

August 23, 2016

Via Electronic Filing

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

RE: Norbert Sliwinski v. Duquesne Light Company
Docket No. C-2016-2559985

Dear Secretary Chiavetta:

Enclosed please find Duquesne Light Company's Preliminary Objections to the Complaint. A copy of this document has been served upon Complainant in accordance with Commission regulations.

Sincerely,



Jeremy V. Farrell
Attorney for Duquesne Light Company

Lauren Woleslagle Rulli
Attorney for Duquesne Light Company

Enclosure

cc: Norbert Sliwinski (w/ enclosure)

LIT:610396-1 014657-158498

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

| | | |
|-------------------------|---|--------------------|
| NORBERT SLIWINSKI, | : | |
| | : | |
| Complainant, | : | |
| | : | |
| vs. | : | No: C-2016-2559985 |
| | : | |
| DUQUESNE LIGHT COMPANY, | : | |
| | : | |
| Respondent. | : | |

PRELIMINARY OBJECTIONS

Pursuant to 52 Pa. Code. § 5.101, Duquesne Light files its Preliminary Objections to the Formal Complaint filed by Complainant Norbert Sliwinski:

1. Duquesne Light seeks to dismiss this Formal Complaint filed by its customer who wishes to opt out of Duquesne Light's smart meter program. A smart meter has not yet been installed at Complainant's residence, yet his reason for wishing to opt out of the program is due to his perceived health and safety concerns that may occur once the smart meter is installed. Complaint, ¶¶ 4-5. The Commission has already determined (on many occasions) that such complaints are legally insufficient because smart meter programs like Duquesne Light's are mandatory under Pennsylvania law.

2. Preliminary objections may be filed for "legal insufficiency of a pleading." 52 Pa. Code § 5.101(a)(4). "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." Drake v. Pennsylvania Electric Co., Docket No. C-2014-2413771, 2014 WL 2003281 at *1 (Pa. P.U.C. May 7, 2014) (Salapa, ALJ).

3. Section 703(b) of the Public Utility Code allows the Commission to dismiss any complaint without a hearing if, in its opinion, a hearing is not necessarily in the public interest. 66 Pa. C.S. § 703(b). See also, Campisi v. PECO Energy Co., Docket No. 2014-2434501, 2014 WL 4644282 at *1 (Pa. P.U.C. Sept. 3, 2014) (Salapa, ALJ) (“The provision at 52 Pa. Code § 5.101(a)(4) serves judicial economy by avoiding a hearing where no factual dispute exists.”).

4. Even accepting as true all well-pleaded material facts and reasonable inferences, the Complaint does not raise a violation of the Public Utility Code, Commission Order or regulation, or any Commission-approved tariff. It is, therefore, legally insufficient.

5. Act 129 of 2008 directed Duquesne Light and other EDCs to file smart meter procurement and installation plans with the Commission, which Duquesne Light did. On May 6, 2013, at Docket No. M-2009-2123948, the Commission approved Duquesne Light’s smart meter procurement and installation plan. Thus, by planning to install a smart meter at Complainant’s residence, Duquesne Light is *complying* with the Commission’s directives, which renders the Formal Complaint legally insufficient. See Campisi, supra (granting preliminary objections for legal insufficiency where the complainant sought to opt out of PECO’s smart meter program) (citing additional cases).

6. Section 2807 of the Public Utility Code provides:

(f) Smart meter technology¹ and time of use rates.

* * *

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

¹ The Commission defines “smart meter technology” as “technology, including metering technology and network communications technology capable of bidirectional communication that records electricity usage on at least an hourly basis, including related electric distribution system upgrades to enable the technology.” 66 Pa. C.S. § 2807(g).

- (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).

7. The Commission has ruled that “[t]he use of the word ‘shall’ in the statutes indicates the General Assembly’s direction that all customers will receive a smart meter.” Evans v. PECO Energy Co., Docket No. C-2013-2368477, 2013 WL 7019103 at *3 (Pa. P.U.C. Dec. 19, 2013) (Hoyer, ALJ) (emphasis added). Likewise, the Commission Implementation Order relating to the installation of smart meters provides: “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.’***” Id. (quoting Smart Meter Procurement and Installation Implementation Order, Docket No. M-2009-2092655 (entered June 24, 2009)) (emphasis added).

8. Simply put, “there is no provision in the statute that allows customers to ‘opt out’ of smart meter installation, as Complainants desire.” Evans, 2013 WL 7019103 at *3. See also, Francis v. PECO Energy Co., Docket No. C-2014-2451351, 2015 WL 5011620 at *7 (Pa. P.U.C. August 20, 2015) (noting that “there is no provision in the Code, the Commission’s Regulations, or Commission Orders that permits a customer to opt out of having a smart meter installed on his or her premises.”); Povacz v. PECO Energy Co., Docket NO. C-2012-2317176, 2013 WL 392699 (Pa. P.U.C. Jan. 24, 2013).

9. In light of the foregoing precedent, the Commission routinely dismisses as legally insufficient cases like the instant one filed by customers who oppose the installation of smart meters. See, e.g., Campisi, supra (collecting cases); Evans, supra.

10. For example, in Evans, supra, the complainants wanted to opt out of PECO's smart meter program "because they believe smart meters are not safe and could potentially cause a fire." Id. at *1. Relying on the mandatory language of Section 2807, ALJ Hoyer ruled:

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 Complainants in this case are unable to demonstrate that PECO has violated the Public Utility Code, any Commission Order or regulation, or any Commission-approved tariff. The complaint here is legally insufficient and must be dismissed.

Id. at *3.

11. Similarly in Campisi, supra, ALJ Salapa granted PECO's preliminary objections and dismissed as legally insufficient a formal complaint filed by a customer who did not want a smart meter installed at her residence. In pertinent part, ALJ Salapa noted: "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." Id. The ruling further provides:

Because Act 129 of 2008 and the Commission's orders authorize the Respondent to develop and implement a smart meter procurement and installation plan, and impose a smart meter charge on its customers to pay for that development, implementation, procurement and installation and do not allow a customer to opt out of having a smart meter installed, the Complainant has not set forth in her complaint any act done by the Respond that violates a Commission regulation, statute, order.

Id. See also, Drake v. Pennsylvania Electric Co., Docket No. C-2014-2413771, 2014 WL 2003281 at *1 (Pa. P.U.C. May 7, 2014) (Salapa, ALJ), (dismissing the complaint of a customer who wanted to opt out of the company's smart meter program due to privacy and safety concerns); Negley v. Metropolitan Edison Co., Docket No. C-2010-2205305 (Initial Decision Jan. 3, 2011) (Colwell, ALJ) (ruling that the Commission regulations relating to smart meter

plans did not exempt any customers from the plans or empower the Commission to allow customers to opt out of having smart meters installed at their residence); Lutherschmidt v. Metropolitan Edison Co., Docket No. C-2010-2200353 (Initial Decision Jan. 3, 2011) (Weismandel, ALJ) (same).

12. Duquesne Light's installation of smart meters is consistent with, and not a violation of, the Code and Commission regulations and orders. See Povacz v. PECO Energy Co., Docket NO. C-2012-2317176, 2013 WL 392699 (Pa. P.U.C. Jan. 24, 2013).

13. For those reasons, the Formal Complaint is legally insufficient and must be dismissed in accordance with Commission precedent.

WHEREFORE, Duquesne Light Company respectfully requests that the Commission sustain its Preliminary Objections and dismiss the Complaint with prejudice without a hearing.

Respectfully submitted,

TUCKER ARENSBERG, P.C. *



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