

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

Chet DeKing,)	
)	
vs.)	
)	
Commonwealth Edison Company,)	Docket No. 13-0186
)	
Complaint as to non-emergency vegetation)	
management activities in Sugar Grove, Illinois)	

**COMMONWEALTH EDISON COMPANY’S
MOTION TO DISMISS THE SECOND AMENDED COMPLAINT**

Now comes the Respondent, Commonwealth Edison Company (“ComEd”) by and through its attorneys, and files ComEd’s Motion to Dismiss the Second Amended Formal Complaint (“Complaint” or “Compl.”) filed by the Complainant, Chet DeKing (“Complainant”).

I. INTRODUCTION

Complainant alleges that on November 21, 2012, ComEd cut down certain trees on his property in violation of tree care and maintenance standards specified in Section 8-505.1 of the Public Utilities Act (the “Act”), 220 ILCS 5/8-505.1, and without providing proper notice under that section of the Act. (Compl., ¶¶ 15-23.)¹ Complainant seeks monetary damages for diminution in value of his property, loss of enjoyment of his property, cost of removing tree stumps and cost of planting new trees. (Compl., ¶ 26.) Complainant also asks the Commission to order that “ComEd cease all non-emergency vegetation management activities until the Commission can review ComEd’s non-emergency vegetation management policies and procedures and satisfy itself that Illinois property owner’s rights will be properly respected by

¹ ComEd does not controvert the factual allegations of the Complaint in this Motion because a motion to dismiss takes well-pleaded factual allegations as true. *Perkaus v. Chicago Catholic High Sch. Athletic League*, 140 Ill. App. 3d 127, 134 (1st Dist. 1986).

ComEd ...” and that it take various other remedial measures. (Compl., ¶ 28.) Finally, the Complainant now also seeks reasonable costs and attorneys’ fees. (Compl., ¶ 29.) The Complaint should be dismissed because the Commission lacks authority to grant any of the three types of relief that the Complainant requests in this proceeding.

II. PROCEDURAL BACKGROUND

The Complainant filed his first Amended Complaint on May 15, 2013. ComEd moved to dismiss that complaint on the basis that, while the matter was properly before the Commission, the Commission was without the authority to award the relief sought. Specifically, Complainant sought monetary damages and injunctive relief – two remedies that the General Assembly has not authorized the Commission to award here. The Administrative Law Judge (“ALJ”) issued a proposed order (“ALJPO”) on July 10, 2013 suggesting dismissal of the Amended Complaint. The ALJPO properly recognized that the Commission has jurisdiction over this matter.² However, the ALJPO also correctly concluded that the Commission lacked the authority to grant the relief that the Complainant sought in his Amended Complaint.

The Commission considered the ALJPO at its September 4, 2013 bench session. Rather than adopting the ALJPO, the Commission entered an Interim Order that (1) granted the Complainant leave to again amend his complaint, and (2) requested that the parties and the Staff of the Commission provide briefing on various subjects relating to jurisdiction and available remedies. While that briefing will soon be scheduled, a review of the subject matters reflects a general recognition for the distinction between the fundamental principles of jurisdiction and

² The Circuit Court of Cook County has recently also recognized that matters such as this one that pertain to a utility’s vegetation management practices are not properly brought in court, but rather they are properly heard and determined by the Commission. *See Durica v. Commonwealth Edison Co.*, Case No. 12 CH 39283, Memorandum Opinion and Order (July 9, 2013), *Durica*, Order on Motion to Reconsider (December 3, 2013). Both of these orders are attached hereto as Attachment A.

available remedies. And though the briefing has yet to take place, ComEd intends to take the same positions that it has already formally taken in this matter. Specifically, this matter is properly before the Commission as it has exclusive jurisdiction over matters brought under the statutory provision governing utility vegetation management. 220 ILCS 5/8-505.1; *Durica, supra* at n.2. Yet, when the Complainant seeks relief that the Commission does not have the authority to award, the Commission is not free to act outside of that authority or craft relief that has not been requested.

On November 12, 2013, Complainant filed his Second Amended Complaint. This Complaint seeks the same relief as the prior two complaints although some references to injunctive relief have been removed (while the substance of the relief remains the same), and Complainant now also seeks to recover reasonable costs and attorneys' fees. ComEd now moves to dismiss the Complaint because the Commission is not authorized to award the relief that the Complainant seeks.

III. ARGUMENT

The Complaint that is now the subject of this motion to dismiss fails for the same reasons identified in ComEd's motion to dismiss the first amended complaint. This is because Complainant seeks three forms of relief – each of which the Commission lacks the authority to award. For this reason, and as recognized by the ALJPO, this matter should be dismissed because an evidentiary hearing would serve no purpose. Despite the forthcoming briefing that the parties and Staff will undertake, the Commission is limited to consideration of the remedies sought by the Complainant and is not free to award relief not sought or craft its own remedies. To do so would certainly deprive ComEd of due process because it only knows of that which has been alleged and sought in the Complaint.

It seems that one of two things has happened here. Either the Complainant has failed to identify a form of relief that the Commission could award him, or he is aware of some relief that he could obtain, but he has chosen not to include it in his request for relief. Under either scenario, the Commission cannot award him any relief (whether requested or omitted) in this proceeding.

A. The Commission Has Jurisdiction Over this Proceeding.

The fact that the requested relief is not available from the Commission does not mean that Complainant has chosen the wrong forum. It is clear that this Complaint cannot be brought in the circuit court. The Complaint alleges violations of subsection (a) of Section 8-505.1 of the Act, which requires utilities, in performing vegetation management activities, to follow applicable tree care and maintenance standard practices and provide notice to affected customers. That statutory provision expressly grants the Commission exclusive jurisdiction over complaints brought under it: “The Commission shall have *sole authority* to investigate, issue, and hear complaints against the utility under this subsection (a).” 220 ILCS 8/5-505.1 (emphasis added).

The Act thus makes it clear that this Complaint cannot be brought in the circuit court under Section 5-201 of the Act or otherwise. It is not just that Act that requires this result; the circuit court has recently considered this very provision and held that such claims are within the exclusive jurisdiction of the Commission. *See Durica, supra*. When asked to reconsider this issue, the circuit court affirmed its conclusion. *Id.* The express statutory provision is also consistent with judicial constructions of other provisions of the Act. ComEd must perform vegetation management around its transmission and distribution facilities in order to provide “service and facilities which are in all respects adequate, efficient, reliable and environmentally safe. . . .” 220 ILCS 5/8-401. This makes vegetation management an inextricable part of

ComEd's provision of electric service to its customers. *See Illinois Commerce Comm' n v. Central Illinois Light Co.*, Dkt. No. 00-0699, 2001 WL 946394, (May 9, 2001) at *5; *Durica* at 6 (“ComEd’s delivery of electrical service and vegetation management services are inextricably tied together.”) It has long been held that complaints for inadequate provision of service are not properly brought before the courts. *In re Illinois Bell Switching Station Litig.*, 161 Ill. 2d 233 (1994); *Scheffler v. Commonwealth Edison Co.*, 955 N.E.2d 1110, 353 Ill. Dec. 299 (2011).

The utility must file with the Commission tariffs that govern its provision of service. The tariff not only sets forth the rates for such services but also the “governing rules, regulations, and practices relating to those services.” *Adams v. Northern Illinois Gas Co.*, 211 Ill. 2d 32, 55 (2004). “Once the Commission approves a tariff, it ‘is a law, not a contract, and has the force and effect of a statute.’” *Id.* (citation omitted). The applicable provision of ComEd’s tariff on file with the Commission is contained in its General Terms and Conditions. The requirement for the right of access to customer premises includes the following:

. . . the Company has the right to trim, remove, or separate trees, vegetation, or any structures therein [*i.e.*, on customer premises], which in the judgment of the Company, interfere with the electric delivery system located in the Company’s service territory in a manner that may pose a threat to public safety or system reliability.

ILL. C.C. No. 10, 3rd Revised Sheet No. 152.³

Accordingly, Complainant is free to argue to the Commission that ComEd has not complied with this provision of the tariff, but he is not free to bring a complaint for actions alleged to constitute non-compliance in the circuit court.⁴

³ Attached hereto as Attachment B.

⁴ ComEd intends to brief the issue of the circuit court’s jurisdiction, but it should be noted that in its filings ComEd has consistently taken the view that the circuit court lacks jurisdiction over vegetation management proceedings. Counsel for ComEd did express an opposite belief informally at a status for this matter, but this belief was not a researched or correct position. The circuit court has subsequently

B. The Commission Lacks the Authority to Award Monetary Damages.

The Complainant requests that the Commission award him monetary damages for the alleged diminution of property value, the loss of enjoyment of his property, the cost of stump removal, and the cost to plant new trees. (Compl., ¶ 26.) “The Commission derives its power solely from the statute [*i.e.*, the Public Utilities Act] and has none except it be by statute expressly conferred upon it.” *Illinois Commerce Comm’n ex rel. East St. Louis, C&W Ry. v. East St. Louis & C. Ry. Co.*, 361 Ill. 606, 611 (1935); *Lambdin v. Illinois Commerce Comm’n*, 352 Ill. 104 (1933). A general power to award monetary damages is not expressly conferred on the Commission by the Act and therefore does not exist.⁵ Indeed, it is beyond dispute that ample case law and a litany of Commission orders consistently find that the Commission cannot award monetary damages. *Barry v. Commonwealth Edison Co.*, 374 Ill. 473, 477-78 (1940); *Ferndale Heights Util. Co. v. Illinois Commerce Comm’n*, 112 Ill. App. 3d 175, 181 (1st Dist. 1982); *Moenning v. Illinois Bell Tel. Co.*, 139 Ill. App. 3d 521, 529 (1st Dist. 1985); *Recycling Servs. (RSI) v. Peoples Gas Light and Coke Co.*, ICC Dkt. No. 04-0614 (Order, Sept. 20, 2005) at 13; *Feiss v. Illinois Bell Tel. Co.*, ICC Dkt. No. 94-0354 (Order, Sept. 13, 1995) at 3; *Carlson v. Commonwealth Edison Co.*, ICC Dkt. No. 10-0051 (Order, Jan. 20, 2011) at 5.

C. The Commission Lacks the Authority to Award Injunctive Relief.

Complainant seeks the same injunctive relief that he has sought all along only now he has disingenuously removed references to the word “injunctive” presumably based on the well-accepted tenet that the Commission cannot order such relief. No general power to award

determined this issue – finding that it has no jurisdiction – consistent with ComEd’s formal position. *See Durica, supra.*

⁵ In contrast to this lack of general authority in the Commission, Section 16-125(e) of the Act expressly makes ComEd liable for actual damages to customers in the event of certain types of widespread outages of lengthy duration, subject to the Commission’s jurisdiction.

injunctive relief is expressly conferred on the Commission by the Act and therefore it, too, does not exist. Nor may the Commission take it upon itself to fashion injunctive relief. *Moening v. Illinois Bell Tel. Co.*, 139 Ill. App. 3d 521, 528 (1985), citing *Barry v. Commonwealth Edison Co.*, 374 Ill. 473 (1940), and *Ferndale Heights Utility Co. v. Illinois Commerce Comm'n*, 112 Ill. App. 3d 175 (1982).

The Commission need look no further than its decision in *Ottenweller v. Central Illinois Light Co. dba Ameren CILCO*, Dkt. No. 10-0249, 2010 WL 3405438 (July 14, 2010) to dismiss Complainant's claims for monetary and injunctive relief. *Ottenweller* was also a complaint proceeding for alleged wrongful tree cutting. Like the Complainant here, the customer sought to recovery monetary damages and injunctive relief. The Commission concluded "the Complainant's request for relief for damages and injunctive relief is beyond the Commission's statutory authority." *Id.* There is no reason why the result should be any different here.

D. The Commission Lacks the Authority to Award Attorneys' Fees.

Unlike in prior iterations, the Complaint now also seeks to recover "reasonable costs and attorney fees" from ComEd. (Compl., ¶ 29.) Again, this relief is not available to the Complainant because the Commission is without the authority to award it. The Illinois Supreme Court has stated that the rule is well-established that attorneys' fees are not allowable to the prevailing party unless a statute or agreement authorizes their award, and this rule is equally applicable to proceedings before administrative agencies. *In re Illinois Bell Tel. Co.*, 98 P.U.R.4th 548 (1988) (citing *City of Chicago v. Fair Employment Practices Comm'n*, 65 Ill. 2d 108 (1976)). Complainant has cited to no such authority or agreement that would authorize the Commission to award attorneys' fees because none exists. Accordingly, the Commission lacks the authority to award attorneys' fees or litigation costs.

E. In Dismissing the Complaint, the Commission May Order Compliance with Vegetation Management Practices.

Although the Commission thus lacks authority to grant the three forms of relief requested in the Complaint, it can direct a utility to take corrective action to assure compliance with the law *if and when it is appropriate to do so*. In *Illinois Commerce Comm' n v. Central Illinois Light Co.*, Dkt. No. 00-0699, 2001 WL 946394, (May 9, 2001) at *5, the Commission Staff presented a report finding that Central Illinois Light Company (CILCO) was not adequately trimming trees. The Commission found that it had jurisdiction over the matter because “[t]he Act and Commission rules promulgated thereunder require electric public utilities to provide safe, reliable, and efficient service. Interference by trees with electric conductors impacts an electric utility’s ability to provide service.” The Commission went on to conclude: “If it is determined that an electric utility is not meeting its tree trimming obligations, it is also within the Commission’s authority to issue an order requiring that corrective action be taken, and in some instances outline the steps that are to be taken to achieve compliance with the Act and the Commission’s rules.” Here, while the Complainant cannot be awarded the relief he seeks, the order dismissing his Complaint may remind ComEd of its compliance obligations. Of course, it is important to note that no evidentiary hearing in this docket has been conducted, and unlike the utility in *Central Light Co.*, the allegations against ComEd are not that it has been wholly remiss in satisfying its vegetation management obligations.⁶

⁶ The Complainant even alleges that he received some form of notice relating to the vegetation condition and that he spoke with someone from ComEd on at least two occasions before ComEd removed the trees from his property. (Compl., ¶¶ 11, 13-14.) Furthermore, at this stage – where the legal sufficiency of the complaint is at issue – ComEd has not been afforded the opportunity to explain that the Complainant received actual, in-person notification (ComEd personnel met with him at the property to review the scope of the work), that the Complainant even requested that an additional tree be removed, or that the trees (at least the ones initially identified by ComEd) were removed as part of ComEd’s vegetation management program, one that ensures the safety and reliability of the electric delivery system.

IV. CONCLUSION

For the reasons given above, the Commission should dismiss the Second Amended Formal Complaint with prejudice for lack of authority to grant the relief requested.

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Respectfully submitted,

COMMONWEALTH EDISON COMPANY

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