- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

In the Matter of the Formal Complaint of Big City Insulation against Questar Gas Company	)	DOCKET NO. 09-057-01
	)	REPORT AND ORDER

ISSUED: April 28, 2009

By The Commission:

This matter is before the Commission on Don Webster and Big City Insulation's (Big City) formal complaint against Questar Gas Company (Questar). On April 27, 2009, Big City filed a Request for Notice to Submit and Request for Oral Argument pursuant to Rule 7(d)-(e) of the Utah Rules of Civil Procedure. The Commission has considered Big City's Request for Oral Argument and denies the Request. For the reasons stated below, the Commission finds the issues raised by Big City's formal complaint have been authoritatively decided, and that oral argument would not materially aid the Commission in reaching a decision.

On January 6, 2009, Don Webster of Big City filed an informal complaint with the Division of Public Utilities (Division). He initially filed his complaint because Questar ended the practice of allowing customers to assign the rebate payments to third parties like Big City, effective January 1, 2009.

Mr. Webster complained that this action would force customers to front insulation costs and then apply for and wait for the rebate. He alleged that this would effectively prevent low income customers, especially the elderly, from being able to insulate their homes. He also complained that he had been waiting for $347,000 in assigned rebates since October 2008 and that Questar had been taking too long to fulfill rebates requests. Questar provided a response to

Mr. Webster's Complaint. It explained why it had ended the option for third-party assignments to contractors and also generally responded to Mr. Webster's complaints about the delays in rebate processing, also specifically addressing rebates specifically assigned to his company. Mr. Webster, however, decided to file a formal complaint on January 20, 2009. His complaint was filed against Questar for allegedly "falsifying records and information to the utility commission" and "taking a prejudicial stand against people on a fixed income"—specifically, "elderly people." *Webster Complaint.*

Mr. Webster also asked for "1.5% interest compounded monthly [for rebates owing] plus $3.00 late fee for each rebate over 8 weeks old." *Webster Complaint.*

The rebates at issue are part of the Demand Side Management (DSM) and market transformation initiative pilot program approved by the Commission in October 2006. A stipulation between Questar, the Division, the Committee of Consumer Services, environmental groups, consumer groups, etc. working through the DSM Advisory Group resulted in the 2006 Order approving the DSM programs. The Commission approved the three year DSM programs and market transformation initiative pilot program in which the Company would design and implement cost-effective programs to encourage residential and commercial customers implement energy-efficient products and measures. The DSM programs and associated tariff, were jointly designed by the Advisory Group. The Commission approved Questar's proposed DSM programs and market transformation initiative tariff in Docket No. 05-057-T01. It is important to note that the weatherization programs are part of a *pilot program* to encourage energy efficiency in the State. The DSM programs offer potential incentives to all of Questar's

residential customers and many commercial customers. *See generally, In the matter of the Approval of the CET Adjustment Option and Accounting Orders,* Docket No. 05-057-T01, January 16, 2007 (January 2007 Order).

As with any pilot program, the programs were implemented with the then-existing market data. As the market transformed, then those programs would also adapt to fit the original intent of the DSM programs and market transformation initiative. The Commission specifically stated, in its January 2007 Order:

> [I]n order to find that the continued operation of the proposed DSM programs is in the public interest, on a going forward basis, the projected benefits need to be substantially realized. In order for the programs to achieve the maximum realized benefit-cost ratios they will need to be monitored *and adjusted over time.*
> *January 2007 Order*, p. 4.

On February 17, 2009, the Division filed its recommendation that the Commission dismiss Mr. Webster's Complaint. It found that Questar had not violated any statutory provision, or rule, or tariff.

On February 19, 2009 Questar filed its Answer to Mr. Webster's formal complaint and also filed its Motion to Dismiss. In its Answer and Motion to Dismiss, Questar raised several points. Questar argued that its tariff did not require rebate processing within any period of time. The rebate merely states a customer should allow six weeks from receipt for processing, but does not serve as a guarantee to deliver a check by a certain date. Also, it contended that the rebate application is not a contract between it and the rebate applicant. Nor does it create a contractual or other obligation between it and the customer or Big City to issues rebates within a certain period of time.

Questar admits that it has taken longer to issues rebates for some applications than the six to eight weeks listed on its application, but that the inordinate increase in applications in a short period of time and the amount of special processing needed for some Big City Insulation applications made the delay reasonable. Questar provided some statistics regarding the increase of rebate applications. In January 2008, there were 1228 applications received. In December 2008, it jumped to 4619. The amount increased even more in January 2009, to 6340. Questar also noted that rebate processing for work done by Big City increased markedly. Questar processed only 82 applications for rebates for Big City from October 24, 2008 to November 30, 2008. However, that number almost tripled in December 2008, when it processed 300 applications for Big City work. Additionally, Questar noted that many applications for Big City work were incomplete or inaccurate and required special processing. Therefore, the increase in rebate applications generally, and specifically for Big City work, and other special processing caused its rebate processing to slow.

Questar also responded that its rebate incentives are open to all residential customers receiving natural gas service. All are eligible for the rebates on the same terms and conditions, regardless of income. Questar denied that its actions specifically harmed "elderly people."

Questar also stated that the discontinuation of the third-party assignment option in its rebate application did not violate its tariff. Big City, like other contractors, used this third party assignment option as a marketing tool to reduce or eliminate any up-front costs of insulation to the customer. Questar, however, states that it never suggested, endorsed, or

intended such a consequence as it developed the rebate program. The original intent in implementing the third-party assignment option was to allow rebates in circumstances where accounts were held by a tenant, but improvements were made by their landlord. But the change in the market demand and circumstances in the insulation industry moved Questar to eliminate that option. It argues that the action does not violate its tariff.

Big City, through its attorneys, Russell Gallian and Jason Dixon of Gallian, Wilcox, Welker, Olson & Beckstrom, L.C. filed its opposing Response to the Motion to Dismiss It makes four contentions for denial of the Motion. Big City first contends the rebate application is a written memorandum of the contract between customer and Questar. It points to Questar's tariff to show that a customer must submit a completed application form to qualify for the rebate. Big City contends that this is an offer on Questar's part. Once the customer "performs" by having eligible weatherization work done, the customer "accepts" the offer and a contract is formed. Big City argues that "the Rebate Application constitutes a written contract between Questar and the customer. . . . When properly filled out by the customer and accepted by Questar, the rebate Application serves as a written memorandum of the agreement between Questar and the customer." *Big City Response*, p.3. Questar, big city contends, must abide by the terms of the contract.

Secondly, Big City contends that Questar is contractually obligated to process rebates in six weeks or breach the "contract" and thereby the tariff. Big City states that the application plainly and repeatedly states that the customer should "allow 6 weeks from receipt of complete application and documents to receive your rebate check." *Big City Response*, p.4. Big

City argues this language clearly and unambiguously confirms that customers can expect their rebate checks within six weeks. This imposes a duty on Questar to provide the rebates within six weeks. Big City argues that, given the explicit language providing for a six week turn-around on rebates, the Commission is precluded from considering Questar's argument as to reasonableness of the delay under the circumstances. Big City states the plain language of the rebate application created a duty that Questar violated.

Big City next claims that it acquired the contractual rights of Questar Customers by assignment. It claims it did this by performing the weatherization for those customers and temporarily carrying the costs of performing services in exchange for the customer's assignment of the rebate check. When customers had their qualifying weatherization work done, and assigned the rebate check to Big City, they also assigned to Big City their right to receive the rebate checks within six weeks.

Finally, Big City claims that Questar's prohibition on assignment of rebate checks has discriminatory impact on lower income customers generally, and elderly people specifically. Because customers must now pay contractors up-front for insulation installation, and then wait six to nine weeks for the rebate, those that do not have enough money to pay the contractor or who cannot carry costs, are excluded from participating in the program. The only customers who can participate are those that can pay for the service up-front and wait the six to nine weeks for the rebate. Big City argues that such an action will mean lower-income customers will "continue to be denied the energy savings benefits the DSM program was meant to provide.

Such discriminatory action by Questar thwarts the energy conservation goals of the weatherization program and the Tariff." *Big City Response*, p.7.

ANALYSIS

The Commission has "power and jurisdiction to supervise and regulate every public utility in this state, and to supervise all of the business of every such public utility in this state, and to do all things . . . which are necessary or convenient in the exercise of such power and jurisdiction . . . ." *Utah Code Ann.* § 54-4-1. In carrying out this power, the Commission has jurisdiction to interpret operative provisions of the statutes it is empowered to administer. *See Dept. Admin. Svcs. v. Public Service Commission*, 658 P.2d 601, 610 (Utah 1983). As part of this power, it also approves actions by public utilities, like Questar to implement programs like the DSM program and market transformation initiative, tariffs, etc., including the weatherization rebates at issue here. *See Utah Admin. Code R746-404-1, -2 and R746-405-2E.*

At the outset, even assuming, *arguendo*, Big City's allegations as true and legal arguments as correct, its complaint must be dismissed given the type of relief it seeks, i.e."1.5% interest compounded monthly [for rebates owing] plus $3.00 late fee for each rebate over 8 weeks old." Though determinations of violations of a tariff are within the Commission's jurisdiction, and thought it may award limited types of relief to those served by public utilities, the types of relief and damages sought by Big City for supposed contractual or tortious liability is not within the Commission's jurisdiction. *See Utah Code Ann. 54-7-20; Atkin Wright & Miles v. Mountain States Tel. & Tel. Co.*, 709 P.2d 330, 334 (Utah 1985) (holding that actions

involving tortious or contractual liability are subject to the jurisdiction of the court). The Commission cannot grant the relief requested.

However, even assuming the Commission was able to grant Big City's pleaded relief, such relief is improper. Big City provides no authority—besides its own belief, for its proposition that "the Rebate Application constitutes a written contract between Questar and the customer. . . . [w]hen properly filled out by the customer and accepted by Questar . . . ." Neither does it provide any authority for the proposition that the rebate application becomes "part of the Tariff by reference." It points to no statement in the tariff that sets timelines for issuing rebates. It cites no Commission Rules, nor any applicable statutes, much less any case law, which support these contentions. Nothing in the Commission's January 2007 Order provides for any set times for rebate issuance. The rebate application may be considered part of the larger DSM program and market transformation initiative approved by the Commission in the docket. However, this does not make it part of the tariff.

Statements on the rebate application cannot override the intent of the DSM programs and market transformation initiative. "Unlike traditional court proceedings, hearings before the Commission are not designed to consider only the interests of the litigating parties. The Commission must consider the interests of the utility's customers and the interests of the public." *Bradshaw v. Wilkinson Water Co.,* 2004 UT 38, ¶ 36. The rebate program was only one component of the measures approved by the Commission to encourage energy efficiency among the public. As with any pilot program, they are subject to amendment or even termination under order of the Commission. In fact, the Commission specifically expected that "to find that the

continued operation of the proposed DSM programs is in the public interest" "they will need to be monitored *and adjusted over time.*" The market, at least in some significant part, was transformed as evidenced by the unexpected increase in rebate applications and in contractors moving towards insulation installation. The Commission must allow for some adjustments, including allowances for more time for rebate processing, not only generally, but specifically as to Big City customer applications, to allow for these market changes as contemplated by its January 2007 Order. To hold that the rebate timeline is a bright-line deadline by which Questar must provide rebates would not serve the public interest. As Questar stated, it would be unreasonable to make such a finding: "Under such a rule there would be no allowance for the customer sending the application to the wrong address, incorrect or incomplete applications requiring additional processing, human error in transcribing the name or address for the rebate check, or accidental mis-delivery or loss by the Postal Service. It is unreasonable [to require] a hard-and-fast six week deadline . . . given all the externalities that impact processing." *Questar Reply*, p.3. At worst, a public utility, when faced with the possibility of violating a tariff for failure to meet the deadline, would have the incentive to find any reason—even minor technicalities, to disallow the rebate instead of permitting for special processing, as currently happens, to ensure rebates are issued.

Questar's delays in the rebate processing are reasonable. The inordinate increase in applications in a short period of time, not only from the public in general, but also from Big City customers, and the amount of special processing needed for some incomplete applications—including those for Big City work, made the delay reasonable. The statistics for

rebate applications show the applications almost doubling each month during the end of the 2008 year and in the beginning of 2009. It would not be in the public's best interest to find that the deadline in the rebate application is a set deadline which must be met, regardless of the realities of the pilot program, considerations of public interest, or of the Commission's January 2007 Order. Therefore, the Commission finds that Questar did not violate the terms of the tariff governing the rebate applications.

Having found that the rebate application is not a contract, it declines to address Big City's contention that it acquired the customer's contractual rights by assignment.

The Commission also finds that Big City's contention that Questar's prohibition on assignment of rebate checks has discriminatory impact on lower income customers generally, and elderly people specifically, is without merit. Again, besides mere conclusory allegations, Big City provides no evidence that the change discriminates against low income customers or the elderly. In fact, nothing in the tariff or the rebate application prevents Big City from fronting the costs for any low income customers that qualify, and then having the customer simply endorse their rebate check to Big City. Nothing in the tariff or the rebate application prevents Big City from entering into a financing agreement with any qualifying customer as well. In fact, the same tariff governing the rebate applications counters Big City's argument that Questar is using this program to withhold the benefits to low income people or the elderly. The tariff requires Questar to "contribute at least $250,000 annually to the Low-Income Weatherization Assistance Program. *See Tariff, § 2.19." Questar Reply*, p.5. That program is a federal program administered by the State to help "eligible households to make energy-efficiency improvements

to [their] homes," including insulation. *See id.* The change does not even thwart the energy conservation goals of the program. In fact, rebate applications have continued to increase after the change. Thus the Commission finds there is no basis to the contention that there is discrimination specifically directed to the low income or elderly caused by the change, or that the change undermines the goals of the program.

Regardless, however, Big City does not explain how the discrimination—even if it exists, violates any tariff, Commission rule, or statutory provision.

> Utah law prohibits public utilities from engaging in disparate treatment of *similarly situated customers*, Utah Code Ann. § 54-3-8 (2003) and requires that a utility's charges be 'just and reasonable,' *id.* § 54-3-1. Utah law recognizes, however, that not all customers are similarly situated. 'The scope [of the] definition of "just and reasonable" may include, but shall not be limited to, the cost of providing service to each category of customer, economic impact of charges on each category of customer, and on the well-being of the state of Utah . . . .' *Bradshaw v Wilkinson Water Co.*, 2004 UT 38, ¶ 14.

Therefore, *even assuming, arguendo*, that the change does discriminate against low income elderly, it only treats them the same as all other low-income customers, and only for reasons found permissible in *Bradshaw*. This is not a violation of the tariff or Utah law.

Finally, the Commission agrees that Big City lacks standing to assert a claim on behalf of low income customers for the change in the assignment provision. Big City fails to show the existence of a real and palpable injury to low income customers, or that its requested relief is likely to benefit anyone other than itself. Big City also fails to show how it is "an appropriate [party] to a full and fair litigation of the dispute in question." *Sierra Club v. Utah Air Quality Baord*, 2006 UT 74, ¶ 36. Therefore, for this reason, additionally, its complaint must be dismissed.

ORDER

For the foregoing reasons, and based on the findings above, the Commission orders as follows:

1. Big City's complaint is dismissed;

2. Pursuant to Utah Code § 63G-4-301 and 54-7-15, an aggrieved party may request agency review or rehearing of this Order by filing a written request for review or rehearing with the Commission within 30 days after the issuance of the Order. Responses to a request for agency review or rehearing must be filed within 15 days of the filing of the request for review or rehearing. If the Commission does not grant a request for review or rehearing within 20 days after the filing of a request for review or rehearing, it is deemed denied. Judicial review of the Commission's final agency action may be obtained by filing a petition for review with the Utah Supreme Court within 30 days after final agency action. Any petition for review must comply with the requirements of Utah Code §§ 63G-4-401, 63G-4-403, and the Utah Rules of Appellate Procedure.

DATED at Salt Lake City, Utah, this 28th day of April, 2009.

/s/ Ruben H. Arredondo
Administrative Law Judge

Approved and confirmed this 28th day of April, 2009, as the Report and Order of the Public Service Commission of Utah.

/s/ Ted Boyer, Chairman

/s/ Ric Campbell, Commissioner

/s/ Ron Allen, Commissioner

Attest:

/s/ Julie Orchard
Commission Secretary
G#61536