

**PENNSYLVANIA PUBLIC UTILITY COMMISSION
HARRISBURG, PENNSYLVANIA 17105-3265**

Marie Keets

**PUBLIC MEETING: October 27, 2016
2541626-ALJ**

v.

UGI Utilities, Inc.

Docket No. C-2016-2541626

MOTION OF COMMISSIONER SWEET

Before the Commission is an initial decision sustaining the preliminary objections filed by UGI Utilities, Inc. and dismissing the formal complaint of Marie Keets without prejudice. For the reasons set forth below, I am moving that the initial decision be reversed and the matter remanded for additional proceedings.

There are a number of abnormalities in this case which have caused the proceeding to become muddled.

First, Chapter 14 of the Public Utility Code requires that the utility be contacted prior to the complaint being accepted for filing. 66 Pa.C.S. § 1410. Here, the formal complaint form indicates that Ms. Keets did not contact the utility prior to filing her formal complaint. I recognize that, routinely, where there is an informal determination of the Commission's Bureau of Consumer Services, the BCS proceeding is normally counted as contact with the utility that satisfies the Chapter 14 requirement. I can see where this formal complaint might have been seen as an untimely appeal of the informal determination issued on November 30, 2015, in which case, the existence of the BCS determination would satisfy the requirement of Section 1410 as a contact with the utility prior to the filing of the formal complaint. However, upon closer inspection, the records show that the complainant's address changed from one in UGI's territory for the BCS proceeding to one in PECO's territory as shown on her formal complaint form. Any assumption that this was an untimely appeal of the BCS determination is unwarranted.

Next, the formal complaint form names both UGI Utilities, Inc., and PECO Energy Company as respondents, but only UGI was named as a respondent and served by the Secretary with the formal complaint. Again, if this were an untimely appeal of the BCS informal proceeding, this action would be a natural one.

Then, UGI filed its answer, new matter and preliminary objections stating that the complainant had been a UGI customer but was no longer a customer. Therefore, UGI moved to dismiss the complaint against it by filing preliminary objections.

The initial decision states the correct legal standard to apply to preliminary objections, i.e., that the Commission may not rely upon the factual assertions of the moving party but must accept as true for purposes of disposing of the motion all well pleaded, material facts of the nonmoving party, as well as every inference from those facts. ID at 4. Then, the ID correctly states that facts alleged in new matter which are not contested may be deemed to be admitted under Commission regulations. 52 Pa. Code § 5.63(b). As complainant did not file a response to new matter, the ID deemed the facts to be admitted.

However, the ID relied upon the facts from the respondent's new matter to support the grant of preliminary objections, when only those facts set forth by the *complainant* may be considered under the applicable standard. Nowhere in the complaint does it say which utility is the correct one to address the allegations, and neither is it clear whether the billing in question is an arrearage from the prior address or deals with the current account.

Where the facts relied upon to support a motion to dismiss a complaint appear in the respondent's own pleadings, the proper filing is a motion for judgment on the pleadings. This permits the Commission to consider all filed pleadings and their contents, including facts found in new matter that have been deemed to be admitted. It is true that, in those instances where it is clear that respondent is entitled to relief and the complainant has not responded to new matter, the Commission has construed preliminary objections to be a motion for judgment on the pleadings, after explaining its actions completely and not mixing the applicable legal standards.

See Utility Workers Union of America System Local 537 v. Pennsylvania-American Water Company, Docket No. C-2012-2287204, 2012 Pa. PUC LEXIS 944 (Order entered June 21, 2012). The Commission may waive a requirement when necessary or appropriate, if the waiver does not adversely affect a substantive right of a party. 52 Pa. Code § 1.2.

According to well-established law, the Commission will grant a motion for judgment on the pleadings when 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). 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). But those instances are the exception, not the rule, and the facts must be clear. This case is not clear.

The ID recognizes that there may be a complaint against PECO and dismissed the complaint against UGI without prejudice to the complainant's right to file it again, this time against PECO. But a review of the formal complaint form shows that the Complainant already did file her complaint against PECO, and she should not have to do so again. Returning this case to its origins and requiring the service of the complaint against PECO will cure the procedural defects which have occurred in this matter. Service of the Commission's Order will notify PECO that the complaint will be filed, thus curing the failure to contact PECO prior to the service of the formal complaint.

As always, the parties are encouraged to pursue amicable resolution of the matter.

Therefore, I move:

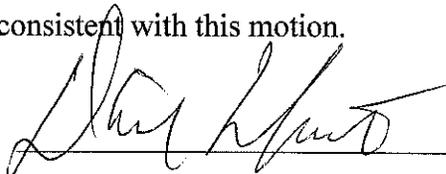
1. That the initial decision in this case is reversed and that the complaint be reinstated.

2. That the Secretary serve the Commission's Order in this matter and the formal complaint on PECO Energy Company and begin the case over with both PECO Energy Company and UGI Utilities, Inc. – Electric Division as named respondents.

3. That the preliminary objections of UGI Utilities, Inc., are denied.

4. That OSA prepare an Order consistent with this motion.

Dated: October 27, 2016

A handwritten signature in black ink, appearing to read "David W. Sweet", written over a horizontal line.

David W. Sweet
Commissioner