

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Robert Naborn and Cynthia Pronko	:	
	:	
v.	:	F-2023-3037611
	:	
Direct Energy Services, LLC	:	
PECO Energy Company	:	

INITIAL DECISION

Before
Arlene Ashton
Administrative Law Judge

INTRODUCTION

This Initial Decision sustains the claims of failure to provide reasonable service made by Robert Naborn and Cynthia Pronko against Direct Energy Services, LLC and PECO Energy Company. The Complainants proved, by a preponderance of the evidence, that PECO Energy Company’s computer system was unable to address or correct an inadvertent error made by a customer while using PECO Energy Company’s automated customer service system, and PECO Energy Company’s customer service representatives failed to provide complete and accurate information to the Complainants. The Complainants also proved, by a preponderance of the evidence, that Direct Energy Services, LLC’s customer service representatives misled the Complainants and failed to provide complete and accurate information to the Complainants. The Complainants’ claims for breach of contract and request for damages included in the Formal Complaint are dismissed as such claims and the requested remedy are beyond the scope of the Public Utility Commission’s jurisdiction. A civil penalty is imposed on each respondent.

HISTORY OF THE PROCEEDING

On December 22, 2022, Rob Naborn (Mr. Naborn) filed a Formal Complaint (Complaint)¹ against PECO Energy Company (PECO) and Direct Energy Services, LLC (Direct Energy). In the Complaint, Mr. Naborn alleges that PECO terminated an existing gas supply contract with Direct Energy and made itself the gas supplier at a higher rate. As relief, he requests reinstatement of the gas supply contract with Direct Energy, reimbursement for higher gas rates paid to PECO, and payment of compensation to Direct Energy for income lost due to the termination of the gas supply contract. In addition, Mr. Naborn requests that PECO be ordered to cease using its Interactive Voice Response (IVR) system until certain changes are implemented. Further, he requests that PECO be fined for misleading marketing and the unauthorized termination of the Complainant's gas supply contract with Direct Energy. The Complaint was amended to include Cynthia Pronko (Ms. Pronko), Mr. Naborn's wife as a Complainant in this matter (Mr. Naborn and Ms. Pronko collectively referred to as Complainants).

On February 1, 2023, Direct Energy timely filed an Answer and New Matter (Direct Energy Answer) with the Commission² averring that Ms. Pronko's account was returned to PECO's default service effective August 22, 2022, pursuant to a cancellation notification sent by PECO to Direct Energy. In addition, Direct Energy asserted that while acting as Ms. Pronko's natural gas supplier (NGS), it acted in accordance with the law, denied any allegations to the contrary, and denied responsibility for any relief requested in the Complaint. In New Matter, Direct Energy also raised arguments concerning Mr. Naborn's standing to pursue the claims set forth in the Complaint.³

¹ As discussed more fully below, the Formal Complaint was amended by Mr. Naborn and Ms. Pronko. Unless otherwise indicated, all references herein to the Complaint refer to the Formal Complaint filed by Mr. Naborn, as amended.

² The Secretary's Bureau served the Complaint on Direct Energy on January 12, 2023.

³ Direct Energy Answer ¶¶ 12-16.

On February 1, 2023, Direct Energy also filed Preliminary Objections (Preliminary Objections) with the Commission in which it requested that the Complaint be dismissed, arguing that Mr. Naborn lacks standing to bring the Complaint before the Commission.

On February 6, 2023, PECO filed an Answer (PECO Answer) in which it denies all material allegations of fact and conclusions of law in the Complaint. PECO acknowledges that initially, the Complainants established an account for electric and gas service and on February 23, 2022, their gas supply service was enrolled with Direct Energy. PECO's Answer contends that on July 22, 2022, the Complainants agreed to drop Direct Energy as their gas supplier and resume electric and gas service from PECO. PECO's Answer states that on July 22, 2022, Ms. Pronko contacted PECO advising that Mr. Naborn had inadvertently and erroneously elected PECO as the gas supplier for the account. PECO avers that Ms. Pronko was informed that PECO could not change the Complainants' gas supplier back to Direct Energy.⁴ PECO also avers that it acted in accordance with its Commission-approved tariff, that all bills issued to the Complainant are accurate, and that the Complaint is without merit.

On February 13, 2023, Mr. Naborn filed a document with the Commission (Response to Preliminary Objections), indicating that it is "my reply to Direct Energy's Preliminary Objections."⁵ On February 14, 2023, Mr. Naborn filed a document (Reply to PECO Answer) in which he responded to the positions and arguments in PECO's Answer.

On March 1, 2023, the Commission issued a hearing notice setting an initial call-in telephonic hearing for April 10, 2023, at 10:00 a.m. and assigning me as the presiding officer.

⁴ PECO Answer at 2.

⁵ The Complainants did not file a response to the New Matter included in the Direct Energy Answer with the Commission. Commission regulations permit the filing of a response to new matter included in an answer and to respond to preliminary objections. *See* 52 Pa. Code §§ 1.8, 5.1(a). As a *pro se* complainant, Mr. Naborn may not be familiar with Commission regulations and practice. Pursuant to Commission regulation 1.2, defects in pleadings filed by Mr. Naborn in this matter were disregarded as they did not affect the substantive rights of the parties. 52 Pa. Code § 1.2(a), (d).

On March 9, 2023, a Prehearing Order was issued to Mr. Naborn, Direct Energy and PECO.

On March 17, 2023, I issued an Interim Order dismissing Direct Energy's Preliminary Objections. The Interim Order also directed Mr. Naborn and/or Ms. Pronko to amend the Complaint to describe how and to what extent Direct Energy and PECO were each responsible for the claims made in the Formal Complaint. After consulting with all parties and obtaining their consent, on March 17, 2023, I rescheduled the initial call-in telephonic hearing for April 17, 2023, at 1:30 p.m. due to a scheduling conflict. A cancelled/rescheduled hearing notice was issued to the parties the same day.

On March 22, 2023, Ms. Pronko filed a letter (Pronko Amendment) requesting that she be added as a co-complainant in this matter and stating that she wished to participate in the resolution of the claims raised in the Complaint.⁶ The Pronko Amendment addressed and resolved the arguments regarding Mr. Naborn's standing raised in the Direct Energy Answer and Preliminary Objections.⁷

On March 23, 2023, Mr. Naborn filed a letter (Naborn Amendment) detailing the Complainants' claims with respect to each respondent.⁸

On March 28, 2023, PECO filed an Answer to Amended Complaint.

The hearing began as scheduled on April 17, 2023. Ms. Pronko did not appear for the hearing. Mr. Naborn appeared *pro se*. Bryce Beard, Esq., Karen Moury, Esquire and Christina Dillard, Esquire appeared on behalf of Direct Energy. Khadijah Scott, Esq. appeared on behalf of PECO.

⁶ Neither Direct Energy nor PECO objected to the Pronko Amendment or Ms. Pronko's participation in the case. Tr. 9-10.

⁷ Tr. 10.

⁸ Naborn Amendment ¶¶ 1-6 (PECO), ¶¶ 1-3 (DIRECT ENERGY). Unless otherwise indicated, all references herein to the Complaint refer to the Formal Complaint filed by Mr. Naborn, as amended by the Pronko Amendment and the Naborn Amendment

During the hearing, Mr. Naborn indicated that he wished to introduce a document into the record; however, the document had not previously been identified as a potential exhibit and circulated by the Complainants to the other parties as directed in the Prehearing Order.⁹ The document was identified as Complainants' Exhibit 1. PECO did not object to the entry of Complainants' Exhibit 1 into the record. Direct Energy objected to the entry into the record of the first three paragraphs of Complainants' Exhibit 1, indicating that they reflected the content of settlement discussions between counsel for Direct Energy and Mr. Naborn.¹⁰ Direct Energy also requested that it be given an opportunity to verify the accuracy of the balance of the document, which Mr. Naborn described as a transcript of a voicemail left by a Direct Energy customer service representative for the Complainants on September 20, 2022. As a result, the parties were informed that it would be treated as a late submitted exhibit.¹¹ At the hearing, in response to a question by Mr. Naborn, PECO also offered to provide a late-submitted exhibit.¹²

The parties were instructed to submit any objection to late-submitted exhibits by April 21, 2023. PECO submitted its late filed exhibit on April 18, 2023.¹³ On April 21, 2023, counsel to Direct Energy advised that Direct Energy had no objection to the admission of Complainants' Exhibit 1. Neither the Complainants nor Direct Energy expressed any objection to PECO's late filed exhibit prior to the April 21, 2023, deadline. Complainants' Exhibit 1 and PECO Exhibit 10 are admitted into the record through this initial decision.

The record closed on May 4, 2023, when the 100-page transcript was filed with the Secretary's Bureau.

⁹ Tr. 19-22; Prehearing Order ¶ 3.

¹⁰ Tr. 25-26.

¹¹ Tr. 27.

¹² Tr. 59, 63.

¹³ The exhibit was not numbered; however, it will be designated as "PECO Exhibit 10" reflecting the next sequential number for exhibits submitted by PECO in this matter.

FINDINGS OF FACT

1. The Complainants are Robert Naborn and Cynthia Pronko.
2. The Respondents are Direct Energy Services, LLC and PECO Energy Company.
3. PECO is a jurisdictional public utility that provides electric and gas services in Pennsylvania.
4. Direct Energy is a licensed NGS operating in Pennsylvania. Tr. 65.
5. The Complainants reside at 307 Runnymede Avenue, Jenkintown, Pennsylvania (service address), where PECO is the default gas and electric supplier. Tr. 15.
6. PECO utilizes an IVR system to allow customers to select and change their natural gas supplier and electricity generation supplier (EGS) via telephone. Tr. 35.
7. After a PECO customer indicates interest in alternative energy suppliers, PECO's IVR system allows customers to use the telephone keypad to change their NGS only, their EGS only, both their NGS and EGS, or to remain with their current suppliers. Tr. 41-44; PECO Exhibits 6 and 8.
8. PECO's IVR system asks customers to confirm any supplier change(s) made using the IVR system. Tr. 45-48, 50-52.
9. PECO's IVR system does not explicitly indicate or reiterate to the customer whether the changes requested and being confirmed by the customer relate to the customer's EGS, NGS or both. Tr. 45-48, 50-52.

10. Once PECO receives notification that a customer has enrolled with an NGS or wishes to select PECO as its NGS, PECO sends an enrollment confirmation letter to the customer. Tr. 35.

11. PECO processes NGS enrollment transactions using a “batch process system.” Tr. 37.

12. Batch processing of NGS enrollment transactions means that all NGS enrollment notifications received by PECO each day are held until the end of the day and are sent to the appropriate NGS the following day. Tr. 37.

13. PECO’s systems will not allow a PECO customer or a PECO customer service agent to “reverse” an inadvertent or erroneous NGS or EGS selection made via IVR and return the customer’s account to the customer’s supplier prior to the selection on the same day the inadvertent or erroneous supplier selection occurred. Tr. 36-37.

14. If a PECO customer inadvertently or erroneously indicates a wish to change natural gas and electricity supply to PECO via PECO’s IVR, and the PECO customer contacts their then-existing NGS or EGS on the same day, due to batch processing by PECO, the customer’s then-existing NGS or EGS would not yet have been notified of the change. Tr. 36-37.

15. If a PECO customer makes an error when selecting an NGS or EGS via PECO’s IVR and contacts PECO within 5 days after of the date of the enrollment confirmation letter to request that the enrollment be reversed by PECO, PECO will return the customer to the previous NGS or EGS. Tr. 36-37.

16. The Complainants enrolled online with Direct Energy on January 31, 2022. Tr. 34, 68; Direct Energy Exhibit 1.

17. The Complainants enrolled with Direct Energy for a 30-month term at the rate of \$0.539 per CCF. Tr. 69, 82 (2022 Enrollment Terms).

18. Direct Energy began providing NGS service to the Complainants on February 23, 2022. Tr. 34, 68. Direct Energy Exhibit 1.

19. Direct Energy served as the Complainants' NGS from February 23, 2022, to August 22, 2022. Tr. 34, 37, 66; DES Exhibit 1; PECO Exhibit 2.

20. On July 22, 2022, Mr. Naborn contacted PECO via telephone to discuss enrollment with PECO as the EGS for the service address. Tr. 15, 44, 55.

21. On July 22, 2022, Mr. Naborn was connected to PECO's IVR system and responded to a query regarding choosing PECO as the EGS and NGS for the service address by selecting the keypad response corresponding to selecting PECO for both gas and electric service. Tr. 15.

22. On July 22, 2022, when Mr. Naborn confirmed his IVR responses, he was unsure what choice he was confirming because the IVR did not identify with specificity which energy supplier choice, EGS, NGS or both, he had made via the IVR system. Tr. 16, 44, 47; PECO Exhibit 8.

23. On July 22, 2022, upon transfer from PECO's IVR system to a PECO customer service representative, Mr. Naborn explained that he did not wish to change gas and electric service to PECO and requested that any NGS selection he had made via the IVR be "reversed" and that the NGS for the service address be returned to its status prior to the call. Tr. 16, 55; PECO Exhibit 9.

24. During the July 22, 2022 telephone call, the PECO customer service representative informed Mr. Naborn that it was "impossible" to change an NGS to PECO via IVR because PECO's systems wouldn't allow such a correction. Tr 16.

25. Also on July 22, 2022, Mr. Naborn contacted Direct Energy to inform Direct Energy that he did not wish to change his selection of Direct Energy as his NGS. Tr. 17, 57.

26. On July 22, 2022, Mr. Naborn advised a Direct Energy customer service representative that he had also contacted PECO and he had informed a PECO customer service representative that he wished to retain Direct Energy as his NGS. Tr. 17.

27. A Direct Energy customer service representative informed Mr. Naborn that there had been no change to his status as a Direct Energy NGS customer. Tr. 17.

28. Mr. Naborn requested that PECO and Direct Energy's customer service representatives he spoke to on July 22, 2022, note in their respective service records his notice that any NGS switch made that same day, had been made inadvertently or in error, and that he wished to retain Direct Energy as his NGS. Tr. 16-17.

29. On July 25, 2022, Direct Energy received a cancellation notice from PECO indicating that Direct Energy's status as the NGS for the service address would end as of August 22, 2022. Tr. 69.

30. PECO began serving as the Complainants' NGS on August 23, 2022. PECO Exhibit 2. Tr. 69.

31. On August 25, 2022, a customer service representative for Direct Energy informed Mr. Naborn that the selection of Direct Energy as the NGS for the service address had been changed as of August 22, 2022, and a new enrollment would be required to reinstate Direct Energy as the NGS for the service address. Tr. 70.

32. In September 2024, Direct Energy sent an email to Mr. Naborn urging him to return as an NGS customer. Tr. 17

33. Following receipt of the email from Direct Energy, Mr. Naborn again contacted PECO and Direct Energy to inform each company that he had not intended to and did not wish to change or cause an interruption in his status as a Direct Energy NGS customer. Tr. 17.

34. A PECO customer service representative informed Mr. Naborn that PECO could not change Mr. Naborn's NGS selection back to Direct Energy. Tr. 55; PECO Exhibit 9.

35. A Direct Energy customer service representative informed Mr. Naborn that he could change his NGS selection back to Direct Energy but that to do so, PECO would be required to acknowledge that any prior change to his status as a Direct Energy NGS customer had been PECO's mistake. Tr. 17, 85.

36. In September 2022, Direct Energy sent multiple requests, including one marked "urgent" to PECO via email, requesting or inquiring whether PECO could reinstate Direct Energy as the Complainants' NGS. Tr. 71-72; Direct Energy Exhibit 2.

37. Direct Energy kept Mr. Naborn informed of its contacts with PECO concerning their efforts to have PECO reinstate Direct Energy as the Complainants' NGS. Tr. 72-74.

38. On September 19, 2022, a PECO representative informed Direct Energy that it could not transfer the Complainants' NGS to Direct Energy. Tr. 89.

39. On September 20, 2022, a Direct Energy customer service representative left a voice mail message for the Complainants indicating that they could change their NGS selection back to Direct Energy at then-prevailing rate of \$0.709 per CCF, which is higher than the 2022 Enrollment Terms. Tr. 85, 87-88, 95.

40. On March 21, 2023, a Direct Energy representative informed Mr. Naborn that if the Complainants re-enrolled with Direct Energy as the NGS for the service address at

then-existing terms and rates, Direct Energy could subsequently “adjust” the terms and rate of service to provide gas service at the 2022 Enrollment Terms. Tr. 78.

41. On March 23, 2023, the Complainants re-enrolled with Direct Energy as their NGS. Tr. 37, 66, 78; PECO Exhibit 2; DES Exhibit 3.

42. When the Complainants re-enrolled with Direct Energy as their NGS, Direct Energy did so at the at the 2022 Enrollment Terms. Tr. 78-80.

43. At no time prior to March 21, 2023, did Direct Energy inform the Complainants that it would be possible to re-enroll with Direct Energy as their NGS on the 2022 Enrollment Terms or make such an offer to the Complainants. Tr. 82-83, 85-88.

DISCUSSION

Legal Standard

As the proponent of a rule or order, the Complainants bear the burden of proof pursuant to Section 332(a) of the Pennsylvania Public Utility Code (Code).¹⁴ To satisfy this burden, the Complainants must demonstrate by a preponderance of the evidence that the Respondent was responsible for the problems alleged in the Complaint through a violation of the Code or a regulation or order of the Commission.¹⁵

Preponderance of the evidence means that the party with the burden of proof has presented evidence that is more convincing than that presented by the other party.¹⁶ In addition, the Commission’s decision must be supported by “substantial evidence,” which consists of

¹⁴ 66 Pa.C.S. § 332(a).

¹⁵ 66 Pa.C.S. § 701.

¹⁶ *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm’n*, 578 A.2d 600 (Pa. Cmwlth. 1990).

evidence that a reasonable mind might accept as adequate to support a conclusion.¹⁷ A trace of evidence or a suspicion of the existence of a fact is insufficient.¹⁸

Upon the presentation by the Complainants of evidence sufficient to initially satisfy the burden of proof, the burden of going forward with the evidence to rebut the evidence of the Complainants shifts to the Respondent. If the evidence presented by the Respondent is of co-equal weight to the evidence presented by the Complainants, the Complainants have not satisfied their burden of proof. The Complainants would then be required to provide additional evidence to rebut the evidence of the Respondent.¹⁹

While the burden of persuasion 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.²⁰

The Pennsylvania Public Utility Code requires each public utility to comply with the following:

Every public utility shall furnish and maintain adequate, efficient, safe, and reasonable service and facilities, . . . Such service and facilities shall be in conformity with the regulations and orders of the commission.^[21]

The Commission has ruled that the statutory definition of “service” is to be broadly construed.²² As defined in the Code:

¹⁷ *Norfolk & W. Ry. Co. v. Pa. Pub. Util. Comm’n*, 413 A.2d 1037 (Pa. 1980).

¹⁸ *Erie Resistor Corp. v. Unemployment Comp. Bd. of Rev.*, 166 A.2d 96 (Pa. Super. 1961).

¹⁹ *Burleson v. Pa. Pub. Util. Comm’n*, 443 A.2d 1373 (Pa. Cmwlt. 1982), *aff’d*, 461 A.2d 1234 (Pa. 1983).

²⁰ *Milkie v. Pa. Pub. Util. Comm’n*, 768 A.2d 1217 (Pa. Cmwlt. 2001).

²¹ 66 Pa.C.S. § 1501.

²² *Betchy v. West Penn Power Co.*, Docket No. C-2018-3000257 (Opinion and Order entered Oct. 8, 2020) (citing *CountryPlace Waste Treatment Co., Inc. v. Pa. Pub. Util. Comm’n*, 654 A.2d 72 (Pa. Cmwlt. 1995)).

“Service.” 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, or contract carriers by motor vehicle, in the performance of their duties under this part to their patrons, employees, other public utilities, and the public, as well as the interchange of facilities between two or more of them[.]^[23]

The Commission does not have standards in place which regulate the conduct of public utility customer service representatives.²⁴ Therefore, the reasonable service standard of Section 1501 of the Public Utility Code applies.²⁵ The Commission has held that when public utility customer service agents fail to provide consumers with complete and accurate information, such failure is a violation of a utility’s statutory duty to provide adequate service.²⁶

Natural gas customers in Pennsylvania may receive gas service from their default gas supplier or voluntarily choose a different NGS.²⁷ Commission regulations govern the NGS selection and enrollment process and provide:

The procedures for changing a customer to an NGS are as follows:

When a contact occurs between a customer and an NGS to request a change of the NGS, upon receiving direct oral confirmation or written authorization from the customer to change the NGS, the customer’s new NGS shall:

(1) Notify the [natural gas distribution company (NGDC)] of the customer’s NGS selection by the end of the next business day following completion of the applications process[.]

²³ 66 Pa.C.S. § 102.

²⁴ *Moffa v. Verizon of Pa. Inc.*, Docket No. C-2010-2212745 (Final Order entered Mar. 22, 2012).

²⁵ 66 Pa.C.S. § 1501.

²⁶ *E.g., Brickner v. PPLElec. Utils. Corp.*, Docket No. C-2009-2105583 (Opinion and Order entered May 21, 2010); *Williams v. Duquesne Light Co.*, Docket No. C-20066228 (Final Order January 17, 2007); *See also Maisch v. PECO Energy Co.*, Docket No. C-2009-2118649 (Opinion and Order May 26, 2011) (failure to adequately explain customer’s complicated billing history is unreasonable service).

²⁷ *See* Natural Gas Choice and Competition Act, 66 Pa.C.S. §§ 2201 – 2212.

(2) Upon receipt of this notification, the NGDC shall send the NGDC ratepayer of record a confirmation letter noting the proposed change of NGS. This letter shall include notice of a 10-day waiting period in which the order may be canceled before the change of the NGS takes place. The notice shall include the date service with the new NGS will begin unless the customer contacts the NGDC to cancel the change . . . The 10-day waiting period shall begin the day the letter is mailed. 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.^[28]

With respect to a customer's claims disputing an NGS change, Commission regulations provide as follows:

§ 59.97. Customer dispute procedures.

(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.

(c) A customer who has had a NGS changed without having consented to that change shall be switched back to the original NGS for no additional fee. Charges involved in the switch back to the prior NGS shall be the responsibility of the company that initiated the change without the customer's consent.^[29]

²⁸ 52 Pa. Code § 59.93.

²⁹ 52 Pa. Code §59.97.

Here, the Complainants contend that PECO switched the NGS for the service address without their authorization. Among other remedies, Complainants seek damages and the difference between what they expected to pay for gas service and what they actually paid while PECO served as their NGS i.e., the period August 23, 2022, through March 22, 2023.³⁰ They also contend that neither PECO nor Direct Energy provided adequate service in response to their report and dispute of an unauthorized or inadvertent change of their NGS. Complainants argue that PECO's IVR system should allow customers to make a correction within 24 hours and to articulate with specificity any NGS supplier changes indicated by the customer as part of the process for confirming a supplier switch using the IVR.³¹

As explained more fully below, the Complainants' claims for damages arising out of breach of contract are dismissed as they are not within the scope of the Commission's jurisdiction. In addition, I find that the Complainants have sustained their burden of proving their claims of unsatisfactory service by PECO and Direct Energy.

Breach of Contract and Damages

Breach of contract claims between the Complainants and the Respondents are beyond the jurisdiction of the Commission.³² Accordingly, any such claims in the Complaint are dismissed.

The Complainants' claims for damages are also dismissed. It is well-established under Pennsylvania law that the enforcement powers of the Commission do not include the power to award money damages.³³ The Commission cannot award the damages sought by the

³⁰ Complaint ¶ 5 ; Tr. 18. Complainants also requested that: (a) their contract for gas supply with Direct Energy be reinstated at a fixed rate of \$0.53900 for 30 billing cycles; and (b) reimburse Direct Energy the income lost due to this irreversible IVR system. Complaint ¶ 5.

³¹ Complaint ¶ 5; Tr. 45-50.

³² See *Yaglidereliler Corp. v. Blue Pilot Energy, LLC*, Docket No. C-2014-2413732, (Opinion and Order entered Jan. 16, 2015), (citing *Allport Water Auth. v. Winburne Water Co.*, 393 A.2d 673 (Pa. Super. 1978)).

³³ *Elkin v. Bell Tel. Co. of Pa.*, 420 A.2d 371 (Pa. 1980); *Feingold v. Bell of Pa.*, 383 A.2d 791 (Pa. 1978).

Complainant here.³⁴ A request for monetary damages must be pursued before a Magisterial District Justice or in a Court of Common Pleas. Therefore, the damages claim will be dismissed for lack of jurisdiction.³⁵

Complainants' NGS Selection/Enrollment and Changes Thereto

The Complainants contend that when using PECO's IVR system on July 22, 2022, Mr. Naborn inadvertently and unknowingly made an error, which changed their existing NGS choice and caused PECO to become their NGS. The Complainants contend that the NGS switch to PECO should be or should have been invalid or ignored and reversed, based on their immediate, same-day notification to PECO and Direct Energy of a possible error, including their efforts to clarify their request and desire to maintain Direct Energy as their NGS, without interruption.

Mr. Naborn provided uncontroverted testimony that during the very same telephone call to PECO during which the error occurred, he informed a PECO customer service representative that the Complainants did not intend to change the NGS, only the EGS.³⁶ In addition, he provided uncontroverted testimony that on the same day via a separate call, he also spoke to a Direct Energy customer service representative and informed Direct Energy of a possible erroneous switch of the Complainants' NGS away from Direct Energy to PECO. Complainants contend that PECO and/or Direct Energy should have promptly re-instated Direct Energy as the Complainants' NGS on the terms prevailing prior to the change and that PECO and Direct Energy should be held responsible for their failure to do so.³⁷ In the context of the

³⁴ See *Morrow v. Bell Tel. Co. of Pa.*, 479 A.2d 548 (Pa. Super. 1984); *West Penn Power Co. v. Pa. Pub. Util. Comm'n*, 521 A.2d 75 (Pa. Cmwlth. 1987); *Ostrov v. I.F.T., Inc.*, 586 A.2d 409 (Pa. Super. 1991).

³⁵ See *Poorbaugh v. Pa. Pub. Util. Comm'n*, 666 A.2d 744 (Pa. Cmwlth. 1995).

³⁶ Mr. Naborn provided inconsistent statements as to what may have occurred while he was using PECO's IVR system. See Complaint ¶ 4; Tr. 16, 30. On cross examination by PECO counsel, he acknowledged that he "may have changed [his contract] by accident. Tr. 31.

³⁷ Complaint ¶¶ 4-5, Naborn Amendment; Tr 30-31, 45-47.

Code and the Commission’s jurisdiction, the Complainants’ claims are claims of unreasonable service relating to PECO’s IVR system and customer service by PECO and Direct Energy.

PECO presented three witnesses who provided testimony at the hearing. Carol Reilly, the Manager of Energy Acquisition testified as to PECO’s electric and gas choice programs. She also explained how PECO handles NGS choice selections and selection changes using batch processing, including those made by the Complainants. Ms. Reilly provided credible testimony that PECO does not switch a customer to make PECO the NGS for an account unless the customer directly made the switch through contact with PECO, whether using PECO’s IVR system or some other method of communication.³⁸ She also explained that after a customer requests an NGS change, PECO sends the customer a confirmation letter providing the name of the NGS and a future effective date. This allows a customer time to contact PECO if the customer did not in fact switch his or her NGS.³⁹ Ms. Reilly further explained that PECO can reverse the enrollment and the customer will go back to their previous supplier “if a customer contacts PECO within five days of the enrollment [confirmation] letter” sent by PECO to the customer.⁴⁰

David Shavor, a Senior Business Analyst, testified that he had been dealing with PECO’s IVR interface for “about 11 years.”⁴¹ Mr. Shavor described how the IVR system functions, including how it records and confirms NGS choices and enrollment selections via “utterances” and “responses.”⁴² Finally, Lauren Evans, a regulatory assessor testified as to her investigation into the Complainants’ informal and Formal Complaints in this matter.

For its part, Direct Energy presented one witness, Spencer Halstead, the Customer Support Manager for Escalated Issues for NRG Energy, the parent company of Direct Energy.

³⁸ Tr. 35-36.

³⁹ Tr. 35-36.

⁴⁰ Tr. 36.

⁴¹ Tr. 40.

⁴² Tr. 44.

Mr. Halstead testified that Direct Energy had “followed the Commission’s rules and honored PECO’s request to return the account to default service when the request was received from PECO.”⁴³ He also testified that beginning in August 2022, Direct Energy had multiple discussions with Mr. Naborn and “explained that he would have to submit a new enrollment in order to re-enroll his account with Direct energy and become a customer . . . again.”⁴⁴

PECO’S IVR system

PECO’s manager of energy acquisition, Ms. Carol Reilly, testified that PECO’s gas choice program and choice selection processes were designed to provide consumers with supplier alternatives and allow consumers opportunities to make selections, correct errors and minimize errors when making an NGS selection.⁴⁵ However, PECO’S batch processing system creates a period of up to 24 hours during which a customer’s NGS change selection made via IVR is “in limbo” because PECO has neither issued a confirmation letter to the customer nor informed the “existing” NGS of the change.⁴⁶

Mr. Naborn provided sworn testimony that he spoke to customer service representatives for both PECO and Direct Energy on July 22, 2023 and advised them that: (1) he did not intend to change his NGS selection; (2) he may have inadvertently or erroneously given permission via PECO’s IVR system to make a change; and (3) despite any indication to the contrary, the Complainants did not wish to switch their NGS from Direct Energy to PECO.⁴⁷ Unfortunately, because he notified PECO during the same call during which the “inadvertent selection” was made, rather than waiting until he had received an NGS change confirmation

⁴³ Tr. 67.

⁴⁴ Tr. 67.

⁴⁵ Tr. 35-38, 42-44.

⁴⁶ Tr. 36-37. Neither PECO nor the Complainants supplied a copy of the NGS confirmation letter sent to the Complainants for the record in this matter.

⁴⁷ Tr. 17-18, 69; PECO Exhibit 9. Direct Energy contended that on July 22, 2022, Ms. Pronko not Mr. Naborn contacted Direct Energy.; However, Direct Energy did not dispute the substance of the conversation with the Direct Energy representative. Tr. 69.

letter from PECO, PECO's systems would not accept and process his "revocation" of any unintentional IVR NGS switch. Further, due to batch processing, the Direct Energy representative was unaware of any NGS switch when Mr. Naborn contacted Direct Energy the very same day.

PECO's use of an automated system to accept and process customer EGS and NGS selections and choices is neither unusual nor unreasonable; such systems are ubiquitous and a part of modern life.⁴⁸ Further, PECO's practice of sending a letter to a customer once it receives notice that the customer has switched an EGS and/or NGS and allowing several days for a customer to contact PECO if the switch is incorrect or unauthorized is also reasonable insofar as it alerts the customer that PECO has received an EGS and/or NGS switch request and that the customer is given the opportunity to verify the switch or correct any error. However, PECO's systems and procedures are unreasonably inflexible in that they do not allow and make no allowance for correction of an EGS and/or NGS change through direct contact with a PECO customer service representative until after PECO's systems have fully processed the change.

Automated systems such as IVR are commonly used to facilitate prompt, continuous and low-cost customer service to utility consumers; however, they must do so in a manner consistent with the level of service required under the Code. As described by PECO's witnesses, PECO's EGS and NGS choice system seems to be reasonable. However, closer scrutiny reveals that batch processing creates a period of up to 24-hours during which a change is in "limbo" and any issues relating to it cannot be addressed by the customer, a PECO customer service agent, or both working in concert. This is problematic.

Ms. Reilly acknowledged that supplier selection error "can happen on a gas enrollment."⁴⁹ Therefore, PECO was clearly aware that circumstances such as those presented here could occur. It is undisputed that the error here was immediately brought to the attention of

⁴⁸ Mr. Naborn acknowledged his own familiarity with such systems in his testimony and suggested that he found PECO's IVR system unsatisfactory based on his prior experience with other automated customer service systems. Tr. 31.

⁴⁹ Tr 36.

a PECO customer service representative on July 22, 2022. It is also undisputed that as the result of batch processing, a PECO customer service representative was unable to correct, flag or otherwise identify the Complainants' NGS choice issue until the PECO system had run its full course. Effectively, this leaves consumers, such as the Complainants, in the position of being unable to register their concern about a supplier selection issue and signal the need for corrective action until an unknown time in the future, when PECO has issued a letter and the postal service has delivered the letter to the customer. Putting aside any issues relating to mail delivery and receipt of a confirmation letter by the customer, such a system is clearly unreasonable. To conclude otherwise would allow PECO to use a flawed system to circumvent the reasonable service standard required under the Code.

There is substantial evidence that PECO's IVR system does not and cannot provide reasonable service as it is currently configured. Accordingly, I find that PECO's IVR system is so inflexible that PECO was unable to reverse the Complainants' inadvertent NGS switch to PECO when using the IVR on the same day the error occurred. PECO's IVR system was incapable of providing and did not provide reasonable service to the Complainants. Therefore, PECO's use of such a system constitutes a violation of the standards for service established by the Code.⁵⁰

Complainants' Customer Service Claims Against PECO and Direct Energy

The Complainants argued that both PECO and Direct Energy failed to respond promptly and appropriately to their requests to reverse an inadvertent NGS change.⁵¹ It is undisputed that on July 22, 2022, the same day on which the switch was made, PECO and Direct Energy were contacted, notified that any NGS switch from Direct Energy to PECO had been made in error, and that the Complainants' wished to have any such switch reversed so that they could retain Direct Energy as their NGS without interruption.⁵²

⁵⁰ 66 Pa.C.S. § 1501

⁵¹ See Naborn Amendment "claims about PECO" ¶¶ 2, 3, 6; "claims about DES" ¶¶ 1-3; Tr. 16-18, 23-24.

⁵² Tr. 17, 55-56, 69; PECO Exhibit 9.

PECO Customer Service

When PECO's customer service representative informed Mr. Naborn that PECO's systems could not reverse an inadvertent NGS change on the same day it was made using the IVR system, the PECO representative's response was incomplete.⁵³ According to Mr. Naborn's testimony, the representative told him that "the system didn't allow for a correction." While the response may have accurately described the limited capability of PECO's IVR and customer service systems, the response lacked critical information that could have allowed Mr. Naborn to promptly resolve the issue of an inadvertent NGS switch notwithstanding those limitations. For example, the representative could have informed Mr. Naborn that by law, *only customers may initiate NGS choices*, meaning that PECO could not act on his behalf to reverse an inadvertent NGS change he may have made via the IVR system. In addition, the representative could have informed Mr. Naborn that *as the customer, only he could reverse an inadvertent NGS change* made via PECO's IVR system. Moreover, it seems inconceivable that the representative was unable to "flag" the Complainants' account or inadvertent NGS switch somewhere in PECO's customer service system database, or otherwise ensure that the Complainants' account was excluded or pulled from NGS supplier batch processing for July 22, 2022, the day on which the NGS switch was made, and the NGS switch error notification was communicated to PECO by the customer via automated and live communication. Further, although the IVR asks a customer to "confirm" their EGS and/or NGS selections, it does not specify for the customer which changes will be made and assumes that the customer will recall what changes were requested and that no errors were made when making a selection on the telephone keypad.

It is unclear why the PECO representative failed to provide more complete information to Mr. Naborn. The explanation cannot be found in the record, as the representative did not appear at the hearing, a transcript of the call was not entered into the record and PECO's other witnesses did not address the issue in their testimony. The PECO customer service representative's failure to provide complete and accurate information to the Complainants as to how to address and remedy an erroneous NGS selection does not meet the standard of reasonable

⁵³ Tr. 16.

service established under Section 1501 of the Code.⁵⁴ Accordingly, the Complainants' claims of unreasonable service shall be granted, and the Complainants shall be issued a refund by PECO.

The Code states in relevant part:

§ 1312. Refunds.

(a) General rule.--If, in any proceeding involving rates, the commission shall determine that any rate received by a public utility was unjust or unreasonable, or was in violation of any regulation or order of the commission, or was in excess of the applicable rate contained in an existing and effective tariff of such public utility, the commission shall have the power and authority to make an order requiring the public utility to refund the amount of any excess paid by any patron, in consequence of such unlawful collection, within four years prior to the date of the filing of the complaint, together with interest at the legal rate from the date of each such excessive payment. In making a determination under this section, the commission need not find that the rate complained of was extortionate or oppressive. Any order of the commission awarding a refund shall be made for and on behalf of all patrons subject to the same rate of the public utility. The commission shall state in any refund order the exact amount to be paid, the reasonable time within which payment shall be made, and shall make findings upon pertinent questions of fact.^[55]

Although Mr. Naborn testified that he believed the difference to be in excess of \$300, the Complainants failed to provide clear evidence supporting that figure.⁵⁶ PECO's witness, Ms. Evans testified that as the result of PECO's failure to reverse Mr. Naborn's inadvertent selection of PECO as the Complainants' NGS, the Complainants paid \$111.56 more to PECO than they would have paid to Direct Energy.⁵⁷ PECO also provided documentary evidence in support of that testimony as a late-filed exhibit. Pursuant to Section 1312 of the Code, PECO will be ordered to reimburse the Complainants the amount of \$111.56.

⁵⁴ 66 Pa.C S. § 1501.

⁵⁵ 66 Pa.C.S. § 1312.

⁵⁶ Tr. 18, 62.

⁵⁷ Tr. 18.

Direct Energy Customer Service

The Complainants made multiple claims of inadequate or unreasonable service against Direct Energy. Mr. Naborn provided testimony regarding each of the Complainants' claims. Spencer Halstead, the customer support manager for escalated issues at Direct Energy's parent company, NRG Energy, testified as to Direct Energy's response to each claim.⁵⁸ He was the sole witness who testified on Direct Energy's behalf. At no point in his testimony did Mr. Halstead indicate that he had ever been in direct contact with the Complainants. Nevertheless, in large part, his testimony confirmed the information provided by Mr. Naborn. Each of the Complainants' claims is examined below.

The Complainants' first claim relates to Direct Energy's failure to respond promptly and appropriately to their July 22, 2022 notice to Direct Energy that any NGS switch from Direct Energy to PECO had been made in error, and that the Complainants' wished to have any such switch reversed so that they could retain Direct Energy as their NGS.⁵⁹ As noted above, Mr. Naborn testified that on July 22, 2022, he notified Direct Energy of a possible unintentional NGS switch from Direct Energy to PECO, that the Complainants did not wish to make such a switch and that they did not want Direct Energy to process such switch for their account.⁶⁰ Mr. Naborn also testified that approximately a month later, after receiving an email from Direct Energy saying, "[w]e want you back," he again contacted Direct Energy. In response to this email, Mr. Naborn contacted Direct Energy and inquired why it had not respected his July 22, 2022 notification that any switch was unintended and his specific instructions in July of 2022 to a Direct Energy customer service representative to "take note" that he did not want a change.⁶¹

⁵⁸ Mr. Halstead's is NRG Energy's customer support manager for escalated issues. NRG Energy is Direct Energy's parent company. He testified that his responsibilities include monitoring compliance and regulatory requirements. Tr. 64-65.

⁵⁹ Tr. 17.

⁶⁰ Tr. 17, 69.

⁶¹ Tr. 17.

Mr. Halstead confirmed that Direct Energy representatives had been in contact with the Complainants about the Complainants' NGS switch from Direct Energy to PECO on July 22, 2022, and again in August and September 2022. Mr. Halstead did not refute or dispute Mr. Naborn's testimony that on July 22, 2022, the Direct Energy representative made a note in its customer service records that if Direct Energy received notice of an NGS switch to PECO, their account "shouldn't be switched."⁶² Thus, the record also demonstrates that on July 22, 2022, Direct Energy's customer service representative understood that the Complainants did not want to change their enrollment with Direct Energy, that they did not want Direct Energy to process any NGS switch presented by PECO, and that the representative also complied with the customer's request and made a notation in the Direct Energy customer service account records that the Complainants' account "shouldn't be switched."⁶³

As indicated above, a PECO witness confirmed that due to batch processing of NGS switch choices by PECO, Direct Energy was not advised of an NGS switch to PECO until July 25, 2022.⁶⁴ Therefore, the Direct Energy representative's statement made on July 22, 2022 to Mr. Naborn that "nothing has changed" was accurate because an NGS change to PECO had not yet been communicated by PECO to Direct Energy.

While the information provided by Direct Energy's representative on July 22, 2022, was *accurate*, it does not follow that the information was *complete*. As a licensed NGS, customer enrollment is a fundamental component of Direct Energy's operations and is critical to its success. Indeed, Mr. Halstead's role and responsibilities themselves reflect the importance of customer service and compliance with regulatory requirements to Direct Energy and its parent company.

Mr. Halstead's testimony demonstrates that he is well-versed in the Commission's regulations pertaining to NGS selection and cancellation and the interface between default

⁶² Tr. 17.

⁶³ Tr. 17.

⁶⁴ See fn. 38 *supra* and accompanying text.

suppliers and NGS entities.⁶⁵ His testimony that Direct Energy does not have the ability to submit a new enrollment on behalf of a customer⁶⁶ reflects his understanding of Commission regulations which provide that only the customer may authorize a supplier switch.⁶⁷ Moreover, his testimony demonstrates an awareness of serious consequences that may result from failure to comply with Commission regulations applicable to NGS choice and selection.⁶⁸

Despite the importance of customer enrollment, customer service and compliance with applicable laws and regulations relating thereto, Mr. Halstead provided no testimony as to whether he, Direct Energy or NRG Energy were aware of PECO's batch processing practice. The record suggests that the Direct Energy representative who spoke to Mr. Naborn was unaware of any possibility of a delay between the timing or date of an NGS switch and notice of such an NGS switch to or from Direct Energy and its appearance in Direct Energy's systems. Although possible, it seems unlikely that Direct Energy would be unaware of a practice that clearly would impact Direct Energy's business, such as batch processing by a large default supplier like PECO.

Defending Direct Energy's failure to act on Mr. Naborn's documented request not to implement an unintentional switch, Mr. Halstead testified that:

Under Chapter 59 of the [Commission's] regulations, Direct Energy is obligated to comply with PECO's inbound cancellation request and to return the account to PECO's service. If Direct Energy does not comply with PECO's inbound cancellation request, it would've been a violation of the Commission's regulations, and Direct Energy would have been at risk of legal enforcement consequences, regardless of whether the customer called and stated their intention that Direct Energy did not honor PECO's request.^[69]

⁶⁵ Tr. 70, 86, 90.

⁶⁶ Tr. 85-87.

⁶⁷ *See* 52 Pa.. Code §59.93 *supra*.

⁶⁸ Tr. 70.

⁶⁹ Tr. 70.

Mr. Halstead's statement fails to recognize that as a licensed NGS, Direct Energy must comply with all regulations applicable to its activities. It cannot prioritize or rely on the regulation concerning NGS switching while simultaneously ignoring its obligation to supply reasonable service. The regulations relating to customer service and customer choice are consistent and complementary and compliance with both regulations is required. Mr. Halstead provided no explanation as to why Direct Energy would prioritize one regulation over the other or interpret them otherwise. Further, Direct Energy's failure to contact PECO, alone or with the Complainants, before implementing what it knew to be an inadvertent NGS switch in July 2022 stands in sharp contrast to its later willingness to do so.

There is nothing in the record that explains why the Direct Energy representative failed to inform the Complainants that: (1) as the customer, they and only they, could reverse an inadvertent switch; and (2) they could do so simply by following the instructions provided by a confirmation notice that would be sent to them by PECO. Likewise, there is nothing in the record indicating why, after receiving and documenting the Complainants' request, the Direct Energy representative could not bring the request to the attention of a supervisor or "flag" the account for prompt follow-up and resolution, if and when Direct Energy received an NGS switch notification for the Complainants' account, as indeed happened on July 25, 2022.

It is unclear from the record whether Direct Energy's failure to provide accurate and complete information in response to a consumer request like that made by the Complainants on July 22, 2022 arose due to a systemic failure e.g., lack of training or automated mechanisms, the customer service representative's failure to use available mechanisms, or the individual customer service representative's failure to take appropriate action. Nevertheless, with respect to their first claim, the Complainants have presented substantial evidence proving that Direct Energy failed to provide adequate service to them.

The Complainants' second claim relates to Direct Energy's representation to the Complainants that Direct Energy could not switch the Complainants back to Direct Energy without the cooperation of PECO.⁷⁰ Mr. Naborn argued strenuously that until September 20,

⁷⁰ Tr. 17.

2022, Direct Energy representatives had led the Complainants to believe, and that the Complainants did, in fact believe, that their inadvertent NGS switch could only be “reversed” if PECO admitted that the switch had been PECO’s mistake.⁷¹

In his testimony, Mr. Naborn emphasized that based on a September 20, 2022 voice mail message left by Malissa, a Direct Energy customer service representative for the Complainants, he understood that if the Complainants chose to return to Direct Energy as their NGS, they could only do so at the then-prevailing rate of \$0.709 per CCF, a significant increase over the 2022 Enrollment Terms which specified a rate of \$0.539 per CCF. In addition, Mr. Naborn noted that the message did not offer or mention reinstatement of the 2022 Enrollment Terms.⁷² In support of their claims, Complainants submitted the transcript of the voicemail left by Malissa.⁷³

Mr. Halstead confirmed that Direct Energy contacted PECO about the Complainants’ NGS account switch to PECO and endeavored to have PECO reinstate the Complainants’ account with Direct Energy. Mr. Halstead testified that reinstatement of the Complainants’ account with Direct Energy “was something that we thought could be done by PECO”⁷⁴ and that Direct Energy had asked PECO to do so “on [Mr. Naborn’s] behalf.”⁷⁵ In addition, he confirmed that Direct Energy repeatedly sent email messages to PECO asking it to reverse the inadvertent NGS selection.⁷⁶

In testimony, Mr. Halstead demonstrated that he knew that Direct Energy does not have the ability to reverse an inadvertent NGS switch by a customer and that doing so would

⁷¹ Tr. 17.

⁷² Tr. 82.

⁷³ Complainants’ Exhibit 1. Direct Energy verified the accuracy of the transcript provided by the Complainants before it was entered into the record.

⁷⁴ Tr. 86, 90.

⁷⁵ Tr. 86, 90.

⁷⁶ Tr. 71-75. As noted above, such an action by PECO is explicitly prohibited by Commission regulations. *See* 52 Pa. Code § 59.93.

violate Commission regulations and could result in negative consequences for Direct Energy.⁷⁷ He failed to explain how he or any of Direct Energy’s customer service representatives, reached the conclusion that unlike Direct Energy, PECO could lawfully “reinstate” Direct Energy as the Complainants’ NGS. Nor did he explain how or why he believed that Direct Energy had the authority to ask PECO to do so on behalf of the Complainants. Indeed, Mr. Halstead confirmed that he was not aware of any situation in which a default supplier had “reversed” a customer NGS choice under circumstances similar to those presented here.⁷⁸

Here, too, the Complainants provided substantial evidence of unreasonable service by demonstrating that Direct Energy misled them as to the Commission’s regulations governing NGS switch, misrepresented PECO’s ability to “reverse” the inadvertent NGS switch and sent misleading requests to PECO on their behalf.

The Complainants’ third claim of unsatisfactory customer service arises out of Direct Energy’s failure to inform the Complainants prior to March 21, 2023, that Direct Energy could or would offer the Complainants re-enrollment with Direct Energy as their NGS at the rate and other terms in effect under their 2022 NGS enrollment with Direct Energy.

Mr. Naborn testified that in March 2023, when Direct Energy offered the Complainants re-enrollment with Direct Energy as their NGS at the rate and other terms in effect under their 2022 NGS enrollment, Direct Energy explained that doing so would be a two-step process. First, the Complainants would be required to re-enroll with Direct Energy as their NGS *under Direct Energy’s then-prevailing terms and rates of service*. Second, after the Complainants had re-enrolled with Direct Energy as their NGS, Direct Energy would *manually adjust the terms and rates of service* to make them correspond to the terms of service in the Complainants’ 2022 agreement with Direct Energy.⁷⁹

⁷⁷ Commission regulations provide that an NGS may reverse a supplier switch that is “improperly cancelled.” The Complainants did not argue that PECO “improperly cancelled” their contract with Direct Energy.

⁷⁸ Tr. 90-92

⁷⁹ Tr. 82-83, 85.

Mr. Naborn contended that Direct Energy could have offered to re-enroll the Complainants with Direct Energy as their NGS at the rate and other terms in effect under their 2022 NGS enrollment with Direct Energy on July 22, 2022, when he first contacted Direct Energy. He argued that Direct Energy did not make such an offer until March 21, 2023, and contended that Direct Energy had not done so because “gas prices had dropped again to exactly the same amount as in February 2022.”⁸⁰

Mr. Halstead affirmed Mr. Naborn’s testimony that on March 21, 2023, a Direct Energy representative reached out to Mr. Naborn to re-enroll the Complainants’ account and that as a result of that contact, Direct Energy “honored Mr. Naborn’s original 2022 rate [and] voluntarily extended the contract by six months to provide Mr. Naborn with the full 30-month term length of the original contract.”⁸¹ Thus, Mr. Halstead established that in March 2023, Direct Energy offered to resume NGS service to the Complainants on the terms and rates in effect under the 2022 Enrollment and on the date when the inadvertent NGS change was made.

Responding to Mr. Naborn’s allegation, Mr. Halstead argued that Direct Energy had accurately communicated information to Mr. Naborn about the action necessary to continue to have Direct Energy serve as the Complainants’ NGS, but that Complainants had failed to take the appropriate action to do so.

The crux of Direct Energy’s argument and Mr. Halstead’s testimony seems to be based on the distinction between “reinstatement” and “re-enrollment” of the Complainants’ account with Direct Energy.⁸² The following exchange between Mr. Halstead and Mr. Naborn demonstrates Direct Energy’s position and reasoning.

Mr. Halstead: I understand that basically from the voicemail you received, that Malissa provided you with the current pricing options as available on the website. And at that point,

⁸⁰ Tr. 83.

⁸¹ Tr. 79.

⁸² Tr. 85

from the information that I have, you had not asked to be reinstated by Direct Energy at your previous pricing. And that was basically -- the reinstatement of your account was only something that we thought could be done by PECO. Direct Energy does not have the ability to reinstate your account without a new enrollment once it's cancelled.

Mr. Naborn: I can't follow. If in September you decided I could not be re-enrolled, why six months later you did know that? . . . Direct Energy said, 'We cannot do this without the help of PECO.' and then six months later, you turn around and say you can do it this way. Why did it take six months?^[83]

The exchange also demonstrates that Mr. Naborn was unaware of any such distinction.

While Direct Energy may distinguish between “reinstatement” and “new enrollment” or “re-enrollment” of a customer account, there is no evidence in the record of the basis for any such distinction. Likewise, there is no evidence that these terms and any distinction among them were ever explained by Direct Energy to Mr. Naborn. Similarly, there is no evidence that Mr. Naborn knew or should have known the implications or alternative consequences of one action as opposed to the others. Thus, Mr. Halstead’s testimony is not supported by any documentary evidence.

Direct Energy presented no evidence that it was unable to make such an offer on July 22, 2022, when it was first advised of the error. The record is likewise void of evidence that at any time prior to March 31, 2023, Direct Energy informed the Complainants that upon re-enrollment with Direct Energy as their NGS, Direct Energy could or would reinstate the terms of the Complainants’ 2022 Enrollment. Mr. Halstead provided no explanation for Direct Energy’s failure to do so. Rather, he testified that the September 20, 2022, voicemail from Direct Energy’s representative “does not state that Direct Energy would not reinstate the Complainants’

previous rate.”⁸⁴ He also testified that as of September 20, 2022, Direct Energy did not have any record of a request by Mr. Naborn to reinstate his previous rate.⁸⁵

Mr. Halstead ‘s argument that Direct Energy did not make such an offer to the Complainants because Direct Energy was waiting for the Complainants to re-enroll with Direct Energy at higher rates and request reinstatement of their 2022 Enrollment rate is unpersuasive. Mr. Naborn’s repeated contacts with Direct Energy’s customer service representatives beginning on July 22, 2022, can be only construed as a plea by the Complainants to Direct Energy to prevent and avoid any change or disruption of the Complainants’ 2022 Enrollment, to reverse any unintended NGS switch, and to reinstate the Complainants’ 2022 Enrollment with Direct Energy by whatever means possible or necessary.

In sum, Direct Energy’s argument that Mr. Naborn failed to understand the differences between the terms reinstatement, new enrollment and re-enrollment and, failed to take appropriate action to restore Direct energy as the Complainants’ NGS lacks credibility and is untenable. Under Section 1501 of the Code, Direct Energy has an obligation to provide reasonable service to customers; it cannot avoid that obligation by shifting the responsibility for any gap or failure in communication to the Complainants. There is substantial evidence in the record to support the Complainants’ claims that by waiting seven months to inform the Complainants that it was possible for them to re-enroll with Direct Energy as their NGS at the rate and on the terms of the 2022 Enrollment, Direct Energy failed to provide reasonable service.

I find (1) that Direct Energy misled the Complainants as to PECO’s ability to reinstate Direct Energy as their NGS, and (2) that Direct Energy failed to provide Complainants with complete and accurate information concerning (a) how to immediately reinstate Direct Energy as their NGS, and (b) the availability of terms of service other than those published on-line. Therefore, I conclude that Direct Energy’s actions/inactions constitute inadequate service under Section 1501 of the Public Utility Code.

⁸⁴ Tr. 75-76.9.

⁸⁵ Tr. 76.

Section 3301 of the Public Utility Code provides that if any public utility fails to comply with any Commission regulation it shall forfeit and pay to the Commonwealth a sum not exceeding \$1,000.00 per day of violation.⁸⁶ To implement this section, the Commission has adopted certain standards that must be applied when imposing a civil penalty for violations of Commission directives and regulations.⁸⁷ Section 69.1201(a) of the Commission's regulations states:

The Commission will consider specific factors and standards in evaluating litigated ... cases involving violations of 66 Pa.C.S. (relating to the Public Utility Code) and this title. These factors and standards will be utilized by the Commission in determining if a fine for violating a Commission order, regulation or statute is appropriate.¹⁸⁸¹

These factors and standards to be considered are enumerated in section 69.1201(c):

(1) Whether the conduct at issue was of a serious nature. When conduct of a serious nature is involved, such as willful fraud or misrepresentation, the conduct may warrant a higher penalty. When the conduct is less egregious, such as administrative filing, or technical errors, it may warrant a lower penalty.

(2) Whether the resulting consequences of the conduct at issue were of a serious nature. When consequences of a serious nature are involved, such as personal injury or property damage, the consequences may warrant a higher penalty.

(3) Whether the conduct at issue was deemed intentional or negligent. This factor may only be considered in evaluating litigated cases. When conduct has been deemed intentional, the conduct may result in a higher penalty.

(4) Whether the regulated entity made efforts to modify internal practices and procedures to address the conduct at issue and prevent similar conduct in the future. These modifications

⁸⁶ 66 Pa.C.S. § 3301.

⁸⁷ See 52 Pa. Code § 69.1201; see also, *Rosi v. Bell Atlantic-Pa., Inc. and Sprint Commc'ns Co.*, Docket No. C-00992409 (Opinion and Order entered Feb. 10, 2000) (*Rosi*).

⁸⁸ 52 Pa. Code § 69.1201(a).

may include activities such as training and improving company techniques and supervision. The amount of time it took the utility to correct the conduct once it was discovered and the involvement of top-level management in correcting the conduct may be considered.

(5) The number of customers affected and the duration of the violation.

(6) The compliance history of the regulated entity which committed the violation. An isolated incident from an otherwise compliant utility may result in a lower penalty, whereas frequent, recurrent violations by a utility may result in a higher penalty.

(7) Whether the regulated entity cooperated with the Commission's investigation. Facts establishing bad faith, active concealment of violations or attempts to interfere with Commission investigations may result in a higher penalty.

(8) The amount of the civil penalty or fine necessary to deter future violations. The size of the utility may be considered to determine an appropriate penalty amount.

(9) Past Commission decisions in similar situations.

(10) Other relevant factors.^[89]

A civil penalty in the amount of \$500 is appropriate for PECO's failure to provide reasonable service to the Complainants. Pursuant to the first criterion, whether the violation was of a serious nature, I find there is no evidence of willful fraud or misrepresentation.

The second criterion considers whether the consequences of the conduct was serious in nature, such as personal injury or property damage. While acknowledging the frustration and inconvenience suffered by the Complainants due to the inflexibility of PECO's IVR and customer service systems and failure to provide complete and accurate customer assistance, these systemic defects did not result in personal injury or property damage.⁹⁰

⁸⁹ 52 Pa. Code § 69.1201(c).

⁹⁰ *McCauley v. Pa. Elec. Co.*, Docket No. C-2014-2417835 (Opinion and Order entered Aug. 12, 2015).

The third criterion is whether the conduct at issue was intentional or negligent. Here, there is no evidence that PECO or its customer service representatives intentionally chose not to address the Complainants' inadvertent NGS switch via IVR. Therefore, this violation is not intentional.

The next criterion concerns whether the utility made efforts to modify internal practices and procedures to address the issue and prevent similar conduct in the future. As explained above, PECO will be ordered to refund to the Complainants the "excess" amount collected from them as a result of PECO's poor customer service.

The next criterion is the number of customers affected and the duration of the violation. The Complainants endeavored to resolve the issue immediately and were unable to do so for seven months. However, the delay in resolving the matter was not entirely within PECO's control. There is no evidence of record as to the number of PECO customers who have experienced similar issues with PECO's IVR system and NGS switch processing.

The sixth criterion concerns the compliance history of the utility and requires a consideration of whether this is an isolated incident or a more frequent, recurrent violation. There is no specific evidence in the record that is appropriate to consider relating to PECO's compliance history. There is also no evidence that PECO engaged in any active concealment or bad faith in this matter.

In consideration of the ninth criterion relating to past Commission decisions, the Commission assessed a civil penalty in *McCauley v. Pennsylvania Electric Co.*⁹¹ In that case, the Commission assessed a \$500 civil penalty because it found a violation of Section 1501. Like the Commission in *McCauley*, I also conclude that a \$500 civil penalty here is sufficient to deter future violations such as those involved in the Complaint.⁹²

⁹¹ Docket C-2014-2417835 (Opinion and Order entered Aug. 15, 2015).

⁹² 52 Pa. Code § 69.1201(c)(8).

A civil penalty in the amount of \$1,000 is appropriate for Direct Energy's failure to provide reasonable service to Complainants and for providing misleading information to the Complainants.

As to the first criterion, I find there is evidence that Direct Energy's position that it was acting "on the Complainants' behalf" when it sent emails to PECO requesting PECO to "reverse" the NGS switch were designed to shift attention from its actions and to convince the Complainants that all responsibility or "blame" for the problem should be shouldered by PECO. In doing so, Direct Energy willfully misled the Complainants into believing that PECO could reverse the NGS switch *sua sponte*.

With respect to the second criterion, while the Complainants suffered frustration and inconvenience due to Direct Energy's failure to provide complete and accurate customer assistance, Direct Energy's actions did not result in personal injury or property damage.⁹³

Under the third criterion, relating to whether the conduct at issue was intentional or negligent, the record in this matter reflects Direct Energy's poor customer service. However, there is no evidence that Direct Energy or its customer service representatives intentionally failed to address the Complainants' inadvertent NGS switch via IVR. Therefore, the violation is not intentional.

Regarding the next criterion, whether the utility made efforts to modify internal practices and procedures to address the issue and prevent similar conduct in the future. There is no evidence in the record that Direct Energy has taken any action to modify customer service practices and procedures to address the issue of incomplete or inaccurate information or to prevent the spread of misleading information or similar conduct in the future. Consideration of this criterion suggests a higher penalty, as the supply of accurate and complete information to customers and avoidance of misleading information are critical to maintaining consumer confidence in public utilities and the Commission's role as a fair and impartial regulator.

⁹³ *McCauley v. Pa. Elec. Co.*, Docket No. C-2014-2417835 (Opinion and Order entered Aug. 12, 2015).

The next criterion considers the number of customers affected and the duration of the violation. As to the duration of the violation, Direct Energy agreed that the Complainants endeavored to resolve the issue immediately but were unable to do for seven months. Direct Energy's witness, Mr. Halstead testified that he was unaware of any other Direct Energy customers who had found themselves in the same circumstances faced by the Complainants. Absent from the record is evidence as to the number of Direct Energy customers who, in a broader sense, have experienced unreasonable service and false and misleading information when interacting with Direct Energy customer service representatives.⁹⁴

Concerning the compliance history of Direct Energy, and whether this is an isolated incident or a more frequent, recurring violation, the record contains no evidence. There is, however, evidence that Direct Energy failed to disclose to and concealed from the Complainants, actions that Direct Energy could have taken, in concert with the Complainants to reverse the inadvertent NGS switch in July 2022. Mr. Naborn strenuously argued that over a period of seven months Direct Energy actively and repeatedly avoided "reinstating" the Complainants' 2022 rate and other contract terms. Further, he argued that Direct Energy only offered to reinstate the Complainants' 2022 rate and contract terms after energy rates had fallen and shortly before the scheduled hearing in this matter. Essentially, Mr. Naborn argues that Direct Energy's actions demonstrate bad faith in its dealings with the Complainants. I find such arguments convincing and compelling.

In consideration of the final criterion relating to past Commission decisions, I note that in *McCauley v. Pennsylvania Electric Co.*⁹⁵ the Commission assessed a \$500 civil penalty because it found a violation of Section 1501. However, unlike PECO's actions in this matter, Direct Energy's actions included intentionally misleading the Complainants as to PECO's ability to correct the Complainants' inadvertent NGS switch. In *Herp v Respond Power, LLC*, Docket No. C-2014-2413756 (Opinion and Order entered Jan. 28, 2016), the Commission assessed a civil penalty of \$1,000.00 per violation against an EGS for misrepresentations made to

⁹⁴ 66 Pa. C. S. 1501

⁹⁵ Docket C-2014-2417835 (Opinion and Order entered Aug. 15, 2015).

a customer. Like the Commission in *Herp*, I also conclude that a \$1,000 civil penalty here is sufficient to deter future violations such as those involved in the Complaint.⁹⁶

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the parties of this proceeding.
66 Pa.C.S. § 701.

2. The party filing the Complaint bears the burden of proving by a preponderance of the evidence that he is entitled to relief from the Commission.
66 Pa.C.S. § 332(a); *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm'n*, 578 A.2d 600 (Pa. Cmwlth. 1990).

3. A Commission decision must be supported by “substantial evidence,” which consists of evidence that a reasonable mind might accept as adequate to support a conclusion. *Norfolk & W. Ry. Co. v. Pa. Pub. Util. Comm'n*, 413 A.2d 1037 (Pa. 1980). A trace of evidence or a suspicion of the existence of a fact is insufficient. *Erie Resistor Corp. v. Unemployment Comp. Bd. of Rev.*, 166 A.2d 96 (Pa. Super. 1961).

4. The enforcement powers of the Commission do not include the power to award money damages. *Elkin v. Bell Tel. Co. of Pa.*, 420 A.2d 371 (Pa. 1980); *Feingold v. Bell of Pa.*, 383 A.2d 791 (Pa. 1978).

5. The Commission does not have subject matter jurisdiction to interpret the terms and conditions of a contract between an EGS and a customer to determine whether a breach of the contract has occurred. *See Yaglidereliler Corp. v. Blue Pilot Energy, LLC*, Docket No. C-2014-2413732, (Opinion and Order entered Jan. 16, 2015) (citing *Allport Water Auth. v. Winburne Water Co.*, 393 A.2d 673 (Pa. Super. 1978)).

⁹⁶ 52 Pa. Code § 69.1201(c)(8).

6. PECO's IVR system fails to provide reasonable service to customers such as the Complainants because it does not allow customers or PECO customer service representative to reverse an inadvertent NGS choice selection on the day the selection is made. 66 Pa.C.S. § 1501.

7. PECO failed to provide reasonable service to the Complainants because its customer service representatives did not give the Complainants complete and accurate information as to how to reverse an inadvertent or erroneous NGS choice selection. 66 Pa.C.S. § 1501.

8. Direct Energy failed to provide reasonable service to the Complainants because its customer service representatives did not give the Complainants complete and accurate information as to how to reverse an inadvertent or erroneous NGS choice selection and misled the Complainants as to PECO's ability to do so. 66 Pa.C.S. § 1501.

9. The Commission has the authority to assess a civil penalty for violations of the Public Utility Code. 66 Pa.C.S. § 3301.

ORDER

THEREFORE

IT IS ORDERED

1. That the portion of Complainants' Late Filed Exhibit No. 1 labeled "Voicemail recorded on September 20, 2022" is admitted into the record at Docket No. F-2023-3037611.

2. That PECO Energy's Late Filed Exhibit Reflecting a Comparison of PECO and Direct Energy Gas Rates for the period August 22, 2022, through February 23, 2023, is labeled as PECO Exhibit 10 and is admitted into the record at Docket No. F-2023-3037611.

3. That consistent with this Initial Decision, the Complaint against Direct Energy Services, LLC and PECO Energy Company in Robert Naborn and Cynthis Pronko v. Direct Energy Services, LLC and PECO Energy Company, Docket No. F-2023-3037611, is sustained as to a violation of 66 Pa.C.S. § 1501 and denied as to the request for relief for damages.

4. That Direct Energy Services, LLC is hereby assessed a penalty of One Thousand Dollars (\$1,000) because the Respondent failed to provide the Complainants with reasonable service in violation of Section 1501 of the Public Utility Code. 66 Pa.C.S. § 1501.

5. That PECO Energy Company is hereby assessed a penalty of Five Hundred Dollars (\$500) because the Respondent failed to provide the Complainants with reasonable service in violation of Section 1501 of the Public Utility Code. 66 Pa.C.S. § 1501.

6. That within thirty (30) days of the Commission's Final Order in this case, Direct Energy Services, LLC and PECO Energy Company shall pay the above assessed civil penalty in the amount ordered by sending a certified check or money order payable to the Commonwealth of Pennsylvania addressed to:

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

7. That, if Direct Energy Services, LLC fails to make the civil penalty payment required by Ordering Paragraph No. 4 above, within thirty (30) days of the entry date of this Order, it is further ordered that the Bureau of Administrative Services, Assessment Section,

shall refer this matter to the Pennsylvania Office of Attorney General for collection of the total set forth above and appropriate action.

8. That, if PECO Energy Company fails to make the civil penalty payment required by Ordering Paragraph No. 5 above, within thirty (30) days of the entry date of this Order, it is further ordered that the Bureau of Administrative Services, Assessment Section, shall refer this matter to the Pennsylvania Office of Attorney General for collection of the total set forth above and appropriate action.

9. That PECO Energy Company is directed to refund \$111.56 to the Complainants within 30 days from the entry date of the Final Commission Order in this matter.

10. That this matter be marked closed.

Date: September 5, 2023

/s/
Arlene Ashton
Administrative Law Judge