

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Carl Evans	:	
	:	
v.	:	C-2017-2628542
	:	
PECO Energy Company	:	

INITIAL DECISION

Before
Darlene D. Heep
Administrative Law Judge

Mr. Evans filed a Complaint wherein he alleged that Smart Meters are being forced on people against their will and that the AMI, or Smart Meter, installed at his home should be removed. PECO filed a Preliminary Objection, contending that PECO installed 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 October 10, 2017, Carl Evans (Complainant) filed a formal Complaint against PECO Energy Company (PECO or Respondent) with the Pennsylvania Public Utility Commission (Commission). In the Complaint, Mr. Evans states that Smart Meters are being forced on people against their will and that he wants his Smart Meter removed or he will remove it himself. He further states that PECO and the Commission are guilty of collusion and that other states give customers an opt-out choice for smart meters.

On October 30, 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 October 30, 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.

This matter was assigned to Administrative Law Judge Joel Cheskis on December 5, 2017. On December 8, 2017, this matter was reassigned to Administrative Law Judge Darlene Heep and received on December 11, 2017.

The Complainant has not filed a response to the Preliminary Objection.

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 Carl Evans who is a PECO customer at his residence in Philadelphia.
2. The Respondent in this proceeding is PECO Energy Company.
3. The Complaint was filed on October 10, 2017.
4. PECO filed an Answer to the Complaint on October 30, 2017.
5. PECO also filed a Preliminary Objection on October 30, 2017.
6. The Complainant did not file a response to the Preliminary Objection filed by PECO.

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.Cmwlth. 1987).

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.

Any offense alleged by a Complainant must be a violation of the Public Utility Code (Code), the Commission's regulations, or an outstanding order of the Commission. 66 Pa.C.S. § 701. As the proponent of a rule or order, the Complainant in this proceeding bears the burden of proof pursuant to Section 332(a) of the Code, 66 Pa.C.S.A. § 332(a).

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).

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. Evans, must be taken as true. *County of Allegheny v. Commw. of Pa.*, 490 A.2d 402 (Pa. 1985).

The crux of Mr. Evans' Complaint is that he does not want the Smart Meter that was installed at his home by PECO. He also questions the motives of the Commission in allowing or directing PECO to install Smart Meters.

Accepting all averments in the Complaint and allowing every reasonable inference, 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. PECO was among these companies. The Commission also ordered EDCs to file a Smart Meter technology procurement and installation plan.¹ PECO developed a Smart Meter installation plan that was approved by the Commission.² Under that plan, PECO is replacing AMR³ meters with AMI⁴ or “Smart Meters.”

Mr. Evans does not allege that PECO violated the Code, the Commission's regulations, or an outstanding order of the Commission. 66 Pa.C.S. § 701. He simply does not want a Smart Meter installed at his residence, seeks to opt out of having a Smart Meter and questions the integrity of the Commission and PECO. He also avers that PECO and the Commission use the threat of shut off to coerce customers to accept Smart Meters.

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 (Order entered May 6, 2010) (*PECO Smart Meter Plan Order*).

³ AMR is an acronym for “automatic meter reading.”

⁴ AMI is an acronym for “advanced metering infrastructure.”

PECO asserts in its Preliminary Objection that it has the right to terminate a customer if access to a meter is refused. PECO's position is supported by Section 18.3 of PECO's Commission-approved tariff, which 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 states:

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.⁵

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. 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*). Complainant does not allege that PECO violated this provision and therefore there is no legally sufficient claim on this issue.

As far as the Complainant seeking to have other than a Smart Meter at his home, the Commission determined in 2013 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)). 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

⁵ PECO Supplement No. 61 to Tariff Electric Pa.P.U.C. No. 4, Fifth Revised Page No. 25.

legislation within an agency's own sphere of expertise absent fraud, bad faith, abuse of discretion or clearly arbitrary action.

Id. at 493. The Commission has, within its discretion, interpreted Act 129 as not allowing an opt out of smart meter installation.

The Commission and Commonwealth Court have allowed some challenges to Smart Meter installation to proceed. However, in the complaints filed in those actions, there were viable allegations of health and safety concerns of a household member. See *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); *Romeo v. Pa. Pub. Util. Comm'n*, 154 A.3d 422 (Pa. Commw. Ct. 2017).

The instant case is distinguishable from those cases because here Mr. Evans has not claimed that smart meters are unhealthy or unsafe for those in his household. He simply avers that PECO and the Commission are forcing a Smart Meter upon him and that he would like the Smart Meter now at his home removed. Given the Commission's interpretation of Act 129 as not providing an opt out and its authority to construe legislation pertaining to its area of expertise, there is no relief available for the Complainant that could result from holding an administrative hearing in this matter.

Further, Mr. Evans does not allege that PECO committed a violation of any sort. Mr. Evans has filed a Complaint questioning the Commission's interpretation and application of a law within Commission authority and PECO's implementation of that interpretation 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.

Accordingly, the Complaint will be 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.Comm.w. Ct. 2003).

ORDER

THEREFORE,

IT IS ORDERED:

1. That the preliminary objection filed by PECO Energy Company in the matter captioned Carl Evans v. PECO Energy Company at Docket Number C-2017-2628542 is sustained;

2. That the Complaint filed in Carl Evans v. PECO Energy Company at Docket Number C-2017-2628542 is dismissed; and

3. That the matter be marked closed.

Date: December 12, 2017

/s/
Darlene Heep
Administrative Law Judge