

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Thomas A. McCarey	:	
	:	C-2017-2615597
v.	:	C-2017-2615980
	:	
PECO Energy Company	:	

INITIAL DECISION

Before
Darlene D. Heep
Administrative Law Judge

INTRODUCTION

This decision grants the Complainant's Petition to Withdraw.

HISTORY OF THE PROCEEDINGS

On or about July 19, 2017, Thomas A. McCarey filed a Complaint at Docket Number C-2017-2615597 against PECO Energy Company (PECO or Respondent) seeking to prevent installation of a PECO AMI electric meter or "smart meter." He also sought to utilize an analog meter for PECO electric services.

On July 20, 2017, Thomas A. McCarey filed a second Complaint against PECO, docketed at C 2017-2615980. In this Complaint, he stated that PECO was threatening to shut off his gas service and that he does not want a smart meter installed at his home for gas service.

On August 8, 2017, PECO filed a Motion to Consolidate Docket Number C-2017-2615980 and Docket Number C-2017-2615597. There was no opposition to the Motion to Consolidate. The Motion to Consolidate was granted by Order dated August 17, 2017.

On August 10, 2017, PECO filed Answers to both Complaints, denying all material allegations.

A Hearing Notice issued on September 1, 2017, set the matter for an Initial Hearing on March 12, and March 13, 2018.

A prehearing order issued on September 7, 2017, directed the parties to exchange information about witnesses and experts by January 16, 2018, and to exchange hearing exhibits by March 5, 2018.

On March 5, 2018, Mr. McCarey sent an email to the undersigned, written to "respectfully decline to appear in PA PUC's Administrative Law Court on March 12th and 13, 2018, due to my physical, mental, and emotional concerns." Mr. McCarey was contacted and informed that because his letter was not an unequivocal request to withdraw his Complaint, the hearing would be held as scheduled.

By email dated March 8, 2018, Mr. McCarey stated, "I wish to unequivocally state that I recall my complaint and wish the court to not be inconvenienced by my not appearing. Please do not call my case as scheduled." Also, on March 8, 2018, Mr. McCarey filed a copy of his March 5, 2018, email with the Secretary's Bureau.

The hearing date was cancelled. All parties were informed that the March 8, 2018, email would be accepted as a Petition to Withdraw.¹

¹ 52 Pa.Code § 1.2(a) provides that the presiding officer at any stage of an action or proceeding may disregard an error or defect of procedure which does not affect the substantive rights of the parties.

On March 13, 2018, PECO filed an Objection to Petition to Withdraw Unless Material Conditions Are Placed Upon the Withdrawal in which it was requested that the Complaint be dismissed with prejudice. In the Objection, PECO noted that the Complainant had previously filed Complaints at Docket Numbers C-2013-2354862 (March 4, 2013), and C-2015-2503724 (September 5, 2015), contesting installation of a smart meter and requested that if the Petition to Withdraw the instant matters - Docket Numbers C-2017-2615597 (July 19, 2017), and C-2017-2615980 (July 20, 2017), - is granted, then these matters should be dismissed with prejudice.

By letter dated March 16, 2018, the Complainant responded to PECO's Objection, stating, *inter alia*, that the letter was written "to inform you that I withdraw my complaint against PECO with prejudice." He further stated that he is "willing to sign a notarized affidavit ... that states that he will not reinvigorate the instant complaint." He added, "However, if PECO's Smart Meter interferes with my health and mandates that I file a new health complaint . . . I will refile to make known my health consequences."

This matter is ready for a decision.

FINDINGS OF FACT

1. The Complainant is Thomas A. McCarey, who resides and receives PECO gas and electric service at 285 Dayleview Road, Berwyn, PA 19312.
2. The Respondent is PECO Energy Company.
3. On or about July 19, 2017, Thomas A. McCarey filed a Complaint at Docket Number C-2017-2615597 against PECO Energy Company seeking to prevent installation of a PECO AMI electric meter or "smart meter" and to utilize an analog meter for PECO electric services.

4. On July 20, 2017, Thomas A. McCarey filed a second Complaint against PECO Energy Company, docketed at C-2017-2615980, stating that PECO was threatening to shut off his gas service and that he does not want a smart meter installed at his home for gas service.

5. On August 8, 2017, PECO filed a Motion to Consolidate Docket Number C-2017-2615980 and Docket Number C-2017-2615597.

6. On August 10, 2017, PECO filed Answers to both Complaints, denying all material allegations.

7. The Motion to Consolidate was granted by Order dated August 17, 2017.

8. By notice dated September 1, 2017, the matters were set for hearing on March 12 and 13, 2018.

9. A prehearing order issued on September 7, 2017, directed the parties to exchange information about witnesses and experts by January 16, 2018, and to exchange hearing exhibits by March 5, 2018.

10. The Complainant did not provide exhibits or a witness list to PECO.

11. On March 5, 2018, the Complainant sent an email to the undersigned stating that he "respectfully decline(s) to appear in PA PUC's Administrative Law Court on March 12, and 13, 2018, due to my physical, mental, and emotional concerns."

12. On March 8 and 13, 2018, the Complainant sent additional correspondence to the Commission stating that he will not appear for the hearing and that he would like to withdraw his consolidated complaints.

13. On March 13, 2018, PECO filed an objection to the Complainant's request to withdraw the Complaints.

14. In the objection, PECO requested that the instant Complaints be dismissed with prejudice.

15. In response to the objection, on March 16, 2018, the Complainant submitted a statement that he is withdrawing "with prejudice."

16. The Complainant has filed four complaints seeking to prevent PECO from installing a smart meter at the service address.

17. The complaints filed by Mr. McCarey are Docket Numbers C-2013-2354862 (March 4, 2013), and C-2015-2503724 (September 5, 2015), and the instant cases Docket Numbers C-2017-2615597 (July 19, 2017), and C-2017-2615980 (July 20, 2017).

18. Docket Number C-2013-2354862 (March 4, 2013), and C-2015-2503724 (September 5, 2015), were dismissed on Preliminary Objections.

DISCUSSION

The Commission's Rules of Practice and Procedure at 52 Pa.Code § 5.94 permit parties to withdraw pleadings in a contested proceeding. It provides as follows:

§ 5.94. Withdrawal of pleadings in a contested proceeding.

(a) Except as provided in subsection (b), a party desiring to withdraw a pleading in a contested proceeding may file a petition for leave to withdraw the appropriate document with the Commission and serve it upon the other parties. The petition must set forth the reasons for the withdrawal. A party may object to the petition within 10 days of service. After considering the petition, an objection thereto and the public interest, the presiding officer or

the Commission will determine whether the withdrawal will be permitted.

52 Pa.Code § 5.94(a).

In determining whether the Petition to Withdraw will be granted, Section 5.94 requires a presiding officer to consider any objections thereto and the public interest. The Complainant has submitted several documents indicating that he does not wish to pursue these matters and would like to withdraw his Complaints against PECO.

PECO would like the Complaint dismissed with prejudice and an order preventing the Complainant from resurrecting any action regarding installation of a smart meter. In its Objection, PECO states that the Complainant has a history of filing additional complaints to raise identical issues. PECO noted that Mr. McCarey filed a complaint against PECO on March 4, 2013, at Docket Number C-2013-2354862, seeking to prevent installation of a smart meter; that PECO's Preliminary Objection to that Complaint was granted; and that the Complaint was dismissed with prejudice. The Commission upheld the dismissal by Opinion and Order entered on September 26, 2013.

On September 5, 2015, the Complainant filed a complaint against PECO at C-2015-2503724 also seeking to prevent installation of a smart meter. PECO filed a Preliminary Objection seeking dismissal of the complaint on the grounds of *res judicata*. The Preliminary Objection was sustained; the Complaint was dismissed; and the ruling was upheld by the Commission. See *McCarey v. PECO Energy Company*, Docket C-2015-2503724 (Order and Opinion entered May 19, 2016).

As PECO notes, on July 19, 2017, and July 20, 2017, the Complainant filed the instant Complaints and in both seeks to prevent installation of a smart meter. In a Prehearing Order dated September 7, 2017, the parties were directed to exchange expert and witness lists no later than January 16, 2018, and to provide one another with copies of all exhibits to be presented at the hearing no later than March 5, 2018. PECO avers that the Complainant did not provide witness and expert information. The Complainant does not dispute this averment. Additionally,

on March 5, 2018, the day the parties were to exchange exhibits, the Complainant sent an email to the undersigned stating that he would not appear for the hearing.

PECO does not object to the dismissal itself but requests certain conditions, particularly that the matter be dismissed with prejudice and that the Complainant not be allowed to file additional claims seeking to prevent smart meter installation. The company avers that Mr. McCarey has had an opportunity to be heard; that his letters indicate that he fully understands the implications of his request to withdraw; and that it would be prejudicial to the Commission, PECO and the public interest to allow Mr. McCarey to revive his Complaint. The undersigned concurs with PECO's assessment.

Mr. McCarey has filed several Complaints seeking to prevent installation of a smart meter. Although two were dismissed on Preliminary Objections, the instant two cases were set for hearing and Mr. McCarey was provided an opportunity to be heard on his claims regarding both his gas and electric service. Instead of exchanging hearing exhibits and witness lists as provided in the Prehearing Order, Mr. McCarey chose to notify the Commission that he would not appear for the hearing. The fact that he wants to withdraw his Complaint and not pursue the matter became clear in subsequent letters to the Commission, particularly his March 16, 2018, letter where he stated, "I withdraw my complaint against PECO with prejudice."

It would not be against the public interest to grant the Petition to Withdraw. Granting the Petition will pertain only to the instant Complaints filed by Mr. McCarey and not preclude or prejudice any action by other members of the public or other PECO customers. Mr. McCarey clearly is not interested in pursuing this matter and there is no public interest in forcing him to do so.

Additionally, the Complaint will be dismissed with prejudice. Mr. McCarey does not object to dismissal with prejudice and has specifically stated that he is withdrawing "with prejudice." (See March 16, 2018 letter). Further, the Complainant has had the opportunity to present his claims seeking to prevent installation of smart meters on several occasions. The

Commission and PECO expended resources in response to the Complaints and in preparation for the scheduled hearing. Mr. McCarey has stated that he does not wish to, and that he will not, appear for a hearing. He has chosen to withdraw his Complaint, with prejudice, and not pursue it further. In light of his history of filing Complaints relating to the installation of smart meters, granting the Complainant's Petition to Withdraw his Complaint with prejudice will preclude him from filing yet another Complaint seeking to prevent installation of a smart meter. Under the circumstances, granting the Complainant's Petition to Withdraw with prejudice is in the public interest.

Accordingly, the Complainant's Petition to Withdraw is granted, with prejudice.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the subject matter and the parties to this proceeding. 66 Pa.C.S. § 701.
2. Liberally construing the written request to withdraw promotes a just, speedy and inexpensive determination of this proceeding. 52 Pa.Code § 1.2(a).
3. A party desiring to withdraw a pleading in a contested proceeding may file a petition for leave to withdraw the appropriate document with the Commission and serve it upon the other parties. 52 Pa.Code § 5.94.
4. After considering the petition, an objection thereto and the public interest, the presiding officer or the Commission will determine whether the withdrawal will be permitted. 52 Pa.Code § 5.94.
5. No public interest is served in maintaining the action. 52 Pa.Code § 5.94.

ORDER

THEREFORE,

IT IS ORDERED:

1. That the request of Thomas A. McCarey to withdraw with prejudice his Complaints filed at Docket Numbers C-2017-2615597 and C-2017-2615980 is granted.
2. That the Complaints filed at Docket Numbers C-2017-2615597 and C 2017-2615980 are withdrawn with prejudice.
3. That Thomas A. McCarey is precluded from filing informal or formal complaints seeking to prevent installation of PECO AMI smart meter devices.
4. That the records at Docket Numbers C-2017-2615597, and C-2017-2615980, be marked closed.

Date: April 6, 2018

/s/
Darlene D. Heep
Administrative Law Judge