

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Nancy Russell	:	
	:	
v.	:	C-2016-2564297
	:	
PECO Energy Company	:	

**INITIAL DECISION SUSTAINING PRELIMINARY OBJECTION  
AND DISMISSING COMPLAINT**

Before  
David A. Salapa  
Administrative Law Judge

**INTRODUCTION**

A customer filed a complaint against her electric utility alleging that the utility is attempting to install a new smart meter at her residence that she does not want. This decision dismisses the complaint because the utility is complying with relevant Commission statutes, regulations and orders by attempting to install the smart meter at the customer's residence.

**HISTORY OF THE PROCEEDING**

On August 25, 2016, Nancy Russell (Complainant) filed a complaint with the Pennsylvania Public Utility Commission (Commission) against PECO Energy Company (Respondent). The complaint alleges that the Respondent is threatening to shut off the Complainant's service. The complaint further alleges that the Respondent is attempting to install a smart meter at the Complainant's residence that the Complainant does not want. Attached to the complaint is a document setting forth the Complainant's reasons for objecting to the smart meter installation.

The document alleges that the Respondent's attempt to install a smart meter at the Complainant's residence is unlawful. The document contends that there are numerous health risks that would arise from installation of a smart meter in the Complainant's residence. The document alleges that there are numerous other risks that would arise from installation of a smart meter at the Complainant's residence, including loss of privacy, fire risk and personal safety. The complaint requests that the Commission prohibit the Respondent from installing a smart meter at the Complainant's residence.

On September 8, 2016, the Respondent filed an answer. The answer admits that the Respondent provides electric service to the Complainant at the address shown on the complaint and that it has attempted to install a smart meter at the Complainant's residence. The answer alleges that the Respondent contacted the Complainant advising her of the smart meter installation. According to the answer, the Complainant refused to allow the smart meter to be installed.

As a result of the Complainant's refusal, the Respondent is attempting to terminate the Complainant's service. The answer alleges that the Respondent may terminate the Complainant's service for failure to permit access to install the smart meter. The answer requests that the Commission dismiss the complaint.

Also on September 8, 2016, 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 complaint is requesting that the Complainant be allowed to opt out of having a smart meter installed at her residence. The preliminary objections allege that the Complainant may not opt out of having a smart meter installed at her residence. The preliminary objections state that the Respondent is required by statute and Commission order to install smart meters throughout its service territory.

The preliminary objections state that Act 129 of 2008 directed the Respondent and other electric distribution companies (EDCs) to file smart meter deployment plans with the

Commission. The Respondent filed a smart meter deployment plan with the Commission. The Commission approved the Respondent's smart meter procurement and installation plan.

The preliminary objections contend that the Respondent is required to install smart meters throughout its service territory, pursuant to the Commission's order. The preliminary objections contend that the complaint fails to state a claim that the Respondent has violated a provision of the Public Utility Code, Commission regulation, Commission order or any provision in its tariff. Therefore, the complaint has failed to state a claim upon which relief can be granted. The preliminary objections request that the Commission dismiss the complaint.

On September 12, 2016, the Complainant filed a response to the Respondent's preliminary objections. The response generally reiterates the allegations in the Complainant's complaint.

By notice dated November 1, 2016, the Commission notified the parties that it had assigned the case to me as motion judge. The preliminary objections are ready for decision. For the reasons set forth below, I will sustain the preliminary objections and dismiss the complaint.

#### FINDINGS OF FACT

1. The Complainant in this case is Nancy Russell.
2. The Respondent in this case is PECO Energy Company.
3. On August 25, 2016, the Complainant filed a complaint with the Commission against the Respondent.
4. The Respondent filed an answer on September 8, 2016.
5. On September 8, 2016, the Respondent filed preliminary objections.

6. On September 12, 2016 the Complainant filed a response to the Respondent's preliminary objections.

### DISCUSSION

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 or its tariff provisions. I agree.

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 preliminary objection 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.Cmwlt. 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.Cmwlt. 1989); Lehigh Valley Power Committee v. Pa. Pub. Util. Comm'n, 563 A.2d 548 (Pa.Cmwlt. 1989); S.M.E. Bessemer Cement, Inc. v. Pa. Pub. Util. Comm'n, 540 A.2d 1006 (Pa.Cmwlt. 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 Respondent is threatening to shut off her service. The Complainant does not want a smart meter installed at her residence but rather wants to opt out of having a smart meter installed at her residence.

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 agree.

In order to be legally sufficient, a complaint must set forth “A clear and concise statement of the act or omission being complained of...” 52 Pa.Code § 5.22(a)(5). 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. Rather, the Respondent is complying with relevant statutes, regulations and orders.

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. The Commission approved the Respondent’s smart meter procurement and installation plan. The Respondent is therefore complying with the Commission’s directives by attempting to install the 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, she held 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. Weisman del dismissed a complaint opposing installation of a smart meter for legal insufficiency, adopting ALJ Colwell's reasoning. By Commission final order entered March 25, 2011, ALJ Weisman del's Initial Decision became final without further Commission action. The Commission has continued to uphold installation of smart meters and imposition of smart meter charges on customers' bills by dismissing complaints opposing installation of smart meters and imposition of smart meter charges on the basis of legal insufficiency. Corbett v. Pennsylvania Power Company, Docket No. C-2011-2219898 (Final Order entered May 27, 2011); Jones v. Metropolitan Edison Company, Docket No. C-2011-2224380 (Final Order entered June 28, 2011); Griffin v. Metropolitan Edison Company, Docket No. C-2012-2300172 (Final Order entered July 31, 2012); Brake v. West Penn Power Company, Docket No. C-2013-2367308 (Opinion and Order entered November 14, 2013); Drake v. Pennsylvania Electric Company, Docket No. C-2014-2413771 (Final Order entered June 12, 2014); Efaw v West Penn Power Company, Docket No. C-2014-2413744 (Final Order entered June 12, 2014), Siemion v PECO Energy Company, Docket No. C-2015-2493952 (Final Order entered October 21, 2015), Schoefer v PECO Energy Company, Docket No. C-2015-2497438 (Final Order entered November 6, 2015), White v Pennsylvania Electric Company, Docket No. C-2016-2553449 (Final Order entered October 5, 2016).

Concerning the alleged adverse health effects of smart meters, the Commission in Kreider v PECO Energy Company, Docket No. P-2015-2495064 (Opinion and Order entered September 3, 2015) (Kreider), issued a decision on a petition for interlocutory review allowing a consumer to raise in a hearing the health effects she has experienced after a smart meter was installed at her residence. The Commission in Kreider distinguished the facts in that case from its previous decisions cited above. The Commission reasoned that because the consumer's complaint alleged specific physical symptoms caused by installation of the smart meter at her residence, it differed from the cases cited above and required a different result. The Commission

in Kreider emphasized that its decision in that case was not intended to create a broad reaching precedent.

In this case, the complaint does not allege that the Respondent has installed a smart meter at the Complainant's residence. The complaint does not allege that a smart meter has caused the Complainant to experience adverse health effects, let alone specific physical symptoms. Since the complaint in this case does not allege that the Respondent installed a smart meter at the Complainant's residence and does not allege that the Complainant has suffered specific physical symptoms resulting from the installation of a smart meter, Kreider is not applicable to this case.

Concerning the alleged unsafe conditions created by smart meters, the Commission in Feldman v. PECO Energy Company, Docket No. C-2014-2442308 (Opinion and Order entered November 19, 2015) (Feldman) addressed a complaint opposing installation of a smart meter at the complainant's residence and alleging unsafe conditions created by smart meters. In Feldman, the Commission dismissed the complaint but referred the complainant's safety concerns about smart meters to the Commission's Bureau of Investigation and Enforcement (I&E) for whatever action it deemed appropriate. The Commission also referred the Complainants' safety concerns about smart meters to I&E for whatever action it deemed appropriate in Colbert v PECO Energy Company, Docket No. C-2015-2515607 (Opinion and Order entered June 30, 2016) (Colbert). I will follow the Commission's decisions in Feldman and Colbert and refer the Complainant's safety concerns to I&E.

Concerning the Respondent's attempts to terminate the Complainant's service, the Commission has previously ruled that the Respondent may terminate a customer's service where the customer has failed to provide the Respondent access to its meter and equipment. In Larson v. PECO Energy Company, Docket No. C-2014-2451754 (Opinion and Order entered June 11, 2015) (Larson) the Commission held that the customer's request to avoid termination of his service for his failure to provide the Respondent with access to its meter and equipment was legally insufficient. The Commission ruled in Larson that the Respondent could terminate the

customer's service and that the ALJ properly granted the Respondent's preliminary objections and dismissed the customer's complaint as legally insufficient.

The Commission's decisions cited above are controlling on the outcome of this case. Act 129 of 2008 and the Commission's orders authorize the Respondent to develop and implement a smart meter deployment plan and impose a smart meter charge on its customers to pay for that deployment. Neither Act 129 of 2008 nor the Commission's order allow a customer to opt out of having a smart meter installed. If a customer refuses to provide the Respondent with access to its meter and equipment to install a smart meter, the Respondent may terminate the customer's service.

Therefore, the Complainant has not set forth in his complaint any act done by the Respondent that violates a Commission regulation, statute or order. The Respondent is authorized to install smart meters and impose a charge on its customers to develop and implement a smart meter procurement and installation plan that will lead to the installation of smart meters throughout its service territory. The Respondent is authorized to terminate the Complainant's service if the Complainant refuses to provide the Respondent with access to its meter and equipment to install the smart meter.

Since the Complainant's complaint does not set forth any violation of a Commission regulation, statute or order, it is legally insufficient. I will sustain the Respondent's preliminary objection and enter the following order.

#### CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the parties and the subject matter of this dispute. 66 Pa.C.S. § 701.

2. The Complainant's complaint fails to state a claim upon which relief can be granted. 52 Pa.Code § 5.101(a)(4).

3. It is just, reasonable and in the public interest that the complaint filed at Docket No. C-2016-2564297 be dismissed. 52 Pa.Code § 5.21 (d).

ORDER

THEREFORE,

IT IS ORDERED:

1. That the preliminary objections filed by PECO Energy Company at Docket No. C-2016-2564297 are sustained.
2. That the complaint of Nancy Russell at Docket No. C-2016-2564297 against PECO Energy Company is dismissed with prejudice.
3. That the public safety concerns raised by Nancy Russell are referred to the Bureau of Investigation and Enforcement for whatever action it deems necessary.
4. That the docket at Docket No. C-2016-2564297 is marked closed.

Date: November 4, 2016

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/s/  
David A. Salapa  
Administrative Law Judge