

Decision No. R21-0189

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 21F-0053E

JAMES M. LAFERRIERE,

COMPLAINANT,

V.

CITY OF LOVELAND, WATER AND POWER DEPARTMENT,

RESPONDENT.

**RECOMMENDED DECISION OF
ADMINISTRATIVE LAW JUDGE
ROBERT I. GARVEY
GRANTING MOTION TO
DISMISS AND CLOSING PROCEEDING**

Mailed Date: March 29, 2020

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I. STATEMENT**A. Procedural History**

1. On January 22, 2021, Mr. James Laferriere (Complainant) filed a Formal Complaint (Complaint) against the City of Loveland, Water and Power Department (Loveland Power). In his Complaint, Complainant alleges that Loveland Power is not in compliance with § 40-2-124, C.R.S. Complainant included nine exhibits with his Complaint.

2. On January 28, 2021, the Commission entered its Order to Satisfy or Answer and issued an Order Setting Hearing and Notice of Hearing. Loveland Power was served the Orders and Notice (including a copy of the Complaint) and was ordered to satisfy the matters in the Complaint or answer the Complaint in writing within 20 days from service of the Orders and Notice. An evidentiary hearing was set for April 8, 2021.

3. On January 29, 2021, counsel for Loveland Power filed its Entry of Appearance.

4. On February 3, 2021, the Commission referred the matter to an Administrative Law Judge (ALJ).

5. On February 17, 2021, Loveland Power filed its Motion to Dismiss. That motion tolls the time within which Loveland Power must file an answer. If the Motion to Dismiss is denied, Loveland Power has 14 days from the date of the Interim Decision denying the Motion to Dismiss within which to file its answer to the Complaint. Rule 1308(e), 4 *Code of Colorado Regulations* (CCR) 723-1 of the Commission's Rules of Practice and Procedure.

6. On March 1, 2021, Complainant filed his Rebuttal to Loveland Power's Motion to Dismiss.

II. COMPLAINT ALLEGATIONS

7. Complainant states that he is a customer-generator of Loveland Power.

8. Complainant alleges that Loveland Power's billing charges are not correct due to a failure to comply with the State of Colorado's Net Metering Law, § 40-2-124(7), C.R.S.

9. Complainant lists the specific areas where he alleges that Loveland Power is not in compliance:

- Section 40-2-124(7)(b)(I), C.R.S., Monthly excess generation: Loveland Power currently settles monthly excess generation in the month it was billed and does not allow customer-generators to carry forward excess energy to be credited at a ratio of one to one against the customer-generators' energy consumption.
- Section 40-2-124(7)(b)(II), C.R.S., Annual excess generation: Loveland Power does not allow customer-generators to carry forward any excess annual generation.
- Section 40-2-124(7)(b)(III), C.R.S., Nondiscriminatory rates: Loveland Power currently reimburses customer-generators at a lower rate for excess generation than they charge the customer-generator for energy consumption. Loveland Power does not pay their customer-generators for the Renewable Energy Premium they provide. Loveland Power also charges customer-generators a higher monthly base rate than it charges the non-generating Residential Customer Class. Additionally, Loveland Power charges customer-generators based on the rate in the month the electricity is billed and not the rate in the month which the electricity was consumed.

10. Complainant alleges that the failure to comply with applicable state statutes has resulted in Loveland Power overcharging him.

III. MOTION TO DISMISS

11. Loveland Power argues that the Commission should dismiss the Complaint filed by Complainant due to a lack of subject matter jurisdiction and in the alternative, because the Complaint does not comply with the requirements of § 40-6-108(1)(b), C.R.S.

12. Loveland Power cites the Colorado Constitution, case law, and Colorado statutes in support of its arguments.

13. Loveland Power argues that Article XXV of the Colorado Constitution explicitly states that the Commission does not have jurisdiction over municipal utilities. Loveland Power then provides examples of where this prohibition of Commission jurisdiction has been codified in Title 40 of the Colorado Revised Statutes.

14. Loveland Power states that the Commission's jurisdiction over municipal utilities is limited to only those matters identified in Article 3.5 of Title 40: service to customers outside of the municipal boundaries.

15. Finally, Loveland Power supplies case law where Colorado courts have found that the Commission has no jurisdiction in matters concerning municipal utilities.

16. In the alternative, Loveland Power argues that if the Commission has jurisdiction, the Complainant fails to meet the pleading requirements set forth in § 40-6-108(1)(b), C.R.S.

IV. REBUTTAL TO MOTION TO DISMISS

17. The Complainant responds to the Motion to Dismiss by first rejecting the argument that his Complaint falls under § 40-6-108(1)(b), C.R.S. Rather, Complainant argues that his Complaint falls under § 40-6-108(1)(a), C.R.S.

18. Complainant addresses the jurisdictional arguments of Loveland Power by arguing that there are similarly situated customers (*i.e.*, solar self-generators) who reside outside the municipal boundaries of Loveland who are also affected by Loveland Power's non-compliance with § 40-2-124(7), C.R.S.

V. LEGAL STANDARD

19. Subject matter jurisdiction concerns a tribunal's authority to deal with the type of claim at hand. *See Dev. Recovery Co., LLC v. Pub. Serv. Co. of Colorado*, 2017 COA 86, ¶ 27. To determine whether it has subject matter jurisdiction, a tribunal must consider the facts alleged

and the relief requested to determine the substance of the claim and then determine whether it has authority to entertain that class of case. *See City of Boulder v. Pub. Serv. Co. of Colorado*, 2018 CO 59, ¶ 14.

20. The Commission's subject matter jurisdiction may be challenged through a motion to dismiss. *See* 4 CCR 723-1-1308(e) of the Commission's Rules of Practice and Procedure. When considering such a motion, we turn to the Colorado Rules of Civil Procedure (C.R.C.P.) for guidance. *See* 4 CCR 723-1-1001 of the Commission's Rules of Practice and Procedure. C.R.C.P. 12(b)(1) governs motions to dismiss for lack of subject matter jurisdiction.

21. "Subject matter jurisdiction concerns the authority of the [Commission] to decide a particular matter." *In re Marriage of Haddad*, 93 P.3d 617, 619 (Colo. App. 2004). When considering a motion to dismiss based on lack of subject matter jurisdiction, the below principles apply.

22. Once subject matter jurisdiction is raised, the complainant bears the burden of proving the existence of the Commission's jurisdiction to decide the case or claim. *Medina v. Colorado*, 35 P.3d 443, 452 (Colo. 2001); *Pfenninger v. Exempla, Inc.*, 12 P.3d 830, 833 (Colo. App. 2000). A complainant may meet this burden by a *prima facie* showing of threshold jurisdiction. *Pioneer Astro Industries, Inc. v. District Court*, 566 P.2d 1067, 1068 (Colo. 1977).

23. The complaint's "allegations have no presumptive truthfulness[.]" *Medina*, 35 P.3d at 452 (internal quotation marks and citation omitted).

24. If necessary to resolve a motion, the Commission may consider evidence outside the complaint. *Smith v. Town of Snowmass Village*, 919 P.2d 868, 871 (Colo. App. 1996). The Commission may weigh the evidence, whether adduced at a hearing or provided in writing, to

“satisfy itself as to the existence of its power to hear the case.” *Trinity Broadcasting of Denver, Inc. v. City of Westminster*, 848 P.2d 916, 925 (Colo. 1993).

25. Finally, if a complainant fails to establish that the Commission has subject matter jurisdiction, the Commission must dismiss the complaint or claim. *City of Boulder v. Public Service Company of Colorado*, 996 P.2d 198, 203 (Colo. App. 1999); *see also* CRCP 12(h)(3) (“Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court *shall dismiss* the action” (emphasis supplied)).

26. With respect to the Commission’s jurisdiction, the Colorado Constitution, in relevant part, provides:

In addition to the powers now vested in the General Assembly of the State of Colorado, all power to regulate the facilities, service and rates and charges therefor, including facilities and service and rates and charges therefor within home rule cities and home rule towns, of every corporation, individual, or association of individuals, wheresoever situate or operating within the State of Colorado, whether within or without a home rule city or home rule town, as a public utility, as presently or as may hereafter be defined as a public utility by the laws of the State of Colorado, is hereby vested in such agency of the State of Colorado as the General Assembly shall by law designate.

Until such time as the General Assembly may otherwise designate, said authority shall be vested in the Public Utilities Commission of the State of Colorado; provided however, nothing herein shall affect the power of municipalities to exercise reasonable police and licensing powers, nor their power to grant franchises; and provided, further, that nothing herein shall be construed to apply to municipally owned utilities.¹

27. The Colorado State Legislature (Legislature) has defined a “public utility” in § 40-1-103, C.R.S., as follows:

(1)(a)(I)The term "public utility", when used in articles 1 to 7 of this title, includes every common carrier, pipeline corporation, gas corporation, electrical corporation, telephone corporation, water corporation, person, or municipality operating for the purpose of supplying the public for domestic, mechanical, or public uses and every corporation, or person declared by law to be affected with a

¹ Colorado Constitution, Article XXV.

public interest, and each of the preceding is hereby declared to be a public utility and to be subject to the jurisdiction, control, and regulation of the commission and to the provisions of articles 1 to 7 of this title.²

(b) Nothing in articles 1 to 7 of this title shall be construed to apply to:

...

(II) Exemptions provided for in the constitution of the state of Colorado relating to municipal utilities; . . .

28. Section 40-3.5-102, C.R.S., provides:

The power and authority is hereby vested in the governing body of each municipal utility and it is hereby made the duty of each such governing body to adopt all necessary rates, charges, and regulations to govern and regulate all rates, charges, and tariffs of its municipal utility within its authorized electric and natural gas service areas which lie outside the jurisdictional limits of the municipality. No rate, charge, tariff, or voluntary plan approved pursuant to section 40-2-122 shall unjustly discriminate between or among those customers or recipients of any commodity, service, or product of the municipal utility within the authorized service area. **In the event that any rate, charge, tariff, or voluntary plan established within the authorized service area which lies outside the jurisdictional limits of the municipality varies from the rate, charge, tariff, or voluntary plan established for the same class of customers or recipients of any such service within the authorized service area which lies inside the jurisdictional limits of the municipality, such rate, charge, tariff, or voluntary plan shall not become effective until reviewed and approved by the commission.** Such review and approval shall be in accordance with the provisions of article 3 of this title; except that in no event shall the commission modify or establish such rate, charge, or tariff to an amount lower than that established by the municipality, or approve a voluntary plan that differs from the voluntary plan, for the same class of customers or recipients of any utility service within the authorized service area which lies inside the jurisdictional limits of the municipality.³

VI. DISCUSSION

29. The jurisdiction of the Commission over municipal utilities is limited by the Colorado Constitution and numerous state laws.

² § 40-1-103(1)(a)(I), (b)(II), C.R.S.

³ § 40-3.5-102, C.R.S. (emphasis added).

30. Loveland Power provides ample support for the proposition that the Commission's jurisdiction in matters concerning municipal utilities is limited to certain situations involving individuals who receive authorized service while residing outside of the jurisdictional limits of the municipality.

31. Complainant lives within the boundaries of the municipality of Loveland. However, he attaches his argument in support of jurisdiction to the class of municipal utility customers who fall within the Commission's jurisdiction, *i.e.*, customers of Loveland Power living outside the boundaries of the municipality of Loveland.

32. Specifically, Complainant makes the unique argument that the Commission has jurisdiction to decide his Complaint because there are customers of Loveland Power living outside the jurisdictional boundaries of the municipality of Loveland who are also receiving bills incorrectly assessed due to Loveland Power's alleged failure to follow Colorado law. In essence, Complainant argues that he stands in the shoes of those outside the boundaries of the municipality in bringing his Complaint against Loveland Power.

33. The Legislature has limited the jurisdiction of the Commission to cases where customers of the municipal utility who live outside of the boundaries of the municipality are treated in a discriminatory manner from those residing within the municipality.

34. Section 40-3.5-102, C.R.S., expressly states:

In the event that any rate, charge, tariff, or voluntary plan established within the authorized service area which lies outside the jurisdictional limits of the municipality varies from the rate, charge, tariff, or voluntary plan established for the same class of customers or recipients of any such service within the authorized service area which lies inside the jurisdictional limits of the municipality, such rate, charge, tariff, or voluntary plan shall not become effective until reviewed and approved by the commission.

35. The Commission does not have exclusive jurisdiction over those customers residing outside of the municipality's boundaries. Rather, the Commission only has jurisdiction to remedy any discriminatory treatment of customers who live beyond the jurisdictional limits of the municipality and are being treated in a different manner than those living within the municipality.

36. Complainant's argument, put simply, is that those living outside of the municipal boundaries are receiving the same treatment as he is concerning the alleged violation of Colorado's Net Metering law. The situation where those outside of the municipal boundaries are treated the same as those inside the municipal boundaries does not fall within the jurisdiction of the Commission. The Complainant's argument fails for this reason, before even reaching the substance of his argument.⁴

37. The undersigned ALJ need not, and does not, address any other arguments made by either party.

VII. CONCLUSION

38. For the foregoing reasons, the Motion to Dismiss is granted, and the Complaint is dismissed without prejudice due to a lack of jurisdiction.

VIII. ORDER

A. The Commission Orders That:

1. The Motion to Dismiss filed by the City of Loveland, Water and Power Department, on February 17, 2021, is granted.

⁴ The ALJ need not, and does not, address the issue of whether jurisdiction exists because there are unidentified similarly situated litigants over whom the Commission would have jurisdiction.

2. The Formal Complaint filed by Mr. James Laferriere on January 22, 2021, is dismissed.

3. The hearing scheduled for April 8, 2021, is vacated.

4. Proceeding No. 21F-0053E is closed.

5. This Recommended Decision will be effective on the day it becomes the Decision of the Commission, if that is the case, and is entered as of the date above.

6. As provided by § 40-6-109, C.R.S., copies of this Recommended Decision will be served upon the parties, who may file exceptions to it.

a) If no exceptions are filed within 20 days after service or within any extended period of time authorized, or unless the decision is stayed by the Commission upon its own motion, the recommended decision will become the decision of the Commission and subject to the provisions of § 40-6-114, C.R.S.

b) If a party seeks to amend, modify, annul, or reverse basic findings of fact in its exceptions, that party must request and pay for a transcript to be filed, or the parties may stipulate to portions of the transcript according to the procedure stated in § 40-6-113, C.R.S. If no transcript or stipulation is filed, the Commission is bound by the facts set out by the administrative law judge and the parties cannot challenge these facts. This will limit what the Commission can review if exceptions are filed.

7. If exceptions to this Decision are filed, they may not exceed 30 pages in length, unless the Commission finds good cause and permits this limit to be exceeded.

(S E A L)



THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

ROBERT I. GARVEY

Administrative Law Judge

ATTEST: A TRUE COPY

A handwritten signature in cursive script that reads "Doug Dean".

Doug Dean,
Director