

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Glenn DeHaven	:	
	:	
v.	:	C-2017-2585680
	:	
PECO Energy Company	:	

INITIAL DECISION
GRANTING PRELIMINARY OBJECTION AND DISMISSING COMPLAINT

Before
Joel H. Cheskis
Administrative Law Judge

INTRODUCTION

This decision dismisses a complaint filed against an electric distribution company by a customer who seeks to have transferred back to his tenants' account an amount he was charged for usage incurred by his tenants that was transferred to his account after foreign load was found at the service address. Even when accepting as true all well pleaded material facts in the complaint, as well as every reasonable inference from those facts, and viewing the complaint in the light most favorable to the complainant, it is clear that the complainant is not entitled to relief under any circumstances as a matter of law. As a result, the preliminary objections filed by the company will be granted and the complaint will be dismissed.

HISTORY OF THE PROCEEDING

On January 11, 2017, Glenn DeHaven filed a formal complaint with the Pennsylvania Public Utility Commission (Commission) against PECO Energy Company, Docket Number C-2017-2585680. In his complaint, Mr. DeHaven averred that PECO billed him for

\$1,800 of electric usage that was accrued by his tenants because foreign load was found at the service address. Mr. DeHaven added that he is not responsible for the bill because electric usage is part of the lease and the disputed usage is associated with a barn, a low voltage dog containment system and a small koi pond. This usage amounts to approximately \$50 per month. Mr. DeHaven requests a thorough investigation regarding how the tenants' usage can be assigned to the landlord's account. Mr. DeHaven attached various documents to his complaint in support of his position that he is not responsible for the foreign load.

The formal complaint was served on PECO electronically by the Commission's Secretary.¹

On February 3, 2017, PECO filed an answer to Mr. DeHaven's complaint. In its answer, PECO affirmed or denied the various averments Mr. DeHaven made in his complaint. In particular, PECO stated that Mr. DeHaven's tenants complained of high bills and possible foreign wiring at the service address. As a result, a PECO technician visited the property and found foreign wiring in a rear barn, fish pond and trough heater connected to the tenants' meter. The tenants' balance of \$1,893.52 was then transferred to Mr. DeHaven's account. PECO provided several attachments to its answer and concluded that the complaint should be dismissed.

Also on February 3, 2017, PECO filed a preliminary objection in response to Mr. DeHaven's complaint. In the preliminary objection, which was accompanied by a notice to plead, PECO argued that the Commission has found that a landlord must pay the utility for any account balance, including arrearages, once a foreign load or wiring has been found. PECO added that, once the foreign load is corrected by the landlord and verified by the utility, the utility will place the account back in the name of the tenant and the arrearage, if any, will remain the landlord's responsibility with any dispute regarding the financial responsibility of the parties being a matter to be resolved in the Court of Common Pleas, not the Commission. PECO

¹ PECO has signed a waiver of the Section 702 requirements for service of formal complaints, 66 Pa.C.S. § 702, and has agreed to electronic service instead under the Commission's Waiver of 702 program. Service is listed in the Audit History of the Commission's docketing system for this case as having been effected on January 25, 2017.

provided significant legal argument in support of its position and concluded that the complaint should be dismissed as a matter of law because it relates to a dispute about the assignment of financial responsibility for a foreign load in a building owned by the complainant. PECO attached a copy of Mr. DeHaven's complaint to its preliminary objection in support of its position that the complaint should be dismissed.

On February 7, 2017, Mr. DeHaven wrote on a copy of the notice to plead that accompanied PECO's preliminary objection that he denies PECO's preliminary objection. Mr. DeHaven provided no other answer to PECO's preliminary objection.

On March 29, 2017, a motion judge assignment notice was issued 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. The preliminary objection filed by PECO is ready for disposition. For the reasons discussed below, PECO's preliminary objection will be granted and the complaint will be dismissed.

FINDINGS OF FACT

1. The Complainant in this case is Glenn DeHaven.
2. The Respondent in this case is PECO Energy Company.
3. The service address is 184 Hibernia Road, Coatesville, PA.
4. On January 11, 2017, Mr. DeHaven filed a formal complaint against PECO.
5. On February 3, 2017, PECO filed an answer to Mr. DeHaven's complaint.
6. On February 3, 2017, PECO filed a preliminary objection in response to Mr. DeHaven's complaint.

7. On February 7, 2017, Mr. DeHaven filed an answer to PECO's preliminary objection.

DISCUSSION

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 Mr. DeHaven and should dismiss the complaint only if it appears that Mr. DeHaven 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, Mr. DeHaven complained that he is not responsible for the high electric bill he received from PECO. He stated that the disputed load was for an upper barn, a low voltage dog containment system and a small koi pond. Mr. DeHaven noted that electric usage for these items are his tenants' responsibility as per the lease and that the total amount of usage is approximately \$50 per month. Mr. DeHaven also complained in his complaint that this agreement was litigated in court and that PECO does not have the ability to override that judgment. Mr. DeHaven requested a thorough investigation of the matter and claimed that he will not be responsible for the disputed foreign load. In its preliminary objection, PECO stated that a technician visited the property in response to a high bill complaint from the tenants and foreign load was found. PECO added that the Commission has held that a landlord must pay the utility for any account balance, including arrearages, once a foreign load or wiring has been found. PECO concluded that Mr. DeHaven's complaint should, therefore, be dismissed.

PECO's preliminary objection will be granted and Mr. DeHaven's complaint will be dismissed because, even when accepting as true all well pleaded material facts in the complaint, as well as every reasonable inference from those facts, and viewing the complaint in the light most favorable to Mr. DeHaven, it is clear that Mr. DeHaven is not entitled to relief under any circumstances as a matter of law. Mr. DeHaven's complaint will, therefore, be dismissed.

To begin, the term “foreign load” refers to utility service which is not related to serving a tenant but for which the tenant is being billed. Santos v. Metropolitan Edison Co., Docket No. C-00967757 (Order entered August 7, 1997). Foreign load occurs when a tenant’s meter registers usage for utility service provided to a dwelling unit or units other than the tenant’s or to a common area of a building such as hallway lighting or to communal laundry room appliances. George W. Kopf, Jr. v. PECO Energy Co., Docket No. C-2012-2332993 (Opinion and Order entered June 13, 2013) (Kopf) at n. 1. Foreign load exists where tenants have a meter and are direct utility customers and where utility service for other tenants or for the landlord is being billed through their meter. David P. Boyce v. Duquesne Light Company, Docket Number Z-00223698 (Opinion and Order entered September 1, 1994) (Boyce); *see also*, 1-A Realty v. Pa. Pub. Util. Comm’n., 63 A.2d 480 (Pa. Cmwlth 2013) (communal street lights in a mobile home park were connected to the electric boxes of the homes of the nearest tenant), Gnana Chinniah v. PPL Electric Utilities Corp., Docket No. F-2012-2325248 (Opinion and Order entered May 9, 2013) (Chinniah) (foreign load was created by a detached storage shed located in the middle of a backyard of a duplex on the boundary between the two properties), and Kopf, supra (the foreign wiring condition related to electric service to common areas in a second floor hallway, basement and outside light of a rental property).

In addition, Section 1529.1 of the Public Utility Code governs the payment of utility services in rental properties. This Section reads as follows:

§ 1529.1. Duty of owners of rental property

(a) Notice to public utility. - It is the duty of every owner of a residential building or mobile home park which contains one or more dwelling units, not individually metered, to notify each public utility from whom utility service is received of their ownership and the fact that the premises served are used for rental purposes.

(b) History of account. - Upon receipt of the notice provided in this section, if the mobile home park or residential building contains one or more dwelling units not individually metered, an affected public utility shall forthwith list the account for the premises in question in the name of the owner, and the owner shall thereafter be responsible for the payment for the utility services

rendered thereunto. In the case of individually metered dwelling units, unless notified to the contrary by the tenant or an authorized representative, an affected public utility shall list the account for the premises in question in the name of the owner, and the owner shall be responsible for the payment for utility services to the premises.

(c) Failure to give notice. - Any owner of a residential building or mobile home park failing to notify affected public utilities as required by this section shall nonetheless be responsible for payment of the utility services as if the required notice had been given.

66 Pa.C.S. § 1529.1. The Commission has established that the presence of "foreign load" prevents a dwelling unit from being deemed "individually metered" as that term is used in Section 1529.1. Boyce, supra.

It is further noted as a preliminary matter that Pennsylvania law is clear that the Commission has no jurisdiction over cases involving disputes between landlords and tenants. The Commission addressed Section 1529.1 in Ace Check Cashing Inc. v. Philadelphia Gas Works, Eddie and Jennifer West, Indispensable Parties, Docket No. C-2008-2056428 (Opinion and Order entered May 21, 2010) (Ace). In Ace, the Commission reversed its then-existing policy in foreign load cases articulated in Afshari v. PPL Electric Utilities Corporation, Docket No. C-20055547 (Order entered April 9, 2008) that allowed a hearing to determine the amount of electric usage attributable to the foreign load. In reversing this policy, the Commission stated:

While the Commission has jurisdiction over the regulation of utility companies and utility service, the Commission does not have jurisdiction to adjudicate every dispute that involves a utility, e.g., personal injury case, discrimination case, etc., and does not have the authority to settle disputes on every contract to which a public utility is a party. Accordingly, the Commission does not have subject matter jurisdiction over a dispute between a property owner and a tenant – two non-utility parties. While such a dispute, arguably, may involve utility rates, when the charges owed to the utility for past service are settled, the only issue to be decided is financial responsibility for the charges. That matter should be handled by the courts.

Ace at 4-5. The Commission added: “The ultimate dispute here is financial responsibility for an established amount of charges for past utility service between a landlord and a tenant. The dispute does not concern the utility or the utility’s service and, therefore, its resolution does not require the Commission’s regulatory expertise.” Id. at 6; *see also*, Edmund V. Corazzini v. UGI Penn Natural Gas, Inc., Docket No. F-2009-2101282 (Opinion and Order entered July 16, 2010) (the landlord may seek damages from his tenant through the courts but that is a private matter that is outside the Commission’s jurisdiction) (Corazzini).

In this case, Mr. DeHaven does not dispute in his complaint that foreign load is present. As he stated in the complaint, “the load disputed was the upper barn, a low voltage dog containment system and a small koi pond on the patio.” These are the type of situations that the Commission has found to constitute foreign load. *See e.g.*, Chinniah, *supra*. Furthermore, Mr. DeHaven attached to his complaint a mailing entitled “Landlords can get tangled up by PECO foreign wiring policies.” Although it is unclear where this mailing came from, since Mr. DeHaven attached it to his complaint, it is clear that he was aware of what foreign wiring is and its impact on a landlord’s responsibility for electric usage at a rental property.

In addition, when viewing every well plead averment in the complaint, as well as every reasonable inference from those averments, and viewing the complaint in the light most favorable to the complainant, it is clear that the matter complained of involves a dispute between a landlord and a tenant over which the Commission does not have jurisdiction, even though the dispute pertains to utility rates. Ace. The ultimate dispute here is financial responsibility for an established amount of charges for past utility service between a landlord and a tenant. Id. The fact that this matter was litigated in common pleas court, as Mr. DeHaven stated in his complaint, further affirms that the Commission has no jurisdiction over this dispute between a landlord and a tenant. PECO acted properly by transferring the disputed amount to Mr. DeHaven and Mr. DeHaven’s proper recourse is through the court of common pleas again. Corazzini.

As noted above, if there is foreign load present, Section 1529 of the Public Utility Code requires the company to transfer the disputed amount to the landlord and resolve any issues

of apportionment of the outstanding amount in a court of common pleas. Even when viewing the complaint in the light most favorable to Mr. DeHaven, it is clear that foreign load is present. As a result, PECO acted correctly in transferring the tenants' account balance to Mr. DeHaven.

Furthermore, it is noted that the amount of electric usage that constitutes the foreign load is irrelevant. The Commission added in Ace that there is "no *de minimus* exception," noting that the reason for the change in policy was to incent the landlord to correct the foreign load situation. Ace at 8. Therefore, Mr. DeHaven's argument that the foreign load constituting only \$50 a month should not make him responsible for the entire \$1,800 bill is irrelevant. Commission precedent requires that the entire balance, including arrearages, be transferred to the landlord. The specific amount of the \$1,800 owed by Mr. DeHaven and the specific amount owed by his tenants is a matter for a court of common pleas. Ace, supra.

Finally, it is noted that Mr. DeHaven did not raise any other issue in his complaint that, even when accepted as true, as well as every reasonable inference, and viewed in the light most favorable to Mr. DeHaven, is sufficient to warrant a hearing on any violation of the Public Utility Code, a Commission order or regulation or a Commission-approved tariff of the company and deny PECO's preliminary objection.

Therefore, even when accepting as true all well pleaded facts in the complaint, as well as every reasonable inference from those facts, and viewing the complaint in the light most favorable to Mr. DeHaven, it is clear that Mr. DeHaven is not entitled to relief under any circumstances as a matter of law. As a result, PECO's preliminary objection will be granted and the complaint will, therefore, be dismissed.

CONCLUSIONS OF LAW

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

2. 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.

3. 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).

4. 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; or (7) standing of a party to participate in a proceeding. 52 Pa.Code § 5.101(a)(1)-(7).

5. 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. Cmwlt. 1988).

6. For purposes of disposing of preliminary objections, 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. Interstate Traveler Services, Inc. v. Commonwealth, Department of Environmental Resources, 406 A.2d 1020 (Pa. 1979).

7. "Foreign load" refers to utility service which is not related to serving a tenant but for which the tenant is being billed. Santos v. Metropolitan Edison Co., Docket No. C-00967757 (Order entered August 7, 1997).

8. Foreign load occurs when a tenant's meter registers usage for utility service provided to a dwelling unit or units other than the tenant's or to a common area of a building such as hallway lighting or to communal laundry room appliances. George W. Kopf, Jr. v. PECO Energy Co., Docket No. C-2012-2332993 (Opinion and Order entered June 13, 2013) at n. 1.

9. Foreign load exists where tenants have a meter and are direct utility customers and where utility service for other tenants or for the landlord is being billed through their meter. David P. Boyce v. Duquesne Light Company, Docket Number Z-00223698 (Opinion and Order entered September 1, 1994); *see also*, 1-A Realty v. Pa. Pub. Util. Comm'n., 63 A.2d 480 (Pa. Cmwlth 2013), Gnana Chinniah v. PPL Electric Utilities Corp., Docket No. F-2012-2325248 (Opinion and Order entered May 9, 2013).

10. The presence of "foreign load" prevents a dwelling unit from being deemed "individually metered" as that term is used in Section 1529.1 of the Public Utility Code. David P. Boyce v. Duquesne Light Company, Docket Number Z-00223698 (Opinion and Order entered September 1, 1994).

11. Pennsylvania law is clear that the Commission has no jurisdiction over cases involving disputes between a landlord and a tenant. Ace Check Cashing Inc. v. Philadelphia Gas Works, Eddie and Jennifer West, Indispensable Parties, Docket No. C-2008-2056428 (Opinion and Order entered May 21, 2010).

12. Even when accepting as true all well pleaded material facts in the complaint, as well as every reasonable inference from those fact, and viewing the complaint in the light most favorable to Mr. DeHaven, it is clear that Mr. DeHaven would not be entitled to relief under any circumstances as a matter of law and his complaint should be dismissed. 52 Pa.Code § 5.101.

ORDER

THEREFORE,

IT IS ORDERED:

1. That the preliminary objection filed by PECO Energy Company at Docket Number C-2017-2585680 on February 3, 2017 is hereby granted.
2. That the formal complaint filed by Glenn DeHaven against PECO Energy Company at Docket Number C-2017-2585680 dated January 11, 2017 is hereby dismissed.
3. That this matter be marked closed.

Date: April 3, 2017

_____/s/_____
Joel H. Cheskis
Administrative Law Judge