BEFORE THE

PENNSYLVANIA PUBLIC UTILITY COMMISSION

Byron Goldstein :

:

v. : C‑2022-3030777

:

PECO Energy Company :

# FIRST INTERIM ORDER

# Concerning Respondent’s

# Preliminary Objections

Before

Katrina L. Dunderdale

Administrative Law Judge

# HISTORY OF THE PROCEEDING

On January 28, 2022, Byron Goldstein (Complainant or Mr. Goldstein) filed a formal complaint against PECO Energy Company (Respondent or PECO Energy) regarding gas service to his residence (service address). Complainant alleged PECO Energy’s natural gas supply charges increased up to 47% and he contended the increase was outrageous and irresponsible due to record high inflation. Mr. Goldstein requested the Commission revisit the rate increase.

On February 24, 2022, PECO Energy filed the Answer with New Matter in which it denied generally the allegations. PECO Energy averred in its Answer that Complainant receives electric and gas service. PECO Energy asserted Complainant, as a customer, was informed through a bill insert and publication that PECO Energy filed a request with the Commission to increase the natural gas supply rate in October 2020. Respondent asserted the notices explained how customers could challenge PECO Energy’s request to increase the natural gas rate. PECO Energy also averred that, after investigation and litigation, the Commission approved on June 17, 2021, PECO Energy’s request to increase the rate it charges to deliver natural gas, effective on July 13, 2021, at Docket No. R-2020-3018929. In New Matter, PECO Energy asks the Commission to dismiss the formal complaint to the extent Complainant request the Commission review its prior approval of the natural gas rate, approved on June 17, 2021. PECO Energy requests the dismissal on the grounds the Commission lacks jurisdiction to address the approval of a gas rate case during a formal complaint after the Commission has approved a rate increase.

On February 25, 2022, PECO Energy filed Preliminary Objections against Complainant. The Preliminary Objections included a Notice to Plead (pursuant to 52 Pa.Code § 5.101) and was served upon Complainant via First Class mail. Through its Preliminary Objections, PECO Energy requests the Commission sustain the preliminary objection and dismiss the formal complaint as a matter of law because the formal complaint is legally insufficient. PECO Energy contends the formal complaint is the wrong forum or means in which to dispute a gas rate increase after the Commission approves the increase and the new rates are effective. Respondent notes the request to increase the natural gas rate was granted by the Commission on June 17, 2021 and became effective on July 13, 2021. The Commission having granted the increase because the increase was just and reasonable, the Commission’s approval has the weight of law especially since Complainant, as a customer, had an opportunity to complain about the increase prior to its approval.

Complainant has not responded to the Preliminary Objections. On March 29, 2022, the Office of Administrative Law Judge assigned the handling of the Preliminary Objections to the undersigned presiding officer as a Motion Judge.

DISCUSSION

The Commission’s regulations make preliminary objections available to parties and allow for those objections to be filed in response to any pleading except a motion or prior preliminary objections. A party filing preliminary objections must include a notice to plead, must state specifically the legal and factual grounds relied upon and limit the objections to the following:

1. Lack of Commission jurisdiction or improper service of the pleading initiating the proceeding.
2. Failure of a pleading to conform to Chapter 5, Title 52 of the Pennsylvania Code, or include scandalous or impertinent matter.
3. Insufficient specificity of a pleading.
4. Legal insufficiency of a pleading.
5. Lack of capacity to sue, nonjoinder of a necessary party or misjoinder of a cause of action.
6. Pendency of a prior proceeding or agreement for alternative dispute resolution.

(7) Standing of a party to participate in the proceeding.

52 Pa.Code § 5.101(a).

The party against whom preliminary objections are filed may file an answer to the objections but the answer must be filed within ten days of the date the preliminary objections are served. 52 Pa.Code § 5.101(f)(1).

In deciding preliminary objections, the Commission must determine whether, based on well-pleaded factual averments of the petitioners, recovery or relief is possible.[[1]](#footnote-1) Any doubt must be resolved in favor of the non-moving party, and if there is doubt, the tribunal must refuse to sustain the preliminary objections.[[2]](#footnote-2) All of the non-moving party’s averments in the complaint must be viewed as true for purposes of deciding the preliminary objections, and only those facts specifically admitted may be considered against the non-moving party.[[3]](#footnote-3) Thus, it is only facts in the complaint which can be presumed to be true in order to determine whether recovery is possible.

Tariff provisions previously approved by the Commission are *prima facie* reasonable.[[4]](#footnote-4) Under the doctrine of collateral estoppel, courts prevent a question of law or an issue of fact from being re-litigated if the issue already was litigated once and adjudicated finally in a court of competent jurisdiction.[[5]](#footnote-5) This doctrine, also known as issue preclusion, seeks to prevent the re-litigation of a fully-litigated issue in a subsequent proceeding between the same parties.[[6]](#footnote-6)

Herein, Mr. Goldstein does more than question the approved supply charge – he indicates there has been a change in circumstance since the Commission’s approval which makes the approved supply charge unreasonable.

This Commission adopted an Order at Public Meeting on June 17, 2021, in PECO Energy’s proceeding at Docket No. R-2020-3018929. Mr. Goldstein filed his formal complaint with the Commission alleging Respondent’s natural gas supply charges increased up to 47% and averring the increase was outrageous and irresponsible given the economy is experiencing a 7% inflation rate. Mr. Goldstein requests the Commission revisit and reduce the approved rate increase. In other words, the supply rate Mr. Goldstein opposes is a preexisting rate approved by the Commission.

Section 1301 of the Public Utility Code (“the Code”), 66 Pa. C.S. §1301, requires that public utility rates be just and reasonable. Where a customer is heard to complain about an existing rate, there is a strong presumption that the preexisting Commission approved rates are just and reasonable.[[7]](#footnote-7) The burden of proof falls upon the customer to prove that the previously approved rate is no longer reasonable, by demonstrating “recent significant changes in circumstances in the interim.”[[8]](#footnote-8) Consequently, Complainant herein has the burden of proof and he must demonstrate recent significant changes in circumstances, after June 17, 2021, which caused the Commission approved rate to be unjust and unreasonable. The absence of such a showing establishes prima facie evidence of the facts found in the prior order.[[9]](#footnote-9)

Complainant is entitled to have an opportunity in a hearing to provide evidence that these significant changes are so great as to render the Commission’s approved supply charge is no longer reasonable and just. He is permitted to have an opportunity to testify at the hearing how the supply rate increase in question adversely affected him personally. While the burden to prove the allegations is squarely on Mr. Goldstein to demonstrate recent significant changes in circumstances, after June 17, 2021, which caused the Commission approved rate to become unjust and unreasonable, he should be afforded the opportunity. Accordingly, the preliminary objections are denied.

CONCLUSIONS OF LAW

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

2. Complainant’s complaint raises a claim that, if proven, would show Respondent failed to furnish adequate, efficient, safe and reasonable service and facilities, because a significant change in circumstances has rendered the Commission-approved rate to be unreasonable and unjust. 66 Pa.C.S.A. §§ 316 and 1501, *et seq*.

3. A preliminary objection in civil practice seeking dismissal of a pleading will be granted only where relief is clearly warranted and free from doubt and only if the moving party prevails as a matter of law. *Interstate Traveler Services, Inc. v. Pa. Dept. of Environmental Resources*, 406 A.2d 1020 (Pa. 1979); and *Roc v. Flaherty*, 527 A.2d 211 (Pa.Cmwlth. 1985).

4. Section 703 of the Public Utility Code, 66 Pa.C.S.A. § 703(b), provides that the Commission may dismiss any complaint without a hearing if, in its opinion, a hearing, is not necessary in the public interest.

5. A hearing in this matter is necessary in the public interest.

ORDER

THEREFORE,

IT IS ORDERED:

1. That the preliminary objections of PECO Energy Company seeking dismissal of the complaint filed by Byron Goldstein at Docket No. C-2022-3030777 are denied.

2. That the formal complaint of Byron Goldstein versus PECO Energy Company at Docket No. C-2022-3030777 will proceed to an initial hearing.

Date: April 6, 2022 /s/

Katrina L. Dunderdale

Administrative Law Judge

**C-2022-3030777 - BYRON GOLDSTEIN v. PECO ENERGY COMPANY-GAS**BYRON GOLDSTEIN2365 GENEVA AVENUEGLENSIDE PA 19038**215.884.5475**BGOLDMARKETING@RCN.COM

KHADIJAH SCOTT ASSOCIATE GENERAL COUNSELPECO ENERGY COMPANY2301 MARKET STREET23RD FLOORPHILADELPHIA PA 19103**215.841.6841**  
Accepts EService

1. *Dept. of Auditor General, et al. v. SERS, et al.*, 836 A.2d 1053 (Pa.Cmwlth. 2003); *P.J.S. v. Pa. State Ethics Comm.*, 669 A.2d 1105 (Pa.Cmwlth. 1996). [↑](#footnote-ref-1)
2. *Boyd v. Ward*, 802 A.2d 705 (Pa.Cmwlth. 2002). [↑](#footnote-ref-2)
3. *Ridge v. State Employees’ Retirement Bd.*, 690 A.2d 1312 (Pa.Cmwlth. 1997). [↑](#footnote-ref-3)
4. 66 Pa.C.S.A. § 316. [↑](#footnote-ref-4)
5. The four requirements to find collateral estoppel is present are: (1) the issue decided in the prior adjudication is identical with the one presented in the later action; (2) there was a final judgment on the merits; (3) the party against whom the plea is asserted was a party or in privity with the party to the prior adjudication; and (4) the party against whom the plea is asserted has had a full and fair opportunity to litigate the issues in question in the prior action. *Day v. Volkswaqenwerk Aktiengesellschaft*, 464 A.2d 1313 (Pa. Super. 1983); *O’Toole v. Bell Telephone Co. of Pa.*, 77 Pa. P.U.C. 98 (1992). [↑](#footnote-ref-5)
6. *Baker v. Pa. Human Relations Comm.*, 462 A.2d 881 (Pa.Cmwlth. 1983). [↑](#footnote-ref-6)
7. *Duquesne Light Co., et al. v. Pa. Pub. Util. Comm’n*, 715 A. 2d 540 (Pa. Cmwlth. 1998); *Popowsky v. Pa. Pub. Util. Comm’n*, 669 A. 2d 1029 (Pa. Cmwlth. 1995). [↑](#footnote-ref-7)
8. *Zucker v. Pa. Pub. Util. Comm’n*, 401 A. 2d at 1380 (Pa. Cmwlth. 1979); *Schellhammer v. Pa. Pub. Util. Comm’n*, 629 A. 2d 189 (Pa. Cmwlth. 1993). [↑](#footnote-ref-8)
9. *Id.* “Whenever the commission shall make any rule, regulation, finding, determination or order, the same shall be prima facie evidence of the facts found and shall remain conclusive upon all parties affected thereby…” 66 Pa.C.S.A. § 316. [↑](#footnote-ref-9)