

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Andrew Starr

v.

PECO Energy Company

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C-2017-2615628

INITIAL DECISION

Before
Darlene D. Heep
Administrative Law Judge

Mr. Starr filed a Complaint wherein he alleged that he received a shut off notice from PECO after refusing installation of an AMI meter, also referred to as a "Smart Meter." He contended that Act 129 does not mandate installation of Smart Meters. PECO filed a Preliminary Objection, contending that PECO seeks to install the meter in accordance with the law, Act 129, that the Complaint is legally insufficient, that no hearing is required and that the Complaint should be dismissed. For the reasons stated below, the Preliminary Objection is sustained and the Complaint is dismissed.

HISTORY OF THE PROCEEDING

On July 20, 2017, Andrew Starr (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." In an attachment to the Complaint, Mr. Starr contends that Act 129 does not mandate installation of smart meters.

On August 7, 2017, PECO filed an Answer denying the material allegations of the Complaint. PECO also asserted that the Smart Meters were being installed in accordance with Act 129.

Also on August 7, 2017, 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.

On August 17, 2017, the complainant filed a response in opposition to PECO's Preliminary Objection.

By Motion Judge Assignment Notice, the motion was assigned to the undersigned and received on September 15, 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 Andrew Starr.
2. The Respondent in this proceeding is PECO Energy Company.
3. The Complainant is a PECO customer at his residence (service address) in Horsham, Pennsylvania.
4. The Complainant refused installation of a PECO Smart Meter at the service address.
5. After Complainant refused installation of a Smart Meter, PECO sent him a shut off notice.

6. On July 20, 2017, Mr. Starr filed a Complaint with the Public Utility Commission against PECO Energy Company.

7. On August 7, 2017, PECO Energy Company filed an Answer to the Complaint and a Preliminary Objection alleging that the Complaint was legally insufficient.

8. Mr. Starr filed a response to the Preliminary Objection on August 17, 2017.

DISCUSSION

PECO has filed a Preliminary Objection seeking dismissal of the Complaint as legally insufficient. Section 5.101 of Commission regulations, 52 Pa.Code § 5.101, provides:

§ 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:

...

(4) Legal insufficiency of a pleading.

52 Pa.Code § 5.101(a)(4).

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.Cmwlt. 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)). When ruling on a Preliminary Objection, all averments of the non-moving party, here Mr. Starr, must be taken as true. *County of Allegheny v. Commw. of Pa.*, 490 A.2d 402 (Pa. 1985).

To be legally sufficient, a complaint before the Commission must set forth "an act or thing done or omitted" 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." 66 Pa. C.S.A. § 701. Also, in considering preliminary objections, one need not accept as true conclusions of law, unwarranted inferences from facts, argumentative allegations, or expressions of opinion. *Commonwealth v. Golden Gate Nat'l Senior Care LLC*, 158 A.3d 203 (Pa. Commw. Ct. 2017) Further, to sustain preliminary objections, "it must appear with certainty that the law will not permit recovery, and, where any doubt exists as to whether the preliminary objections should be sustained, the doubt must be resolved in favor of overruling the preliminary objections. *Id.* A complainant must be able to recover under law to survive a preliminary objection. *See Milliner v. Enck*, 709 A. 2nd 417, 418 (Pa. Super. Ct. 1998).

Section 703(b) 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).

In his response to the Preliminary Objection, Mr. Starr reiterates his position that Act 129 does not mandate installation of Smart Meters. He avers that the legislative history establishes that installation of Smart Meters is not mandatory. As he specifically states in his response to the Preliminary Objection,

. . . PECO and the PUC have absolutely no power to force smart meters onto the general public as they have been doing for years. PECO is wrong in their assertion that the Smart Meter implementation plan approved by the PUC gives them the power to force smart meters when the PUC does not have that authority. PECO has no argument in matters at law and therefore the PUC should rule in my favor.

Accepting all averments in the Complaint and allowing every reasonable inference from those averments, PECO's Preliminary Objection should be sustained. A review of the pleadings and law do not support the position of the Complainant.

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.¹ Accordingly, PECO developed a Smart Meter installation plan² that was approved by the Commission.³ Under that plan, PECO is replacing AMR⁴ meters with AMI⁵ or “Smart Meters.”

PECO developed a Smart Meter installation plan that was approved by the Commission. Under that plan, PECO is replacing AMR meters with AMI or “Smart Meters.”

As Mr. Starr acknowledges in his Complaint, he received a shut off notice for failure to allow PECO to install an AMI or "Smart Meter." Section 18.3 of PECO’s Commission-approved tariff provides that the Company may terminate a customer’s service 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.⁶

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, *Kossmann v. Pa. Pub. Util. Comm'n*, 694 A.2d 1147 (Pa.Cmwlth. 1997) (*Kossmann*); and *Stiteler v. Bell Telephone Co. of Pennsylvania*, 32 Pa. Commw. 319, 379 A.2d 339 (Pa.Cmwlth. 1977) (*Stiteler*).

¹ See *Smart Meter Procurement and Installation*, Docket No. M-2009-2092655 (Implementation Order entered June 24, 2009) (*Smart Meter Procurement and Installation Order*).

² 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).

³ 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*).

⁴ AMR is an acronym for “automatic meter reading.”

⁵ AMI is an acronym for “advanced metering infrastructure.”

⁶ PECO Supplement No. 61 to Tariff Electric Pa.P.U.C. No. 4, Fifth Revised Page No. 25.

Mr. Starr does not contest the shut off procedures themselves. He contends that installation of Smart Meters is not mandatory and that the Commission has misinterpreted Act 129 and is without authority to require Smart Meter installation.

Complainant contends that the legislative history supports his position that Smart Meter installation is optional as there is no installation mandate in the Act and a plain reading of the statute suggests customers may "opt in" or "opt out." However, 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 Meter installation. See *Maria Povacz v. PECO Energy Company*, Docket No. C-2012-2317176 (Order and Opinion entered January 24, 2013). As courts have held, agencies are given discretion with respect to matters within their authority, including the meaning of legislation. As noted in *Highmark Inc. v. Voltz*, 163 A.3d 485 (Pa. Commw. Ct. 2017):

As to administrative deference, our Supreme Court holds: It is well-settled that when the courts of this Commonwealth are faced with interpreting statutory language, they afford great deference to the interpretation rendered by the administrative agency overseeing the implementation of such legislation. Thus, our courts will not disturb administrative discretion in interpreting legislation within an agency's own sphere of expertise absent fraud, bad faith, abuse of discretion or clearly arbitrary action.

Id. at 493.⁷

The Commission has, within its discretion, interpreted Act 129 as not allowing an opt out of smart meter installation. However, the Commission has recognized that complaints

⁷ A similar argument was made in *Romeo v. Pa. Pub. Util. Comm'n*, 154 A.3d 422 (Pa. Commw. Ct. 2017). Romeo argued that the Public Utility Regulatory Policies Act of 1978 (PURPA), 16 U.S.C.S. § 2627(b) did not mandate smart meter installation and that the PURPA pre-empted the interpretation of the Commission. The Commonwealth Court held that the PURPA ". . . explicitly provides that it does not preempt state law, noting: "Nothing in this chapter prohibits any State regulatory authority or nonregulated electric utility from adopting, pursuant to State law, any standard or rule affecting electric utilities which is different from any standard established by this subchapter" and that it was indicative of " Congress's objective to allow states to regulate how they choose." *Id.*

pertaining to Smart Meter installation may give rise to potential customer service violations for unsafe and/or unreasonable service under Section 1501 of the Code.⁸

In *Romeo v. Pa. Pub. Util. Comm'n*, 154 A.3d 422 (Pa. Commw. Ct. 2017), the Commonwealth Court held that Mr. Romeo's claim that Smart Meters cause safety and fire hazards and have a negative health impact is not legally insufficient pursuant to 66 Pa. C.S. § 1501, which requires utilities to maintain adequate, efficient, safe and reasonable service and facilities for their customers. *Id.* Therefore, the court found, Mr. Romeo was entitled to a hearing.

The *Romeo* case may be distinguished from the instant case because Mr. Starr has not claimed smart meters are unhealthy or dangerous. He merely avers the Commission has misinterpreted Act 129, and argues he has a legal right to refuse a Smart Meter installation as there is no legislative mandate that he accept a Smart Meter on his service property. Here, given the interpretation of the Commission and its authority to interpret legislation pertaining to its area of expertise, there is no relief available for the Complainant based on the claim he has raised. Mr. Starr has filed a Complaint questioning the Commission's interpretation and application of a law within Commission authority but does not allege that PECO has violated that law or will violate any provision of the Code, regulations or a standing Commission Order.

Therefore, the Complaint is legally insufficient. The Preliminary Objection will be sustained.

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 Commission has 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 Meter

⁸ See *Kreider v. PECO Energy Company*, Docket No. P-2015-2495064 (Order on Material Question entered September 3, 2015; Order on Reconsideration entered January 28, 2016) (*Kreider*); *Paul v. PECO Energy Company*, Docket No. C-2015-2475355 (Order entered March 17, 2016); *Frompovich v PECO Energy Company*, Docket No. C-2015-2474602 (Order entered April 21, 2016).

