

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

Public Meeting held February 22, 2024

Commissioners Present:

Stephen M. DeFrank, Chairman
Kimberly Barrow, Vice Chair
Ralph V. Yanora, Concurring in Result Only
Kathryn L. Zerfuss
John F. Coleman, Jr., Statement, Concurring in Result Only

Robert Naborn and Cynthia Pronko

F-2023-3037611

v.

Direct Energy Services, LLC
PECO Energy Company

OPINION AND ORDER

BY THE COMMISSION:

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition are the Exceptions filed by Direct Energy Services, LLC (Direct Energy) on September 26, 2023, to the Initial Decision (I.D.) of Administrative Law Judge (ALJ) Arlene Ashton, issued September 6, 2023, in the above-captioned proceeding. The Initial Decision sustained the Formal Complaint (Complaint) filed by

Robert Naborn (Mr. Naborn) on December 22, 2022.¹ No Reply Exceptions were filed. For the reasons stated below, we shall grant, in part, and deny, in part, Direct Energy's Exceptions, and modify the ALJ's Initial Decision, consistent with this Opinion and Order.

I. History of Proceeding

On December 22, 2022, Mr. Naborn filed the Complaint against PECO Energy Company (PECO) and Direct Energy.^{2,3} Mr. Naborn's natural gas distribution company is PECO, and he is a shopping customer of Direct Energy. The Complaint alleged that PECO terminated an existing gas supply contract with Direct Energy and made itself the gas supplier at a higher rate. As relief, the Complaint requested reinstatement of the Complainants' original gas supply contract with Direct Energy; reimbursement for higher gas rates paid to PECO; payment of compensation to Direct Energy for income lost due to the termination of the gas supply contract; ordering PECO to cease using its Interactive Voice Response (IVR) system until certain changes are implemented; and fining PECO for misleading marketing and the unauthorized termination of the Complainants' gas supply contract with Direct Energy. Complaint at 2-4.

¹ The Complaint was initially filed by Mr. Naborn but was later amended to include his wife, Cynthia Pronko (Ms. Pronko) (Mr. Naborn and Ms. Pronko are collectively referred herein as the Complainants). As discussed, *infra*, the Complaint was further amended. All references herein to the Complaint refer to the Complaint, as amended.

² See, n.1, *supra*.

³ The Complaint is a timely appeal from the Bureau of Consumer Services (BCS) determination at BCS No. 3864366 issued on December 16, 2022. An appeal of a BCS informal complaint decision is a *de novo* review conducted by either an ALJ or a Special Agent. 52 Pa. Code § 56.173(a).

On February 1, 2023, Direct Energy filed an Answer and New Matter averring that Ms. Pronko's gas 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. Direct Energy Answer at 2-6.

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. Preliminary Objections at 2-6.

On February 6, 2023, PECO filed an Answer in which it denied all material allegations of fact and conclusions of law in the Complaint. PECO stated 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 contended that on July 22, 2022, the Complainants agreed to drop Direct Energy as their electric and gas supplier. PECO averred that on July 22, 2022, Ms. Pronko contacted PECO advising that Mr. Naborn had elected for the gas supply to be returned to PECO in error. PECO stated that Ms. Pronko was informed that PECO could not change the Complainants' gas supplier back to Direct Energy once the switch election was made. PECO also argued that the Complainants must contact Direct Energy to change their gas supplier, that the bills issued to the Complainants are correct, and that the Complaint is without merit and should be dismissed. PECO Answer at 2-3.

On February 13, 2023, Mr. Naborn filed a document indicating that it was his "reply to Direct Energy's Preliminary Objections." The Complainants did not file a

response to the New Matter contained in Direct Energy’s Answer. However, the ALJ, pursuant to 52 Pa. Code § 1.2, disregarded any defects in pleadings filed by Mr. Naborn because Mr. Naborn is a *pro se* complainant and any defects in the pleadings did not affect the substantive rights of the parties. On February 14, 2023, Mr. Naborn filed a document stating that it was his “reply to PECO’s Answer,” in which he responded to the positions and arguments in PECO’s Answer. I.D. at 3.

On March 17, 2023, the ALJ 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 Complaint. The initial telephonic hearing was rescheduled for April 17, 2023. I.D. at 4.

On March 22, 2023, Ms. Pronko filed a letter requesting that she be added as a co-complainant in this matter and addressing the arguments with respect to Mr. Naborn’s standing raised by Direct Energy. On March 23, 2023, Mr. Naborn filed a letter detailing the Complainants’ claims with respect to each respondent. Both of these letters amended the original Complaint. I.D. at 4; *see*, n.1 at 2, *supra*.

On March 28, 2023, PECO filed an Answer to Amended Complaint. I.D. at 4.

The hearing was conducted on April 17, 2023. Mr. Naborn appeared *pro se*; however, Ms. Pronko did not appear for the hearing. Counsel appeared on behalf of each of Direct Energy and PECO. I.D. at 4. Complainants’ Exh. No. 1, PECO Exh. Nos. 1, 3, 5, 6, 8, 9 and 10, and Direct Energy’s Exh. Nos. 1-3 were admitted into the record. Tr. at 97; I.D. at 5.

The record closed on May 4, 2023, when the 100-page transcript was filed with the Commission's Secretary's Bureau. I.D. at 5.

In the Initial Decision issued on September 6, 2023, the ALJ sustained the Complainants' claims of failure to provide reasonable service against Direct Energy and PECO. The ALJ found that the Complainants proved, by a preponderance of the evidence, that PECO's computer system was unable to address or correct an inadvertent error made by a customer while using PECO's automated customer service (IVR) system, and PECO customer service representatives failed to provide complete and accurate information to the Complainants. The ALJ further found that the Complainants also proved, by a preponderance of the evidence, that Direct Energy's customer service representatives misled the Complainants and failed to provide complete and accurate information to them. As a result, the ALJ imposed a civil penalty on both PECO and Direct Energy. Finally, the ALJ dismissed the Complainants' claims for breach of contract and request for damages because such claims and requested remedy are beyond the scope of the Commission's jurisdiction. I.D. at 1, 15-16, 20, 22, 26, 31, 33-37.

On September 13, 2023, PECO submitted its payment of \$500 to satisfy the civil penalty assessed by the ALJ in this matter.

As noted, *supra*, Direct Energy filed Exceptions on September 26, 2023. No Reply Exceptions were filed.

II. Discussion

As a preliminary matter, we note that any argument or Exception that we do not specifically delineate shall be deemed to have been duly considered and denied without further discussion. The Commission is not required to consider expressly or at length each contention or argument raised by the parties. *Consolidated Rail Corp. v.*

Pa. PUC, 625 A.2d 741 (Pa. Cmwlth. 1993); *see also, generally, University of Pennsylvania v. Pa. PUC*, 485 A.2d 1217 (Pa. Cmwlth. 1984).

A. Legal Standards

1. Burden of Proof

Section 332(a) of the Public Utility Code (Code) provides that a complainant, as the party seeking affirmative relief from the Commission, has the burden of proof. 66 Pa. C.S. § 332(a). To establish a legally sufficient case and satisfy the burden of proof, a complainant must show that the named utility is responsible or accountable for the problem described in the complaint. *Patterson v. The Bell Telephone Company of Pennsylvania*, 72 Pa. P.U.C. 196 (1990). Such a showing must be by a preponderance of the evidence. *Samuel J. Lansberry, Inc. v. Pa. PUC*, 578 A.2d 600 (Pa. Cmwlth. 1990), *alloc. denied*, 529 Pa. 654, 602 A.2d 863 (1992) (*Lansberry*). That is, a complainant's evidence must be more convincing, by even the smallest amount, than that presented by the respondent utility. *Se-Ling Hosiery, Inc. v. Margulies*, 364 Pa. 45, 70 A.2d 854 (1950). Additionally, this Commission's decision must be supported by substantial evidence in the record. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk & Western Ry. Co. v. Pa. PUC*, 489 Pa. 109, 413 A.2d 1037 (1980) (*Norfolk*).

Upon the presentation by a 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 utility. If the evidence presented by the respondent utility is of co-equal value or "weight," the burden of proof has not been satisfied. The complainant now has to provide some additional evidence to rebut that of the respondent. *Burleson v. Pa. PUC*, 443 A.2d 1373 (Pa. Cmwlth. 1982), *aff'd*, 501 Pa. 433, 461 A.2d 1234 (1983).

While the burden of production may shift back and forth during a proceeding, the burden of proof never shifts. The burden of proof always remains on the party seeking affirmative relief from the Commission. *Milkie v. Pa. PUC*, 768 A.2d 1217 (Pa. Cmwlth. 2001).

To establish a legally sufficient claim, a complainant must show that the named utility is responsible or accountable for the problem described in the complaint in order to prevail. *Patterson v. Bell Tel. Co. of Pa.*, 72 Pa. PUC 196 (1990). The offense must be a violation of the Code or a Commission Regulation or Order. 66 Pa. C.S. § 701.

2. Safe, Adequate and Reasonable Electric Service

A public utility has a duty to maintain safe, adequate and reasonable service and facilities and to make repairs, changes, and improvements that are necessary or proper for the accommodation, convenience, and safety of its patrons, employees, and the public. 66 Pa. C.S. § 1501. Section 1501 of the Code provides, in pertinent part, as follows:

§ 1501. Character of service and facilities

Every public utility shall furnish and maintain adequate, efficient, safe, and reasonable service and facilities, and shall make all such repairs, changes, alterations, substitutions, extensions, and improvements in or to such service and facilities as shall be necessary or proper for the accommodation, convenience, and safety of its patrons, employees, and the public. Such service also shall be reasonably continuous and without unreasonable interruptions or delay. Such service and facilities shall be in conformity with the regulations and orders of the commission. Subject to the provisions of this part and the regulations or orders of the commission, every public utility may have reasonable rules

and regulations governing the conditions under which it shall be required to render service.

66 Pa. C.S. § 1501.

3. Natural Gas Competition

Natural gas customers in Pennsylvania may receive gas service from their default gas supplier or voluntarily choose a different natural gas supplier (NGS). *See*, Natural Gas Choice and Competition Act, 66 Pa. C.S. §§ 2201-2212 (Choice Act). Commission regulations govern the NGS selection and enrollment process. The procedures for changing a customer to an NGS are as follows:

§ 59.93. Customer contacts with NGSs.

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 NGDC of the customer's NGS selection by the end of the next business day following completion of the applications process. The NGDC shall verify the accuracy of the information provided by the NGS by matching at least two data elements such as name and account number, or address and account number, with NGDC records.
- (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 a NGS.

52 Pa. Code § 59.93.

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.

52 Pa. Code § 59.97.

4. Jurisdiction

Jurisdiction relates solely to the competency of the particular court or administrative body to determine controversies of the general class to which the case then presented for its consideration belongs. *Riedel v. The Human Relations Comm'n of the City of Reading*, 559 Pa. 33, 739 A.2d 121 (1999). The Commission, as a creation of the General Assembly, has only the powers and authority granted to it by the General Assembly contained in the Code. *Shedlosky v. Pa. Elec. Co.*, Docket No. C-20066937 (Order entered May 28, 2008); *Feingold v. Bell Tel. Co. of Pa.*, 383 A.2d 791 (Pa. 1977). The Commission must act within, and cannot exceed, its jurisdiction. *City of Pittsburgh v. Pa. PUC*, 157 Pa. Super. 595, 43 A.2d 348 (1945). Subject matter jurisdiction is a prerequisite to the exercise of the power to decide a controversy. *Hughes v. Pa. State Police*, 152 Pa. Cmwlth. 409, 619 A.2d 390 (1992), *app denied*, 536 Pa. 633, 637 A.2d 293 (1993). Jurisdiction may not be conferred by the parties where none exists. *Roberts v. Martorano*, 427 Pa. 581, 235 A.2d 602 (1967). Neither silence nor agreement of the parties will confer jurisdiction where it otherwise would not exist, *Commonwealth v. VanBuskirk*, 303 Pa. Super. 148, 449 A.2d 621 (1982), nor can jurisdiction be obtained by waiver or estoppel. *Scott v. Bristol Twp. Police Dep't*, 669 A.2d 457 (Pa. Cmwlth. 1995).

B. ALJ's Initial Decision

In her Initial Decision, ALJ Ashton made forty-three Findings of Fact and reached nine Conclusions of Law. I.D. at 6-11; 37-38. The Findings of Fact and Conclusions of Law are incorporated herein by reference and are adopted without comment unless they are either expressly or by necessary implication rejected or modified by this Opinion and Order.

Initially, the ALJ dismissed the Complainants' breach of contract claims and request for damages. The ALJ ruled that the breach of contract claims are beyond the jurisdiction of the Commission. Further, the ALJ explained that the enforcement powers of the Commission do not include the power to award damages. I.D. at 15-16.

Next, the ALJ addressed the Complainants' claims of unreasonable service regarding PECO's IVR system and customer service by PECO and Direct Energy as it related to Mr. Naborn's inadvertent change of his NGS supplier and the inability to promptly reverse the change based on an immediate, same-day notification of the error by the Complainant. Based on the witness testimony and evidence in the record, the ALJ recognized that PECO's use of an automated system to accept and process NGS selections is not unusual or unreasonable, and that PECO's practice of sending a letter to a customer once it receives notice that the customer has switched an EGS and allowing several days for a customer to contact PECO if the switch is incorrect or unauthorized is also reasonable. However, the ALJ concluded that PECO's systems and procedures are unreasonably inflexible because they make no allowance for correction of an NGS change through direct contact with a PECO customer service representative until after PECO's systems have fully processed the change. The ALJ found it to be problematic that the batch processing in PECO's IVR system 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. I.D. at 16-19.

The ALJ concluded that PECO was aware that circumstances such as those presented here could occur. Further, the ALJ found that the error here was immediately brought to the attention of a PECO customer service representative, but due to batch processing PECO was unable to correct or identify this issue until the PECO system had run its full course. The ALJ stated that this situation effectively “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.” Accordingly, the ALJ found that such a system is unreasonable, and concluding otherwise would allow PECO to use a flawed system to circumvent the reasonable service standard required under the Code. I.D. at 20.

Moreover, the ALJ stated that PECO’s IVR system does not and cannot provide reasonable service as it is currently configured. To that end, the ALJ found 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, and that PECO’s IVR system was incapable of providing and did not provide reasonable service to the Complainants. Therefore, the ALJ concluded that PECO’s use of such a system constitutes a violation of the standards for service established by 66 Pa. C.S. § 1501. I.D. at 20.

Turning to the Complainants’ customer service claims against PECO and Direct Energy, specifically the alleged failure to respond promptly and appropriately to the request to reverse an inadvertent NGS change, the ALJ found that PECO and Direct Energy failed to provide reasonable service as required under 66 Pa. C.S. § 1501. With respect to PECO’s customer service, the ALJ found that the service provided by PECO’s representative was incomplete. Although the PECO representative described the limited capability of PECO’s IVR and customer service systems, the response lacked critical information, including the fact that only customers, and not PECO, may initiate NGS

changes under law, and only the customer could reverse an inadvertent NGS change made via PECO's IVR system. Also, the ALJ found it inconceivable that the PECO representative was unable to identify the Complainants' account or inadvertent NGS switch somewhere in PECO's customer service system to ensure that the Complainants' account was excluded from NGS supplier batch processing on the day the NGS switch was made and the customer notified PECO of the error. Therefore, the ALJ concluded that 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 service established under 66 Pa. C.S. § 1501. Furthermore, the ALJ ordered that the Complainants shall be issued a refund by PECO, pursuant to 66 Pa. C.S. § 1312, in the amount of \$111.56, which represents the additional payments that the Complainants paid to PECO as a result of PECO's failure to reverse Mr. Naborn's inadvertent selection of PECO as his NGS supplier, as compared to what they would have paid to Direct Energy. I.D. at 21-22.

Regarding Direct Energy's customer service, the ALJ found that the service provided by Direct Energy was also incomplete. The ALJ stated that Direct Energy should have been aware of PECO's batch processing practice because it could impact Direct Energy's business. Moreover, the ALJ concluded that there is nothing in the record that explains why the Direct Energy representative failed to inform the Complainants that only they, as the customer, could reverse an inadvertent switch, and this could be done by following the instructions provided by a confirmation notice that would be sent to them by PECO. The ALJ also found that there is nothing in the record indicating why the Direct Energy representative could not bring the request to the attention of a supervisor or identify the account for prompt follow-up and resolution, if and when an NGS switch notification is received for the Complainants' account. Based upon the witness testimony and record evidence, the ALJ determined that Direct Energy failed to provide adequate service to the Complainants. I.D. at 23-26.

Furthermore, the ALJ concluded that the Complainants provided substantial evidence of unreasonable service by demonstrating that Direct Energy misled them as to the Commission's regulations governing the switching of an NGS, misrepresented PECO's ability to reverse the inadvertent switch, and sent misleading requests to PECO on their behalf. I.D. at 26-28. In addition, the ALJ found that Direct Energy failed to inform the Complainants that it could offer re-enrollment as their NGS at the same rate and terms as the previous enrollment. The ALJ concluded that Direct Energy failed to provide reasonable service by waiting seven months to inform the Complainants of this possibility. I.D. at 28-31.

The ALJ summarized her findings that Direct Energy misled the Complainants regarding PECO's ability to reinstate Direct Energy as their NGS, and that Direct Energy failed to provide the Complainants with complete and accurate information concerning how to reinstate Direct Energy as their NGS under terms of service other than those published online. Accordingly, the ALJ concluded that Direct Energy's actions and inactions constituted inadequate service under 66 Pa. C.S. § 1501. I.D. at 31.

Finally, based upon 66 Pa. C.S. § 3301 and 52 Pa. Code § 69.1201(a), the ALJ ordered that PECO pay a civil penalty in the amount of \$500 for its failure to provide reasonable service to the Complainants. Likewise, the ALJ ordered that Direct Energy pay a civil penalty of \$1,000 for its failure to provide reasonable service to the Complainants. I.D. at 32-37.

C. Exceptions

1. Direct Energy's Exception No. 1

In its Exception No. 1, Direct Energy argues that the Initial Decision erred as a matter of law in finding that Direct Energy violated 66 Pa. C.S. § 1501. Direct Energy avers that the statutory requirement at 66 Pa. C.S. § 1501 for adequate service is the standard with which “public utilities” must comply, and this obligation does not apply to NGSs which were created and are regulated pursuant to the Choice Act. Direct Energy contends that Chapter 15 of the Code, and specifically 66 Pa. C.S. § 1501, only applies to “public utilities” as defined at 66 Pa. C.S. § 102. Direct Energy states that the Choice Act gives retail customers in Pennsylvania the ability to purchase gas from independent NGSs while continuing to receive distribution services from local distribution companies, and it defines the scope of the Commission’s oversight and regulation of NGSs.

Exc. at 4-5.

Furthermore, Direct Energy submits that the Commonwealth Court has clearly held that an NGS, who is not a natural gas distribution company, is not a “public utility” as defined in 66 Pa. C.S. § 102. *Id.* at 5-6 (citing *Indep. Oil & Gas Ass'n of Pa. v. Pa. PUC*, 789 A.2d 851, 855 (Pa. Cmwlth. 2002); *Equitable Gas Co., a Div. of Equitable Res. v. Com., Pa. PUC*, 880 A.2d 48, 50–51 (Pa. Cmwlth. 2005); *Independent Oil and Gas Ass'n of Pa. v. Pa. PUC*, 804 A.2d 693 (Pa. Cmwlth. 2002)). Direct Energy also argues that, similar to the definition of NGS under the Choice Act, the Pennsylvania Supreme Court has held that the comparable definition of “electric generation supplier” under the Electricity Generation Customer Choice and Competition Act, 66 Pa. C.S. §§ 2801 – 2815, excludes suppliers from the definition of “public utility” for most

purposes, subject to limited express exemptions. *Id.* at 6-7 (citing *Delmarva Power & Light Co. v. Com.*, 582 Pa. 338, 352, 870 A.2d 901, 909 (2005)).

For these reasons, Direct Energy contends that it is not a “public utility” subject to Chapter 15 of the Code; therefore, it cannot be found to have provided inadequate service under 66 Pa. C.S. § 1501. Direct Energy submits that the Initial Decision should be reversed on this erroneous application of law. *Exc.* at 7.

2. Direct Energy’s Exception No. 2

In its Exception No. 2, Direct Energy argues that the Initial Decision erred in recommending a civil penalty against Direct Energy because Direct Energy did not mislead or provide incomplete information to the Complainants. Direct Energy avers that the Initial Decision’s findings that Direct Energy failed to provide complete and accurate information to the Complainants, misled the Complainants to believe that PECO could fix the Complainant’s error and reinstate their account with Direct Energy, and did not reinstate the Complainants’ prior rates and terms sooner than March 2023 were based on inaccurate and incomplete readings of the evidentiary record. To the contrary, Direct Energy contends that it went above and beyond any customer service expectations to attempt to assist the Complainants and these efforts were ignored by the Initial Decision. Direct Energy states that while the issue here was caused by the Complainants’ inadvertent cancelation of their account with Direct Energy through PECO’s IVR system, Direct Energy was simply a third party to the underlying circumstances that tried, in good faith, to assist in resolving the issue while complying with the law. Direct Energy provides a summary of the events of this case and objects to the Initial Decision’s finding that Direct Energy’s conduct amounted to unreasonable service. *Exc.* at 7-10.

In addition, Direct Energy submits that the Initial Decision erred in finding that Direct Energy failed to provide the Complainants with information on how to re-

enroll with Direct Energy. Direct Energy avers that it informed the Complainants on four occasions that new enrollment was needed and explained how to complete a new enrollment. Direct Energy contends that the Initial Decision incorrectly found that the Complainants carried their burden of proof that they were uninformed or misinformed because Direct Energy did not mislead the Complainants on the action needed for a new enrollment. I.D. at 11-13.

Direct Energy also argues that the Initial Decision's application of a \$1,000 civil penalty is incorrect because Direct Energy cannot be found to have violated any law or regulation, specifically the inadequate service standard under 66 Pa. C.S. § 1501. Where no violation can be found, Direct Energy submits that the application of a civil penalty is in error. Direct Energy addresses how the Initial Decision erred in its analysis of the criteria regarding civil penalties in 52 Pa. Code § 69.1201(c). Direct Energy contends that the Initial Decision should be reversed and that no civil penalty is warranted. Exc. at 13-16.

3. Direct Energy's Exception No. 3

In its Exception No. 3, Direct Energy argues that the Initial Decision erred by *de facto* regulating the contractual relationship between the Complainants and Direct Energy when finding that Direct Energy should not have delayed in offering to revive the Complainants' rates and terms from the 2022 enrollment. Direct Energy contends that the Initial Decision's finding in this regard improperly requires Direct Energy to enter into a new contractual agreement with the Complainants over which the Commission has no jurisdiction. Direct Energy submits that as an NGS, it does not have any obligation to enter into a contract with a customer, and the Commission has no jurisdiction to direct Direct Energy to establish or revive a contractual relationship with a customer. While the Commission has the authority under 66 Pa. C.S. § 2208 to ensure that Direct Energy meets its obligation to comply with the Choice Act and Commission Regulations, Direct

Energy avers that this jurisdiction does not extend over Direct Energy’s discretionary business decisions to enter into contracts with customers. Direct Energy argues that, unlike an NGDC as a supplier of last resort, there is no obligation that Direct Energy provide service or enter into contracts with anyone, and holding otherwise is not permissible under the law. Exc. at 16-17.

Furthermore, Direct Energy argues that the Commission does not have authority to set the rates or terms of service of an NGS, nor does it have jurisdiction to interpret the terms and conditions of a contract between an NGS and a customer. Direct Energy avers that the Commission has no role in Direct Energy’s ability to make an offer to re-enroll. Direct Energy further argues that it was not obligated to offer the Complainants their prior rate and term after they canceled their 2022 contract, inadvertently or not. Direct Energy also states that it could not *sua sponte* re-enroll the Complainant because doing so would have amounted to a “slam” by enrolling the Complainants without the necessary provisions, consent, and third-party verifications that govern a customer’s enrollment. Inasmuch as the Initial Decision *de facto* regulated the contractual relationship between the Complainants and Direct Energy when finding that Direct Energy should have offered to revive the Complainants’ contract at the rate and terms of their 2022 enrollment sooner than it did, Direct Energy contends that this was error and the Initial Decision must be reversed. Exc. at 18-19.

D. Disposition

Initially, Direct Energy argues that, as an NGS, it is not a public utility and, therefore, it is not subject to Chapter 15 of the Code, specifically 66 Pa. C.S. § 1501. Direct Energy avers that 66 Pa. C.S. § 1501 applies to public utilities and is inapplicable to NGSs, including Direct Energy. According to Direct Energy, the Initial Decision’s finding that Direct Energy violated 66 Pa. C.S. § 1501 is incorrect as a matter of law. We agree that 66 Pa. C.S. § 1501 does not apply to Direct Energy as an NGS.

The Commission has previously determined that it does not have subject matter jurisdiction under 66 Pa. C.S. § 1501 over the service of a non-utility, such as an NGS. See, *Crescent Hotel-Plymouth Meeting, LP v. PECO Energy Company*, *Crescent Hotel-Plymouth Meeting, LP v. UGI Energy Services, Inc.*, *Crescent Hotel-Plymouth Meeting, LP v. Celeren Corporation*, Docket Nos. C-2008-2068258, C-2008-2068267, C-2009-2089563 (Opinion and Order entered August 23, 2018) (*Crescent Hotel*). In *Crescent Hotel*, the Commission addressed this issue through its consideration and disposition of a Petition for Interlocutory Review and Answer to Material Question. In that matter, UGI Energy Services (UGIES), an NGS, argued that it is not a public utility and, therefore, not subject to 66 Pa. C.S. § 1501. The Commission, agreeing with UGIES, stated that:

It is well-established that Section 1501 of the Code only applies to public utilities and licensed NGSs are not public utilities. Section 1501 requires that a “*public utility* ... furnish and maintain adequate, efficient, safe and reasonable services and facilities.” 66 Pa. C.S. § 1501 (emphasis added). UGIES is a licensed NGS, which “is not a public utility as defined in section 102.” 66 Pa. C.S. § 2202. The Commonwealth Court has held that “Section 102 does *not* contain an exception to the statement that NGSs are not public utilities.” [*Indep. Oil & Gas Ass’n v. Pa. PUC*, 804 A.2d 693, 702 (Pa. Cmwlth. 2002)] (emphasis in original). Consistent with this application, the Commission in [*Philadelphia HGI Associates, LP v. Hess Corporation*, Docket No. 2008-206941 (Order entered August 28, 2009) (*Hess*)] determined that NGSs are not public utilities and thus cannot violate Section 1501.

Crescent Hotel at 13.

Consistent with the determination in *Crescent Hotel* and *Hess* that NGSs are not public utilities, and thus, cannot violate Section 1501, we find that Direct Energy, as an NGS, is not a public utility pursuant to 66 Pa. C.S. § 102, 66 Pa. C.S. § 2202;

see, Id.; *Blue Pilot Energy, LLC v. Pa. PUC*, 241 A.3d 1254, 1262 (Pa. Cmwlth. 2020); *Delmarva Power & Light Co. v. Com.*, 870 A.2d 901, 909 (Pa. 2005); *Independent Oil & Gas Ass’n of Pa. v. Pa. PUC*, 789 A.2d 851, 853 (Pa. Cmwlth. 2002); *Equitable Gas Co., a Div. of Equitable Resources v. Com., Pa. PUC*, 880 A.2d 48, 50-51 (Pa. Cmwlth. 2005) (citing *Independent Oil & Gas Ass’n of Pa. v. Pa. PUC*, 804 A.2d 693 (Pa. Cmwlth. 2002)), and that the Commission does not have jurisdiction over the services of Direct Energy under 66 Pa. C.S. § 1501. Therefore, the requirement in 66 Pa. C.S. § 1501 that a “*public utility*...furnish and maintain adequate, efficient, safe and reasonable services and facilities” does not apply to Direct Energy here. Accordingly, we shall grant Direct Energy’s Exception No. 1.

However, similar to the Commission’s action in *Crescent Hotel*, we find that a further examination of the scope of our authority over NGSs is necessary here. In *Crescent Hotel*, the Commission referenced its decision in *Digital 833 Chestnut, LLC v. UGI Energy Services, Inc.*, Docket No. C-2008-2076623 (Order entered April 10, 2010) (*Digital*) in declining to dismiss certain complaint allegations against UGIES. Specifically, the Commission referenced its Order in *Digital*:

We note that, although the Commission regulates NGSs to a lesser extent than public utilities, § 2208(e) of the Natural Gas Choice and Competition Act, 66 Pa. C.S. § 2208(e), does expressly provide that “the Commission may forbear from extending its regulation of natural gas suppliers beyond licensing, bonding, reliability and consumer services and protections, including all applicable portions of 52 Pa. Code Ch. 56.” The apparent meaning of this provision is that the Commission, acting within its discretion, may refrain from exercising its jurisdiction over NGSs in all matters included within the Code except for NGSs’ behavior related to licensing, bonding, reliability and consumer services and protections.

Crescent Hotel at 14-15 (citing *Digital* at 5-7); *see also, Hess* at 8.

The Commission, in finding in *Crescent Hotel* and *Digital* that it had the authority under 66 Pa. C.S. § 2208(e) to determine whether an NGS breached any consumer service and protection duties to its customers, declined to dismiss the formal complaint against the NGSs and remanded the matters to the Office of Administrative Law Judge (OALJ) for further proceedings as deemed necessary to determine whether the NGSs acted reasonably in providing customer services under the facts of the cases. *See, Crescent Hotel* at 15-16; *Digital* at 6-7. Because the requisite authority exists, we must next determine here whether Direct Energy breached any consumer service and protection duties to the Complainants under the facts of this case. However, unlike the Commission's actions in *Crescent Hotel* and *Digital* where evidentiary hearings had not been conducted, we find that remanding the matter to the OALJ for further proceedings is not necessary because an evidentiary hearing was already conducted in this case, the record has been closed, the ALJ issued an Initial Decision, and Exceptions have been submitted.

Consistent with 66 Pa. C.S. § 2208(e), in determining whether Direct Energy breached any of its consumer service and protection duties to the Complainants, we must first identify any rules or standards that may apply to Direct Energy, as an NGS, under the specific facts of this case. Next, we must review whether the Complainants satisfied their burden of proving that Direct Energy failed to adhere to any such rules or standards.

Upon our review of the Code and our Regulations, we note that the Commission regulates NGSs to a lesser extent than public utilities. *Crescent Hotel* at 14 (citing *Digital* at 5-7); *Hess* at 8. However, we have identified several regulations that may be applicable to the claims alleged by the Complainants herein that warrant further review.

NGSs must comply with the standards of conduct for NGS licensees established at 52 Pa. Code § 62.114 and contained within the Commission’s Regulations regarding Natural Gas Supply Customer Choice, 52 Pa. Code §§ 62.1-62.225, which were promulgated to implement the Choice Act. Section 62.114, in relevant part, states:

To protect the consumers of this Commonwealth, licensees shall adhere to the following principles in the provision of natural gas service:

- (1) *A licensee shall provide accurate information about its natural gas services using plain language and common terms in communications with consumers. When new terms are used, the terms shall be defined again using plain language.*
- (2) *A licensee shall provide notification of change in conditions of service, intent to cease operation as an NGS, explanation of denial of service, proper handling of deposits and proper handling of complaints in accordance with this title.*

52 Pa. Code § 62.114 (emphasis added).

In addition, NGSs must comply with the rules that provide, *inter alia*, certain requirements to be followed when an NGS has contact with a customer or a customer raises a dispute about an NGS switch. Those Regulations, regarding the Standards for Changing a Customer’s Natural Gas Supplier, 52 Pa. Code §§ 59.91-59.99, provide specific directives as to what must occur when a contact occurs between a customer and an NGS regarding a request to change the NGS, 52 Pa. Code § 59.93; the timeframe for when an NGS switch must occur, 52 Pa. Code 59.94; and rules as to what

must happen when a customer alleges that their NGS has been switched without consent, 52 Pa. Code § 59.97.⁴

Therefore, in determining whether Direct Energy breached any consumer service and protection duties to the Complainants in accordance with 66 Pa. C.S. § 2208(e), we will review whether the Complainants satisfied their burden of proving that Direct Energy failed to adhere to any of the applicable standards discussed above that apply to Direct Energy, as an NGS, under the specific facts of this case. Specifically, we must determine whether Direct Energy adhered to the requirements with respect to the handling of a customer dispute with an NGS about a switch, under 52 Pa. Code §§ 59.93, 59.94 and 59.97. Also, we must determine whether Direct Energy provided accurate information about its natural gas service and properly handled the Complainants' dispute regarding the facts and circumstances in the instant proceeding, pursuant to 52 Pa. Code § 62.114(1) and (2).

The Complainants' claims arose from: (1) Direct Energy's alleged failure to respond promptly and appropriately to the Complainants' notice on July 22, 2022, that any NGS switch from Direct Energy was in error and that they wanted to retain Direct Energy as their NGS; (2) Direct Energy's alleged representation that it could not switch the Complainants back to Direct Energy without the cooperation of PECO; and (3) Direct Energy's alleged lack of informing the Complainants, prior to March 21, 2023, that it could offer re-enrollment to the Complainants with Direct Energy as their NGS at the rate and terms in effect under their previous 2022 NGS enrollment. Based upon our review of the record and the applicable law discussed, *supra*, it does not appear that Direct Energy breached any consumer service and protection duties to the Complainants with respect to

⁴ There is nothing in Chapter 59 of the Commission's Regulations, 52 Pa. Code § 59.91, *et seq.*, that appears to adopt a general reasonable service standard for NGSs. Furthermore, the Commission's Regulations addressing Standards and Billing Practices for Residential Public Utility Service, 52 Pa. Code §§ 56.1-56.461, do not apply to NGSs. *See*, 52 Pa. Code § 56.1(b).

the claims described above, nor were its actions inconsistent with the relevant Commission Regulations and standards applicable to NGSs, regarding the specific facts and circumstances of this case.

First, we conclude that 52 Pa. Code §§ 59.93 and 59.94 are not applicable to the facts and circumstances in the instant matter. These Regulations apply to situations where a customer contacts an NGS requesting a change of an NGS. In the instant matter, the Complainants contacted Direct Energy and informed them that they had inadvertently canceled their current NGS service. At the time of this call on July 22, 2022, Direct Energy informed Mr. Naborn that nothing appeared to have been changed with respect to his NGS because Direct Energy was not advised by PECO of the Complainants' switch until July 25, 2022.

Furthermore, with respect to 52 Pa. Code § 59.97 and a customer's NGS being switched without consent, we find that 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. Specifically, 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.⁵ However, Mr. Naborn immediately notified both Direct Energy and PECO of the inadvertent selection to cancel his account with Direct Energy before the

⁵ 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*.

transfer request had even been processed. 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.⁶ For these reasons, we disagree that the NGS change occurred with Mr. Naborn's consent. However, we conclude that Direct Energy followed a reasonable reading of Chapter 59 of the Commission's Regulations, 52 Pa. Code §§ 59.1. *et seq.*, with respect to the Complainants' cancellation order.

Next, turning to 52 Pa. Code § 62.114, we conclude that the record in this proceeding does not support a finding that Direct Energy misled or provided incomplete or inaccurate information to the Complainants. There is nothing in the record that supports a conclusion that Direct Energy violated 52 Pa. Code § 62.114(1) by not providing accurate information about its gas service. As discussed, *supra*, at the time of the Complainants' initial call on July 22, 2022, Direct Energy was not aware of any receipt of a drop transaction with respect to the Complainants' NGS service. Subsequently, Direct Energy informed the Complainants several times that a new enrollment was needed to switch back to Direct Energy.

Finally, with respect to whether Direct Energy properly handled the Complainants' Complaint, as required by 52 Pa. Code § 62.114 (2), we conclude that the

⁶ 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.

Complainants did not meet their burden of proving that Direct Energy did not properly handle the issues raised in the Complaint. To the contrary, we find that Direct Energy's actions demonstrate compliance with the requirements in 52 Pa. Code § 62.114(2). Importantly, as discussed herein in this Opinion and Order, we have not identified any consumer service and protection duties to the Complainants that Direct Energy breached with respect to this matter.

Because we conclude that 66 Pa. C.S. § 1501 does not apply to the services of Direct Energy and that Direct Energy did not breach any consumer service and protection duties to the Complainants in accordance with 66 Pa. C.S. § 2208(e) in this matter, we find that the assessment of a civil penalty is not justified in this case and shall be reversed. Accordingly, we will grant Direct Energy's Exception No. 2 to the extent that the Initial Decision recommended a civil penalty against Direct Energy. 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. However, we would have preferred to see Direct Energy offer the original terms and conditions immediately upon learning of the situation, rather than waiting several months later to do so. 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.

Based on the previous analysis herein, we further determine that there is no need to consider Direct Energy's Exception No. 3 regarding the Initial Decision's impact on the contractual relationship between the Complainants and Direct Energy, which we shall deny.

III. Conclusion

For the reasons set forth above, we shall grant, in part, and deny, in part, the Exceptions of Direct Energy, and therefore, modify the ALJ's Initial Decision, consistent with this Opinion and Order; **THEREFORE,**

IT IS ORDERED:

1. That the Exceptions of Direct Energy Services, LLC, filed on September 26, 2023, to the Initial Decision of Administrative Law Judge Arlene Ashton, issued on September 6, 2023, at this docket, are granted, in part, and denied, in part, consistent with this Opinion and Order.

2. That the Initial Decision of Administrative Law Judge Arlene Ashton, issued on September 6, 2023, at this docket, is modified, consistent with this Opinion and Order.

3. That the portion of the Formal Complaint filed by Robert Naborn and Cynthia Pronko on December 22, 2022, against Direct Energy Services, LLC, at Docket No. F-2023-3037611, is dismissed, consistent with this Opinion and Order.

4. That this proceeding shall be marked closed.

BY THE COMMISSION

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

Rosemary Chiavetta
Secretary

(SEAL)

ORDER ADOPTED: February 22, 2024

ORDER ENTERED: March 4, 2024