



Eckert Seamans Cherin & Mellott, LLC
213 Market St., 8th Floor
Harrisburg, PA 17101

TEL: 717 237 6000
FAX: 717 237 6019

February 1, 2023

Bryce R. Beard
717.237.6041
bbeard@eckertseamans.com

Via Electronic Filing

Rosemary Chiavetta, Secretary
Pa. Public Utility Commission
400 North Street
Harrisburg, PA 17120

RE: Rob Naborn v. Direct Energy Services, LLC
Docket No. F-2023-3037611

Dear Secretary Chiavetta:

Enclosed for electronic filing please find the Preliminary Objections of Direct Energy Services, LLC, with regard to the above-referenced matter. Copies to be served in accordance with the attached Certificate of Service.

Sincerely,

/s/ Bryce R. Beard

Bryce R. Beard

Enclosure

cc: Certificate of Service (with Enclosures)

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Rob Naborn,	:		
	Complainant	:	
	:		
v.	:	Docket No. F-2023-3037611	
	:		
Direct Energy Services, LLC,	:		
	Respondent	:	

NOTICE TO PLEAD

To: Rob Naborn
307 Runnymede Ave.
Jenkintown, PA 19046
Rob.naborn@gmail.com

You are hereby notified that a reply to the **Preliminary Objections** of Direct Energy Services, LLC. (“Direct Energy”) must be filed within 10 days of the date of service.

All pleadings, such as a reply to Preliminary Objections, must be filed with the Secretary of the Pennsylvania Public Utility Commission with a copy served to counsel for the Direct Energy and, where applicable, the Administrative Law Judge (“ALJ”) presiding over this proceeding.

File with:

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility
Commission
400 North Street
Harrisburg, PA 17120

With a copy to:

Karen O. Moury, Esquire (I.D. No. 36879)
Bryce R. Beard, Esquire (I.D. No. 325837)
Eckert Seamans Cherin & Mellott, LLC
213 Market St., 8th Floor
Harrisburg, PA 17101
(717) 237-6036 (phone)
(717) 237-6019 (fax)
kmoury@eckertseamans.com
bbeard@eckertseamans.com

/s/ *Bryce R. Beard*

Bryce R. Beard, Esquire

Counsel for
Direct Energy Services, LLC

Date: February 1, 2023

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Rob Naborn,	:		
	Complainant	:	
	:		
v.	:	Docket No. F-2023-3037611	
	:		
Direct Energy Services, LLC,	:		
	Respondent	:	

**DIRECT ENERGY SERVICES LLC’S
PRELIMINARY OBJECTIONS TO COMPLAINT**

Pursuant to 52 Pa. Code § 5.101, Direct Energy Services, LLC (“Direct Energy” or Respondent”) submits the following Preliminary Objections to the Complaint of Rob Naborn (“Complainant” or “Naborn”), which was served on Direct Energy by the Pennsylvania Public Utility Commission (“Commission” or “PUC”) on January 12, 2023. Pursuant to 52 Pa. Code §§ 5.61 and 5.62, Direct Energy is also filing an Answer and New Matter to the Complaint. In support of this Preliminary Objections, Direct Energy avers as follows:

I. INTRODUCTION

1. Naborn filed a Formal Complaint with the Pennsylvania Public Utility Commission (“Commission”) against PECO Energy Company¹ (“PECO”) and Direct Energy. In the Complaint, Naborn alleges that due to issues caused by PECO’s customer service, PECO switched his natural gas supply service from Direct Energy back to default service with PECO on or about August 22, 2022. Naborn seeks relief exclusively against PECO for their conduct, including but not limited to fines, penalties, and reimbursements for PECO’s actions which caused Complaint’s account to be taken away from Direct Energy’s supply service. The Complaint further requests remedial actions be taken to fix PECO’s IVR system which allegedly

¹ Upon information and belief, the Commission did not serve the Complaint on PECO.

caused the Complainant's account to be switched without confirmation. Direct Energy incorporates its responses contained in its Answer and New Matter as if set forth in full herein. However, upon information and belief, the account holder of record is Cindy Pronko, not Rob Naborn. Direct Energy's records indicate that Cindy Pronko executed the contract with Direct Energy for natural gas supply service on January 30, 2022 and is the utility account holder of record. Direct Energy cannot independently verify the relationship between the Account Holder Pronko and Naborn at this time.

2. Direct Energy is filing these Preliminary Objections in an effort to secure the just, speedy and inexpensive dismissal of the Complaint against Direct Energy. For the reasons stated herein and in Direct Energy's Answer and New Matter to the Complaint, which is incorporated herein by reference, the Complaint should be dismissed because the Naborn lacks standing to bring the Complaint as he is not the account holder of record and was not a party to the natural gas supply contract entered between Direct Energy and Cindy Pronko on January 30, 2022.

II. PRELIMINARY OBJECTIONS

A. Applicable Legal Standards

3. The Commission's Rules of Administrative Practice and Procedure permit the filing of preliminary objections. 52 Pa. Code § 5.101(a).

4. Under Section 5.101(a) of the Commission's regulations, 52 Pa. Code § 5.101(a)(1)-(7), preliminary objections must specifically state the legal and factual grounds relied upon and be limited 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 this chapter or the inclusion of 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; and
- (7) Standing of a party to participate in the proceeding.

5. The moving party may not rely on its own factual assertions but must accept for the purposes of disposition of the preliminary objection, all well-pleaded, material facts of the other party, as well as every inference fairly deducible from those facts.² However, the Commission need not accept as true conclusions of law, unwarranted inferences from facts, argumentative allegations or expressions of opinion.³

6. In deciding the preliminary objections, the Commission must determine whether, based on the well-pleaded factual averments of the party, recovery or relief is possible.⁴

B. Dismissal Based on Lack of Standing, 52 Pa. Code § 5.101(a)(7).

7. Section 5.101(a)(7) of the Commission's regulations permits the filing of a preliminary objection based on a lack of standing of a party to participate in the proceeding.

8. The Commission has held that, in general, a complainant must be the customer of the utility in order to have standing to file a complaint about its utility service.⁵ In other words, a complainant who is not a customer of a utility, generally, does not have the requisite substantial,

² *County of Allegheny v. Cmwlth. of Pa.*, 490 A.2d 402 (Pa. 1985).

³ *Stanton-Negley Drug Co. v. Dep't of Pub. Welfare*, 927 A.2d 671, 673 (Pa. Cmwlth. 2007).

⁴ *Department of Auditor General, et al. v. SERS, et al.*, 836 A.2d 1053, 1064 (Pa. Cmwlth. 2003); *P.J.S. v. Pa. State Ethics Commission*, 669 A.2d 1105 (Pa. Cmwlth. 1996).

⁵ *See, Re: Pennsylvania American Water Company*, 85 Pa. PUC 548 (1995); *PUC v. Marietta Gravity Water Company*, 87 Pa. PUC 864 (1997).

direct, and immediate interest necessary to confer standing to bring the complaint about the service of that utility.

11. As explained in the Direct Energy's Answer and New Matter,⁶ Direct Energy's records show that the account holder, Cindy Pronko, enrolled with Direct energy on January 30, 2022. As part of the enrollment, Pronko attested that she was authorized to make changes on the account and was presented with and accepted the Disclosure Statement, which contained all required terms of service, including that the natural gas supply plan was for a fixed supply price for a 30-month term that continued as monthly variable pricing plan after the initial term ended. Following the enrollment, on January 31, 2022, Pronko was emailed and mailed the Disclosure Statement for the Direct Energy natural gas supply plan, which further served to reiterate all the terms of service, including the pricing terms and the right to rescind the enrollment.

12. The instant Complaint, however, was filed by Rob Naborn. Naborn is not the account holder of the utility account in question and did not enter into a contract with Direct Energy. Direct Energy further avers that it is unable to independently verify the relationship between Pronko and Naborn at this time.

13. On information and belief, Naborn is not an attorney and does not represent Pronko in such capacity in this Complaint.

14. As such, the Complainant lacks standing in his own right to bring a Complaint against Direct Energy.

15. Additionally, to the extent the Complainant seeks to represent the interest of a third party, i.e. account holder Pronko, the law is well settled that a party cannot "vindicate the

⁶ Direct Energy's allegations of lack of standing are based, in part, on information contained in the Direct Energy's Answer and New Matter. As such, as an alternative to treating this argument as a Preliminary Objection, Direct Energy requests that the Commission wait for the Complainants' Response to New Matter and then treat this Preliminary Objection as a Motion to Dismiss.

rights of a third party who has the opportunity to be heard.”⁷ For these reasons, the Complaint against Direct Energy should be dismissed.

C. Dismissal Based on Legal Insufficiency of the Complaint, 52 Pa. Code § 5.101(a)(4).

16. In order to be legally sufficient, a complaint must set forth “an act or thing done or omitted to be done by any 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.”⁸

17. Section 5.101(a)(4) permits a party to file a preliminary objection if the complaint is legally insufficient.⁹

18. The Complaint alleges no violation by Direct Energy of the Public Utility Code (“Code”),¹⁰ a Commission regulation or a Commission order. The Complaint further alleges no facts that would support a finding that Direct Energy has violated the Code, a regulation or an order.

19. Indeed, the Complaint’s allegations and relief sought are targeted exclusively at PECO’s conduct and service provided to Complainant regarding changes to his supply service, and issues with PECO’s customer service systems.

20. Even when all factual averments set forth in the Complaint are accepted as true, they do not show that Direct Energy violated the Code, a Commission regulation or Commission

⁷ *Mid-Atlantic Power Supply Ass’n v. Pa. Pub. Util. Comm’n*, 746 A.2d 1196, 1200 (Pa. Cmwlth. 2000) (citing *Pa. Dental Ass’n v. Cmwlth., Dep’t of Health*, 461 A.2d 329 (Pa. Cmwlth. 1983)).

⁸ 66 Pa. C.S. § 701 (emphasis supplied).

⁹ 66 Pa. C.S. § 5.101(a)(4).

¹⁰ 66 Pa. C.S. §§ 101 *et seq.*

order. Therefore, the Complaint should be dismissed against Direct Energy without a hearing, which would needlessly consume valuable resources of Direct Energy and the Commission.

CONCLUSION

WHEREFORE, Direct Energy Services, LLC, respectfully requests that the Commission (a) serve a copy of the Complaint on PECO Energy Company to whom the allegations in the complaint are directed, (b) grant these Preliminary Objections so as to dismiss the Complaint against Direct Energy Services, LLC, and (c) grant any other relief deemed appropriate.

Respectfully submitted,

Bryce R. Beard

Karen O. Moury, Esq. (PA ID #36879)
Bryce R. Beard Esq. (PA ID #325837)
Eckert Seamans Cherin & Mellott, LLC
213 Market Street, 8th Floor
Harrisburg, PA 17101
Email: kmoury@eckertseamans.com
bbeard@eckertseamans.com

Date: February 1, 2023

Attorneys for Direct Energy Service, LLC.

Verification

I, Spencer Halstead, am the CSMR Retail Operations Manager – East Escalated Issues for NRG Energy Inc., the Parent of Direct Energy Services, LLC, and I hereby state that the facts set forth in the foregoing **Preliminary Objections** are true and correct to the best of my knowledge, information and belief and that I expect Direct Energy Services, LLC, to be able to prove the same at a hearing held in this matter. I understand that the statements herein are made subject to the penalties of 18 Pa. C.S. § 4904 (relating to unsworn falsification to authorities).

Date: February 1, 2023

/s/ *Spencer Halstead*

Spencer Halstead
CSMR Retail Operations Manager- East
Escalated Issues
NRG Energy, Inc.

CERTIFICATE OF SERVICE

I hereby certify that this day I served a copy of the foregoing Preliminary Objections upon the persons listed below in the manner indicated in accordance with the requirements of 52 Pa. Code Section 1.54.

Via Email Only

Rob Naborn
307 Runnymede Ave.
Jenkintown, PA 19046
Rob.naborn@gmail.com

Hon. Charles E. Rainey, Jr.
Chief Administrative Law Judge
Pa. Public Utility Commission
400 North Street
Harrisburg, PA 17120
bobbwillia@pa.gov

Date: February 1, 2023

/s/ Bryce R. Beard

Bryce R. Beard, Esquire
Counsel for
Direct Energy Services, LLC