**BEFORE THE**

**PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Barbara Dahdah Anderson :

:

v. : C-2014-2434639

:

PECO Energy Company :

**ORDER**

**GRANTING IN PART AND DENYING IN PART PRELIMINARY OBJECTION**

On July 11, 2014, Barbara Dahdah Anderson filed a formal Complaint with the Pennsylvania Public Utility Commission (Commission) against PECO Energy Company (PECO or “the Company”), Docket Number C-2014-2434639. In her Complaint, Ms. Anderson indicated that PECO is threatening to shut off her service or has already shut off her service. Ms. Anderson also wrote on her Complaint “no smart meter”[[1]](#footnote-1) and attached a multi-page, typed document denying consent for the installation of a smart meter on her property and providing several factors why she believes smart meters “violate the law and cause endangerment to residents.” Ms. Anderson made several other demands in her attachment regarding smart meters.

On August 5, 2014, PECO filed an Answer with New Matter in response to Ms. Anderson’s Complaint. In its Answer, PECO denied all material allegations of fact and conclusions of law in the Complaint. PECO further noted the circumstances surrounding its attempts to install a smart meter at two residential addresses where Ms. Anderson receives electric service. In its New Matter, which was accompanied by a Notice to Plead, PECO averred that Ms. Anderson is not entitled to “opt out” of smart meter installation and provided extensive legal support for its position. PECO included several attachments and concluded that Ms. Anderson’s Complaint should be dismissed as a matter of law.

On August 1, 2014, PECO also filed a Preliminary Objection in response to Ms. Anderson’s Complaint. In its Preliminary Objection, which was also accompanied by a Notice to Plead, PECO argued that Ms. Anderson’s Complaint should be dismissed because there are no genuine issues of material fact and PECO is entitled to judgment as a matter of law with respect to all of the allegations in the Complaint. PECO reiterated the extensive legal support regarding the absence of an ability to opt out of smart meter installation, as Ms. Anderson has requested in her Complaint, and concluded that Ms. Anderson’s Complaint requesting the ability to opt out of smart meter installation should be dismissed as a matter of law. PECO argued that Ms. Anderson’s Complaint does not allege any violation of any Commission order, law or tariff that can be the basis for any finding against PECO. PECO concluded its Preliminary Objection by requesting that the Commission dismiss Ms. Anderson’s Complaint.

Ms. Anderson’s Answer to PECO’s Preliminary Objection was due no later than August 14, 2014. 52 Pa.Code §§ 5.101(f)(1), 1.12(a), 1.56(a)(1) and (b). Ms. Anderson’s Answer to PECO’s New Matter was due no later than August 28, 2014. 52 Pa.Code §§ 5.63(a), 1.12(a), 1.56(a)(1) and (b). Ms. Anderson filed neither an Answer to PECO’s Preliminary Objection nor to its New Matter.

On September 3, 2014, the Commission issued a Motion Judge Assignment Notice informing the parties that I was assigned as the Presiding Officer and responsible to resolve any issues which might arise during the preliminary phase of this proceeding. PECO’s Preliminary Objection is ready for disposition. For the reasons discussed below, PECO’s Preliminary Objection will be granted in part and denied in part and the remaining issue will proceed to a hearing.

Section 5.101 of the Commission’s Rules of Administrative Practice and Procedure provides 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). Section 5.101(a) provides:

(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.
7. Standing of a party to participate in a proceeding.

52 Pa.Code § 5.101(a)(1)-(7).

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). The Commission must view the complaint in this case in the light most favorable to Ms. Anderson and should dismiss the complaint only if it appears that Ms. Anderson 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, 406 A.2d 1020 (Pa. 1979).

In this case, Ms. Anderson averred that PECO is threatening to shut off her service or has already shut off her service. Ms. Anderson also wrote on her Complaint “no smart meter” and attached a multi-page, typed document denying consent for the installation of a smart meter on her property and providing several factors why she believes smart meters “violate the law and cause endangerment to residents.” As discussed further below, PECO’s Preliminary Objection will be granted with regard to Ms. Anderson’s averments regarding smart meters but denied with regard to her averments regarding service termination.

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 a customer to “opt out” of smart meter installation, as Ms. Anderson desires.

Nor do the Commission’s Orders implementing this provision of Act 129 allow a customer to “opt out” of smart meter installation. As PECO noted in its Preliminary Objection to support its argument that Ms. Anderson cannot opt out of the smart meter installation:

Act 129 requires EDCs to furnish smart meter technology (1) upon request from a customer that agrees to pay the cost of the smart meter at the time of the request, (2) in new building construction, and (3) in accordance with a depreciation schedule not to exceed 15 years. … The Commission believes that it was the intent of the General Assembly to require all covered EDCs 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; *see also*, Smart Meter Procurement and Installation Implementation Order, Docket No. M-2009-2092655 (entered June 24, 2009). PECO further noted that the Commission’s Order does not have a provision for customers to “opt out” of the smart meter installation. Id. at 6, *see also*, Richard Negley v. Metropolitan Edison Co., Docket No. C-2010-2205305, Opinion and Order (entered Dec. 15, 2010).

Whereas the statute provides that electric distribution companies (EDCs) such as 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, Ms. Anderson is unable to demonstrate that PECO has violated the Public Utility Code, any Commission Order or regulation or any Commission-approved Company tariff by installing smart meters. PECO’s Preliminary Objection will, therefore, be granted in part and this portion of Ms. Anderson’s Complaint will be stricken.

This position is supported by recent Commission cases. *See e.g.*, Maria Povacz v. PECO Energy Company, Docket Number C-2012-2317178, Opinion and Order (entered January 24, 2013) (Povacz); *see also*, Gloria Corbett v. Pennsylvania Power Co., Docket No. C-2011-2219898, Initial Decision (Final Order entered May 27, 2011). In Povacz, for example, 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 Ms. Anderson’s Complaint in part in this case.

As a result, even when accepting as true all well pleaded materials facts, and every reasonable inference from those facts, and viewing the Complaint in the light most favorable to the Complainant, Ms. Anderson 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 with regard to its smart meter installation policies and procedures. PECO’s Preliminary Objection will be granted in part. The portions of Ms. Anderson’s Complaint pertaining to the installation of smart meters will be stricken.

Ms. Anderson’s Complaint, however, avers more than just her opposition to the installation of a smart meter at her properties. Ms. Anderson also averred that PECO is threatening to shut off her service or has already shut off her service. The Commission certainly has authority to hear such a claim. This averment warrants a hearing and cannot be dismissed on the basis of a Preliminary Objection. Therefore, PECO’s Preliminary Objection will be denied in part and Ms. Anderson’s averment regarding service termination shall proceed to a hearing.

ORDER

THEREFORE,

IT IS ORDERED:

1. That the Preliminary Objection filed by PECO Energy Company at Docket Number C-2014-2434639 on August 1, 2014 is hereby granted in part and denied in part.
2. That the averments regarding smart meters in the Complaint filed by Barbara Dahdah Anderson at Docket Number C-2014-2434639 are stricken from the Complaint.
3. That the remaining issues raised in the formal Complaint filed by Barbara Dahdah Anderson at Docket Number C-2014-2434639 will be heard in an Initial Hearing before an Administrative Law Judge.

Date: September 12, 2014 \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Joel H. Cheskis

Administrative Law Judge

**C-2014-2434639 - BARBARA DAHDAH ANDERSON v. PECO ENERGY COMPANY**BARBARA DAHDAH ANDERSON2632 S 16TH STREETPHILADELPHIA PA 19145609-634-4584SHAWANE L LEE ESQUIREEXELON BUSINESS SERVICES2301 MARKET STREET S23-1PHILADELPHIA PA 19103215-841-6841

***Accepts E-Service***

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)