**BEFORE THE**

**PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Maria Povacz :

:

v. : C-2012-2317176

:

PECO Energy Company :

**INITIAL DECISION**

Before

Joel H. Cheskis

Administrative Law Judge

HISTORY OF THE PROCEEDING

On July 13, 2012, Maria Povacz filed with the Pennsylvania Public Utility Commission (“Commission”) a formal Complaint against PECO Energy Company (“PECO” or “the Company”), at Docket Number C-2012-2317176. In her formal Complaint, Ms. Povacz averred that she indicated to PECO that she did not give permission for the Company to install a “smart meter.”[[1]](#footnote-1) Ms. Povacz further averred that she did not believe that failure to install a smart meter should be the basis for termination of her account as she has never been late in paying her bill. Ms. Povacz attached to her Complaint a series of letters between her and PECO regarding this matter, including a letter from her to the Company, the smart meter installer and some of Ms. Povacz’s elected officials that lists twenty-five (25) reasons why she believes smart meters “violate the law and cause endangerment to residents.” Ms. Povacz concludes her Complaint by requesting that she be allowed to “opt out” of the smart meter installation and reiterating that she does not give the smart meter installer permission to enter her property.

On August 22, 2012, PECO filed an Answer with New Matter to Ms. Povacz’s Complaint. In its Answer, PECO denied all material allegations of fact and conclusions of law in the Complaint. PECO confirmed the contacts between Ms. Povacz and the Company regarding her desire to not have a smart meter installed in her property, including attaching copies of two letters it sent to her about the matter. In its New Matter, which was accompanied by a Notice to Plead, PECO provided extensive background regarding the advent of smart meters, including the legislation signed by Governor Rendell that directed the installation of smart meters, known as Act 129, the Implementation Order adopted by the Commission and PECO’s own smart meter implementation plan that was approved by the Commission. PECO concludes its New Matter by averring that Ms. Povacz has not alleged that PECO improperly installed the meter in any way contrary to the Commission-approved plan and that PECO is operating under the basis of Act 129. PECO avers that there is no legal basis for Ms. Povacz’s Complaint and that her Complaint should be dismissed.

Also on August 22, 2012, PECO filed a Preliminary Objection. The Preliminary Objection was accompanied by a Notice to Plead. As discussed further below, PECO argued that Ms. Povacz’s Complaint should be dismissed because it is legally insufficient. PECO reiterated, and elaborated upon, the extensive background discussion regarding the advent of smart meters that was provided in its New Matter, including further legal support for PECO’s position why Ms. Povacz’s Complaint does not allege any violation of any order, law or tariff that can be the basis of any finding against the Company. PECO again requests that Ms. Povacz’s Complaint be dismissed.

On August 30, 2012, Ms. Povacz filed an Answer to PECO’s Preliminary Objection. In her Answer, Ms. Povacz responded to PECO’s claim of legal insufficiency. Ms. Povacz argued that smart meters are by definition surveillance devices which she claimed violate federal and state wiretapping laws. She also argued that smart meter installation is not mandatory. Ms. Povacz provided several other arguments in response to PECO’s claim that her Complaint is legally insufficient and concluded her Answer by requesting that the matter be presented in front of an administrative law judge.

Ms. Povacz’s answer to PECO’s New Matter was due no later than September 14, 2012. 52 Pa. Code §§ 5.63(a), 1.12(a), 1.56(a)(1) and (b). Ms. Povacz did not file an answer to PECO’s New Matter.

By Motion Judge Assignment Notice dated August 27, 2012, the parties were informed that I was assigned as the Presiding Officer in this matter and responsible for resolving any issues which may arise during the preliminary phase of this proceeding. PECO’s Preliminary Objection is procedurally ready to be ruled upon. For the reasons discussed further below, PECO’s Preliminary Objection will be granted and Ms. Povacz’s Complaint will be dismissed.

FINDINGS OF FACT

1. The Complainant in this proceeding is Maria Povacz.
2. The Respondent in this proceeding is PECO Energy Company.
3. The Service Address is 533 Tori Court, New Hope, PA.
4. On June 15, 2012, Ms. Povacz received a notice from PECO advising her of the installation of smart meters in her area.
5. In response to the June 15, 2012 letter, Ms. Povacz called PECO and stated that she did not give her permission for a smart meter to be installed at her home.
6. Ms. Povacz was informed by PECO personnel that the installation of the smart meters was mandatory.
7. Ms. Povacz has never been late in paying her PECO bill.
8. Ms. Povacz will not allow for the replacement of her meter or for access to her property for such purposes.
9. On June 18, 2012, Ms. Povacz mailed a letter by Certified Mail to PECO and Grid One Solutions, the smart meter installer, with a copy of the letter sent to State Representative Bernard T. O’Neill, United States Representative Michael Fitzpatrick and Bucks County District Attorney David Heckler.
10. In Ms. Povacz’s June 18, 2012 letter, she indicated that she denied consent for installation and use of any smart meter “or any other surveillance and activity monitoring device, or devices, at [her] property.”
11. In Ms. Povacz’s June 18, 2012 letter, she stated twenty-five (25) reasons why she believed smart meters “violate the law and cause endangerment to residents.”
12. In Ms. Povacz’s June 18, 2012 letter, she “demanded an immediate stop to the installation of all smart meters until all issues are resolved, the smart meters to be removed at customers request with no extra charge, an opt-in only for customers who are properly and fully informed and that must have this technology for their own specific need. This is in the public’s best interest.”
13. On June 19, 2012, Linda Lamberson, from the PECO AMI Meter Installation Team, sent a letter to Ms. Povacz.
14. In Ms. Lamberson’s June 19, 2012 letter, she provided Ms. Povacz with additional information regarding the smart meter project, including information regarding radio frequency issues and stating that “all Pennsylvania utilities are required to install new metering technology for customers as part of Pennsylvania’s 2008 Act 129.”
15. On July 13, 2012, Ms. Povacz filed a formal Complaint with the Commission against PECO stating her opposition to the installation of a smart meter at her property.
16. On August 22, 2012, PECO filed an Answer with New Matter in response to Ms. Povacz’s Complaint denying all material allegations of fact and conclusions of law in the Complaint, and asserting its legal justification for the installation of smart meters.
17. On August 22, 2012, PECO filed a Preliminary Objection seeking the dismissal of Ms. Povacz’s Complaint because it is legally insufficient, and reiterated its legal justification for the installation of smart meters.
18. On August 30, 2012, Ms. Povacz filed an Answer to PECO’s Preliminary Objection arguing, *inter alia*, that smart meters are by definition surveillance devices which she claimed violate federal and state wiretapping laws and that smart meter installation is not mandatory.
19. Ms. Povacz did not file an Answer to PECO’s New Matter.

DISCUSSION

The Commission’s Rules of Administrative Practice and Procedure, 52 Pa. Code Chapters 1, 3 and 5, provide for the filing of Preliminary Objections. 52 Pa. Code § 5.101. Commission Preliminary Objection practice is comparable to Pennsylvania civil practice respecting the filing of preliminary objections. Equitable Small Transportation Intervenors v. Equitable Gas Company*,* 1994 Pa PUC LEXIS 69, Docket No. C-00935435 (July 18, 1994) (Equitable). PECO filed a Preliminary Objection arguing that Ms. Povacz’s Complaint is legally insufficient. The Commission’s Rules provide, in relevant part:

(a) *Grounds.* Preliminary objections are available to parties and may be filed in response to a pleading except motions and prior preliminary objections. Preliminary objections must be accompanied by a notice to plead, must state specifically the legal and factual grounds relied upon and be limited to the following:

1. Lack of Commission jurisdiction or improper service of the pleading initiating the proceeding.
2. Failure of a pleading to conform to this chapter or the inclusion of scandalous or impertinent matter.
3. Insufficient specificity of a pleading.
4. Legal insufficiency of a pleading.
5. Lack of capacity to sue, nonjoinder of a necessary party or misjoinder of a cause of action.
6. Pendency of a prior proceeding or agreement for alternative dispute resolution.

52 Pa. Code § 5.101(a)(1)-(6).

For purposes of disposing of the Preliminary Objection, the Commission must accept as true all well pleaded, material facts of the nonmoving party, as well as every reasonable inference from those facts. County of Allegheny v. Commonwealth of Pennsylvania, 490 A. 2d 402 (Pa. 1985); Commonwealth of Pennsylvania v. Bell Telephone Co. of Pa., 551 A.2d 602 (Pa. Cmwlth. 1988). The Commission must view the complaint in this case in the light most favorable to Ms. Povacz and should dismiss the complaint only if it appears that Ms. Povacz would not be entitled to relief under any circumstances as a matter of law. Equitable, *supra*; *see also*, Interstate Traveler Services, Inc. v. Commonwealth, Department of Environmental Resources, 486 Pa. 536, 406 A.2d 1020 (1979).

Also relevant here is Section 703(b) of the Public Utility Code which allows the commission to dismiss any complaint without a hearing if, in its opinion, a hearing is not necessary in the public interest. 66 Pa. C.S. § 703(b).

PECO’s Preliminary Objection will be granted. Even when accepting as true all well pleaded materials facts, and every reasonable inference from those facts, Ms. Povacz’s Complaint does not raise a violation of the Public Utility Code, any Commission Order or regulation or any Commission-approved Company tariff and, therefore, her Complaint will be dimissed.

To begin, Section 2807 of the Public Utility Code provides:

**(f) Smart meter technology and time of use rates.—**

\* \* \* \*

(2) Electric distribution companies ***shall*** furnish smart meter technology as follows:

(i) Upon request from a customer that agrees to pay the cost of the smart meter at the time of the request.

(ii) In new building construction.

(iii) In accordance with a depreciation schedule not to exceed 15 years.

66 Pa. C.S. §2807(f)(2)(emphasis added). The use of the word “shall” in the statute indicates the General Assembly’s direction that all customers will receive a smart meter. Furthermore, there is no provision in the statute that allows customers to “opt out” of smart meter installation, as Ms. Povacz desires.

Nor do the Commission’s Orders implementing this provision of Act 129 or PECO’s specific implementation plan allow customers to “opt out” of smart meter installation. PECO relies, in part, on the following language from the Commission’s Implementation Order to support its argument that Ms. Povacz cannot opt out of the smart meter installation:

The Commission believes that it was the intent of the General Assembly to require all covered [Electric Distribution Companies] to deploy smart meters system-wide when it included a requirement for smart meter deployment ‘in accordance with a depreciation schedule not to exceed 15 years.’

Preliminary Objection at 5; *quoting*, Smart Meter Procurement and Installation Implementation Order, Docket No. M-2009-2092655 (entered June 24, 2009). PECO adds that “the Commission’s Order does not have a provision for customers to ‘opt out’ of the smart meter installation.” Id. at 6.

Whereas the statute provides that PECO “shall” install these meters and there is no provision in the statute or the Commission’s Implementation Order that allows a customer to opt out of the smart meter installation, coupled with the ability of the Commission to dismiss a complaint without a hearing if it is in the public interest, I find that Ms. Povacz is unable to demonstrate that PECO has violated the Public Utility Code, any Commission Order or regulation or any Commission-approved Company tariff. As the party with the burden of proof in this proceeding, *see*, 66 Pa. C.S. § 332(a), Ms. Povacz’s Complaint must therefore be dismissed.

This position is further supported by the introduction in the General Assembly of a bill that would allow customers to opt out of the smart meter installation if passed. *See*, House Bill 2188 (introduced on February 8, 2012). Unless and until such legislation is passed, however, or some other provision is put in place that specifically allows customers to opt out of smart meter installation, PECO has not violated any provision of the Public Utility Code, any Commission Order or regulation or any Commission-approved Company tariff by prohibiting Ms. Povacz from opting out.

To the extent that Ms. Povacz desires the ability to opt out of the smart meter installation, she should advocate for such ability before the General Assembly. In the alternative, and in light of the Commission’s Orders implementing Act 129, Ms. Povacz could also file a Petition for Rescission or Amendment under Section 703(g) of the Public Utility Code to advocate before the Commission that customers be allowed to opt out of smart meter installation.[[2]](#footnote-2) Such efforts would be the appropriate avenues at this juncture to raise the issue raised in her Complaint. The formal Complaint process against one Electric Distribution Company, PECO, is not the appropriate avenue for this issue to be addressed.

In conclusion, Ms. Povacz has failed to carry her burden to demonstrate that PECO has violated the Public Utility Code, any Commission Order or regulation or any Commission-approved Company tariff when prohibiting Ms. Povacz from opting out of smart meter installation. PECO’s Preliminary Objection will be granted. Ms. Povacz’s Complaint will therefore be dismissed.

CONCLUSIONS OF LAW

1. Commission Preliminary Objection practice is comparable to Pennsylvania civil practice respecting the filing of preliminary objections. Equitable Small Transportation Intervenors v. Equitable Gas Company*,* 1994 Pa PUC LEXIS 69, Docket No. C-00935435 (July 18, 1994) (Equitable).
2. Preliminary objections are available to parties and may be filed in response to a pleading except motions and prior preliminary objections. Preliminary objections must be accompanied by a notice to plead, must state specifically the legal and factual grounds relied upon and be limited to the following: (i) lack of Commission jurisdiction or improper service of the pleading initiating the proceeding; (ii) failure of a pleading to conform to this chapter or the inclusion of scandalous or impertinent matter; (iii) insufficient specificity of a pleading; (iv) legal insufficiency of a pleading; (v) lack of capacity to sue, nonjoinder of a necessary party or misjoinder of a cause of action; and (vi) pendency of a prior proceeding or agreement for alternative dispute resolution. 52 Pa. Code § 5.101(a)(1)-(6).
3. For purposes of disposing of Preliminary Objections, the Commission must accept as true all well pleaded, material facts of the nonmoving party, as well as every reasonable inference from those facts. County of Allegheny v. Commonwealth of Pennsylvania, 490 A. 2d 402 (Pa. 1985); Commonwealth of Pennsylvania v. Bell Telephone Co. of Pa., 551 A.2d 602 (Pa. Cmwlth. 1988).
4. For purposes of disposing of Preliminary Objections, the Commission must view the complaint in this case in the light most favorable to the nonmoving party and should dismiss the complaint only if it appears that the nonmoving party would not be entitled to relief under any circumstances as a matter of law. Equitable, *supra*; *see also*, Interstate Traveler Services, Inc. v. Commonwealth, Department of Environmental Resources, 486 Pa. 536, 406 A.2d 1020 (1979).
5. The Commission may dismiss any complaint without a hearing if, in its opinion, a hearing is not necessary in the public interest. 66 Pa. C.S. § 703(b).
6. Electric distribution companies shall furnish smart meter technology as follows: (i) upon request from a customer that agrees to pay the cost of the smart meter at the time of the request; (ii) in new building construction; and (iii) in accordance with a depreciation schedule not to exceed 15 years. 66 Pa. C.S. §2807(f)(2).
7. The Commission believes that it was the intent of the General Assembly to require all covered Electric Distribution Companies to deploy smart meters system-wide when it included a requirement for smart meter deployment ‘in accordance with a depreciation schedule not to exceed 15 years.’ Smart Meter Procurement and Installation Implementation Order, Docket No. M-2009-2092655 (entered June 24, 2009).
8. Except as may otherwise be provided in section 315 (relating to burden of proof) or other provisions of this part or other relevant statute, the proponent of a rule or order has the burden of proof. 66 Pa. C.S. § 332(a).
9. Ms. Povacz’s Complaint against PECO should be dismissed with prejudice.

ORDER

THEREFORE,

IT IS ORDERED:

1. That the Preliminary Objection filed by PECO Energy Company dated August 22, 2012 at Docket Number C-2012-2317176 is granted.
2. That the formal Complaint filed by Maria Povacz against PECO Energy Company dated July 13, 2012 at Docket Number C-2012-2317176 is dismissed.
3. That this matter be marked closed.

Date: September 28, 2012 \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Joel H. Cheskis

Administrative Law Judge

1. A “smart meter” is an electric meter that records consumption of electric energy in increments of an hour or less and communicates that information at least daily back to the utility for monitoring and billing purposes. [↑](#footnote-ref-1)
2. Section 703(g) of the Public Utility Code provides: “**(g) Rescission and amendment of order.--** The commission may, at any time, after notice and after opportunity to be heard as provided in this chapter, rescind or amend any order made by it. Any order rescinding or amending a prior order shall, when served upon the person, corporation, or municipal corporation affected, and after notice thereof is given to the other parties to the proceedings, have the same effect as herein provided for original orders.” 66 Pa. C.S. § 703(g). [↑](#footnote-ref-2)