

ORIGINAL

WINDY CITY ENERGY, INC.,)
Complainant,)
)
vs.)
)
NORTHERN ILLINOIS GAS COMPANY,)
d/b/a NICOR GAS COMPANY,)
Respondent.)

Docket No. 14-0709

2015 SEP 24 P 12:53
ILLINOIS COMMERCE
COMMISSION
COMMERCIAL CLERK'S OFFICE

**WINDY CITY ENERGY'S VERIFIED RESPONSE TO NICOR GAS COMPANY'S
VERIFIED MOTION TO DISMISS THE FIRST AMENDED COMPLAINT**

Windy City Energy, Inc., by and through its attorneys, Vincent S. Cook and Gary D. McGuane, for its Response to NICOR Gas Company's Verified Motion to Dismiss the First Amended Complaint, states as follows:

I. LEGAL STANDARD

A motion to dismiss pursuant to section 2-615 admits as true all well pleaded facts and questions only whether the facts alleged are sufficient as a matter of law to entitle the plaintiff to relief. A section 2-615(a) motion presents the question of whether the facts alleged in the complaint, viewed in the light most favorable to the plaintiff, and taking all well-lead facts and all reasonable inferences that may be drawn from those facts as true, are sufficient to state a cause of action upon which relief may be granted. *Doe-3 v. McLean County Unit District No. 5 Board of Directors*, 2012 IL112479, 973 N.E.2d 880. A cause of action should not be dismissed pursuant to a section 2-615 motion unless it is clearly apparent that no set of facts can be proved that would entitle the plaintiff to relief. *Pooh-Bah Enterprises, Inc. v. County of Cook*, 232 Ill. 2d 463, 473, 905 N.E.2d 781, 789 (2009).

A section 2-619(a)(9) motion to dismiss alleges the claim asserted against the defendant is "barred by other affirmative matter avoiding the legal effect of or defeating the claim." 735

ILCS 5/2-619(a)(9) A section 2-619 motion admits the legal sufficiency of the plaintiff's cause of action and all well-pleaded facts alleged in the complaint are taken as true. *Johnson v. DuPage Airport Authority*, 268 Ill.App.3d 409, 414 (1994).

NICOR's motion fails to demonstrate either that Windy City's Amended Complaint fails to state a cause of action pursuant to section 2-615, or that there is any affirmative matter defeating that claim pursuant to section 2-619. NICOR's motions should therefore be denied.

II. FACTUAL ALLEGATIONS

Windy City's First Amended Complaint alleges as follows:

14. NICOR had broad discretion pursuant to the Schedule for Rates for Gas Service and Terms and Conditions in ensuring continuous service, declaring Critical Days, and requesting deposits from suppliers like Windy City.

15. In addition to the NICOR/Windy City Contract, Windy City and NICOR have had a course of dealing pursuant to which NICOR has exercised its discretion pursuant to its Schedule of Rates and Terms and Conditions.

16. That course of dealing constitutes additional terms of the contract between NICOR and Windy City and Windy City has taken actions and invested significant sums in reliance on NICOR's abiding by the terms of the Windy City Contract and the parties' course of dealings. Windy City has entered into a series of annual contracts with NICOR in reliance on the parties' course of dealings and has entered into contracts with its own customers in reliance on NICOR's obligation to deliver gas to Windy City customers **at commercially reasonable rates.** (emphasis added)

...

27. NICOR had an obligation to exercise its discretion and provide Windy City's customers with a continuous supply of natural gas **in a commercially reasonable manner and pursuant to the NICOR/Windy City Contract and the parties' course of dealings.** (emphasis added)

...

34.asa As a result of the excessive and unnecessary Critical Days declared by NICOR in 2014, NICOR charged Windy City **excessive penalties** during the 3

Critical Days at the beginning of March an amount totaling \$396,150.80....
(emphasis added)

...
36. But for the Critical Days caused by NICOR's breach of its duty to supply Windy City a "regular supply of gas" at a commercially reasonable price, Windy City would have owed NICOR approximately \$42,718.28....

...
40. NICOR has de facto confiscated Windy City's \$100,000 pool security deposit as a means of attempting to collect the disputed, and unjust \$396,150.80 in penalties resulting from the improperly declared Critical Days.

III. ARGUMENT

NICOR fails to meet its burden to either demonstrate that the Amended Complaint fails to state a claim for which relief could be granted pursuant to 735 ILCS 5/2-615 or that there is affirmative matter that defeats those claims pursuant to 735 ILCS 5/2-619. NICOR's motion should accordingly be denied.

A. THE FIRST AMENDED COMPLAINT STATES A STATUTORY CLAIM FOR WHICH RELIEF CAN BE GRANTED (2-615)

Count I of Windy City's First Amended Complaint properly alleges a cause of action pursuant to 220 ILCS 56/9-252 as it sets forth facts establishing that NICOR charged Windy City unreasonable and unjustified penalties by declaring Critical Days to cover for its own failure to provide adequate gas at the commercially reasonable rates required by NICOR's contract and course of dealings with Windy City.

The Illinois Public Utilities Act specifically provides that a utility customer may file an action for damages for excessive or unjust charges. 220 ILCS 5/9-252. The Amended Complaint alleges that penalties assessed by NICOR in this case are "overcharges" and are "excessive or unjust."

Windy City is not alleging that NICOR charged its penalties contrary to the express terms of its published rates. Windy City alleges that NICOR abused its discretion under its published Schedule of Rates and Terms and Conditions. Windy City alleges that NICOR voluntarily, contractually, limited the manner in which it would exercise that discretion. Windy City further alleges that it continued contracting with NICOR, and with its own customers, in reliance on that contractual agreement on how NICOR would exercise its discretion. The penalties NICOR charged are unjust because they are a breach of NICOR's contractual agreement with Windy City with respect to the manner in which it declared critical Days, subsequently assessed the penalties to Windy City, and confiscated Windy City's pool deposit as payment on those unjust and disputed penalties.

As noted above, these facts must be taken as true for purposes of NICOR's motion to dismiss. *Doe-3 v. McLean County Unit District No. 5 Board of Directors, supra*. NICOR's motion to dismiss in fact improperly disputes these facts. Windy City alleges that NICOR exercised its discretion contrary to its contractual obligations to Windy City, and that those penalties are thus “unjust”, while NICOR denies the existence of any contract.

The Illinois Public Utility Act allows the Commission to order the refund of “unjust charges”. 220 ILCS 5/9-252 Count I simply asserts that NICOR's assessment of excessive penalties was a breach of its contractual obligations by which NICOR voluntarily limited its discretion. Those penalties are thus unjust.

NICOR correctly states in its motion that “Windy City must allege that it has paid some amount to NICOR as to which the Commission may order a refund.” (Motion to Dismiss, pg. 6) As set forth above, Windy City has alleged that the Critical Day penalties charged by NICOR were unjust and improper. Windy City also alleged that NICOR

confiscated Windy City's \$100,000 deposit for its pool agreement customers as payment of those unjust penalties. Contrary to NICOR's claim, there is nothing "conclusory" about that claim.

It is simple - Windy City paid NICOR a \$100,000 deposit to ensure future payments of its obligations to NICOR pursuant to Rider 13, and Windy City's participation in a pool agreement with its customers pursuant to that rider. The First Amended Complaint alleges that "As a result of the penalties assessed by NICOR, Windy City disbanded the Windy City Pool." (First Amended Complaint, ¶ 37). This allegation, which must also be accepted as true, demonstrates that NICOR no longer has the right to demand a pool deposit from Windy City, because Windy City no longer has any pool for which it must provide security for future payments. Funds retained to satisfy a pre-existing obligation are not a security deposit, they are a payment.

NICOR also claims that "Windy city does not challenge the amount of the deposit paid to NICOR under Rider 13. Nor does it challenge that the deposit was required under the terms of Rider 13." Actually, Windy City alleges that the deposits charged by NICOR are discretionary. While Rider 13 gives NICOR the discretion to require a security deposit, and sets a maximum limit on the amount of such deposits, it does not set the minimum amount. Rider 13 only requires that NICOR obtain "adequate" assurances, another discretionary term. But what Windy City expressly challenges in its First Amended Complaint is not the amount of the deposit initially required by NICOR, but NICOR's right to confiscate that deposit once Windy City disbanded the Windy City Pool. Rider 13 simply no longer grants NICOR the right to demand such a deposit.

The First Amended Complaint alleges that NICOR did not retain Windy City's \$100,000 as a pool security deposit. Rather, it retained it as a payment of the unjust

penalties as set forth in Count I. These allegations must be taken as true for purposes of the pending motion. This Commission does in fact thus have the authority to order the return of that deposit pursuant to 220 ILCS 56/9-252.

B. THE FIRST AMENDED COMPLAINT ADEQUATELY STATES CLAIMS FOR BREACH OF CONTRACT FOR WHICH RELIEF CAN BE GRANTED (2-615)

Counts II, III and IV of the First Amended Complaint all adequately state causes of action for breach of contract. The First Amended Complaint alleges that NICOR had and has broad discretion under its published Schedules of Rates and Terms and Conditions and Rider 13, and that NICOR voluntarily agreed to contractually limit that discretion.

The First Amended Complaint alleges that:

13. NICOR's Rider 13 gives NICOR the discretion to request deposits from gas providers like Windy City with respect to pools created by the providers among their customers. NICOR has the discretion to require deposits up to two times the monthly gas usage by such pools.

14. NICOR had and has broad discretion pursuant to the Schedule of Rates for Gas Service and Terms and Conditions in ensuring continuous service, declaring Critical Days, and requesting deposits from suppliers like Windy City.

15. In addition to the NICOR/Windy City Contract, Windy City and NICOR have had a course of dealing pursuant to which NICOR has exercised its discretion pursuant to its Schedule of Rates and Terms and Conditions.

16. That course of dealing constitutes additional terms of the contract between NICOR and Windy City and Windy City has taken actions and invested significant sums in reliance on NICOR's abiding by the terms of the Windy City Contract and the parties' course of dealings.

As NICOR notes, the Critical Day Definition in NICOR's Terms and Conditions provides that "A Critical Day shall be a day which **may** be declared by [NICOR]...." (Motion to Dismiss, pg. 4) The use of the word "may" clearly makes the declaration of Critical Days discretionary with NICOR. And there is **nothing** in NICOR's published

Terms and Conditions, or Rider 13, that prevents NICOR from contractually defining the limits on its exercise of that discretion as alleged in the First Amended Complaint.

NICOR Claims that “Windy City cannot plead the essential elements of a breach of contract claim because Nicor Gas' obligation to provide continuous service derives, not from a contract, but from the Company's tariff, which carries the force of a statute.”

(Motion to Dismiss, pg. 9) But Windy City does not allege that NICOR breached its obligation to provide Continuous Service pursuant to its published Terms and Conditions. Windy City alleges that NICOR had discretion on the issue of declaring Critical Days, and the resulting penalties, and that it contractually limited that discretion with Windy City so that Windy City could properly plan and run its business.

Windy City alleges that “Windy City has entered into a series of contracts with NICOR in reliance on the parties' course of dealings and has entered into contracts with its own customers in reliance on NICOR's obligation to deliver gas to Windy City customers **at commercially reasonable rates.**” (First Amended Complaint, ¶ 16). The excessive penalties charged by NICOR due to its improperly called Critical Days were a breach of that contractual obligation.

If NICOR could show that its Schedule of Rates, Terms and Conditions, or Rider 13, precluded such a voluntary limitation on its discretion, that might defeat Windy City's claims. But that is a question of fact, and not a proper issue for resolution on a 2-615 motion to dismiss.

1. COUNT III PROPERLY STATES A CLAIM FOR BREACH OF CONTRACT – GOOD FAITH AND FAIR DEALING

NICOR claims again that Nicor Gas' obligations to Windy City are governed by its tariff, “not a contract that could be alleged to include an implied duty.” (Motion to

Dismiss, pg. 10). In point of fact, Windy City has expressly alleged that NICOR agreed to contractually limit its discretion under its tariff. NICOR cannot dispute these allegations in a 2-615 motion to dismiss.

NICOR is correct that the duty of good faith and fair dealing is “an aid to interpretation, not a source of contractual duties or liability under Illinois law.” *Zeidler v. A & W Rests, Inc.*, 301 F.3d 572, 575 (7th Cir. 2002) It serves as an aid in determining the intent of the parties.

In Illinois, a contract may be express or implied. Implied contracts are those where the agreement is inferred from the acts or conduct or course of dealings of the parties. *In Re Estate of Brumshagen*, 27 Ill.App.2d 14, 169 N.E.2d 112, 116 (2d Dist.1960). An implied contract is proven by circumstances showing that the parties intended to contract or by circumstances showing the general course of dealing between the parties. *In re Estate of Brumshagen*, 27 Ill.App.2d 14, 23, 169 N.E.2d 112, 117 (2nd Dist. 1960)

The implied contract Windy City alleges does not conflict with or vary NICOR's Tariff, but supplements it. Windy City alleges that NICOR, by its course of dealings with Windy City, agreed to limit its exercise of discretion with respect to Critical Days, and the associated penalties. In fact, the requirement that NICOR perform its obligations in good faith and with fair dealing is analogous to the statutory requirement that it not assess “excessive and unjust” penalties.

NICOR has not cited to any legal authority that limits its authority to enter contractual agreements limiting its statutory discretion. Nor has Windy City alleged any contractual agreement by NICOR that would conflict with its statutory tariffs. In short, NICOR had the right to declare Critical Days in its sole discretion. The Amended

Complaint alleges that NICOR had uniformly exercised that discretion to not declare Critical Days, even when it had the discretion to do so.

Windy City has not alleged that NICOR could never declare a Critical Day. That would be in clear contravention of the tariff. Windy City instead alleges that NICOR, by its practice and by its course of dealings with Windy City, contracted to provide Continuous Service to Windy City's customers at a commercially reasonable rate, except when the declaration of such Critical Days were in fact necessary. The fact that NICOR could have declared any number of Critical Days on prior cold days in the years immediately preceding the time at issue, **and did not do so**, demonstrates that the declarations and resulting penalties in this case were not **required** by the Tariff, but were in the discretion of NICOR.

Windy City does not challenge the rate NICOR normally charged Windy City. It does not challenge the penalty rate for over usage during Critical Days in the tariff and agreement with Windy City. Windy City does not challenge the right of NICOR to declare Critical Days under appropriate circumstances and then charge the set penalty rate if Windy City used gas in excess of that allowed for Critical Days. Windy City simply alleges that NICOR had a contractual obligation to exercise its discretion in each of those instances in a manner that would be “commercially reasonable” for Windy City and its customers.

If NICOR declared Critical Days, and assessed the resulting penalties, as a matter of economic necessity, then there would be no breach of contract. NICOR would be expected to exercise its discretion in a manner which would protect itself and its customers. That would in itself be commercially reasonable, even with a resulting

increased cost to Windy City. But under the facts alleged in the First Amended Complaint, which must be taken as true, that was not the case here.

Windy City also alleges that there was an enormous increase in the market price of gas as a direct result of NICOR's declaration of excessive Critical Days. (First Amended Complaint ¶ 28). Windy City further alleges that that spike in prices prevented Windy City from being able to supply the additional gas to NICOR required when Critical Days are declared. (First Amended Complaint ¶ 29) Windy City has thus alleged that NICOR breached its contractual duty to Windy City by calling discretionary Critical Days that made it impossible for Windy City to meet its obligations pursuant to Rider 13, and that NICOR then assessed Windy City penalties in the amount of \$396,150.80. These combined actions of discretion by NICOR breached its contractual duty to Windy City to provide continuous service to Windy City's customers at a commercially reasonable rate.

2. COUNT IV PROPERLY STATES A CLAIM FOR BREACH OF CONTRACT – ESTOPPEL

NICOR claims again that Windy City cannot assert a claim for breach of contract, based on estoppel because “Windy City received Continuous Service from Nicor Gas as provided for in the Company's tariff and Windy City fails to allege any facts showing that Nicor Gas must provide such Continuous Service at any rate other than the applicable rate provided under its tariff.” (Motion to Dismiss, pg. 12). But as set forth above, Windy City has alleged that NICOR agreed contractually to limit its exercise of discretion,

But the issue is not whether NICOR performed its statutory obligation to provide Continuous Service as defined in its tariff. The issue raised by the First Amended Complaint is whether NICOR complied with its voluntarily accepted contractual

limitation on its discretion in declaring Critical Days and assessing penalties.

NICOR has cited to no authority limiting its ability to voluntarily, contractually limit its broad discretion in those regards. The question of whether NICOR in fact did so limit its discretion may be disputed by NICOR, but that again is an issue of fact and cannot be resolved on a motion to dismiss.

C. THIS COMMISSION SHOULD DETERMINE WHETHER WINDY CITY IS ENTITLED TO DECLARATORY RELIEF (2-615)

NICOR's own Motion to Dismiss demonstrates why this Commission has jurisdiction to determine Windy City's right to declaratory relief in Count V of the First Amended Complaint. NICOR alleges in its motion pursuant to section 2-619 that all of Windy City's claims are barred by the filed-rate doctrine.

As noted by NICOR, the filed rate doctrine provides that "rights as defined by tariff cannot be varied or enlarged by either contract or tort." *Am. Tel. & Tel. Co. v. Cnet. Office Tel., Inc.* 524 U.S. 214, 227 (1998). Windy City maintains that the contractual obligations alleged in the First Amended Complaint do not vary or enlarge any rights under NICOR's tariff. Instead, Windy City alleges that NICOR has voluntarily agreed to limit its exercise of its broad discretion to allow Windy City to properly plan and manage its affairs.

NICOR's motion pursuant to section 2-619 admits the truth of the facts alleged and the sufficiency of the claims stated in the First Amended Complaint. NICOR's motion thus must admit that the parties established a contractual agreement by which NICOR limited the exercise of its broad discretion with respect to declaring Critical Days and assessing the accompanying penalties. The issue thus raised by the motion to dismiss is whether those properly pleaded claims are barred by the filed-rate doctrine.

As NICOR itself claims, its filed tariff “carries the force of a statute. *Sheffler*, 2011 IL 110166, ¶ 28.” (Motion to Dismiss, pg., 9). If Windy City filed its complaint for declaratory relief (and its contract claims as well) in the circuit court, NICOR would assert the defined-rate doctrine and its statutory tariff as affirmative defenses. The circuit court would then likely dismiss the claims as falling under the exclusive jurisdiction of this Commission because of the statutory defense necessarily implicated by Windy City's claims. This Commission does therefore have jurisdiction over Windy City's claim for declaratory relief pursuant to 200.220 of its Rules of Procedure.

D. THE CLAIMS IN THE AMENDED COMPLAINT ARE NOT BARRED BY THE FILED RATE DOCTRINE OR BY NICOR'S TARIFF(2-619)

As set forth above, Windy City has not alleged any contractual obligation that conflicts with the express terms of the applicable tariff. Nor does NICOR set forth any such conflicts in its motion to dismiss. The real issue raised by NICOR therefore is whether NICOR even **can** contractually limit its discretion under the relevant tariff, Terms and Conditions and Rider 13, and if so, to what extent.

The filed rate doctrine alleged by NICOR is more properly an affirmative defense, because it relies on the determination of disputed facts. More importantly, NICOR is raising this defense against ALL of Windy Cities' claims.

As set forth more fully above, and contrary to the claims in NICOR's Motion to Dismiss, Windy City is not challenging the rates in NICOR's tariffs, nor the calculation of the assessed penalties. It is challenging NICOR's exercise of its discretion in declaring Critical Days and assessing penalties contrary to its contractual obligations as set forth above. Under the facts alleged, that is the basis for Windy City's claims.

In its motion, NICOR claims that “Windy City cannot hold NICOR to a standard of service other than that established in the Company's tariff.” (Motion to Dismiss, pg.8) But the “standard of service” with respect to Critical Days is a simple delegation of discretion to NICOR. The issue then is not whether NICOR had the discretion to declare Critical Days, but whether its exercise of that discretion was improper because NICOR agreed to exercise its discretion in a commercially reasonable manner.

As a contract claim, its conduct as alleged in the First Amended Complaint constitutes a breach contract and a breach of the covenant of good faith and fair dealing. As a statutory claim it constitutes “excessive and unjust charges.” The question raised by the Amended Complaint, which cannot be determined pursuant to either section 2-615 or 2-619, is whether NICOR's declaration of the Critical Days was improper under the facts alleged.

In *Am. Tel. & Tel. Co. v. Cnet. Office Tel., Inc.* 524 U.S. 214, 227 (1998), the plaintiff claimed that the utility “promised various service, provisioning, and billing options in addition to those set forth in the tariff.” 524 U.S., at 222. The claimed contract thus varied the terms of the tariff, by requiring the provision of services and billing options not provided therein. The Supreme Court held that “even if a carrier intentionally misrepresents its rate and a customer relies on the misrepresentation, the carrier cannot be held to the promised rate if it conflicts with the published tariff.” 524 U.S., at 222.

In this case, the First Amended Complaint does not allege any added services or billing options. Nor does it allege that NICOR made representations inconsistent with its “promised rate.” It simply alleges that NICOR agreed contractually **how** it would exercise its discretion in the declaration of Critical Days and assessment of accompanying penalties. These obligations did not vary the services provided by NICOR, alter its rates,

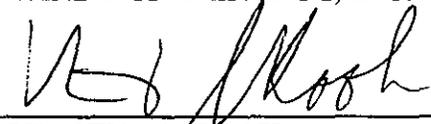
or affect in any way the calculation of penalties. They simply gave Windy City some certainty that NICOR would exercise its discretion in a commercially reasonable manner.

Because the contractual terms alleged by Windy City do not vary in any way the terms of the tariff, Rules and conditions or Rider 13, they are not barred by NICOR's tariff or the filed-rate doctrine.

IV. CONCLUSION

For the reasons set forth above, NICOR's Motion to Dismiss Windy City's First Amended Complaint should be denied.

WINDY CITY ENERGY, INC.

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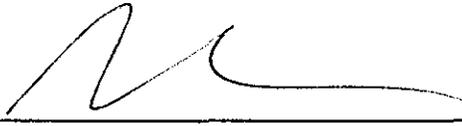
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STATE OF ILLINOIS)
)
COUNTY OF KANE)

VERIFICATION

I, Gary McGuane, one of the attorney's for Windy City Energy, Inc., being duly sworn and under oath, states that I have prepared and read the foregoing Windy City Energy's Verified Response to Nicor Gas Company's Motion to Dismiss the First Amended Complaint and know to the best of my knowledge that the allegations contained therein are true and correct.



GARY MCGUANE
One of the Attorneys for
WINDY CITY ENERGY, INC.
COMPLAINANT

Subscribed and Sworn to before me
This 21st day of September, 2015.





Notary Public

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

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NOTICE OF FILING AND CERTIFICATE OF SERVICE

Take note that on September 21, 2015, Vincent S. Cook, Esq. caused to be filed the Windy City Energy, Inc., Windy City Energy's Verified Response to NICOR Gas Company's Verified Motion to Dismiss the First Amended Complaint in the above captioned proceeding with Elizabeth Rolando, Chief Clerk of the Illinois Commerce Commission via regular mail. Furthermore, I, Vincent Cook, hereby certify that a copy of the forgoing document and this Notice of Filing were served upon the service list in Docket No. 14-0709 by email and/or US Postal Service on September 21, 2015.

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