

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

VILLAGE OF EAST DUNDEE	:	
v.	:	No. 13-0450
COMMONWEALTH EDISON COMPANY	:	
Complaint in regard to easement issues in East	:	
Dundee, Illinois.	:	

COMMONWEALTH EDISON COMPANY’S
REPLY IN SUPPORT OF MOTION TO DISMISS

Commonwealth Edison Company (“ComEd”) respectfully submits to the Illinois Commerce Commission (“Commission”) this Reply in Support of its Motion to Dismiss the Village of East Dundee’s (the “Village” or “Complainant”) Complaint. In support thereof, ComEd states:

I. INTRODUCTION

The Village’s Response to the Motion (“Response”) offers no basis, legal or otherwise, to support the Complaint. Nowhere does the Village’s Complaint or Response cite to any provision of the law that gives rise to any of the claims pled. As the Motion to Dismiss details and case law unanimously confirms, the Complaint, on its face, is deficient as a matter of law and should be dismissed. The Village’s Response fails to overcome that the Complainant has failed to plead a cognizable claim under any theory of law. The Response also neglects to address, let alone overcome, the fact that the Commission has no authority to award the relief sought. For these reasons, ComEd respectfully requests that the Commission grant its Motion to Dismiss.

II. ARGUMENT

A. The Village's Response Cites No Legal Authority that the Granting or Denial of Easements for Private Use is a Commission-Regulated Utility Function

Citing to inapplicable law, the Village asserts that “land ownership is a public business” to be regulated by the Commission under the Public Utilities Act (“PUA” or “Act”). Resp. at 2-3. The Village errs. The sole power of the Commission comes from the PUA, and it has power and jurisdiction *only* to determine facts and make orders concerning the matters specified in the Act. *Lowden v. Illinois Commerce Comm’n*, 376 Ill. 225 (1941) (*emphasis added*). An administrative agency, such as the Commission, is different from a court because an agency only has the authorization given to it by the legislature through the statutes. *Business & Professional People for Public Interest v. Illinois Commerce Comm’n*, 136 Ill. 2d 192, 243 (1989); an administrative agency has no inherent judicial powers. *Ford v. Environmental Protection Agency*, 9 Ill. App. 3d 711 (1973). Neither the General Assembly nor the Commission has authority to authorize the taking of private property for private use. *See, e.g. Town of Kingston v. Anderson*, 300 Ill. 577, 580 (1921), attached hereto as Attachment A; *Tower Leasing v. Commonwealth Edison Co.*, ICC Docket No. 97-0200 (Final Order, May 20, 1998), attached hereto as Attachment B. Here, the Village is improperly asking the Commission to read into the law provisions which simply do not exist. For the reasons stated herein and in its Motion to Dismiss, the Village’s Complaint¹ must be dismissed.

¹ On July 25, 2013, Lael Miller filed a Complaint against ComEd. On October 10, 2013, Lael Miller, Mayor of the Village of East Dundee, filed a motion for leave to amend the caption and to file an amended Complaint instant. Because ComEd did not object to the motion for leave, it filed its motion to dismiss on November 8, 2013. On December 2, 2013, the Administrative Law Judge granted the Village’s motion to amend the caption and file an amended complaint. On December 5, 2013, the Village served all parties with a second amended complaint (filed with the Commission on December 9, 2013), which is identical in all respects, except the case caption, to the Amended Complaint filed on October 10, 2013. Accordingly, ComEd seeks dismissal of whichever amended complaint is deemed to be operative.

1. The Village Has Failed to Plead a Claim Under Section 7-205

The Village erroneously claims that Section 7-205 of the Act authorizes the Commission to overturn ComEd’s denial of easement to a private company, Insurance Auto Auctions, Inc. (“IAA”). That provision does nothing of the sort. Rather, it provides that if a public utility “is engaged in carrying on any business other than that of a public utility,” the utility shall be “subject to inquiry, examination and inspection by the Commission” as “may be necessary to enforce any provision of [the] Act.” 220 LCS 5/7-205. That the Commission may “inquire, examine and inspect” the non-public business aspects of a utility proves first that ComEd’s status as a regulated electric utility does not require that every aspect of its business and property is subject to regulation as a utility service. Second, the Commission’s authority to “inquire, examine and inspect” the non-public aspects of ComEd’s business in no way authorizes the Commission to mandate ComEd to grant an easement across its private property for an unregulated commercial purpose.

The latter half of the statute to which Complainant cites (“every public utility and affiliated interest... shall provide the Commission with access to books, records, accounts... to effectuate the provisions of Section 7-204”) is also inapplicable as Section 7-204 establishes the regulatory requirements for public utility reorganizations and certain affiliate transactions. This proceeding involves neither of those issues.

2. The Village Has Failed to Plead a Claim Under Section 1-102

The Village similarly misconstrues Section 1-102 of the Act, asserting that “[b]y denying IAA’s permit request for a utility and roadway easement without any reference to or consideration of the plan IAA submitted to the IEPA, ComEd violated its duty under 220 ILCS 5/1-102.” Resp. at 4.

In pertinent part, Section 1-102 applies to “*public utility services.*” Like Section 1-101, it creates no substantive rights for private parties, and it certainly does not apply to a utility company’s non-public utility functions, such as unregulated commercial real estate transactions. The law is well-established that, in the case of ComEd, “public utility service” is analogous to the manner in which ComEd provides *electric* service, including the associated rates, terms, and conditions. Not the manner in which it buys, grants, or sells real property.² The Commission does not “have the legal authority to require ComEd to sell or lease its distribution facilities ... as a remedy for discrimination.” *Tower Leasing v. Commonwealth Edison Co.*, ICC Docket No. 97-0200 (Final Order, May 20, 1998) at 6. Neither the common law nor any Illinois statute imposes any obligation on ComEd to grant another commercial entity an easement over its property. Similarly, no rule of law requires that ComEd give or have any reason to refuse one.

Despite the Village’s contention, granting commercial easements is not subject to the same regulation and standards as electric utility service. ComEd does not hold itself out to the public as a vendor of real property or easements. *See, e.g. Mississippi River Fuel Corp. v. Ill. Comm. Comm’n*, 1 Ill. 2d 509 (1953). Nor does any Illinois utility have tariffs setting out the rates, terms, and conditions applicable to grants of easements, which would be required if granting easements were regulated as a utility service. *See General American Realty Co., Inc. v. Greene*, 107 Ill. App. 3d, 1011, 1015 (1st Dist. 1982). The PUA does not even speak of regulating grants of interests in land, such as this, to unrelated commercial third-parties.

² Subject to limited exceptions, which do not apply here: the PUA provides narrow and explicit circumstances where the Commission has statutory authority to take private property: Section 8-509 provides that the power of eminent domain exists when a public utility has been ordered by the Commission, under 8-503, to add or modify its plant; and Section 4-502 states that the Commission can permit the taking of a small utility by a capable utility if the small utility cannot meet its service obligations. *See, e.g. Tower Leasing v. Commonwealth Edison Co.*, ICC Docket No. 97-0200 (Final Order, May 20, 1998) at 4; 220 ILCS 5/8-509, 8-503, 4-502.

3. The Village Has Failed to State a Claim Under Section 1-101

The Village's Section 1-101 claim is equally baseless. The gist of Complainant's contention is that because ComEd has granted other easements on the subject property, its refusal to grant a roadway easement to IAA is discriminatory. This argument, too, must fail. Article VIII of the PUA speaks to utility "service obligations and conditions," not to the other actions of utilities. Section 8-101, in particular, addresses the adequacy, efficiency, and nature of utilities' "service instrumentalities, equipment, and facilities" and their "charges or services to the public." 220 ILCS 5/8-101. It says nothing about how utilities must respond to demands for access to property that are not requests for electric utility services. The Village makes no allegation that any electric utility services or facilities were inadequate, deficient, or otherwise in violation of Section 8-101.

4. The Village Has Pled No Claim Under Section 9-241

Complainant's Article IX claim must fail, too. Article IX of the PUA addresses the regulated rates, terms, and conditions under which utility services and facilities are provided. Article IX does not regulate non-utility services or facilities for which no regulated rates are required or filed. In particular, Section 9-241 requires utilities to file and apply rates for utility services that are free from unreasonable discrimination. 220 ILCS 5/9-241. The Village does not allege that ComEd applied any electric service rate, imposed any electric service charge, or provided any electric service facility in a manner that was unlawful, unreasonably discriminatory, or contrary to any Commission rule or ComEd tariff. No provision of the PUA, no Commission rule or order, and no applicable tariff imposes any obligation on ComEd to grant IAA an easement, or to refuse it, on any particular grounds. The Commission has addressed this very issue, recognizing that its authority under Section 9-241 is neither "so broad [n]or so wide

as to encompass the taking of private property as a remedy for discrimination.” *Tower Leasing v. Commonwealth Edison Co.*, ICC Docket No. 97-0200 (Final Order, May 20, 1998) at 5.

B. The Village Has No Claim Against ComEd

The Village does not allege that it sought an easement from ComEd or that it asked ComEd to grant IAA an easement. Rather, it asserts that, in reliance on easement that a non-resident company (IAA) did not have, it enacted a special transfer tax, and denial of the easement would cause unnecessary delays, “thus damaging East Dundee’s tax revenues.” Resp. at 9; Compl. ¶21. There is no claim pled that ComEd failed to do anything the Village requested or had a right to request. The fact that a commercial entity or, in this case, a *prospective* commercial entity wishes to locate in a Village does not create a cause of action in favor of the municipality in which that prospective business might have located. *See Town of Kingston*, 300 Ill. 577 at 580-581. The Village’s status as a municipality does not allow it to recover damages or other relief even if the Complaint had alleged cognizable injury to a prospective claimant. Moreover, that the PUA provides that “no complaint shall be dismissed because of the absence of direct damage to the complainant,” (Resp. at 9) is irrelevant here because, for the reasons stated herein, the Village has no claim under the PUA.

C. The Commission Lacks Authority to Award the Relief Sought

The Village mistakenly asserts that the Commission has the authority to award penalties, damages, punitive damages, and/or attorney’s fees against ComEd. In arriving at its conclusion, the Complainant confuses the law and misstates the extent of the Commission’s authority in relation to damages.

It is well-established that “the Commission has no general authority to fashion an award of damages.” *Citizens Utilities Co. of Illinois v. Illinois Commerce Comm’n*, 157 Ill. App. 3d

201, 207 (1st Dist. 1987), citing *Barry v. Commonwealth Edison Co.*, 374 Ill. 473 (1940); *Ferndale Heights Utility Co. v. Illinois Commerce Comm’n*, 112 Ill. App. 3d 175 (1st Dist. 1982). The legal rationale for this rule is simple: if utilities were liable for damages, the costs of paying them would be borne by customers as a whole, driving rates to unreasonable levels. See, e.g. *Sheffler*, 955 N.E. 2d. Nor does the Commission, like any other agency, have the authority to assess penalties beyond those authorized by the PUA, as further requested by Complainant. See, e.g. *People v. P.H.*, 145 Ill. 2d 209, 233 (1991), citing *people v. Bradley*, 79 Ill. 2d 410, 417 (1980) (“Under the State’s police power, the legislature has discretion to prescribe penalties for defined offenses”); 19 Ill. L. & Prac. *Fines, Forfeitures, & Penalties* §3, at 410 (“The legislature has the authority to set the nature and extent of penalties.”); See *DiBello v. Illinois Commerce Commission*, 241 Ill. App. 3d 1088, 1092-93 (4th Dist. 1993).

In response, the Village cites to Section 5-201 of the PUA, which discusses the extent to which a *circuit court* – not the Commission – may assess damages against a public utility once a determination has been properly made that a violation of the PUA, or any rule or order of the Commission. Resp. at 11-12. While the Commission has exclusive jurisdiction to determine in the first instance – including in a case like this – whether the PUA has been violated,³ the Commission cannot award consequential and punitive damages or attorneys’ fees, let alone to parties – like the Village – which, as discussed in Section B, above, does not even allege harm. The Village cites no authority whatsoever to the contrary.

III. CONCLUSION

In sum, the Village does not allege that ComEd violated any provision of the PUA, or any rule or Order of the Commission, or that it breached any other legal duty. The Village is not

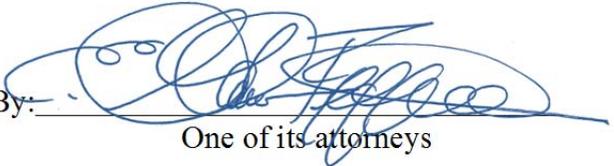
³ See, e.g. *Sheffler*, 955 N.E. 2d.

entitled to demand that ComEd give up rights to its property, absent lawful exercise of eminent domain. For these reasons, ComEd respectfully requests that the Commission dismiss the Amended Complaint with prejudice, and for all other just and appropriate relief.

Dated: December 13, 2013.

Respectfully submitted,

COMMONWEALTH EDISON COMPANY

By: 
One of its attorneys

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