

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Diana Sabatine	:	
	:	
v.	:	C-2018-3002804
	:	
West Penn Power Company	:	

INITIAL DECISION

Before
Jeffrey A. Watson
Administrative Law Judge

Complainant filed an Amended Formal Complaint against Respondent alleging Respondent was threatening to terminate her service. Complainant objects to the installation of a smart meter at her residence due to health, safety, privacy, and constitutional concerns. This decision dismisses the Amended Formal Complaint for failure of Complainant to meet her burden of proof.

HISTORY OF THE PROCEEDING

On June 18, 2018, Diana Sabatine (Complainant) filed a Formal Complaint (Complaint) with the Pennsylvania Public Utility Commission (Commission) averring West Penn Power Company (Respondent, West Penn or Company) was threatening to terminate her service at her residence at 315 Possum Hollow Road, Latrobe, Pennsylvania (service location or service address) and averred that installation of a smart meter was not safe.

On July 9, 2018, the Company filed its Answer denying the material allegations within the Complaint and submitted Preliminary Objections.

On July 24, 2018, a Motion Judge Assignment Notice was issued assigning the undersigned Administrative Law Judge (ALJ) as the Presiding Officer in this proceeding.

On July 30, 2018, Complainant filed an Amended Formal Complaint (Amended Complaint), averring she objected to the installation of a smart meter at the service location due to health, safety, privacy, and constitutional concerns. Complainant also averred that Act 129 of 2008 (Act 129) provides that smart meters are voluntary and only those customers who “opt-in” should receive one. As relief, Complainant requested she be allowed to keep her analog meter.

On August 22, 2018, Respondent filed an Amended Answer and New Matter to the Amended Complaint, as well as Amended Preliminary Objections to the Amended Complaint. Respondent denied the material allegations within the Amended Complaint.

On October 12, 2018, Complainant filed a “Notice and Petition For Judicial Determination Of Jurisdiction” (Notice and Petition).

On October 15, 2018, an Interim Order was entered denying the Company’s Amended Preliminary Objections to the Amended Complaint.

On October 17, 2018, an Interim Order was entered establishing a procedural schedule in this proceeding.

On October 25, 2018, Complainant filed a document styled as a “Petition for Interim Review of Law by Pennsylvania Commonwealth Court to Determine Jurisdiction” (Petition for Review).¹

¹ On October 25, 2018, Complainant also filed a document titled "Settlement Offer." As settlement offers are generally not admissible as evidence, *see* Pa.R.E. 408, this document and its contents were not considered by the undersigned in drafting this Initial Decision.

On November 29, 2018, Complainant filed a Motion to Stay these proceedings to allow Complainant an opportunity to “pursue moving [her] civil Complaint to an Article III Court of Record....”

On December 27, 2018, three Interim Orders were issued, one denying Complainant’s Notice and Petition, one denying Complainant’s Petition for Review, and one denying Complainant’s Motion to Stay.

On January 10, 2019, Complainant filed a “First Amended Notice and Petition for Judicial Determination of Jurisdiction” (First Amended Notice and Petition), “Second Amended Notice and Petition for Judicial Determination of Jurisdiction” (Second Amended Notice and Petition), and a “Third Amended Notice and Petition for Judicial Determination of Jurisdiction” (Third Amended Notice and Petition).

On January 29, 2019, three Interim Orders were issued, one denying Complainant’s First Amended Notice and Petition, one denying Complainant’s Second Amended Notice and Petition, and one denying Complainant’s Third Amended Notice and Petition.

On January 30, 2019, an Interim Order was entered revising the procedural schedule in this proceeding.

On February 5, 2019, Complainant filed a “Fourth Amended Notice and Petition to Challenge Jurisdiction” (Fourth Amended Notice and Petition).

On April 12, 2019, Complainant filed correspondence addressed to the Chairman of the Commission.

On April 30, 2019, an Interim Order was entered, denying Complainant’s Fourth Amended Notice and Petition.

On June 4, 2019, a prehearing conference was held. Complainant appeared *pro se*, and Respondent was represented by counsel. On June 5, 2019, an Interim Order was entered, revising the procedural schedule.

On June 21, 2019, Respondent filed a Motion to Dismiss Complaint of Diana Sabatine for Failure to Comply with Order (Motion to Dismiss). Complainant filed a response to the Motion on June 25, 2019.

On September 3, 2019, an Interim Order was entered, denying Respondent's Motion to Dismiss, scheduling an evidentiary hearing for October 30-31, 2019, and revising the procedural schedule.

On October 24, 2019, Complainant filed a "Motion To Strike – No. 1" and "Motion To Strike – No. 2." These motions were denied by two Interim Orders entered on October 28, 2019.

On October 30, 2019, an evidentiary hearing was held. Complainant presented her case through her own testimony. West Penn presented its case through the testimony of Mr. John Ahr and Respondent Exhibit JCA-1. In addition, official notice was taken of Complainant's Exhibits A and B, as well as Respondent's Exhibits PD-1, PD-2, PD-3, and PD-4.

On October 30, 2019, an Interim Order Setting Briefing Schedule was issued requiring the parties to submit any briefs on or before January 3, 2020. On December 30, 2019, Complainant submitted a request to extend the deadline for her to file her brief. On January 3, 2020, an Interim Order was issued, extending the deadline for the parties to file their briefs to January 16, 2020.

On January 16, 2020, Complainant and Respondent each filed a Main Brief, and the hearing record closed.²

FINDINGS OF FACT

1. Complainant is Diane Sabatine, who resides at 315 Possum Hollow Road, Latrobe, Pennsylvania (service location or service address).

2. Respondent is West Penn Power Company, an electrical distribution Company (EDC) that provides residential electrical service to Complainant at the service address.

3. Act 129 of 2008 requires EDCs with more than 100,000 customers to adopt smart meter technology procurement and installation plans.³

4. Respondent has more than 100,000 customers.⁴

5. Act 129 provides a list of specific characteristics required of smart meters.⁵

6. On June 24, 2009, the Commission issued an implementation order, providing general directions to EDCs regarding the adoption of smart meter programs and requiring EDCs, including West Penn, to submit their initial Smart Meter Technology Implementation Procurement Plans (SMTPIP) by August 14, 2009.⁶

² Complainant's Main Brief refers to extra-record materials and information to support her arguments. The extra-record materials and information contained in Complainant's Main Brief were not considered by the undersigned in preparing this Initial Decision.

³ Tr. 74.

⁴ Tr. 88.

⁵ Tr. 74, 8; Exhibit PD-1 at 21.

⁶ Tr. 83; Exhibit PD-2.

7. On August 14, 2009, West Penn submitted its SMTPIP to the Commission.⁷

8. On June 30, 2011, the Commission approved a Joint Petition for Settlement of All Issues regarding West Penn's SMTPIP.⁸

9. On December 31, 2012, West Penn, along with FirstEnergy Corporation's other EDCs in Pennsylvania, filed a Joint Petition for Approval of their Smart Meter Deployment Plan (SMDP).⁹

10. The Commission determined that West Penn's SMDP was compliant with Act 129 and ultimately approved the SMDP on June 5, 2014.¹⁰

11. The SMDP provides "no opt-out for customers."¹¹

12. West Penn's SMDP requires West Penn to deploy 98.5% of smart meters to its customer service locations by mid-2019, and the remaining 1.5% of smart meters, which are located in hard-to-access locations, such as remote hunting cabins, by 2022.¹²

13. The Company sent notification to its customers prior to the deployment of the smart meters, advising them that a smart meter would be deployed at their residences.¹³

⁷ Tr. 86.

⁸ Tr. 89; Exhibit PD-3.

⁹ Tr. 93; Exhibit PD-4.

¹⁰ Tr. 93; Exhibit PD-4.

¹¹ Exhibit JCA-1 at 9 and 47.

¹² Tr. 99; Exhibit JCA-1 at 47-48.

¹³ Tr. 115 at 22-25.

14. The Company provided information on its website regarding the SMDP and smart meter technology.¹⁴

15. Complainant offered her own lay witness testimony at the hearing in this matter.¹⁵

16. West Penn offered testimony of Company employee, John Ahr.¹⁶

17. On June 18, 2018, West Penn received notice of the filing of the Complaint in the instant proceeding. West Penn did not terminate electric service to the service location because of the filing of the Complaint in this proceeding.

DISCUSSION

Legal Standards

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*, 557 Pa. 207, 732 A.2d 1167 (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).

¹⁴ Tr. 116.

¹⁵ Tr. 35- 43.

¹⁶ Tr. 68 - 105.

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.*, 348 Pa. 558, 36 A.2d 492 (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).¹⁷

In smart meter related matters, 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); 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 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 Complainant was adversely

¹⁷ 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).

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 at 23 (Order entered Jan. 28, 2016) (citing *Woodbourne-Heaton*, 1992 Pa. PUC Lexis 160, at *12-13). *Frompovich v. PECO Energy Co.*, Docket No. C-2015-2474602 (Opinion and Order entered May 3, 2018 at 10).

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.

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.

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).

Smart Meter Mandate

The crux of Complainant's Complaint is that Act 129 provides that smart meter installation is voluntary; therefore, the Company's position that a smart meter be installed at all service locations, regardless of customer consent, is inconsistent with and violative of Act 129.

On October 15, 2008, Act 129 was signed into law and codified as part of the Public Utility Code (Code).¹⁸ Act 129 required EDCs with at least 100,000 customers, such as West Penn, to file a SMTPIP with the Commission for approval.¹⁹ Specifically, Section 2807(f)(2) of the Code directed EDCs to furnish smart meter technology as follows: 1) upon request from a customer that agrees to pay the cost of the smart meter at the time of the request; 2) in new building construction; and 3) in accordance with a depreciation schedule not to exceed fifteen years.²⁰

On December 31, 2012, West Penn, along with FirstEnergy Corporation's other EDCs in Pennsylvania, filed their Joint Petition for Approval of their SMDP, in which they requested that the Commission: (1) find that their proposed Deployment Plan satisfies the requirements of Act 129 and the Commission's Implementation Order²¹; (2) approve the Companies' proposed procurement and deployment of approximately 2.1 million smart meters, over 98% of which should be installed by the end of 2019; (3) authorize the Companies to continue to recover smart meter costs; and (4) authorize the Companies to create a regulatory asset for their investment in their existing meters to be replaced by smart meters.²² On

¹⁸ 66 Pa.C.S. § 101 *et seq.*

¹⁹ 66 Pa.C.S. § 2807(f); *see* Exhibit PD-1.

²⁰ 66 Pa.C.S. § 2807(f)(2).

²¹ *See* Exhibit PD-2.

²² *Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company For Approval of Their Smart Meter Deployment Plan*, Docket Nos. M-2013-2341990, M-2013-2341991, M-2013-2341993, M-2013-2341994, Smart Meter Deployment Plan, filed December 31, 2012.

March 19, 2014, the Companies submitted their revised SMDP, which was ultimately approved by the Commission on June 5, 2014.²³

Commission precedent supports Respondent's conclusion that the Commission cannot grant exceptions to the statutory directive that smart meters be installed at all service locations and allow customers to "opt-out."²⁴ Neither the Company's Commission-approved SMDP nor Act 129 provide for such opt-outs to occur.²⁵ The Commission has recently reaffirmed this conclusion, holding in a similar complaint proceeding that: (1) there is no provision in the Code or Commission regulations or Orders that allows a customer to "opt-out" of a smart meter installation; (2) there is Commission precedent that no opt-out provision exists in current Pennsylvania law; and (3) the EDC is legally required to install smart meters by Act 129 and Commission Orders.²⁶

Complainant's testimony and exhibits were related to her position that smart meter installation is voluntary under Act 129. The dispute at issue in this case is a question of law, which at this point is well-settled. Therefore, Complainant failed to meet her burden to prove Respondent's refusal to allow her to opt-out of smart meter installation is a violation of any statute, regulation, or Commission Order. Accordingly, Complainant's claims are not supported by the evidence and must be dismissed.

Unreasonable or Inadequate Service

Complainant raised several health, safety, and privacy concerns related to smart meters in her Amended Complaint but failed to provide any evidence related to these allegations at the evidentiary hearing.

²³ See Exhibits PD-4 and JCA-1.

²⁴ See, e.g., *Lutherschmidt v. Metro. Edison Co.*, Docket No. C-2010 2200353 (Final Order entered March 25, 2011); *Negley v. Metro. Edison Co.*, Docket No. C-2010-2205305 (Initial Decision dated January 3, 2011 became final without Commission action on March 3, 2011).

²⁵ 66 Pa.C.S. § 2807(f); Exhibit JCA-1 at 9 and 47-48; see Exhibit PD-1.

²⁶ *Hoffman-Lorah v. PPL Elec. Util. Corp.*, Docket No. C-2018-2644957 (Order entered May 23, 2019).

Pursuant to Section 1501 of the Code, public utilities have a duty to maintain safe, adequate and reasonable service and facilities and to make repairs, changes, and improvements that are necessary or proper for the accommodation, convenience, and safety of its patrons, employees, and the public. *See*, the relevant portion of Section 1501 of the Code, as cited above.

Complainant failed to present any evidence or testimony related to these claims. As such, there is no record evidence to support the conclusion that Respondent's installation of a smart meter at the service location constitutes a violation of Section 1501 of the Code. Accordingly, Complainant's claims must be dismissed.

Record Evidence

At the evidentiary hearing, Complainant testified and offered exhibits. Her testimony and exhibits pertained to her legal arguments as to why mandatory smart meter installation violates Act 129. Official notice was taken of Exhibits A and B.

John Ahr, Manager of Regulatory Compliance for Smart Meters, testified for Respondent regarding the mandates in Act 129, regulatory requirements for smart meter plans in Pennsylvania, and Respondent's SMDP. In addition, Respondent Exhibit JCA-1 was admitted into evidence. Official Notice was taken of PD-1, PD-2, PD-3, and PD-4.

In view of Complainant's failure to meet her burden of proof, the Amended Complaint must be denied and dismissed with prejudice.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the parties and the subject matter in this proceeding. 52 Pa.C.S. § 331; 66 Pa.C.S. §§ 102, 107, 1501, 701.

2. 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.Cmwlt. 1990).

3. 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.Cmwlt. 2008) (citation omitted).

4. In smart meter-related matters, 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).

5. 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.

6. 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).

7. 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 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) (citation omitted).

8. To satisfy her burden of proof, Complainant must demonstrate that the utility violated the Public Utility Code or a regulation or order of the Commission. 66 Pa.C.S. § 701. This must be shown by a preponderance of the evidence. *Patterson v. Bell Telephone Company of Pennsylvania*, 72 Pa. PUC 196 (1990).

9. Assertions, personal opinions, or perceptions do not constitute evidence. *Pa. Bureau of Corrections v. City of Pittsburgh*, 532 A.2d 12 (Pa. 1987).

10. A public utility is required to provide adequate, efficient, safe, and reasonable service. 66 Pa.C.S. §§ 102 and 1501.

11. There is no specific provision in the Code or the Commission’s regulations or orders that provides that an electric distribution customer may opt-out of smart meter installation. *Povacz v. PECO Energy Company*, Docket No. C-2012-2317176 (Opinion and Order entered January 24, 2013).

12. Act 129 of 2008, 66 Pa.C.S. § 2806.1 *et seq.*, required electric distribution companies to file smart meter technology procurement and installation plans with the Commission for approval. 66 Pa.C.S. § 2807(f).

13. A utility may issue written notice of termination to a customer if a customer does not permit access to meters, service connections, or other property of the public utility for the purpose of replacement, maintenance, repair, or meter reading, including the installation of a smart meter. 66 Pa.C.S. § 1406(a)(4); 52 Pa.Code § 56.81(3).

14. Complainant failed to carry her burden of proof establishing that West Penn violated the Public Utility Code or a regulation or order of the Commission in requiring installation of a smart meter at her property. 66 Pa.C.S. § 332.

15. Complainant failed to carry her burden of proof establishing that West Penn provided unsafe or unreasonable service in violation of 66 Pa.C.S. § 1501.

ORDER

THEREFORE,

IT IS ORDERED:

1. That the Formal Amended Complaint of Diana Sabatine filed against West Penn Power Company at Docket No. C-2018-3002804 is dismissed with prejudice.
2. That Docket No. C-2018-3002804 be marked closed.

Date: April 20, 2020

_____/s/
Jeffrey A. Watson
Administrative Law Judge