

August 13, 2018

Via Electronic Filing

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Keystone Bldg. 2nd Floor W
400 N. Street
Harrisburg, PA 17120

RE: Sage Gardner v. Duquesne Light Company
Docket No. C-2018-3003550

Dear Secretary Chiavetta:

Enclosed please find Duquesne Light Company's Preliminary Objections to the Formal Complaint filed by Sage Gardner.

A copy of this document has been served upon Complainant in accordance with Commission regulations.

Sincerely,



Jeremy V. Farrell
Attorney for Duquesne Light Company

Paul Shane Miller
Attorney for Duquesne Light Company

Enclosure

c: Sage Gardner (with enclosure)

TADMS:1004136-1 014657-158498

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

SAGE GARDNER

Complainant,

vs.

DUQUESNE LIGHT COMPANY,

Respondent.

No: C-2018-3003550

PRELIMINARY OBJECTIONS

Filed on behalf of Respondent
Duquesne Light Company

Counsel of Record for this Party:

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NOTICE TO PLEAD

TO COMPLAINANT SAGE GARDNER:

YOU ARE NOTIFIED TO FILE A WRITTEN RESPONSE TO RESPONDENT'S PRELIMINARY OBJECTIONS WITHIN 10 DAYS OF SERVICE OR A JUDGMENT MAY BE ENTERED AGAINST YOU.

TUCKER ARENSBERG, P.C.



Paul Shane Miller, Esquire
Attorney for Duquesne Light Company

PRELIMINARY OBJECTIONS

Pursuant to 52 Pa. Code. § 5.101, Duquesne Light files its Preliminary Objections to the Formal Complaint filed by Complainant Sage Gardner (“Complainant”):

I. Introduction

1. The narrow issue raised by these preliminary objections is whether the Commonwealth Court’s Romeo decision either created an opt-out provision in Act 129 or conferred new jurisdiction on the Commission in smart meter cases to adjudicate alleged violations of laws other than the Public Utility Code or its associated regulations. It did neither, so Duquesne Light files these targeted objections seeking to dismiss only the *portions* of the formal complaint that (1) seek relief that does not exist under the law (a smart meter opt-out), or (2) raise alleged violations of law that fall outside the Commission’s jurisdiction (e.g. alleged violations of state and federal constitutions). These *portions* of the complaint fail as a matter of law and dismissing them now will foster a more orderly, efficient, and informed proceeding.¹

II. Relevant Factual Background

2. Complainant is a Duquesne Light customer at the property located at 4134 Gladstone Street, Pittsburgh, Pennsylvania 15207 (the “Property”). Complaint at ¶ 1.

3. Duquesne Light plans to install a “smart meter” at the Property. Complaint at ¶ 4.

4. Complainant filed a Formal Complaint against Duquesne Light to prevent it from installing a smart meter at the Property. Complaint at ¶ 5.

¹ Duquesne Light is aware that ALJ Watson issued an Interim Order Denying Respondent’s Preliminary Objections issued in Corinne Green v. Duquesne Light Co., Docket No. C-2018-3002223, on August 7, 2018. That decision does not affect these preliminary objections for two reasons. First, in Green, Duquesne Light sought to dismiss the complaint in its entirety; conversely, here, Duquesne Light only seeks to dismiss certain portions of the complaint. Second, in Green, unlike here, the complainant did not seek to completely opt out of Duquesne Light’s smart meter program. Rather, she requested that Duquesne Light simply delay the installation of a smart meter until 2023. Accordingly, ALJ Watson’s decision in Green is not dispositive in evaluating these preliminary objections.

5. Complainant contends that the installation of a smart meter at her residence threatens her health and safety. Complaint at ¶ 4. She also alleges that the installation of a smart meter "goes against the 4th Amendment [to the United States Constitution] and the commerce clause." Id.

6. Complainant has refused to allow Duquesne Light to install a smart meter at the Property and asks that the Commission permit her to opt out of receiving a smart meter. Complaint at ¶¶ 4-5.

7. Duquesne Light has not installed a smart meter at the Property yet. Complaint at ¶ 5.

III. Argument

A. Complainant's request to "opt out" of receiving a smart meter must be dismissed because it is legally insufficient.

8. Preliminary objections may be filed for "legal insufficiency of a pleading." 52 Pa. Code § 5.101(a)(4). "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." Drake v. Pa. Elec. Co., Docket No. C-2014-2413771, 2014 WL 2003281, at *1 (Pa. P.U.C. May 7, 2014) (Salapa, ALJ).

9. Section 703(b) of the Public Utility Code ("Code") allows the Commission to dismiss any complaint without a hearing if, in its opinion, a hearing is not necessarily in the public interest. 66 Pa. C.S. § 703(b); See also Campisi v. PECO Energy Co., Docket No. 2014-2434501, 2014 WL 4644282, at *1 (Pa. P.U.C. Sept. 3, 2014) (Salapa, ALJ) ("The provision at 52 Pa. Code § 5.101(a)(4) serves judicial economy by avoiding a hearing where no factual dispute exists.").

10. Act 129 requires electric distribution companies with more than 100,000 customers, including Duquesne Light, to deploy smart meters throughout their service territories. 66 Pa. C.S. § 2807.

11. Act 129 also requires electric distribution companies with more than 100,000 customers, including Duquesne Light, to file a smart meter technology procurement and installation plan with the Commission for approval. 66 Pa. C.S. § 2807(f)(1).

12. Duquesne Light filed a smart meter technology procurement and installation plan, which the Commission approved on May 6, 2013. See Docket No. M-2009-2123948.

13. The Commission approved, in relevant part, Duquesne Light's amended smart meter technology procurement and installation plan ("Smart Meter Plan") on April 7, 2017. See Docket No. P-2015-2497267, Opinion and Order at 9, 51.

14. The Smart Meter Plan requires Duquesne Light to finish installing residential smart meters, including at the Property, by the end of 2018.

15. By attempting to install a smart meter at the Property in accordance with the Smart Meter Plan, Duquesne Light is, therefore, complying with the law.

16. Duquesne Light's installation of smart meters is consistent with, and not a violation of, the Code and Commission regulations and orders.

17. Act 129 does not permit a customer to "opt out" of receiving a smart meter. To the extent that Complainant is requesting Duquesne Light to provide her with an opt out of its smart meter program, Complainant asks Duquesne Light to break the law.

18. The Commission has ruled that "[t]he use of the word '*shall*' in the statutes indicates the General Assembly's direction that all customers will receive a smart

meter.” Evans v. PECO Energy Co., Docket No. C-2013-2368477, 2013 WL 7019103, at *3 (Pa. P.U.C. Dec. 19, 2013) (Hoyer, ALJ) (emphasis added).

19. Likewise, the Commission Implementation Order relating to the installation of smart meters provides: “The Commission believes that it was the intent of the General Assembly ***to require all covered EDCs 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.’***” Id. (quoting Smart Meter Procurement and Installation Implementation Order, Docket No. M-2009-2092655 (entered June 24, 2009)) (emphasis added).

20. Simply put, “there is no provision in the statute that allows customers to ‘opt out’ of smart meter installation, as Complainants desire.” Evans, 2013 WL 7019103 at *3; see also, Francis v. PECO Energy Co., Docket No. C-2014-2451351, 2015 WL 5011620, at *7 (Pa. P.U.C. August 20, 2015) (noting that “there is no provision in the Code, the Commission’s Regulations, or Commission Orders that permits a customer to opt out of having a smart meter installed on his or her premises.”).

21. Complainant seeks to “opt out” of receiving a smart meter, Complaint at ¶ 5, but this request is legally insufficient and should be dismissed. See Campisi, supra (granting preliminary objections for legal insufficiency where the complainant sought to opt out of PECO’s smart meter program) (citing additional cases); Jackson v. PECO, Docket No. C-2017-2600495 (June 26, 2017) (Salapa, ALJ) (sustaining preliminary objections and dismissing a formal complaint that opposed the installation of a smart meter).

22. Finally, the Romeo decision does not undermine Duquesne Light's Preliminary Objections, which seek dismissal of the portion of the Formal Complaint in which Complainant requests to opt out of Duquesne Light's smart meter program. Romeo did not create an opt-out

provision in Act 129. Installation of smart meters is still mandatory as a condition of receiving electric service from Duquesne Light, so the portion of the Formal Complaint requesting an opt-out is legally insufficient.

B. Complainant's claim that Duquesne Light has violated the Fourth Amendment to the United States Constitution or the Federal Commerce Clause must be dismissed because the Commission lacks jurisdiction to resolve these claims.

23. A party may file preliminary objections on the grounds that the Commission lacks jurisdiction. 52 Pa. Code §5.101(a).

24. The Commission is a creature of statute and may exercise only those powers that are expressly conferred upon it by the legislature. Feingold v. Bell of Pennsylvania, 383 A.2d 791, 794 (Pa. 1978).

25. The Commission must act within, and cannot exceed, its jurisdiction. City of Pittsburgh v. Pa. Pub. Util. Comm'n., 43 A.2d 348, 348 (Pa. Super. 1945).

26. Subject matter jurisdiction is a prerequisite to the exercise of power to decide a controversy. Hughes v. Pennsylvania State Police, 619 A.2d 390, 393 (Pa. Cmwlth. 1992).

27. Section 701 of the Code, 66 Pa. C.S. § 701, authorizes the Commission to hear complaints regarding the Code, Commission Regulations, or a Commission order. Haleema B. Alkhatib v. PECO Energy Co., C-2011-2242125, 2012 WL 641672, at *5 (Pa. P.U.C. Jan. 12, 2012).

28. The Commission does not have jurisdiction over claims arising under the United States Constitution. See Alice Ann Belmonte-Gates v. PECO Energy Co., F-2012-2332583, 2013 WL 596066, at *7 (Jan. 24, 2013) (Commission does not have jurisdiction over matters involving federal civil rights) (Cheskis, ALJ); James Coppedge v. PECO Energy Co., F-2009-2135893, 2010 WL 3183815, at *5-6 (July 29, 2010) (Commission does not have jurisdiction over issues arising under the United States Constitution).

29. Here, Complainant claims that Duquesne Light has violated her rights under the Fourth Amendment to the United States Constitution and the Federal Commerce Clause by attempting to install a smart meter at the Property. Complaint at ¶ 4.

30. The Commission does not have jurisdiction to rule on these claims.

31. Accordingly, this portion of the Formal Complaint must be dismissed.

WHEREFORE, Duquesne Light Company respectfully requests that the Commission sustain its Preliminary Objections, and dismiss the portions of the Formal Complaint that: a) seeks to opt out of Duquesne Light Company's smart meter program; and b) alleges that Duquesne Light Company has violated the Fourth Amendment to the United States Constitution or the Federal Commerce Clause.

Respectfully submitted,

TUCKER ARENSBERG, P.C.



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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing document upon the participant listed below in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant):

Sage Gardner
4134 Gladstone Street
Pittsburgh, PA 15207

Dated this 13th day of August, 2018



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