

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

ROBIN HAWKINS, *et al.*,

Plaintiffs,

v.

COMMONWEALTH EDISON COMPANY,
an Illinois corporation,

Defendant.

No. 13 CH 09126

Judge Mary L. Mikva

Calendar 6

OPINION AND ORDER

This case comes to the Court on Defendant Commonwealth Edison Company's Motion to Dismiss under 735 ILCS 5/2-619.1. For the reasons that follow, the Motion is GRANTED on jurisdictional grounds.

Background

On April 4, 2013, Plaintiffs filed a class action lawsuit on behalf of all electricity customers in Defendant Commonwealth Edison Company's ("ComEd") service territory. The Complaint seeks damages for ComEd's alleged violation of the Illinois Public Utilities Act ("PUA"), 220 ILCS 5/1-101 *et seq.*, by failing to comply with an Illinois Commerce Commission ("ICC") order requiring ComEd to begin deploying "smart meter" technology in September 2012. Plaintiffs request at least \$182 million in "actual" damages, which they claim was the net benefit ComEd's customers lost due to the delay, together with exemplary damages, interest, and attorneys' fees.

In 2011, the General Assembly passed the Illinois Energy Infrastructure Modernization Act ("EIMA"), Public Act 97-0616, amending the PUA. EIMA was enacted to revitalize the State's energy infrastructure with smart grid technology. The ICC is granted exclusive authority to oversee the implementation of EIMA. *See* 220 ILCS 5/16-108.5, -108.6.

ComEd filed a petition with the ICC in April of 2012, requesting approval of ComEd's smart grid plan under EIMA. On June 22, 2012, the ICC approved the plan with modifications and issued an order for smart meter deployment to begin in September 2012 (the "June 2012 Order"). In the June 2012 Order, the ICC rejected the new formula rate that ComEd had proposed.

ComEd sought a rehearing of the June 2012 Order, claiming that deployment was infeasible under the ICC's rate formula. ComEd also filed a motion asking the ICC to stay its June 2012 Order. The ICC granted ComEd a rehearing, and issued an order on December 5, 2012 (the "December 2012 Order"). The December 2012 Order noted that the June 2012 Order had not been stayed and was enforceable, and ComEd's failure to begin the smart grid deployment in September 2012 constituted noncompliance with the June 2012 Order. The December 2012 Order also adopted a revised deployment timeline, recognizing that ComEd's noncompliance with the September start date made the original timeline unachievable. *See* Plaintiffs' Ex. H at 32-33.

Plaintiffs filed suit alleging damages from ComEd's noncompliance with the June 2012 Order. On June 10, 2013, ComEd filed its Motion to Dismiss Plaintiffs' Complaint, asserting four grounds for dismissal. The Court is dismissing Plaintiffs' Complaint on the basis that it lacks subject matter jurisdiction because Plaintiffs' claims fall within the ICC's exclusive jurisdiction over rates and infrastructure under Section 9-252 of the PUA. In light of this holding, the Court finds it inappropriate to reach ComEd's other grounds for dismissal, including its contention that Public Act 98-0015, effective May 22, 2013, eliminates any basis for Plaintiffs' Complaint.

Analysis

ComEd argues that the ICC has exclusive jurisdiction under Section 9-252 and this Court therefore has no jurisdiction. Section 9-252 provides:

When complaint is made to the Commission concerning any rate or other charge of any public utility and the Commission finds, after a hearing, that the public utility has charged an excessive or unjustly discriminatory amount for its product, commodity or service, the Commission may order that the public utility make due reparation to the complainant therefor, with interest at the legal rate from the date of payment of such excessive or unjustly discriminatory amount.

220 ILCS 5/9-252.

In response, Plaintiffs maintain that the Court has jurisdiction under Section 5-201 of the PUA. Section 5-201 provides for circuit court jurisdiction

In case any public utility shall do, cause to be done or permit to be done any act, matter or thing prohibited, forbidden or declared to be unlawful, or shall omit to do any act, matter or thing required to be done either by any provisions of this Act or any rule, regulation, order or decision of the Commission, issued under authority of this Act, the public utility shall be liable to the persons or corporations affected thereby for all loss, damages or injury caused thereby or

resulting therefrom, and if the court shall find that the act or omission was wilful, the court may in addition to the actual damages, award damages for the sake of example and by the way of punishment. An action to recover for such loss, damage or injury may be brought in the circuit court by any person or corporation.

Id. § 5-201.

This Court's jurisdiction depends on whether this case falls under Section 9-252 as a rates case or Section 5-201 as one dealing with "loss, damages or injury" caused by ComEd's conduct. The line between rates reparations cases and civil damages cases is far from clear. *See, e.g., Thomas v. Peoples Gas Light & Coke Co.*, 2011 IL App (1st) 102868, ¶¶ 15–22 (surveying Illinois case law on the distinction). Recently, however, the Illinois Supreme Court interpreted the exclusive jurisdiction of the ICC broadly in *Sheffler v. Commonwealth Edison Co.* 2011 IL 110166. In light of *Sheffler*, this Court agrees with ComEd that it lacks jurisdiction to adjudicate this case.

Sheffler arose from power outages suffered by plaintiffs during severe storms. Plaintiffs alleged that the outages violated ComEd's duty under the PUA to provide continuous power to its customers. *Sheffler*, 2011 IL 110166, at ¶ 5. Plaintiffs also alleged negligence and breach of contract. *Id.* at ¶ 6. The Supreme Court held that, at bottom, plaintiffs were alleging rates reparations and that fell within the ICC's exclusive jurisdiction. *Id.* at ¶ 39. Where the complaint was "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 [ICC]." *Id.* at ¶ 56. The *Sheffler* Court noted that "the relief sought by plaintiffs was predicated on allegations that ComEd was not providing adequate service under the [PUA]." *Id.* at ¶ 50 (citing *Vill. of Deerfield v. Commonwealth Edison Co.*, 399 Ill. App. 3d 84, 89 (1st Dist. 2009)). The ICC, therefore, retained exclusive jurisdiction despite plaintiffs' claim for "damages" because it was "clear that the relief sought goes directly to ComEd's service and infrastructure," *id.*, and "rates and services are inextricably tied together," *id.* at ¶ 53 (citing *Vill. of Apple River v. Ill. Commerce Comm'n*, 18 Ill. 2d 518, 523 (1960)).

Like *Sheffler*, Plaintiffs complain about ComEd's service and infrastructure. Indeed, this case is even more clearly about rates than *Sheffler* because it concerns a delay in infrastructure

that clearly impacts rates, where *Sheffler* dealt more generally with the failure to provide adequate service. As *Sheffler* recognized, the ICC has the expertise to consider the complex data that relates to services and rates and it is the ICC's purpose "to determine that a utility's rates are just and reasonable and that its services are adequate." *Id.* at ¶ 40. Therefore, this Court must defer to the ICC's expertise to determine the extent to which this delay in smart grid infrastructure will adversely impact ComEd's customers' rates and future service, and what remedy, if any, should be employed.

Plaintiffs attempt to distinguish *Sheffler* on the basis that in this case ComEd violated a specific ICC order, which was not the case in *Sheffler*. However, this is a distinction that makes no difference to whether this is a rates case for the ICC or a damages case for the courts. With one exception that is not applicable here, the statutory scheme makes no distinction between a violation of an ICC order and a violation of the PUA. Section 5-201 applies equally where a public utility "omit[s] to do any act . . . required to be done . . . by any provisions of this Act [the PUA], or any rule, regulation, order, or decision of the Commission." 220 ILCS 5/5-201. Thus, there is no basis in the statute for differentiating between the statutory violation before the Supreme Court in *Sheffler* and the June 2012 Order violation before this Court here.

The one exception to the identical treatment for statutory and order violations is in reference to violations of ICC orders that a utility pay a specific amount of money at a specific time. Section 9-252 of the PUA provides in relevant part:

If the public utility does not comply with an order of the Commission for the payment of money within the time fixed in such order, the complainant, or any person for whose benefit such order was made, may file in a circuit court of competent jurisdiction a complaint setting forth briefly the causes for which the person claims damages and the order of the Commission in the premises.

220 ILCS 5/9-252.

The June 2012 Order, however, was not an order "for the payment of money" within a fixed time, so this sentence of 9-252 does not apply. This express provision for circuit courts to enforce ICC orders for the payment of money underscores that there is no special court jurisdiction for other ICC orders. This further confirms this Court's understanding that it has no basis for distinguishing between the alleged violation of the PUA in *Sheffler* and the alleged violation of the ICC's June 2012 Order in this case.

Finally, Plaintiffs suggest that if ComEd disregarded an ICC order once, then nothing will stop ComEd from disregarding future orders, including any that result from the claims in

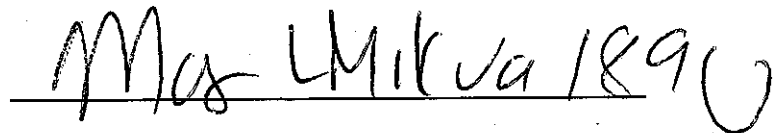
this case. That is, of course, a policy argument that would be more properly addressed through the legislature. In any event, this argument is unpersuasive for several reasons. In the first place, and as already noted, once the ICC has issued an order for the payment of money, the recipient is free to come into court for enforcement. Secondly, the attachments to the Complaint demonstrate that in its December 2012 Order, the ICC approved a new deployment schedule to compensate for ComEd's delay and set documentation requirements for ComEd to meet in the future. *See* Plaintiffs' Ex. H, 32-33. Thus, the ICC did not believe it was without power to respond to ComEd's failure to follow its June 2012 Order. Lastly, the PUA empowers the ICC to seek assistance from the judiciary if it believes its orders are not being followed. *See* 220 ILCS 5/4-202 ("Whenever the Commission shall be of the opinion that any public utility is failing . . . to do anything required of it by . . . any order . . . of the Commission, . . . the Commission shall file an action . . . in the circuit court . . . for the purpose of having the violation . . . stopped and prevented, either by mandamus or injunction."). Thus, Plaintiffs' suggested scenario of a powerless ICC is simply not apparent to this Court.

Conclusion

The ICC has exclusive jurisdiction over Plaintiffs' claims. Accordingly, Defendant's Motion to Dismiss Plaintiffs' Complaint for lack of subject matter jurisdiction is GRANTED. The status set for November 6, 2013 at 9:45am is STRICKEN. This is a final and appealable order.

IT IS SO ORDERED.

ENTERED:



Judge Mary L. Mikva
Circuit Court of Cook County, Illinois
County Department, Chancery Division

