

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

German Yakubov	:	
on behalf of James and Charlotte Brown	:	
	:	
v.	:	C-2016-2570704
	:	
Philadelphia Gas Works	:	

**INITIAL DECISION SUSTAINING PRELIMINARY OBJECTION
AND DISMISSING COMPLAINT**

Before
David A. Salapa
Administrative Law Judge

INTRODUCTION

An individual filed a complaint on behalf of customers against a natural gas utility. This decision dismisses the complaint for lack of standing because the individual is not a customer of the natural gas utility and is not a resident at the service address.

HISTORY OF THE PROCEEDING

On October 11, 2016, German Yakubov (Complainant), on behalf of James and Charlotte Brown (Customers), filed a complaint with the Pennsylvania Public Utility Commission (Commission) against Philadelphia Gas Works (Respondent). The complaint alleges that there are incorrect charges on the Customers' bill and requests that Respondent provide proper detailed billing. The Complainant also filed with the Commission three documents titled Account Pay-Off Inquire Form.

The Respondent filed an answer with new matter and a preliminary objection and motion to strike on November 1, 2016. The answer denies that there are any incorrect charges on the Customer's bill. The answer and new matter state that the Complainant is neither the customer of record for the disputed account nor the attorney for James and Charlotte Brown. The answer asks that the complaint be dismissed.

The preliminary objection states that the Complainant is neither the customer of record on the account nor an attorney representing James or Charlotte Brown. The preliminary objection requests that the Commission dismiss the complaint for lack of standing on the part of the Complainant. No answer was filed in response to the preliminary objection.

By notice dated April 18, 2017, the Commission notified the parties that it had assigned the case to me as motion judge. The preliminary objection is ready for decision. For the reasons set forth below, I will sustain the preliminary objection and dismiss the complaint.

FINDINGS OF FACT

1. The Complainant in this case is German Yakubov.
2. The Respondent in this case is Philadelphia Gas Works.
3. The Customers are James and Charlotte Brown.
4. The Complainant is not the customer of record nor is he an attorney representing the customers.
5. On October 11, 2016, the Complainant filed a complaint with the Commission against the Respondent.
6. The Respondent filed an answer with new matter on November 1, 2016.

7. No answer to the new matter was filed with the Commission.
8. On November 1, 2016, the Respondent filed a preliminary objection.
9. No answer to the preliminary objection was filed with the Commission.

DISCUSSION

The Commission's Rules of Practice and Procedure permit parties to file preliminary objections. Standing is among the grounds allowed under which dismissal of a complaint can be sought. 52 Pa.Code § 5.101(a)(7).

Here the Respondent's preliminary objection asserts lack of standing by the Complainant to raise the issues set forth in the complaint. The Respondent also filed new matter asserting that the Complainant is not the customer of record for the disputed account.

Commission preliminary objection practice is analogous to Pennsylvania civil practice regarding preliminary objections. Equitable Small Transportation Intervenors v. Equitable Gas Company, 1994 Pa PUC LEXIS 69, Docket No. C-00935435 (July 18, 1994). Preliminary objections in civil practice requesting dismissal of a pleading will be granted only where the right to relief is clearly warranted and free from doubt. Interstate Traveller Services, Inc. v. Pa. Dept. of Environment Resources, 406 A.2d 1020 (Pa. 1979); Rivera v. Philadelphia Theological Seminary of St. Charles Borromeo, Inc., 595 A.2d 172 (Pa. Super. 1991). The Commission follows this standard. Montague v. Philadelphia Electric Company, 66 Pa. PUC 24 (1988). 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. County of Allegheny v. Commonwealth of Pennsylvania, 490 A. 2d 402 (Pa. 1985); Commonwealth of Pennsylvania v. Bell Telephone Co. of Pa., 551 A.2d 602 (Pa. Cmwlt. 1988).

The Respondent's preliminary objection contends that the Complainant lacks standing because he is not the customer of record. While my review of the Respondent's preliminary objection, along with the Respondent's new matter, show that the Complainant lacks standing to bring the complaint or participate in the proceeding, a preliminary objection is not the proper vehicle for dismissal of this case.

In considering a preliminary objection, the Commission cannot rely upon the assertions made by the Respondent but must rely only on the assertions made by the Complainant in the complaint. Here, the assertions in the complaint do not provide information on whether the Complainant is the customer of record. That information is contained only in Respondent's unanswered new matter.

The regulation at 52 Pa. Code §1.2(a) provides that the presiding officer or Commission may disregard an error or defect of procedure which does not affect the substantive rights of the parties. Here, the Respondent raised the issue of standing in its new matter but filed a preliminary objection rather than a motion for summary judgment. I may disregard the Respondent's error in procedure if it does not affect the Complainants' substantive rights.

I will consider the issue of the Complainant's lack of standing 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 since the Complainant had notice of the issue. Since the Complainant's lack of standing is an affirmative defense, and the Respondent properly raised it in a timely fashion, I shall treat the Respondent's preliminary objection as a motion for summary judgment filed pursuant to 52 Pa. Code § 5.102.

The Commission's regulation at 52 Pa. Code §5.102(a) permits any party to move for summary judgment after the pleadings are closed, but within such time as to not to delay a hearing. A motion for summary judgment must be based on the pleadings, depositions, answers to interrogatories, admissions and supporting affidavits. 52 Pa. Code §5.102(c) The presiding officer will grant a motion for summary judgment if the pleadings, depositions, answers to

interrogatories, admissions and affidavits show that 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)

The moving party bears the burden of showing that no genuine issue of material fact exists and that it is entitled to a judgment as a matter of law. The Commission must view the record in the light most favorable to the non-moving party, giving that party the benefit of all reasonable inferences. First Mortgage Co. of Pennsylvania v. McCall, 459 A.2d 406 (Pa. Super.1983); Mertz v. Lakatos, 381 A.2d 497 (Pa. Cmwlt. 1976). All doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. Thomson Coal Company v. Pike Coal Company, 412 A.2d 466 (Pa. 1979). Summary judgment will be granted only where the right is clear and free from doubt.

The non-moving party in a motion for summary judgment must allege facts showing that an issue for trial exists. First Mortgage Co. of Pennsylvania v. McCall, 459 A.2d 406 (Pa. Super. 1983); Commonwealth v. Diamond Shamrock Chemical Co., 391 A.2d 1333 (Pa. Cmwlt. 1978); Stover v. The United Telephone Co. of Pennsylvania, Docket No. C-00923833 (Order entered July 21, 1992). The Commission has interpreted Section 5.102(c) of its regulations in conformity with Rule 1035 (now Rule 1035.1) of the Pennsylvania Rules of Civil Procedure. South River Power Partners, L.P. v. West Penn Power Company, Docket No. C-00935287 (Order entered November 6, 1996). In civil practice, a non-moving party may not rely solely upon denials in its pleadings, but must submit some materials to establish that a genuine issue of material fact exists. Nicastro v. Cuyler, 467 A.2d 1218 (Pa. Cmwlt. 1983); Pennsylvania Gas & Water Co. v. Nenna & Frain, Inc., 467 A.2d 330 (Pa. Super. 1983); Geriot v. Council of Borough of Darby, 457 A.2d 202 (Pa. Cmwlt. 1983)

The provision at 52 Pa. Code §5.102(c) serves judicial economy by avoiding a hearing where no factual dispute exists. If no factual issue pertinent to the resolution of a case exists, a hearing is unnecessary. 66 Pa. C.S. §703(a); Lehigh Valley Power Committee v. Pa. Pub. Util. Comm'n., 563 A.2d 557 (Pa. Cmwlt. 1989); Lehigh Valley Power Committee v. Pa. Pub. Util. Comm'n., 563 A.2d 548 (Pa. Cmwlt. 1989); S.M.E. Bessemer Cement, Inc. v. Pa.

Pub. Util. Comm'n., 540 A.2d 1006 (Pa. Cmwlth. 1988); White Oak Borough Authority v. Pa. Pub. Util. Comm'n., 103 A.2d 502 (Pa. Super.1954).

Standing to participate in proceedings before an administrative agency is primarily within the discretion of the agency. Pennsylvania National Gas Association v. T.W. Phillips Gas and Oil Co., 75 Pa. P.U.C. 598, 603 (1991) Generally, the Commission has held that a person or entity has standing when the person or entity has a direct, immediate and substantial interest in the subject matter of a proceeding. Joint Application of Pennsylvania-American Water Co. and Evansburg Water Co. for Approval of the transfer, by sale, of the water works property and rights of Evansburg Water Co. to Pennsylvania-American Water Co., A-212285F0046/47 and A-210870F01 (Ordered entered July 9, 1998); William Penn Parking Garage, Inc. v. City of Pittsburgh, 464 Pa. 168, 346 A.2d 269 (1975); Landlord Service Bureau, Inc. v. Equitable Gas Co., 79 Pa. P.U.C. 342 (1993); Re Equitable Gas Co., 76 Pa. P.U.C. 23 (1992); Manufacturers' Association of Erie v. City of Erie - Bureau of Water, 50 Pa. P.U.C. 43 (1976); Waddington v. Pennsylvania Public Utility Commission, 670 A.2d 199 (Pa. Cmwlth. 1995), alloc. denied, 678 A.2d 368 (Pa. 1996) Requiring a person or entity to have a direct, immediate and substantial interest in the subject matter of a proceeding helps avoid frivolous, harassing lawsuits whose costs are ultimately borne, at least in part, by utility ratepayers. Pennsylvania Public Utility Commission v. National Fuel Gas Distribution Corp., 73 Pa. P.U.C. 552 (1990).

In order to bring a complaint before the Commission, the Complainant must first demonstrate that he has standing to maintain the action. Nye v. Erie Insurance Exchange, 470 A.2d 98 (Pa. 1983). The Complainant's interest in the subject matter of the proceeding is direct if his interest is adversely affected by the actions challenged in the complaint, is immediate if there is a close causal nexus between his asserted injury and the actions challenged in the complaint and is substantial if he has a discernible interest other than the general interest of all citizens in seeking compliance with the law. Ken R. ex rel. C.R. v. Arthur Z., 682 A.2d 1267 (Pa. 1996); In re El Rancho Grande, Inc., 437 A.2d 1150 (Pa. 1981); William Penn Parking Garage, Inc.; Empire Coal Mining & Development, Inc. v. Department of Environmental Resources, 623 A.2d 897 (Pa. Cmwlth. 1993). Mere conjecture about possible future harm does

not confer a direct interest in the subject matter of a proceeding. Official Court Reporters of the Court of Common Pleas of Philadelphia County v. Pennsylvania Labor Relations Board, 467 A.2d 311 (Pa. 1983).

The Commission has held that, in general, a complainant must be respondent's customer to have standing to file a complaint about utility service. See, Re: Pennsylvania American Water Company, 85 Pa. P.U.C. 548 (1995); and Pa. P.U.C. v. Marietta Gravity Water Company, 87 Pa. P.U.C. 864 (1997). In other words, a complainant which is not a customer of a utility generally does not have the requisite substantial, direct, and immediate interest necessary to confer standing to bring the complaint about the service of that utility. John Lavelly v. West Penn Power Company, Docket No. C-2014-2408502 (Order entered February 12, 2015).

The Public Utility Code defines “customer” as a natural person in whose name a residential service account is listed and who is primarily responsible for payment of bills, or any adult occupant whose name appears on the mortgage, deed, or lease of the property. 66 Pa. C.S. § 1403.

In this instance, the complaint alleges that there are incorrect charges on the Customers’ bill. While this fact must be accepted as true, facts alleged in new matter which are not denied by the Complainant, may also be accepted as true. The Commission's regulation at 52 Pa. Code § 5.63(b) states that a party failing to file a timely reply to new matter may be deemed in default and the facts stated in the new matter deemed admitted. Admitting the factual allegations in the complaint as true for purposes of disposing of the objection, as well as the averments in Respondent’s new matter, it is clear that the Complainant is not the customer of record for the account in dispute. Since the Complainant is not the customer of record for the disputed account, he is not a customer as defined by 66 Pa. C.S. §1403.

Admitting the factual allegations in the complaint as true for purposes of disposing of the motion, the Complainant did not file an answer to Respondent’s new matter and makes no assertion that he owns, or is on the lease of, the property constituting the service address. The Complainant is therefore not the customer of the disputed account and has no

standing to file a complaint. His interest is not direct because he is not adversely affected by the actions challenged in the complaint. His interest is not immediate because he has suffered no injury as a result of the actions challenged in the complaint. His interest is not substantial because he has no discernible interest other than the general interest of all citizens in seeking compliance with the law. The Complainant lacks standing to maintain the action as a customer.

Sustaining the Respondent's preliminary objection, which I am treating as a motion for summary judgment, is appropriate under the circumstances. I will therefore grant the Respondent's request to dismiss the complaint due to the Complainants' lack of standing. I will therefore deny the complaint without prejudice and enter the following order.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the parties and the subject matter of this dispute. 66 Pa. C.S.A. §701

2. The Complainant lacks standing to file a complaint on behalf of the Customers.

3. It is just, reasonable and in the public interest that the complaint filed at Docket No. C-2016-2570704 is dismissed without prejudice.

ORDER

THEREFORE,

IT IS ORDERED:

1. That the preliminary objection filed by Philadelphia Gas Works at Docket No. C-2016-2570704 is sustained.

2. That the complaint of German Yakubov on Behalf of James and Charlotte Brown at Docket No. C-2016-2570704 against Philadelphia Gas Works is dismissed without prejudice.

3. That the record at Docket No. C-2016-2570704 is marked closed.

Date: June 26, 2017

_____/s/_____
David A. Salapa
Administrative Law Judge