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**STATE OF ILLINOIS  
ILLINOIS COMMERCE COMMISSION**

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WRPV, XI SENECA CHICAGO, LLC  
d/b/a The Seneca,

Petitioner

v.

COMMONWEALTH EDISON COMPANY,

Respondent

Docket No. 13-0060

PETITIONER'S RESPONSE TO MOTION  
FOR JUDGMENT ON THE PLEADINGS  
PER THE AMENDED PETITION

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COMES NOW WRPV, XI SENECA CHICAGO, LLC (hereinafter "the Seneca" or "Petitioner"), to respond to Commonwealth Edison Company's ("ComEd" or "Respondent") motion for judgment on the pleadings *per the amended petition* ("Motion") 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. In support of its position, the Seneca states as follows:

**Introduction**

ComEd's Motion asserts that there is no legal basis upon which the Seneca is entitled to an exception from the prohibition of electric resale. Their main argument sets forth the idea that "resale and redistribution" are not interchangeable practices to qualify for the "uninterrupted continuation" exception contained in Com Ed's tariffs. While this argument creatively interprets

the meaning of General Terms and Conditions, ILL. C.C. No. 10, Orig. Sheet No. 145, it ignores the plain language of the tariff which does not legally distinguish the continuous resale of electricity from the continuous redistribution of electricity for purposes of permitting a grandfathered exception of either. Therefore, the Seneca's asserted continuous redistribution satisfies the plain meaning of Com Ed's tariffs, and would in fact qualify it for a resale exception.

Petitioner requests that the Illinois Commerce Commission ("Commission") deny Respondent's instant Motion and grant Petitioner's requested relief.

#### Legal Standard

A dispositive motion under section 2-615 attacks only the legal sufficiency of the complaint. *Urbaitis v. Commonwealth Edison*, 143 Ill.2d 458, 475 (1991); *Janes v. First Federal Savings & Loan Association*, 57 Ill.2d 398, 406 (1974). The question presented by a 2-615 motion is whether sufficient facts are contained in the pleadings which, if proved, would entitle the plaintiff to relief. *Urbaitis*, at 475.

In ruling on a Section 2-615 motion to dismiss, all well-pled facts in the complaint are taken as true and the allegations are interpreted in the light most favorable to the non-moving party. *Jarvis v. South Oak Dodge, Inc.*, 201 Ill. 2d 81, 86 (2002); *Wakulich v. Mraz*, 203 Ill. 2d 223, 228 (2003). Furthermore, all inferences from those well-pled facts are drawn in favor of the non-moving party. *Lee v. Nationwide Cassel. L.P.*, 174 Ill. 2d 540, 545 (1996); *Kolegas v. Hestel Broad Corp.*, 154 Ill. 2d 1, 9 (1992). A dismissal based on a failure to state a claim must only be sustained "if it clearly appears that no set of facts could be proved under the allegations which would entitle the party to relief." *Lee*, 174 Ill. 2d at 545. Moreover, even if the Commission finds that Petitioner the Seneca failed in any respect to plead a claim with sufficient

particularity, the proper result is to dismiss *with leave to amend*. *Harvey v. McKay*, 109 Ill. App. 3d 582, 586 (1st Dist. 1982) (purpose of a 2-615 motion “is to point out the defects so that the complainant will have the opportunity to cure them before trial”).

The only matters to be considered in ruling on a motion under § 2-615 are the allegations of the pleading itself. *Id.* In fact, such a motion does not raise affirmative factual defenses, but rather alleges only defects on the face of the complaint. *Id.* Thus, it is well established that evidentiary material outside of the complaint may not be considered in ruling on a § 2-615 motion. *Seibring v. Parcell's Inc.* 178 Ill.App.3d 62, 69 (4th Dist.1988).

Based on this legal standard, the Seneca’s facts overcome the Respondent’s Motion, and therefore the Commission should deny Respondent’s Motion in its entirety.

#### **Background**

In March 1, 2012 the owners of the Seneca purchased the building located at 200 E Chestnut Street, Chicago, IL 60611 (“Property”). The new owners of the Property learned that the original building design contemplated a dual-purpose use for the premises – to be operated as a mixed-use residence and hotel *or* to be used solely as an apartment community. Just prior to the owner’s purchase of this community, the Property was being operated as a mixed-use residence and hotel in Downtown Chicago, at which time it had both permanent and temporary residents as occupants. While some rooms were rented on a “temporary” basis, the entirety of such building was not “normally considered” to be a temporary domicile. Upon information and belief, throughout its history, the Property had been continuously occupied with permanent residents, even during the time in which it operated part of the premises as a hotel. Upon information and belief, there were also periods of time prior to 1957 and thereafter that the

Property operated solely as a multi-family residential building. Therefore, throughout its history, the building has continuously redistributed electric power to occupants since 1929.

### **Amended Petition**

On or around August 1, 2013, the Commission denied Com Ed's motion for judgment on the pleadings and permitted the Seneca's amended petition ("Petition") to stand. In its Petition, the Seneca sets forth all of the relevant facts related to the property's history and continuous redistribution of electricity, which for purposes of the instant motion, must be accepted as true. The Petition seeks relief from the Commission as follows: 1) That the Commission find that Petitioner has in fact engaged in continuous redistribution of electricity to its residents, and 2) That such redistribution qualifies Petitioner to install submeters for the purpose of reselling electricity to its residents. The Commission has authority under 220 ILCS 5/2-101 and 220 ILCS 5/4-101 to grant such relief.

### **THE PLAIN LANGUAGE OF COM ED'S TARIFFS PERMITS THE SENECA TO RESELL ELECTRICITY PROVIDED THEY HAVE CONTINUOUSLY ENGAGED IN RESELL OR REDISTRIBUTION PRACTICES IN THE PAST**

Based on the Seneca's continuous redistribution of electric power since the property's inception in 1929, it would qualify for the limited exception on the bar of electric resale to residents.

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.

ComEd now argues that 1) the Seneca has not been continuously engaged in electric redistribution, and 2) ComEd’s tariffs do not provide an exception that allows electric “resale” based on prior continuous “redistribution” of electricity. See Motion p. 5. Both arguments fail due to the clear facts alleged in the Petition, as well as the unambiguous language contained in ComEd’s tariffs.

The facts alleged in the Petition, which must be accepted as true for purposes of this Motion, set forth that the Seneca and its predecessor entities have continuously “redistributed” electric power at the Property on a continuous basis since on or around its date of inception in 1929. See Petition, paragraphs 7 and 9. The building had operated solely as a multi-family residential building for periods of time, and then as a mixed-use hotel (with permanent residents). The entirety of interior electrical wiring of the building was not replaced at any time.

In its Motion, ComEd tries to convince the Commission that the Seneca did not engage in redistribution of electricity because at all times the building was considered a “temporary domicile” such as a motel. This is simply untrue. As the Petition alleges in paragraphs 7 and 9, the Seneca has been engaged in the continuous redistribution of electricity since 1929, and that long-term residents have always resided at the property. In fact, there were times when the property exclusively served as a multi-family residential complex, and not a hotel.

Furthermore, in its Motion ComEd tries to revise the intent of its tariffs, General Terms and Conditions, ILL. C.C. No. 10, Orig. Sheet No. 145, by insisting that prior “resale” and

“redistribution” are not interchangeable for purposes of establishing a grandfathered exception to electric resale. In support of this argument, ComEd points out the differences between resale and redistribution. See Motion p. 9-10. Petitioner does not deny that these two methods of providing electric service to residents are different. One consists of merely furnishing the service, while the other also consists of measurement and billing components as well. However, to say that the use of one method precludes the future use of another is without merit. Had a landlord continuously resold electricity to its residents sufficient to meet the exemption, and then wished to simply begin redistributing the electricity without measuring consumption or collecting payment from residents, surely this would reasonably satisfy the tariff’s intent of “an uninterrupted continuation of resale or redistribution practices” in order to qualify for redistribution. The reverse is true in the instant case. The Seneca would like to install submeters to measure the consumption of electricity and pass along charges to residents to encourage conservation of natural resources. It has alleged and demonstrated a continuous redistribution. The tariffs state that resale or redistribution must occur continuously in order to qualify for resale or redistribution. It does not condition resale solely on previous resale; nor does it condition redistribution solely on previous redistribution. To interpret it that way misconstrues the intent of the tariff.

As such, Respondent’s Motion should be denied.

**THE SENECA’S AMENDED COMPLAINT PROPERLY PLEADS VALID CLAIMS AGAINST COMED**

The Seneca’s Petition clarifies the building’s historical status, and affirmatively avers facts against ComEd to state valid causes of action. Petitioner alleges, *inter alia*, that it falls into the class of limited grandfathered exceptions permitted to resell electric power to occupants, pursuant to ComEd’s tariffs, General Terms and Conditions, ILL. C.C. No. 10, Orig. Sheet No.

145. It further alleges that ComEd's failure to permit resale is a violation of its own tariffs and governing regulations. Petitioner's amended Petition sufficiently pleads a violation of ComEd's tariffs to survive a motion for judgment on the pleadings. As such, Petitioner respectfully requests that ComEd's Motion be denied.

### **Conclusion**

In the instant Motion, Respondent ComEd argues that the Seneca has not engaged in continuous redistribution, and even if it has, that such redistribution would not qualify it to resell electric service at this point. Petitioner respectfully disagrees. The only matters to be considered in ruling on a motion under § 2-615 are the allegations of the pleading itself. The Seneca is able to properly plead that the Property has continuously redistributed electric service to occupants and therefore qualifies for one of the limited exceptions to the rule on resale prohibition. Such facts, when taken on their face, must be accepted as true and taken in the light most favorable to Petitioner. As such, Petitioner respectfully requests that the Commission deny Respondent's instant Motion in its entirety.

Dated this 19<sup>th</sup> day of September, 2013.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Brett Kraus", written over a horizontal line.

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**NOTICE CERTIFICATE**

A copy of this *Petitioner's Response to Motion for Judgment on the Pleadings per the Amended Petition* has been sent via U.S. Mail and/or email to Respondent through the following individuals:

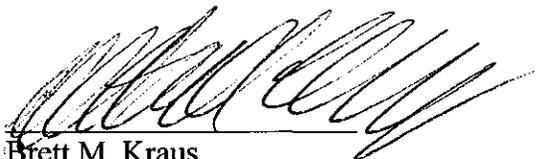
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Signed this 20th Day of September 2013.

  
Brett M. Kraus  
Counsel for Petitioner