**BEFORE THE**

**PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Dinen Sanders :

:

v. : C-2014-2445224

:

Planet Energy (Pennsylvania) Corp. :

**INITIAL DECISION GRANTING MOTION FOR JUDGMENT**

**ON THE PLEADINGS AND DISMISSING COMPLAINT**

Before

David A. Salapa

Administrative Law Judge

INTRODUCTION

A customer filed a complaint against her electric generation supplier (EGS) alleging that the EGS charged excessive rates. This decision dismisses the complaint against the EGS because the Pennsylvania Public Utility Commission (Commission) lacks jurisdiction to determine the reasonableness of rates charged by an EGS.

HISTORY OF THE PROCEEDING

On September 30, 2014, Dinen Sanders (Complainant) filed a complaint with the Commission against Planet Energy (Pennsylvania) Corp. (Respondent). In the complaint, the Complainant alleges that the Respondent was her EGS from May 11, 2012 to January 15, 2013. According to the complaint, during this time period the Respondent increased the rate it charged the Complainant by three times the original rate it charged her. The complaint requests that the Commission direct the Respondent to refund the Complainant $1,100.00.

The Respondent filed an answer combined with a motion for judgment on the pleadings on October 17, 2014. The answer and motion states that the Respondent sold its Pennsylvania book of customers to Xoom Energy, LLC (Xoom) effective November 9, 2012. The answer and motion asserts that the Respondent provided notice of the sale to all of its Pennsylvania customers, including the Complainant.

According to the answer and motion, Xoom assumed responsibility for the Complainant’s account on November 9, 2012. However, the Respondent provided billing and collection services for the Complainant’s account through the January 15, 2013 bill under a transition services agreement with Xoom.

The answer and motion denies that the Complainant’s rate tripled. According to the answer and motion, the Complainant’s rate fluctuated pursuant to the terms of her variable rate plan, increasing in some months and decreasing in others. The answer and motion contends that the Complainant’s bills increased and decreased primarily based on her electricity usage, not her rate. Included in the answer and motion is a chart showing the billing period, amount billed, usage and rate for the Complainant. The answer and motion requests that the Commission dismiss the Complainant’s complaint.

By notice dated February 26, 2015, the Commission notified the parties that it had assigned the case to me as motion judge. As of the date of this decision, the Complainant has not filed an answer to the Respondent’s pleading. The motion for judgment on the pleadings is ready for decision. For the reasons set forth below, I will grant the motion for judgment on the pleadings and dismiss the complaint.

FINDINGS OF FACT

1. The Complainant in this case is Dinen Sanders.

2. The Respondent in this case is Planet Energy (Pennsylvania) Corp.

3. On September 30, 2014, the Complainant filed a complaint with the Commission against the Respondent.

4. The Respondent filed an answer combined with a motion for judgment on the pleadings on October 17, 2014.

5. The Complainant did not file an answer to the Respondent’s pleading.

DISCUSSION

The Commission’s Rules of Practice and Procedure at 52 Pa.Code § 5.102 govern motions for judgment on the pleadings. The Commission will grant a motion for judgment on the pleadings only if the pleadings show there is no genuine issue as to a material fact and that the moving party is entitled to judgment as a matter of law. 52 Pa.Code § 5.102(d)(1). Only in a case where the moving party’s right to prevail is so clear that a trial would be a fruitless exercise should judgment on the pleadings be granted. Williams v. Lewis, 466 A.2d 682 (Pa. Super. 1983); Service Employees International Union, Local 69, AFL-CIO v. The Peoples Natural Gas Company, d/b/a Dominion Peoples, Docket No. C-20028539 (Order entered December 19, 2003). In ruling on a motion for judgment on the pleadings, the tribunal must consider as true all well-pleaded averments of the party against whom the motion is directed and consider against her only those facts she specifically admits. Judgment on the pleadings should be entered only when the case is clear and free from doubt. Reuben v. O’Brien, 496 A.2d 913 (Pa. Super 1985).

The Respondent’s October 17, 2014 answer combined with a motion for judgment on the pleadings does not comply with 52 Pa.Code § 102 in that the motion should have been filed as a separate pleading. However, the regulation at 52 Pa.Code § 1.2(a) provides that the presiding officer or the Commission may disregard an error or defect of procedure which does not affect the substantive rights of the parties. Since the Respondent’s motion requested that the Commisison dismiss the Complainant’s complaint and a copy of the motion was served on the Complainant, the Complainant had notice of the request and an opportunity to file an answer to the motion.

I will ignore the procedural defects of the Respondent’s motion for judgment on the pleading and address the merits of the motion in order to secure a just, speedy and inexpensive determination of this proceeding, pursuant to 52 Pa.Code § 1.2(a). This will not adversely affect the Complainant’s substantive rights, pursuant to 52 Pa.Code § 1.2(c), since she had notice of the issue and an opportunity to respond. I will address the merits of the Respondent’s motion for judgment on the pleadings after providing a brief explanation of the Commission’s limited jurisdiction over EGSs.

The Commission, as a creation of the General Assembly, has only the powers and authority granted to it by the General Assembly contained in the Public Utility Code. Tod and Lisa Shedlosky v. Pennsylvania Electric Co., Docket No. C-20066937 (Order entered May 28, 2008); Feingold v. Bell Tel. Co. of Pa., 383 A.2d 791 (Pa. 1977). The Commission must act within, and cannot exceed, its jurisdiction. City of Pittsburgh v. Pa. Pub. Util. Comm’n, 43 A.2d 348 (Pa. Super. 1945). Jurisdiction may not be conferred by the parties where none exists. Roberts v. Martorano, 235 A.2d 602 (Pa. 1967). Subject matter jurisdiction is a prerequisite to the exercise of power to decide a controversy. Hughes v. Pennsylvania State Police, 619 A.2d 390 (Pa. Cmwlth. 1992), alloc. denied, 637 A.2d 293 (Pa. 1993).

The Respondent, as an EGS, is not a public utility subject to Commission regulation, except in limited circumstances. Delmarva Power & Light Co. v. Pa. Pub. Util. Comm’n, 870 A.2d 901 (Pa. 2005) (Delmarva). In Delmarva, the Pennsylvania Supreme Court held that the definition of “public utility” at 66 Pa.C.S. § 102 does not include EGSs except for the limited purposes set forth in 66 Pa.C.S. § 2809, regarding licensing requirements and 66 Pa.C.S. § 2810, regarding revenue neutral reconciliation. The Pennsylvania Supreme Court noted that the Commission could forbear from regulating EGSs, pursuant to 66 Pa.C.S. § 2809(e), if it determined that the requirements of 66 Pa.C.S. § 2809 were unnecessary due to competition among the EGSs.

On December 22, 2014, Act 155 of 2014 became effective. Among other changes to the Public Utility Code, Act 155 added a provision at 66 Pa.C.S. § 2809(g) authorizing the Commission to establish fees to be charged for Commission activities related to the oversight of EGSs.

Having provided a brief explanation of the Commission’s limited jurisdiction over EGSs, I will address the merits of the Respondent’s motion for judgment on the pleadings. In ruling on a motion for judgment on the pleadings, the Commission must consider the factual averments in the complaint as true for purposes of disposing of the motion for judgment on the pleadings. The factual averments in the complaint are that the Complainant entered into an agreement with the Respondent for electric generation service. The Respondent was her EGS from May 11, 2012 to January 15, 2013. During this time period the Respondent increased the rate it charged the Complainant by three times the original rate it charged her.

Accepting these facts alleged in the complaint as true for purposes of disposing of the motion for judgment on the pleadings, the Commission may not regulate the rates that the Respondent charged the Complainant for electric generation supply service since it is not a public utility except for the limited purposes of 66 Pa.C.S. §§ 2809 and 2810. Therefore, the Commission has no jurisdiction over the Respondent to the extent that the Complainant contends that the Respondent has charged an unreasonable, unjust or illegal rate for electric generation supply service. Since the Commission lacks the jurisdiction to regulate rates charged for electric generation supply service, it lacks the authority to order a refund or credit to the Complainant.

In Review of Rules, Policies and Consumer Education Measures Regarding Variable Rate Retail Electric Products, Docket No. M-2014-2406134 (Order entered March 4, 2014) (Variable Rate Order), the Commission recognized that in early 2014 many EGSs had to increase their retail prices to customers in order to recover the higher wholesale electric energy costs they incurred in January 2014. In the Variable Rate Order, the Commission noted that in many cases, the EGSs voluntarily absorbed losses in order to maintain long term contractual relationships with their customers. However, the Commission acknowledged that not all EGSs acted to mitigate the financial hardships experienced by their customers and some EGSs passed the costs to their retail customers.

As a result of the higher wholesale electric energy costs experienced by the EGSs, the Variable Rate Order observed that some of the EGSs’ customers received higher electric bills. Some of these bills were two or three times the amount the customer would normally be billed. Most of these customers had entered into contracts with a variable rate that is adjusted monthly.

The Variable Rate Order stated that the rates consumers pay in the retail electric market are governed by the terms of the contract with their EGS. The Commission emphasized that it was important for consumers in variable rate contracts to review the terms and conditions of those contracts to determine if they were at risk for large rate increases.

Underlying this discussion in the Variable Rate Order is the unstated acknowledgement by the Commission that it does not have jurisdiction to regulate the rates charged by an EGS, such as the Respondent, or order a refund of unreasonable rates. Rather, these rates are governed by private contract between the EGS and the customer. The Commission lacks the jurisdiction to rule on the parties’ responsibilities under a private agreement or the authority to award damages under that agreement. Feingold v. Bell Tel. Co. of Pa., 383 A.2d 791 (Pa. 1977). Since the Commission lacks jurisdiction to regulate the rates charged by the Respondent or rule on the parties’ responsibilities under their private agreement, the Commission cannot order the Respondent to refund any charges for electric generation supply service to the Complainant.

The Commission has specifically addressed its authority to direct EGSs to refund charges for electric generation supply service. In Commonwealth of Pennsylvania, by Attorney General, Kathleen G. Kane, through the Bureau of Consumer Protection and Tanya J. McCloskey, Acting Consumer Advocate v. IDT Energy, Inc., Docket No. C-2014-2427657 (Order entered December 18, 2014) (IDT Order), the Commission held that it lacked the authority, pursuant to 66 Pa.C.S. § 1312, to direct EGSs to refund charges for electric generation supply service. The Commission reached this conclusion because it reasoned that 66 Pa.C.S. § 1312 applied only to rates charged by public utilities and EGSs are not public utilities except for the limited purposes of 66 Pa.C.S. §§ 2809 and 2810. Therefore, the Commission could not generally refund charges for electric generation supply service.

However, the Commission carved out two exceptions to this no refund rule in the IDT Order. First, the Commission noted that, pursuant to 52 Pa.Code § 57.177(b), it could direct an EGS to refund charges when a customer has been switched to an EGS without the customer’s consent. Second, the Commission stated that it had the authority, pursuant to 66 Pa.C.S. § 501, to order a credit or refund where the EGS overbills a customer by failing to bill a customer in accordance with its disclosure statement, in violation of 52 Pa.Code §§ 54.4(a) and 54.5(a) and 66 Pa.C.S. § 2809(b). Neither exception to the no refund rule stated in the IDT Order applies in this case because the Complainant has failed to state in her complaint either that she was switched to the Respondent as her EGS without her consent or that the Respondent failed to bill her in accordance with its disclosure statement.

Accepting as true all of the facts alleged in the Complainant’s complaint, the Complainant is not entitled to relief as a matter of law. As set forth above, the Commission lacks jurisdiction to determine the reasonableness of the rates charged by the Respondent or to order a refund. I will grant the Respondent’s motion for judgment on the pleadings and deny the complaint against the Respondent.

In prior decisions, the Commission has indicated that it disfavors granting motions dismissing complaints filed by pro se complainants. Carlock v. The United Telephone Company of Pennsylvania, Docket No. F-00163617 (Order entered July 14, 1993) (Carlock); Brown v. PECO Energy Company, Docket No. C-2008-2055866 (Order entered May 29, 2009) (Brown); Richmond v. PECO Energy Company, Docket No. F-2010-2187305 (Order entered December 7, 2011) (Richmond). In Carlock, Brown, and Richmond, the Commission indicated that a complaint filed by a pro se complainant should not be dismissed until the complainant has the opportunity to orally explain his or her position at a hearing.

However, in Nadav v. Respond Power, LLC, Docket No. C-2014-2429159 (Order entered December 19, 2014) (Nadav) and Werle v. Respond Power, LLC, Docket No. C-2014-2429158 (Order entered February 23, 2015) (Werle) the Commission sustained preliminary objections filed by an EGS and dismissed a complaint where the complaint alleged that an EGS’s rates were unreasonable. In dismissing the complaints, the Commission in Nadav and Werle concluded that it had no authority to regulate an EGS’s rates and that the complaint in each case was legally insufficient for failing to identify a violation of the electric supply contract, the Public Utility Code, Commission regulation or Commission order.

Since the complaint in this case raises the same issues as the complaints in Nadav and Werle I find the decisions in Nadav and Werle to be more persuasive than the decisions in Carlock, Brown, and Richmond. In these circumstances, giving the Complainant the opportunity to explain her position at a hearing would be a fruitless exercise.

Since there are no material facts in dispute and the Respondent is entitled to judgment as a matter of law, I will grant its motion for judgment on the pleadings and enter the following order.

CONCLUSIONS OF LAW

1. The Commission’s Rules of Practice and Procedure at 52 Pa.Code § 5.102 govern motions for judgment on the pleadings.

2. A motion for judgment on the pleadings is properly granted where the pleadings show there is no genuine issue as to a material fact and that the moving party is entitled to judgment as a matter of law. 52 Pa.Code § 5.102(d)(1).

3. The Commission has no jurisdiction to regulate the rates charged by the Respondent.

4. The Respondent, as an EGS, is not a public utility subject to Commission regulation, except in limited circumstances. Delmarva Power & Light Co. v. Pa. Pub. Util. Comm’n, 870 A.2d 901 (Pa. 2005).

5. The Respondent is a public utility for purposes of 66 Pa.C.S. § 2809 with regard to licensing requirements.

6. It is just, reasonable and in the public interest that the complaint filed at Docket No. C-2014-2445224 is dismissed without hearing.

ORDER

THEREFORE,

IT IS ORDERED:

1. That the motion for judgment on the pleadings filed by Planet Energy (Pennsylvania) Corp. at Docket No. C-2014-2445224 is granted.

2. That the complaint of Dinen Sanders at Docket No. C-2014-2445224 against Planet Energy (Pennsylvania) Corp. is denied.

3. That the docket at Docket No. C-2014-2445224 is marked closed.

Date: March 3, 2015 /s/

David A. Salapa

Administrative Law Judge