

**PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17120**

Public Meeting held April 20, 2023

Commissioners Present:

Gladys Brown Dutrieuille, Chairman
Stephen M. DeFrank, Vice Chairman
Ralph V. Yanora
Kathryn L. Zerfuss
John F. Coleman, Jr.

Marie Blitzer

C-2022-3033912

v.

PECO Energy Company

OPINION AND ORDER

BY THE COMMISSION:

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition is the Initial Decision (I.D.) of Administrative Law Judge (ALJ) F. Joseph Brady, issued on January 19, 2023, in the above-captioned proceeding. Exceptions have not been filed. However, we have exercised our right to review the Initial Decision pursuant to Section 332(h) of the Public Utility Code (Code), 66 Pa. C.S. § 332(h). For the reasons stated below, we shall vacate the Initial Decision and remand this matter to the Office of Administrative Law Judge (OALJ).

History of the Proceeding

On May 17, 2022, Marie Blitzer (Complainant or Ms. Blitzer) filed a Formal Complaint (Complaint)¹ against PECO Energy Company (PECO or Company) alleging incorrect charges on her bill. Ms Blitzer noted that “Green Mountain Energy [Company] was assigned to [her] bill /service without [her] authorization” and attached a few pages of explanation alleging the incorrect charges she believes to be from 2013 until February 2022 including a copy of her bill dating from December 21, 2021 to January 25, 2022. Complaint at 2-3 and attachments.

On August 9, 2022,² PECO filed an Answer in which, unless PECO specifically admitted the allegation, it denied all material allegations of fact and conclusions of law. Ans. at 1. In its Answer, PECO admitted, *inter alia*, that: (1) it issued a shut off notice for service at the address; and (2) the Complainant is seeking a payment arrangement. Ans. at 1. By way of further answer, PECO noted, *inter alia*, that: (1) the Complainant established service at the address as of July 1, 2020; (2) the address is listed as residential heat and domestic usage; (3) the address is equipped with a functioning automatic meter reading device and the billing is based on actual meter reading; (4) the Complainant has one prior broken Company-issued payment arrangement; and (5) the Complainant is appealing the PUC-issued payment arrangement granted to her on July 20, 2022 by BCS at Docket No. 3851470. Ans. at 1-3.

By Hearing Notice dated September 9, 2022, the Commission scheduled this matter for an initial call-in telephonic hearing on October 9, 2022, and assigned the case to ALJ Brady.

¹ The Complaint is a timely review of the Bureau of Consumer Services (BCS) decision entered on July 20, 2022, at BCS No. 3851470, which granted the Complainant a payment arrangement. PGW Exhibit 3.

² The Complaint was not served on PECO until July 20, 2022.

The telephone hearing convened as scheduled. The Complainant appeared, self-represented, and testified on her own behalf. Tr. at 5-6. The Complainant did not sponsor any exhibits. *Id.* PGW was represented by Khadijah Scott, Esquire, and called two witnesses as well as offered six exhibits, which were admitted into the record. *Id.* at 6.

The record closed on November 8, 2022.

The Commission issued the Initial Decision on January 19, 2023, dismissing the Complaint solely on the basis that it is barred by the statute of limitations. I.D. at 1, 6.

Discussion

Legal Standards

As the proponent of a rule or order, the 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, the Complainant must show that PECO is responsible or accountable for the problem described in the Complaint. *Patterson v. The Bell Telephone Company of Pennsylvania*, 72 Pa. P.U.C. 196 (1990). Such a showing must be by a preponderance of the evidence. *Samuel J. Lansberry, Inc. v. Pa. PUC*, 578 A.2d 600 (Pa. Cmwlth. 1990), *alloc. denied*, 529 Pa. 654, 602 A.2d 863 (1992). That is, the Complainants' evidence must be more convincing, by even the smallest amount, than that presented by PECO. *Se-Ling Hosiery, Inc. v. Margulies*, 364 Pa. 45, 70 A.2d 854 (1950). Additionally, this Commission's decision must be supported by substantial evidence in the record. *Mill v. Pa. PUC*, 447 A.2d 1100 (Pa. Cmwlth. 1982). 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. PUC*, 489 Pa. 109, 413 A.2d 1037 (1980).

Upon the presentation by the Complainant of evidence sufficient to initially satisfy the burden of proof, the burden of going forward with the evidence to rebut the evidence of the customer shifts to PECO. If the evidence presented by PECO is of co-equal value or “weight,” the burden of proof has not been satisfied. The Complainant now has to provide some additional evidence to rebut that of PECO. *Burleson v. Pa. PUC*, 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. PUC*, 768 A.2d 1217 (Pa. Cmwlth. 2001).

With regard to the statute of limitations, Section 3314 of the Public Utility Code specifically provides:

§ 3314. Limitation of actions and cumulation of remedies.

- (a) General Rule. No action for the recovery of any penalties or forfeitures incurred under the provisions of this part, and no prosecutions on account of any matter or thing mentioned in this part, shall be maintained unless brought within three years from the date at which the liability therefore arose, except as otherwise provided in this part.

66 Pa. C.S. § 3314(a).

ALJ's Initial Decision

ALJ Brady made eight Findings of Fact and reached seven Conclusions of Law. I.D. at 3, 4-5. We shall adopt and incorporate herein by reference the ALJ's Findings of Fact and Conclusions of Law, unless they are reversed or modified by this Opinion and Order, either expressly or by necessary implication.

In his Initial Decision, ALJ Brady denied and dismissed the Complaint because the Complaint was barred by the statute of limitations. I.D. at 1.

The ALJ decided that since it is undisputed that the Complainant was switched to a third-party supplier, Green Mountain Energy, without her knowledge or consent in 2013 she had until 2016 to bring her complaint in a timely manner. The Complainant filed her Complaint in 2022, or approximately nine years after the alleged violation, which is well beyond the three years allowed by law. I.D. at 4.

The ALJ stated that 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 Code, *Feingold v. Bell Tel. Co. of Pa.*, 383 A.2d 791 (Pa. 1977) and, consequently, it must act within, and cannot exceed, its jurisdiction. *City of Pittsburgh v. Pa. PUC*, 43 A.2d 348 (Pa. 4 Super. 1945). I.D. at 2-3. Furthermore, the ALJ noted that jurisdiction may not be conferred by the parties where none exists, *Roberts v. Martorano*, 235 A.2d 602 (Pa. 1967) and that 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). *Id.* Finally, the ALJ stated that the Commission has consistently held that Section 3314 of the Code, 66 Pa. C.S. § 3314, “is non-waivable because it terminates the right to bring an action as well as any remedy the Commission may order.” *Kovarikova v. Pa. Am. Water Co.*, Docket No. C-2017-2592131 (Order entered August 23, 2018). Thus, according to the ALJ,

Ms. Blitzer had until 2016 to timely raise her Complaint pursuant to Section 3314(a) of the Code, which precludes recovery if an action is brought three years after the date on which the liability arose. I.D. at 3-4

Instead, the Complainant filed her Complaint in 2022 – eight years after the alleged liability arose. As a result, the ALJ found that Section 3314(a) divests the Commission of jurisdiction to hear the Complainant's action. I.D. at 4. Accordingly, the ALJ dismissed the Complaint. *Id.*

Disposition

As a preliminary matter, any argument that we do not specifically delineate shall be deemed to have been duly considered and denied without further discussion. We are not required to consider expressly or at length each contention or argument raised by parties. *Consolidated Rail Corp. v. Pa. PUC*, 625 A.2d 741 (Pa. Cmwlth. 1993); *see also, generally, University of Pennsylvania v. Pa. PUC*, 485 A.2d 1217 (Pa. Cmwlth. 1984). On exercise of our independent review of the Parties' positions in their pleadings in this case, we shall remand the matter to the Office of Administrative Law Judge for such further proceedings on the merits, as deemed necessary, and the issuance of an Initial Decision on Remand consistent with this Opinion and Order.

It is correct that Ms. Blitzer's Complaint regarding any unauthorized switch of her generation service in 2013 is now untimely. However, Ms. Blitzer also checked the box on her formal complaint indicating that there are incorrect charges on her bill and specifically averred that there are incorrect charges on her bill as recently as February 2022, as evidenced by the bill she attached to her Complaint.

As a result, there is more to Ms. Blitzer's Complaint than just her enrollment with Green Mountain in 2013. The averments of incorrect charges on her bill

as recently as February 2022 are within the Commission's statute of limitations to consider. However, there was no discussion during the evidentiary hearing regarding the incorrect charges on Ms. Blitzer's bill and the Initial Decision focusses solely on dismissing the Complaint because the switch to Green Mountain occurred in 2013. There is no analysis in the Initial Decision of whether incorrect charges as recently as February 2022 appear on Ms. Blitzer's bill. Furthermore, Green Mountain was not even joined as an indispensable party to respond to the averments regarding incorrect charges.

An indispensable party is “one whose rights are so directly connected with and affected by litigation that he must be a party of record to protect such rights, and his absence renders any order or decree of court null and void for want of jurisdiction.” *Columbia Gas Transmission Corp. v. Diamond Fuel Co.*, 464 Pa. 377, 379 (Pa. 1975). Failure to join an indispensable party goes to the court's jurisdiction and, if not raised by the parties, should be raised *sua sponte*. *Posel v. Redevelopment Authority of Philadelphia*, 72 Pa. Commw. 115, 121 (Pa. Cmwlth 1983). The Pennsylvania Supreme Court has established that “the basic inquiry in determining whether a party is indispensable concerns whether justice can be done in the absence of a third party ... In order to make the analysis, however, one must refer to the nature of the claim and the relief sought.” *Cry, Inc. v. Mill Service, Inc.*, 536 Pa. 462, 468-469 (Pa. 1994).³

It is clear based on a reading of Ms. Blitzer’s Complaint and the transcript of the hearing held in this proceeding that Green Mountain should have been joined as an indispensable party in this matter because the charges of which Ms. Blitzer complains are charges from Green Mountain. Ms. Blitzer stated in her Complaint that “after reviewing

³ The test for determining indispensability involves “at least” the following considerations: (1) Do absent parties have a right or interest related to the claim? (2) If so, what is the nature of that right or interest? (3) Is that right or interest essential to the merits of the issue? (4) Can justice be afforded without violating the due process rights of absent parties? *Mechanicsburg Area School District v. Kline*, 494 Pa. 476, 481 (Pa. 1981).

the bill, [her daughter] noticed that the supplier was not indeed PECO but Green Mountain Energy” and when asked “PECO pointed the finger at Green Mountain Energy and Green Mountain Energy pointed the finger back at PECO.” In addition, the bill for electric service as recently as January 2022 that Ms. Blitzer attached to her complaint specifically listed Green Mountain as her electric generation supplier. Ms. Blitzer seeks as relief of her Complaint to be refunded by “PECO/Green Mountain.” There were also extensive references to Green Mountain by both Ms. Blitzer and counsel for PECO during the evidentiary hearing held in this matter. *See*, Tr. 7-15, 18, 22-25, 27-30, 33.

As a result, it is appropriate that this matter be remanded back to the OALJ so that Green Mountain can be joined as an indispensable party, and be given all notice and opportunity to be heard, and a hearing held regarding whether there are incorrect charges on Ms. Blitzer’s bill within the statute of limitations, measured from the date her Complaint was filed on May 17, 2022.⁴

Conclusion

Upon review of the record, we shall vacate the Initial Decision of the ALJ dismissing the Complaint and remand this matter to the Office of Administrative Law Judge, for such further proceedings on the merits, as deemed necessary, consistent with this Opinion and Order; **THEREFORE**,

⁴ A review of the Commission's docket indicates that PECO also filed Preliminary Objections on the same date it filed its Answer but the Preliminary Objections were never addressed.

IT IS ORDERED:

1. That the Initial Decision of Administrative Law Judge F. Joseph Brady, that was issued on January 19, 2023, is vacated, consistent with this Opinion and Order.

2. That the matter be remanded to the Office of Administrative Law Judge, for such further proceedings on the merits, as deemed necessary, consistent with this Opinion and Order.

3. That Green Mountain Energy Company be joined as an indispensable party to this proceeding and be given all notice and opportunity to be heard and afforded as such.

4. That a further evidentiary hearing be held regarding whether there are incorrect charges on Marie Blitzer's bill from PECO Energy Company within the statute of limitations.

5. That the Office of Administrative Law Judge shall issue an Initial Decision on Remand.

BY THE COMMISSION,

A handwritten signature in black ink, appearing to read "Rosemary Chiavetta". The signature is written in a cursive, flowing style.

Rosemary Chiavetta
Secretary

(SEAL)

ORDER ADOPTED: April 20, 2023

ORDER ENTERED: May 31, 2023