

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Nancy Colbert

v.

PECO Energy Company

:
:
:
:
:

C-2016-2561993

ORDER
DENYING MOTION FOR JUDGMENT ON THE PLEADINGS
AND TRANSFERRING CASE TO OFFICE OF SPECIAL ASSISTANTS

On August 8, 2016, Nancy Colbert filed a complaint with the Pennsylvania Public Utility Commission (Commission) against PECO Energy Company (PECO). The complaint makes an allegation of corruption, and cites to a prior complaint Ms. Colbert filed against PECO at Docket No. C-2015-2515607. Attached to the complaint is a copy of a letter dated July 7, 2016, sent to Ms. Colbert by the Commission's Secretary's Bureau, concerning a letter Ms. Colbert sent to the Commission dated July 4, 2016, which the Secretary's Bureau rejected due to Ms. Colbert's failure to comply with the Commission's regulations for filing. The July 7, 2016 Secretarial Letter included instructions for filing a petition for reconsideration and for filing a petition for recession or amendment.

In response to the complaint, PECO filed an answer with new matter on September 6, 2016, properly accompanied by a notice to plead. The answer denies all material allegations of the instant complaint. The answer further indicates that the Commission recently denied and dismissed Ms. Colbert's prior complaint objecting to the installation of a smart meter at her residence at Docket No. C-2015-2515607, generally overruled Ms. Colbert's Exceptions, and upheld Administrative Law Judge (ALJ) David A. Salapa's Initial Decision dismissing the prior complaint because Ms. Colbert did not set forth any violation of a Commission regulation,

statute or order, and was therefore legally insufficient.¹ PECO avers that the instant complaint is an attempt by Ms. Colbert to re-litigate the prior complaint, and therefore should be dismissed as set forth in PECO's new matter.

The new matter states that the instant complaint is barred by the doctrine of res judicata and must be dismissed with prejudice. The new matter reviews the history of the prior complaint in which Ms. Colbert alleged that she does not want a smart meter installed at her property because she believes it is an invasion of her privacy and a violation of constitutional law. In the prior complaint, Ms. Colbert also stated that she believes that smart meters cause fires and pose a risk of identity theft. The prior complaint was dismissed by the Commission by Opinion and Order on June 30, 2016. The new matter further claims that PECO is required by Act 129 to install smart meters and that there is no opt-out for smart meter installation. The new matter states that Ms. Colbert filed the instant complaint to delay installation of a smart meter. The new matter requests that the instant complaint be dismissed.

Ms. Colbert filed a response to the new matter on September 19, 2016. Ms. Colbert alleges that she was denied notice and opportunity to participating at the "public hearing" regarding her prior complaint on June 30, 2016. Ms. Colbert also disputes PECO's characterization of events concerning the instant complaint in new matter. Ms. Colbert further argues that the Commission improperly claims the authority to interpret Act 129. Ms. Colbert requests that the Commission provide her a form to complete a petition for reconsideration.

On September 27, 2016, PECO filed a motion for judgment on the pleadings (motion), properly accompanied by a notice to plead. The motion reiterates the allegations in the new matter and notes that no smart meter has been installed at Ms. Colbert's residence. The motion states that Ms. Colbert is barred by the doctrine of res judicata because all of the allegations raised in the instant complaint were previously raised by Ms. Colbert in the prior complaint, which was dismissed. The motion notes that Ms. Colbert's prior complaint was reviewed by ALJ Salapa, who issued an initial decision dismissing the prior complaint. In

¹ See, Nancy and Jim Colbert v. PECO Energy Company Docket Number C-2015-2515607 (Opinion and Order entered June 30, 2016). The Order adopted Ms. Colbert's exception to correct a procedural error articulated in a finding of fact in the Initial Decision.

response to Ms. Colbert's exceptions, the Commission reviewed ALJ Salapa's initial decision complaint and issued an Opinion and Order upholding the initial decision and dismissing the prior complaint. The motion contends that Ms. Colbert has therefore had an opportunity to be heard and, because the instant complaint asserts the same factual and legal basis for the prior complaint, which was dismissed, she should not be permitted to attempt to re-litigate the prior complaint here. In sum, the motion claims that PECO is entitled to judgment as a matter of law on the pleadings, and requests that the Commission sustain the motion and dismiss the instant complaint with prejudice.

On October 11, 2016, Ms. Colbert filed a response to the motion, signed by both Nancy and James Colbert. Ms. Colbert states that she had not planned to file another complaint with the Commission, but resorted to using a formal complaint form because the Commission did not attach a petition for reconsideration form to its Opinion and Order for her to complete. Ms. Colbert therefore states that the new docket and allegations of res judicata are "inappropriate and unnecessary." Ms. Colbert again raises the issue of her allegedly being denied notice and opportunity to be heard regarding the prior complaint at the June 30, 2016 public meeting. Ms. Colbert emphasizes that PECO has misrepresented the content of Ms. Colbert's response to new matter. Ms. Colbert also states that she purposely did not file exceptions to the ALJ's initial decision to the prior complaint, but claimed via letter to the Commission dated January 14, 2016 that the "/s/" on the signature line renders ALJ Salapa's initial decision unofficial and invalid. Ms. Colbert also asserts that she has never made a claim of damages, and that she has had the same meter since 2003. In conclusion, Ms. Colbert reiterates that she wants an in person hearing for the disposition of the prior and instant complaints.

On January 18, 2017, a motion judge assignment notice was issued notifying the parties that I had been assigned to the case as motion judge. PECO's motion is ready for decision. For the reasons set forth below, the motion will be denied and the matter will be referred to the Commission's Office of Special Assistants for any further action.

The Commission's Rules of Practice and Procedure at 52 Pa.Code § 5.102 govern motions for judgment on the pleadings. Generally, the moving party bears the burden of

showing that no genuine issue of material fact exists and that it is entitled to a judgment as a matter of law. The Commission must view the record in the light most favorable to the non-moving party, giving that party the benefit of all reasonable inferences. First Mortgage Co. of Pennsylvania v. McCall, 459 A.2d 406 (Pa. Super. 1983); Mertz v. Lakatos, 381 A.2d 497 (Pa. Cmwlth. 1978). It must accept as true all well pleaded statements of fact of the non-moving party and consider only those facts that the non-moving party specifically admits. Weik v. Estate of Brown, 794 A.2d 907 (Pa. Super. 2002). All doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. Thomson Coal Company v. Pike Coal Company, 412 A.2d 466 (Pa. 1979).

The Commission will grant a motion for judgment on the pleadings only if the pleadings show there is no genuine issue as to a material fact and that the moving party is entitled to judgment as a matter of law. Only in a case where the moving party's right to prevail is so clear that a trial would be a fruitless exercise should judgment on the pleadings be granted. Williams v. Lewis, 466 A.2d 682 (Pa. Super. 1983); Service Employees International Union, Local 69, AFL-CIO v. The Peoples Natural Gas Company, d/b/a Dominion Peoples, Docket No. C-20028539 (Order entered December 19, 2003). Judgment on the pleadings should be entered only when the case is clear and free from doubt. Reuben v. O'Brien, 496 A.2d 913 (Pa. Super. 1985).

A review of the preliminary pleadings reveals that, when viewed in the light most favorable to Ms. Colbert and giving Ms. Colbert the benefit of all reasonable inferences, PECO's argument that Ms. Colbert's complaint should be dismissed based on the doctrine of res judicata should be rejected. Ms. Colbert's complaint, however, should be referred to the Office of Special Assistants for further action related to the complaint Ms. Colbert filed at docket number C-2015-2515607.

The doctrine of res judicata is designed to promote certainty, finality and judicial economy. It reflects the refusal of the law to tolerate the re-litigation of a matter decided by a court or agency of competent jurisdiction. The courts have repeatedly stated that a "final valid judgment on the merits by a court of competent jurisdiction bars any future suit between the

same parties on the same cause of action." McCarthy, et al. v. Township of McCandless, 7 Pa. Commonwealth Ct. 611, 300 A.2d 815 (1973); Martin v. Poole, 232 Pa. Superior Ct. 263, 177 A.2d 339 (1975). Under res judicata, when a court of competent jurisdiction enters a final judgment on the merits of a cause of action, the parties to that case and their privies are thereafter bound "not only as to every matter which was offered and received, but also as to any other admissible matter which might have been offered." Commission v. Sunnen, 333 U.S. 591, 68 S.Ct. 715, 719 (1948); Jones v. Costlow, 354 Pa. 245, 47 AW. 2d 259 (1946).

For the doctrine to prevail, four conditions must be met: (1) identity of issues, (2) identity of causes of action, (3) identity of persons and parties to the action, and (4) identity of the quality and capacity of the parties suing or sued. Safeguard Mutual Insurance Co. v. Williams, 463 Pa. 567, 345 A.2d 664 (1975) and Day v. Volkswagenwerk Aktiengesellschaft, 318 Pa. Superior Ct. 225, 464 A.2d 1313 (1983); Northwestern Lehigh School District v. Commonwealth of Pennsylvania, Agricultural Lands Condemnation Approval Board, 134 Pa. Commonwealth Ct. 291, 578 A. 2d 614 (1990). The Commonwealth Court stated that, "for the purposes of res judicata, there is identity of causes of action when in both the old and new proceedings, the subject matter and the ultimate issues are the same." Howard v. Department of Public Welfare, 108 Pa. Commonwealth Ct. 592, 529 A.2d 1231 (1987).

Although the Commission's procedural rules do not specifically address the issue, the Commission has adopted this well-settled legal principle. Ella Simms v. Philadelphia Electric Company, Docket No. F-889246 (1988). The Commission has recognized the applicability of the doctrine of res judicata in proceedings before it. O'Toole v. Bell Telephone Company of Pennsylvania, 77 Pa. PUC 98 (1992). Tomazin v. Pennsylvania-American Water Company, 1997 Pa. PUC LEXIS 52 (1997). The Pennsylvania courts have affirmed the Commission's application of the doctrine in the context of utility rate proceedings. Philadelphia Electric Company v. Pennsylvania Public Utility Commission, 433 A.2d 620 (Pa. Cmwlth. 1981); *see also*, Kentucky West Virginia Gas Co. v. Pennsylvania Public Utility Commission, 721 F. Supp. 710 (M.D. Pa. 1989) (acknowledging the role of res judicata and collateral estoppel in administrative proceedings), *affd.*, 899 F. 2d 1217; *see also*, 66 Pa C.S. § 316 ("Whenever the Commission shall make any rule, regulation, finding, determination or order, the same shall be

prima facie evidence of the facts found and shall remain conclusive upon all parties affected thereby, unless set aside, annulled or modified on judicial review.”).

In this case, however, given the facts and circumstances of this matter, it is not appropriate to dismiss Ms. Colbert’s complaint on the basis of res judicata. Rather, as discussed below, it is more appropriate that Ms. Colbert’s complaint be treated as a petition for relief from a Commission action. Section 5.572 of the Commission’s regulations provides:

§ 5.572. Petitions for relief.

(a) Petitions for rehearing, reargument, reconsideration, clarification, rescission, amendment, supersedeas or the like must be in writing and specify, in numbered paragraphs, the findings or orders involved, and the points relied upon by petitioner, with appropriate record references and specific requests for the findings or orders desired.

(b) A copy of every petition covered by subsection (a) shall be served upon each party to the proceeding.

(c) Petitions for reconsideration, rehearing, reargument, clarification, supersedeas or others shall be filed within 15 days after the Commission order involved is entered or otherwise becomes final.

(d) Petitions for rescission or amendment may be filed at any time according to the requirements of section 703(g) of the act (relating to fixing of hearings).

(e) Answers to a petition covered by subsection (a) shall be filed and served within 10 days after service of a petition.

(f) Subsections (a)—(e) supersede 1 Pa. Code § 35.241 (relating to application for rehearing or reconsideration).

52 Pa.Code § 5.572.

The Commission’s June 30, 2016 Opinion and Order at C-2015-2515607 dismissed Ms. Colbert’s prior complaint in its entirety. The Commission determined that the

complaint was legally insufficient and upheld ALJ Salapa's initial decision dismissing the complaint at C-2015-2515607:

We agree with the ALJ's determination to dismiss the Complaint on legal insufficiency grounds. We have held that the express language in Act 129 does not prohibit us from holding a hearing on issues related to the safety of smart meters, consistent with our statutory authority in Section 1501 of the Code, when a legally sufficient claim is present. *Kreider, supra*, at 17. In cases involving smart meter installation, we evaluate the specific allegations made by the complainant under the circumstances in each case and reach a conclusion based on those particular circumstances. See *Susan Kreider v. PECO Energy Company*, Docket No. P-2015-2495064 (Order on Reconsideration entered January 28, 2016), at 21. In this particular case, the Complainants' factual averments fail to implicate a potential violation of the Code, a Commission Order or Regulation, or the Company's tariff. The Complainants have not presented a claim to which they could personally testify that would support a finding that the installation of a smart meter was responsible for any specific safety or health affects they experienced within their home.

Nancy and Jim Colbert v. PECO Energy Company, Docket Number C-2015-2515607 (Opinion and Order entered, June 30, 2016). Given the history of this matter and by filing her second complaint, Ms. Colbert seeks to have the decision regarding her first complaint reconsidered.

Although Ms. Colbert does not indicate that she is requesting reconsideration of the prior complaint in the formal complaint, a review of Ms. Colbert's responses to the new matter and the motion reveals, for example, that:

... puc's FAILURE TO PROVIDE THE "ATTACHED" FORM (and not on its website EITHER) STATED IN ITS JULY 7, 2016 LETTER RE: DOCKET #C-2015-2515607 TO ADDRESS OPINION AND ORDER, PUBLIC MEETING HELD ON 6/30/16 WITHOUT NOTICE TO COMPLAINANT" (Emphasis in original)

Furthermore, Ms. Colbert stated: "Provide the Petition for Reconsideration you say you need, and it will be completed and returned." (Emphasis in original). Ms. Colbert also stated:

As stated above, since we had no intention of starting another docket, but was forced to by the puc which returned our letter affirming our right to a public hearing and required us to complete an “attached” form it did not provide, Nancy filled out the back page of a formal complaint form as the only form available to fulfill its bogus requirement...which puc returned TWICE because it wanted the whole entire form completed, SO IT STARTED A BRAND NEW DOCKET, NOT NANCY. **SO ALL THIS “RES JUDICATA” VERBIAGE IS COMPLETELY INAPPROPRIATE AND UNNECESSARY.**

(Emphasis in original). Ms. Colbert concluded:

Yup, that’s why puc never sent the form they required; they have a “res judicata” excuse that they themselves created and set up to avert factual dispute.

In these excerpts from Ms. Colbert’s responses to the new matter and motion, Ms. Colbert clearly states that she does not intend for the instant complaint to be treated as a new complaint to re-litigate Docket No. C-2015-2515607. In fact, it appears that Ms. Colbert is attempting to file a petition for relief from a final Commission action. Ms. Colbert is under the perception that the Commission has an official form for filing such a petition, and that said form was not provided to her by the Commission. Such a perception is not unreasonable given that the Commission has a formal complaint form that it mails to consumers wishing to file a formal complaint against a utility. In fact, however, the Commission does not have such a form.

The Commission’s regulations allow for liberal construction to “secure the just, speedy and inexpensive determination of every action or proceeding to which it is applicable.” 52 Pa.Code § 1.2(a). The Commission’s regulations further provide that “the Commission or presiding officer at any stage of an action or proceeding may disregard an error defect of procedure which does not affect the substantive rights of the parties.” 52 Pa.Code § 1.2(a). Therefore, a review of the pleadings filed in this case reveals that the instant complaint should be treated as a petition for relief from a final Commission action. Doing so will secure the just, speedy and inexpensive determination of every action or proceeding but not affect PECO’s substantive rights.

The Commission's internal operating procedures require that all petitions for relief from a final Commission order be assigned to the Office of Special Assistants. Therefore, PECO's motion will be denied and the instant complaint will be referred to the Commission's Office of Special Assistants for any action regarding the Commission's June 30, 2016 decision at docket number C-2015-2515607.

ORDER

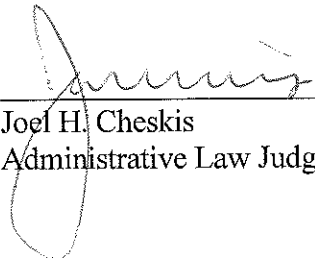
THEREFORE,

IT IS ORDERED:

1. That the motion for judgment on the pleadings filed by PECO Energy Company at Docket No. C-2016-2561993 and dated September 27, 2016 is denied.

2. That the complaint of Nancy Colbert at Docket No. C-2016-2561993 against PECO Energy Company dated August 8, 2016 is referred to the Office of Special Assistants for any further action.

Date: February 8, 2017



Joel H. Cheskis
Administrative Law Judge

C-2016-2561993 - NANCY COLBERT V PECO ENERGY COMPANY

NANCY COLBERT
142 PENNSYLVANIA AVENUE
PHOENIXVILLE PA 19460
610.917.1116

SHAWANE L LEE ESQUIRE
PECO ENERGY COMPANY
2301 MARKET STREET S23-1
PO BOX 8699
PHILADELPHIA PA 19101-8699
215.841.6841
Accepts e-Service