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STATE OF ILLINOIS
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THOMAS CHUMMAR, GURNEE TRUCK STOP, INC.	)	
v.	)	Docket No. 11-0703
COMMONWEALTH EDISON COMPANY	)	
Complaint as to choice of supplier denied by ComEd and power outages in Gurnee, Illinois.	)	

RESPONSE TO DEFENDANT'S 2-615 AND 2-619 MOTION TO DISMISS

Thomas Chummar ("Claimant"), by his counsel, Tom V. Mathai, in response to Defendant's Motionto Dismiss pursuant to Sec 2-615 and Sec. 2-619, states as follows:

I. FACTUAL BACKGROUND

Claimant runs a gas station and food retail business. Claimant received public utility service from ComEd for his gas station and food retail business. Over a four year period, Claimant suffered multiple lapses in coverage in his service with ComEd. Two of the many outages and lapses occurred May 25, 2011 and July 11, 2011. However, many more outages occurred over the four year period. Claimant held a total of four accounts with ComEd ("Accounts A,B,C,D").

In early 2011 Claimant was under tremendous pressure to save his business due to his lender's insistence that the business be foreclosed. Claimant was searching for a lender to refinance the mortgage. Claimant was interested in transferring service due to the multiple outages and resulting damages suffered over his four year service period with ComEd. However, Claimant was unaware that he had the option to transfer service. On March 3, 2011 Claimant received a call from third party, Spark Energy, an alternative supplier of energy. Spark Energy

explained that Claimant would gain significant financial savings if he switched the above named four electrical accounts to Spark Energy. Seeking to benefit from such savings, Claimant contacted ComEd to request that all four accounts be switched to Spark Energy. Pursuant to 220 ILCS 5/16-101 (e):

> (e) All consumers must benefit in an *equitable and timely fashion* from the lower costs for electricity that result from retail and wholesale competition and receive sufficient information to make informed choices among suppliers and services. The use of renewable resources and energy efficiency resources should be encouraged in competitive markets. (emphasis added).

However, Defendant does not seek to dismiss this claim. Its motion to dismiss only relates to the claim for weather related damages.

II. ARGUMENT

A. ComEd's Significant Lapse in Service Caused Claimant Damages

Over a *four year period*, Claimant suffered repeated lapses in service *including but not limited to* lapses in coverage on May 25, 2011 and July 11, 2011. Claimant suffered approximately $8,000 in damages. Claimant's service was interrupted numerous times even in slight rain storms and minor inclement weather conditions. In particular, Claimant was required to spend in excess of $5,000 to repair his facility equipment caused by the repeated service interruptions. In addition, Claimant's food items were destroyed and unable to be sold to the public due to the service disruptions. The food item damage amounted to approximately $3,000.00 for a total damage amount of $8,000.00. (See Group Exhibit A, receipts for repair bills and lost food items).

ComEd erroneously relies upon a June 5, 2011 Order from the Commission to escape liability. On June 5, 2011, the Commission issued an Order in ICC Docket No 11-0588 ("11-0588") allegedly exonerating ComEd from liability for damages incurred by customers as a result of certain weather events. However, ComEd has not shown that 11-0588 encompasses the

damages caused to Claimant on either July 11, 20011 or the other multiple dates of service lapse that Claimant suffered. ComEd's unsupported proclamation that "11-0588 conclusively establishes that Com Ed is not and cannot be liable for Complainant for any damages stemming from the July 11, 2011 weather events," ("ComEd's Third Motion to Dismiss") contains two fatal flaws.

First, ComEd fails to explain or prove how Claimant definitely encompassed within the 11-0588 Order. ComEd simply says it is so and leaves it at that. Indeed, as noted in an October 2, 2013 Ruling by the Administrative Law Judge (Docket No. 11-0703) "the ComEd argues that the Complainant was not one of the 34,559 customers that are eligible to bring claims for actual damages due to a power interruption on July 11, 2011. (See partial Motion to Dismiss at 6). The ComEd has not provided any proof regarding that fact." (ALJ Order, Docket No. 11-0703).

The second flaw with ComEd's argument is that Claimant suffered *multiple* lapses in service over a *four year period* not *including but not limited to* the lapse of July 11, 2011. ComEd conveniently glosses over the numerous other power outages that occurred over the four year period and attempts to distract the court by focusing solely on the single outage of July 11, 2011. ComEd seeks to escape the damages that it caused Claimant by somehow claiming that the multiple outages that occurred over a four year period are all covered by the single 11-0588 Order. However, as ComEd openly admits, the 11-0588 Order covers only July 11, 2011 outages. ComEd fails to show how this order definitely covers Claimant and how the 11-0588 Order excuses ComEd from liability for the other outages that occurred over the four year period of service.

ComEd as a utility provider owed a duty to Claimant to provide a reasonable level of service to its paying customer. *Adams v. Northern Illinois Gas Co.*, 809 N.E.2d 1248, 1272 (2004). ComEd's multiple outages constituted an actionable breach of the agreement to provide reasonable service. As a result of ComEd's actionable breach, Claimaint suffered over $8,000 in damages to equipment and food items. ComEd is liable for these damages.

It is true that under the Moorman Doctrine, purely economic damages are not typically permitted in tort actions. However the Illinois Supreme Court has recognized three exceptions to this doctrine.

> Three exceptions were articulated (1) where a plaintiff has sustained damage resulting from a sudden or dangerous occurrence (2) where the plaintiff's damages are the proximate result of a defendant's intentional, false representation and (3) where the plaintiff's damages are a proximate result of a negligent misrepresentation by a defendant in the business of supplying information for the guidance of others in their business transactions.
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> *Adams*, 809 N.E.2d at 1272.

The current claim meets all three criteria articulated under the above exception. Further, both the Illinois Supreme Court and this Commission have stated that it is entirely appropriate to hold a public utility company liable for damages arising out of its own negligence willful misconduct:

> The Supreme Court of Illinois agrees with the Illinois Commerce Commission, which has stated: (1) it is entirely appropriate that a utility remain responsible for personal injury or property damage that results from its own negligence or willful misconduct, and (2) there is no general rule or policy that allows the Commission to grant utilities limitations on liability for personal injury and property damage.[1]

[1] In contrast to the Illinois Commerce Commission's jurisdiction, the jurisdiction of the circuit courts is set forth in section 5-201 of the Act, which states: In case any public utility shall do, cause to be done or permit to be done any act, matter or thing prohibited, forbidden or declared to be unlawful, or shall omit to do any act, matter or thing required to be done either by any provisions of this Act or any rule, regulation, order or decision of the Commission,

Adams, 809 at 1272.

The Illinois Supreme Court has further stated that the Public Utilities Act is properly "to be strictly construed in favor of persons sought to be subjected to its operation." *Id.*

C. 2-615 Motion to Dismiss relates to the pleading.

Motion to Dismiss attacks legal sufficiency of the Complaint, not is factual sufficiency. *Dawson-vs-Elgin, Joliet & Eastern Ry Co. 266 Il. App 31 329, 640 N.E. and 661.*

Claim should not be dismissed on pleadings unless it clearly appears that no set of facts can be proved under pleadings which will entitle to party to recover.

F.H. Prince & Co, Inc. – vs- Towers Financial Corp., App. 1 Dist 1995, 665 N.E. 2nd 142.

Under the Adams – vs Northern Illinois Gas Co. 809 N.E. 2n 1248, 1272 (2004) exception plaintiff can recover and, therefore, a 2-615 Motion to Dismiss is improper.

Dismissal of Complaint or portion thereof, should not be granted under provision governing involuntary dismissal unless it clearly appears that no set of facts can be proved which would entitle Plaintiff to recover. *Eck v McHenry County Public Bldg, App 2nd Dist. 1992, Ill App 3rd 755, 604 N.E. 2bd 1107.* Trial court should grant Sec. 2-619 Motion for Involuntary Dismissal only if, after construing documents supporting motion in light most favorable to non-movant, if it finds no disputed issue of fact. *Draper v. Frontier Ins. Co., App. 2nd Dist. 1994, 265 IllApp. 3rd, 739,638 N.E. 2nd 1176.*

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issued under authority of this Act, the public utility shall be liable to the persons or corporations affected thereby for all loss, damages or injury caused thereby or resulting therefrom, and if the court shall find that the act or omission was wilful, the court may in addition to the actual damages, award damages for the sake of example and by the way of punishment. An action to recover for such loss, damage or injury may be brought in the circuit court by any person or corporation, 220 ILCS 5/5-201 (2008). Thomas v. Peoples Gas Light and Coke Co, 959 N.E.2d 1201 (1st Dist., 2011).

Finally, the affidavit of Jaime Ortega attached to Respondent's 2-619 motion does not meet the standard of Rule 191. Therefore, Plaintiff moves to strike the affidavit.

Wherefore, Plaintiff requests the Commission to deny Defendant's combined 2-615 and 2-619 Motion to Dismiss Plaintiff's claim relating to weather related damages.

Respectfully Submitted,

/s/

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ICC DOCKET NO. 11-0703

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I, Tom V. Mathai, do hereby certify that on Nov. 20,2013, I caused a copy the plaintiff's response to defendant's 2-615 and 2-619 motion to dismiss to be served electronic mail on each of the parties noted above.

Tom V. Mathai