

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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Pennsylvania Public Utility Commission, :
Bureau of Investigation and Enforcement, :
Complainant :
v. :
Docket No. C-2012-2297092 :
Glacial Energy of Pennsylvania, Inc. :
Respondent :

**MEMORANDUM IN SUPPORT OF I&E'S RESPONSE TO GLACIAL ENERGY
OF PENNSYLVANIA'S STATEMENT OF UNDISPUTED MATERIAL FACTS
RE: MOTION FOR SUMMARY JUDGMENT**

AND NOW comes the Bureau of Investigation and Enforcement (I&E) of the Pennsylvania Public Utility Commission (Commission), by its counsel, Heidi L. Wushinske, and files this Objection to the Motion for Reconsideration in the above-captioned case pursuant to 52 Pa. Code § 5.103, and in support thereof states as follows.

LEGAL STANDARD

Motions for summary judgment are governed by the Commission's Regulations at 52 Pa. Code § 5.102. Section 5.102(c) provides that “[a] motion for summary judgment must be based on the pleadings and depositions, answers to interrogatories, admissions and supporting affidavits.” A motion for summary judgment will be granted only “if the applicable pleadings, depositions, answers to interrogatories and admissions, together with affidavits, if any, show that there is no genuine issue as to a material fact and that the moving party is entitled to a judgment as a matter of law.” 52 Pa. Code § 5.102(d)(1).

It is not the court's function to decide issues of fact, but merely to determine whether material issues of fact exist. *Sanders v. Loomis Armored*, 614 A.2d 320, 321 (Pa. Super. 1992). It is the burden of the moving party to show that no genuine issue of material fact exists and that it is entitled to a judgment as a matter of law. *First Mortgage Co. of Pennsylvania v. McCall*, 459 A.2d 406, 407 (Pa. Super. 1983). The non-moving party in a motion for summary judgment must allege facts showing that an issue for trial exists. *Id.*

A motion for summary judgment should *only* be granted in the clearest of cases, where the right to relief is clear and free from doubt. *Musser v. Vilsmeier Auction Co., Inc.*, 562 A.2d 279, 280 (1989); *Kotwasinski v. Rasner*, 258 A.2d 865, 867-68 (1969); *see also Prince v. Pavoni*, 302 A. 2d 452 (Pa. Super. 1973). In determining the absence of a genuine issue of material fact, the Commission must take the view of the evidence most favorable to the non-moving party. *First Mortgage Co. of Pennsylvania*, 459 A.2d at 407; *see also Mertz v. Lakatos*, 381 A.2d 497 (Pa. Cmwlt. 1978). The courts will accept as true all well-pleaded facts in the pleadings of the non-moving party and give the non-moving party the benefit of all reasonable inferences. *Spain v. Vicente*, 461 A.2d 833, 835 (Pa. Super. 1983). "All doubts as to the existence of a genuine issue of material fact must be resolved against the moving party." *Thomson Coal Co. v. Pike Coal Co.*, 412 A.2d 466,469 (Pa. 1979) (citing *Ritmanich v. Jonnel Enterprises*, 280 A.2d 570 (Pa. Super. 1971).

ARGUMENT

Glacial Energy of Pennsylvania, Inc., (Glacial) has not satisfied its burden of proof to show that it is entitled to summary judgment. As set forth in detail in I&E's Response to Glacial's Statement of Undisputed Material Facts, these facts are material and are not undisputed.

A. Question No. 16 of the Application Required Disclosure of Gary Mole's Involvement with Franklin Power

I&E disputes Glacial's contention that Question No. 16 of Glacial's 2009 application for approval as an electric generation supplier (application) did not require disclosure of Gary Mole's involvement with Franklin Power Company (Franklin).

Question 16 of the application requests identification of all proceedings in which the Applicant, an affiliate, a predecessor of either, or a person identified herein has been a defendant or respondent. Specifically, Question No. 16 states:

[s]tate specifically whether the Applicant, an affiliate, a predecessor of either, or a person identified in this Application has been convicted of a crime involving fraud or similar activity. Identify all proceedings by name, subject and citation, dealing with business operations, in the last five (5) years, whether before an administrative body or in a judicial forum, in which the Applicant, an affiliate, a predecessor of either, or a person identified herein has been a defendant or a respondent. Provide a statement as to the resolution or present status of any such proceedings.

Glacial responded to this question that neither it nor any of its entities had been cited or sanctioned for criminal activity or fraud. Glacial further responded that it "has not been a defendant or a respondent to any proceedings dealing with business operations."

I&E disputes Glacial's allegation that its answer to this question was grounded in fact and that it was not required to disclose Gary Mole's involvement with Franklin. I&E asserts that Franklin is the predecessor of Glacial to the extent that Gary Mole formed Glacial while Franklin was still viable. Gary Mole did not follow through with his promised capitalization of Franklin and assumed the assets of Franklin for Glacial. Glacial then stepped into the shoes of Franklin. I&E has produced evidence supporting these facts and proving that Gary Mole is the common thread between Franklin and Glacial. *See*, I&E's Statement Nos. 1, 2, and 3; Glacial New Matter.

I&E disputes that Glacial was not required to disclose Gary Mole's involvement with Franklin because Gary Mole was not named as a "defendant or respondent" in any legal action dealing with business operations. Glacial Motion at 5. Glacial attempts to mischaracterize the revocation proceedings filed against Franklin by the Public Utility Commission of Texas (PUCT) in 2005 and 2006. *Complaint of TXU Electric Delivery Company and CenterPoint Houston Energy, LLC, to Revoke Retail Electric Service Provider Certificate No. 10068 of Energy West Resources, LTD*, Final Order, Docket No. 31166 (Texas Proceedings). A certified true and correct copy of this Final Order is attached to I&E Statement No. 1 as I&E Exhibit 1, Sch. No. 2.

Glacial's argument that for a finding that question 16 of the application required disclosure of Gary Mole's involvement in the Texas Proceedings, the terms "defendant" and "respondent" would have to be redefined to include "anyone who was 'involved with' or 'had experience' with the entity" named as respondent is misguided and should be rejected. Glacial Motion at 5. I&E makes no claims that "anyone" involved with or

having experience with Franklin should have disclosed their involvement with it. To the contrary, I&E asserts that Gary Mole, as a board member, majority and controlling owner, and person involved with the day-to-day operations of Franklin should have disclosed his involvement with Franklin regarding the Texas Proceedings.

Specifically, at the time the Texas Proceedings were filed, Gary Mole, through Touchdown Properties (Touchdown), had already obtained a majority and controlling 60% ownership of Franklin. *See* Glacial New Matter, ¶ 36. In addition, Gary Mole had already been appointed to the Board of Directors of Franklin. *See* I&E Exhibit No. 3. Roger McAulay and Michael Petras testified that Gary Mole was actively involved in the day-to-day operations of Franklin. *See* I&E Statement No. 2, pp. 3-6; and I&E Statement No. 3, pp. 1-4. Gary Mole was not “anyone” merely involved with Franklin, but rather was an integral part of Franklin. Moreover, as stated previously, Franklin is the predecessor of Glacial to the extent that Gary Mole did not follow through with his promised capitalization of Franklin and assumed the assets of Franklin for Glacial; after which Glacial stepped into the shoes of Franklin. Therefore, Glacial had an obligation to disclose Gary Mole’s involvement with Franklin in response to Question No. 16 of the application.

Glacial incorrectly argues that Gary Mole’s position in Franklin is not a material fact and will not change the outcome of the case.¹ Glacial’s Motion at 6. This is incorrect. In support of this argument, Glacial alleges that I&E admitted this, citing

¹ Glacial’s argument appears to be assuming that Franklin and Glacial are two completely separate and distinct types of business operations. On the contrary, Glacial and Franklin are or were in the same business, that of electric generation suppliers; and both were/are owned and operated by Gary Mole.

I&E's Objections to Glacial's Document Request 8 and 9. Glacial's Motion at 6. These objections are not factual responses to document requests, but legal objections to discovery requests. In addition, as explained in detail in I&E's Response to Glacial's Statement of Undisputed Material Facts (I&E Response), Glacial misstates and mischaracterizes I&E's objections. *See* I&E's Response at 9.

Furthermore, Glacial has raised the issue of Gary Mole's position and has therefore made this issue relevant. *See* Glacial Answer and New Matter ¶¶ 11, 13, 14, 16, 19, 20, 21, 33, 36, 37, 38, and 40. I&E has produced numerous documents disputing Glacial's defenses that Gary Mole's involvement or position with Franklin did not rise to a level that required disclosure. *See* I&E Exhibit No. 1, Sch. No. 5; I&E Exhibit No. 3, Sch. No. 2; I&E Statement No. 2; I&E Exhibit No. 2, Sch. No. 1; I&E Statement No. 2; and I&E Statement No. 3, Sch. Nos. 1 and 2. All of these documents contradict Glacial's defenses and create genuine issues of material fact.

When the words of a statute are not explicit, the determination of legislative intent may be informed by other factors, including administrative interpretations of the statute. *Colville v. Allegheny County Retirement Board*, 926 A.2d 424, 432 (2007) (citing 1 Pa.C.S. § 1921(c)). Courts will also presume that when enacting any statute, the General Assembly intended to favor the public interest as against any private interest. 1 Pa.C.S. § 1922(5); *Vitac Corporation v. Workers' Compensation Appeal Board (Rozanc)*, 854 A.2d 481, 485 (2004).

An evaluation of the relevant case law clearly leads to a finding that the Commission's interpretation of its own application question is entitled to deference.

Glacial's argument that I&E's interpretation of Question No. 16 is based on a "tortured" reading of this question is without merit. In support of this argument, Glacial attempts to state that the Application limits the required disclosures regarding affiliates and predecessors to the Applicant and that individuals cannot have affiliates. Both of these arguments are misguided.

First, the application does not limit the disclosure of affiliates and predecessors to the Applicant. To the contrary, Question No. 16 separates "applicant" and "affiliate" with a comma, thus distinguishing them from each other. Glacial's characterization of this term as "affiliate [of the Applicant]" is pure invention. Glacial's Motion at 7. Second, an examination of the plain and common meaning of the word "affiliate" reveals that Glacial's interpretation is incorrect; an affiliate can mean "an affiliated *person*." Webster's Third New International Dictionary (1971) (emphasis added). Glacial's argument hangs on an extremely limited and incorrect definition of the word "affiliate" and an improper reading of Question No. 16. I&E asserts that Glacial's interpretation is incorrect and that I&E's interpretation is a fair reading of the question.

Importantly, Glacial's interpretation of Question No. 16 favors its private interests over the public interest. The public interest is best served by full and fair disclosure of an entity's prior business operations so that the Commission can make a fully informed decision on whether that entity should receive a license in the Commonwealth. This is especially true in this case, where Franklin had its certificate revoked in another jurisdiction. Under Glacial's interpretation, an individual could defraud investors and creditors in another jurisdiction, have certifications revoked, start a new company in a

new jurisdiction, and have no requirement to disclose this information as long as the revocation order referred to the regulated entity and not the individual owner or board member. Such a result does not make sense and certainly does not serve the public interest.

B. Both Gary Mole's Professional Resume and the Dunn & Bradstreet Report Submitted with Glacial PA's Application Were Incomplete and/or Misleading

Gary Mole's professional resume, submitted in conjunction with Glacial's Application, should have mentioned Franklin. Glacial again tries to argue that Gary Mole's involvement with Franklin was purely financial. This position is without merit. Glacial's argument that Gary Mole was not required to disclose his involvement with Franklin because this involvement was a "financial ownership" or "investment" at best reveals the existence of a dispute of material fact regarding Gary Mole's role with Franklin and at worst, reveals an blatant mischaracterization of Gary Mole's involvement with Franklin. *See* I&E Response to Glacial's Statement of Undisputed Material Facts, ¶¶ 8, 9, 10, 15, and 22.

Glacial's argument that there was nothing in the Application that required this information is also without merit. Glacial's Motion at 9. The term "professional resume," as it appears in the Application, speaks for itself. It is common sense that a professional resume submitted in connection with a license application is expected to accurately reflect the applicant's prior relevant experience. *See also* I&E's response to Glacial's Interrogatory-Set I, Interrogatory 14.

The Dunn &Bradstreet Report (D&B Report) submitted in connection with Glacial’s application was also incomplete and/or inaccurate. The D&B Report that Glacial submitted is for “Glacial Energy of New York,” whereas the parent company of Glacial PA is Glacial Energy Holdings. *See* I&E Exhibit No. 1, Sch. 1, p. 22. Glacial does not deny that regarding Gary Mole’s history, the D&B report states “Gary Mole Antecedents Undetermined.” Glacial knowingly submitted incomplete information to the Commission in response to Question No. 19 of the Application.

C. I&E’s Complaint Stands on its Own

I&E’s Complaint against Glacial is grounded in Pennsylvania law and explicitly references specific violations of the Pennsylvania Public Utility Code. Glacial’s attempts to imply that I&E does not understand the difference between the PUCT’s regulations and its own are ludicrous and ignore the fact the I&E’s Complaint refers explicitly to the Commission’s regulations. The mere fact that I&E contacted the PUCT to obtain documents, in particular certified copies, in no way implies that I&E attempted to file a complaint in which no violations of the Pennsylvania Public Utility Code were committed.

As set forth in the Complaint, Glacial’s omissions in its Application constitute specific violations of the Public Utility Code and regulations. Specifically, I&E believes that Glacial’s failure to disclose Gary Mole’s involvement with Franklin violated 66 Pa. C.S. § 2809(b) and 52 Pa. Code § 1.35(c). Nowhere in I&E’s Complaint does it reference Texas law. Glacial’s suggestion that I&E filed a Complaint with no violations of Pennsylvania law and only violations of Texas law is absurd and should be dismissed.

D. Glacial's Application Was Not Grounded in Fact Or Was Signed by a Representative of Glacial Without Knowing the Contents Thereof

I&E's Complaint is well supported by the evidence and should be sustained.

Glacial's argument that "the only evidence" supporting I&E's allegations is the failure to disclose Gary Mole's involvement with Franklin attempts to trivialize Glacial's omissions and ignores the requirements of 66 Pa. C.S. § 2809(b) and 52 Pa. Code § 1.35(c). Through the submission of various pleadings and witness testimony, I&E has demonstrated that Glacial was required to disclose Gary Mole's involvement with Franklin. I&E Statement No. 1 at 5-6.

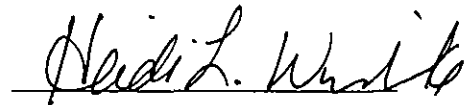
I&E has presented expert testimony that an EGS application requires the applicant to include all information relevant to the applicant within a five year look-back period from the date the application is filed. I&E Statement No. 1 at 4. Specifically, I&E has presented testimony that Glacial did not accurately or completely respond to Question No. 16, among others, on its application, and that Glacial should have identified and discussed the Texas Proceedings. I&E Statement No. 1 at 5-6. Glacial's argument that I&E cannot demonstrate that disclosure of Gary Mole's involvement with Franklin was required is without merit.

To the extent that Glacial attempts to argue that revocation is not an authorized remedy for Glacial's violations, this allegation is also without merit. The Commission's regulations specifically provide for revocation of a license for failure to comply with the applicable requirements of the code and Commission regulations and orders. 52 Pa. Code § 54.42. In this case, I&E believes that Glacial violated 66 Pa. C.S. § 2809(b) and

52 Pa. Code § 1.35(c). Therefore, revocation of Glacial's license is an appropriate and permissible remedy.

WHEREFORE, for all the foregoing reasons, the Bureau of Investigation and Enforcement of the Pennsylvania Public Utility Commission respectfully requests that, after consideration of the record, the Office of Administrative Law Judge and the Commission deny Glacial's Motion for Summary Judgment.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I am serving the foregoing I&E Response to Glacial Energy of Pennsylvania's Statement of Undisputed Material Facts Re: Motion for Summary Judgment and Memorandum in Support of I&E's Response to Glacial Energy of Pennsylvania's Statement of Undisputed Material Facts Re: Motion for Summary Judgment, upon the persons listed below, in accordance with the requirements of § 1.54 (relating to service by a party):

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