

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Rashid El Malik	:	
	:	
v.	:	F-2020-3018838
	:	
PECO Energy Company and Reliant Energy	:	
Northeast LLC d/b/a NRG Residential Solutions	:	

**INITIAL DECISION**

Before  
Conrad A. Johnson  
Administrative Law Judge

**INTRODUCTION**

A customer filed a Complaint against his electric and gas distribution company (EDC), PECO Energy Company, and an electric generation supplier (EGS) and natural gas supplier (NGS), NRG Residential Solutions (NRG Residential), alleging that his electric and natural gas supply was switched from his EDC to the EGS and NGS without his authorization. This decision finds the confirmation letter mailed to the customer regarding the switch to an NGS did not contain the 10-day waiting period to confirm the selection required by Commission regulations. The EDC followed Commission regulations in processing the EGS switch and subsequent return to the EDC after instructions from the customer. The EGS and NGS switches were unauthorized by the customer. This decision orders NRG Residential to refund the customer all of the electric and natural gas supply charges he paid because the EGS and NGS switches were not authorized by the customer.

## HISTORY OF THE PROCEEDING

On February 21, 2020, Rashid El Malik (Complainant) filed a Complaint with the Commission against PECO Energy Company (PECO) and Reliant Energy Northeast LLC d/b/a NRG Residential. The Complaint is a timely appeal of the Bureau of Consumer Services (BCS) decision dated December 21, 2019, at BCS No. 3689289. The Complaint alleges that Complainant never authorized PECO or NRG Residential to switch his electric supplier and natural gas supplier from PECO to NRG Retail Solutions (NRG Retail) and NRG Home, respectively. Complainant seeks damages and a civil penalty.

PECO filed an Answer to the Complaint on March 10, 2020. The Answer provides that PECO processed a switch request submitted to it by NRG Residential. PECO avers it is not a party to the contracts between Complainant and NRG Residential that were allegedly unauthorized, and that NRG Residential is the proper Respondent party for Complainant's Complaint, not PECO.

PECO filed Preliminary Objections on March 12, 2020. PECO requests that the Complaint against PECO be dismissed because it is legally insufficient. Specifically, the Complaint does not allege any facts that could be construed as a violation by PECO of any statute, regulation, or order. PECO reiterates its position that the supplier switch contracts are between Complainant and NRG Residential. PECO adds that it followed its Commission-approved tariff in processing the switches.

On May 26, 2020, Complainant filed his Answer to PECO's Preliminary Objections and "withdrawing" PECO from this proceeding.

On May 27, 2020, NRG Residential filed its Answer to the Complaint denying the material allegations contained therein.

On June 9, 2020, a Motion Judge Assignment was sent to the parties advising them that the undersigned was assigned to resolve any issues that may arise during the preliminary phase of this proceeding.

On June 9, 2020, a corrected hearing notice was sent to Complainant, PECO and NRG Residential advising them that an initial call-in telephone hearing was scheduled for Wednesday, July 1, 2020 at 11:30 a.m.<sup>1</sup>

On June 10, 2020, Complainant filed a revised Answer to PECO's Preliminary Objections and rescinded his removal of PECO as a respondent party in this proceeding.

On June 16, 2020, the undersigned issued a Prehearing Order addressing, *inter alia*, requests for continuance, subpoena procedures, attorney representation and the Commission's policy encouraging settlements.

Also, on June 16, 2020, the undersigned issued an Interim Order holding PECO's Preliminary Objections in abeyance.<sup>2</sup>

On June 18, 2020, Complainant filed three subpoenas directed to Avis Chisholm, an investigator for BCS, NRG Residential and PECO.

On June 19, 2020, Karen O. Moury, Esquire, entered her appearance on behalf of NRG Residential. On June 29, 2020, NRG Residential filed objections to the subpoena filed by Complainant. NRG Residential asserted numerous objections to the subpoena for failure to comply with the Commission's regulation at 52 Pa.Code § 5.421.<sup>3</sup>

---

<sup>1</sup> An initial call-in hearing notice and a corrected initial call-in hearing notice were sent to the three parties on June 9, 2020 prior to this corrected call-in telephone hearing notice.

<sup>2</sup> The Preliminary Objections of PECO were denied at the hearing on July 1, 2020. Transcript (Tr.) 62.

<sup>3</sup> The undersigned was not served with applications for subpoenas and the three subpoenas filed with the Commission's Secretary's Bureau did not comply with 52 Pa.Code § 5.421. Complainant did not orally apply for subpoenas at the hearing on July 1, 2020. The subpoena requests were denied by the undersigned during the hearing on July 1, 2020 and Complainant agreed with the denial. Tr. 60.

The undersigned conducted a telephonic hearing on July 1, 2020, at 11:30 a.m., as scheduled. Complainant appeared *pro se*. Complainant testified and presented the testimony of his wife, Rosalind El Malik. Complainant offered Complainant's Exhibits 1-8. Complainant's Exhibits 1-6, and 8 were admitted into evidence. Khadijah Scott, Esquire, represented PECO. Counsel for PECO presented the testimony of two witnesses, Carol Reilly, and Anna Mae Migliaccio, and offered PECO Exhibits 1-3, which were admitted into evidence. Karen O. Moury, Esquire, represented NRG Residential. Counsel for NRG Residential presented the testimony of one witness, Spencer Halstead, and offered two exhibits, which were admitted as NRG Exhibits 1 and 2. The initial hearing resulted in a transcript of 139 pages. The record closed by Interim Order on July 30, 2020.

#### FINDINGS OF FACT

1. Complainant in this case is Rashid El Malik.
2. Respondents in this case are NRG Residential Solutions and PECO Energy Company.
3. Complainant resides at 1320 Via Margarita, Palos Verdes Estate, CA 90274 (Tr. 5).
4. The service address where Complainant receives electric and gas utility service is 249 Haverford Road, Wynnewood, PA 19106 (Tr. 41).
5. On January 21, 2019, an unauthorized person switched Complainant's electric supplier to NRG Retail from PECO and natural gas supplier to NRG Home from PECO for the service address at a retail event held at SEPTA Suburban Station in Philadelphia, Pennsylvania (Tr. 37-39, 100; Complainant's Exhibit 8).

6. Complainant, PECO and NRG Residential stipulated that Complainant did not authorize the supplier switches on January 21, 2019 at the retail event and that he was not present at the retail event (Tr. 37-39).

7. NRG Retail became Complainant's electric supplier for the service address on January 28, 2019 (Tr. 99).

8. NRG Home became Complainant's natural gas supplier for the service address on February 4, 2019 (Tr. 99).

9. On January 31, 2019, after Complainant became aware of the supplier switches, he contacted PECO to disenroll and switch his electric supplier and natural gas supplier back to PECO (Tr. 45, 87).

10. NRG Retail was Complainant's electric supplier for the service address from January 28, 2019 to February 5, 2019 (Tr. 87, 99; Complainant's Exhibit 8, PECO Ex. 1).

11. NRG Home was Complainant's natural gas supplier for the service address from February 4, 2019 to March 6, 2019 (Tr. 87, 99; Complainant's Exhibit 8, PECO Ex. 1).

12. NRG Retail's electric supplier charges billed to Complainant totaled \$6.56. NRG Home's natural gas supplier charges billed to Complainant totaled \$62.72. The total amount of charges billed to Complainant was \$69.28 (Tr. 85-87, 138; PECO Ex. 1).

13. The enrollment of Complainant's service address account with NRG Residential at the SEPTA Suburban Station on January 21, 2019, was completed using an electronic tablet that required the unauthorized enrollee to provide an electronic signature for both the Residential Electric Enrollment Form and the Residential Gas Enrollment Form (Tr. 37-39, 101-104, 115; NRG Exhibits 1 and 2).

14. On the electronic enrollment forms completed on January 21, 2019, where an e-mail address is to be provided, the following was entered on both enrollment forms: [noemail@nrg.com](mailto:noemail@nrg.com) (Tr. 101-104; NRG Exhibits 1 and 2).

15. Confirmation of the electric and natural gas supplier changes made to Complainant's account for the service address on January 21, 2019, were sent by mail because the electronic enrollment forms do not contain an e-mail address for Complainant (Tr. 104).

16. On January 22, 2019, after being notified by NRG Residential via the electronic data interchange enrollment transaction, PECO mailed Complainant a Confirmation of New Electric Generation Supplier letter listing NRG Retail as the chosen supplier with an effective date of January 28, 2019 (Tr. 42-43, 72; Complainant's Exhibit 8).

17. On January 23, 2019, after being notified by NRG Residential via the electronic data interchange enrollment transaction, PECO mailed Complainant a Confirmation of New Natural Gas Supplier letter listing NRG Home as the chosen supplier with an effective date of February 4, 2019 (Tr. 42-43, 72; Complainant's Exhibit 8).

18. The January 23, 2019 letter from PECO to Complainant containing information about the switch of his natural gas supplier advised Complainant that if the information contained in the confirmation letter was not correct he should contact PECO within 6 days of the date of the confirmation letter (Tr. 42-43; Complainant's Exhibit 8).

19. On January 31, 2019, after being contacted by Complainant, PECO mailed a Confirmation of Return to PECO for Electric Supply letter to Complainant (Tr. 29; Complainant's Ex. 1).

20. NRG Residential is willing to reimburse Complainant all the supply charges incurred resulting from the unauthorized switch of his electric and natural gas suppliers from PECO to NRG Retail and NRG Home (Tr. 106-107).

21. Complainant filed an informal complaint with the BCS at BCS No. 3689289 and appealed the BCS decision dated December 21, 2019 (Tr. 91-92; PECO Exhibit 3).

### DISCUSSION

Complainant in this proceeding has the burden of proof to show that either PECO or NRG Residential is responsible or accountable for the problem described in the Complaint. *Patterson v. Bell Tel. Co. of Pa.*, 72 Pa. PUC 196 (1990), *Feinstein v. Philadelphia Suburban Water Co.*, 50 Pa. PUC 300 (1976). Complainant must establish his case by a preponderance of the evidence. *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm'n*, 578 A.2d 600 (Pa. Cmwlth. 1990), *alloc. den.*, 602 A.2d 863 (Pa. 1992). To meet his burden of proof, Complainant must present evidence more convincing, by even the smallest amount, than that presented by either PECO or NRG Residential. *Se-Ling Hosiery v. Margulies*, 70 A.2d 854 (Pa. 1950). Here the Complainant alleges that he never authorized PECO or NRG Residential to switch his electric supplier and natural gas supplier from PECO to NRG Retail for electric and NRG Home for natural gas. Complainant seeks damages and a civil penalty.

No party to this proceeding disputes the fact that Complainant did not attend the retail event at the SEPTA Suburban Station in Philadelphia on January 21, 2019. Tr. 37-39. Complainant resides in California and the service address is in Pennsylvania. The parties to this proceeding also do not dispute the fact that Complainant's electric supplier and natural gas supplier were switched by an unauthorized person on January 21, 2019. As a result of these unauthorized switches, which NRG Residential admitted occurred, NRG Residential is agreeable to refunding the supplier charges incurred by Complainant in the amount of \$69.28. Tr. 106, 138.

### PECO

When a customer contacts an EGS to request a change from the default service provider, in this case PECO, to a newly selected EGS, the selected EGS shall notify the EDC of the customer's EGS selection. 52 Pa.Code § 57.173(1). Upon receipt of the notification, the EDC must send the customer a confirmation letter noting the proposed change. 52 Pa.Code § 57.173(2). The

notice must include the date service with the newly selected EGS is to begin and the letter must be mailed by the end of the next business day following the receipt of notification of the customer's selection of an EGS. *Id.* The Commission's regulations do not require an EDC, such as PECO, to provide a customer with a specific amount of time within which to confirm his or her switch to an EGS. *Id.*

No evidence was present at hearing that PECO violated the Pennsylvania Public Utility Code, 66 Pa.C.S. § 101 *et seq.*, the Commission's regulations or any orders of the Commission in the manner in which it processed the electric supply switch from PECO to NRG Retail and then back to PECO. PECO processed the electronic data interchange enrollment transaction properly after receiving the switch request from NRG Residential. After Complainant contacted PECO to cancel the electric supplier change on January 31, 2019, PECO sent a confirmation letter that same day switching Complainant's electric supplier from NRG Retail back to PECO.

Concerning the natural gas supplier switch that is at issue in this proceeding, when a customer contacts a NGS to request a new NGS, the newly selected NGS must notify the natural gas distribution company (NGDC) of the customer's new selection by the end of the next business day following completion of the application process. 52 Pa.Code § 59.93(1). Upon receipt of this notification, the NGDC must send the NGDC ratepayer of record a confirmation letter noting the proposed change of NGS. 52 Pa.Code § 59.93(2). This letter must include notice of a 10-day waiting period in which the order may be canceled before the change of the NGS takes place. *Id.* The notice shall include the date service with the new NGS will begin unless the customer contacts the NGDC to cancel the change. *Id.* The 10-day waiting period shall begin on the day the letter is mailed. *Id.* The letter shall be mailed by the end of the next business day following the receipt of the notification of the customer's selection of an NGS. *Id.* When a customer has provided the NGS with authorization to change 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 section 59.93(2). 52 Pa.Code § 59.93.

PECO's Commission-approved Tariff differs from section 59.93(2) in that it provides for only 5 days from the date of the confirmation letter to cancel the natural gas supplier switch. Pursuant to PECO's Tariff, the Company will send a confirmation notice to all customers who have made a NGS selection by the next business day after receiving the request from the NGS. Included in this notice shall be notification of a five-day waiting period in which the customer may cancel its selection of an NGS. The waiting period shall begin on the day the notice is mailed to the customer. PECO Energy Company-Gas Choice Supplier Coordination Tariff-Tariff Gas Pa. PUC No. 2S, Original Page No. 19, NGS Selection Procedures 6.3.1f.

The January 23, 2019, confirmation letter switching Complainant's natural gas supplier from PECO to NRG Home provided for 6 days from the date on the letter for Complainant to contact PECO if the information contained therein was incorrect. Complainant's Exhibit 8. This letter complies with PECO's Commission-approved Tariff that requires a 5-day waiting period, but it does not comply with 52 Pa.Code § 59.93(2) which requires 10 days. PECO's Commission-approved Tariff should comply with the applicable regulation and PECO's Tariff should require a 10-day waiting period in confirmation letters to customers advising of a natural gas supplier switch from PECO to an NGS. PECO's January 23, 2019, confirmation letter is in violation of the regulation; however, since it complies with its Commission-approved Tariff, a civil penalty is not warranted. *See*, 66 Pa.C.S. § 3301. The more appropriate remedy in this case is to order PECO to explicitly provide the requisite 10-day waiting period in future confirmation letters advising customers of a natural gas supplier switch from PECO to an NGS. PECO should also change its Tariff accordingly.

It is unclear from the record evidence why Complainant's gas service was switched to NRG Home on February 4, 2019, despite the fact he called PECO on January 31, 2019 to cancel. Maybe Complainant failed to mention the natural gas supplier switch when he spoke with a representative of PECO on January 31, 2019 and only discussed the electric supplier switch or maybe PECO, for some unknown reason, did not cancel the switch at that time and allowed natural gas supply to be provided by NRG Home from February 4, 2019 to March 6, 2019. Complainant has the burden of proof to establish a violation of the Code, Commission regulations or

Commission orders and the record evidence does not establish a violation by PECO with respect to completing the switch from February 4, 2019 to March 6, 2019.

### NRG Retail

With respect to disputes arising over EGS supplier switches, Section 57.177 of the Commission's regulations provides in pertinent part as follows:

(b) When the customer's dispute has been filed within the first two billing periods since the customer should reasonably have known of a change of the EGS and the dispute investigation establishes that the change occurred without the customer's consent, the customer is not responsible for EGS bills rendered during that period. If the customer has made payments during this period, the company responsible for initiating the change of supplier shall issue a complete refund within 30 days of the close of the dispute. The refund or credit provision applies only to the generation charges.

(c) A customer who has had an EGS changed without having consented to that change shall be switched back to the original EGS for no additional fee. Any charges involved in the switch back to the prior EGS are the responsibility of the company that initiated the change without the customer's consent.

(e) In addition to customer-specific remedies, the Commission may, after investigation and decision, assess fines under 66 Pa.C.S. Chapter 33 (relating to violations and penalties) and initiate proceedings to revoke the license of an EGS that demonstrates a pattern of violating this subchapter. The Commission may order a particular EGS that has a pattern of violating this subchapter to obtain written authorization from every new customer as a condition of providing service in this Commonwealth. Nothing in this subchapter is intended to limit the Commission's authority.

52 Pa.Code § 57.177(b), (c) and (e).

With respect to disputes arising as over NGS switches, Section 59.97 of the Commission's regulations provides in pertinent part as follows:

(a) When a customer contacts an NGDC or an NGS and alleges that the customer's NGS has been changed without consent, the company contacted shall:

(1) Consider the matter a customer registered dispute.

(2) Investigate and respond to the dispute consistent with the requirements in § 56.151 and 56.152 (relating to utility company dispute procedures).

(b) When the customer's dispute has been filed within the first two billing periods since the customer should reasonably have known of a change of NGSs and the dispute investigation establishes that the change occurred without the customer's consent, the customer is not responsible for NGS charges rendered during that period. If the customer has made payments during this period, the company responsible for initiating the change of supplier shall issue a complete refund within 30 days of the close of the dispute. The refund or credit provision applies only to the natural gas supply charges.

52 Pa.Code § 59.97(a), (b).

The Commission, as a creation of the General Assembly, has only the powers and authority granted to it by the General Assembly contained in the Public Utility Code. *Shedlosky v. Pa. Elec. Co.*, Docket No. C-20066937 (Order entered May 28, 2008); *Feingold v. Bell Tel. Co. of Pa.*, 383 A.2d 791 (Pa. 1977). The Commission must act within, and cannot exceed, its jurisdiction. *Pittsburgh v. Pa. Pub. Util. Comm'n*, 43 A.2d 348 (Pa. Super. 1945). Jurisdiction may not be conferred by the parties where none exists. *Roberts v. Martorano*, 235 A.2d 602 (Pa. 1967). Subject matter jurisdiction is a prerequisite to the exercise of power to decide a controversy. *Hughes v. Pa. State Police*, 619 A.2d 390 (Pa. Cmwlth. 1992), *alloc. denied*, 637 A.2d 293 (Pa. 1993).

NRG Residential, as an EGS and NGS, is not a public utility subject to Commission regulation, except in limited circumstances. *Delmarva Power & Light Co. v. Pa. Pub. Util. Comm'n*, 870 A.2d 901 (Pa. 2005) (*Delmarva*). In *Delmarva*, the Pennsylvania Supreme Court held that the definition of "public utility" at 66 Pa.C.S. § 102 does not include EGSs except for the limited purposes set forth in 66 Pa.C.S. § 2809, regarding licensing requirements and 66 Pa.C.S. § 2810, regarding revenue neutral reconciliation.

The evidence entered in to record at the hearing did not shed much light on the unauthorized supplier switches, both electric and natural gas, that occurred at the SEPTA Suburban Station on January 21, 2019. NRG Retail stipulated that the supplier switches were unauthorized, and that Complainant did not attend that retail event but that is all that is known about the transactions that occurred that day. Evidence is lacking regarding who signed the enrollment forms. Evidence is also lacking with respect to any culpability by NRG Residential. Because the facts here are unknown, NRG Residential cannot be charged with improper conduct regarding the switches. The evidence does not establish a pattern of unauthorized enrollments by NRG Residential and any civil penalty discussion involving NRG Residential's EGS and NGS licenses is unwarranted.

NRG Residential is directed to refund all of the EGS and NGS supplier charges billed to Complainant as a result of these two unauthorized switches in accordance with 52 Pa.Code §§ 57.177(b) and 59.97 (b). NRG agreed to do so at the hearing. Tr. 106-107.

#### CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the subject matter and parties to this proceeding. 66 Pa.C.S. § 701.
2. The burden of proof in this proceeding is on the Complainant. 66 Pa.C.S. § 332(a).
3. The confirmation letter a natural gas distribution company must send its ratepayer of record regarding a supplier switch from the natural gas distribution company to a natural gas supplier must include notice of a 10-day waiting period in which the order may be canceled before the change of the NGS takes place. 52 Pa.Code § 59.93(2).
4. NRG Residential, as an EGS and NGS, is not a public utility subject to Commission regulation, except in limited circumstances. *Delmarva Power & Light Co. v. Pa. Pub. Util. Comm'n*, 870 A.2d 901 (Pa. 2005).

5. The Commission has the authority to direct EGSs to refund charges for electric generation supply service and to direct NGSs to refund charges for natural gas supply service when the switches were not authorized. 52 Pa.Code §§ 57.177(b) and 59.97 (b).

ORDER

THEREFORE,

IT IS ORDERED:

1. That the Complaint of Rashid El Malik against PECO Energy Company and Reliant Energy Northeast LLC d/b/a NRG Residential at Docket No. F-2020-3018838 is sustained, in part, and denied, in part.

2. That PECO Energy Company shall include notice of a 10-day waiting period in which the order switching natural gas suppliers may be canceled in the confirmation letters it sends to ratepayers pursuant to 52 Pa.Code § 59.93.

3. That Reliant Energy Northeast LLC d/b/a NRG Residential shall refund to Complainant all the electric supply charges Complainant paid and all of the natural gas supply charges Complainant paid within 30 days of the entry of a final order in this proceeding, and submit a filing with the Commission's Secretary's Bureau confirming the refund.

4. That the docket at Docket No. F-2020-3018838 is marked closed.

Date: November 24, 2020

\_\_\_\_\_  
/s/  
Conrad A. Johnson  
Administrative Law Judge