

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Dorie Adams	:	
	:	
v.	:	C-2018-3002271
	:	
West Penn Power Company	:	

INITIAL DECISION

Before
Benjamin J. Myers
Administrative Law Judge

INTRODUCTION

A residential customer filed a complaint to prevent his electric utility from installing a smart meter at his residence. The complaint will be dismissed for failure to show that the installation of the smart meter constitutes unsafe or unreasonable service under 66 Pa. C.S. § 1501 or otherwise violates any provision of the Public Utility Code, a Commission order or regulation or a Commission-approved tariff.

HISTORY OF THE PROCEEDING

On May 25, 2018, Dorie Adams (Complainant) filed a complaint with the Pennsylvania Public Utility Commission (Commission) against West Penn Power Company (West Penn) regarding the proposed installation of a smart meter at his residence located at 940 Shady Dell Road, Port Matilda, Pennsylvania for privacy issues. By way of relief, the Complainant requested that the Commission prohibit the installation of said meter at his home.

On June 19, 2018, West Penn filed an answer with new matter. The answer admitted or denied the various averments of the complaint. Respondent's new matter contends that

the Respondent is required to install smart meters for all automatic meter reading customers and that Act 129 of 2008 (Act 129) does not enable the Commission to grant the relief Complainant has requested.

This matter was initially assigned to Administrative Law Judge (ALJ) Jeffrey Watson in the Commission's Pittsburgh office. A lengthy procedural history followed thereafter. On July 23, 2019 this matter was transferred to the Commission's offices in Harrisburg and assigned to me for the purposes of conducting a hearing and issuing an initial decision. On that same date, a hearing notice was issued scheduling an in-person hearing for September 5, 2019. On July 30, 2019 counsel for West Penn contacted the Office of Administrative Law Judge (OALJ) to indicate that neither they nor their potential witnesses were available on the date of hearing.

On August 16, 2019 a notice was issued rescheduling the hearing to a call-in telephonic hearing on October 8, 2019. On October 7, 2019 the Complainant sent correspondence to OALJ requesting a continuance of the October 8, 2019 hearing due to a family medical emergency that occurred on October 4, 2019. Due to the late nature of this request, the parties were informed that the October 8, 2019 hearing would be conducted as scheduled and the Complainant could more fully describe the nature and reason for his request on the record.

The call-in telephonic hearing was conducted as scheduled on October 8, 2019 at which time both Complainant and counsel for West Penn participated in the hearing. At that time, Complainant indicated that due to certain issues that arose in his residence on October 4, 2019, that he was required to abruptly leave his residence and as a result, he did not have access to all of the necessary paperwork from his home to allow him to fully participate in the hearing. While counsel for West Penn objected to a continuance, Complainant's request was granted and the October 8, 2019 hearing concluded.

On October 10, 2019, a new hearing notice was issued rescheduling this matter for a call-in telephonic hearing on December 5, 2019. At that hearing, Complainant appeared *pro se* with two witnesses. Attorneys Tori Giesler and Lauren Lepkoski, as well as two witnesses, appeared on behalf of West Penn. Neither party offered or moved any documents or exhibits into the record.

The record closed on December 5, 2019 at the conclusion of the hearing. The hearing resulted in a transcript of 19 pages.

FINDINGS OF FACT

1. The Complainant in this proceeding is Dorie Adams.
2. The Respondent in this proceeding is West Penn Power Company.
3. The Complainant's service address is 940 Shady Dell Road, Port Matilda, Pennsylvania. N.T. 4.

DISCUSSION

At the time of hearing, the Complainant was placed under oath and afforded the opportunity to present his testimony and evidence as well as the testimony of his witnesses. N.T. 10-11. The Complainant made a statement which, in general, argued that he had already proved his case by a preponderance of the evidence during the pendency of this matter before the Commission.¹ N.T. 12. At the conclusion of this statement, the Complainant indicated that he "rested his case". N.T. 13. Despite being asked repeatedly whether he had any additional testimony, the Complainant indicated that he did not and that he had nothing additional to say until after he had listened to what West Penn's counsel had to offer. N.T. 13-14.

West Penn's counsel had no questions for the Complainant. N.T. 14.

The Complainant was then given the opportunity to present the testimony of his witnesses. N.T. 14. The Complainant again indicated that he did not wish to present any additional testimony.² The Complainant instead indicated that he wished to listen to West Penn's case. N.T. 15.

¹ For the full text of Complainant's testimony, see N.T. 12, ln 8 through N.T. 13, ln 8.

² At the beginning of the hearing two witnesses initially called in to participate on the behalf of the Complainant. Shortly after the hearing began, one witness left the conference call and did not rejoin. N.T. 6.

West Penn was then given the opportunity to present evidence on its own behalf. Counsel, however, indicated that there was no response to be made and declined to offer any testimony. N.T. 15. However, West Penn made a motion that the complaint be dismissed for failure of the Complainant to meet his burden under Section 701 of the Public Utility Code. N.T. 15-16.

Prior to concluding the hearing, Complainant was given an additional opportunity to provide testimony and evidence. The Complainant had no additional testimony or evidence and reiterated that he had already proved his case during the pendency of this matter before the Commission. N.T. 16. The hearing concluded at that time and the record closed. N.T. 17-18.

Section 701 of the Public Utility Code provides that “any person . . . having an interest in the subject matter . . . may complain in writing, setting forth any act or thing done or omitted to be done by any public utility in violation, or claimed violation, of any law which the commission has jurisdiction to administer, or of any regulation or order of the commission.” 66 Pa. C.S. § 701. Therefore, a complainant must generally demonstrate that the public utility violated the Public Utility Code or a Commission regulation or order.

The Commission has exclusive jurisdiction to adjudicate “issues involving the reasonableness, adequacy, and sufficiency” of a public utility’s facilities and services. *See Elkin v. Bell of Pa.*, 420 A.2d 371, 374 (Pa. 1980) (citations omitted). Section 1501 of the Public Utility Code states, in pertinent part, that:

Every public utility shall furnish and maintain adequate, efficient, safe, and reasonable service and facilities, and shall make all such repairs, changes, alterations, substitutions, extensions, and improvements in or to such service and facilities as shall be necessary or proper for the accommodation, convenience, and safety of its patrons, employees, and the public. Such service also shall be reasonably continuous and without unreasonable interruptions or delay. Such service and facilities shall be in conformity with the regulations and orders of the commission. Subject to the provisions of this part and the regulations or orders of the commission, every public utility may have reasonable rules and regulations governing the conditions under which it shall be required to render service. . .

66 Pa. C.S. § 1501.

Under Section 332(a) of the Public Utility Code, 66 Pa. C.S. § 332(a), “the proponent of a rule or order has the burden of proof.” It is well-established that “[a] litigant’s burden of proof before administrative tribunals as well as before most civil proceedings is satisfied by establishing a preponderance of evidence which is substantial and legally credible.” *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm’n*, 578 A.2d 600, 602 (Pa. Cmwlth. 1990). The preponderance of evidence standard requires proof by a greater weight of the evidence. *Commonwealth v. Williams*, 732 A.2d 1167 (Pa. 1999). This standard is satisfied by presenting evidence more convincing, by even the smallest amount, than that presented by another party. *Brown v. Commonwealth*, 940 A.2d 610, 614 n.14 (Pa. Cmwlth. 2008).

If the party seeking a rule or order from the Commission sets forth a *prima facie* case, then the burden shifts to the opponent. *MacDonald v. Pa. R.R. Co.*, 36 A.2d 492 (Pa. 1944). Establishing a *prima facie* case requires either evidence sufficient to make a finding of fact permissible or evidence to create a presumption against an opponent which, if not met, results in an obligatory decision for the proponent. Once a *prima facie* case has been established, if contrary evidence is not presented, there is no requirement that the party seeking a rule or order from the Commission must produce additional evidence to sustain its burden of proof. *See Replogle v. Pa. Elec. Co.*, 54 Pa. PUC 528, 1980 Pa. PUC LEXIS 20 (Order entered Oct. 9, 1980); *see also Dist. of Columbia’s Appeal*, 21 A.2d 883 (Pa. 1941); *Application of Pennsylvania-American Water Co. for Approval of the Right To Offer, Render, Furnish or Supply Water Serv. to the Pub. in Additional Portions Of Mahoning Twp., Lawrence County, Pa.*, Docket No. A-212285F0148, 2008 Pa. PUC LEXIS 874 (Order entered Oct. 29, 2008).

In addition, any finding of fact necessary to support an adjudication of the Commission must be based upon substantial evidence. *Met-Ed Indus. Users Grp. v. Pa. Pub. Util. Comm’n*, 960 A.2d 189, 193 n.2 (Pa. Cmwlth. 2008) (citing 2 Pa.C.S. § 704). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Borough of E. McKeesport v. Special/Temporary Civil Serv. Comm’n*, 942 A.2d 274, 281 n.9 (Pa. Cmwlth. 2008) (citation omitted). Although substantial evidence must be “more than a scintilla and must do more than create a suspicion of the existence of the fact to be established,” *Kyu Son Yi v. State Bd. of Veterinary Med.*, 960 A.2d 864, 874 (Pa. Cmwlth. 2008) (citation omitted), the “presence of conflicting evidence in the record does not mean that

substantial evidence is lacking.” *Allied Mech. and Elec., Inc. v. Pa. Prevailing Wage Appeals Bd.*, 923 A.2d 1220, 1228 (Pa. Cmwlth. 2007) (citation omitted).

As to matters relating to smart meters, the Commission has held that “[t]he Complainant will have the burden of proof during the proceeding to demonstrate, by a preponderance of the evidence, that [the utility] is responsible or accountable for the problem described in the Complaint.” *Kreider v. PECO Energy Co.*, Docket No. P-2015-2495064, p. 18 (Order entered Sept. 3, 2015) (*Kreider*); *see also Romeo v. Pa. Pub. Util. Comm’n*, 154 A.3d 422, 429 (Pa. Cmwlth. 2017) (finding that the smart meter complainant should have a hearing to try to prove his claim through “the testimony of others as well as other evidence that goes to that issue”).

When presented with a challenge to a smart meter installation, the Commission has pronounced that “[t]he ALJ’s role . . . will be to determine based on the record in this particular case, whether there is sufficient evidence to support a finding that the Complainant was adversely affected by the smart meter or whether [the utility’s] use of a smart meter will constitute unsafe or unreasonable service in violation of Section 1501 under the circumstances in this case.” *Kreider, supra* (citing *Woodbourne-Heaton*, 1992 Pa. PUC Lexis 160, at *12-13). *Frompovich v. PECO Energy Co.*, Docket No. C-2015-2474602 at 10 (Opinion and Order entered May 3, 2018).

Here, Complainant has the burden of proof to demonstrate, by a preponderance of the evidence, that West Penn is responsible or accountable for the privacy concern described in his complaint. *Id.* at 18. In order to establish that burden, the Complainant must present sufficient evidence to support a finding that the Complainant was adversely affected by the smart meter or that West Penn’s use of a smart meter would constitute unsafe or unreasonable service in violation of Section 1501 of the Public Utility Code. *Id.* at 23. The Complainant has failed to meet this burden. Despite repeated opportunities to offer testimony and evidence at the time of hearing, the Complainant elected not to and instead simply indicated that he had already sustained his burden throughout the litigation and pendency of this matter before the Commission. Such a general assertion is insufficient to meet this burden.

For these reasons, the complaint will be dismissed for failure to prove by a preponderance of evidence that the installation of a smart meter constitutes unsafe or unreasonable service under 66 Pa. C.S. § 1501 or otherwise violates the Public Utility Code, a Commission order or regulation or a Commission-approved tariff of the company.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the parties and the subject matter in this proceeding. 66 Pa. C.S. § 701.
2. The Commission has exclusive jurisdiction to adjudicate “issues involving the reasonableness, adequacy, and sufficiency” of a public utility’s facilities and services. See *Elkin v. Bell of Pa.*, 420 A.2d 371, 374 (Pa. 1980) (citations omitted).
3. Under Section 332(a) of the Pennsylvania Public Utility Code, the proponent of a rule or order has the burden of proof. 66 Pa. C.S. § 332(a). It is well established that “[a] litigant’s burden of proof before administrative tribunals as well as before most civil proceedings is satisfied by establishing a preponderance of evidence which is substantial and legally credible.” *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm’n*, 578 A.2d 600, 602 (Pa. Cmwlth. 1990).
4. The preponderance of evidence standard requires proof by a greater weight of the evidence. *Commonwealth v. Williams*, 557 Pa. 207, 732 A.2d 1167 (1999). This standard is satisfied by presenting evidence that makes the existence of a contested fact more likely than its nonexistence. *Brown v. Commonwealth*, 940 A.2d 610, 614 n.14 (Pa. Cmwlth. 2008) (citation omitted).
5. As to matters relating to smart meters, the Commission has held that “[t]he Complainant will have the burden of proof during the proceeding to demonstrate, by a preponderance of the evidence, that [the utility] is responsible or accountable for the problem described in the Complaint.” *Kreider v. PECO Energy Co.*, Docket No. P-2015-2495064, p. 18 (Order entered Sept. 3, 2015).

6. The Commission has pronounced that “[t]he ALJ’s role . . . will be to determine based on the record in this particular case, whether there is sufficient evidence to support a finding that the Complainant was adversely affected by the smart meter or whether [the utility’s] use of a smart meter will constitute unsafe or unreasonable service in violation of Section 1501 under the circumstances in this case.” *Kreider v. PECO Energy Co.*, Docket No. P-2015-2495064, p. 23 (Order entered Jan. 28, 2016) (citing *Woodbourne-Heaton*, 1992 Pa. PUC Lexis 160, at *12-13).

7. Complainant has failed to show that the installation of a smart meter constitutes unsafe or unreasonable service under 66 Pa. C.S. § 1501.

ORDER

THEREFORE,

IT IS ORDERED:

1. That the complaint filed by Dorie Adams against West Penn Power Company at Docket No. C-2018-3002271 is denied and dismissed.

2. That the docket in this proceeding be marked closed.

Date: March 4, 2020

_____/s/
Benjamin J. Myers
Administrative Law Judge