

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
RESPONSE TO SENECA’S MOTION TO AMEND**

Commonwealth Edison Company (“ComEd”) hereby submits to the Illinois Commerce Commission (“Commission”) this Response to WRPV, XI SENECA CHICAGO, LLC’s (“Seneca” or “Petitioner”) Motion to Amend Petition (“Motion”) as filed on June 17, 2013. In support thereof, ComEd states:

I. INTRODUCTION

On May 15, 2013, ComEd filed a Motion for Judgment on the Pleadings, which challenged the sufficiency of Seneca’s Verified Petition. On June 17, 2013, Seneca filed a Motion to Amend its Petition concurrently with its Response to ComEd’s Motion for Judgment on the Pleadings. Attached to this Motion was an Amended Petition and Complaint (“Amended Petition”). This Amended Petition is intended to replace Seneca’s previously amended Verified Petition, and contains new facts concerning the property located at 200 E Chestnut St, Chicago, IL 60611 (the “Property”) not previously provided in Seneca’s initial or first amended filing. Indeed, the new facts propounded in Seneca’s Amended Petition at times contradict those facts contained within the original Verified Petition. Pursuant to well-established Illinois law, Seneca may not amend its Verified Petition with new facts in an effort to avoid the deficiencies in its

original filing. Instead, Seneca is bound by the judicial admissions made in its original Verified Petition. Moreover, as set forth in ComEd's Reply to Seneca's Response, Seneca cannot state a claim for resale under ComEd's tariffs and the applicable law based on the alleged redistribution of power and energy. Thus, Seneca's Motion should be denied.

II. SENECA MAY NOT AMEND ITS VERIFIED PETITION

Seneca seeks to amend its Verified Petition, claiming that it "has learned of new information which would greatly benefit its position in having its request granted by the Commission." Motion at 2. Although Seneca does not cite any legal support for its Motion, it claims that "granting of the Seneca's motion to amend will no [sic] prejudice the Respondent in any fashion." *Id.* Regardless of whether Seneca has discovered new information regarding the basic history of the property, it is not entitled to an amendment in this instance.

Under Illinois law, "amended pleadings ordinarily supersede prior pleadings, but a well-recognized exception exists where...the original pleading was verified." *Rynn v. Owens*, 181 Ill. App. 3d 232, 235, 536 N.E.2d 959, 962 (1st Dist. 1989). A verified pleading is unique, in that it "remains part of the record despite any amendments to the pleadings." *Crittenden v. Cook County Comm'n on Human Rights*, 2012 IL App (1st) 112437 at ¶ 49; 973 N.E.2d 408, 422 (1st Dist. 2012). Indeed, any admissions contained within a verified pleading that are "not the product of mistake or inadvertence become binding judicial admissions." *Id.*; *see also Rynn* at 235. In Illinois, judicial admissions are defined as "deliberate, clear, unequivocal statements by a party about a concrete fact within that party's knowledge." *Crittenden* at ¶ 49; *In re Estate of Rennick*, 181 Ill. 2d 395, 406 (1998). Parties are clearly prohibited from "creat[ing] a factual dispute by contradicting a previously made judicial admission." *Id.*; *Burns v. Michelotti*, 237 Ill. App. 3d 923, 932, 604 N.E.2d 1144, 1151 (1992).

Seneca's revisions clearly do not rise to the level of mistake or inadvertence, and would in fact contradict judicial admissions previously made by Seneca; thus, Seneca is bound by the admissions contained within its Verified Petition. For example, Seneca now states that "in 1929, [the Property] was built to be able to operate as an apartment community." Amended Petition at 1. Seneca also claims that, since 1929, "the Seneca operated as either a multifamily dwelling or a mixed-use residence and hotel." *Id.* at 3. In contrast to these statements, Seneca's original Verified Petition stated that "Seneca recently purchased [the Property], which had been operated as a hotel prior to our purchase. Upon purchasing this building, the Seneca began pursuing efforts to turn this hotel into a multifamily apartment community." Verified Petition at 1. Seneca also stated that the building has "short-term occupants." *Id.* at 2.

The Amended Petition goes on to include information regarding the Property's meter configuration, and states that "upon information and belief, the Seneca has been continuously redistributing electric power since the Property's inception in 1929." Amended Petition at 2. The original Verified Petition is entitled a "Petition for Waiver to Allow Redistribution of Electricity for Multi-family Building." The request to "allow" redistribution is clearly contrary to a claim that the property was continuously engaged in redistribution. Further, at no point in the original Verified Petition does Seneca make any reference to redistribution practices; indeed, the only reference to redistribution occurs on the initial page of the Verified Petition, wherein the Seneca states: "we now wish to pursue using submeters to rebill (or redistribute) electricity to our residents." *Id.* at 1. Notably, Seneca does not claim that these facts were previously omitted as a result of mistake or inadvertence; instead, by its own admission, Seneca "seeks to clarify" its facts. Motion at 1. Seneca cannot seek to rehabilitate its deficient pleading by adding new facts that would contradict previously made judicial admissions.

Moreover, in further support of its Motion to Amend, Seneca states that it has “learned of new information which would greatly benefit its position.” Motion at 2. This unsupported statement does not provide an adequate justification for the contravention of established law, nor does it provide evidence or support as to why these facts were not provided in its initial Verified Petition. Instead, Seneca confirms that the “current owners of the Seneca purchased the Property on March 1, 2012.” Amended Petition at 2. This proceeding was commenced when Seneca filed its Verified Petition on January 14, 2013. Over six months have passed since Seneca initially filed its petition, and more than a year has passed since the property was purchased by the Seneca. The contradictory facts as stated in the Amended Petition are not new, and were not previously omitted due to mistake or inadvertence. These “facts”, provided subsequent to ComEd’s Motion for Judgment on the Pleadings, are intended to give Seneca’s Petition additional weight in an effort to survive the dispositive motion. The Amended Petition runs afoul of Illinois law, and as a result, the Motion should be denied.

Finally, as explained in ComEd’s Reply In Support of its Motion for Judgment on the Pleadings, even if the new assertion that the property was continuously engaged in redistribution since prior to 1957 were allowed to be made, that allegation would not remedy the legal defect that engaging in continuous “redistribution” does not entitle a retail customer to engage in “resale” under ComEd’s tariffs. “[A] court properly denies leave to amend where, as here, it is clear that the plaintiff cannot amend its complaint to cure the defect which resulted in its dismissal.” *Village of Lake in the Hills v. Illinois Emcasco Ins. Co.*, 153 Ill.App.3d 815, 818, 506 N.E.2d 681, 684 (2nd Dist. 1987). In addition, the Amended Petition 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.

III. CONCLUSION

For each of the foregoing reasons, ComEd respectfully requests that the Commission deny Seneca’s Motion to Amend Petition with prejudice, and for all other just and appropriate relief.

Dated: July 5, 2013.

Respectfully submitted,

COMMONWEALTH EDISON COMPANY

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