

NOT TO BE PUBLISHED WITHOUT  
THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY  
MORRIS COUNTY  
LAW DIVISION, CIVIL PART  
DOCKET NO. L-1277-17

MIDDLETOWN TOWNSHIP BOARD  
OF EDUCATION, for itself  
and others similarly  
situated,  
834 Leonardville Road  
Leonardo, NJ 07737

Plaintiff(s),

v.

JERSEY CENTRAL POWER &  
LIGHT CO.,  
STATE OF NEW JERSEY AND  
300 Madison Avenue  
Morristown

Defendant(s).

---

Decided: February 2, 2018

Patrick Perotti, Esq.,  
attorney for plaintiff  
MIDDLETOWN TOWNSHIP BOARD OF EDUCATION

Michael J. Deem, Esq.,  
attorney for plaintiff  
MIDDLETOWN TOWNSHIP BOARD OF EDUCATION

Charles M. Fisher, Esq.,  
Attorney for defendant  
JERSEY CENTRAL POWER & LIGHT CO.

FRANK J. DEANGELIS, J.S.C.

On June 5, 2017, Middletown Township Board of Education

("Plaintiff") filed a Class Action Complaint to remedy an overcharge of a New Jersey State tax called the transitional energy facility assessment ("TEFA"). Plaintiff asserted claims for unjust enrichment and fraud alleging that Jersey Central Power & Light Co. ("Defendant") billed for the TEFA tax by both building it into the base delivery and listing it as a separate line. On November 11, 2017, Plaintiff filed a motion to dismiss Plaintiff's Complaint with prejudice for Lack of Subject Matter Jurisdiction pursuant to R. 4:6-2(a) on the grounds that the claims raised by Plaintiff are within the exclusive jurisdiction of New Jersey Board of Public Utilities ("BPU") and require BPU's expertise to review and determine the validity of BPU-approved tariffs, including the TEFA tax.

The New Jersey Constitution provides that "[t]he Superior Court shall have original general jurisdiction throughout the State in all causes." N.J. Const. art. VI, § 3, ¶ 2. This means that the Superior Court of New Jersey is a court of general jurisdiction, having subject matter jurisdiction over all claims, subject to limited exceptions.

One such exception is where an agency is granted exclusive jurisdiction over a particular matter. Pressler & Verniero, Current N.J. Court Rules, comment 2.6 on R. 4:6-2 (2016).

The principle is well established that a court cannot hear a case as to which it lacks subject matter jurisdiction even

though all parties thereto desire an adjudication on the merits. State v. Osborn, 32 N.J. 117, 122 (1960); Abbott v. Beth Israel Cemetery Ass'n of Woodbridge, 13 N.J. 528, 537 (1953); Petersen v. Falzarano, 6 N.J. 447, 454 (1951). Such jurisdiction must be granted to the court by the Constitution or by valid legislation, as it "cannot be vested by agreement of the parties." [Osborn, *supra*, 32 N.J. at 122.] Likewise, subject matter jurisdiction cannot be conferred by waiver resulting from a party's failure to interpose a timely objection to the assumption of jurisdiction. Lay Faculty Ass'n of [Reg'l] Secondary Schools of Archdiocese of Newark v. Roman Catholic Archdiocese of Newark, 122 N.J. Super. 260, supplemented 124 N.J. Super. 369, 307 (App. Div. []), cert[if]. den[ied], 64 N.J. 153 (1973). Objection to jurisdiction of the court over the subject matter is effective whenever made. McKeeby v. Arthur, 7 N.J. 174 (1951).

Peper v. Princeton Univ. Bd. of Trs., 77 N.J. 55, 65-66 (1978).

A party may file a motion to dismiss based on lack of subject matter jurisdiction at any time. R. 4:6-2(a).

The Appellate Division is vested with jurisdiction to review final decisions of State administrative agencies. Rule 2:2-3(a)(2) states that an appeal may be taken as of right:

to review final decisions or actions of any state administrative agency or officer, and to review the validity of any rule promulgated by such agency or officer excepting matters prescribed by [R.] 8:2 (tax matters) and matters governed by [R.] 4:74-8 (Wage Collection Section appeals), except that review pursuant to this subparagraph shall not be maintainable so long as there is available a right of review before any administrative agency or officer,

unless the interest of justice requires  
otherwise[.]

The Rule contemplates that "every proceeding to review the action or inaction of a [S]tate administrative agency would be by appeal to the Appellate Division." Vas v. Roberts, 418 N.J. Super. 509, 516 (App. Div. 2011) (emphasis omitted) (quoting Pascucci v. Vagott, 71 N.J. 40, 52 (1976)).

The BPU extensively regulates power companies and has jurisdiction over many types of disputes between power companies and their customers. See N.J.S.A. 48:2-13(d) (declaring that "all services necessary for the transmission and distribution of electricity and gas, including but not limited to safety, reliability, meter reading and billing, shall remain the jurisdiction of the Board of Public Utilities"). As New Jersey Supreme Court has observed, the Legislature intended that the BPU have "the widest range of regulatory power over public utilities." Deptford v. Woodbury Terrace Sewerage Corp., 54 N.J. 418, 424 (1969); see also Atlantic Coast Elec. Ry. Co. v. Bd. of Pub. Util. Comm'rs, 92 N.J.L. 168, 173 (E. & A. 1918), app. dismissed, 254 U.S. 660 (1920); In re Centex Homes, LLC, 411 N.J. Super. 244, 254 (App. Div. 2009).

In the instant matter, Plaintiff claims that it was overcharged for TEFA tax, but that this Court, not the BPU, has jurisdiction over its claims because it does not challenge the

tariff. The parties do not dispute that the Board has exclusive jurisdiction to decide claims that challenge rates. The issue is whether a plaintiff may proceed on a claim for a double charge of a TEFA tax where one charge is included as a line item on the bill and another is allegedly included in the delivery charges. Plaintiff submits that this Court has jurisdiction over its claims because Plaintiff does not challenge the tariff but rather brings legal claims of unjust enrichment and fraud for charging the tariff twice. Defendant argues that these claims require interpretation of the TEFA tax, which also falls under the purview and expertise of the BPU.

Before the introduction of competition into the electricity market, all services were bundled together and billed as one charge. See N.J.S.A. 48:3-52(a). The Competition Act, however, requires electric public utilities to unbundle electric rate schedules to reveal each service and charges billed to non-residential consumers, including charges authorized by the Legislature and BPU. Id. Discrete billing charges "shall include, at a minimum, customer account services and charges, distribution and transmission services and charges and generation services and charges, and the [BPU] may require that additional services and charges be unbundled and separately billed." N.J.S.A. 48:3-52(a). "Billings for such services also shall include charges related to regulatory assets

and may include restructuring related costs." Id. Additionally, electric public utilities and third-party suppliers of electricity are not required to unbundle a sales tax in certain circumstances, allowing it to be embedded in the tariff rates charged to electricity customers. N.J.S.A. 54:32B-14(e).

Although, Plaintiff submits that these are straightforward legal claims, the determination of Plaintiff's unjust enrichment and fraud claims will necessitate proof that the TEFA tax was in fact improperly unbundled and charged twice, once as a line item and once with the delivery charge. If this matter remains with this Court, it will have to analyze the billing and determine whether the delivery charge encompasses a charge for TEFA. Such a determination is outside of the Court's expertise. Previously presented with a matter where the determination of one issue necessitated the expertise of BPU and the determination of damages was an issue within the purview of the Superior Court, the Appellate Division held that the lower court properly retained jurisdiction over the damages claim while BPU resolved the issues within its expertise. Muise v. GPU, Inc., 332 N.J. Super. 140, 165 (App. Div. 2000) ("certain questions about the provision of safe and adequate electric service" fell within "the Board's exclusive jurisdiction" but "customer damage claims against defendants for the negligent failure to provide such

service" did not.). Similarly here, while the claims of unjust enrichment and fraud are subject to this Court's jurisdiction, the determination of whether double billing actually occurred necessitates BPU's expertise and is subject to the Board's exclusive jurisdiction pursuant to N.J.S.A. 48:3-52(a). The Court further finds that if the BPU determines whether Plaintiff was double charged, New Jersey case law does not preclude Plaintiff from filing its legal claims in Superior Court. See Muise v. GPU, Inc., 332 N.J. Super. at 165; see also Daaleman v. Elizabethtown Gas Co., 77 N.J. 267, 271 (1978) (remanding the determination of tariffs that were governed by an agency's administrative order to the agency, but dismissing claims based on the selling and advertising practices because they were not cognizable under the Consumer Fraud Act.<sup>1</sup>).

Accordingly, this case is dismissed without prejudice subject to BPU's findings. Defendant's motion to dismiss Plaintiff's complaint for lack of subject matter jurisdiction is therefore granted. Plaintiff, however, may re-file its claims in this Court if the BPU finds that Plaintiff was, in fact, charged twice for the TEFA tax, as the unjust enrichment and

---

<sup>1</sup> Notably, the Court did not remand the CFA claim to the agency for its determination and nothing in the Court's holding indicates that had plaintiffs' CFA claim been cognizable under the law that plaintiffs could not submit it to New Jersey Superior Court for its determination, after the agency's conclusions on the issues within its expertise.

fraud claims would not accrue until there is a finding against Defendant by the BPU.