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June 11, 2018

VIA CERTIFIED MAIL NO. 7016 1970 0000 3093 9919
RETURN RECEIPT NO. 9590 9402 3264 7196 9242 14

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, Second Floor
Harrisburg, PA 17120

RECEIVED

JUN 11 2018

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

RE: *Ryan Ingham v. PECO Energy Company*
Docket No. C-2016-2579564

Dear Ms. Chiavetta:

I am in receipt of the attached notice addressed to Ryan Ingham in the aforementioned matter. By way of background, Mr. Ingham filed exceptions to Judge Heep's decision of May 31, 2017 on the basis that he was not being properly served by PECO which has been established in the record.

No response was received on these exceptions until the attached. As you can see, the cover letter was generated on May 4, 2018 giving Mr. Ingham ten (10) days to file a response to the preliminary objections by the close of business on May 14, 2018. You will notice by the postmark that the notice was not even mailed until May 29, 2018 and therefore his compliance was impossible.

The lack of proper service and correspondence is the crux of this action, and continues to create additional hurdles and prejudice for Mr. Ingham, who intends to fully participate in and defend this action. Accordingly, we are requesting an additional ten (10) days be granted by which to file a response to the preliminary objections.

In order to avoid further service delays and complications, I would very much appreciate any further notices, including a decision on this request, being copied to my attention via fax and/or e-mail to ensure their timely delivery.

Please contact my office at your earliest convenience regarding this request. Thank you in advance for your kind consideration.

Sincerely yours,



DANA F. INGHAM

RECEIVED

JUN 11 2018

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

DFI/ma

Enclosures

Cc: Ryan Ingham (w/ encl. via e-mail)

Exelon Business Services Company (w/ encl. via regular mail)



COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
400 NORTH STREET, HARRISBURG, PA 17120

IN REPLY PLEASE
REFER TO OUR FILE

May 4, 2018

C-2016-2579564

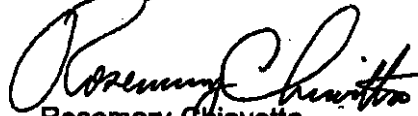
RE: Ryan Ingham v. PECO Energy Company
Docket No. C-2016-2579564

TO ALL PARTIES OF RECORD:

Please be advised that the Commission's Opinion and Order entered April 10, 2018 in the above matter was not successfully served on the Complainant. Therefore, the Complainant is being re-served with this Opinion and Order and is provided the opportunity to file a response to the Preliminary Objection filed by PECO Energy Company within ten (10) days of the date of this Letter, as directed in Ordering Paragraph 6 of the Opinion and Order.

Complainant's response to the Preliminary Objection filed by PECO Energy Company must be filed with the Commission by the close of business (4:30 p.m. EST) on Mon., May 14, 2018.

Sincerely,


Rosemary Chiavetta
Secretary

cc: Office of Administrative Law Judge

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JUN 11 2018

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

**PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17105-3265**

Public Meeting held March 15, 2018

Commissioners Present:

Gladys M. Brown, Chairman
Andrew G. Place, Vice Chairman
Norman J. Kennard
David W. Sweet
John F. Coleman, Jr.

Ryan Ingham

C-2016-2579564

v.

PECO Energy Company

OPINION AND ORDER

BY THE COMMISSION:

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition are the Exceptions (Exceptions) of Ryan Ingham (the Complainant) filed on September 25, 2017, to the Initial Decision (Initial Decision or I.D.) of Administrative Law Judge (ALJ) Darlene D. Heep, issued on September 5, 2017, in the above-captioned proceeding. On October 26, 2017, PECO Energy Company (PECO or the Respondent) filed a Motion to File Reply Exceptions *Nunc Pro Tunc* (Motion) and Replies to Exceptions. For the reasons discussed below, we shall grant PECO's Motion, grant, in part, the Complainant's Exceptions, revoke the Initial Decision of ALJ Heep, and remand this matter for further proceedings, consistent with this Opinion and Order. In accordance with 52 Pa. Code § 5.101(f), Mr. Ryan Ingham shall

have ten days from the entry date of this Opinion and Order to file a response to the Preliminary Objection filed by PECO, on December 15, 2016, in this proceeding.

History of the Proceeding

On December 9, 2016, the Complainant filed the instant Formal Complaint (Complaint) against PECO with the 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 [*sic*] 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.” Complaint at ¶ 4. The Complaint did not contain any attachments.

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.

Complaint at ¶ 5.

On December 14, 2016, the Commission’s Secretary’s Bureau received a courtesy copy of a letter dated November 7, 2014, from an attorney, Ms. Dana F. Ingham,

Esquire (Attorney Ingham's Letter or Letter),¹ addressed generally to the Legal Department of Exelon Business Services Company, stating the following:

Please be advised that a formal complaint has been filed with the [Commission] regarding the installation of a smart meter at the aforementioned residence. Confirmation of the complaint filing is enclosed. Accordingly, all shut off efforts must be halted pending a decision on the merits. Your courtesies in this matter are appreciated. As always, please feel free to contact my office should you have questions or concerns.

Contrary to the statement in Attorney Ingham's Letter, no confirmation of the Complaint filing was enclosed with the Letter. However, enclosed with the Letter was a copy of PECO's ten-day termination notice indicating that service had been scheduled for shut-off on December 18, 2016, and a copy of the Federal Express slip showing that the Letter had been sent to PECO's legal department.

On December 14, 2016, PECO filed an Answer to the Complaint. PECO's Answer denied the material allegations of fact and conclusions of law alleged in the Complaint. Answer at ¶ 4. PECO averred that on September 20, 2016, it sent correspondence to the Complainant requesting access to install an AMI meter, or smart meter, at his residence to replace his AMR meter. On October 24, 2016, the Complainant contacted PECO and stated that he refused to have the meter installed. PECO averred that it must comply with Act 129 and the Commission's Orders requiring it to install AMI meters for all current AMR customers by the end of 2014. PECO stated that it is terminating service to customers who, after repeated requests, do not give the Company

¹ Upon review of this Letter, we find it does not constitute a written notice of appearance by an attorney in this proceeding as required by Section 1.24 of the Commission's Regulations, 52 Pa. Code § 1.24, because it had not been filed directly with the Commission and it did not indicate that the attorney was representing the Complainant in the Formal Complaint proceeding before the Commission.

access to install the meter. PECO averred it has the right to terminate a customer's service for failure to permit access to install a smart meter pursuant to Sections 10.5 and 18.3 of PECO's Electric Service Tariff. Therefore, PECO asserted that the Complaint should be dismissed, as a matter of law. Answer at ¶ 4.

On December 15, 2016, PECO filed a Preliminary Objection (P.O.) to the Complaint in which it argued that the Complaint should be dismissed under 52 Pa. Code § 5.101(a)(4) for legal insufficiency. P.O. at ¶¶ 41-53. 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. P.O. ¶¶ 29-30, 45-46. 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. P.O. ¶¶ 31-33. PECO also referenced several Commission Orders in which complaints against smart meter installation were dismissed upon preliminary objection. P.O. ¶ 35-40 (citations omitted). PECO endorsed its Preliminary Objection with a Notice to Plead.

The Commission's docket folder shows that no answer to PECO's Preliminary Objection had been filed by the Complainant by the required due date of January 4, 2017.

On June 12, 2017, the Commission issued ALJ Heep's Initial Decision that dismissed the Complaint.

In the Commission's docket folder is an envelope postmarked June 12, 2017, showing that the Commission sent a copy of the Initial Decision to the Complainant's address, at the address provided in the Complaint, by certified U.S. mail. The envelope contains a label dated June 15, 2017, marked as "Return to Sender, Not Deliverable as Addressed, Unable to Forward."

The Commission's docket folder reflects that no Exceptions or Replies to Exceptions to the Initial Decision had been filed by the required due date of July 3, 2017, and July 13, 2017, respectively.

On July 20, 2017, the Commission entered a Final Order adopting the Initial Decision of ALJ Heep as the Commission's action in this matter ("*July 20 Final Order*").

On September 5, 2017, the Commission issued a Secretarial Letter (*September 5 Secretarial Letter*) stating that it had come to the Commission's attention that the Complainant was not served with a copy of the Initial Decision or the *July 20 Final Order* "because he inadvertently unchecked the box electing service when he signed up for eService with the Commission." To preserve the Complainant's due process rights, the Commission's *September 5 Secretarial Letter* rescinded the *July 20 Final Order* and established a new due date for Exceptions to the Initial Decision and Replies to Exceptions.

On September 25, 2017, the Complainant timely filed Exceptions in accordance with the deadline set forth in the *September 5 Secretarial Letter*.

On October 26, 2017, PECO filed a Motion to File Reply Exceptions *Nunc Pro Tunc* (Motion), along with its Replies to Exceptions. In its Motion, PECO claimed that neither the Complainant nor the Commission served it with a copy of the Complainant's Exceptions. Motion at ¶¶ 2, 4-6. PECO submits that the reason for its late filing of its Replies to Exceptions was due to the fact it was not served with the Exceptions. Motion at ¶ 12.

Moreover, in its Motion, PECO argues that the Commission's acceptance of PECO's Reply Exceptions *nunc pro tunc* – meaning, retroactively as if it had been

filed timely by the due date established in the *September 5 Secretarial Letter* – does not affect the substantive rights of the Complainant in this matter as PECO’s Replies to Exceptions do not contain any information that was not already expressed to the Complainant; nor do they contain any new allegations that require a response from the Complainant. Additionally, PECO claims that the Commission had not ruled on the Complainant’s Exceptions as of the date of the Motion, and therefore, permitting PECO’s Replies to Exceptions would cause no delay in adjudication in the case. Motion at ¶¶ 13-14. PECO asserts that the Commission has the authority to waive procedural defects when such defects do not affect the substantive rights of the parties. Motion at ¶¶ 10-11, citing 52 Pa. Code § 1.2 and *Info. Connections, Inc. v. Pa. PUC*, 630 A. 2d 498 (Pa. Cmwlth. 1993).

Discussion

As a preliminary matter, we note that we are not required to consider expressly or at length each contention or argument raised by the parties. *Consolidated Rail Corp. v. Pa. PUC*, 625 A.2d 741 (Pa. Cmwlth. 1993); also see, generally, *University of Pennsylvania v. Pa. PUC*, 485 A.2d 1217 (Pa. Cmwlth. 1984). Therefore, any issue that the Commission does not specifically address or delineate in its decision shall be deemed to have been duly considered and denied without further discussion.

Legal Standards

As a matter of law, to establish a legally sufficient claim, a complainant must show that the named utility is responsible or accountable for the problem described in the complaint in order to prevail. *Patterson v. The Bell Telephone Company of Pennsylvania*, 72 Pa. P.U.C. 196 (1990). The offense must be a violation of the Public Utility Code (Code), a Commission Regulation or Order or a violation of a Commission-approved tariff. 66 Pa. C.S. § 701.

Here, PECO's Preliminary Objection asserted that the Complaint is legally insufficient pursuant to 52 Pa. Code § 5.101(a)(4), because the Complainant failed to allege in the Complaint that PECO violated the Code, Commission Regulations or Orders or a Commission-approved tariff.

Section 5.101 of the Commission's Regulations makes preliminary objections available to a party to request that a pleading of another party be stricken. *See* 52 Pa. Code § 5.101. Preliminary objections must be accompanied by a notice to plead, and 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) (emphasis added).

The Commission's 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 motion, all well-pleaded, material facts of the nonmoving party, as well as every reasonable 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. Cmwlth. 1988). Thus, the Commission must view a complaint in the light most favorable to the complainant and should dismiss the complaint only if it appears that the complainant 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 practical result of the Commission's sustaining a party's preliminary objection to strike a complaint, in its entirety, is to dismiss the complaint without a hearing.

As an administrative agency of the Commonwealth, the Commission is required to provide due process to the parties appearing before it. *Schneider v. Pa. PUC*, 479 A.2d 10, 15 (Pa. Cmwlth. 1984), citing *Fusaro v. Pa. PUC*, 382 A.2d 794 (Pa. Cmwlth. 1978). Due process is satisfied when the parties are afforded notice and the opportunity to appear and be heard. *Schneider v. Pa. PUC*, 479 A.2d 10, 15 (Pa. Cmwlth. 1984), citing *Township of Middleton v. The Institute District of the County of*

Delaware, 293 A.2d 885 (Pa. Cmwlth. 1972), *aff'd* 450 Pa. 282, 299 A.2d 599 (Pa. Cmwlth. 1973).

Section 703(b) of the Code provides that the Commission may dismiss any complaint without a hearing if, in its opinion, a hearing is not necessary to the public interest. 66 Pa. C.S. § 703(b). An evidentiary hearing is required only if there are disputed questions of fact to be resolved and is not required to resolve questions of law or policy. 66 Pa.C.S. § 703(b); *Painter v. Pa. PUC*, 116 A. 3d 749, 755 (Pa. Cmwlth. 2015); *West Penn Power Company v. Pa. PUC*, 659 A.2d 1055, 1062 (Pa. Cmwlth. 1995); *Lehigh Valley Power Committee v. Pa. PUC*, 563 A.2d 557, 564 (Pa. Cmwlth. 1989); *Lehigh Valley Power Committee v. Pa. PUC*, 563 A.2d 548, 556-557 (Pa. Cmwlth. 1989); *S.M.E. Bessemer Cement, Inc. v. Pa. PUC*, 540 A.2d 1006, 1008-9 (Pa. Cmwlth. 1988); *White Oak Borough Authority v. Pa. PUC*, 103 A.2d 502, 507 (Pa. Super. 1954); *Chester Water Authority v. Pa. PUC*, 868 A.2d 384, 392 (Pa. Cmwlth. 2005) (“[A]s a matter of constitutional due process, an evidentiary hearing is most often implicated where there are material facts in dispute); *Dee-Dee Cab, Inc. v. Pa. Pub. Util. Comm’n*, 817 A.2d 593 (Pa. Cmwlth. 2003), petition for allowance of appeal denied, 836 A.2d 123 (Pa. 2003).

Exceptions and Replies to Exceptions

The Complainant filed two Exceptions. In his Exception No. 1, the Complainant claims he never received service of PECO’s Preliminary Objections or Answer, and therefore, has been denied and continues to be denied due process and is unable to properly respond. The Complainant asserts that the Initial Decision was issued without providing Complainant notice or opportunity to present his defense, and therefore his due process rights were violated. Exc. at 3.

In its Replies to Exceptions, PECO asserts that the Complainant's allegations that he never received service from PECO of the Preliminary Objection and Answer is incorrect. PECO avers that it mailed the Answer and Preliminary Objection to the Complainant to his address via United States Postal Service. PECO asserts that the Commission's docket reflects that PECO filed a Certificate of Service attesting that the Company served these documents by the U.S. Postal Service, as well as accompanying instructions in the form of a Notice to Plead. Moreover, PECO avers that it did not receive a returned mail notice and the pleadings were never returned to PECO as undeliverable. R. Exc. at 3. Attached as an Exhibit to PECO's Replies to Exceptions is a Verification of Legal Assistant, Amy Bota, certifying as much. R. Exc. at 3. PECO asserts that notice mailed to a party's last known address and not returned by the post office is presumed to have been received. R. Exc. at 4, citing *Brown v. PECO Energy Co.*, Docket No. C-2008-2060121 (Initial Decision Issued May 18, 2009) (citing *Meierdierck v. Miller*, 394 Pa. 484 (Pa. 1959), *inter alia*).

PECO argues that the Complainant's actions in this matter appear to be a tactic to further delay this matter, as requested in his Complaint, to prevent installation of the smart meter in hope that "opt out" legislation is passed by the Pennsylvania Legislature. Absent compelling evidence that Complainant has a problem with his mail, the Commission should deny his Exceptions, uphold ALJ Heep's Initial Decision and issue a Final Order, dismissing this matter. R. Exc. at 4.

In the Complainant's Exception No. 2, the Complainant asserts that he has not been afforded an opportunity to amend his Complaint as required under 52 Pa. Code § 5.101(h), which provides the party who submitted the stricken pleading the right to file an amended pleading within ten days from the service of the order. The Complainant stated: "This is especially true where a pleading is stricken for legal insufficiency." Exc. at 3-4. The Complainant requested that he be afforded an opportunity to amend his Complaint within ten (10) days of the date of the order. Exc. at 4.

In its Replies to Exceptions, PECO argues, in relevant part, that there would be no purpose to allow the Complainant to amend his formal complaint. PECO contends the public interest would not be served by allowing the Complainant to create a complaint against PECO with legal sufficiency through the filing of an amended complaint designed to delay the installation of a smart meter at the Complainant's service address. R. Exc. at 5. PECO asserts that permitting the Complainant to file an amended complaint would burden the Commission and PECO's ratepayers with the time and expense of the formal complaint process and potential evidentiary hearing that otherwise may not be necessary. R. Exc. at 6. PECO contends that the Complainant is simply attempting to delay this matter, the installation of his smart meter, and the termination of his service for failure to give PECO the required access to install the smart meter. R. Exc. at 6. Notably, the Complainant has never had an attorney enter an appearance or have any attorney reach out to PECO to "address the issue" and he has had plenty of time to find counsel. PECO asserts that the fact that no counsel has entered an appearance since the Complaint was filed in December 2016 goes to the point that the Complainant is using any excuse he can raise as a delay tactic. R. Exc. at 6.

Disposition

In this case, the Complainant, Mr. Ingham, signed up for electronic filing and expected to be e-served with documents. However, the box for the election of e-service was not checked, leaving the Complainant with the impression that service of Commission documents would be electronic, and leaving the Commission under the impression that he had asked for service of hard copies. When an Initial Decision was later issued and mailed to the Complainant, it was returned to the Commission as undeliverable.

Upon discovery of the service issue, the Secretary re-served the Initial Decision and set a new schedule for Exceptions. Mr. Ingham filed Exceptions and indicated therein that he had not been served with PECO's Answer and Preliminary Objection to his Complaint and, therefore, he had had no opportunity to file a response to them. In its Reply Exception, PECO maintains that it did serve its Answer and Preliminary Objection upon Mr. Ingham, that these documents were not returned as undeliverable, and that, therefore, they should be deemed to have been served consistent with the "mailbox rule."

Given the initial failure of service of the Initial Decision, and the dispute regarding service of the Answer and Preliminary Objection, it is prudent to reverse and remand this matter to the Office of Administrative Law Judge. Therefore, we will return the case to where the earliest failure of service is alleged to have occurred. As this was with the service of the PECO Answer and Preliminary Objection, this is where the case should be returned. Pursuant to 52 Pa. Code § 5.101(f), Mr. Ryan Ingham shall have ten days from the entry date of this Opinion and Order to file a response to the Preliminary Objection filed by PECO on December 15, 2016, in this proceeding.

Conclusion

Based upon our review of the record, we shall grant PECO's Motion, grant, in part, the Complainant's Exceptions, revoke the Initial Decision, and remand this matter to the Office of Administrative Law Judge for proceedings consistent with this Opinion and Order; **THEREFORE,**

IT IS ORDERED:

1. That the Motion to File Reply Exceptions *Nunc Pro Tunc* filed by PECO Energy Company, on October 26, 2017, in this docket, is granted.

2. That the Exceptions filed by Ryan Ingham, on September 25, 2017, in this docket, are granted, in part, consistent with this Opinion and Order.

3. That the Initial Decision of Administrative Law Judge Darlene D. Heep, issued on September 5, 2017, in this docket, is revoked.

4. That the Formal Complaint filed by Ryan Ingham, on December 9, 2016, in this docket, is remanded to the Office of Administrative Law Judge for proceedings, consistent with this Opinion and Order.

5. That this case shall proceed before the Office of Administrative Law Judge from the entry date of this Opinion and Order, consistent with the Commission's Rules of Administrative Practice and Procedure, 52 Pa. Code §1.1, *et seq.* and the Commission's Regulations governing Formal Proceedings, 52 Pa. Code § 5.1 *et seq.*

6. That, in accordance with 52 Pa. Code § 5.101(f), Ryan Ingham shall have ten days from the entry date of this Opinion and Order to file a response to the Preliminary Objection filed by PECO Energy Company, on December 15, 2016, in this docket.

BY THE COMMISSION,



Rosemary Chiavetta
Secretary

(SEAL)

ORDER ADOPTED: March 15, 2018

ORDER ENTERED: April 10, 2018



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UNITED STATES POSTAGE
PITNEY BOWES
02 1P \$007.830
0004727547 JUN 11 2018
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MALLEY LAW

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RETURN RECEIPT

