**BEFORE THE**

**PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Susan Kreider :

:

v. : C-2015-2469655 :

PECO Energy Company :

**ORDER SUSTAINING PRELIMINARY OBJECTIONS IN PART**

On February 5, 2015, Susan Kreider (Complainant) filed a complaint with the Pennsylvania Public Utility Commission (Commission) against PECO Energy Company (Respondent) objecting to the installation of a smart meter at her residence.

In her complaint, the Complainant alleged the following; that (1), the Respondent was threatening to terminate her service; (2), the Respondent would not respect her notice of self help or offer any alternative; (3), there are incorrect charges on her bill; and (4), the Respondent did not seem to be accepting her monthly readings. As relief, she requested to be permitted to keep her analog meter until the year 2023 or be allowed to opt out of having a smart meter installed altogether. She contended that legislation regarding smart meters does not require installation until 2023 and legislation was being introduced to allow customers to opt out. Attached to the complaint were copies of correspondences from her attorney to PECO, pictures of a meter, copies of a bill and account summary from her attorney, copies of bills from PECO, a copy of an invoice from a third party for replacing an electrical meter, copies of three termination notices from PECO, and a print out of a Commission webpage titled Smart Meter Q&A. On this last attachment, “I do not consent” is handwritten on the page.

On March 10, 2015, the Respondent filed an answer with new matter and preliminary objections. The answer admits that the Respondent provides electric service to the Complainant at the address shown on the complaint. The answer contends that the Respondent is required to install AMI[[1]](#footnote-1) meters for all AMR[[2]](#footnote-2) customers by the end of 2014 and that it has the right to terminate service for failure of the customer to permit access to the meter.

The new matter states that Act 129 of 2008 directed the Respondent and other electric distribution companies (EDCs) to file smart meter procurement and installation plans with the Commission. The Respondent filed a smart meter procurement and installation plan on August 14, 2009 with the Commission which was approved by Commission order entered May 6, 2010, at M-2009-2123944. The new matter contends that the Respondent is required to install smart meters throughout its service territory and that neither Act 129, nor any Commission order, provide for the ability of customers to opt out of having a smart meter installed. The answer and new matter request that the Commission dismiss the complaint.

Also on March 10, 2015, the Respondent filed preliminary objections. The preliminary objections contend that the complaint is legally insufficient, pursuant to 52 Pa.Code § 5.101(a)(4). The preliminary objections assert that the Respondent is installing smart meters in compliance with Act 129 of 2008 and the Commission’s orders approving the Respondent’s smart meter procurement and installation plan. The preliminary objections further assert that although the Complainant wants to opt out of having a smart meter installed for health reasons, she may not opt out and is subject to termination of service for refusing access to her meter and installation of a smart meter.

The preliminary objections contend that no genuine issues of fact are present and the Respondent is entitled to judgment as a matter of law. The preliminary objections request that the Commission dismiss all issues raised in the complaint.

By notice dated March 27, 2015, the Commission notified the parties that it had assigned the case to me as motion judge. As of the date of this decision, the Complainant has not filed an answer to the Respondent’s preliminary objections. The preliminary objections are ready for decision. For the reasons set forth below, I will sustain in part and dismiss in part the preliminary objections.

The Commission’s Rules of Practice and Procedure permit parties to file preliminary objections. The grounds for preliminary objections are limited to those set forth in 52 Pa.Code § 5.101(a) as follows:

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 the proceeding

Here, the Respondent’s preliminary objections assert that the complaint is legally insufficient pursuant to 52 Pa.Code § 5.101(a)(4), in that the complaint fails to allege that the Respondent violated the Public Utility Code, Commission regulations or orders. I disagree in part.

Commission preliminary objection practice is analogous to Pennsylvania civil practice regarding preliminary objections. Equitable Small Transportation Intervenors v. Equitable Gas Company, 1994 Pa PUC LEXIS 69, Docket No. C‑00935435 (July 18, 1994). Preliminary objections in civil practice requesting dismissal of a pleading will be granted only where the right to relief is clearly warranted and free from doubt. Interstate Traveller Services, Inc. v. Pa. Dept. of Environment Resources, 406 A.2d 1020 (Pa. 1979); Rivera v. Philadelphia Theological Seminary of St. Charles Borromeo, Inc., 595 A.2d 172 (Pa. Super. 1991). The Commission follows this standard. Montague v. Philadelphia Electric Company, 66 Pa. PUC 24 (1988).

The Commission may not rely upon the factual assertions of the moving party but must accept as true for purposes of disposing of the motion all well pleaded, material facts of the nonmoving party, as well as every 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 Complainant and should dismiss the complaint only if it appears that the Complainant would not be entitled to relief under any circumstances as a matter of law. Equitable Small Transportation Intervenors v. Equitable Gas Company, 1994 Pa PUC LEXIS 69, Docket No. C-00935435 (July 18, 1994).

The Commission regulation at 52 Pa.Code § 5.21(a) states that a person may file a formal complaint claiming violation of a statute that the Commission has jurisdiction to administer. The regulation at 52 Pa.Code § 5.21(d) authorizes the Commission to dismiss a complaint if a hearing is not necessary and authorizes preliminary objections to be filed in response to a complaint.

The regulation at 52 Pa.Code § 5.101(a)(4) permits the filing of a preliminary objection to dismiss a pleading for legal insufficiency. The provision at 52 Pa.Code § 5.101(a)(4) serves judicial economy by avoiding a hearing where no factual dispute exists. If no factual issue pertinent to the resolution of a case exists, a hearing is unnecessary. 66 Pa.C.S. § 703(a); Lehigh Valley Power Committee v. Pa. Pub. Util. Comm’n, 563 A.2d 557 (Pa. Cmwlth. 1989); Lehigh Valley Power Committee v. Pa. Pub. Util. Comm’n, 563 A.2d 548 (Pa. Cmwlth. 1989); S.M.E. Bessemer Cement, Inc. v. Pa. Pub. Util. Comm’n, 540 A.2d 1006 (Pa. Cmwlth. 1988); White Oak Borough Authority v. Pa. Pub. Util. Comm’n, 103 A.2d 502 (Pa. Super. 1954).

Viewing the complaint in this case in the light most favorable to the Complainant, the Complainant objects to the Respondent attempting to install a smart meter at her residence and wants to opt out of having a smart meter installed at her residence. She additionally alleges incorrect billing and that the Respondent would neither accept her monthly readings nor her notice of self help.

Accepting the facts alleged in the complaint as true for purposes of disposing of its preliminary objection, the Respondent contends that the complaint fails to allege that the Respondent has violated the Public Utility Code, Commission regulations, or orders. The Respondent concludes that the complaint is legally insufficient. I disagree.

In order to be legally sufficient, a complaint must set forth “an act or thing done or omitted to be done or about to be done or omitted to be done by the respondent in violation, or claimed violation, of a statute which the Commission has jurisdiction to administer, or of a regulation or order of the Commission.” 52 Pa.Code § 5.22(a)(4). Here, the Respondent has not violated any statute, regulation or order which the Commission has jurisdiction to administer by attempting to install a smart meter at the Complainant’s residence or by threatening termination for lack of access to the meter. Rather, the Respondent is complying with relevant statutes, regulations and orders.

However, the Complainant has also alleged issues regarding incorrect billing and that the Respondent does not seem to be accepting her meter readings. Accepting as true these allegations in the complaint, they cannot be dismissed based upon a preliminary objection as they squarely implicate statutes and regulations which the Commission has jurisdiction to administer.

As set forth in the Respondent’s preliminary objections, Act 129 of 2008 directed the Respondent and other EDCs to file smart meter procurement and installation plans with the Commission. The Respondent filed a smart meter procurement and installation plan with the Commission. By order entered May 6, 2010, at M-2009-2123944, the Commission approved the Respondent’s smart meter procurement and installation plan. The Respondent is complying with the Commission’s directives by attempting to install a smart meter at the Complainant’s residence. The Commission has previously addressed complaints opposing smart meter installation and charges.

In her Initial Decision in Negley v. Metropolitan Edison Company, Docket No. C‑2010-2205305 (Initial Decision issued January 3, 2011), Administrative Law Judge (ALJ) Susan D. Colwell dismissed a complaint opposing installation of smart meters for legal insufficiency. ALJ Colwell concluded that Act 129 of 2008 authorized the installation of smart meters by EDCs. ALJ Colwell held that the Commission’s orders approving the EDC’s smart meter plans did not exempt any customers from the smart meter plans or from paying the charges associated with the smart meter plans. In addition, ALJ Colwell found that Act 129 of 2008 did not empower the Commission to allow customers to opt out of having smart meters installed at their residences. By Commission final order entered March 3, 2011, ALJ Colwell’s Initial Decision became final without further Commission action.

In Lutherschmidt v. Metropolitan Edison Company, Docket No. C‑2010‑2200353 (Initial Decision issued January 31, 2011), ALJ Wayne L. Weismandel dismissed a complaint opposing installation of smart meters for legal insufficiency, adopting ALJ Colwell’s reasoning. By Commission final order entered March 25, 2011, ALJ Weismandel’s Initial Decision became final without further Commission action. The Commission has continued to uphold smart meter installation and charges and dismiss complaints opposing smart meter installation and charges on the basis of legal insufficiency. Corbett v. Pennsylvania Power Company, Docket No. C-2011-2219898 (Order entered May 27, 2011); Jones v. Metropolitan Edison Company, Docket No. C‑2011-2224380 (Order entered June 28, 2011); Griffin v. Metropolitan Edison Company, Docket No. C-2012-2300172 (Order entered July 31, 2012); Brake v. West Penn Power Company, Docket No. C-2013-2367308 (Order entered November 14, 2013). Additionally, in Povacz v. PECO Energy Company, Docket No. C-2012-2317176 (Order entered September 28, 2012), the Commission stated there is no statutory provision, regulation, or order that allows a customer to opt out of smart meter installation.

The Commission’s decisions cited above are controlling. Because Act 129 of 2008 and the Commission’s orders authorize the Respondent to develop and implement a smart meter procurement and installation plan, the issues related to the installation of a smart meter and termination of service notices in the complaint are dismissed for legal insufficiency. The remaining allegations allege incorrect charges in the Complainant’s bill and issues regarding meter reading and implicate possible violations of rules and orders over which the Commission has jurisdiction to administer. The Respondent contests these allegations. A hearing will be necessary to resolve this factual dispute.

ORDER

THEREFORE,

IT IS ORDERED:

1. That the preliminary objections filed by PECO Energy Company at Docket No. C-2015-2469655 are sustained in part and denied in part.

2. That the allegations in the Complaint at Docket No. C-2015-2469655 concerning smart meter installation are dismissed for legal insufficiency.

3. That the portion of the complaint of Susan Kreider at Docket No. C-2015-2469655 alleging incorrect charges and the failure of PECO Energy Company to accept her meter readings shall be scheduled for a hearing before an administrative law judge.

Date: April 8, 2015

David A. Salapa

Administrative Law Judge

**C-2015-2469655 - SUSAN KREIDER v. PECO ENERGY COMPANY**SUSAN KREIDER169 W QUEEN LANEPHILADELPHIA PA 19144**215.849.1698**

SHAWANE L LEE ESQUIREEXELON BUSINESS SERVICES2301 MARKET STREET S23-1PHILADELPHIA PA 19103**215.841.6841**Accepts E-service

Representing PECO Power Company

pc: ALJ David A. Salapa

Jose Garcia

File Room

1. AMI is an acronym for “advanced metering infrastructure.” An AMI meter is also commonly called a smart meter. [↑](#footnote-ref-1)
2. AMR is an acronym for “automatic meter reading.” An AMR meter is one equipped with a device to allow the electronic transmission of data from the meter to the utility enabling the meter to be electronically read rather than having to have an employee visually read each meter. Although smart meters also allow for this type of communication, an AMR device is typically attached to an older style analog meter. [↑](#footnote-ref-2)