BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Roger Brodzinski	:	
	:	
v.	:	C-2019-3011939
	:	
PPL Electric Utilities Corporation	:	

INITIAL DECISION

Before
Joel H. Cheskis
Deputy Chief Administrative Law Judge

INTRODUCTION

This decision grants a preliminary objection filed by an electric distribution company seeking to dismiss a complaint filed against it by a customer who opposes the installation of an automated metering infrastructure (AMI) meter, or smart meter, at his residence because the case is the same, the parties are the same, and the relief requested is the same as a complaint currently pending before the Commission. As a result, the complaint is barred by the doctrine of *lis pendens*.

HISTORY OF THE PROCEEDING

On August 2, 2019, Roger Brodzinski filed a formal complaint with the Pennsylvania Public Utility Commission (Commission) against PPL Electric Utilities Corporation (PPL), docket number C-2019-3011939. In his complaint, Mr. Brodzinski argued that PPL is threatening to shut off his service or has already shut off his service and that he is having a reliability, safety or quality problem with his service. Mr. Brodzinski explained, among other things, that PPL is requiring him to have a smart meter but that he does not want one

because he believes it will expose him to radiation and cause him cancer. Mr. Brodzinski added that he does not consent to having a smart meter installed at his residence.

On August 22, 2019, PPL filed an answer and new matter in response to Mr. Brodzinski's complaint. In its answer, PPL admitted that it has attempted to install a new AMI meter at Mr. Brodzinski's service address but denied that the meter poses any health hazards. PPL added that Mr. Brodzinski has a separate complaint pending at docket number C-2018-3006234 that he filed in November 2018 and that the hearing in that case proceeded without Mr. Brodzinski because he failed to appear. PPL also added, among other things, significant information regarding its requirement that it install new AMI meters. In its new matter, which was accompanied by a notice to plead, PPL averred that Mr. Brodzinski's complaint is barred by the doctrine of *res judicata* because of the complaint filed by Mr. Brodzinski in November 2018. PPL concluded that Mr. Brodzinski's complaint should be denied in its entirety and with prejudice. Mr. Brodzinski did not file an answer to PPL's new matter.

On August 23, 2019, PPL filed a preliminary objection in response to Mr. Brodzinski's complaint. In its preliminary objection, which was also accompanied by a notice to plead, PPL argued that the Commission should dismiss the complaint because the issues regarding the installation of the AMI meter at Mr. Brodzinski's property, as well as the alleged adverse health effects, are already the subject of ongoing litigation involving Mr. Brodzinski's prior complaint filed in November 2018 that is currently pending before the Commission. As discussed further below, PPL argued that all the factors of *lis pendens* have been satisfied.

Mr. Brodzinski's answer to PPL's preliminary objection was due no later than September 5, 2019. Mr. Brodzinski did not file an answer.

A motion judge assignment notice was issued on September 23, 2019 informing the parties that I would be responsible to resolve any issues that arise during the preliminary phase of this proceeding.

The record in this case closed on September 23, 2019, the day the motion judge assignment was issued. For the reasons discussed below, PPL's preliminary objection will be granted and Mr. Brodzinski's complaint will be dismissed.

FINDINGS OF FACT

1. The Complainant in this case is Roger Brodzinski.

2. The Respondent in this case is PPL Electric Utilities Corporation.

3. The service address is 430 S. Front Street, Sunbury, Pa.

4. On August 2, 2019, Mr. Brodzinski filed a formal complaint with the Commission against PPL.

5. On August 22, 2019, PPL filed an answer and new matter in response to Mr. Brodzinski's complaint.

6. On August 23, 2019, PPL filed a preliminary objection in response to Mr. Brodzinski's complaint.

7. Mr. Brodzinski did not file an answer to PPL's preliminary objection.

8. On November 29, 2018, Mr. Brodzinski filed a separate complaint against PPL at Docket Number C-2018-3006234.

9. On August 5, 2019, an Initial Decision was issued dismissing the complaint that was filed by Mr. Brodzinski against PPL on November 29, 2018.

10. No Final Order has been issued in response to the Initial Decision dismissing the formal complaint filed by Mr. Brodzinski against PPL on November 29, 2018.

11. The complaint filed by Mr. Brodzinski on November 29, 2018 is the same case, the parties are the same, and the relief requested is the same as the complaint filed by Mr. Brodzinski on August 2, 2019.

DISCUSSION

Section 5.101 of the Commission's Rules of Administrative Practice and Procedure provides for the filing of preliminary objections. 52 Pa.Code § 5.101. Commission preliminary objection practice is comparable to Pennsylvania civil practice respecting the filing of preliminary objections. Equitable Small Transportation Intervenors v. Equitable Gas Company, 1994 Pa PUC LEXIS 69, Docket No. C-00935435 (July 18, 1994) (Equitable). Section 5.101(a) provides:

> (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:
>
> (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 a proceeding.

52 Pa.Code §§ 5.101(a)(1)-(7).

For purposes of disposing of preliminary objections, the Commission must accept as true all well pleaded, material facts of the nonmoving party, as well as every reasonable 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. Cmwlth. 1988). The Commission must view the complaint in this case in the light most favorable to Mr. Brodzinski and should dismiss the complaint only if it appears that Mr. Brodzinski would not be entitled to relief under any circumstances as a matter of law. Equitable, *supra*; *see also*, Interstate Traveler Services, Inc. v. Commonwealth, Department of Environmental Resources, 406 A.2d 1020 (Pa. 1979).

In its preliminary objection, PPL argues that Mr. Brodzinski's complaint should be dismissed because of the pendency of a prior proceeding, i.e., that Mr. Brodzinski already has a complaint pending before the Commission against PPL regarding the same issues raised in the current complaint. Such a preliminary objection is commonly referred to as *lis pendens*.

Lis pendens means "a pending suit." Black's Law Dictionary at 932 (6th ed. 1990). Section 5.101(a)(6) of the Commission's regulations allows the filing of a preliminary objection to dismiss a pleading due to the pendency of a prior proceeding. 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." Procacina v. Susen, 301 Pa. Super. 392, 394, 447 A.2d 1023, 1025 (1982) (citations omitted).

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." Hillgartner v. Port Authority of Allegheny Cty., 936 A.2d 131, 137 (Pa. Cmwlth. 2007) (citations omitted). It is purely a question of law determinable from an inspection of the records in the two causes. Id., 936 A.2d at 138, *quoting*, Hessenbruch v.

Markle, 194 Pa. 581, 45 A. 669 (1900). If the identity test is not strictly met but the action involves a set of circumstances where litigation of two suits would create a duplication of effort by the parties and waste judicial resources, the court may stay the later-filed action. Crutchfield v. Eaton Corp., 806 A.2d 1259, 1262 (Pa. Super. 2002). The purpose of *lis pendens* is to prevent a party from being forced to defend itself against the same claims twice. Penox Technologies, Inc. v. Foster Medical Group, 546 A.2d 114, 115 (Pa. Super. 1988).

In this case, even when accepting as true all well pleaded, material facts in Mr. Brodzinski's complaint, as well as every reasonable inference from those facts, and viewing the complaint in the light most favorable to Mr. Brodzinski, Mr. Brodzinski would not be entitled to relief under any circumstances as a matter of law and his complaint should be dismissed.

With regard to the first prong of the *lis pendens* test, whether the issues in the complaints are the same, in the complaint filed in November 2018, Mr. Brodzinski averred that PPL is threatening to shut off his service or has already shut off his service and that he is "asking for a hearing on the safety risks of smart meters." Subsequently, in the complaint filed in August 2019, Mr. Brodzinski again averred that PPL is threatening to shut off his service or has already shut off his service and provided more details regarding his concerns about the adverse health effects of smart meters. Although Mr. Brodzinski raises some averments in the second complaint that are not in the prior complaint, i.e., that smart meters cause cancer and that Mr. Brodzinski can protect his home under the Castle doctrine, all of the averments in the second complaint also pertain to his opposition to the installation of a smart meter. None of the additional averments are sufficient to warrant denying PPL's preliminary objection and having a hearing. Judicial economy would not be served if the averments raised in this complaint would be considered beyond the scope of the first complaint and warrant a hearing. Instead, PPL would be forced to defend itself against the same claims twice which the doctrine of *lis pendens* specifically prohibits.

With regard to the second and third prongs of the *lis pendens* test, whether the parties and relief requested in both complaints are the same, again, even when accepting as true all well pleaded, material facts of Mr. Brodzinski, as well as every reasonable inference from

those facts, and viewing the complaint in the light most favorable to Mr. Brodzinski, it is clear that the parties involved in the November 2018 complaint and in the August 2019 complaint are the same (both involve Mr. Brodzinski and PPL) and the relief requested is the same (both request that a smart meter not be installed and an analog meter be used).

Finally, it is noted that, even though the Initial Decision in the November 2018 complaint was issued August 5, 2019, no Final Order has been issued and the case therefore remains pending before the Commission.

In conclusion, even when viewed in the light most favorable to Mr. Brodzinski and accepting as true all well plead averments in the complaint, as well as all reasonable inferences from those averments, it is clear that the complaint filed by Mr. Brodzinski in November 2018 and the complaint filed by Mr. Brodzinski in August 2019 share the same issues, the same parties and the same relief requested. Since the first complaint is still pending, the complaint filed by Mr. Brodzinski in August 2019 must be dismissed on the basis of *lis pendens*.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the subject matter and the parties to this proceeding. 66 Pa.C.S. § 701.

2. Section 5.101 of the Commission's Rules of Administrative Practice and Procedure provides for the filing of preliminary objections. 52 Pa.Code § 5.101.

3. Commission preliminary objection practice is comparable to Pennsylvania civil practice respecting the filing of preliminary objections. Equitable Small Transportation Intervenors v. Equitable Gas Company, 1994 Pa PUC LEXIS 69, Docket No. C-00935435 (July 18, 1994).

4. Preliminary objections are available to parties and may be filed in response to a pleading except motions and prior preliminary objections for pendency of a prior proceeding or agreement for alternative dispute resolution. 52 Pa.Code § 5.101(a)(6).

5. For purposes of disposing of preliminary objections, the Commission must accept as true all well pleaded, material facts of the nonmoving party, as well as every reasonable 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. Cmwlth. 1988).

6. The Commission must view the complaint in this case in the light most favorable to the nonmoving party and should dismiss the complaint only if it appears that the nonmoving party would not be entitled to relief under any circumstances as a matter of law. Interstate Traveler Services, Inc. v. Commonwealth, Department of Environmental Resources, 406 A.2d 1020 (Pa. 1979).

7. *Lis pendens* means "a pending suit." Black's Law Dictionary at 932 (6th ed. 1990).

8. *Lis pendens* is a valid defense only when the parties, the causes of action and the relief sought are the same in both actions. Procacina v. Susen, 301 Pa. Super. 392, 394, 447 A.2d 1023, 1025 (1982).

9. The three-pronged identity test for *lis pendens* 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. Hillgartner v. Port Authority of Allegheny Cty., 936 A.2d 131, 137 (Pa. Cmwlth. 2007).

10. *Lis pendens* is purely a question of law determinable from an inspection of the records in the two causes. Hessenbruch v. Markle, 194 Pa. 581, 45 A. 669 (1900).

11. The purpose of *lis pendens* is to prevent a party from being forced to defend itself against the same claims twice. Penox Technologies, Inc. v. Foster Medical Group, 546 A.2d 114, 115 (Pa. Super. 1988).

12. PPL has satisfied its burden of demonstrating that Mr. Brodzinski's complaint filed August 2, 2019 should be dismissed on the basis of *lis pendens*.

ORDER

THEREFORE,

IT IS ORDERED:

1. That the preliminary objection filed by PPL Electric Utilities Corporation on August 23, 2019 at docket number C-2019-3011939 is hereby granted.

2. That the formal complaint filed by Roger Brodzinski against PPL Electric Utilities Corporation on August 2, 2019 at docket number C-2019-3011939 is hereby dismissed.

3. That this matter be marked closed.

Date: September 25, 2019

/s/
Joel H. Cheskis
Deputy Chief Administrative Law Judge