

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Richard Schappel	:	
	:	
v.	:	C-2024-3047611
	:	
PECO Energy Company	:	

ORDER
DENYING PRELIMINARY OBJECTION OF PECO ENERGY COMPANY

On March 19, 2024, Richard Schappel (Complainant or Mr. Schappel) filed a Formal Complaint (Complaint) with the Pennsylvania Public Utility Commission (Commission) against PECO Energy Company (PECO or Respondent). In the Complaint, the Complainant disputed his Fixed Distribution Service Charge (Customer Charge) and the Distribution System Improvement Charges (DSIC). The Complainant requests that the charges be eliminated.

On April 5, 2024, PECO filed an Answer with New Matter (Answer) along with a Notice to Plead. In its Answer, PECO admitted in part and denied in part various material allegations of the Complaint. In its New Matter, PECO averred that its Customer Charge and DSIC are defined in its Commission approved Electric Service Tariff. PECO requested that the Complaint be dismissed.

The Complainant's Answer to PECO's New Matter was due no later than April 25, 2024. 52 Pa. Code §5.63(a). The Complainant did not file an Answer to PECO's New Matter.

Also on April 5, 2024, PECO filed a Preliminary Objection to the Complaint, along with a Notice to Plead. In its Preliminary Objection, PECO argues that the Customer Charge and DSIC are part of its Commission approved Electric Services Tariff, and therefore, already determined to be just and reasonable. Thus, the Complaint is legally insufficient as it

fails to set forth a violation of the Public Utility Code, Commission Order or regulation, or PECO's Electric Service Tariff as required by 52 Pa. Code §5.22(a)(4).

The Complainant's Answer to PECO's Preliminary Objection was due no later than April 15, 2024. 52 Pa.Code §§ 5.101(f)(1). The Complainant did not file an Answer to PECO's Preliminary Objection.¹

By Motion Judge Assignment Notice dated May 17, 2024, this matter was assigned to me.

PECO's Preliminary Objection is now ready to be ruled upon. For the reasons discussed below, the Preliminary Objection will be denied, and the case will proceed to a hearing.

DISCUSSION

The Commission's Rules of Administrative Practice and Procedure provide for the filing of Preliminary Objections. 52 Pa. Code § 5.101. The Commission's Rules provide, in relevant part:

§ 5.101. Preliminary objections.

(a) *Grounds.* Preliminary objections are available to parties and may be filed in response to a pleading except motions and prior preliminary objections. Preliminary objections must be accompanied by a notice to plead, must state specifically the legal and factual grounds relied upon and be limited to the following:

(1) Lack of Commission jurisdiction or improper service of the pleading initiating the proceeding.

(2) Failure of a pleading to conform to this chapter or the inclusion of scandalous or impertinent matter.

¹ The Complainant had 10 days to respond. PECO's Notice to Plead incorrectly stated the Complainant had 20 days to respond and cited to a Regulation – 52 Pa. Code § 5.62(c) – that does not exist. Nevertheless, more than 20 days has elapsed and the Complainant has not filed a response.

- (3) Insufficient specificity of a pleading.
- (4) Legal insufficiency of a pleading.
- (5) Lack of capacity to sue, nonjoinder of a necessary party or misjoinder of a cause of action.
- (6) Pendency of a prior proceeding or agreement for alternative dispute resolution.
- (7) Standing of a party to participate in the proceeding.

* * *

52 Pa. Code § 5.101(a).

When deciding preliminary objections, the Commission must accept as true all well pleaded material facts of the nonmoving party, as well as every reasonable inference deducible from those facts. *County of Allegheny v. Commonwealth*, 490 A. 2d 402 (Pa. 1985); *Commonwealth v. Bell Tel. Co. of Pa.*, 551 A.2d 602 (Pa. Cmwlth. 1988). The Commission must view the pleadings in the light most favorable to the nonmoving party and should dismiss a pleading only if it appears that the nonmoving party would not be entitled to relief under any circumstances as a matter of law. *Equitable Small Transportation Intervenors v. Equitable Gas Company*, 1994 Pa. PUC LEXIS 69, Docket No. C-00935435 (July 18, 1994); see also, *Interstate Traveler Services, Inc. v. Pennsylvania Department of Environmental Resources*, 486 Pa. 536, 406 A.2d 1020 (1979). “For purposes of testing the legal sufficiency of the challenged pleading, a [motion to dismiss] ... admits as true all well-pleaded, material, relevant facts, and every inference deducible from those facts.” *Marinoff v. Bell Tel. Co. of Pa.*, 75 Pa. PUC 489, 491 (1991). All of the non-moving party’s averments in the complaint must be viewed as true for purposes of deciding the preliminary objections, and only those facts specifically admitted may be considered against the non-moving party. *Ridge v. State Employees’ Retirement Board*, 690 A.2d 1312 (Pa. Cmwlth. 1997).

In this case, the Complainant has essentially filed a Complaint against PECO’s Electric Service Tariff. Specifically, the Customer Charge and DSIC provisions of the tariff. It

is well established that a Commission-approved tariff is *prima facie* reasonable, has the full force of law, and is binding on the utility and the customer. 66 Pa.C.S. § 316; *Zucker v. Pa. Pub. Util. Comm'n*, 437 A.2d 1067 (Pa. Cmwlth. 1981). However, since the tariff is only *prima facie* reasonable, the Complainant must be given the opportunity to rebut that presumption. It also follows that if the Complainant is able to rebut that presumption, recovery or relief would be possible for the Complainant. That being said, the Complainant should note that a complainant seeking to evade the effect of an existing tariff provision *carries a very heavy burden* of proving that the facts and circumstances leading to the creation of the tariff provision have changed so drastically as to render the application of the tariff provision unreasonable. *Shenano Twp. Bd. of Supervisors v. Pa. Pub. Util. Comm'n*, 686 A.2d 910 (Pa. Cmwlth. 1996)(emphasis added).

Based on the foregoing, I conclude that PECO has failed to show that the Complainant would not be entitled to relief under any circumstance as a matter of law and the Preliminary Objection must be denied.

THEREFORE,

IT IS ORDERED:

1. That the Preliminary Objection of PECO Energy Company in the matter of *Richard Schappel v. PECO Energy Company*, Docket No. C-2024-3047611, is denied.
2. That the scheduling staff of the Office of Administrative Law Judge shall schedule this matter for a hearing and notify the parties in writing.

Date: June 3, 2024

/s/
F. Joseph Brady
Administrative Law Judge

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