

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Ryan Ingham	:	
	:	
v.	:	C-2016-2579564
	:	
PECO Energy Company	:	

INITIAL DECISION

Before
Darlene D. Heep
Administrative Law Judge

The Complainant filed a Complaint seeking postponement of shut off to seek legal counsel and options to prevent smart meter installation. PECO filed a Preliminary Objection, contending that PECO seeks to install the meter in accordance with the law and therefore the Complaint is legally insufficient and should be dismissed. For the reasons stated below, the preliminary objection is sustained and the Complaint is dismissed.

HISTORY OF THE PROCEEDING

On December 9, 2016, Ryan Ingham (Complainant) filed a formal Complaint against PECO Energy Company (PECO or respondent) with the Pennsylvania Public Utility Commission (Commission). In the Complaint, the Complainant placed a checkmark in the box marked “[t]he utility is threatening to shut off my service or has already shut off my service” and added the following explanation: “PECO threatening shut off due to refusing smart meter. I am simply asking for the shut off to be postponed until my attorney gets in touch with the appropriate counsel.”

In the request for relief, Complainant stated:

I received a 10-day shut off notice for refusing a smart meter. I would like the shut off postponed until my attorney can address the issue with the appropriate counsel. Given the fact that there is pending legislation to allow PA residents to opt out of the smart meter program (HB 394), I am exploring my legal options to prevent a smart meter from being installed.

On December 14, 2016, PECO filed an Answer denying the material allegations of the Complaint.

On December 15, 2016, PECO filed a Preliminary Objection to the Complaint. In the Preliminary Objection, PECO argued that the Complaint should be dismissed under 52 Pa.Code § 5.101(a)(4) for legal insufficiency. Specifically, PECO averred that the Complainant wants to opt out of smart meter installation, but that an opt out is not available under any controlling authority. PECO contended that an opt out is not provided for under PECO's smart meter installation plan¹ that was approved by the Commission,² under Act 129 of 2008 (Act 129) under which PECO's smart meter plan was compelled, or under the Commission's June 18, 2009 Order establishing standards for which each electric distribution company (EDC) with more than 100,000 customers must file smart meter technology procurement and installation plans.³

PECO also averred in support of its Preliminary Objection that the General Assembly has not acted on draft legislation that would permit a customer to opt out of smart meter installation. PECO also referenced several Commission Orders in which complaints against smart meter installation were dismissed upon preliminary objection.⁴ PECO endorsed its

¹ See *Petition of PECO Energy Company for Approval of its Smart Meter Technology Procurement and Installation Plan*, Docket No. M-2009-2123944 (Smart Meter Plan).

² See *Petition of PECO Energy Company for Approval of its Smart Meter Technology Procurement and Installation Plan*, Docket No. M-2009-2123944 (Order entered May 6, 2010) (*PECO Smart Meter Plan Order*).

³ See *Smart Meter Procurement and Installation*, Docket No. M-2009-2092655 (Implementation Order entered June 24, 2009) (*Smart Meter Procurement and Installation Order*).

⁴ See *Maria Povacz v. PECO Energy Company*, Docket No. C-2012-2317176 (Order entered January 24, 2013); *Theresa Gavin v. PECO Energy Company*, Docket No. C-2012-2325258 (Order entered January 24, 2013); *Jeff Morgan v. PECO Energy Company*, Docket No. C-2013-2356606 (Final Order entered July 23, 2013); *Thomas McCarey v. PECO Energy Company*, Docket No. C-2013-2354862 (Final Order entered

Preliminary Objection with a Notice to Plead. Complainant's response was due on or before January 4, 2017.

The complainant has not filed a response to PECO's Preliminary Objection.

By Motion Judge Assignment Notice, the matter was assigned to the undersigned and received on May 22, 2017.

This matter is ripe for a decision. For the reasons set forth below, PECO's Preliminary Objection is granted, and the Complaint is dismissed.

FINDINGS OF FACT

1. The Complainant in this proceeding is Ryan Ingham.
2. The Respondent in this proceeding is PECO Energy Company.
3. The Complainant resides at 213 Brownbacks Church Road, Spring City 19475, the service address.
4. The Complainant refused installation of a PECO Smart Meter at the service address.
5. On December 15, 2016, PECO filed a Preliminary Objection to the Complaint.
6. Complainant did not file a response to the Preliminary Objection.

September 26, 2013); *Renney Thomas v. PECO Energy Company*, Docket No. C-2012-2336225 (Final Order entered December 31, 2013); *Ellen Donnelly v. PECO Energy Company*, Docket No. F-2013-2330663 (Final Order entered March 18, 2014); and *Gerald H. Smith v. PECO*, Docket No. C-2014-2443198 (Final Order entered April 23, 2015).

DISCUSSION

Section 5.101 of Commission regulations, 52 Pa.Code § 5.101, sets forth the grounds for granting preliminary objections. That section provides as follows:

§ 5.101. Preliminary objections.

(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 the proceeding.

52 Pa.Code § 5.101(a).

Commission procedure regarding the disposition of preliminary objections is similar to the procedure utilized in Pennsylvania civil practice. A preliminary objection in civil practice seeking dismissal of a pleading will be granted only where relief is clearly warranted and free from doubt. *Interstate Traveller Services, Inc. v. Pa. Dep't of Environmental Resources*, 486 Pa. 536, 406 A.2d 1020 (1979). The moving party may not rely on its own factual assertions, but must accept for the purposes of disposition of the preliminary objection all

well-pleaded, material facts of the other party, as well as every inference fairly deducible from those facts. *County of Allegheny v. Commonwealth of Pa.*, 507 Pa. 360, 490 A.2d 402 (1985). The preliminary objection may be granted only if the moving party prevails as a matter of law. *Rok v. Flaherty*, 527 A.2d 211 (Pa.Cmwlth. 1987). Any doubt must be resolved in favor of the non-moving party by refusing to sustain the preliminary objections. *Dep't. of Auditor General, et al. v. State Employees' Retirement System, et al.*, 836 A.2d 1053, 1064 (Pa. Cmwlth. 2003) (citing *Boyd v. Ward*, 802 A.2d 705 (Pa. Cmwlth. 2002)).

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). Further, a complainant must be able to recover under law to survive a preliminary objection. *Milliner v. Enck*, 709 A. 2nd 417, 418 (Pa. Super. Ct. 1998); 66 Pa. C.S.A. § 701.

Act 129 of 2008 (“the Act” or “Act 129”) required electric distribution companies (“EDCs”) to file Smart Meter technology procurement and installation plans with the Commission for approval. The Act provided:

(f) *Smart Meter technology and time of use rates.*

(1) Within nine months after the effective date of this paragraph, electric distribution companies shall file a Smart Meter technology procurement and installation plan with the commission for approval. The plan shall describe the Smart Meter technologies the electric distribution company proposes to install in accordance with paragraph (2).

(2) Electric distribution companies shall furnish Smart Meter technology as follows:

(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).

On June 18, 2009, the Commission ordered EDCs with greater than 100,000 customers to adhere to the guidelines established for Smart Meter technology procurement and installation. The Commission also ordered EDCs to file a Smart Meter technology procurement and installation plan.⁵ Accordingly, PECO developed a Smart Meter installation plan⁶ that was approved by the Commission.⁷ Under that plan, PECO is replacing AMR⁸ meters with AMI⁹ or “Smart Meters.”

In the Complaint, Mr. Ingham stated that he would like a postponement of the shut off of his service. He received a shut-off notice from PECO after he refused Smart Meter installation. As relief, he is seeking postponement of the shut-off until he consults with an attorney.

Accepting all averments in the Complaint and allowing every inference fairly deducible from those averments, PECO’s Preliminary Objection should be sustained.

In 2013, the Commission determined that there is no provision in the Code, the Commission’s Regulations or Orders that allows a PECO customer to “opt out” of smart installation (*See Maria Povacz v. PECO Energy Company*, Docket No. C-2012-2317176 (Order and Opinion entered January 24, 2013)). Complainant refused to allow installation of a Smart Meter at the service address and PECO issued shut off notice as provide under its tariff.

⁵ See *Smart Meter Procurement and Installation*, Docket No. M-2009-2092655 (Implementation Order entered June 24, 2009) (*Smart Meter Procurement and Installation Order*).

⁶ See *Petition of PECO Energy Company for Approval of its Smart Meter Technology Procurement and Installation Plan*, Docket No. M-2009-2123944 (Smart Meter Plan).

⁷ See *Petition of PECO Energy Company for Approval of its Smart Meter Technology Procurement and Installation Plan*, Docket No. M-2009-2123944 (Order entered May 6, 2010) (*PECO Smart Meter Plan Order*).

⁸ AMR is an acronym for “automatic meter reading.”

⁹ AMI is an acronym for “advanced metering infrastructure.”

Respondent is attempting to comply with the Commission's directives by attempting to install a smart meter at the property. Section 18.3 of PECO's Commission-approved tariff provides that the Company may terminate on reasonable notice if entry to the meter is refused, or if access to the meter is obstructed or hazardous. Specifically, PECO's tariff provides:

The Company may terminate on reasonable notice if entry to the meter or meters is refused or if access thereto is obstructed or hazardous; or if utility service is taken without the knowledge or approval of the Company; or for other violation of these Rules and Regulations and/or applicable Commission rules, including those found at Pennsylvania Public Utility Code or the Commission's regulations.¹⁰

A public utility's Commission-approved tariff is *prima facie* reasonable, has the full force of law and is binding on the utility and the customer. *Id.*; 66 Pa.C.S. § 316, *Kossman v. Pa. Pub. Util. Comm'n*, 694 A.2d 1147 (Pa.Cmwlth. 1997) (*Kossman*); and *Stiteler v. Bell Telephone Co. of Pennsylvania*, 32 Pa. Commw. 319, 379 A.2d 339 (Pa.Cmwlth. 1977) (*Stiteler*).

Section 703 of the Public Utility Code, 66 Pa. C.S.A. § 703(b) provides that the Commission may dismiss any complaint without a hearing if, in its opinion, a hearing is not necessary to the public interest. A hearing is required only when there is a disputed question of fact, and is not required to resolve questions of law. *Dee-Dee Cab, Inc. v. Pa.Pub. Util. Comm'n*, 817 A.2d 593 (Pa.Commw. Ct. 2003), petition for allowance of appeal denied, 836 A.2d 123 (Pa. 2003).

Here, Complainant is seeking a postponement of shut off. He stated that he wanted to obtain the services of an attorney to prevent smart meter installation. In the approximately six-month period since he filed the Complaint, Complainant has had ample opportunity to obtain the services of an attorney. No attorney has made an appearance on behalf of the Complainant. Further, he has not alleged that PECO has violated or will violate any

¹⁰ PECO Supplement No. 61 to Tariff Electric Pa.P.U.C. No. 4, Fifth Revised Page No. 25.

provision of the Code, regulations or a standing Commission Order. Accordingly, the Complaint is legally insufficient.

As there are no disputed questions of law or fact in the instant Complaint, a hearing is not required or in the public interest. Therefore, PECO's Preliminary Objection to the Complaint must be sustained.

Accordingly, the Complaint is dismissed.

CONCLUSIONS OF LAW

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

2. The Complaint does not 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).

3. The Complaint is not legally sufficient and no hearing is required. 52 Pa.Code § 5.22(a)(4); *Dee-Dee Cab, Inc. v. Pa.Pub. Util. Comm'n*, 817 A.2nd 593 (Pa.Commw. Ct. 2003).

