

**OFFICIAL FILE**  
**ILLINOIS COMMERCE COMMISSION**

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STATE OF ILLINOIS

**ORIGINAL**

COMMERCE COMMISSION

2003 SEP 11 P 2:05

CHIEF CLERK

COTTONWOOD FARM, INC.  
(an Ill. Corporation),  
Petitioner,

vs.

EXELON CORPORATION, and  
COM ED. (a division of Exelon  
Corporation formerly known as  
Commonwealth Edison Company)  
Respondents.

Case No. 02-0662

**RESPONSE TO RESPONDENT'S MOTION FOR SUMMARY JUDGMENT**

I

**COTTONWOOD RECEIVED NO ACTUAL OR CONSTRUCTIVE  
NOTICE OF THE INCORRECT BILLING FOR THE GUM PROPERTY.**

How can COTTONWOOD be required to prove that it received constructive notice on ComEd's incorrect billing? COTTONWOOD cannot prove the negative. The billing to COTTONWOOD for the Gum property was one of eight meters billed by ComEd to COTTONWOOD. For ComEd to argue that COTTONWOOD is under an affirmative duty to check all of their bills against all of their meters is disingenuous at best. In the final analysis ComEd took money belonging to COTTONWOOD, and provided no service or benefit to COTTONWOOD.

ComEd held the money under a Constructive Trust for the benefit of COTTONWOOD, or is required to return COTTONWOOD's payment, under the Unjust Enrichment Doctrine.

A  
CONSTRUCTIVE TRUST

A Constructive Trust is one raised by operation of law as distinguished from a trust created by express agreement between the settler and the trustee. It is imposed by a court of equity to prevent a person from holding for his own benefit an advantage which he has gained by reason of a fiduciary relationship or by fraud, Anderson vs. Lybeck, 54 NE 2<sup>nd</sup> 259,15 Ill.2<sup>nd</sup> 227 (1958).

ComEd has been holding COTTONWOOD's payment, as constructive trustee for the benefit of COTTONWOOD FARM. The purpose of a constructive trust, in addition to preventing unjust enrichment is to make available against the involuntary trustee all the conventional remedies available against a conventional fiduciary for breach of duty. That is David vs. Russo, 74 Ill.Dec. 840, 456 NE 2<sup>nd</sup> 342,119 Ill.App. 3<sup>rd</sup> 290 (1<sup>st</sup> District-1983). ComEd must return the monies it holds for the benefit of COTTONWOOD plus interest.

B  
UNJUST ENRICHMENT

HPI Healthcare vs. Mount Vernon Hospital, 137 Ill.Dec. 19,545 NE 2<sup>nd</sup> 672,131 Ill.2<sup>nd</sup> 145 (1989), states that a plaintiff must allege that the defendant has unjustly retained a benefit to the plaintiff's detriment, and that defendant's retention of the benefit violates the fundamental principles of justice, equity, and good conscience.

The theory of unjust enrichment is based upon a finding of a contract implied in law. The essential element of a contract implied in law is the receipt of benefits by one party which it would be inequitable for him to retain without payment; it is predicated on

the principle that no one should unjustly enrich himself at another's expense. Schlosser vs. Welk, 140 Ill.Dec. 605,550 NE 2<sup>nd</sup> 241,193 Ill.App. 3<sup>rd</sup> 448 (3<sup>rd</sup> District-1990).

It would be an injustice for the defendant to receive this benefit without paying the plaintiff for it, Partipilo vs. Hallman, 109 Ill.Dec. 387,510 NE 2<sup>nd</sup> 8,156 Ill.App. 3<sup>rd</sup> 806 (1<sup>st</sup> District-1987).

Unjust enrichment recovery requires a showing that the defendant has voluntarily accepted a benefit which would be inequitable for him to retain without payment since the law implies a promise to pay compensation when value of services are knowingly accepted. Premier Electrical Construction Company vs. LaSalle National Bank, 87 Ill.Dec. 721,477 NE 2<sup>nd</sup> 1249,132 Ill.App. 3<sup>rd</sup> 485 (1<sup>st</sup> District-1984).

What can be clearer? COTTONWOOD paid to ComEd the sum of \$18,182.03, and received no benefit in return; it is inequitable for ComEd to retain this money. Clearly, it cannot enrich itself at COTTONWOOD's expense. This Tribunal must prevent this injustice .

## II ACCOUNT STATED

ComEd has misstated and misapprehended the doctrine of "Account Stated". Dreyer Medical Clinic vs. Corral, 169 Ill.Dec. 231,591 NE 2<sup>nd</sup> 111,227 Ill.App. 3<sup>rd</sup> 221 (2<sup>nd</sup> District-1992), states the Illinois position on "account stated"; it can not be the instrument to create an original liability. It merely determines the amount of the debt where liability previously existed, and cannot create a liability per se where none before existed.

"Account Stated" must demonstrate the mutual ascent of both creditor and debtor,

Toth vs. Mansel, 152 Ill.Dec. 853,207 Ill.App. 3<sup>rd</sup> 665,566 NE 2<sup>nd</sup> 730 (1<sup>st</sup> District-1991).

For an account stated to be present between ComEd and Cottonwood, there must be an original agreement for Cottonwood to request electrical service on the Gum property, and have agreed to pay for it; neither was present.

### III LACHES

LaSalle National Bank vs. Dubin, 271 Ill.Dec. 803,337 Ill.App. 3<sup>rd</sup> 345,785 NE 2<sup>nd</sup> 997 (1<sup>st</sup> District-2003) states "whether the defense of laches is available is to be determined upon the facts and circumstances of each case. Like any affirmative defense, the burden is on the defendant to establish laches by a preponderance of the evidence. The party asserting estoppel (through laches) must show prejudice or hardship rather than mere passage of time and must demonstrate that the delay induced him to adversely change his position. Lack of diligence must result in some inequity to the adverse party such that it would be unfair and unjust to allow the belated assertion of the claim. If the defendant is not injured by the delay, laches is inapplicable".

In Pyle vs. Ferrell, 147 NE 2<sup>nd</sup> 341,12 Ill.2<sup>nd</sup> 547 (1958), the Supreme Court states the rules for barring a lawsuit because of laches. The rules are as follows:

1. Conduct on the part of the defendant giving rise to the situation of which complaint is made and for which the complaint seeks remedy.
2. Delay in asserting the complainant's rights, the complainant having had notice or knowledge of defendant's conduct and the opportunity to institute a suit.
3. Lack of knowledge or notice on the part of the defendant that the complainant would assert the right on which he bases his suit and for injury or prejudice to the

defendant in the event relief is accorded to the complainant or suit is held not to be barred.

Slatin's Properties, Inc. vs. Hassler, 291 NE 2<sup>nd</sup> 641,53 Ill.2<sup>nd</sup> 25 (1972), stated that laches is defined as such neglect or omission to assert a right taken in conjunction with the lapse of time of more or less duration in other circumstances causing prejudice to an adverse party, as will operate to bar relief in equity.

How has ComEd been injured by the actions of COTTONWOOD? ComEd possesses the money submitted by COTTONWOOD; it can show no prejudice.

#### IV STATUTE OF LIMITATIONS DISCOVERY RULE

It is uncontroverted that COTTONWOOD discovered the incorrect billing on or about March, 2003. Shortly thereafter, this action was filed with this Tribunal.

The Discovery Rule mandates that the Statute of Limitations starts to run when a person knows or reasonably should know his injury and also knows or reasonably should know that is was wrongfully caused; Bashton vs. Ritko, 115 Ill.Dec. 296,164 Ill.App. 3<sup>rd</sup> 37,517 NE 2<sup>nd</sup> 707 (3<sup>rd</sup> District-1987).

The effect of the discovery rule is to postpone the starting of the period of limitations until the injured party knows or should have known of his injury, Kinsey vs. Scott, 79 Ill.Dec. 584,124 Ill.App. 3<sup>rd</sup> 329,463 NE 2<sup>nd</sup> 1359 (2<sup>nd</sup> District-1984).

The discovery rule was first articulated in Rozny vs. Marnul 43 Ill.2<sup>nd</sup> 54,250 NE 2<sup>nd</sup> 656 (1969). The Court stated as follows: "the basic problem is one of balancing the increase in difficulty of proof which accompanies the passage of time against the

hardship to the plaintiff who neither knows nor should have known of the existence of his right to sue. There are some actions in which the passage of time, from the instant when the facts give rise to liability occurred, so greatly increases the problems of proof that it has been deemed necessary to bar plaintiffs who had not become aware of their rights of action within the statutory period as measured from the time such facts occurred. But where the passage of time does little to increase the problems of proof, the ends of justice are served by permitting plaintiff to sue within the statutory period computed from the time at which he knew or should have known of the existence of the right to sue."

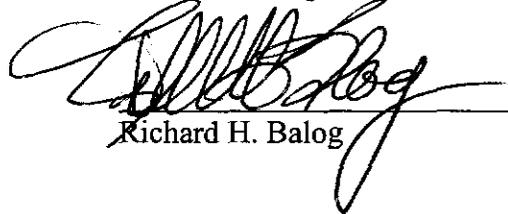
This rule was followed in Knox College vs. Celotex, 40 Ill.Dec. 945,407 NE 2<sup>nd</sup> 176,85 Ill.App. 3<sup>rd</sup> 714 (3<sup>rd</sup> District-1980).

COTTONWOOD relies on the ends of justice, articulated by the Supreme Court in Rozny vs. Marnal, and on the discovery rule to defeat any Statute of Limitation claim raised by ComEd.

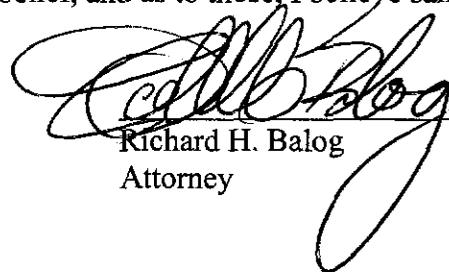
#### CONCLUSION

The Motion for Summary Judgment submitted by ComEd is raft with conclusions, suppositions, and innuendo. Their position concerning notice, account stated, laches, and the Statute of Limitations is without merit.

WHEREFORE, the Petitioner, COTTONWOOD FARM, prays that this Honorable Tribunal deny ComEd's Motion for Summary Judgment and award COTTONWOOD FARM such other and further relief in the premises this Tribunal shall deem meet and just.

  
Richard H. Balog

I, Richard H. Balog, first being duly sworn upon oath deposes and say that I am Attorney of Cottonwood Farm, Inc., a Corporation formed under the laws of the State of Illinois; that I have read the above and foregoing Response by me subscribed and know the contents thereof; that said contents are true in substance and in fact, except as to those matters stated upon information and belief, and as to those, I believe same to be true.

  
Richard H. Balog  
Attorney

Subscribed and Sworn to before me this \_\_\_ day  
of \_\_\_\_\_, 2003.

\_\_\_\_\_  
Notary Public

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To: Ms. Elizabeth Rolando  
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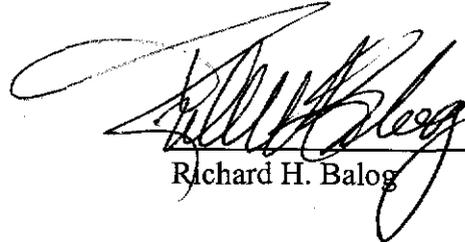
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Judge Terrance A. Hilliard  
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**PROOF OF FILING**

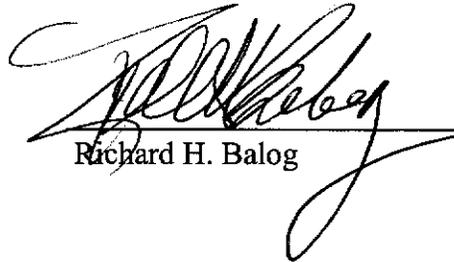
On September 10, 2003, I have caused the attached Response to Respondent's Motion for Summary Judgment to be filed with the Chief Clerk of the Illinois Commerce Commission.



Richard H. Balog

**PROOF OF SERVICE**

The undersigned certifies that a the foregoing Response to Respondent's Motion for Summary Judgment was served upon the Illinois Commerce Commission and attorney for Exelon Corporation to the above cause by enclosing the same in an envelope and addressed to such Attorney at his last known business address, with postage fully prepaid and by depositing said envelope in a United States Post Office Mail Box in Geneva, Illinois on the 10<sup>th</sup> day of September, 2003.

  
Richard H. Balog

Signed and Sworn to before me this  
\_\_\_ day of September, 2003.

\_\_\_\_\_  
Notary Public

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