

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Kevin Brabank	:	
	:	
v.	:	F-2023-3042345
	:	
PECO Energy Company	:	

INITIAL DECISION

Before
Darlene Heep
Administrative Law Judge

INTRODUCTION

This Initial Decision dismisses the Complaint because the Complainant did not meet his burden of showing that PECO violated the Public Utility Code, Commission regulations or a Commission Order with respect to his enrollment with Tomorrow Energy as his electric supplier.

HISTORY OF THE PROCEEDING

On August 21, 2023, Mr. Kevin Brabank (Mr. Brabank or Complainant) filed a Complaint with the Pennsylvania Public Utility Commission (Commission). Mr. Brabank listed PECO Energy Company and Tomorrow Energy Corp. as the utilities of concern. This is an appeal of a decision of the Commission’s Bureau of Consumer Services (BCS), Case Number 3916000.¹

¹ The Complaint is a timely appeal from the determination of the Commission’s Bureau of Consumer Services (BCS), at BCS No. 3911484, which dismissed Complainant’s informal complaint. A timely BCS appeal is subject to *de novo* review. 52 Pa. Code § 56.173(a).

Mr. Brabank explained in writing on the Complaint form that he was enrolled in the Standard Offer Program (SOP) without his knowledge or consent on August 19, 2019. He also alleged that he did not receive notice that Tomorrow Energy, an electric generation supplier (EGS), was the company selected to provide him with electricity under the SOP and that he was not notified that at the end of the SOP that he would be subject to unregulated high rates. He further stated that on June 2, 2023, he discovered that he was being overcharged and switched back to regular rates. Mr. Brabank also averred that he has been overcharged approximately \$8,500 over five years.

Tomorrow Energy Corp. filed an Answer on September 6, 2023. In the Answer, Tomorrow Energy stated that Tomorrow Energy had provided electric service to the Complainant and that the Complainant was enrolled in the SOP program through PECO. Tomorrow Energy Corp. further stated that the company properly billed the Complainant at the SOP rates and that required renewal notices were sent to Mr. Brabank, including notice of transition to variable rates when the SOP term expired.

PECO also filed an Answer on September 6, 2023, denying all material allegations. The PECO Answer further stated that the Complainant enrolled in the SOP program and that PECO complied with all regulations and laws with respect to that enrollment. PECO also asserted that it is not a party to the contract between the Complainant and Tomorrow Energy Corp.

An Initial Call-In Telephonic Hearing Notice was issued on September 15, 2023, setting a telephonic hearing for October 31, 2023. Subsequently, Tomorrow Energy and the Complainant reached a settlement agreement. On September 18, 2023, a Certificate of Satisfaction of the dispute between Mr. Brabank and Tomorrow Energy was filed.

A Prehearing Order was issued on October 6, 2023. The Prehearing Order advised the remaining parties, Mr. Brabank and PECO, of the hearing procedures and that the Complainant has the burden of proof.

The hearing began as scheduled on October 31, 2023. Mr. Brabank represented himself. Mr. Brabank presented two exhibits.

PECO was represented by Khadijah Scott Esquire. On behalf of PECO, she presented ten Exhibits and the testimony of Nadine Tillman, PECO Senior Energy Acquisition Analyst, and Renee Tarpley, PECO Senior Regulatory Assessor.

All exhibits presented at the hearing were admitted into the record.

During the hearing, Mr. Brabank made reference to a legal decision regarding the standard offer program and by Order dated October 31, 2023, he was given ten days to provide a copy of the decision to counsel for PECO and the presiding officer. In the same order PECO was given ten days from receipt of the information from Mr. Brabank to file a response.

By email on November 1, 2023, the Complainant submitted electronic links to “(1) Petition of PPL Electric Utilities Corporation for Approval of Its Default Service Plan For the Period June 1, 2021 Through May 31, 2025. P-2020-3019356; (2) Articles about the ALJ’s recommendations and PUC’s response; and (3) Retail Energy Supply Association v. PA PUC :: 2018 :: Pennsylvania Commonwealth Court Decisions :: Pennsylvania Case Law :: Pennsylvania Law :: US Law :: Justia.” November 1, 2023 email.

On November 10, 2023, PECO submitted a letter objecting to the admission of the documents in the links provided by the Complainant as irrelevant and moot. I have determined that the documents in the links presented by the Complainant will be reviewed as containing possibly relevant caselaw but will not be admitted into evidence.

The record closed on November 28, 2023 upon receipt of the transcript.

FINDINGS OF FACT

1. The Complainant is Mr. Kevin Brabank.
2. The Respondent is PECO Energy Company, from which Mr. Brabank receives electric utility service. Tr. 8.
3. The Complainant resides on Harvey Road in Chadds Ford, Pennsylvania where PECO is his default electric supplier. Tr. 7
4. Tomorrow Energy is an EGS that was part of the PECO Energy Company Standard Offer Program (SOP).
5. Front Door, also known as Porch, is a third-party provider that handles enrollment of PECO customers interested in the SOP.
6. The SOP is a Commission-mandated process that provides residential and small commercial customers with a percentage discount on PECO rates. Tr. 38.
7. Any EGS such as Tomorrow Energy that participates in the SOP must provide a discounted rate for 12 billing cycles. Tr. 38.
8. When a customer contacts PECO for any reason, a PECO representative may offer and explain the customer EGS referral program and, if the customer agrees, the customer is transferred to Front Door, where the sign up with the EGS is completed. Tr. 40.
9. Customers may terminate EGS service at any time without penalty or early termination fee. Tr. 38.
10. Information concerning the PECO SOP is on the PECO website and includes a statement that at the end of the 12-month discount period, a customer may:

- Remain with the current supplier.
- Switch to another competitive supplier, or
- Return to default service offered by their EDC (or, Electric Distribution Company, here PECO).

Tr. 39; PECO Exhibit 1.

11. On August 19, 2019, Mr. Brabank called PECO to establish electric service. Tr. 15.

12. Also on August 19, 2019, Mr. Brabank was referred to the PECO SOP. Tr. 9, 15, 39; PECO Exhibit 2.

13. When the Complainant contacted PECO to begin his PECO service, he was given information about the SOP, including the period of the discount. PECO Exhibit 3; Tr. 87.

14. After the Complainant indicated that he was interested in the SOP, he was referred to Front Door. PECO Exhibit 3; Tr.87.

15. Once a customer signs up with an EGS, the EGS sends PECO an electronic transaction stating that the supplier is enrolling the customer. Tr. 49; Complainant Exhibit A.

16. Once enrolled with Tomorrow Energy, PECO sent the Complainant a letter confirming that he was enrolled with Tomorrow Energy. PECO Exhibits 3, 4; Tr. 43.

17. The EGS enrollment confirmation letter sent to the customer by PECO informs the customer that the rate charged by the supplier could be higher or lower than PECO and that the rate the customer is paying the supplier is on page 2 of PECO bills. PECO Exhibit 4.

18. The EGS enrollment confirmation letter also provides a contact telephone number that the customer may call if the switch information is incorrect. Tr. 43; PECO Exhibit 4.

19. PECO has issued a monthly bill to the Complainant since August 2019. PECO Exhibit 7.

20. The bills issued by PECO to the Complainant stated that Tomorrow Energy was his energy supplier. Tr. 28.

21. The bills issued by PECO also included the rate charged by Tomorrow Energy and the rate of PECO to compare. PECO Exhibit 5; Tr. 34, 45-46.

22. The bills issued by PECO also include a telephone contact number for Tomorrow Energy. Tr. 34.

23. On June 8, 2023, the Complainant switched from Tomorrow Energy to PECO as his electric supplier. Tr. 8-9; PECO Exhibit 2.

24. When Mr. Brabank returned to PECO as his electric supplier, PECO sent a confirmation letter to Mr. Brabank. PECO Exhibit 6.

DISCUSSION

As the proponent of a rule or order, the Complainant bears the burden of proof pursuant to Section 332(a) of the Pennsylvania Public Utility Code (Code). 66 Pa.C.S. § 332(a). To satisfy this burden, the Complainant 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. 66 Pa.C.S. § 701.

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. *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm'n*, 578 A.2d 600 (Pa. Cmwlth. 1990). In addition, the Commission's 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).

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 Complainant shifts to the Respondent. If the evidence presented by the Respondent is of co-equal weight to the evidence presented by the Complainant, the Complainant has not satisfied his burden of proof. The Complainant would then be required to provide additional evidence to rebut the evidence of the Respondent. *Burleson v. Pa. Pub. Util. Comm'n*, 443 A.2d 1373 (Pa. Cmwlth. 1982), *aff'd*, 461 A.2d 1234 (Pa. 1983).

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. *Milkie v. Pa. Pub. Util. Comm'n*, 768 A.2d 1217 (Pa. Cmwlth. 2001).

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.

66 Pa.C.S. § 1501. The statutory definition of "service" is to be broadly construed. *Betchy v. West Penn Power Co.*, Docket No. C-2018-3000257 (Opinion and Order entered Oct. 8, 2020)

(citing *Country Place Waste Treatment Co., Inc. v. Pa. Pub. Util. Comm'n*, 654 A.2d 72 (Pa. Cmwlth. 1995)). As defined in the Code:

“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[.]

66 Pa.C.S. § 102.

Electric distribution companies (EDCs), as the default service provider, have been directed by the Commission to include a Standard Offer Customer Referral Program, or SOP, in their default service plans. *See Investigation of Pennsylvania's Retail Electricity Market: Intermediate Work Plan*, Docket No. I-2011-2237952 (Order entered Mar. 2, 2012).

The Standard Offer Customer Referral Program is a program that involves voluntary participation by EGSs who agree to provide a standard offer to participating customers.

The standard offer typically provides for a percentage off an EDC's price for a stated period of time. A customer may voluntarily participate in the program, switching his or her supplier. *Id.* at 31-36.

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

[w]hen a customer contacts an EGS to request a change from the current EGS or default service provider to a new selected EGS, the following actions shall be taken by the selected EGS and the customer's EDC:

(1) The selected EGS shall notify the EDC of the customer's EGS selection at the end of the 3-business day rescission period under § 54.5(d) (relating to disclosure statement for residential and small business customers) or a future date specified by the customer. The selected EGS may notify the

EDC by the end of the next business day following the customer contact upon customer consent.

(2) Upon receipt of this notification, or notification that the customer has authorized a switch to default service, the EDC shall send the customer a confirmation letter noting the proposed change of EGS or change to default service. The notice must include the date service with the new selected EGS or default service provider will begin. 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 EGS or default service provider.

52 Pa. Code § 57.173.

The Complainant has the burden of showing that the Respondent violated these provisions.

Mr. Brabank testified that he was not aware that he was enrolled in the standard offer program. Tr. 24. He also stated that he does not recall receiving communication from PECO or Tomorrow Energy that he was enrolled with Tomorrow Energy or when his SOP was coming to an end. Tr.12.

Mr. Brabank began to question his electricity charges when in December of 2023, he had a bill that was about \$1,000. He did not look at his bill to see why the charge was so high. He thought that there was a problem with his furnace. Tr. 29-30. In May or June of 2023, a solar energy consultant brought to Mr. Brabank's attention the rate that he was paying Tomorrow Energy. Tr. 8-9, 29. He then switched his electric service to PECO.

Mr. Brabank testified that once he switched to PECO, he began to research the EGS enrollment process. Tr. 11- 13. He questions certain aspects of the procedure for the Standard Offer Program. He testified that PECO does not notify customers that they are enrolled in the standard offer program but sends a letter stating that the customer has selected an EGS, in his case, Tomorrow Energy, when in fact PECO selects the EGS. He also averred that the customer does not receive written notice of the terms and conditions of the standard offer

program. Specifically, he objects that at no point during the process is a customer notified that at the end of the SOP contract, the customer will be moved to unregulated and unlimited rates. Tr. 11, 13.

According to Mr. Brabank, a customer is only notified that he or she may stay with the current provider, sign up with a new provider or switch to the regulated rates of PECO. Tr. 10-11. He also stated that neither PECO nor Tomorrow Energy collected “affirmative confirmation” that the customer was signed up for the standard offer program and that the notice that is to be issued to customers does not state that the rates to be paid will increase substantially and are unregulated and unlimited. Tr. 13. He also objected to the fact that a disclosure regarding the end of the 12-month period under the standard offer is read to a customer over the telephone and not provided in writing, Tr. 14.

Mr. Brabank also contends that because he was enrolled with Tomorrow Energy, he was overcharged for a 47-month to 48-month period. Tr. 15. He calculated the overpayment based on information from the PECO website and various estimates. Tr. 15-16, Complainant Exhibit B.

PECO presented evidence that the company complied with statutory, regulatory and legal requirements. Nadine Tillman, PECO Senior Energy Acquisition Analyst, testified that the Complainant was enrolled with Tomorrow Energy as a result of a referral from PECO’s SOP. Tr. 38. A PECO representative explained the SOP to the Complainant, who expressed interest in the program, and he was referred to Front Door, PECO’s third-party contractor who handles EGS sign ups. PECO Exhibit 3; Tr. 40-42.

Following the enrollment of the Complainant with Tomorrow Energy, PECO sent an EGS enrollment confirmation letter to the Complainant, which stated that he was enrolled with the EGS and provided contact information if the switch is incorrect or the customer did not choose the supplier. Tr. 43,48; PECO Exhibits 3, 4. The EGS is to disclose terms of service to the customer. 52 Pa. Code § 54.5; Tr.58.

Since 2019, monthly bills sent to Mr. Brabank stated that Tomorrow Energy was his electric supplier and included the price to compare the charges of the EGS to the PECO rate. PECO Exhibit 5; Tr. 45-46.² The bills also included contact information for both Tomorrow Energy and PECO if there were any questions.³ Upon the Complainant's switch to PECO as his provider, PECO also sent a letter to the Complainant confirming the switch. Tr. 48, PECO Exhibit 6.

PECO provided the notices required under 52 Pa. Code § 57.173.

Mr. Brabank's testimony that he was not aware and was not informed that his electric supplier was Tomorrow Energy is outweighed by the testimony and documentation provided by PECO showing that notice was given to the Complainant. Mr. Brabank believes that PECO should have provided him with more information about the EGS as well as the terms and conditions of the Tomorrow Energy service. While such notices and information may have better served Mr. Brabank, PECO provided the information and notices legally required. PECO is not required to provide the additional information and notices sought by the Complainant, and by not issuing such notices, PECO did not violate a Commission Order, the Utility Code or regulations.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the parties to and subject matter 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).

² This was also confirmed by PECO Senior Regulatory Assessor, Renee Tarpley. Tr. 74-75.

³ Ms. Tillman also testified that the supplier is required to send two contract renewal notices to the customer prior to the 12-month contract expiring or if there are changes in terms. *See* 52 Pa. Code § 54.10. There is no indication that PECO is required to provide such notice.

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. PECO provided reasonable service to the Complainant. 66 Pa.C.S. § 1501.

5. The EGS is required to disclose terms of service to the customer. 52 Pa. Code § 54.5.

6. PECO sent the Complainant a letter confirming his enrollment with Tomorrow Energy in accordance with 52 Pa. Code § 57.173(2).

7. The Complainant has not established by a preponderance of the evidence that PECO violated the Pennsylvania Public Utility Code, regulations, or a Commission Order. *See Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm’n*, 578 A.2d 600 (Pa. Cmwlth. 1990).

ORDER

THEREFORE

IT IS ORDERED

1. That the Formal Complaint filed by Kevin Brabank in *Kevin Brabank v. PECO Energy Company*, Docket No. F-2023-3042345, is denied and the Complaint is dismissed.

2. That this matter be marked closed.

Date: February 23, 2024

/s/
Darlene D. Heep
Administrative Law Judge