

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Randy Stewart	:	
	:	
v.	:	C-2018-2642778
	:	
UGI Utilities, Inc. – Gas Division	:	

INITIAL DECISION

Before
Conrad A. Johnson
Administrative Law Judge

This decision dismisses the Complaint for Complainant’s failure to establish that Respondent’s tariff, under which it may take more than two months to switch a customer’s natural gas supplier, violates the reasonable service provisions of the Public Utility Code.

HISTORY OF THE PROCEEDING

Complaint

On January 11, 2018, Randy Stewart (Complainant) filed a Complaint with the Pennsylvania Public Utility Commission (Commission) against UGI Utilities, Inc. – Gas Division (UGI, Respondent or Company). Complainant alleged as follows:

I went to switch to a new supplier at a much lower rate and UGI told me it will take two billing cycles to switch, thus eliminating my ability to enjoy those lower rates for the coldest two months of the year. This is not acceptable when my electric utility can change my supplier in less than a week. UGI has taken the position that it can change my supplier at its leisure, and that I have no recourse.

Complainant ¶ 4. As relief, Complainant asked the Commission to order UGI to immediately change his supplier to the supplier of his choice.¹ Complaint ¶ 5.

Answer, New Matter and Preliminary Objections

Respondent filed an Answer and New Matter and Preliminary Objections (PO) on January 31, 2018. Respondent denied Complainant's characterization of the events that occurred. In New Matter, Respondent asserted conclusions of law and specifically alleged the Complaint was legally insufficient. As relief, Respondent requested dismissal of the Complaint.

In its PO, Respondent averred the Company received information on December 22, 2017, that Complainant was switching his natural gas supplier (NGS). On December 25, 2017, according to UGI, the Company mailed a letter to Complainant informing him that his NGS would be switched on February 28, 2018, his scheduled meter reading date, under the provisions of the Company's Commission-approved tariff. Complainant was further informed he could cancel the switch by contacting UGI within 5 days of the date of the letter. PO ¶¶ 4-6. Respondent asserted the Complaint failed to allege a violation of the Public Utility Code; therefore, the Complaint should be dismissed as a matter of law.

Response to New Matter and Answer to Preliminary Objections

On February 20, 2018, Complainant filed a Response to the New Matter and an Answer to the PO. Complainant argued, in part, that Respondent's New Matter did not assert any factual averments; rather the New Matter contained a legal conclusion. Therefore, the New Matter should be stricken as impertinent matter or denied.

In Answer to the PO, Complainant, in part, admitted he had received a letter from Respondent stating that his choice of NGS would not be effectuated until more than two months after he made his selection, and he did not contact the company to cancel his request to change

¹ By the time of hearing, Complainant's natural gas supplier had been switched to the supplier of his choice. Tr. 25, 40.

suppliers. Complainant further averred that his failure to cancel his supplier choice within five days of receiving the letter was not the issue. Answer to PO ¶ 5. Rather, the issue was whether UGI's taking more than two months to switch suppliers constituted unreasonable service under 66 Pa.C.S. § 1501, considering the Commission's regulations require that customers be switched at "the beginning of the first feasible billing period following the 10-day waiting period. 52 Pa.Code § 59.94." *Id.*

Hearing Notice

By Hearing Notice dated April 18, 2018, the Parties were informed that this case was assigned to me for a telephonic hearing on May 16, 2018, at 10:00 a.m., and to rule upon the PO and Answer to PO. On the same date, I issued a Prehearing Order informing the Parties about the applicable procedural rules for the hearing.

Ruling on Preliminary Objections

On April 25, 2018, I issued an interim order denying UGI's PO because Complainant was challenging the reasonableness of UGI's tariff. While a utility's Commission-approved tariff is *prima facie* reasonable, a complainant may establish that facts and circumstances have changed so drastically as to render the application of the tariff provision unreasonable. Therefore, UGI could not prevail on its PO as a matter of law.²

Evidentiary Hearing

The hearing convened as scheduled. Complainant appeared, and he was represented by Todd S. Stewart, Esquire. Complainant did not sponsor any exhibits. Respondent was represented by Jorge Pereira, Esquire, who called one witness, David Lahoff. Mr. Lahoff has the position of Senior Manager, Tariff and Supplier Administration with UGI. He sponsored UGI's Exhibits 1 and 2, which were admitted into the record. I informed the

² The reader is directed to the *First Interim Order Denying Respondent's Preliminary Objections* issued herein, for a more detailed analysis and disposition of the preliminary motion.

Parties that I was taking judicial notice of UGI's Tariff, Gas-Pa. P.U.C. No. 6-S, Rule 9.3, effective October 19, 2016, relating to the enrollment of customers choosing to switch their NGS.³ Tr. 43.

The hearing generated a 63-page transcript. The record was closed by an interim order entered on June 4, 2018. This case is procedurally ready for ruling.

FINDINGS OF FACT

1. Complainant Randy Stewart resides at 526 Pine Street, Denver Pennsylvania (service address). Tr. 5.
2. Respondent UGI Utilities, Inc. is a jurisdictional public utility providing gas service to Pennsylvania customers.
3. On December 21, 2017, Complainant contacted Dominion Energy Solutions (Dominion) to switch from his NGS, Shipley Energy Company, to Dominion, and he understood that Dominion in turn would notify UGI about his NGS choice. Tr. 9, 13-15.
4. On December 22, 2017, UGI received, through its electronic data interchange system, a request to change Complainant's NGS to Dominion. Tr. 23-24, 47.
5. On December 25, 2017, Respondent mailed a letter to Complainant stating if he did not contact Respondent within 5 days of receiving the letter, his NGS would be switched to Dominion on the second month after the next meter reading date, which would be February 28, 2018. Tr. 16, 25, 46.
6. Complainant did not contact Respondent within 5 days of receiving a letter from Respondent concerning switching his natural gas supplier. Tr. 16.

³ Upon notification to the parties, the Commission or the Presiding Officer may take judicial notice of a material fact not appearing in the record. *See* 52 Pa.Code §§ 5.408(a) and (b).

7. Complainant's meter reading date is the 28th of the month. Tr. 41.

8. On February 28, 2018, Respondent switched Complainant to his new NGS, i.e., Dominion. Tr. 25, 40.

9. Respondent's Commission-approved tariff provides that if a customer makes a request to switch to a new NGS before the 15th of the month, the customer is switched to the new supplier starting with the next billing cycling following the customer's request to switch suppliers. Tr. 24.

10. When Respondent receives a request to switch a customer's NGS after the 15th of the month, Respondent switches the customer to the new supplier of choice starting on the second month following the request, in accordance with Respondent's Commission-approved tariff. *Id.*

11. Respondent's Gas Service Tariff Number 6 and Gas Choice Supplier Tariff Number 6-S concerning the Respondent's policies for switching a customer's NGS were approved by the Commission on September 1, 2016. Tr. 26.

12. "The main reason for the cutoff of the 15th of the month [for switching a customer's NGS] is that because on the 16th of the month UGI determines the amount of capacity for a functionally equivalent gas sale that it will provide to each NGS based on the expected peak day demand of the NGS's customers at the end of the calendar month." This process permits NGSs to know what their gas assets need to be for the upcoming month. Tr. 27-28.

DISCUSSION

Legal Standards

Complaints and Burden of Proof

Section 701 of the Public Utility Code (Code), 66 Pa.C.S. § 701, provides that any person may complain, in writing, about any act or thing done or omitted to be done by a public utility in violation, or claimed violation, of any law which the Commission has the jurisdiction to administer, or of any regulation or order of the Commission.

As the proponent of a rule or order, Mr. Stewart, Complainant in this proceeding, bears the burden of proof pursuant to Section 332(a) of the Code, 66 Pa.C.S. § 332(a). To establish a sufficient case and satisfy the burden of proof, Complainant must show that UGI is responsible or accountable for the problem described in the Complaint. *Patterson v. Bell Telephone Company of Pennsylvania*, 72 Pa. PUC 196 (1990). Such a showing must be by a preponderance of the evidence. *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm'n*, 578 A.2d 600 (Pa.Cmwlth. 1990), *alloc. denied*, 529 Pa. 654, 602 A.2d 863 (1992). That is, Complainant's evidence must be more convincing, by even the smallest amount, than that presented by UGI. *Se-Ling Hosiery, Inc. v. Margulies*, 364 Pa. 45, 70 A.2d 854 (1950).

Additionally, any finding of fact necessary to support the Commission's adjudication must be based upon substantial evidence in the record. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk & Western Ry. Co. v. Pa. Pub. Util. Comm'n*, 489 Pa. 109, 413 A.2d 1037 (1980).

Upon the presentation by Complainant of evidence sufficient to initially satisfy the burden of proof, the burden of going forward with the evidence to rebut the evidence of Complainant shifts to UGI. If the evidence presented by UGI is of co-equal value or "weight,"

the burden of proof has not been satisfied. Complainant now must provide some additional evidence to rebut that of UGI. *Burleson v. Pa. Pub. Util. Comm'n*, 443 A.2d 1373 (Pa.Cmwlth. 1982), *aff'd*, 501 Pa. 433, 461 A.2d 1234 (1983).

While the burden of going forward with the evidence may shift back and forth during a proceeding, the burden of proof never shifts. The burden of proof always remains on the party seeking affirmative relief from the Commission. *Milkie v. Pa. Pub. Util. Comm'n*, 768 A.2d 1217 (Pa.Cmwlth. 2001).

Reasonable Service

Section 1501 of the Code, 66 Pa.C.S. § 1501, states, “Every public utility must furnish and maintain adequate, efficient, safe, and reasonable service and facilities, and must make all repairs, changes, alterations, substitutions, extensions, and improvements in or to its service and facilities as shall be necessary or proper for the accommodation, convenience, and safety of its patrons, employees, and the public.” Section 102 of the Code, 66 Pa.C.S. § 102, defines “service” as:

Used in its broadest and most inclusive sense, includes *any and all acts done, rendered, or performed*, and any and all things furnished or supplied, and any and all facilities used, furnished, or supplied by public utilities

(emphasis added). A utility’s “service” is not merely confined to the distribution of utility service, but also includes “any and all acts” related to that function. *West Penn Power Co. v. Pa. Pub. Util. Comm'n*, 578 A.2d 75 (Pa.Cmwlth. 1990). Consequently, a utility’s procedures for switching a customer’s natural gas supplier falls within the Code’s definition of service.

Changing a Customer’s NGS

Under the Commission’s regulations, upon receiving notice from an NGS that a customer wished to switch his NGS, a natural gas distribution company (NGDC), such as UGI, is

required to change a customer's NGS starting with the first feasible billing period. Specifically, the regulation provides as follows:

§ 59.94. Time frame requirement.

When a customer has provided the NGS with oral confirmation or written authorization to changes NGSs, the NGDC shall make the change at the beginning of the first feasible billing period following the 10-day waiting period, as prescribed in § 59.93 (relating to customer contacts with NGSs).

52 Pa.Code § 59.94. Note, the Commission waived the 10-day waiting period to a 5-day waiting period, under *Interim Guidelines Regarding Standards for Changing a Customer's Electricity Generation Supplier*, Docket No. M-2011-2270442 (Final Order entered October 25, 2012). See Appendix B of the Final Order. Also, amendments to the regulations for switching a customer's natural gas supplier are currently under review by the Commission. See *Rulemaking to Amend the Provisions of 52 Pa.Code, Chapter 59 Regulations Regarding Standards for Changing a Customer's Natural Gas Supplier Amendments*, Docket No. L-2016-2577413.

UGI's Tariff

UGI's tariff for enrolling customers with the NGS of their choice provides as follows:

Determination of Gas Flow Date. For enrollments received on or before the 15th of any calendar month, the customer will be switched to Rate Schedule RT [residential rate] and NT [small commercial rate schedule], where the customer does not respond within 5 days from the Company's mailing of a letter confirming the election to be served by the Choice Supplier [NGS], on the Customer's regularly scheduled meter reading date in the calendar month immediately following the month the enrollment information was received. For enrollments received after the 15th of any calendar month, the customer will be switched to Rate Schedule RT and NT, where the customer does not respond within 5 days from the Company's mailing of a letter confirming the election to be served by the Choice Supplier, on the Customer's regularly scheduled meter reading date in the second

calendar month following the month the enrollment information was received.

UGI Utilities, Inc.—Gas P.U.C. No. 6-S, Rule 9.3; Tr. 43-44.

Positions of the Parties

Complainant maintains Respondent's requirement that he must wait two months to switch to a new gas supplier is unreasonable. Tr. 10-12. Complainant claims UGI should be able to switch a customer's NGS within one billing cycle, and the Commission should order Respondent to change its rules (tariff) to switch a customer's supplier within one billing cycle Tr. 17.

Respondent argues that the requirements for switching suppliers are set forth in its Commission-approved tariff. Tr. 24, 26. Respondent further argues that Complainant failed to establish that the Company violated the Code, a Commission regulation, or a Commission order. Tr. 57. Thus, Respondent argues the Complaint must be dismissed.

Analysis

Pennsylvania courts have repeatedly held that tariff provisions that have been properly submitted to and approved by the Commission are *prima facie* reasonable. *Zucker v. Pa. Pub. Util. Comm'n*, 401 A.2d 1377 (Pa.Cmwlth. 1979), *Shenango Township Board of Supervisors v. Pa. Pub. Util. Comm'n*, 686 A.2d 910, 914 (Pa.Cmwlth. 1996), *Kossmann v. Pa. Pub. Util. Comm'n*, 694 A.2d 1147, 1151 (Pa.Cmwlth. 1997). Therefore, a complainant seeking to evade the effect of an existing tariff provision carries a very heavy burden to prove that the facts and circumstances have changed so drastically as to render the application of the tariff provision unreasonable. *Id.*; *Brockway Glass Co. v. Pa. Pub. Util. Comm'n*, 437 A.2d 1067 (Pa.Cmwlth. 1981).

In the instant case, Complainant contends that UGI's two-month delay in switching a customer's NGS is unreasonable. Tr. 10. Complainant suggests UGI should switch

a customer within one billing cycle. *Id.* As the rationale for one billing cycle, Complainant posits, “That’s the way I would conduct business.” Tr. 12.

Respondent’s tariff manager, Mr. Lahoff, explained when a customer makes a request to change his NGS after the 15th day of the calendar month, the Company requires two months to effectuate the change. The two-month period for switching NGSs is related to forecasting the monthly amount of gas supply needed for customers. Tr. 30.

[If] the customer ended up switching either during or after bid week, the suppliers could end up with an imbalance in their portfolio and possibly be charged imbalance penalties.

In addition, if the supplier does not have the capacity to deliver the gas to the customer, . . . in the information provided for the facility, the utility would have to step in and cover the gas based on the supplier of last resort obligation.

Ultimately you would need – the utility would have to carry a great level of capacity to cover the potential gas or withdraw capacity from another supplier and transmit to the supplier deficit.

[The bid week is] . . . the last week of the month, and it’s when the majority of trading occurs for natural gas. It’s the period when natural gas producers are trying to sell their core production. The suppliers are trying to lock in their purchases for the upcoming month.

Capacity is basically the space in the pipeline that a supplier is contracted for out of their peak daily demand in a given month.

Tr. 30-31.

The whole process is to allow for the utility to determine . . . what capacity it has to release to its supplier based on their portfolio - - their known portfolio or customers, and they do that release of that information on the 16th of every month so the suppliers will have that information prior to bid week to source their natural gas for the coming month.

[S]o if the switch came after that period [the 15th of the month], the system wouldn't pick up that supply obligation. It wouldn't pick up that customer as a supplier obligation until that second month.

Tr. 49.

In the present case, Complainant admits he called NGS Dominion on December 21, 2017 to switch from Shipley to Dominion. Tr. 9, 13-15. Since Complainant requested a change in his NGS after the 15th of the month, UGI sent him a letter on December 25, 2017, informing him that his NGS would be changed on February 28, 2018, his scheduled meter reading date. The procedure UGI employed to switch Complainant's NGS complied with the provisions of the Company's Commission-approved tariff. The rationale for UGI's procedure to switch a customer's NGS, as explained by Mr. Lahoff, is reasonable. In other words, the process enables UGI and NGSs to forecast the amount of monthly gas supply needs for customers and permits an NGS to lock in gas purchases by factoring in the number of customers it is required to supply with gas for the upcoming month. Tr. 30-31, 49. Considering Mr. Lahoff's rationale, February 28, 2018 was the beginning of the first feasible billing period by which UGI could change Complainant's NGS.

Complainant did not present any facts or circumstances to warrant a finding that the tariff provisions have become unreasonable since the Commission approved the tariff in 2016. Complainant simply asks the Commission to change the procedure that UGI uses to switch a customer to a new natural gas supplier.

Complainant's position, that he would employ a one-month billing cycle to switch NGSs because that is "how he would conduct business," is reduced to a personal opinion. Tr. 12. Personal opinions, assertions or perceptions do not rise to the level of substantial evidence, which is necessary of Complainant to establish his burden of proof. *Pennsylvania Bureau of Corrections v. City of Pittsburgh*, 532 A.2d 12 (Pa. 1987).

Without any supporting evidence that UGI's Commission-approved tariff has become unreasonable, the Complaint cannot be sustained. Therefore, the Complaint must be

dismissed for Complainant's failure to establish that Respondent violated any applicable law, regulation or order of the Commission.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the Parties and the subject matter in this proceeding.

2. Pursuant to 66 Pa.C.S. § 332(a), the burden of proof in this proceeding is upon Complainant.

3. A public utility's tariff provisions approved by the Commission are *prima facie* reasonable. *Zucker v. Pa. Pub. Util. Comm'n*, 401 A.2d 1377 (Pa.Cmwlth. 1979), *Shenango Township Board of Supervisors v. Pa. Pub. Util. Comm'n*, 686 A.2d 910, 914 (Pa.Cmwlth. 1996), *Kossmann v. Pa. Pub. Util. Comm'n*, 694 A.2d 1147, 1151 (Pa.Cmwlth. 1997).

4. Complainant presented no evidence that Respondent's tariff relevant to switching a customer to a new natural gas supplier as approved by the Commission is unreasonable.

5. Complainant failed to meet his burden of proof that Respondent violated any applicable law, regulation or order of the Commission.

ORDER

THEREFORE,

IT IS ORDERED:

1. That the Complaint of Randy Stewart v. UGI Utilities, Inc. – Gas Division at Docket No. C-2018-2642778 is dismissed for Complainant’s failure to carry his burden of proof.
2. That the Secretary’s Bureau shall mark Docket No. C-2018-2642778 closed.

Dated: August 9, 2018

_____/s/_____
Conrad A. Johnson
Administrative Law Judge