

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Betty Boyd	:	
	:	
v.	:	F-2017-2595578
	:	
PECO Energy Company	:	

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

Before
Steven K. Haas
Administrative Law Judge

INTRODUCTION

This decision sustains preliminary objections filed by PECO Energy Company (Respondent or PECO) and dismisses the formal complaint filed by Betty Boyd (Complainant or Ms. Boyd), who refuses to allow PECO to install a smart meter at her residence. The preliminary objections are sustained because the Complainant does not allege a violation by PECO of the Pennsylvania Public Utility Code, an order or regulation of the Pennsylvania Public Utility Commission (Commission), or any Commission-approved tariff provision.

HISTORY OF THE PROCEEDING

On March 22, 2017, the Complainant filed a formal complaint with the Commission against PECO. Complainant avers that PECO is insisting that it be permitted to install a smart meter at her residence. The Complainant objects to the smart meter installation and is refusing to allow PECO to perform the installation. The Complainant avers that the law

was drafted as an opt-in program. Ms. Boyd requests, by way of relief, that PECO not install a smart meter at her residence.

On March 31, 2017, the Respondent filed an answer and preliminary objections to Ms. Boyd's complaint. PECO admits in its answer that the company provides electric service to the Complainant at the address shown on the complaint and that it has requested on several occasions that it be granted access to install a smart meter at her residence. The answer alleges that the Complainant refuses to allow PECO representatives to install the smart meter. PECO further avers that it is required to install smart meters for its customers pursuant to Pennsylvania's Act 129 of 2008. PECO states that it has the right to terminate a customer's service if the customer fails to provide access to install the smart meter. Finally, PECO asserts that the Complainant may not opt out of having a smart meter installed at her residence.

In its preliminary objections, PECO states that Act 129 of 2008 directed the Respondent and other electric distribution companies (EDCs) to develop and file smart meter procurement and installation plans with the Commission. The Respondent filed a smart meter procurement and installation plan with the Commission. By order entered May 6, 2010, at M-2009-2123944, the Commission approved the Respondent's smart meter plan. PECO contends that it is required, pursuant to the Commission's order, to install smart meters throughout its service territory, and that customers are not permitted to opt out of smart meter installation.

PECO states that House Bill 394 was introduced on February 9, 2015 and seeks to change existing law by adding an "opt out" provision to the current statute. PECO further notes, however, that this "opt out" provision has not yet been scheduled for a vote by the General assembly and, consequently, the ability to "opt out" of smart meter installation is not permissible under current law.

The preliminary objections contend that the complaint fails to allege that PECO violated a provision of the Public Utility Code, a Commission regulation or order, or any

provision in its tariff. Therefore, according to PECO, the Complainant has failed to state a claim upon which relief can be granted. PECO requests that the Commission dismiss the complaint.

A notice to plead was attached to PECO's preliminary objections, informing the Complainant that an answer, if any, was to be filed within (10) days of the date of service of the preliminary objections. The Complainant did not file a response to PECO's preliminary objections. The record closed on April 13, 2017, upon expiration of the deadline for filing a response. 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 proceeding Betty Boyd.
2. The Respondent in this proceeding is PECO Energy Company.
3. The service address at issue here is 2920 Wishart Street, Philadelphia, PA, 19132.
4. On March 22, 2017, the Complainant filed a complaint against PECO.
5. On March 31, 2017, PECO filed an answer and preliminary objection in response to the complaint.
6. The Complainant did not file an answer to the preliminary objection.

DISCUSSION

As noted above, the Complainant is refusing to permit PECO to install a smart meter at her residence. She requests that she be permitted to opt out of such installation. PECO requests in its preliminary objections that the complaint be dismissed on the basis that, even assuming the truth of the averments made by the Complainant in her complaint, the complaint

does not allege the company violated any statutes, Commission regulations or orders, or Commission-approved tariff provisions.

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 the company's 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 Complainants and should dismiss the complaint only if it appears that the Complainants 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 Complainant does not want a smart meter installed at her residence, and has refused to allow

PECO to do so. The Complainant 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 PECO's preliminary objections, I agree that the complaint is legally insufficient in that it fails to allege that the Respondent has violated the Public Utility Code or a Commission regulation or Order.

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 seeking to install a smart meter at the Complainants' residence. Rather, the Respondent is merely complying with relevant statutes, regulations and orders.

As set forth in more detail in the Respondent's answer and preliminary objections, Act 129 of 2008 directed PECO and other EDCs to file smart meter procurement and installation plans with the Commission. Pursuant to Act 129, electric distribution companies are required to 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)(2). It was the intent of the General Assembly to require all covered Electric Distribution Companies 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. Smart Meter Procurement and Implementation Order, Docket No. M-2009-2092655.

The Respondent filed a smart meter procurement and installation plan with the Commission. By order entered May 6, 2010, at M-2009-2123944, the Commission approved the Respondent's smart meter procurement and installation plan. The Respondent is complying with the Commission's directives by seeking to install a smart meter at the Complainants' residence.

The Commission has addressed complaints opposing smart meter installation and charges in numerous prior decisions. 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. 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 smart meters 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 (Order entered May 27, 2011); Jones v. Metropolitan Edison Company, Docket No. C-2011-2224380 (Order entered June 28, 2011); Griffin v. Metropolitan Edison Company, Docket No. C-2012-2300172 (Order entered July 31, 2012); Brake v. West Penn Power Company, Docket No. C-2013-2367308 (Order entered November 14, 2013); Drake v. Pennsylvania Electric Company, Docket No. C-2014-2413771 (Order entered June 12, 2014); Efaw v West Penn Power Company, Docket No. C-2014-2413744 (Order entered June 12, 2014).

The Commission's decisions cited above are controlling on the outcome of this case. Because Act 129 of 2008 and the Commission's orders authorize PECO 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 identified in his complaint any act done by PECO that violates a statute, Commission regulation or order. PECO 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.

I note that 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, a smart meter has not yet been installed at the Complainant's residence. Accordingly, there is no allegation that a smart meter caused the Complainant to experience adverse health effects or specific physical symptoms. Therefore, Kreider is not applicable to this case.

Since the complaint does not allege any violations of a Commission regulation, statute or order, it is legally insufficient. I will sustain the Respondent's preliminary objections 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 complaint fails to state a claim upon which relief can be granted.

3. The Commission may dismiss a complaint without a hearing if, in its opinion, a hearing is not necessary in the public interest. 66 Pa.C.S. §703(b).

4. 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; and (iii) in accordance with a depreciation schedule not to exceed 15 years. 66 Pa.C.S. §2807(f)(2).

5. It was the intent of the General Assembly to require all covered Electric Distribution Companies 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.

Smart Meter Procurement and Implementation Order, Docket No. M-2009-2092655

(Implementation Order entered June 24, 2009); Maria Povacz v. PECO Energy Company,

Docket No. C-2012-2317176 (Opinion and Order entered January 24, 2013).

6. The complaint filed by Betty Boyd against PECO Energy Company at Docket No. F-2017-2595578 should be dismissed with prejudice.

ORDER

THEREFORE,

IT IS ORDERED:

1. That the preliminary objections filed by PECO Energy Company at Docket No. F-2017-2595578 on March 31, 2017 are sustained.

