IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

Robin HAWKINS, *et al.*,	)	
	)	
Plaintiffs,	)	Case No. 2013-CH-09126
	)	
v.	)	Judge Mary Lane Mikva
	)	
COMMONWEALTH EDISON COMPANY,	)	Calendar 6
	)	
Defendant.	)	

DEFENDANT COMMONWEALTH EDISON COMPANY'S
MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS

The Complaint should be dismissed pursuant to Section 2-619 because (1) the General Assembly recently passed legislation that eliminates any conceivable basis for the action; (2) the Court lacks subject matter jurisdiction, exclusive jurisdiction being in the Illinois Commerce Commission ("ICC"); and (3) plaintiffs lack standing. The Complaint also should be dismissed pursuant to Section 2-615 because the damages it seeks are speculative and not recoverable.

I. PUBLIC ACT 98-0015 ESTABLISHES THAT COMED IS NOT IN DEFAULT OF ANY ICC ORDER AND THUS REQUIRES DISMISSAL OF THIS ACTION PURSUANT TO SECTION 2-619.

This action is brought under Section 5-201 of the Illinois Public Utilities Act (the "Act"), which provides in relevant part that if a public utility omits to do any act required by an order of the ICC, the utility will be liable for any resulting loss or damage and an action to recover such loss or damage may be brought in the circuit court. 220 ILCS 5/5-201. The Complaint alleges, in summary, that Commonwealth Edison Company ("ComEd") failed to comply with an Order entered by the ICC in June 2012. This Order approved a plan submitted by ComEd to install so-called "smart meters" pursuant to the provisions of the Energy Infrastructure Modernization Act of 2011 ("EIMA") beginning in September 2012. The June 2012 Order was modified by the ICC on rehearing, in December 2012, to provide for a delayed schedule for the installation of the

meters, beginning in 2015. Although the December 2012 Order supersedes the June 2012 Order, the Complaint alleges that ComEd failed to comply with the June 2012 Order and that this alleged non-compliance reduced the benefit of the smart meters to ComEd's customers by $182 million. Plaintiffs seek to recover that amount on behalf of all ComEd customers.

On May 22, 2013, however, the General Assembly enacted a provision that clarifies that ComEd is not in default of any ICC Order, including the June 2012 Order.[1] Public Act 98-0015 ("P.A. 98-0015") enacts a new subsection (l) of Section 16-108.5 of the Act, and became effective May 22, 2013. P.A. 98-0015 (eff. May 22, 2013) (amending 220 ILCS 5/4-301 and 220 ILCS 5/16-108.5). In relevant part, P.A. 98-0015 provides that ComEd shall be "deemed to have been in full compliance with the requirements of ... Section 16-108.6 of this Act, and all Commission orders entered pursuant to Section[ ] ... 16-108.6 of this Act. ..." The June 2012 ICC Order approving ComEd's proposed meter deployment schedule was entered pursuant to Section 16-108.6. Enactment of P.A. 98-0015 therefore removes any conceivable basis for plaintiffs' Complaint and requires that it be dismissed pursuant to Section 2-619.

II. THE ICC'S EXCLUSIVE JURISDICTION OVER THIS ACTION MANDATES DISMISSAL PURSUANT TO SECTION 2-619.

A. Statutory Background.

This case does not fall within the Court's subject matter jurisdiction. *See Sheffler v. Commonwealth Edison Co.*, 2011 IL 110166 (discussed in Section II.B, *infra*). The ICC has wide-ranging authority over Illinois public utilities like ComEd. This authority extends to

[1] ComEd does not concede that it was in default of any ICC Order and believes it would prevail on this issue even in the absence of P.A. 98-0015. The issue concerning non-compliance with the June 2012 Order was not the subject of any evidence or argument and was not necessary to support the ultimate conclusions in the ICC's December 2012 Order, and thus the statement as to non-compliance is nonbinding *dictum*. Furthermore, because the December 2012 Order granted ComEd the relief which it sought, ComEd was likely not a party "affected" by that Order and thus would have lacked standing to appeal that Order under Section 10-201 of the Act. 220 ILCS 5/10-201.

virtually all aspects of ComEd's activities: financing, construction of facilities, accounts and records, transactions with affiliates and rates the utility may charge. The Act confers upon the Commission "general supervision of all public utilities." 220 ILCS 5/4-101. EIMA, a 2011 amendment to the Act described more fully below, is a recent example of the ICC's legislatively granted extensive authority over public utilities.

The General Assembly enacted EIMA to revitalize the State's energy infrastructure, create jobs, promote economic growth, improve reliability and increase energy efficiency. To implement this unprecedented modernization project, the legislature structured EIMA around three features: (1) investment to benefit customers, (2) performance standards to ensure those benefits are realized and delivered to customers, and (3) a new regulatory model that provides a stable funding mechanism for the utility, through a "formula" rate. Although a public utility's participation is voluntary, as long as it elects to participate it must comply with each EIMA requirement or be subject to the comprehensive penalty and enforcement mechanisms prescribed in EIMA. The ICC was charged with the exclusive authority to oversee the implementation of each piece of EIMA. 220 ILCS 5/16-108.5; 220 ILCS 5/16-108.6. As described below, the pieces fit together into an integrated whole.

By electing to participate in EIMA, ComEd committed to invest an estimated $2.6 billion above its baseline level of investment. Of this amount, an estimated $1.3 billion will be spent to modernize ComEd's transmission and distribution infrastructure, including the installation of smart meters and systems (called "Advanced Metering Infrastructure" or "AMI") to, among other things, improve system reliability and performance, provide customers with real-time usage and pricing information and lower the cost of providing electric service. The remaining EIMA investment will be for other electric system upgrades, modernization projects, and job

training facilities. ComEd also agreed to create, during a "peak" year, 2,000 new jobs and to contribute millions of dollars to energy-related low-income support programs.

To ensure the AMI investment is made, EIMA requires that ComEd file an AMI Deployment Plan ("AMI Plan") within 180 days of the legislation's effective date. ComEd did so, and that was the plan that was initially approved by the June 2012 Order. However, in May 2012 the ICC issued its first order approving the formula rate cost recovery mechanism, which unexpectedly imposed on ComEd an annual revenue shortfall of $100 million. ComEd then petitioned the ICC for rehearing of the meter deployment schedule and proposed to postpone the start of deployment from 2012 until 2015. While the ICC's December 2012 order on rehearing approved ComEd's revised schedule, P.A. 98-0015 requires that the Commission issue an order accelerating that revised deployment schedule. 220 ILCS 5/16-108.5(*l*)(1)(A).

EIMA further requires that the ICC oversee AMI deployment, 220 ILCS 5/16-108.6(c), and, on April 1, 2013, ComEd filed with the ICC its first annual AMI progress report. The ICC opened an investigation regarding that report on April 9, 2013. ICC Dkt. No. 13-0285. If the ICC finds that ComEd's progress in implementing the AMI Plan is materially deficient, the ICC must issue an order (by July 1, 2013) requiring ComEd to devise a corrective action plan to bring implementation back on schedule with the AMI Plan. 220 ILCS 5/16-108.6(e). On June 5, 2013, moreover, the ICC issued an order in Docket No. 13-0285 setting the accelerated deployment schedule required by P.A. 98-0015. 220 ILCS 5/16-108.5(*l*)(1)(A).

Significantly, the General Assembly also provided an enforcement mechanism within EIMA to ensure that the benefits of the required infrastructure investment, including savings realized through AMI deployment, are delivered to customers. 220 ILCS 5/16-108.5(f). Pursuant to EIMA's requirements, ComEd filed a petition with the ICC seeking approval of its

multi-year performance plan on December 8, 2011. ICC Dkt. No. 11-0772. This plan is designed to achieve multiple performance improvements over ten years in several areas related to reliability of service, as well as reduce through AMI deployment energy consumption on inactive meters ("CIM"), unaccounted for energy ("UFE"), bad debt expense, and the number of estimated bills issued.

Importantly, if ComEd does not achieve the incremental annual performance goals for a given year, it is subject to penalties assessed by the ICC and must reduce its tariffed return on equity by an amount specified in EIMA. 220 ILCS 16-108.5(f-5). The ICC approved ComEd's metrics plan and accompanying penalty tariff on April 4, 2012. The first annual performance period for those metrics related to ComEd's non-AMI investment began on January 1, 2013. For the AMI-dependent metrics, the first annual performance period does not begin until August 1, 2013. Pursuant to EIMA, on June 1 of each year, ComEd will file a report with the ICC describing how it performed under each metric for the most recently completed performance year. The ICC is to evaluate each report, and if ComEd fails to meet its incremental annual performance goals, it will earn a lower return on equity for the relevant 12-month period as specified in the statute.

B. The Allegations of the Complaint Fall Squarely Within the ICC's Exclusive Jurisdiction.

The ICC has unquestioned exclusive authority to set rates charged, and to oversee infrastructure investments made in accordance with EIMA, by public utilities. *See Sheffler*, 2011 IL 110166 (discussed, *infra*). The allegations in the Complaint make it clear that in order to grant the relief requested therein, the Court would be required to invade space reserved to the ICC, including within the new and complex EIMA framework. This the Court should not do. Nor need it do so to protect customers' interests with respect to smart meter or AMI investment,

inasmuch as EIMA has vested the ICC with ample enforcement authority to do that, including the power to impose penalties for any non-compliance as alleged here.

The Complaint is clear that the benefits allegedly lost through delayed implementation of smart meters would be lost (or, conversely, realized) only through ComEd's rates. Quoting the testimony (from the ICC rehearing case) underlying the "damages" claim, it asserts: "the revised [smart] meter deployment delays the occurrence of CIM [consumption on inactive meters], UFE [unaccounted for energy] and bad debt. Also, the operational benefits are delayed." (Compl., 31.) The Black & Veatch analysis, upon which plaintiffs rely for their claim of reduced benefits, explicitly recognizes, however, that utility customers realize these kinds of benefits only through rates: "This means that ComEd's customers are saving money over the 20 year period, *assuming that customer rates are adjusted to capture all savings.*" (B&V Report (ComEd Ex. 6.02 REV) at 6-3, emphasis added).[2] This recognition is consistent with the fact that, under the Act, rates to customers are to reflect a utility's prudent and reasonable costs of service (220 ILCS 5/16-108.5(c)(1)); thus it is only through a reduction of costs that would otherwise need to be recovered from customers that AMI is expected to produce benefits. That ComEd's rates are at the center of this dispute is conclusively evident from the face of the Complaint, in that plaintiffs

[2] Plaintiffs have attached as Exhibit G to the Complaint selected pages from the update to the Black & Veatch analysis filed in ICC Docket No. 12-0298. As relevant documents filed in the ICC proceeding, the Court may take judicial notice of both the original Black & Veatch analysis (ComEd Ex. 6.02 REV) and the update (ComEd Ex. 17.01 REV) in connection with ComEd's motion to dismiss. *K. Miller Constr. Co., Inc. v. McGinnis*, 238 Ill. 2d 284, 291 2010 ("In ruling on a section 2– 615 motion ... matters of which the court can take judicial notice ... may be considered"); *Rural Elec. Convenience Co-op v. Illinois Commerce Comm'n,* 118 Ill. App. 3d 647, 651-652 (4th Dist. 1983) (holding that judicial notice may be taken of documents filed in an ICC proceeding if the documents are relevant (but declining to take judicial notice of a brief filed in an ICC proceeding because the brief was not relevant to the issues being considered by the court)).

seek to bring this case on behalf of all those who "pay delivery services charges to ComEd." (Compl. ¶ 40; *see also id.* at ¶ 34: the Class consists of all ComEd delivery services customers).

Although Section 5-201 grants jurisdiction to the circuit courts to entertain claims for damages, it has long been recognized that the ICC has "exclusive jurisdiction" over cases involving utility rates. Within a year of the passage of the Act, the Supreme Court recognized that where the Act provides a specific cause of action before the ICC for claims that rates are excessive or unreasonable, this statutory action supersedes any judicial claim based on the same facts. *Terminal R.R. Ass'n of St. Louis v. Public Utilities Comm'n,* 304 Ill. 312, 317 (1922). The Act provides for detailed ICC oversight of utility rates in effect and a remedy if those rates are found to be excessive. Section 9-252 of the Act provides that if the ICC finds after hearing that a utility has charged an "excessive" amount for its service, it may order that the utility make reparation therefor. The Illinois Supreme Court said very recently, "[t]he [ICC's] exclusive jurisdiction over rates is set forth in section 9-252 of the Act." *Sheffler*, 2011 IL 110166, ¶ 41.

Likewise, when a utility desires to change existing rates, the Act specifies that such changes are subject to ICC review and approval. Relevant here are Sections 9-201 of the Act, 220 ILCS 5/9-201, and the formula rate provisions of EIMA, 220 ILCS 5/16-108.5. Under Section 9-201, a utility desiring to increase its rates must file new tariffs with the ICC which is then authorized to suspend and investigate those tariffs and, after such investigation and hearing, approve tariffs setting forth "just and reasonable" rates. The rate setting provisions under EIMA similarly provide for annual updates of the formula rate, which are subject to ICC investigation, review and approval. 220 ILCS 5/16-108.5.

For the Court to enter any relief in favor of plaintiffs on account of "lost benefits," it would need to find that the rates charged to customers by ComEd at some indeterminate time –

likely far in the future (*see* Section IV, *infra*) – will be excessive or unjust and unreasonable because of the alleged failure to comply with the ICC's June 2012 AMI Order. As pointed out above, realization of these benefits depends on whether they are reflected in rates. The Court is ill-equipped to perform this task even if it had authority to do so. Moreover, in making its rate determination, the Court would, because of the well-established prohibition against "single issue ratemaking," conceivably need to engage in a comprehensive review of *all* the utility's costs. *Business & Professional People for the Public Interest v. Illinois Commerce Comm'n,* 146 Ill. 2d 175, 244-45. Accordingly, it would not be sufficient for the Court to analyze only the impact of the delayed implementation of AMI meters without considering all other changes in utility costs and revenues. Indeed, because of EIMA, this task is further complicated by the need to consider all of the EIMA rate impacts, including those resulting from performance metrics penalties. This is, however, a function the General Assembly has entrusted to the ICC.

Sheffler, supra, demonstrates that the circuit court lacks jurisdiction over plaintiffs' claims. There, plaintiffs sought damages for power outages to their homes following severe storms, alleging that ComEd negligently failed to maintain its facilities so that it could provide adequate, continuous, efficient and reliable power to customers, and that as a result plaintiffs suffered damages in the form of spoiled food, water damages to walls, furniture, appliances and equipment, and repair costs. The circuit court dismissed a series of complaints on grounds of lack of jurisdiction and the appellate court affirmed.

The Supreme Court, in affirming that the circuit court lacked jurisdiction, noted that the ICC exists to maintain a balance between the rates charged and the services provided by utilities.

> It has long been recognized that "in matters relating to services and rates of utilities technical data and expert opinion, as well as complex technological and scientific data, make it essential that the matter be considered by a tribunal that is itself capable of passing upon complex data." ... The [ICC] is to determine that a

> utility's rates are just and reasonable and that its services are adequate... Thus, the legislature has given the [ICC] broad powers, so that the [ICC] on its own initiative can promulgate orders, rules or regulations fixing adequate service standards and requiring adequate facilities.

2011 IL 110166, ¶ 40 (citations omitted).

Further, held the Court, where the "essence" of plaintiff's claim is that the rates are excessive, the remedy is before the ICC, through a claim for reparations under Section 9-252. Thus, if plaintiffs here claim that rates are *already* too high because of the delayed implementation of meters, their remedy is a claim for reparations under Section 9-252. If their claim is that *future* rates *may be* excessive, their remedy is at the ICC in future formula rate update or Section 9-201 rate proceedings. Regardless, the remedy is *not* an action for damages.

It is significant that the Supreme Court in *Sheffler* found the plaintiffs' claims to be rate claims and not damages claims under Section 5-201 *even though* they requested monetary damages for lost or ruined property, living expenses and personal injury, and they did not directly seek any change in ComEd's rates. Nonetheless, the Court held that by directly attacking the quality of ComEd's infrastructure and service, the plaintiffs were implicating ComEd's rates because of the close relationship between facilities and the rates needed to pay for those facilities. *Sheffler*, ¶¶ 53-56. Concluding, the Court stated:

> Where, as in this case, a plaintiff's complaint is based upon allegations concerning ComEd's infrastructure and its provision of electrical services, and seeks relief based upon systemic defects in the provision of electrical services or the repair of those services when a power outage occurs, that complaint seeks reparations and is within the exclusive jurisdiction of the Commission.

2011 IL 110166, ¶ 56.

Here, by way of comparison, plaintiffs cannot even disguise their claim for relief as ordinary civil damages, in the form of lost or damaged property, or personal injury. Theirs is simply a claim that because ComEd did not install some smart meters when it should have,

ComEd's rates either are or will be less beneficial for customers than they otherwise would have been. These claims are squarely within the ICC's jurisdiction, as the scope of that jurisdiction was interpreted by the Supreme Court less than two years ago. The ICC's exclusive jurisdiction mandates dismissal pursuant to Section 2-619.

III. PLAINTIFFS' LACK OF STANDING TO BRING A CLAIM UNDER SECTION 5-201 REQUIRES DISMISSAL PURSUANT TO SECTION 2-619.

Plaintiffs allege that their interests are the same as those of all other of ComEd's 3.8 million delivery services customers. Compl. ¶¶ 34-36, 40-45. Under Section 5-201 of the Act, however, a plaintiff has standing only if her claims are *different from* those of the public at large. Because plaintiffs' claims are in no way unique, as they themselves concede, they lack standing.

Section 5-201 provides that a utility that violates an order issued by the Commission "shall be liable to the persons or corporations affected thereby." 220 ILCS 5/5-201. Under Section 5-201, however, a person is not "affected" by a violation of an order unless the person has "a direct personal interest in the matter," as opposed to an interest that "is merely in common with that of the general public." *Diamond v. Gen. Tel. Co. of Illinois*, 211 Ill. App. 3d 37, 49 (2d Dist. 1991) ("We further note that the supreme court has stated that '[g]enerally, a person "affected" by a wrongful act is one who shows a direct personal interest in the matter as opposed to one whose interest is merely in common with that of the general public. The issue may be expressed as one of standing'"), citing *Churchill v. Norfolk & Western Ry. Co.*, 73 Ill. 2d 127, 139 (1978). As a result, cases properly brought under Section 5-201 do not (and cannot) rest on claims that rates are too high for all customers; rather, Section 5-201 cases typically involve a plaintiff who has suffered a unique or specialized injury due to a violation of an ICC order, rule or regulation. *See, e.g., Churchill*, 73 Ill. 2d 127, 139 (plaintiff had standing under Section 5-201

to assert a wrongful death action based on a railroad's violation of an ICC rule that required a railroad to keep its right-of-way reasonably clear of unnecessary obstructions).

Plaintiffs contend that they have suffered the same injury as "all delivery services customers of ComEd located in ComEd's service territory" as a result of ComEd's alleged failure to comply with the ICC's June 2012 meter deployment order. (Complaint, ¶¶ 34-36, 40-45.) By admitting that their alleged interest is the same as the interests of ComEd's 3.8 million other customers, plaintiffs concede that they have no standing. As they have no "direct personal interest in the matter," as opposed to an interest that "is merely in common with that of the general public," plaintiffs are not "affected" (and certainly are not uniquely affected) by ComEd's alleged failure to comply with the order and lack standing. *Diamond*, 211 Ill. App. 3d at 49. Plaintiffs' lack of standing requires dismissal pursuant to Section 2-619.

IV. THIS ACTION ALSO SHOULD BE DISMISSED PURSUANT TO SECTION 2-615 BECAUSE THE DAMAGES SOUGHT BY THE COMPLAINT ARE SPECULATIVE AND THUS UNRECOVERABLE.

The damages sought by the Complaint are speculative and unrecoverable. Under both the June 2012 Order and the December 2012 Order (and notwithstanding the accelerated meter deployment schedule approved in Docket No. 13-0285), all the smart meters will be installed across the ComEd service territory by the end of 2021. As shown by the table in paragraph 27 of the Complaint, the only difference in the schedule under the two orders is one of timing and sequencing, *i.e.*, under the Rehearing Order the smart meters will be installed later than they would have been under the initial order. Because the ICC duly approved the revised schedule, by an Order that has not been appealed by any party and is now final, no party has a right to complain of the modified, delayed schedule. It is, however, this *overall* delay – approved by the Rehearing Order – that is said to result in a diminution of benefits to customers in the amount of $182 million. (Compl. ¶ 31). Plaintiffs make much of this estimate, but it has nothing to do with

any consequences arising from ComEd's failure to comply with the June 2012 Order. The only conceivable impact of ComEd's alleged failure to comply with any ICC Order is that 131,000 meters (out of over 4 million) were not installed in 2012 as contemplated by the June 2012 Order. Failure to install meters other than those that would have been installed in 2012 results from the later ICC Order, not from ComEd's alleged *failure to comply* with an ICC order, but from the later ICC Order. (P.A. 98-0015 mitigates this by requiring installation sooner than under the December 2012 Order.) Any "harm" suffered by ComEd customers due to alleged non-compliance will be limited to at most whatever "lost benefits" might result from the delay in installing about 3.25% (131,000 ÷ 4,029,000) of the meters contemplated by the program.

Damages are not recoverable if they are not capable of reasonably accurate determination. "Damages cannot be based on potential or future loss, unless it is reasonably certain to occur, nor can damages be based on speculation and conjecture." *Platinum Tech., Inc. v. Fed. Ins. Co.*, 282 F.3d 927, 933 (7th Cir. 2002) (applying Illinois law). "The mere fear of contingent injury, which may never occur, and the happening of which is speculative and uncertain, is not a showing of damage." *Dep't of Transp., State of Illinois v. Lowdermann, LLC*, 367 Ill. App. 3d 502, 507 (3d Dist. 2006). Here, no damages can be incurred before rates are established by the ICC, and it is simply impossible to determine what rate-making action the ICC might take with respect to claims such as those raised by the Complaint. This is especially true given that, under EIMA, ComEd's failure to achieve a smart meter deployment goal could result in the imposition of financial penalties in the form of a reduction to ComEd's rates. 220 ILCS 5/16-108.5(f), (f-5). It is simply pure speculation for any judicial finder of fact to determine how ComEd's customers may be harmed by reason of the modest delay in installing a small percentage of meters, given the ICC's ability to act in this regard.

Although they attempt to do so, plaintiffs cannot rely on the record of the ICC proceeding to supply evidence of "lost benefits." Plaintiffs allege that in the December 2012 Rehearing Order the ICC "specifically found" that ComEd's "intentional delay" in the meter deployment schedule had "damaged ComEd customers" in the "net present value amount of $182,000,000" (Compl. ¶ 32). Even if this figure were relevant to this case, which (as explained above) it is not, the ICC made no such express finding. Instead at the cited page (28), the ICC simply recited *ComEd's evidence* of the impact of the *overall delay* in the deployment schedule, not the impact of the delay in installing the meters that were to have been installed in 2012. The ICC found only that the revised plan "reduces benefits" to customers, but did not quantify the reduction. (Rehearing Order at 28). No evidence appears in the record of the ICC proceeding, and the ICC made no finding whatsoever with respect to the only matter that is important in this case: any diminished benefits resulting from the delayed installation beyond 2012 of the 131,000 meters.

Moreover, that estimates of likely savings were presented to and relied upon by the ICC in approving the deployment schedules proposed by ComEd does not mean that damages are determinable.[3] The two analyses are different. EIMA simply requires a determination that total benefits will exceed total costs. 220 ILCS 5/16-108.6(c). That analysis was conducted over a 20-year planning horizon. Notably, the ComEd analysis showed that the costs of AMI

[3] The total amount of benefits expected to accrue from the program as initially conceived (and thus the $182 million which is the diminution of benefits from that initial program) was the subject of much controversy at the ICC hearings leading up to the approval of the ComEd program by the June 2012 Order. As reflected by that Order, two parties at the ICC contended that, under proper assumptions, little or no net benefits would result from the ComEd program. (*See* Ex. C to Compl. at 32-39.) The ICC ultimately rejected these arguments (correctly in ComEd's view) but the ICC did not find that customers would benefit by any specific amount, or (in the Rehearing Order) that the overall delay would diminish benefits by $182 million or by any other amount. The Rehearing Order concluded only that the revised deployment schedule was "supported by the entirety of the record and provides a defensible date for beginning meter installation and should be adopted." (December 2012 Order at 33, Conclusion (7).)

deployment would exceed the benefits *through 2021.* B&V Report at 6-1. All of the positive savings and thus *benefits to customers through rates* would occur in the ten years after 2022. Although this type of long-term economic analysis is standard for use in making investment decisions for utility assets having long lives, an award of damages in civil litigation requires more precise quantification than a "net benefit" showing.

This case is similar to a breach of contract case involving losses suffered by a new business enterprise with no established history of earnings or revenue. "Lost profits are allowed as measure of damage when a business is interrupted only if the business has been established prior to the interruption." *Hill v. Brown,* 166 Ill. App. 3d 867, 875 (4th Dist. 1988); *Stuart Park Assoc. Ltd. P'ship v. Am. Pension Trust,* 846 F. Supp. 701, 715 (N.D. Ill. 1994), *aff'd* 51 F.3d 1319, 1328 (7th Cir. 1995)). If the business did not exist prior to the breach of contract, the lost profits cannot be calculated to a reasonable certainty because the plaintiff cannot provide sufficient evidence or a comparison to what profits would have been had the contract not been breached. *Drs. Sellke & Conlon, Ltd. v. Twin Oaks Realty, Inc.,* 143 Ill. App. 3d 168, 174 (2nd Dist. 1986). The situation here is similar, in that no experience with implementation of smart meters exists in Illinois that would allow the finder of fact to make the required reasonably accurate determination of damages. Quite simply, too many factors, uncertainties and contingencies might occur in the future – including rate making, performance penalties or other regulatory decisions made by the ICC and the possibility that ComEd might lose or surrender its status as a "participating utility" – to make it possible to evaluate the effects of delayed installation of these meters, and in particular to estimate the amount of any economic loss that might result from this delayed implementation.

It should also be noted that even if, as plaintiffs allege, all customers will benefit from installation of any number of smart meters, plaintiffs do not and cannot allege that all customers would benefit *equally* from installation of only *some* meters. Not only will it be impossible to identify with any certainty at all which customers would have been among the 131,000 recipients of meters in 2012, but the Court would then be obligated to apportion the "lost benefits" between that "subclass" and the "subclass" of other ComEd customers. This apportionment itself would, of necessity, be speculative if not completely arbitrary. This action thus also should be dismissed pursuant to Section 2-615.

CONCLUSION

The Complaint should be dismissed with prejudice because (1) P.A. 98-0015 establishes that ComEd was not in default of the ICC's June 2012 Order; (2) the Court lacks subject matter jurisdiction, exclusive jurisdiction being in the ICC over infrastructure and "lost benefits" issues; (3) plaintiffs lack standing because they fail to allege that they were adversely affected differently than all other ComEd customers; and (4) the "damages" alleged are so inherently speculative and contingent upon many events far into the future that plaintiffs will be unable to prove damages to the reasonable degree of certainty required by Illinois law.

Respectfully submitted,

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