

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Timothy Lorah	:	
	:	
v.	:	C-2019-3010473
	:	
PPL Electric Utilities Corporation	:	

INITIAL DECISION

Before
Elizabeth H. Barnes
Administrative Law Judge

INTRODUCTION

This decision denies and dismisses a customer’s complaint under the doctrine of *lis pendens* and pursuant to 52 Pa.Code § 5.101(a)(6) because the complaint raises the same issues that have been decided by the Commission at Docket No. C-2018-2644957, and the Commission’s May 23, 2019 Opinion and Order at that docket is currently under appellate review before the Commonwealth Court of Pennsylvania.

HISTORY OF THE PROCEEDING

Evangeline Hoffman-Lorah lives with her husband, Timothy Lorah (Complainant), at 1635 Fourth Street, Bethlehem, PA. On January 26, 2018, Ms. Hoffman-Lorah filed a complaint docketed at C-2018-2644957 against PPL Electric Utilities Corporation (PPL) seeking to prevent the installation of an AMI “smart meter” on her residence due to alleged adverse health effects experienced by her due to smart meters being installed in her neighborhood in Bethlehem, Pennsylvania. Before her hearing, on May 17, 2018, Ms. Hoffman-Lorah filed a complaint seeking to enjoin the installation at her daughter’s residential address in Port Clinton,

Pennsylvania, for the same health reasons when she visits her daughter. Ms. Hoffman-Lorah averred that she co-owns with her daughter the service property in Port Clinton. The Secretary treated the second complaint as an amendment to the original complaint and docketed the complaint to the original case number. At the hearing, the Amended Complaint was addressed.

On May 23, 2019, the Commission entered an Opinion and Order dismissing the Amended Complaint. On or about May 28, 2019, Ms. Hoffman-Lorah filed a Petition for Supersedeas of the May 23, 2019 Order pending resolution of her appeal. In her request, she asked the Commission to prevent the company from installing the AMI meters at 1635 4th Street, Bethlehem and 4 North Street, Port Clinton. Ms. Hoffman-Lorah also filed a Petition for Review with the Commonwealth Court at Docket No. 712 CD 2019, challenging the Commission's May 23, 2019 Order.

On June 6, 2019, Timothy Lorah filed the instant Complaint at Docket No. C-2019-3010473, requesting the same relief as in Ms. Hoffman-Lorah's original complaint – that is, to enjoin PPL from installing an AMI meter at the Bethlehem residence due to Ms. Hoffman-Lorah's Electromagnetic Hypersensitivity Syndrome (EHS). On June 11, 2019, PPL was served with the Complaint.

PPL filed an Answer and New Matter as well as Preliminary Objections on July 1, 2019 in both cases arguing the Commission should dismiss the complaints because the issues are already the subject of an ongoing litigation on appeal before the Commonwealth Court. 52 Pa. Code § 5.101(a)(6) (pendency of a prior proceeding or agreement for alternative dispute resolution). PPL argues the doctrine of *lis pendens* applies to block PPL from having to defend itself in several identical suits at the same time.

On July 31, 2019, the instant Complaint was assigned to me as Motion Judge for a disposition regarding preliminary objections. I will grant these preliminary objections for the reasons discussed below.

FINDINGS OF FACT

1. The Complainant in this case is Timothy Lorah.
2. The Respondent in this case is PPL Electric Utilities Corporation.
3. On June 6, 2019, the Complainant filed a complaint with the Commission against the Respondent seeking to challenge the planned installation of an AMI meter at his residence, 1635 4th Street, Bethlehem, Pennsylvania (service address) due to alleged adverse health effects experienced by his wife.
4. On July 1, 2019, the Respondent filed an Answer and New Matter as well as preliminary objections.
5. The averments in the complaint are that Complainant wishes to keep his existing meter and service because he resides at the service property with his wife, Evangeline Hoffman-Lorah, whose health has been drastically impacted by AMI meters.
6. The instant complaint raises the same issues that have been decided by the Commission at Docket No. C-2018-2644957, and the Commission's May 23, 2019 Opinion and Order at that docket is currently under appellate review before the Commonwealth Court of Pennsylvania.
7. Complainant filed an Answer to the preliminary objections on July 8, 2019.
8. On July 30, 2019, the instant Complaint was assigned to Administrative Law Judge Elizabeth Barnes as Motion Judge.

DISCUSSION

The Commission's Rules of Practice and Procedure permit parties to file preliminary objections. The grounds for preliminary objections are limited to those set forth in 52 Pa.Code § 5.101(a) as follows:

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).

Commission 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 inference from those facts. County of Allegheny v. Commonwealth, 490 A. 2d 402 (Pa. 1985); Commonwealth v. Bell Telephone Co. of Pa., 551 A.2d 602 (Pa. Cmwlt. 1988). The Commission must view the complaint in this case 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 Commission regulation at 52 Pa. Code § 5.21(a) states that a person may file a formal complaint claiming violation of a statute that the Commission has jurisdiction to administer. The regulation at 52 Pa. Code § 5.21(d) authorizes the Commission to dismiss a complaint if a hearing is not necessary and authorizes preliminary objections to be filed in response to a complaint.

The regulation at 52 Pa. Code § 5.101(a)(6) permits the filing of a preliminary objection to dismiss a pleading due to the pendency of a prior proceeding. The provision at 52 Pa. Code § 5.101(a)(6) serves judicial economy by avoiding a hearing where no factual dispute exists. If no factual issue pertinent to the resolution of a case exists, a hearing is unnecessary. 66 Pa. C.S. § 703(a); Lehigh Valley Power Committee v. Pa. Pub. Util. Comm'n, 563 A.2d 557 (Pa. Cmwlt. 1989); Lehigh Valley Power Committee v. Pa. Pub. Util. Comm'n, 563 A.2d 548 (Pa. Cmwlt. 1989); S.M.E. Bessemer Cement, Inc. v. Pennsylvania Pub. Util. Comm'n., 540 A.2d 1006 (Pa. Cmwlt. 1988); White Oak Borough Authority v. Pa. Pub. Util. Comm'n, 103 A.2d 502 (Pa. Super. 1954).

The purposes of recognizing the doctrine of *lis pendens* are to prevent the respondent from having to defend several suits on the same cause of action at the same time, to

prevent the squandering of scarce judicial resources on duplicative actions, to maintain an orderly legal process, and to avoid inconsistent decisions on the same causes of action. “The law is quite clear that *lis pendens* is a valid defense only when the parties, the causes of action and the relief sought are the same in both actions (citations omitted).” Procacina v. Susen, 301 Pa. Super. 392, 394, 447 A.2d 1023, 1025 (1982).

The three-pronged identity test “requires more than a mere allegation of a pending suit; it requires proof that the prior case is the same, the parties are substantially the same, and the relief requested is the same (citations omitted).” Hillgartner v. Port Authority of Allegheny Cty., 936 A.2d 131, 137 (Pa. Cmwlth. 2007). “[I]t is purely a question of law determinable from an inspection of the records in the two causes.” Hillgartner, 936 A.2d at 138 [quoting Hessenbruch v. Markle, 194 Pa. 581, 45 A. 669 (1900)]. Parties are essentially the same if the parties are in privity with each other. Hillgartner, 936 A.2d at 140. “Privity” is broadly defined as “mutual or successive relationships to the same right of property or such an identification of interest of one person with another as to represent the same legal right. Hillgartner, 936 A.2d at 140; citing Montella v. Berkheimer Assocs. 690 A.2d 802, 804 (Pa.Cmwlth. 1997).

Disposition

In the instant case, the Respondent’s preliminary objections contend that the Commission should dismiss the complaint under the doctrine of *lis pendens* and pursuant to 52 Pa.Code § 5.101(a)(6) because the complaint raises the same issues that have been decided by the Commission at Docket No. C-2018-2644957, and the Commission’s May 23, 2019 Opinion and Order at that docket is currently under appellate review before the Commonwealth Court of Pennsylvania.

Conversely, Complainant argues his Complaint is separate from his wife’s and that he not only wants a removal of an AMI meter from his residence in Bethlehem for his wife’s health, but also for his own. Complainant claims to be negatively affected by the digital smart meters which PPL has installed. He claims his symptoms are location-specific to only those areas with smart meters. Additionally, Complainant has been witnessing the negative health

effects to his wife, which have occurred since smart meters were installed in their neighborhood. The factual averments in the instant complaint will be viewed as true for purposes of disposing addressing Respondent's preliminary objections. The averments in the complaint are that Complainant resides at the service property with his wife, Evangeline Hoffman-Lorah, whose health has been drastically impacted by AMI meters as she is electromagnetically hypersensitive. Therefore, Complainant wishes to keep his existing meter and service. He requests to opt-out of a smart meter installation.

In response to Preliminary Objections, Complainant additionally avers that he has concerns of the safety and ill health effects of the digital smart meter for himself as well as for his wife and that his family is separated and affected because of his wife's health issues, which have only arisen since the installation of smart meters in his area.

Although Complainant raises his own health concerns in addition to concerns for his wife's health in Complainant's response to the Preliminary Objections, the original complaint seeks to relitigate the same factual and legal issues raised or could have been raised in the Hoffman-Lorah Complaint proceeding, which is currently pending before the Commonwealth Court. An Opinion and Order dismissing the Hoffman Lorah Complaint was issued by the Commission on May 23, 2019. The instant Complaint filed by the Complainant seeks to relitigate the same issues and claims addressed and dismissed by the Commission.

Additionally, according to Pa.R.A.P. 1701, generally, after the review of a quasi-judicial order is sought, the governmental agency may no longer proceed in the matter. Complainant is asking for the same relief Ms. Hoffman-Lorah requested with regard to the same service property for the same alleged health reason. Mr. Lorah is requesting Commission review of the same case that is currently pending before the appellate court. This is an attempt to reopen Ms. Hoffman-Lorah's claim against the Respondent.

From the face of these two comparable complaints: (1) the case is the same; (2) the parties are essentially the same; and (3) the rights asserted and relief sought is the same. Ms. Hoffman-Lorah's Petition for Supersedeas contests PPL's installation of an AMI meter at the

same account and service address at issue in Mr. Lorah's complaint proceeding. Both complaints allege the new AMI meter should not be installed at the Bethlehem and arguably the Port Clinton addresses due to alleged adverse health effects experienced by Ms. Hoffman-Lorah. Additionally, Mr. Lorah and Ms. Hoffman-Lorah are co-inhabitants of the instant service property, are in a marital relationship, and Ms. Hoffman-Lorah claims the same relief in her Petition for Supersedes as the instant complaint.

Further, pursuant to Pa.R.A.P. 1702, there is no automatic stay or supersedeas injunction of a Commission's final order in this case. Complainant filed this complaint in a further attempt to opt out of a smart meter installation at the same service property, which was the subject of a prior complaint proceeding for essentially the same alleged health reasons. Therefore, Respondent has satisfied the three-pronged test for *lis pendens* and I will sustain the preliminary objections and dismiss the instant Complaint.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the parties and the subject matter of this dispute. 66 Pa. C.S.A. § 701.

2. The regulation at 52 Pa. Code § 5.101(a)(6) permits the filing of a preliminary objection to dismiss a pleading due to the pendency of a prior proceeding. 52 Pa. Code § 5.101(a)(6).

3. To support a claim of pendency of a prior proceeding, known as *lis pendens*, the moving party must allege and prove that in both actions, the same parties are involved, the same rights asserted, and the same relief sought. Hillgartner v. Port Authority of Allegheny Cty., 936 A.2d 131 (Pa. Cmwlth. 2007).

4. Review of these complaints shows that (1) the cases are the same; (2) the parties are the same; and (3) the rights asserted and relief sought is the same. Hillgartner v. Port Authority of Allegheny Cty., 936 A.2d 131 (Pa. Cmwlth. 2007).

5. It is just, reasonable and in the public interest that the complaint filed at Docket No. C-2019-3010414 be dismissed under the doctrine of *lis pendens* and pursuant to 66 Pa. C.S. § 5.101(a)(6).

6. Generally, after the review of a quasi-judicial order is sought, the governmental agency may no longer proceed in the matter. Pa.R.A.P. 1701.

7. There is no automatic stay or supersedeas injunction of the Commission's May 23, 2019 final order in this case. Pa.R.A.P. 1702.

ORDER

THEREFORE,

IT IS ORDERED:

1. That the preliminary objections filed by PPL Electric Utilities Corporation at Docket No. C-2019-3010473 are sustained.

2. That the complaint of Timothy Lorah at Docket No. C-2019-3010473 against PPL Electric Utilities Corporation is dismissed.

3. That the record at Docket No. C-2019-3010473 be marked closed.

Date: August 7, 2019

/s/
Elizabeth H. Barnes
Administrative Law Judge