

**IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN**

THOMAS KLOTZBACH,	)	
Individually and on behalf of others	)	
Similarly situated,	)	
Plaintiff,	)	CASE NO. ST-13-CV-445
vs.	)	
	)	ACTION FOR DAMAGES
VIRGIN ISLANDS WATER AND	)	
POWER AUTHORITY	)	
Defendant.	)	
_____	)	

MEMORANDUM OPINION

THIS MATTER comes before the Court on a Motion to Dismiss Based on Lack of Subject Matter Jurisdiction, filed by Defendant Virgin Islands Water and Power Authority, pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure.¹ For the reasons set forth herein, the Motion will be denied.

I. Introduction

Defendant Virgin Islands Water and Power Authority ("WAPA") is a public utility that serves customers in the U.S. Virgin Islands. Thomas Klotzbach ("Klotzbach") is a customer of WAPA who resides on the island of St. Thomas. This litigation concerns alleged violations of the Net Energy Metering Act ("NEMA"). 12 V.I.C. § 1141 (2009). One of the purposes of NEMA is to "encourage private investment in renewable and alternative energy resources." *Id.* at § 1142. NEMA

¹ Defendant's Motion was filed on October 15, 2013. Plaintiff filed an Opposition on November 21, 2013, and Defendant filed a Reply on December 10, 2013. Defendant also filed its Answer and Affirmative Defenses on October 15, 2013.

requires the utility provider, here Defendant WAPA, to offer net metering systems which can measure energy used by the customer as well as energy that is generated by the customer's renewable generator and put back into the grid. *Id.* at § 1144.²

Sometime before June 2012, Klotzbach installed solar panels atop his home. He then requested that WAPA supply a net metering system. Klotzbach was given an application for net metering and charged Thirty Dollar (\$30.00) as an application fee. Klotzbach alleges he installed a knife-switch device at his own expense, which WAPA required of him as a condition of net metering service. Sometime in or around September 2012, WAPA installed a net metering device to measure the energy usage and generation at Klotzbach's home. Klotzbach alleges that, after the net metering device was installed, his WAPA bills became significantly higher than they had been before he installed solar panels. Klotzbach alleges that this increase occurred because "the meter was including as consumed electricity all electricity flowing through the meter, in both directions, regardless of whether the electricity was supplied by WAPA or produced by [Klotzbach]'s solar panels." Pl.'s Compl. ¶ 26. Klotzbach argues that in reality, much of the energy that the meter identified as WAPA-supplied energy, was generated by Klotzbach's rooftop solar array. Further, Klotzbach claims that as a result of this inaccurate metering, WAPA overcharged him. In January 2013, WAPA installed a new net metering device at Klotzbach's

² When the amount of energy a customer-generator feeds into the system during a billing period exceeds the amount of energy that his system uses in that period, the utility provides a credit to the customer's account. 12 V.I.C. § 1146(b)(3).

home, which Klotzbach alleges is properly performing net metering functions. Pl.'s Compl. ¶ 29.

II. Procedural History

Klotzbach filed a Complaint against WAPA alleging that WAPA violated the Net Energy Metering Act. The Complaint alleges: (1) Consumer Fraud; (2) Unfair Trade Practices; (3) Breach of Contract; (4) Unjust Enrichment; (5) Common Law Fraud; (6) Breach of Duty of Good Faith and Fair Dealing; (7) Negligence, and (8) Class Action. The Complaint asks the court for: (1) Permanent Injunction; and (2) Declaratory Judgment, and 3) Damages.

WAPA moves to dismiss Klotzbach's Complaint based on lack of subject-matter jurisdiction. WAPA argues that the Virgin Islands Public Services Commission ("PSC") is the proper forum for Klotzbach's Complaint. WAPA also filed its Answer and Affirmative Defenses simultaneously with its Motion To Dismiss. WAPA claims that the Court cannot exercise subject-matter jurisdiction with respect to Klotzbach's complaint because the PSC exercises exclusive jurisdiction over customer complaints regarding WAPA's services. Furthermore, WAPA argues that Klotzbach failed to exhaust his administrative remedies at the PSC.

In his response to WAPA's Motion to Dismiss, Klotzbach argues that the PSC lacks jurisdiction over claims arising under the NEMA and that this Court may exercise original jurisdiction over his claims. Alternatively, Klotzbach argues that he

exhausted all available administrative remedies before the PSC and this Court may properly exercise jurisdiction over his Complaint.

III. Subject Matter Jurisdiction

If the Court lacks subject-matter jurisdiction, the case must be dismissed. Fed. R. Civ. P. 12(h)(3); *See* Super. Ct. R. 7 (“The practice and procedure in the Superior Court shall be governed by the Rules of the Superior Court and, to the extent not inconsistent therewith...the Federal Rules of Civil Procedure...”). “Subject matter jurisdiction defines the court's authority to hear a given type of case....” *Carlsbad Tech., Inc. v. HIF Bio, Inc.*, 556 U.S. 635, 639 (2009) (*citing United States v. Morton*, 467 U.S. 822, 828 (1984)). The Plaintiff carries the burden of establishing subject-matter jurisdiction. *Chavayez v. Buhler*, Civ. No. 2007–060 (V.I. June 25, 2009). “A plaintiff may be prejudiced if what is, in essence, a Rule 12(b)(6) challenge to the complaint is treated as a challenge under Rule 12(b)(1). When subject matter jurisdiction is challenged under Rule 12(b)(1), the plaintiff must bear the burden of persuasion.” *Kehr Packages v. Fidelcor, Inc.*, 926 F.2d 1406, 1409 (3d Cir. Pa. 1991). If a defendant attacks subject matter jurisdiction after answering the complaint, as WAPA did, a court will consider it a “factual attack” and may weigh the evidence allegedly giving rise to its jurisdiction. *Carpet Group Intern. v. Oriental Rug Importers Ass'n, Inc.*, 227 F.3d 62, 69 (3d Cir. 2000).

A. PSC Jurisdiction to Hear WAPA Customer Complaints

“The doctrine of primary jurisdiction, like the rule requiring exhaustion of administrative remedies, is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties.” *V.I. Conservation Soc’y v. Golden Resorts, LLLP*, 55 V.I. 613, 620 (V.I. 2011). “‘Exhaustion’ applies where a claim is cognizable in the first instance by an administrative agency alone; judicial interference is withheld until the administrative process has run its course.” *Id.* at 620 (citing *United States v. Western Pacific R. Co.*, 352 U.S. 59, 63-64 (1956)). On the other hand, primary jurisdiction “applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body.” *Id.*

The PSC’s jurisdiction over WAPA has recently changed. In 2012, the Virgin Islands Supreme Court held that the PSC lacked jurisdiction to resolve a billing dispute between WAPA and one of its customers. *V.I. Pub. Servs. Comm’n v. V.I. Water & Power Auth.*, 56 V.I. 508, 514 (V.I. 2012). In reaching its decision, the V.I. Supreme Court held that the PSC lacked jurisdiction over WAPA with regard to anything other than setting rates. *Id.* The Court held that the PSC could only exercise jurisdiction beyond rate setting if the legislature passed legislation specifically granting the PSC jurisdiction over WAPA. *Id.* at 514. Thereafter, in 2012, the legislature passed Act

7394, which amended 30 V.I.C. § 20(a), adding the words, “including the Virgin Islands Water and Power Authority.” 2012 V.I. Sess. Laws 7394 (Act No. 7394). V.I.C. § 20(a) (2013). Section 20(a) now reads:

Upon its own initiative or upon reasonable complaint made against any public utility including the Virgin Islands Water and Power Authority that any of the rates, tolls, charges, or schedules, or services, or time and conditions of payment, or any joint rate or rates, schedules, or services, are in any respect unreasonable or unjustly discriminatory, or any service in connection therewith, is in any respect unreasonable, insufficient, or unjustly discriminatory, or that any service is inadequate or cannot be obtained, or any billing for service inaccurate or erroneous the Commission may, in its discretion, proceed, with or without notice, to make such investigation as it may deem necessary or convenient.

30 V.I.C. § 20(a). Nothing in the text of Section 20 appears to vest the PSC with exclusive jurisdiction over customer complaints. On the other hand, it would appear that the legislature clearly provided an avenue for the PSC to resolve billing and service disputes between WAPA and its customers. *See V.I. Conservation Soc’y*, 55 V.I. at 620 (denying the Superior Court’s use of the primary jurisdiction doctrine because no administrative agency had statutory authority to review the plaintiff’s claim).

B. Analysis

While Klotzbach’s claim is cognizable in the Superior Court based on the Court’s general jurisdiction, the history surrounding Section 20, outlined above, suggests that the Legislature intended to place customer complaints over WAPA’s billing and services within the purview of the PSC. *See id.* at 620.

Furthermore, the Legislature clearly endowed the PSC with the ability to perform adjudicatory functions. The PSC has the “right to inspect the books, accounts, papers, records, and memoranda of any public utility, and to examine, under oath, any officer, agent, or employee of such public utility in relation to its business.” 30 V.I.C. § 16. The PSC may use a subpoena or order to require a public utility to produce any books, accounts, papers, or records and compel attendance and testimony by any witnesses deemed necessary to its examination. 30 V.I.C. § 17(a) & (b).

Issues relating to the billing and service disputes between WAPA and its customers are within the competence of the PSC. *See V.I. Conservation Soc'y*, 55 V.I. at 620. The Court believes that complaints of this nature should properly go before the PSC based on the legislative jurisdictional grant in Section 20.

Klotzbach argues that the PSC may not exercise jurisdiction over his equitable and common law claims as well as his statutory claims under the consumer protection laws.³ The Court agrees and finds no basis to dismiss Plaintiff's equitable, common law, and statutory claims.

It is clear that while the legislature intended for the PSC to field WAPA customer complaints regarding billing services, the legislature was silent with regard

³ In its Motion to Dismiss, WAPA argues “Even in the event that [the consumer protection laws] could be found to apply to the Authority, Plaintiff cannot overcome the statutory administrative jurisdiction granted to the PSC regarding all claims asserted by Plaintiff including those made pursuant to the 1973 CPL.” However, the Court finds no provision within Virgin Islands law that ascribes jurisdictional authority to the PSC over statutory consumer protection laws.

to abrogation of common law and equitable remedies. *See Cascen v. People of the Virgin Islands*, 60 V.I. 392, 405, (V.I. 2014) (“abrogation only occurs when the legislative intent to do so is plainly manifested”); *see also Haynes v. Ottley*, 61 V.I. 547, 566-567 (V.I. 2014) (“[i]t is presumed that when the legislature enacts a new law, that law is intended to operate in harmony with existing statutes and common law.”). Thus, common law claims, equitable claims, and other statutory rights may accrue under the same factual circumstances giving rise to a complaint which falls within the scope of the PSC’s Section 20 jurisdiction. But, if the Court allowed a complainant to pursue both avenues simultaneously, the result would squander judicial and administrative resources and create the potential for conflicting results. Furthermore, the parties have not notified the Court of any complaint which Klotzbach currently has before the PSC.⁴ Based upon the foregoing, the Court will exercise jurisdiction over Klotzbach’s Complaint and deny WAPA’s motion to dismiss for lack of subject matter jurisdiction.

⁴ Many courts choose to stay utility customers’ equitable and common law claims pending PSC decisions regarding relief under utility statutes when a customer lodges a claim at the PSC while simultaneously filing an action in court. *See Wanning v. Carolinas*, 2013 U.S. Dist. LEXIS 78745, *10 (D.S.C. June 5, 2013) (staying electric utility customers common law claims which were “too intertwined” with a PSC determination to move forward without prior resolution at the PSC); *Bowers v. Windstream Ky. E., LLC.*, 709 F. Supp. 2d 526, 535 (W.D. Ky. 2010) (staying customer’s judicial complaint against utility while PSC addressed the dispute); *Bell Atl. of Md., Inc. v. Intercom Sys. Corp.*, 366 Md. 1, 27 (Md. 2001) (“a consumer first must file a complaint with the PSC and then may decide to file an independent judicial action. Thereafter, the trial court must stay the independent judicial action upon the request of either party until after final resolution of the administrative proceeding”); *Farmers Ins. Exchange v. Superior Court*, 2 Cal. 4th 377, 393 (Cal. 1992) (holding that if the legislature granted non-exclusive authority to an administrative agency to hear a statutory complaint, a court of general jurisdiction may still hear a complaint based on the same facts but ought to stay the proceedings pending a finding by the agency).

IV. Conclusion

The Court finds that 30 V.I.C. § 20(a) gives the PSC initial jurisdiction to hear customer complaints regarding WAPA billing and services. But, the Court further finds that the PSC lacks jurisdiction to hear Klotzbach's common law, equitable, and consumer protection causes of action. In an effort to conserve judicial and administrative resources, the Court denies Defendant Virgin Islands Water and Power Authority's Motion to Dismiss for lack of Personal Jurisdiction.

The Court will enter an Order consistent herewith.

DATED: March 29, 2016



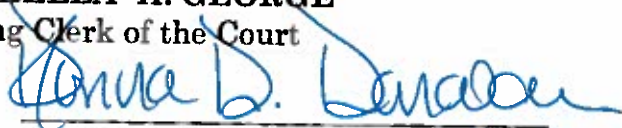
Kathleen Mackay
Judge of the Superior Court
of the Virgin Islands

ATTEST:

ESTRELLA H. GEORGE

Acting Clerk of the Court

BY:



DONNA D. DONOVAN

Court Clerk Supervisor 329 / 2016

CERTIFIED TRUE COPY

Date:

3/29/2016

ESTRELLA H. GEORGE

Acting Clerk of the Court

By:

Tiger



Court Clerk II