**BEFORE THE**

**PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Thomas A. McCarey and Margery H. McCarey :

:

v. : C-2013-2354862

:

PECO Energy Company :

**INITIAL DECISION**

Before

Joel H. Cheskis

Administrative Law Judge

HISTORY OF THE PROCEEDING

On February 11, 2013, Thomas A. McCarey and Margery H. McCarey filed with the Pennsylvania Public Utility Commission (Commission) a formal Complaint against PECO Energy Company (PECO) at Docket Number C-2013-2354862. In their Complaint, the McCarey’s included a 14-page, single-spaced, typed attachment explaining that they do not want a smart meter installed on their property.[[1]](#footnote-1) The attachment included significant detail regarding twenty-five separate reasons why the McCarey’s believe that smart meters are bad and why they do not want one on their property. The McCarey’s included, among other things, a “Notice of No Consent to Trespass and Surveillance,” stating “be advised, you and all other parties are hereby denied consent for installation and use of any and all ‘Smart Meters’ or any other surveillance and activity monitoring device, or devices, at the above property.”

On April 1, 2013, PECO filed a Preliminary Objection in response to the McCarey’s Complaint. The Preliminary Objection included a Notice to Plead. In its Preliminary Objection, PECO argued that the McCarey’s Complaint should be dismissed because it is legally insufficient. PECO argued that there are no genuine issues of material fact and that PECO is entitled to judgment as a matter of law with respect to all allegations in the Complaint. In support of its argument, PECO provided extensive legal discussion and background detailing requirements that PECO must install smart meters for all its customers. PECO concluded its Preliminary Objection by stating that “as the law currently stands, pursuant to Act 129 and the Commission’s Implementation Order, customers do not have the ability to ‘opt out’ of smart meter installation.” PECO added that there is therefore no legal basis for the McCarey’s Complaint and that the Complaint should be dismissed as a matter of law.

The McCarey’s Answer to PECO’s Preliminary Objection was due no later than April 15, 2013. 52 Pa. Code §§ 5.101(f)(1), 1.12(a), 1.56(a)(1) and (b). The McCarey’s did not file an Answer to PECO’s Preliminary Objection.

By Motion Judge Assignment Notice dated April 2, 2013, 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 below, PECO’s Preliminary Objection will be granted and the McCarey’s Complaint will be dismissed.

FINDINGS OF FACT

1. The Complainants in this case are Thomas A. McCarey and Margery H. McCarey.
2. The Respondent in this case is PECO Energy Company.
3. The Service Address is 285 Dayleview Road, Berwyn, PA 19312.
4. On February 11, 2013, the McCarey’s filed a formal Complaint with the Commission detailing numerous reasons why they believe that smart meters are bad and stating that they do not want a smart meter installed on their property.
5. On April 1, 2013, PECO filed a Preliminary Objection in response to the McCarey’s formal Complaint arguing that the Complaint should be dismissed because it is legally insufficient.
6. The McCarey’s did not file an Answer to PECO’s Preliminary Objection.

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 the McCarey’s Complaint is legally insufficient and should be dismissed. 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 the McCarey’s and should dismiss the complaint only if it appears that the McCarey’s 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).

In addition, 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).

PECO’s Preliminary Objection will be granted. Even when accepting as true all well pleaded materials facts, and every reasonable inference from those facts, the McCarey’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, the Complaint should be dismissed.

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 the McCarey’s desire.

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 the McCarey’s 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 the McCarey’s are 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), the McCarey’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 the McCarey’s from opting out.

As PECO referenced in its Preliminary Objection, this precise issue has recently been addressed by the Commission in Maria Povacz v. PECO Energy Company, Docket Number C-2012-2317178, Opinion and Order (entered January 24, 2013) (Povacz). In Povacz, the complainant averred that she did not give permission for the company to install a smart meter and requested that she be allowed to “opt out” from the smart meter installation program. In dismissing the complainant’s Exceptions to the Initial Decision that granted the company’s Preliminary Objections in that case, the Commission relied on both Section 2807(f)(2) of the Public Utility Code as well as PECO’s Smart Meter Installation Plan to reject the argument that the installation of smart meters violated the Public Utility Code, a Commission regulation or Order. The Commission noted:

Additionally, as noted by the ALJ, Section 2807(f)(2) of the Code, *supra*, is controlling here, and the use of the word “shall” in the statute indicates the General Assembly’s direction that all customers will receive a smart meter. The Complainant’s smart meter was installed by PECO in accordance with a plan approved by this Commission. Therefore, installation of the smart meter was consistent with, rather than a violation of, the Code, a Commission regulation or Order.

Id. at 10 (citations omitted). The Commission added: “Furthermore, there is no provision in the Code, the Commission’s regulations or Orders that allows a PECO customer to ‘opt out’ of smart meter installation, as the Complainant desires to do.” Id. The Commission’s determination in Povacz applies equally to require dismissal of the McCarey’s Complaint in this case.

In Povacz, the Commission also addressed why granting preliminary objections in that case was correct even though the complainant was unrepresented, noting that, in the normal course, the Commission would not dismiss a complaint filed by an unrepresented complainant without first providing a hearing during which the complainant could further explain the factual basis for the complaint. Id. at 9, *citing*, Carlock v. United Telephone Company of Pennsylvania, Docket No. F-00163617, Order (entered July 14, 1993) (Carlock). The Commission’s decision in Carlock was subsequently clarified to allow ALJ’s the discretion to dispose of the pleadings in a proceeding provided that the action is neither arbitrary nor capricious, and that it is in accordance with the law. John A. Graham Jr. v. Philadelphia Suburban Water Company and Bell Atlantic-Pennsylvania, Inc., Docket No. C-00957557, Opinion and Order (entered June 12, 1996). In Povacz, the Commission noted that there are some cases where a hearing would not enable the complainant to better explain his position or provide additional facts such as to alter inevitable conclusions and, in those cases, a hearing need not be held. Povacz at 9.

Such is the case with the Complaint filed by the McCarey’s in this case where it is clear that, even when viewing the Complaint in the light most favorable to the McCarey’s, and accepting as true all well pleaded material facts, as well as every reasonable inference from those facts, the McCarey’s would not be entitled to relief under any circumstances as a matter of law. PECO’s Preliminary Objection should therefore be granted, and the McCarey’s Complaint dismissed, without a hearing.

In conclusion, the McCarey’s have failed to carry their burden to demonstrate that PECO has violated the Public Utility Code, any Commission Order or regulation or any Commission-approved Company tariff with regard to its smart meter installation policies and procedures. PECO’s Preliminary Objection will be granted. The McCarey’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).
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); Maria Povacz v. PECO Energy Company, Docket Number C-2012-2317178, Opinion and Order (entered January 24, 2013).
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. Although normally the Commission would not dismiss a complaint filed by an unrepresented complainant without first providing a hearing during which the complainant could further explain the factual basis for the complaint, Carlock v. United Telephone Company of Pennsylvania, Docket No. F-00163617, Order (entered July 14, 1993), ALJ’s have the discretion to dispose of the pleadings in a proceeding provided that the action is neither arbitrary nor capricious, and that it is in accordance with the law. John A. Graham Jr. v. Philadelphia Suburban Water Company and Bell Atlantic-Pennsylvania, Inc., Docket No. C-00957557, Opinion and Order (entered June 12, 1996).
10. The McCarey’s Complaint against PECO should be dismissed with prejudice.

ORDER

THEREFORE,

IT IS ORDERED:

1. That the Preliminary Objection filed by PECO Energy Company on April 1, 2013 at Docket Number C-2013-2354862 is hereby granted.
2. That the formal Complaint filed by Thomas A. McCarey and Margery H. McCarey against PECO Energy Company at Docket Number C-2013-2354862 is hereby dismissed.
3. That this matter be marked closed.

Date: April 18, 2013 /s/

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)