

**/BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Radoslaw Olszewski	:	
	:	
v.	:	C-2019-3014276
	:	
Metropolitan Edison Company	:	

INITIAL DECISION

Before
Eranda Vero
Administrative Law Judge

INTRODUCTION

This decision grants a Preliminary Objection filed by an electric distribution company and dismisses a Complaint filed by the company's customer who requested that the installation of his smart meter be delayed until 2023. Even when accepting as true all well pleaded, material facts in the Complaint, as well as every reasonable inference from those facts, and viewing the Complaint in the light most favorable to the Complainant, it does not appear that the Complainant would be entitled to relief under any circumstances as a matter of law. Therefore, the Preliminary Objection will be granted, and the Complaint dismissed.

HISTORY OF THE PROCEEDING

On November 12, 2019, Radoslaw Olszewski (Mr. Olszewski or Complainant) filed with the Pennsylvania Public Utility Commission (Commission) a formal Complaint against Metropolitan Edison Company (Met-Ed or Respondent), docket number C-2019-3014276. In his Complaint, Mr. Olszewski alleged that the Respondent is threatening to terminate his electric service to force him to install their smart meter. Mr. Olszewski maintained

that “[A]s per PA Act 129 of 2008 smart meters are [not] due for installation until 2023.” Complaint ¶ 4. By way of relief, Mr. Olszewski requests that the Commission “prevent Met-Ed from shutting down my electric supply since installation of smart meters is [not] due until 2023.” Complaint ¶ 5. He further explains that he is willing to provide weekly readings to Med-Ed from his existing meter.

On December 3, 2019, Met-Ed filed an Answer with New Matter in response to Mr. Olszewski’s Complaint. In its Answer, Met-Ed admitted or denied the various averments Mr. Olszewski made in his Complaint. In particular, Met-Ed denied Mr. Olszewski’s averment regarding “smart meter issue” and explained its legal obligation to deploy smart meters throughout its service territory. In its New Matter, which was accompanied by a Notice to Plead, Met-Ed averred its various attempts to install a smart meter at Mr. Olszewski’s premises and reiterated its legal obligation to deploy smart meters throughout its service territory. Met-Ed concluded that Mr. Olszewski’s Complaint should be dismissed with prejudice.

Also, on December 3, 2019, Met-Ed filed a Preliminary Objection in response to Mr. Olszewski’s Complaint. In its Preliminary Objection, which was also accompanied by a Notice to Plead, Met-Ed argued that, given the company’s legal obligation to deploy smart meters throughout its service territory, Mr. Olszewski’s formal Complaint is legally insufficient because it fails to state a claim upon which the Commission can grant relief and must be dismissed.

Mr. Olszewski’s reply to Met-Ed’s New Matter was due no later than December 26, 2019. 52 Pa.Code §§ 5.63(a), 1.12(a), 1.56(a)(1) and (b). Mr. Olszewski’s reply to Met-Ed’s Preliminary Objection was due no later than December 17, 2019. 52 Pa.Code § 5.101(f)(1). Mr. Olszewski did not file a reply to either Met-Ed’s New Matter or Preliminary Objection.

By Motion Judge Assignment Notice dated January 9, 2020, the parties were informed that I was assigned as the presiding officer in this matter and responsible for resolving any issues which may arise during the preliminary phase of this proceeding. Met-Ed’s

Preliminary Objection is procedurally ready to be ruled upon. For the reasons discussed further below, Met-Ed's Preliminary Objection will be granted, and Mr. Olszewski's Complaint will be dismissed.

FINDINGS OF FACT

1. The Complainant in this proceeding is Radoslaw Olszewski.
2. The Respondent in this proceeding is Metropolitan Edison Company.
3. The service address is 88 Crystal Terrace, Upper Mount Bethel, PA 18343.
4. On November 12, 2019, Mr. Olszewski filed a Complaint against Met-Ed asking that the installation of his smart meter be delayed until 2023.
5. On December 3, 2019, Met-Ed filed an Answer to the Complaint admitting or denying the various averments made by Mr. Olszewski.
6. On December 3, 2019, Met-Ed filed New Matter in response to the complaint averring that the company is legally obligated to deploy smart meters throughout its service territory and explaining its attempt to install a smart meter at the service address.
7. On December 3, 2019, Met-Ed filed a Preliminary Objection in response to Mr. Olszewski's Complaint arguing that Mr. Olszewski's Complaint is legally insufficient and should be dismissed because the company is legally obligated to deploy smart meters throughout its service territory.
8. Mr. Olszewski did not file a reply to either Met-Ed's New Matter or Preliminary Objection.

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

Here, Met-Ed asserts in its Preliminary Objection that the Complaint is legally insufficient, pursuant to 52 Pa.Code § 5.101(a)(4), in that the Complaint fails to allege that the Respondent violated the Public Utility Code, Commission regulations or orders or its tariff provisions. I agree.

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) (*Equitable*). 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 preliminary objection 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*).

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 regulation at 52 Pa.Code § 5.101(a)(4) permits the filing of a preliminary objection to dismiss a pleading for legal insufficiency. The provision at 52 Pa.Code § 5.101(a)(4) 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. Pa. 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).

Viewing the Complaint in this case in the light most favorable to the Complainant, Met-Ed is threatening to shut off Mr. Olszewski's service because he refuses to let the company install a smart meter at his residence at this time. Rather, the Complainant wants to

have the installation delayed until 2023 since “per PA Act 129 of 2008 smart meters are [not] due for installation until 2023.” Complaint ¶ 4.

Even accepting the facts alleged in the Complaint as true for purposes of disposing Met-Ed’s Preliminary Objection, as I must, I find that the Complaint is legally insufficient.

In order to be legally sufficient, a complaint must set forth “[a] clear and concise statement of the act or omission being complained of....” 52 Pa.Code § 5.22(a)(5). Here, the Complainant has not alleged that Respondent has violated any statute, regulation or order which the Commission has jurisdiction to administer by attempting to install a smart meter at the Complainant’s residence. Rather, the Respondent is complying with relevant Commission statutes, regulations and orders.

As set forth in Met-Ed’s Preliminary Objections, Act 129 of 2008, 66 Pa.C.S. § 2806.1 *et seq.* (Act 129), directed the Respondent and other electric distribution companies (EDCs) to file smart meter procurement and installation plans with the Commission. The Respondent filed a smart meter procurement and installation plan with the Commission. The Commission previously approved Met-Ed’s smart meter deployment plan at docket number M-2013-2341990 by Order entered June 5, 2014. The Respondent is, therefore, complying with the Commission’s directives by attempting to install the smart meter at the Complainant’s residence.

The Commission has previously addressed whether a company’s preliminary objection should be granted where a complainant opposes smart meter installation and charges. In *Kreider v. PECO Energy Company*, Docket No. C-2015-2469655 (Order on Reconsideration entered January 28, 2016) and *Van Schoych v. PECO Energy Company*, Docket No. C-2015-2478739 (Opinion and Order entered February 26, 2016), the Commission indicated that smart meter cases should not be dismissed by preliminary objections when there are specific medical concerns related to the smart meter installation and the matter should be allowed to proceed to hearing. However, the Complainant in this matter did not make any allegations regarding health

or medical concerns in his Complaint. The only remedy that the Complainant requested was to delay the installation of the smart meter.

It should be noted that after *Kreider* and *Van Schoych* were decided, the Commonwealth Court, in *Romeo v. Pa. Pub. Util. Comm'n*, 154 A.3d 422 (Pa.Cmwlth. 2017), reversed the portion of the Commission's decision that sustained PECO's Preliminary Objections and dismissed Romeo's complaint for legal insufficiency and remanded the matter to the Commission for proceedings on Romeo's complaint. The Commonwealth Court stated as follows:

What was before the Commission was PECO's preliminary objections, in which all factual allegations are taken as true. Romeo claimed that the smart meters cause safety and fire hazards and have a negative health impact. Just because he cannot personally testify as to the health and safety effects does not mean his complaint is legally insufficient. He could make out his claim through the testimony of others as well as other evidence that goes to that issue. Because his complaint was not legally insufficient, the Commission erred in dismissing the complaint.

Romeo at 430. Similar to *Romeo*, in *Ottaviano v. PECO Energy Company*, Docket No. F-2016-2542081 (Opinion and Order entered July 13, 2017), Mr. Ottaviano's Complaint contained allegations about health and safety concerns he had regarding the installation of a smart meter at his home. Consistent with *Romeo*, the Commission found that Mr. Ottaviano's Complaint was not legally insufficient and that he should be afforded a hearing on this issue.

However, in *Jackson v. Pennsylvania Electric Company*, Docket No. C-2017-2600495 (Final Order entered on August 31, 2017) (*Jackson*), the Commission found that Administrative Law Judge (ALJ) David Salapa was correct in concluding that where the complainant made no specific allegations regarding the smart meter but simply did not want to have the meter installed at his residence, the matter could be dismissed on preliminary objections based on legal insufficiency. Further, ALJ Salapa indicated that there were no violations of the statute, regulations or Commission order when the utility sent a termination notice to the complainant for failure to allow the company to install the smart meter on the premises.

Concerning the Respondent's attempts to terminate the Complainant's service, the Commission has previously ruled that the Respondent may terminate a customer's service where the customer has failed to provide the Respondent access to its meter and equipment. In *Larson v. PECO Energy Company*, Docket No. C-2014-2451754 (Opinion and Order entered June 11, 2015) (*Larson*), the Commission held that the customer's request to avoid termination of his service for his failure to provide the Respondent with access to its meter and equipment was legally insufficient. The Commission ruled in *Larson* that the Respondent could terminate the customer's service and that the ALJ properly granted the Respondent's preliminary objections and dismissed the customer's complaint as legally insufficient.

The Commission's decisions cited above are controlling on the outcome of this case. Act 129 and the Commission's orders authorize the Respondent to develop and implement a smart meter deployment plan and impose a smart meter charge on its customers to pay for that deployment. Neither Act 129 nor the Commission's order allows a customer to opt out of having a smart meter installed. If a customer refuses to provide the Respondent with access to its meter and equipment to install a smart meter, the Respondent may terminate the customer's service.

Similar to *Jackson*, Mr. Olszewski makes no specific allegations regarding the smart meter other than he simply does not want to have the meter installed at his residence until 2023. Mr. Olszewski has failed to set forth in his Complaint any act done by Met-Ed that violates a Commission regulation, statute or order. Met-Ed is authorized to install smart meters and impose a charge on its customers to develop and implement a smart meter procurement and installation plan that will lead to the installation of smart meters throughout its service territory. Additionally, the company is authorized to terminate the Complainant's service if the Complainant refuses to provide Met-Ed with access to its meter and equipment to install the smart meter.

Since Mr. Olszewski's Complaint does not set forth any violation of a Commission regulation, statute or order, it is legally insufficient. Consequently, I will sustain Met-Ed's Preliminary Objection and dismiss the Complaint.

CONCLUSIONS OF LAW

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

2. Commission preliminary objection practice is comparable 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).

3. 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).

4. 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. *Equitable Small Transportation Intervenors v. Equitable Gas Company*, 1994 Pa. PUC LEXIS 69, Docket No. C-00935435 (July 18, 1994).

5. In order to be legally sufficient, a complaint must set forth “A clear and concise statement of the act or omission being complained of...” 52 Pa.Code § 5.22(a)(5).

6. When the complainant made no specific allegations regarding the smart meter, but simply did not want to have the meter installed at his residence, the matter could be dismissed on preliminary objections based on legal insufficiency. *Jackson v. Pennsylvania Electric Company*, Docket No. C-2017-2600495 (Final Order entered on August 31, 2017).

7. The Complainant’s Complaint fails to state a claim upon which relief can be granted. 52 Pa.Code § 5.101(a)(4).

8. It is just, reasonable and in the public interest that the Complaint filed at Docket No. C-2019-3014276 be dismissed. 52 Pa.Code § 5.21(d).

ORDER

THEREFORE,

IT IS ORDERED:

1. That the Preliminary Objection filed by Metropolitan Edison Company on December 3, 2019, at docket number C-2019-3014276 is granted.
2. That the formal Complaint filed by Radoslaw Olszewski against Metropolitan Edison Company on November 12, 2019, at docket number C-2019-3014276 is dismissed.
3. That this matter be marked closed.

Date: March 5, 2020

_____/s/
Eranda Vero
Administrative Law Judge