

PENNSYLVANIA PUBLIC UTILITY COMMISSION
Harrisburg, Pennsylvania 17120

**Robert Naborn and Cynthia Pronko
vs. PECO Energy Company and
Direct Energy Services LLC**

**Public Meeting held February 22, 2024
3037611-OSA
Docket No. F-2023-3037611**

MOTION OF VICE CHAIR KIMBERLY BARROW

Robert Naborn¹ is a shopping customer of the competitive Natural Gas Supplier (NGS) Direct Energy Services, LLC (Direct Energy). Mr. Naborn's distribution company is PECO Energy Company (PECO).

On July 22, 2022, Mr. Naborn contacted PECO, and using PECO's automated system, accidentally switched his gas and electric supplier to PECO when he only intended to switch his electric supplier. Although PECO's system confirmed that he wanted to switch, it did not specify what should be switched.² He stayed on the call, explained his mistake to a PECO customer service representative, and asked for the change to be reversed. The customer service representative could not override the switch initiated by the automated system. The same day, Mr. Naborn contacted Direct Energy to inform them of the accidental switch, and asked them not to accept it. A Direct Energy representative advised that they had not received any change in status, and Mr. Naborn requested that the Direct Energy representative note that the forthcoming switch request would be an error.

Despite Mr. Naborn's efforts, PECO sent a notice to Direct Energy of the switch request, which Direct Energy accepted. After some months of negotiation with Direct Energy and PECO, Mr. Naborn filed a Formal Complaint on December 12, 2022, against PECO and Direct Energy. Ultimately, in late March 2023, Mr. Naborn was placed back on his original Direct Energy contract terms with an extended term.

The Administrative Law Judge's (ALJ) Initial Decision in the Formal Complaint found PECO had violated the Public Utility Code, and ordered the imposition of a civil penalty and refund of the difference between the PECO rate and the Direct Energy rate. PECO filed no exceptions and has paid the civil penalty. The refund aspect of the Initial Decision has made the customer whole.

The ALJ also found that Direct Energy violated section 1501 of the Public Utility Code.³ Direct Energy filed three Exceptions.

¹ For simplicity, I refer to Mr. Naborn as the customer and Complainant due to him taking all actions at issue, however I note here that the Complainants are actually Robert Naborn and Cynthia Pronko, and the account holder is Cynthia Pronko.

² PECO's automated confirmation language was: "Please note that if you switch back to PECO, you may be subject to early cancellation fees from your current competitive supplier...Do you wish to continue to return to PECO?" Notes of Testimony, p. 45. Mr. Naborn did want to return to PECO for electric service, so he thought the answer was yes, but the confirmation did not specify it was asking about both electric *and gas service*.

³ 66 Pa.C.S. § 1501.

First, Direct Energy argues that it cannot violate section 1501 of the Code because it is not a “public utility.” I agree.⁴

Direct Energy’s second Exception is generally that no civil penalty is justified because it did not provide inadequate service, did not provide misleading information, and did not willfully mislead the Complainant. Direct Energy’s third exception is that the Commission has no power to force it to enter into or revive a contract.

This matter presents unique facts. The Commission’s supplier regulations protect consumers from switching performed by persons not authorized to act on the account, a practice known as slamming. Here, Mr. Naborn had authority to take action on the account although the prompts that he selected on PECO’s IVR program were incorrect. However, Mr. Naborn immediately notified both Direct Energy and PECO of the inadvertent selection to cancel his account with Direct Energy before the transfer request had even been processed. For these reasons, I disagree that the NGS change occurred with Mr. Naborn’s consent.


Nevertheless, I agree that no civil penalty imposed upon Direct Energy is justified in this case. Our regulations on customer switching do not neatly fit this situation. Direct Energy acted in accordance with a reasonable reading of the standards governing its conduct as an NGS in the unique situation where the customer initiated the switch, albeit inadvertently, which was then processed by the natural gas distribution company. Yet, a commonsense business practice would have been for Direct Energy to offer the original terms and conditions at the outset – and not several months later. Mr. Naborn immediately notified Direct Energy of his mistaken selection on PECO’s automated system and asked that Direct Energy note the issue in the event that it received an order from PECO to cancel Direct Energy’s service. Providing Mr. Naborn with the same terms and conditions that he previously received could have avoided the time and expense of litigation as it relates to Direct Energy’s involvement in this matter.

It is my hope that the spotlight placed on this case will be sufficient to deter the mindlessly mechanistic application of switching processes in future cases where customers clearly do not intend to switch their service.

THEREFORE, I MOVE THAT:

1. The Exceptions of Direct Energy Services, LLC, to the Initial Decision issued on September 6, 2023, at this docket are granted in part and denied in part, consistent with this Motion.
2. The Office of Special Assistants shall prepare an opinion and order consistent with this Motion.

February 22, 2024
DATE


Kimberly Barrow, Vice Chair

⁴ See e.g. *Blue Pilot Energy, LLC v. Pennsylvania Pub. Util. Comm'n*, 241 A.3d 1254, 1262 (Pa. Cmwlth. 2020) (Electric Generation Suppliers are not public utilities); *Delmarva Power & Light Co. v. Com.*, 870 A.2d 901, 909 (Pa. 2005) (same); *Indep. Oil & Gas Ass'n of Pennsylvania v. Pennsylvania Pub. Util. Comm'n*, 789 A.2d 851, 853 (Pa. Cmwlth. 2002) (NGSs not public utilities for the purposes of assessments).