

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

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

COMMONWEALTH EDISON COMPANY’S REPLY
IN SUPPORT OF ITS MOTION FOR JUDGMENT ON THE PLEADINGS

Commonwealth Edison Company (“ComEd”) hereby submits this Reply in support of its Motion for Judgment on the Pleadings in accordance with the Illinois Commerce Commission’s (the “Commission”) Rules of Practice, 83 Ill. Adm. Code § 200.190, Section 2-615 of the Illinois Code of Civil Procedure, 735 ILCS 5/2-615, and the schedule established by the Administrative Law Judge (“ALJ”).

In support of its Reply, ComEd states:

I. Introduction

In its Response to ComEd’s Motion for Judgment on the Pleadings (“Response”), Petitioner, WRPV, XI SENECA CHICAGO, LLC d/b/a The Seneca (“Seneca”), fails to respond to or refute the specific arguments raised in ComEd’s Motion for Judgment on the Pleadings (“Motion”). ComEd’s Motion was directed to the *verified* allegations contained in Seneca’s “Petition for Waiver to Allow Redistribution of Electricity for Multi-family Building” filed on January 14, 2013, as supplemented by the verified “Amendment to Petition for Waiver to Allow Redistribution of Electricity for Multi-Family Building” filed on April 1, 2013 (collectively, “Petition to Allow Redistribution”). Instead of disputing the merits of the specific arguments

raised in the Motion, Seneca's Response acknowledges the validity of those arguments by attempting to change the verified facts asserted in its Petition to Allow Redistribution – namely, by referring to revised facts alleged in an “Amended Petition and Complaint” (“Amended Petition”) that it has not been given leave to file. It is clear from the lack of a substantive response that the Petition to Allow Redistribution does not state a valid claim and that ComEd is entitled to Judgment on the Pleadings. Moreover, Seneca admits that it has never resold electricity at the property. Response at 4-5. This fact remains fatal to its request to be allowed to engage in the resale or redistribution of electric power and energy under ComEd's tariffs and applicable law. Thus, the Motion for Judgment on the Pleadings should be granted.¹

II. SENECA'S RESPONSE MUST RESPOND TO COMED'S MOTION FOR JUDGEMENT ON THE PLEADINGS

Under Section 200.190(a) of the Commission's Rules of Practice and Section 2-615 of the Illinois Code of Civil Procedure, a party may file dispositive motions based on the facts pled. It is well established that in Illinois, a motion for judgment on the pleadings pursuant to §2-615(e) examines whether the allegations contained in a complaint 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, 823 N.E.2d 1113, 1118 (1st Dist. 2005). ComEd filed its Motion for Judgment on the Pleadings in response to Seneca's verified Petition to Allow Redistribution, relying upon the allegations and facts contained within that Petition to demonstrate that Seneca was not entitled to relief. Seneca must respond to these arguments based on the facts alleged in the record – it is improper to introduce new facts and new arguments in its Response not supported by the current pleadings. In light of Seneca's failure to respond to the substance of ComEd's

¹ ComEd has separately filed a Response to Seneca's “Motion for Leave to Amend Petition” (“Motion to Amend”) establishing that the Motion to Amend should be denied.

Motion and its implicit admission that the allegations contained within the verified Petition to Allow Redistribution are deficient, the Commission should grant judgment in favor of ComEd pursuant to 735 ILCS 5/2-615(e).

III. SENECA DID NOT RESPOND TO, CONTEST, OR REFUTE THE ARGUMENTS IN THE MOTION ESTABLISHING THAT ITS PETITION TO ALLOW REDISTRIBUTION IS CONTRARY TO APPLICABLE TARIFFS, COMMISSION RULES, AND THE LAW

ComEd fully explained in its Motion that the relief requested in Seneca’s Petition to Allow Redistribution must be denied under the law, the Commission’s Rules, and ComEd’s tariffs. Seneca’s Response cites to no law or evidence in its Petition to Allow Redistribution to refute this showing.

A. Seneca Failed to Allege Violation of a Statute, Regulation, Order, or Tariff

The Motion established that the Petition to Allow Redistribution failed to allege any violation of a statute, regulation, order, or tariff that would support its Complaint. Motion at 7. Seneca did not contest this requirement, nor did it dispute that the Petition to Allow Redistribution failed to meet it, but instead asserts that “Petitioner’s *amended petition* sufficiently pleads a violation of ComEd’s tariffs to survive a motion for judgment on the pleadings.” Response at 6 (emphasis added). This statement readily acknowledges that the verified Petition to Allow Redistribution is deficient and must be dismissed.

B. Seneca’s Request is Contrary to Applicable Tariffs

The Motion established that ComEd’s tariffs generally prohibit the resale *or* redistribution of electric power and energy, and that the very limited “grandfather” exceptions for “*such* resale or redistribution” only apply “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.” See Motion at 7-8, quoting ILL. C. C. No. 10, Rider Resale, Orig. Sheet No. 282; Motion, Attachment B (emphasis added). Seneca previously acknowledged that the tariffed exception for “resale” only applies if there has been the continuous “reselling” of electricity since prior to 1957: “That rule 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 ... continuously been *reselling* their electricity since that time.” Petition to Allow Redistribution at 2 (emphasis added).

Seneca argues that “Respondent mischaracterizes Petitioner's petition when it states that ‘Seneca acknowledges that the Property was operated as a hotel and was not engaged in the resale or redistribution of electric power and energy.’” Response at 4. To the contrary, and unlike Seneca’s Response, ComEd fairly and accurately described the Petition to Allow Redistribution. Seneca clearly stated that the building “had been operated as a hotel prior to [its] purchase” and asserted that the hotel’s occupants were “short term” in its attempt to obtain a tolling of the requirement to rebill through resale or redistribution (“As a hotel, there is no need for owners to rebill utility charges of any type to their *short-term occupants*.”). Petition to Allow Redistribution at 1, 2 (emphasis added). Given Seneca’s verified allegation that the building’s occupants were “short-term,” this case falls squarely within the tariffed exclusions from resale or redistribution for “units within a multiple-unit building normally considered to be a temporary domicile, such as a motel ...” ILL. C. C. No. 10, General Terms and Conditions, Original Sheet No. 145; Motion, Attachment A. Further, nowhere did Seneca allege that it, the prior owner, or the building was involved in continuous “redistribution” of electric power and energy since prior to 1957. Moreover, Seneca itself indicated that it had not redistributed electricity by virtue of the fact that it styled its petition as one to “allow redistribution.” Petition

to Allow Redistribution at 1 (“Petition for Waiver to Allow Redistribution of Electricity for Multi-family Building”) (emphasis added).

Instead, what is mischaracterized, or simply wrong, is Seneca’s description of ComEd’s tariffs. According to Seneca:

Under ComEd’s tariffs, General Terms and Conditions, ILL. C. C. No. 10, Orig. Sheet No. 145, the resale of electric power is permitted “provided such resale or redistribution is only 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 ...” [emphasis added.] Redistribution is defined as “the furnishing of electric power and energy by a retail customer to third persons under circumstances that do not constitute resale.” Orig. Sheet No. 145. Third person “means an occupant of a building to which a retail customer served hereunder resells or redistributes electric power and energy.” Id. By ComEd’s very definitions, the Seneca meets the requirements for continuous redistribution on its face, and therefore should be permitted to resell electric service based on its historical redistribution.

Response at 4 (bold emphasis in original; underlined emphasis added). This paragraph contains incorrect and inaccurate assertions. Seneca confuses the resale of electricity with redistribution; these are not interchangeable, and the qualification for one does not automatically result in qualification for the other. ComEd’s tariffs do not contain language providing an exception allowing a retail customer to engage in the “resale” of electric power and energy based on the prior continuous “redistribution” of power and energy. ComEd’s tariffs always refer to an exception for “such resale *or* redistribution” (“*such resale or redistribution* is only 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”), and nowhere refer to an exception for “resale” – as opposed to redistribution – based on prior continuous “redistribution.” Rider Resale, Original Sheet No. 282 (emphasis added); Motion, Attachment B. Rather, as correctly

stated by Seneca in its petition, the continuous “resale” exception in ComEd’s tariffs requires prior continuous “reselling.” Petition to Allow Redistribution at 2.

Notwithstanding its Motion to Amend, Seneca continues to admit that it has never resold electricity at the property. Response at 4-5. Thus, even if Seneca’s Petition to Allow Redistribution were somehow construed to include an allegation of prior continuous redistribution – which ComEd maintains it should not be – its argument that it should be allowed to engage in the *resale* of power and energy based on *redistribution* is not allowed by ComEd’s tariffs and judgment on the pleadings must be entered in favor of ComEd as a matter of law.²

C. Seneca Failed to Refute or Address Other Arguments Set Forth in the Motion

In addition to the foregoing fatal flaws, Seneca also failed to offer responses to other arguments raised in the Motion, such as:

- Seneca’s argument to “toll” the continuous use requirement is contrary to ComEd’s Rider Resale which states that “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.” Rider Resale, Orig. Sheet No. 282; Motion at 9. Seneca offered no response to this deficiency, thereby abandoning this argument.
- Nothing in ComEd’s tariffs nor the PUA allows for a tariff to simply be “waived” as claimed by Seneca. Motion at 9. Seneca offered no response to this failing.

² In addition, Seneca fails to plead any facts that would support an allegation of continuous redistribution as defined by ComEd’s tariffs. See Ill. C.C. No. 10, Rider Resale, Original Sheet No. 282; see also Ill. C.C. No. 10, Original Sheet No. 145. Illinois is not a notice pleading state; it is a fact pleading state. See, e.g., *Johnson v. Matrix*, 354 Ill. App. 3d 684, 696, 820 N.E.2d 1054, 1105 (1st Dist. 2004); *Richco Plastic Co. v. IMS Co.*, 288 Ill. App. 3d 782, 784, 681 N.E.2d 56, 58 (1st Dist. 1997), requiring that pleadings state the factual background for conclusions made therein.

- 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 such resale or 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. Again, Seneca offers no response.
- 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 does not allege it has been denied master metered service. Motion at 10-12. Seneca offers no response.

Seneca’s failure to respond on the merits to the substantive arguments raised in ComEd’s Motion for Judgment on the Pleadings implicitly admits that the allegations contained within its verified Petition to Allow Redistribution were deficient. Seneca has failed to demonstrate that it has sufficiently alleged facts that entitle it to the relief sought in its verified Petition to Allow Redistribution; hence, Seneca cannot argue that it is entitled to resell or redistribute the retail electric service that it purchases from ComEd, and does not meet any defined exceptions to the relevant rules. As a result, ComEd’s Motion should be granted and the Petition to Allow Redistribution should be denied.

IV. SENECA’S CUSTOMER CHOICE AND CONSERVATION RESPONSES LACK MERIT

A. Customer Choice

Seneca argues that customer choice is not an issue implicated by its request, asserting that it is untrue that its request would somehow “subvert” customer rights in any way. Response at 6-

7. Seneca's argument rings hollow and is contrary to Commission policy. Seneca's basic argument is that the occupants of its building are not currently customers of ComEd. "As such, the occupants' rights to choose an electric provider would be unaffected, as no such choice is currently available." *Id.* at 7. Seneca's argument misses the mark, and fails to respond to ComEd's essential point that Seneca seeks to change the status quo and resell electric service to its occupants. Motion at 12-13. ComEd disagrees with Seneca's view that the interest of its occupants is of no consequence here. Indeed, the very reason the Commission allowed the implementation of prohibitions on resale and redistribution of electric power and energy is due to the interest in the protection of such third persons under the regulatory construct in Illinois:

As found above, Complainant intends to resell electricity to its tenants, and generate a return in doing so, under its proposal for master metering. Because it would not be reselling electricity to the public generally, Complainant would not fall within the definition of a public utility as that term is defined in the Illinois Public Utilities Act, and would therefore not be subject to Commission jurisdiction as a reseller of electric service. As argued by Edison in this matter, the Illinois Public Utilities Act creates certain rights, benefits and obligations that run between a regulated utility and the customers of that utility. The Commission finds the creation of unregulated resellers of any utility service which will remove the basic user of that service from the protection of the Commission's rules and regulations concerning that service to be contrary to the public policy embodied by the General Assembly in the Illinois Public Utilities Act.

For the foregoing reasons, the Commission is of the opinion that plans for the resale of utility service such as that proposed by Complainant should be discouraged.

Melvin Simon & Associates, Inc. v. Commonwealth Edison Co., Ill. C. C. Docket No. 88-0272, 1989 Ill. PUC LEXIS 501, *30-31, 1989 WL 1645368 at p. 9 (Order, February 23, 1989). With the introduction of retail electric choice in Illinois, the Commission's regulatory jurisdiction now includes competitive alternative retail electric suppliers under the Electric Service Customer Choice and Rate Relief Law of 1997. *See* 220 ILCS 5/16-101 et seq. Seneca's argument that its occupants have no rights here clearly goes too far.

B. Conservation and Public Policy

Seneca once again argues that it should be permitted to resell due to alleged conservation benefits and due to public policy that “favors allowing rebilling of electricity as a means of promoting conservation.” Response at 7. This argument is irrelevant, as the allowance of resale or redistribution practices is solely a matter of tariff and statutory construction. Seneca cannot properly ask the Commission to act contrary to the Public Utilities Act (“PUA”) or ComEd’s tariffs, as codified by Section 16-102 of the PUA. *See Business & Professional People for the Public Interest v. Illinois Commerce Comm’n*, 136 Ill. 2d 192, 201, 555 N.E.2d 693, 697 (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, 699 N.E.2d 218, 221 (2nd Dist. 1998) (“The Commission derives its power from the statute and only has the authority that is expressly conferred upon it.”). Therefore, Seneca’s arguments as to conservation benefits derived from resale are unavailing.

Moreover, the same conservation benefits and more would be possible if Seneca installed individual sub-meters that allowed its occupants to become delivery service customers. Seneca ignores that the Illinois legislature has implemented statutory provisions requiring energy efficiency and demand response measures for customers (220 ILCS 5/8-103), the deployment of Smart Grid Advanced Metering Infrastructure (“AMI”) or smart meters (220 ILCS 5/16-108.6), and the application of a renewable energy portfolio standards to competitive suppliers (220 ILCS 5/16-115(d)(5)). The benefits of these and other legislative initiatives will be diminished or eliminated for the building’s occupants under Seneca’s view. In response to these arguments, Seneca has failed to provide a valid response to the Motion.

V. CONCLUSION

For the reasons set forth above and in the Motion, Seneca does not qualify for the clearly stated exceptions to the prohibition against the resale or redistribution of electricity as a matter of law. The Commission should enter an order granting ComEd's Motion for Judgment on the Pleadings.

Dated: July 5, 2013.

Respectfully submitted,

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