

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Ethan Habrial	:	
	:	
v.	:	C-2018-3005907
	:	
Metropolitan Edison Company	:	

INITIAL DECISION

Before
Joel H. Cheskis
Deputy Chief Administrative Law Judge

INTRODUCTION

This decision denies a formal complaint filed by a customer of an electric distribution company who averred that the radio frequency emissions from his AMI, or “smart,” meter have caused him adverse health effects and therefore a smart meter should not be installed at his home. The complainant failed to satisfy his burden of demonstrating that the company violated the Public Utility Code, a Commission order or regulation or a Commission-approved tariff of the company regarding the installation of a smart meter.

HISTORY OF THE PROCEEDING

On November 7, 2018, Ethan Habrial filed a formal complaint with the Pennsylvania Public Utility Commission (Commission) against Metropolitan Edison Company (Met-Ed), docket number C-2018-3005907. In his complaint, Mr. Habrial averred that Met-Ed is threatening to terminate his service or has already terminated his service. Mr. Habrial requested that he be allowed to keep his analog meter for health and safety reasons and to keep the cost of his electricity down. Mr. Habrial attached multiple documents to his complaint in support of his

position. In particular, Mr. Habrial indicated that Met-Ed threatened to terminate his service because he does not want a smart meter on his home. Mr. Habrial added that he has very severe tinnitus that is affected by radio and microwave radiation. Mr. Habrial also added, among other things, that his electric bill will go up with the smart meter because transmissions take place every 15 seconds.

On November 29, 2018, Met-Ed filed an answer and new matter in response to Mr. Habrial's complaint. In its answer, Met-Ed admitted or denied the various averments in Mr. Habrial's complaint, including denying it has any active intent on terminating Mr. Habrial's service but admitting that it has lawfully issued a pre-disconnection notice and service termination notice to Mr. Habrial. Met-Ed added that it is legally required to install smart meters throughout its service territory and that it can lawfully terminate Mr. Habrial's service because he has refused the installation of a smart meter at his home. Met-Ed further provided additional detail regarding its attempts to install a smart meter at Mr. Habrial's home. In its new matter, which was accompanied by a notice to plead, Met-Ed reiterated its legal position regarding its lawful right to terminate Mr. Habrial's service because he has not allowed Met-Ed to install a smart meter at his home. Met-Ed requested that Mr. Habrial's complaint be dismissed with prejudice.

Also on November 29, 2018, Met-Ed filed a preliminary objection in response to Mr. Habrial's complaint. In its preliminary objection, which was accompanied by a notice to plead, Met-Ed reiterated its legal requirements to deploy smart meters throughout its service territory. Met-Ed added that, assuming the facts in the complaint are true, Mr. Habrial has failed to allege that Met-Ed has committed or omitted an act in violation of the Public Utility Code or a Commission regulation or order and that, therefore, the complaint is legally insufficient because it fails to state a claim upon which the Commission can grant relief. Met-Ed discussed additional Commission precedent that it believes supports its preliminary objection. Met-Ed again asked that Mr. Habrial's formal complaint be dismissed in its entirety with prejudice.

On December 12, 2018, Mr. Habrial filed an answer to Met-Ed's preliminary objection wherein he responded to each of Met-Ed's arguments. Mr. Habrial concluded that his

complaint should proceed. Similarly, on December 21, 2018, Mr. Habrial filed an answer to Met-Ed's new matter wherein, again, Mr. Habrial responded to each of Met-Ed's arguments and asked that his complaint move forward.

On December 14, 2018, a motion judge assignment notice was issued assigning Administrative Law Judge (ALJ) Jeffrey A. Watson to address Met-Ed's preliminary objection. By order dated June 10, 2019, ALJ Watson denied Met-Ed's preliminary objection and allowed Mr. Habrial's complaint to move forward.

Subsequently, various procedural matters occurred in this case. This includes various status reports and discovery matters.

On January 17, 2020, the Commission issued a hearing notice scheduling an initial in-person evidentiary hearing for this matter for Thursday, March 5, 2020 and assigning me as presiding officer. A hearing cancellation/reschedule notice was issued on January 21, 2020 rescheduling the hearing for Monday, March 2, 2020. A prehearing order dated February 12, 2020 was issued setting forth various procedural rules that would govern the hearing.

The hearing convened on March 2, 2020, as scheduled. Mr. Habrial appeared *pro se* and provided oral testimony and multiple exhibits that were admitted into the record. Tori Giesler, Esquire and Lauren Lepkoski, Esquire appeared on behalf of Met-Ed and presented one witness who sponsored multiple exhibits that were also admitted into the record. A transcript of 60 pages was created.

The record in this case closed on May 1, 2020 when the transcript was submitted to the Commission. For the reasons discussed below, Mr. Habrial's complaint will be denied.

FINDINGS OF FACT

1. The Complainant in this case is Ethan Habrial.
2. The Respondent in this case is Metropolitan Edison Company.
3. The service address is 100 A Street, Pen Argyl, Pennsylvania.
4. Mr. Habrial suffers from tinnitus. Tr. 17-18.
5. John Ahr is employed by First Energy Service Corporation as an advisor for regulatory compliance for smart meters. Tr. 39.
6. Mr. Ahr has worked for First Energy Service Corporation for 35 years. Tr. 39.
7. Met-Ed can see the customer's local usage through the smart meter but not the individual appliances being used. Tr. 41.
8. Met-Ed Exhibit JCA-7 is the company's customer privacy policy that states that Met-Ed will not share any customer information with third parties and identifies sensitive customer information to include customer address, usage data, social security number, date of birth, phone number and bank account information. Tr. 42-43; Met-Ed Exh. JCA-7.
9. Met-Ed Exhibit JCA-6 is the Secretarial Letter dated May 1, 2015 approving Met-ED's customer privacy policy. Tr. 43-44; Met-Ed Exh. JCA-6.
10. The smart meters installed by Met-Ed are tested to meet the American National Standards tests for smart meters. Tr. 44.

11. The smart meters installed by Met-Ed do not have the capability to communicate with smart appliances in a customer's home. Tr. 45.

12. The smart meters installed by Met-Ed are not capable of turning down a customer's usage, heat, electricity or air conditioning if the customer has not chosen to have that capability. Tr. 46.

13. The smart meter has security protocols in place such as firewalls, passwords and continuous security monitoring on the system to protect the smart meter network. Tr. 49.

14. Mr. Ahr is not aware of a customer's bill increasing after a smart meter is installed. Tr. 51.

DISCUSSION

Section 332(a) of the Public Utility Code provides that the party seeking relief from the Commission has the burden of proof. 66 Pa.C.S. § 332(a). As a matter of law, a complainant must show that the named utility is responsible or accountable for the problem described in the complaint in order to prevail. Patterson v. Bell Tel. Co. of Pa., 72 Pa. PUC 196 (1990). "Burden of proof" means a duty to establish a fact by a preponderance of the evidence, or evidence more convincing, by even the smallest degree, than the evidence presented by the other party. Se-Ling Hosiery v. Margulies, 364 Pa. 54, 70 A.2d 854 (1950) (Se-Ling Hosiery). The offense must be a violation of the Public Utility Code, the Commission's regulations or an outstanding order of the Commission. 66 Pa.C.S. § 701. In this proceeding, Mr. Habrial averred in his complaint that he would like to keep his analog meter for health reasons and to keep his electric costs down. Mr. Habrial, therefore, has the burden of proof in this proceeding.

If a complainant establishes a *prima facie* case, the burden of going forward with the evidence shifts to the utility. If a utility does not rebut that evidence, the complainant will prevail. If the utility rebuts the complainant's evidence, the burden of going forward with the evidence shifts back to the complainant, who must rebut the utility's evidence by a

preponderance of the evidence. The burden of going forward with the evidence may shift from one party to another, but the burden of proof never shifts; it always remains on a complainant. Milkie v. Pa. Pub. Util. Comm'n, 768 A.2d 1217 (Pa.Cmwlth. 2001) (Milkie); *see also*, Burleson v. Pa. Pub. Util. Comm'n, 443 A.2d 1373 (Pa.Cmwlth. 1982).

The decision of the Commission must be supported by substantial evidence. 2 Pa.C.S. § 704. "Substantial evidence" is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. Norfolk & Western Ry. Co. v. Pa. Pub. Util. Comm'n, 489 Pa. 109, 413 A.2d 1037 (1980); Erie Resistor Corp. v. Unemployment Comp. Bd. of Review, 166 A.2d 96 (Pa.Super. 1961); and Pa. Dept. of Public Welfare, White Haven Center, 480 A.2d 382 (Pa.Cmwlth.1984).

More specifically, the Commission has issued various orders regarding smart meter cases. In those orders, the Commission established that a person does not sustain his or her burden of proof in an electric and magnetic field exposure case when the record evidence, "taken as a whole, leads to the ultimate finding and conclusion that the scientific studies at present are inconclusive." Letter of Notification of Phila. Elec. Co. Relative to the Reconstructing and Rebuilding of the Existing 138 kV Line to Operate as the Woodbourne-Heaton 230 kV Line in Montgomery and Bucks Counties, 1992 Pa. PUC Lexis 160, at *210-11 (June 29, 1992) (Initial Decision). Rather, the person must demonstrate by a preponderance of the evidence that such exposure actually causes adverse health effects. Id. at *211. More recently, 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 an AMI 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.” *Id.*, *citing*, 66 Pa.C.S. § 1501. Section 1501 of the Public Utility Code provides, in pertinent part:

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. . . .

66 Pa.C.S. § 1501.

In this case, Mr. Habrial testified regarding various problems he believes are associated with smart meters. This includes interference with his phone, microwaves and Wi-Fi and the impact of smart meters on health, including tinnitus which he suffers. Tr. 11-12, 14-18. Mr. Habrial testified that he suffers as a result of the installation of a smart meter at his neighbors’ home which is about 50-75 feet from his home. Tr. 18. Mr. Habrial also testified that he believes smart meters have reduced the number of birds in his backyard. Tr. 19-20. Mr. Habrial testified regarding his concerns about the ability of smart meters to be hacked. Tr. 20-21. Mr. Habrial added that smart meters can control the individual appliances within a home. Tr. 22. In support of his testimony, Mr. Habrial presented multiple exhibits. These include various reports, articles, websites, and a House Bill, among other documents.

In response, Met-Ed presented the testimony of John Ahr who testified that Met-Ed cannot see usage of individual appliances through the smart meter. Tr. 41. Mr. Ahr also testified regarding Met-Ed’s customer privacy policy that was approved by the Commission. Tr. 42. Mr. Ahr noted that the policy states that customer information will not be shared with third parties and that there are various methods Met-Ed uses to keep the information secure. Tr. 43.

Mr. Ahr testified that there are no safety concerns regarding the use of smart meters and smart meters cannot be used to control a customer's appliances, although the customer can activate that feature if he or she chooses. Tr. 44-46. Mr. Ahr sponsored Met-Ed's customer privacy policy and the Commission Secretarial Letter approving it as exhibits in support of his testimony.

Mr. Habrial's complaint must be dismissed because he has failed to present substantial record evidence demonstrating that Met-Ed violated the Public Utility Code, a Commission order or regulation or a Commission-approved tariff of the company with regard to the service provided to him. Therefore, Mr. Habrial has failed to satisfy his burden of proof in this case.

The evidence presented by Mr. Habrial in support of his complaint is outweighed by the evidence presented in response by Met-Ed. *See, Se-Ling Hosiery, Milkie, Kreider, supra.* Mr. Habrial's complaint is supported solely by his own personal opinions and perceptions. Bald assertions, personal opinions or perceptions do not constitute evidence. Rivera v. Philadelphia Gas Works, Docket No. C-2010-2164222 (Order entered January 12, 2012) (Rivera) *citing, Pa. Bureau of Corrections v. City of Pittsburgh*, 516 Pa. 75, 532 A.2d 12 (1987). For example, Mr. Habrial believes that the smart meter has or will cause his tinnitus to worsen but he did not present any evidence to support finding that this had happened or will happen to him. Such evidence could have included a report or testimony from his physician. Additionally, Mr. Habrial believes that the smart meter has caused birds to not come into his backyard but, again, he did not present any evidence to support that. Mr. Habrial believes that the smart meter will be able to control his appliances but he likewise did not provide evidence that demonstrates that in fact is the case. Personal opinions or perceptions do not constitute substantial evidence sufficient to permit complainants to sustain their burden of proof. *See, Rivera; see also, Kirby v. PPL Electric Utilities Corporation*, Docket No. C-20066297 (Final Order entered November 16, 2006) (*citing, Pa. Bureau of Corrections v. City of Pittsburgh*, 532 A.2d 12 (Pa. 1987)).

Similarly, the exhibits presented by Mr. Habrial also do not support granting his complaint. The various reports, articles, websites, and a House Bill, among other documents, are hearsay and can be afforded little weight in determining whether Met-Ed has violated the Public

Utility Code. Hearsay is an out-of-court statement offered for the truth of the matter asserted. Pa.R.E. 801. Although the rules of evidence in an administrative setting are relaxed, hearsay evidence, properly objected to, is not competent evidence to support a finding. Walker v. Unemployment Compensation Board of Review, 367 A.2d 366, 370 (Pa. Cmwlth. 1976). The exhibits presented by Mr. Habrial were not corroborated by other evidence. In addition, the exhibits presented by Mr. Habrial are also outweighed by the testimony of Met-Ed's witness Ahr. Mr. Ahr, who has worked for Met-Ed for 35 years and is employed by First Energy Service Corporation, Met-Ed's parent company, as an advisor for regulatory compliance for smart meters, testified, for example, that Met-Ed's privacy policy will not allow customer private information to be shared, as Mr. Habrial expressed concern would happen. Mr. Ahr testified that each of the concerns raised by Mr. Habrial are unfounded and his complaint should be rejected. When weighed against Mr. Ahr's testimony, the evidence presented by Mr. Habrial is insufficient to sustain his complaint.

To the extent that Mr. Habrial would have presented his own witnesses in support of his complaint, such as his personal physician, or exhibits that demonstrate how smart meters specifically affect him, Mr. Habrial's testimony that the smart meter causes or exacerbates his tinnitus would have more credibility. Without such testimony, or the authors of any of the various articles that Mr. Habrial presented, who could then be cross-examined by Met-Ed and judged for credibility, the articles and reports presented by Mr. Habrial are hearsay and will be given little weight.

When balancing the evidence of record in this case, it is clear that Mr. Habrial has failed to meet his burden of proof that smart meters cause him adverse health effects. *See, Se-Ling Hosiery, supra*, ("Burden of proof" means a duty to establish a fact by a preponderance of the evidence, or evidence more convincing, by even the smallest degree, than the evidence presented by the other party). This is particularly true given the burden associated with smart meter cases, as discussed above, that, in AMI 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. Mr. Habrial has raised several general concerns that he

believes to be true with regard to smart meters – health, safety, privacy concerns, etc. – but nothing regarding the service as it specifically applies to him.

Similarly, Mr. Habrial has also failed to satisfy his burden with regard to his arguments concerning the environment, fire safety, security and privacy of smart meters. The evidence presented by Mr. Habrial again was essentially comprised of his own perceptions and hearsay and were made in passing at the conclusion of his testimony during the hearing. Tr. 23-24. Regardless, these arguments are also outweighed by the testimony of Met-Ed's witness based on his 35 years working in the industry. As a result, Mr. Habrial's arguments regarding these other issues must also be rejected.

As such, Mr. Habrial's argument that Met-Ed has violated the Public Utility Code, a Commission order or regulation or a Commission-approved tariff of the company because of his smart meter will be rejected. On balance, Mr. Habrial has failed to satisfy his burden of demonstrating by a preponderance of the evidence that Met-Ed's use of the AMI smart meters creates the issues raised by Mr. Habrial 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 subject matter and the parties to this proceeding. 66 Pa.C.S. § 701.

2. Section 332(a) of the Public Utility Code provides that the party seeking relief from the Commission has the burden of proof. 66 Pa.C.S. § 332(a).

3. A complainant must show that the named utility is responsible or accountable for the problem described in the complaint in order to prevail. Patterson v. Bell Tel. Co. of Pa., 72 Pa. PUC 196 (1990).

4. "Burden of proof" means a duty to establish a fact by a preponderance of the evidence, or evidence more convincing, by even the smallest degree, than the evidence presented by the other party. Se-Ling Hosiery v. Margulies, 364 Pa. 54, 70 A.2d 854 (1950).

5. The offense must be a violation of the Public Utility Code, the Commission's regulations or an outstanding order of the Commission. 66 Pa.C.S. § 701.

6. If a complainant establishes a *prima facie* case, the burden of going forward with the evidence shifts to the utility. If a utility does not rebut that evidence, the complainant will prevail. If the utility rebuts the complainant's evidence, the burden of going forward with the evidence shifts back to the complainant, who must rebut the utility's evidence by a preponderance of the evidence. The burden of going forward with the evidence may shift from one party to another, but the burden of proof never shifts; it always remains on a complainant. Milkie v. Pa. Pub. Util. Comm'n, 768 A.2d 1217 (Pa.Cmwlth. 2001); *see also*, Burleson v. Pa. Pub. Util. Comm'n, 443 A.2d 1373 (Pa.Cmwlth. 1982).

7. The decision of the Commission must be supported by substantial evidence. 2 Pa.C.S. § 704.

8. "Substantial evidence" is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. Norfolk & Western Ry. Co. v. Pa. Pub. Util. Comm'n, 489 Pa. 109, 413 A.2d 1037 (1980); Erie Resistor Corp. v. Unemployment Comp. Bd. of Review, 194 Pa.Superior 278, 166 A.2d 96 (1961); and Murphy v. Pa. Dept. of Public Welfare, White Haven Center, 85 Pa.Cmwlth. 23, 480 A.2d 382 (1984).

9. A person must demonstrate by a preponderance of the evidence that an electric and magnetic field exposure actually causes adverse health effects. Letter of Notification of Phila. Elec. Co. Relative to the Reconstructing and Rebuilding of the Existing 138 kV Line to Operate as the Woodbourne-Heaton 230 kV Line in Montgomery and Bucks Counties, 1992 Pa. PUC Lexis 160, at *211 (June 29, 1992) (Initial Decision).

10. In AMI meter-related matters, the 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).

11. 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. 66 Pa.C.S. § 1501.

12. Hearsay is an out-of-court statement offered for the truth of the matter asserted. Pa.R.E. 801.

13. Hearsay evidence, properly objected to, is not competent evidence to support a finding. Walker v. Unemployment Compensation Board of Review, 367 A.2d 366, 370 (Pa. Cmwlth. 1976).

14. Personal opinions or perceptions do not constitute substantial evidence sufficient to permit a complainant to sustain their burden of proof. Kirby v. PPL Electric Utilities Corporation, Docket No. C-20066297 (Final Order entered November 16, 2006) (citing, Pa. Bureau of Corrections v. City of Pittsburgh, 532 A.2d 12 (Pa. 1987)).

15. Mr. Habrial has failed to satisfy his burden of demonstrating that Met-Ed has violated the Public Utility Code, a Commission order or regulation or a Commission-approved tariff of the company with regard to installing a smart meter at his home.

