

Docket No: 12-0111
Bench Session: 07/31/13
Deadline: 06/28/13

MEMORANDUM

TO: The Commission

FROM: D. Ethan Kimbrel, Administrative Law Judge

DATE: July 17, 2013

SUBJECT: 401 N. Wabash Venture LLC
-vs-
Commonwealth Edison Company

Complaint as to billing/charges in Chicago, Illinois

RECOMMENDATION: Enter the attached Order dismissing the Complaint without prejudice.

Procedural History

On February 10, 2012, 401 North Wabash Venture LLC (“401 Venture” or “Complainant”), a Delaware limited liability corporation and the developer and owner of the Trump International Hotel & Tower (“Trump Tower”) located at 401 North Wabash Avenue in Chicago, Illinois, filed a verified Complaint with the Illinois Commerce Commission (“Commission”) against Commonwealth Edison Company (“ComEd” or “Respondent”). 401 Venture contested ComEd’s attempt to back bill Complainant for a two year period in the amount of \$150,600.72 as well as an increased adjustment of \$1,519.86 per month. 401 Venture asserted that ComEd was negligent in its billing and that the increased adjustment was excessive, unjustly discriminatory and not in compliance with Illinois law.

Pursuant to notice given in accordance with the law and the rules and regulations of the Commission, the parties convened for prehearing conferences on March 27, 2012, June 6, 2012, October 9, 2012, and February 13, 2013. After the parties exchanged discovery and attempts to resolve the matter failed, ComEd filed a Verified Motion to Dismiss the Complaint with Prejudice on March 18, 2013. 401 Venture filed its Response on April 15, 2013 and ComEd filed its Reply on May 1, 2013. The ALJ issued the Proposed Order on May 24, 2013. On June 20, 2013, 401 Venture filed and served its Brief on Exception. ComEd filed and served its Reply Brief on Exception on July 15, 2013. The ALJ marked the matter “heard and taken” on July 17, 2013.

Commission Analysis and Conclusions

Illinois is a fact pleading jurisdiction and thus a complainant must allege facts sufficient to bring its claim within the scope of the cause of action asserted. Turner v. Memorial Medical Center, 223 Ill. 2d 494 (2009). 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).

Claim No. 1

The first claim of 401 Venture's Complaint states that ComEd should be prevented from collecting \$150,600.72, which was later reduced to \$149,777.28, in back charges not previously billed. 401 Venture acknowledges that the December 6, 2005, Electric Facilities Service Agreement ("Agreement") between the two parties stated that the total monthly rental to be charged was \$10,564.03 and that ComEd billed 401 Venture \$4,289 per month instead of \$10,564.03 per month from April 1, 2009 through March 31, 2011. However, 401 Venture maintains that pursuant to the Illinois Public Utilities Act ("PUA") ComEd has an obligation to correctly bill its customers for all services provided. 401 Venture asserts that as a result of ComEd's own negligence and mistake ComEd should be prevented from collecting the \$150,600.72 in back charges.

Pursuant to Section 280.100(a)(2) of the Administrative Regulations of the Commission "A utility may render a bill for services or commodities provided to a non-residential customer only if such bill is presented within two years from the date the services or commodities were supplied." 83 Ill. Adm. Code 280.100(a)(2). 401 Venture admits that it was billed at \$4,289 per month instead of the agreed to \$10,564.03 per month from April 1, 2009 through March 31, 2011 and that on or about March 31, 2011, ComEd discovered its billing error and notified 401 Venture that it owed an additional \$150,600.72. ComEd complied with Section 280.100(a)(2) and thus the Order finds that 401 Venture failed to plead sufficient facts to bring its claim within the scope of the cause of action asserted.

401 Venture indicates in its Brief on Exceptions that it does not take exception to the Proposed Order as it relates to Claim No. 1.

Claim No. 2

401 Venture's second claim is that in or about April 2011, ComEd unilaterally informed 401 Venture that it was implementing a new monthly Rider NS – Nonstandard Services and Facilities ("Rider NS") charge of \$12,083.89 rather than the \$10,564.03 amount originally specified in the Agreement. 401 Venture explains that ComEd based this increase on an audit of the actual usage of each transformer specified by ComEd as Standard in the original Rider NS where it found that the Standard Transformers Facilities originally specified in Rider NS were wrong. 401 Venture argues that the monthly charge increased even though the Standard Facilities charge decreased because ComEd adjusted the Standard Facilities charge based on usage but failed to do a similar adjustment to the Required Facilities charge. 401 Venture asserts that by failing to uniformly adjust both the Standard and Required Facilities charges, the result is an unjust and discriminatory rate increase that is prohibited and unlawful. Further, the effect of ComEd's change to the Standard Facilities charges without a corresponding change to the Required Facilities charge is to implement a rate increase

on a single customer, which is not in compliance with 220 ILCS 5/9-201 and other sections of Illinois statutes including 220 ILCS 5/9-102.

401 Venture fails to allege the necessary facts to support its conclusion on the face of its Complaint that the increased adjustment to its monthly bill is excessive, unjustly discriminatory and not in compliance with Illinois law. It is undisputed that 401 Venture requested non-standard services and facilities from ComEd at Trump Tower. It is also undeniable that ComEd recovers the cost of non-standard facilities under Rider NS, the rates of which were approved by the Commission, Ill. C.C. No. 10, Original Sheet No. 277. A tariff is a public document setting forth services being offered; rates and charges with respect to services; and governing rules, regulations, and practices relating to those services. Adams v. N. Illinois Gas Co., 211 Ill. 2d 32, 55, 809 N.E.2d 1248, 1263 (2004). The PUA requires public utilities to file tariffs with the Commission that bind both the utility and the customer and govern their relationship. Id. Once the Commission approves a tariff, it is a law, not a contract, and has the force and effect of a statute. Id. The Order finds that inasmuch as Complainant cannot rely on conclusions of fact or law unsupported by factual allegations, its second claim is dismissed.

Accordingly, I recommend entry of the attached Order dismissing the Complaint without prejudice.

DK:fs