

- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

In the Matter of the Formal Complaint of)
McCleary Associates, LLC against Questar) DOCKET NO. 12-057-06
Gas Company)
ORDER OF DISMISSAL

ISSUED: August 30, 2012

SYNOPSIS

The Commission enters this Order granting Questar's motion to dismiss.

By The Commission:

ORDER OF DISMISSAL

I. INTRODUCTION

On April 18, 2012, McCleary Associates LLC ("McCleary") filed a formal complaint against Questar Gas Company ("Questar"), claiming overbilling between its December 2011 and January 2012 billing cycles due to an alleged meter malfunction. See Formal Complaint, filed April 18, 2012. Questar responded and moved to dismiss the complaint for failure to state a claim upon which relief may be granted. See Questar's Answer and Motion to Dismiss, filed May 18, 2012. Questar argues dismissal should be granted because the meter test showed no problems and the usage contested is consistent with prior consumption. See id. at 6-7.

II. ISSUE AND STANDARD OF REVIEW

Rule 12(b)(6) of the Utah Rules of Civil Procedure, which is incorporated by reference by Utah Admin. Code R746-100-1(C), permits a party to file a motion to dismiss for

“failure to state a claim upon which relief can be granted.” Utah R. Civ. P. 12(b)(6). In ruling on a motion to dismiss for failure to state a claim, the Commission construes the complaint in the light most favorable to the complainant and indulges all reasonable inferences in its favor. Cf. Mounteer v. Utah Power & Light Co., 823 P.2d 1055, 1058 (Utah 1991).

III. BACKGROUND

1. Kraig McCleary (“Mr. McCleary”) and his father, Ken McCleary, are shareholders in McCleary. See Transcript of Hearing at 4, lines 13-17.

2. McCleary owns an office complex in Salt Lake City and leases space therein to commercial tenants. See id. at 4, lines 18-20. The office complex consists of 20 units, approximating 20,000 total square feet. See id. at 16, line 2. The tenant base consists of mixed commercial, including health care professionals (dental and chiropractic), an insurance agency, and hair care (treatments, replacements, and wigs). See id. at 17, lines 9-12.

3. All tenants consume natural gas. See Transcript of Hearing at 17, lines 19-21. One gas meter serves the entire complex. See id. at 16, line 4. During the winter months, tenants use natural gas for heating only. See id. 18, line 21. Mr. McCleary controls the thermostats, see id. at 18-19, lines 25, 1-2, but the managers on each floor know how to override the system. See id. at 19, lines 20-23. Mr. McCleary testified that employees of one tenant frequently complain during the winter months that it is too hot (rather than too cold). See id. at 22, lines 8-17.

4. Mr. McCleary testified that he believed something was “out of whack” with the meter reading and billing that he received from Questar beginning with the October 2011 billing

cycle, see Transcript of Hearing at 7, line 13; see also id. at 8, line 13, because the bill was much higher than it had been in the past two years, see id. at 8, lines 14-15, so, he called Questar and asked for the meter to be checked. See id. at 8, lines 16-19. Mr. McCleary testified that he could not be certain whether anyone made an adjustment to the thermostat during the contested timeframe; however, he has had issues in the past where tenants have changed the settings, but that has been in the summertime and not in the wintertime. See id. at 24, lines 9-20.

5. On or about December 8, 2011, Mr. McCleary called Questar concerning the gas bill. See Formal Complaint, filed April 18, 2013.

6. On or about December 13, 2011, Questar sent a technician to check the meter, and the technician found the meter was working properly. See id. See also Questar's Answer and Motion to Dismiss at 3, ¶ 7. The technician conducted an automated meter reading ("AMR") and compared that value with a visual read of the meter and found that the values matched. See Questar's Answer and Motion to Dismiss at 3, ¶ 7. Additionally, the technician confirmed the accuracy of the meter reading used to calculate the McCleary bill by comparing the visual and AMR readings (of 44683) on December 13, 2011 with the previous AMR reading (of 44145) on December 2, 2011. See id. at 3, ¶ 8.¹

7. On or about December 16, 2011, Questar sent McCleary a letter confirming that everything was "ok" with the meter. See Formal Complaint at 1, ¶ 3. See also Questar's Answer and Motion to Dismiss at 3, ¶ 9.

¹ According to Questar, "[i]f the visual meter read is greater than the AMR read previously taken, the AMR read is confirmed as accurate with the difference between the two reads indicating the amount of gas consumed since the previous read was taken." Questar's Answer and Motion to Dismiss at 3, ¶ 8.

8. Thereafter, Mr. McCleary continued to contact representatives at Questar and “[a]ll agreed that the [current] reading was way out of line with past years[’] gas usage, but they . . . could do nothing about it.” Formal Complaint at 1, ¶ 3.

9. On or about December 22, 2011, Mr. McCleary contacted Questar and requested the meter be rechecked. See id. See also Questar’s Answer and Motion to Dismiss at 3, ¶ 10.

10. On or about January 4, 2012, Questar sent a second technician to check the meter. See Formal Complaint at 1, ¶ 3; see also Questar’s Answer and Motion to Dismiss at 3, ¶ 11. The technician visually inspected the meter, see Transcript of Hearing at 5, line 25; 6, line 1, and while there he thought he heard a furnace turn on at the property but since no gas was registering on the meter, he entered an order to replace the transponder. See Questar’s Answer and Motion to Dismiss at 4, ¶ 11.

11. On or about January 23, 2012, Questar sent a third technician to the property to replace the transponder. See Questar’s Answer and Motion to Dismiss at 4, ¶ 12. While the third technician was there, he noted a crack on the meter index, which was not significant enough to affect the meter’s operation. See Questar’s Answer and Motion to Dismiss at 4, ¶ 12. However, due to changes in inventory caused by retiring the type 225 meters installed at the property, and because the technician did not have a replacement on hand, the technician replaced the older, retired 225 meter with a new AC630 meter and transponder, which was usual company practice when problems with 225 meters were reported. See id. Before removing the 225 meter, the technician read the meter’s index, which showed a value of 45743. See id. The new AC630 meter and transponder were set at zero, per Questar protocol. See id.

12. Questar subsequently tested the removed 225 meter in its test facility and found that it was operating at two-tenths of a percent (+0.2%) fast, but still within the three percent (3%) range allowed by the Commission under R746-320-3 of the Utah Admin. Code. See Questar's Answer and Motion to Dismiss at 4, ¶¶ 13-14.

13. Before the new AC630 meter was installed, usage normalized. See Transcript of Hearing at 121, lines 1-17. In addition, McCleary had consumed a similar amount of gas in the past. See id. at 122, lines 14-21.

14. On April 18, 2012, McCleary filed a formal complaint against Questar, alleging that the old 225 meter was malfunctioning and therefore its December 2011 and January 2012 bills should be adjusted based on the last two years' usage. See Formal Complaint at 1, ¶ 4.

15. On April 27, 2012, the Division of Public Utilities filed a memo recommending the Commission hold a hearing to evaluate the testimony of both parties in this docket. See Division Memo, filed April 27, 2012.

16. On May 18, 2012, Questar filed an answer and motion to dismiss the McCleary complaint. See Questar's Answer and Motion to Dismiss. Questar argues no billing adjustment is necessary and, thus, dismissal of the McCleary complaint is appropriate because: (1) high usage has occurred many times before (although longer ago than two years before the period in question); (2) both the recent *high usage* and the *normalization thereof* occurred *before* the installation of the new meter; and (3) the old meter tested within the range of acceptability under Commission rules. See id. at 4-5, ¶¶ 13-16; see also id. at 6.

17. On May 22, 2012, the Commission issued a notice of filing of answer and motion to dismiss which stated: “On May 18, 2012, Questar Gas Company filed its Answer and Motion to Dismiss (“Questar’s filing) in this docket. In accordance with Rule R746-100-4 of the Utah Administrative Code, [McCleary] has until 5:00 p.m. MST, Monday, June 4, 2012, to file a response to Questar’s filing.” Notice of Filing of Answer and Motion to Dismiss, issued May 22, 2012.

18. On May 30, 2012, McCleary filed a letter opposing the dismissal of its complaint. See Letter from Kraig McCleary, to Commission (May 29, 2012).

19. On June 4, 2012, McCleary filed a response to Questar’s motion. See Motion to Continue with Co[m]plaint, filed June 4, 2012. McCleary requested a hearing based on the allegations that the meter was malfunctioning because the dial was not working properly (thus resulting in an incorrect gas bill) and because the last two years (e.g., 2010 and 2009) are a fairer comparison based on weather and gas consumed. See id. at 3.

20. On July 10, 2012, the Commission held a duly noticed hearing in this docket. See Notice of Hearing, issued May 3, 2012. Mr. McCleary appeared *pro se*, along with his father, Ken McCleary, on behalf of McCleary. Arminda Jurgenson (“Ms. Jurgenson”) appeared on behalf of Questar. See Transcript of Hearing.

21. At the hearing, Mr. McCleary argued that an adjustment was appropriate because the dial on the 225 meter was allegedly not working properly.

22. Questar's witness, Alan Blain ("Mr. Blain"), who has worked for 21 years in Questar's metering and regulation department, countered McCleary's contention about the meter dial in the following exchanges:

Q [Ms. Jurgenson]: From your experience if any of these dials were malfunctioning would this cause a meter to register high usage?

A [Mr. Blain]: Absolutely not. ...[T]hey would under-register. One hundred percent of the time.

...

Q [Mr. McCleary]: If the test dial does not turn when natural gas is flowing the result is the transponder will not send a signal.

A [Mr. Blain]: If the test dial does not turn when natural gas is flowing the result is the transponder would not send a signal. I would say that would be a correct statement, and you would be getting free gas.

Transcript of Hearing at 75, lines 3-10; 90, lines 20-24.

23. Questar also presented evidence that the meter removed from the McCleary property was tested and worked properly. See id. at 82. See also Questar Exhibit No. 4.

24. Questar's testimony regarding the working order of the meter and the test results were uncontroverted.

IV. ANALYSIS

Based on the evidence presented, no basis exists to grant McCleary the relief requested. The uncontroverted evidence supports that the meter removed from the McCleary property was working properly and well within the three percent (3%) range of acceptability required by R746-320-3 of the Utah Admin. Code.

ORDER

For the foregoing reasons, Questar's motion is granted and this matter is dismissed.

DATED at Salt Lake City, Utah this 30th day of August, 2012.

/s/ Melanie A. Reif
Administrative Law Judge

Approved and confirmed this 30th day of August, 2012, as the Order of Dismissal of the Public Service Commission of Utah.

/s/ Ted Boyer, Chairman

/s/ Ric Campbell, Commissioner

/s/ Ron Allen, Commissioner

Attest:

/s/ Gary L. Widerburg
Commission Secretary
D#233335

Notice of Opportunity for Agency Review or Rehearing

Pursuant to Utah Code Ann. §§ 63G-4-301 and 54-7-15, a party may seek agency review or rehearing of this order by filing a 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 fails to 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 Ann. §§ 63G-4-401, 63G-4-403, and the Utah Rules of Appellate Procedure.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 30th day of August, 2012, a true and correct copy of the foregoing was served upon the following as indicated below:

By U.S. Mail:

Mr. Kraig McCleary
McCleary Associates, LLC
6364 S. Highland Drive, #9
Salt Lake City, UT 84121

By Electronic Mail:

Jennifer Nelson Clark (jennifer.clark@questar.com)
Arminda I. Jurgenson (arminda.jurgenson@questar.com)
Questar Gas Company

By Hand-Delivery:

Division of Public Utilities
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Office of Consumer Services
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Administrative Assistant