



COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
P.O. BOX 3265, HARRISBURG, PA 17105-3265

IN REPLY PLEASE
REFER TO OUR FILE
C-2012-2297092

May 13, 2013

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

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

Dear Secretary Chiavetta:

Enclosed for filing is an original copy of Exceptions on behalf of the Bureau of Investigation and Enforcement of the Pennsylvania Public Utility Commission in the above-referenced case. Copies have been served on the parties of record in accordance with the Certificate of Service.

Sincerely,

A handwritten signature in cursive script that reads "Heidi L. Wushinske".

Heidi L. Wushinske
Prosecutor

Enclosure

cc: As per certificate of service
Honorable David A. Salapa

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**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

EXCEPTIONS TO THE INITIAL DECISION OF ADMINISTRATIVE LAW
JUDGE DAVID A. SALAPA

Heidi L. Wushinske
Prosecutor

Wayne T. Scott
First Deputy Chief Prosecutor

P.O. Box 3265
Harrisburg, PA 17105-3265
(717) 787-5000

Dated: May 13, 2013

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A. Introduction

On April 23, 2013 an Initial Decision was issued by Administrative Law Judge David A. Salapa (“ALJ”) in the above-captioned matter. The Bureau of Investigation and Enforcement (“I&E”) of the Pennsylvania Public Utility Commission, through Prosecutor, Heidi L. Wushinske, files the following Exceptions to the Initial Decision of Administrative Law Judge David A. Salapa, and states as follows:

B. Exceptions

1. The ALJ Incorrectly Concluded that No Genuine Issue of Material Fact Exists for Trial In this Proceeding.

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).

The ALJ's Initial Decision, which grants Glacial's Motion for Summary Judgment, failed to follow these well-established legal principles.

2. The ALJ Incorrectly Found that Glacial Was Not Required to Provide Information Regarding Gary Mole and Franklin Power Company

I&E disagrees with the ALJ's finding that "[n]either Glacial, its affiliates nor Mr. Mole have been a respondent or defendant in any administrative or judicial proceeding dealing with business operations." (I.D. 6, Finding of Fact No. 9). The ALJ based this finding on a conclusion that Gary Mole and Franklin Power Company (Franklin) are not "affiliates" or "predecessors" of Glacial. (I.D. 12). I&E disagrees that Franklin is not a predecessor of Glacial.

I&E asserts that Gary Mole owned Franklin. Franklin began to encounter problems with the Texas PUC while Gary Mole was actively involved in the day-to-day operations of Franklin. Gary Mole formed Glacial during the pendency of the Franklin proceedings in Texas and 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 and un-rebutted testimony 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. Franklin's status as a predecessor to Glacial is most certainly a fact in dispute.

3. The ALJ Failed to Consider the Un-rebutted Evidence Showing that Gary Mole was a Director and Shareholder of Franklin

I&E submitted un-rebutted evidence showing that Gary Mole was a director, shareholder, and involved in the day-to-day operations of Franklin, not merely an investor as Glacial contended.¹ However, the ALJ did not even discuss this evidence or explain how he reached the conclusion that Gary Mole was merely an investor in Franklin. (I.D. 16-17). This disputed material fact alone justifies the opportunity to hold evidentiary hearings. In fact, the ALJ stated that “[i]n order to accept I&E’s argument, one must conclude that a professional resume must include information on a person’s *investments* as well as prior employment experience.” (I.D. 17, emphasis added). The ALJ goes on to conclude that Gary Mole did not have to include Franklin, and more importantly, his prior regulatory experience in Texas on his professional resume because investments do not have to be included on professional resumes. (I.D. 17). At no point during this discussion does the ALJ explain how he summarily dismissed I&E’s un-rebutted evidence showing that Gary Mole was not merely an investor in Franklin, but was a director and directly involved in the day-to-day management of Franklin, which is clearly beyond the definition of an investor.

I&E has submitted documents and testimony clearly showing that Gary Mole was more than just a typical investor in Franklin. For example, at the time the Texas Proceedings were filed, Gary Mole, through Touchdown Properties (Touchdown), had

¹ Pursuant to the ALJ’s Prehearing Order #2 dated January 2, 2013, I&E’s prepared direct testimony was submitted on March 1, 2013, Glacial’s prepared direct testimony was submitted on March 22, 2013, and I&E’s prepared rebuttal testimony was submitted on April 15, 2013. No other prepared testimony was submitted by the parties.

already obtained a majority and controlling 60% ownership of Franklin. *See* Glacial New Matter, ¶ 36. I&E also submitted evidence showing that Gary Mole had already been appointed to the Board of Directors of Franklin. *See* I&E Exhibit No. 3. Roger McAulay and Michael Petras submitted prepared testimony stating 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. Glacial did not present any evidence to rebut the evidence submitted by I&E. Moreover, the ALJ did not even address his quick dismissal of I&E's un-rebutted evidence and found that Gary Mole was only an investor in Franklin and as such, did not have to disclose Franklin on his professional resume.²

It should also be noted that the ALJ's decision is dated prior to the submission of I&E's rebuttal testimony. The ALJ's decision is dated April 9, 2013. I&E's rebuttal testimony was submitted on April 15, 2013. Therefore, there is no way that the ALJ could have considered the testimony that I&E submitted rebutting Glacial's pre-filed written testimony. I&E contends that this testimony contains material disputed facts important to I&E's case and should have been considered and discussed by the ALJ.

4. Glacial Should Be Held Responsible For Any Incorrect or Incomplete Information Submitted in Connection With Its EGS Application

I&E disagrees with the ALJ's contention that it is unreasonable to hold Glacial

² I&E pre-filed direct and rebuttal testimony, with supporting exhibits, which was served on all parties and the ALJ. I&E's testimony stated that Gary Mole was a Director of Franklin and was actively involved in the day-to-day operations of Franklin. I&E's testimony was un-rebutted in Glacial's pre-filed testimony. Furthermore, The ALJ relied on the allegations that Gary Mole was merely an investor in Franklin that were presented in Glacial's pleadings but not supported in their pre-filed testimony.

responsible for the accuracy and completeness of the Dunn and Bradstreet (D&B) Report. (I.D. 14-15). First, the D&B Report submitted by Glacial in connection with its electric generation supplier (“EGS”) application was incomplete and/or inaccurate. Second, Glacial should be held responsible for the contents of information it provided in connection with its EGS application, even if this information was prepared by third parties. Other innocent parties, including the Commission, looked to D&B information to make business as well as regulatory decisions regarding companies.

I&E asserts that the D&B Report submitted in connection with Glacial’s application was 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.” The information that Glacial knowingly submitted to the Commission in response was incomplete. The Commission should never permit a company to engage in this conduct.

Glacial is responsible for submitting this incomplete information to the Commission. The ALJ stated that the applicable statutes and regulations do not hold EGS applicants responsible for the contents of information provided by third parties. (I.D. 15). However, an EGS applicant has a choice of what information to submit in connection with its application. If the EGS applicant is uncertain about the contents of a particular document, it does not have to submit that document. Moreover, Glacial’s representative, Joel Glassman, signed the application and verified that it was well

grounded in fact, as required by 52 Pa. Code § 1.35(c). Glacial cannot now escape responsibility for the documents it submitted and verified merely because it did not originally prepare the documents.

I&E would ask that the Commission consider the ramifications of allowing the ALJ's decision to stand on this matter. Should the Commission adopt the ALJ's Initial Decision on this issue, it would permit any applicant to provide incomplete and omit possibly damaging information just by having a surrogate fill out its application thereby avoiding having to provide all necessary and relevant information. This is an unacceptable result and makes the Commission's EGS application process ineffectual.

I&E has submitted un-rebutted testimony and documentary evidence to show that Glacial should have disclosed Gary Mole's involvement with Franklin, or at the very least that a disputed issue of material fact exists surrounding this issue.

5. The ALJ Incorrectly Concluded That Glacial Was Not Required to Disclose Gary Mole's Involvement With Franklin As a Matter of Law

I&E disagrees with the ALJ's conclusion that "neither the Commission's statutes and regulations nor the application for EGS authority required Glacial to disclose Mr. Mole's involvement with Franklin." (I.D. 18). On the contrary, I&E asserts that the EGS application required Glacial to disclose Gary Mole's prior regulatory experience in Texas and his involvement with Franklin. And by failing to do so, Glacial violated 66 Pa. C.S. § 2809(b) and 52 Pa. Code § 1.35(c).

Question No. 16 of Glacial's 2009 EGS application required disclosure of Gary Mole's involvement with 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 the ALJ’s conclusion that, as a matter of law, this question did not require Glacial to disclose Gary Mole’s involvement with Franklin. (I.D. 18). I&E asserts that Franklin is the predecessor of Glacial to the extent that Gary Mole formed Glacial while Franklin was still viable, as stated above.

I&E has submitted testimony and evidence showing that Franklin is a predecessor of Glacial. The ALJ stated that “Black’s Law Dictionary, 5th Edition defines predecessor as one who has gone before.” (I.D. 13). As I&E has shown through multiple pleadings, testimony, and other evidence, Franklin came before Glacial in 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.

Question 16 of the EGS application states “affiliate” and Black’s Law Dictionary defines affiliate as “signifies a condition of being united; being in close connection, allied, associated, or attached as a member or branch.” Clearly Gary Mole was in close connection, allied, and associated with Franklin. It is the intent of the application to seek any experience that the applicant or any affiliate may have regarding regulatory experience.

The ALJ found that because Franklin did not merge with Glacial and Glacial did not purchase Franklin’s stock, Franklin is not a predecessor of Glacial. (I.D. 13). However, the definition of “predecessor” put forth by the ALJ is not nearly so narrow as to limit a predecessor to those specific situations. Rather, this definition, “one who has gone before,” is much more broad. The ALJ erred by not explaining how or why the evidence that I&E submitted showing that Franklin and Glacial are connected by Gary Mole did not meet this very broad definition of “predecessor.”

Once again, I&E asks that the Commission consider the ramifications of the ALJ's decision. Under the ALJ’s rationale, even the notorious Bernie Madoff, the perpetrator of one of the biggest financial frauds in history could come to be Commission and be licensed. This is because he would not be required to disclose his prior business activity so long as he was opening a new company with a new name. One can only imagine the possible consequences of this Initial Decision.

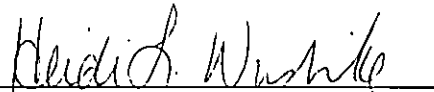
I&E contends that the evidence it submitted, including un-rebutted testimony, proves that Franklin was a predecessor of Glacial. Therefore, Glacial had an obligation

to disclose Gary Mole's involvement with Franklin in response to Question No. 16 of the application and Glacial is not entitled to summary judgment as a matter of law.

C. Conclusion

WHEREFORE, for the foregoing reasons, the Bureau of Investigation and Enforcement of the Pennsylvania Public Utility Commission requests that the Commission GRANT the above Exceptions and remand this matter back to the Administrative Law Judge for the purpose of holding evidentiary hearings.

Respectfully submitted,



Heidi L. Wushinske
Prosecutor

Wayne T. Scott
First Deputy Chief Prosecutor

P.O. Box 3265
Harrisburg PA 17105-3265
(717) 787-5000

Dated: May 13, 2013

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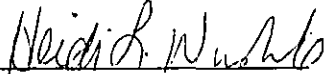
I hereby certify that I am this day serving the foregoing document, Exceptions, upon the persons listed and in the manner indicated below, which service satisfies the requirement of 52 Pa.Code § 1.54 (relating to service by a participant):

Service by First Class Mail:

Robert B. Hoffman, Esquire
Daniel Clearfield, Esquire
Eckert Seamans Cherin & Mellott, LLC
213 Market Street, Eighth Floor
Harrisburg, PA 17101

Joel Glassman
Business Filings, Inc.
116 Pine Street, Suite 320
Harrisburg, PA 17101

John McGahren, Esquire
Stephanie Feingold, Esquire
Patton Boggs, LLP
The Legal Center
One Riverfront Plaza
1037 Raymond Blvd., Suite 600
Newark, NJ 07102


Heidi L. Wushinske
Prosecutor
PA Attorney I.D. #93792

PA Public Utility Commission
Bureau of Investigation and Enforcement

P.O. Box 3265
Harrisburg, PA 17105-3265
Phone: 717-787-5000

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