ability to choose an electric provider, and would inhibit competition. Seneca's claim that its request for permission to resell electricity would have no effect on the options currently available to residents of its building misses the point. First, this request ignores the certification requirements in the PUA. Second, Seneca's argument ignores that it is requesting a change to the status quo – its request for resale to its residents – and would ignore the rights of its residents as retail customers in changing the status quo. There is no basis for ignoring the certification requirements under the PUA or the rights of customers to choose their supplier, and Seneca fails to state a claim for relief as a matter of law.

IV. CONCLUSION

In conclusion, Seneca does not qualify for the clearly stated exceptions to the prohibition against the resale or redistribution of electricity. Nor is Seneca able to allege any violation of law, regulation, or tariff that would permit the Commission to entertain this collateral attack on a filed and approved tariff or “waive” the provisions of such a tariff. Moreover, such a request would make Seneca the equivalent of an unlicensed ARES and, in the process, strip customers of their own right to individually select their energy provider. The relief Seneca seeks is also contrary to the provisions of the PUA defining retail customers. Finally, apart from the question of resale and redistribution, Seneca does not allege that it has been denied the use of a master meter on its property, and hence has no basis for seeking a waiver from the regulation mandating separate metering of each retail customer. Therefore, the Commission should grant judgment in favor of ComEd pursuant to 735 ILCS 5/2-615(e).

Dated: May 14, 2013.

Respectfully submitted,

COMMONWEALTH EDISON COMPANY



By: _____

One of its attorneys

Thomas S. O’Neill
Senior Vice President & General Counsel
COMMONWEALTH EDISON COMPANY
440 S. LaSalle Street, Suite 3300
Chicago, IL 60603
(312) 394-7205
thomas.oneill@comed.com

Bradley R. Perkins
10 S. Dearborn, Suite 4900
Chicago, IL 60603
(312) 394-2632
brad.perkins@exeloncorp.com

E. Glenn Rippie
Carmen L. Fosco
Maris J. Jager
ROONEY RIPPIE & RATNASWAMY LLP
350 W. Hubbard Street, Suite 600
Chicago, Illinois 60654
(312) 447-2800
glenn.rippie@r3law.com
carmen.fosco@r3law.com
maris.jager@r3law.com

Counsel for Commonwealth Edison Company