

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Jeanene Denlinger	:	
	:	
v.	:	C-2019-3014786
	:	
PPL Electric Utilities Corporation	:	

INITIAL DECISION

Before
Elizabeth H. Barnes
Administrative Law Judge

INTRODUCTION

This decision denies and dismisses a customer’s complaint pursuant to 52 Pa.Code § 5.101(a)(4) and the doctrines of *res judicata* and collateral estoppel pursuant to 66 Pa. C.S. § 316 because the complaint raises the same issues of fact and law that have been decided by the Commission in the case of *Kyle Denlinger v. PPL Electric Utilities Corporation* at Docket No. C-2018-3005721 (Final Order entered September 26, 2019)(*K. Denlinger*).

HISTORY OF THE PROCEEDING

Jeanene Denlinger (Complainant) lives with her husband, Kyle Denlinger, at 14 Susquaw Place, Lancaster, Pennsylvania. On November 29, 2019, Ms. Denlinger filed a complaint docketed at C-2019-3014786 against PPL Electric Utilities Corporation (PPL Electric) seeking to prevent the installation of an Automated Metering Infrastructure (AMI) meter or “smart meter” on her residence. Complainant alleges that the new AMI meter: (1) is not mandatory; (2) will cause, contribute to, or exacerbate adverse health effects; and (3) raises privacy, safety and financial concerns. Complaint ¶¶ 4-5.

The Complaint was served upon PPL on December 5, 2019. PPL filed an Answer and New Matter (raising the affirmative defense of *res judicata*) as well as Preliminary Objections on December 26, 2019 arguing the Commission should dismiss the Complaint because the issues of fact and law regarding the installation of an AMI meter at the same service property were addressed in *Kyle M. Denlinger v. PPL Electric Utilities Corporation*, Docket No. C-2018-3005721 (Final Order entered September 26, 2019) (*Kyle Denlinger Order*). PPL argues these issues are now barred by the Commission's Final Order that was not appealed. Therefore, the Complaint is legally insufficient pursuant to 52 Pa.Code § 5.101(a)(4). PPL also averred that Complainant's allegations pertaining to her water service from the City of Lancaster – Water Bureau constitute impertinent matter given Complainant crossed out her water service provider's name when identifying the respondents to this Complaint. PPL argues that to the extent it is more proper to file a motion for judgment on the pleadings instead of preliminary objections alleging legal insufficiency, it requests the Commission treat its Preliminary Objections as though they were a motion for judgment on the pleadings. To date, Complainant has not filed an Answer to Preliminary Objections or New Matter.

On February 3, 2020, the instant Complaint was assigned to me as Motion Judge for a disposition regarding the preliminary objections. I will treat the preliminary objections as though they were a motion for judgment on the pleadings and grant dismissal of the Complaint for the reasons discussed below.

FINDINGS OF FACT

1. The Complainant in this case is Jeanene Denlinger, Kyle Denlinger's wife.
2. The Respondent in this case is PPL Electric Utilities Corporation.
3. Complainant challenges PPL Electric's planned installation of a new AMI meter at 14 Susquaw Place, Lancaster, Pennsylvania 17601 due to allegations that the installation of the new AMI meter: (1) is not mandatory; (2) will cause, contribute to, or exacerbate adverse health effects; and (3) raises privacy, safety, and financial concerns. Complaint ¶¶ 4-5.

4. On October 31, 2018, PPL Electric was served with the Complaint of Kyle Denlinger (*Kyle Denlinger Complaint*), in which Mr. Denlinger stated that the installation of the new AMI meter is “unauthorized by Kyle + Jeanene Denlinger.” Preliminary Objections Appendix B ¶ 4.

5. On October 27, 2018, Kyle M. Denlinger filed a Formal Complaint against PPL Electric seeking to prevent the installation of a smart meter at his home in Lancaster County and alleged: 1) that radiofrequency fields from smart meters have adverse health effects; 2) that the meters are a fire hazard; 3) that the meters reduce the longevity of household appliances; 4) that the meters increase costs to consumers; and 5) that there are data privacy issues with the meters; *see Kyle Denlinger Complaint*, Docket No. C-2018-3005721.

6. By Secretarial Letter dated August 16, 2019, the Commission issued the Initial Decision of Administrative Law Judge (ALJ) Elizabeth H. Barnes at Docket No. C-2018-3005721, which dismissed the *Kyle Denlinger Complaint* with prejudice, for failure to comply with the ALJ’s prior July 1, 2019 Order Granting Motion to Compel and the February 1, 2019 Prehearing Order (*Kyle Denlinger Initial Decision*).

7. No exceptions to the *Kyle Denlinger Initial Decision* were filed.

8. On September 26, 2019, the *Kyle Denlinger Initial Decision* became final by operation of law. *See Kyle M. Denlinger v. PPL Electric Utilities Corporation*, Docket No. C-2018-3005721 (Final Order entered September 26, 2019) (*Kyle Denlinger Order*).

9. No appeal of the *Kyle Denlinger Order* was filed.

10. The Complainant resides with Kyle Denlinger at 14 Susquaw Place, Lancaster, Pennsylvania, 17601, and receives electric service under the same utility account number.

11. In both the instant Complaint and the *Kyle Denlinger Complaint*, the complainants allege that the new AMI meter to be installed at 14 Susquaw Place, Lancaster, Pennsylvania 17601: (1) is not mandatory; (2) will cause, contribute to, or exacerbate adverse health effects; and (3) raises privacy, safety, and financial concerns.

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 Commission previously determined that *res judicata* is not properly raised through preliminary objections alleging legal insufficiency. *Cuff v. PECO Energy Co.*, Docket No. C-2013-2370894 (Final Order entered October 7, 2013) (*Cuff*). In her initial decision in *Cuff*, ALJ Kandace F. Melillo held that *res judicata* was an affirmative defense and should properly be raised in new matter, not preliminary objections. ALJ Melillo found that *res judicata* could nonetheless be raised in new matter and preliminary objections and thus serve as a basis for dismissing a complaint.

In reaching the conclusion that an affirmative defense such as *res judicata* could not be raised in preliminary objections and serve as a basis for dismissing a complaint, the Commission concluded that a preliminary objection asserting the affirmative defense of lack of standing could appropriately be treated as a motion for judgment on the pleadings rather than preliminary objections, under certain circumstances. *Wroblewski v. Pennsylvania Electric Company*, Docket No. C-2008-2058385 (Opinion and Order entered May 15, 2009) (*Wroblewski*).

In addition to the doctrines of *res judicata* and collateral estoppel, a complaint may be barred by 66 Pa.C.S. § 316 which states in part:

Whenever the commission shall make any rule, regulation, finding, determination or order, the same shall be prima facie evidence of the facts found and shall remain conclusive upon all parties affected thereby, unless set aside, annulled or modified on judicial review. . . .

66 Pa.C.S. § 316.

The Commission will grant a motion for judgment on the pleadings only if the pleadings show there is no genuine issue as to a material fact and that the moving party is entitled to judgment as a matter of law. Only in a case where the moving party's right to prevail is so clear that a trial would be a fruitless exercise should judgment on the pleadings be granted. *Williams v. Lewis*, 466 A.2d 682 (Pa.Super. 1983); *Service Employees International Union, Local 69, AFL-CIO v. Peoples Natural Gas Company*, Docket No. C-20028539 (Opinion and Order entered December 19, 2003). Judgment on the pleadings should be entered only when the case is clear and free from doubt. *Reuben v. O'Brien*, 496 A.2d 913 (Pa.Super. 1985).

Disposition

I will treat the Preliminary Objections as a Motion for Judgment on the Pleadings as PPL Electric raised the affirmative defense of *res judicata* in its New Matter. For the doctrine of *res judicata* to apply, four conditions must be met: (1) identity of issues, (2) identity of causes of action, (3) identity of persons and parties to the action, and (4) identity of the quality and capacity of the parties suing or sued. *Day v. Volkswagenwerk Aktiengesellschaft*, 464 A.2d 1313 (Pa.Super. 1983). Complainant is prohibited from raising issues that were previously decided in the *Kyle Denlinger Order*. See *Moore, Jr. v. PECO Energy Company*, Docket No. C-2012-2309932, 2012 Pa. PUC LEXIS 1251, at *12 (Initial Decision dated July 18, 2019), *adopted without modification*, Docket No. C-2012-2309932 (Order entered Oct. 24, 2012). Ms. Denlinger is precluded from collaterally attacking a Commission order that has not been reversed upon appeal. 66 Pa. C.S. § 316. Under Section 5.101(a)(4) of the Commission's regulations, a party may file a preliminary objection for "legal insufficiency." 52 Pa. Code § 5.101(a)(4).

The *Kyle Denlinger Order* dismissed, with prejudice, a complaint regarding the installation of an AMI meter at 14 Susquaw Place, Lancaster, Pennsylvania 17601. The service address and the account number listed in the instant Complaint are identical to those at issue in the *Kyle Denlinger Complaint*. Ms. Denlinger resides at the same service property and requests the same relief “from power shut off and from being forced to accept a RF meter.” Complaint at 3-4. Ms. Denlinger wishes to retain her current analog meter for the same reasons that were set forth in Mr. Denlinger’s earlier complaint. Her complaint raises the same issues regarding health and safety.

The Complainant in the instant action is the same or is in privity with Mr. Kyle M. Denlinger because the Complainant is his wife, resides at the same address, receives electric service at that same address, and receives electric service pursuant to the same utility account as her husband. “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 v. Port Auth.*, 936 A.2d 131, 140 (Pa. Cmwlth. 2007) (quoting *Montella v. Berkheimer Assocs.*, 690 A.2d 802, 804 (Pa. Cmwlth. 1997)). “Typically, the same loss, the same measure of damages, and the same or nearly identical issues of fact and law are involved.” *Id.* (internal quotation marks omitted). Thus, the Complainant’s claims and issues are barred by Section 316 of the Code, 66 Pa. C.S. § 316.

As noted above, the service address and the account number listed in the instant Complaint are identical to those at issue in the *Kyle Denlinger Complaint*. Moreover, to the extent that her issues were any different than her husband’s, the Complainant could have and should have raised her concerns regarding the installation of an AMI meter at 14 Susquaw Place, Lancaster, Pennsylvania 17601 during her husband’s formal complaint proceeding at Docket No. C-2018-3005721. Through the instant Complaint, the Complainant is seeking to litigate the same factual and legal issues, related to the same service address and service account, which were raised or could have been raised in the *Kyle Denlinger Complaint*. The *Kyle Denlinger Order* was not set aside, annulled, or modified by judicial review. In fact, the *Kyle Denlinger Order* was not appealed and so remains conclusive upon all parties affected thereby.

Additionally, PPL Electric raised as an affirmative defense in its New Matter that the elements of *res judicata* are all present in Ms. Denlinger's Complaint as the "thing sued upon" and that the "cause of action" in the present Complaint is identical to those raised in her husband's prior complaint. The Commission is granted discretion to dismiss any complaint without a hearing if, in its opinion, a hearing is not necessary in the public interest. 66 Pa.C.S. § 703(b), 52 Pa.Code § 5.21(d). A hearing is necessary only to resolve disputed questions of fact, and when the question presented is one of law, the Commission need not hold a hearing. *Lehigh Valley Power Comm. v. Pa. Pub. Util. Comm'n*, 128 Pa.Cmwlth. 259, 563 A.2d 548 (1989); *Edan Transportation Corp. v. Pa. Pub. Util. Comm'n*, 154 Pa.Cmwlth. 21, 623 A.2d 6 (1993).

The Commission has previously addressed the issue of whether a complainant can refile the same complaint after failing to timely object to a certificate of satisfaction resolving his or her dispute. In *Reynolds v. PPL Electric Utilities Corporation*, Docket No. C-2011-2255268 (Opinion and Order entered January 5, 2012) (*Reynolds*), the Commission reviewed an initial decision which had dismissed a complaint on the grounds of *res judicata*, for raising matters previously resolved through a certificate of satisfaction. While ruling that *res judicata* was not an appropriate ground for dismissal since there had been no final judgment on the merits, the Commission found that 66 Pa.C.S. § 316 prohibited a complainant from raising the same issues before the Commission a second time.

In ruling that 66 Pa.C.S. § 316 was applicable, the Commission concluded that a certificate of satisfaction, which was not objected to, and resulted in the closing of the case, conclusively determined that the issues had been resolved to the satisfaction of the complainant. Accordingly, a complainant could not file another complaint raising the same issues because the issues had already been resolved through the certificate of satisfaction. In the instant case, the same issues were raised in *Kyle Denlinger's Complaint* and although there was no specific ruling upon the merits of the claims, the Commission entered a Final Order dismissing the Complaint for failure to comply with prehearing orders compelling discovery. Accordingly, pursuant to 66 Pa.C.S. § 316, Mrs. Denlinger's complaint is barred as she raises the same issues before the Commission a second time. *Reynolds*; *Creehan v. Duquesne Light Company*, Docket No. C-2012-

2297124 (Opinion and Order entered May 23, 2013); *Wright v Philadelphia Gas Works*, Docket No. C-2013-2368462 (Opinion and Order entered October 23, 2014). Mrs. Denlinger's claims were resolved before the Commission through the issuance of a Final Order, to which Mr. Denlinger never appealed. For these reasons, I find in favor of PPL Electric and the above-captioned complaint will be dismissed with prejudice.

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. Under Section 5.101(a)(4) of the Commission's regulations, a party may file a preliminary objection for "legal insufficiency." 52 Pa. Code § 5.101(a)(4).

3. It is just, reasonable and in the public interest that the complaint filed at Docket No. C-2019-3014786 be dismissed pursuant to 66 Pa. C.S. § 5.101(a)(4).

4. *Res judicata* is an affirmative defense and should properly be raised in new matter. *Cuff v. PECO Energy Co.*, Docket No. C-2013-2370894 (Final Order entered October 7, 2013).

5. For the doctrine of *res judicata* to apply, four conditions must be met: (1) identity of issues, (2) identity of causes of action, (3) identity of persons and parties to the action, and (4) identity of the quality and capacity of the parties suing or sued. *Day v. Volkswagenwerk Aktiengesellschaft*, 464 A.2d 1313 (Pa.Super. 1983).

6. In ruling on a motion for judgment on the pleadings, the Commission must view the record in the light most favorable to the non-moving party, giving that party the benefit of all reasonable inferences. *First Mortgage Co. of Pennsylvania v. McCall*, 459 A.2d 406 (Pa.Super. 1983); *Mertz v. Lakatos*, 381 A.2d 497 (Pa.Cmwlth. 1978).

