

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Charles & Sylvia Bolte	:	
	:	
v.	:	C-2019-3011287
	:	
Metropolitan Edison Company	:	

INITIAL DECISION

Before
Benjamin J. Myers
Administrative Law Judge

INTRODUCTION

Residential customers filed a complaint to prevent their electric utility from installing a smart meter at their 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 June 29, 2019, Charles and Sylvia Bolte (Complainants) filed a complaint with the Pennsylvania Public Utility Commission (Commission) against Metropolitan Edison Company (Met Ed) regarding the proposed installation of a smart meter at their residence located at 108 Pinebrook Road, Milford, Pennsylvania for health and safety issues. By way of relief, the Complainants requested that the Commission prohibit the installation of said meter at their home.

On July 22, 2019, Met Ed 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 Complainants have requested.

On July 22, 2019, Met Ed also filed preliminary objections to the complaint. On August 27, 2019 a motion judge assignment notice was issued assigning this matter and the disposition of the preliminary objections to me. On September 17, 2019, an order was issued denying the preliminary objections and directing that this matter be scheduled for an evidentiary hearing.

On September 20, 2019, a hearing notice was issued scheduling this matter for an initial call-in telephonic hearing on November 25, 2019. On September 23, 2019, a prehearing order was issued addressing, *inter alia*, requests for continuance, subpoena procedures, attorney representation and the Commission's policy encouraging settlements.

On October 2, 2019, Met Ed requested the cancellation of the November 25, 2019 hearing. This request was granted and a hearing notice was issued on October 18, 2019 rescheduling the hearing for December 18, 2019. The hearing notice was reissued on November 13, 2019, after consultation with the parties regarding preparations for the hearing. The notice instructed the parties to provide each other with copies of any documents and the names of any witnesses they intended to utilize at the time of hearing by November 18, 2019.

On November 18, 2019, Met Ed submitted its identification of witnesses and exhibits.

On December 11, 2019 Ms. Bolte requested the cancellation of the December 18, 2019, hearing due to health issues. After providing additional information regarding her request, on December 13, 2019, the cancellation was granted.

At that time, the parties were advised that the hearing would be rescheduled between January 13 and January 31, 2020 and that the parties were to provide dates of availability between these dates. After receiving those dates, the hearing was rescheduled for January 21, 2020.

On December 31, 2019, Ms. Bolte requested the cancellation of the January 21, 2020 hearing due to feeling ill-prepared to participate in the hearing as the result of ongoing health issues. The Complainants also indicated that they had not been afforded a “litigation schedule” in this matter and requested additional time to prepare for a hearing and conduct discovery. This request was initially denied in part with the explanation that it was not appropriate at that stage to grant another continuance because a party now wished to engage in discovery given that the hearing in this matter had already been rescheduled three times.

On January 8, 2020 the Complainants filed an amended complaint with attached documents. On January 14, 2020, the Complainants submitted a packet of exhibits in anticipation of the January 21, 2020 hearing.

On January 17, 2020, the Complainants renewed their request for the cancellation of the January 21, 2020 hearing citing again to health issues. The Complainants also requested that given those health issues, Ms. Bolte could neither appear in person for a hearing or fully participate in a hearing by telephone. Instead, Ms. Bolte requested that she be permitted to submit the entirety of the testimony and evidence she wished to present in this matter by email.

On January 17, 2020, in responding to the Complainants’ requests, Met Ed made several suggestions. First, the Complainants had filed an amended complaint on January 8, 2020 and Met Ed would not have the opportunity to file an answer to the amended complaint prior to the January 21, 2020 hearing. Second, Met Ed was not opposed to a “paper hearing” process whereby Ms. Bolte would submit her testimony and exhibits by email after which Met Ed would have the same opportunity. Met Ed, however, indicated that this process was conditioned on several points. One, Met Ed reserved the right to object to any testimony or exhibits submitted that it believed were not properly admissible, but would make such objections in writing through

a motion to strike and would expect Complainants be permitted to do the same. Two, the agreement was conditioned on the working assumption that Ms. Bolte would only be testifying on her own behalf and would not be presenting the testimony of any expert or other witnesses.

Based on the forgoing, and the fact that Met Ed wished to be afforded the opportunity to file an answer to the amended complaint, the January 21, 2020 hearing was cancelled.

On January 20, 2020, Complainants indicated that their testimony would be what Ms. Bolte had already submitted in the amended complaint and their exhibits would be those which had been submitted five days prior for use during the January 21, 2020 telephonic hearing. Ms. Bolte indicated that she may wish to add some additional testimony depending on the contents of Met Ed's written response to her amended complaint.

On February 6, 2020, Met Ed filed an answer to the amended complaint as well as new matter.

On February 25, 2020, Complainants filed a response to Met Ed's answer and new matter.

On March 3, 2020, I sent an email to the parties acknowledging that an agreement had been reached pertaining to the submission of pre-served testimony and exhibits in this matter and the desire of the parties to forgo a telephonic hearing. It was agreed at that time the Complainants would have until March 31, 2020 and Met Ed would have until April 14, 2020 to submit any additional testimony or exhibits.

On March 31, 2020, Complainants submitted the remainder of Ms. Bolte's written testimony as well as 20 exhibits.

On April 14, 2020, Met Ed submitted the written rebuttal testimony of John C. Ahr.

On April 22, 2020, I sent an email to both parties regarding the conduct of a hearing in this matter. It was indicated that in circumstances where pre-served testimony has been provided by the parties, a hearing would typically be conducted to give the parties the opportunity to cross-examine each other regarding the testimony they presented as well as the opportunity to object to any exhibits being offered by the parties and to move said testimony and exhibits into the record. It was reiterated that the hearing would be by telephone at a date to be determined.

This email also informed the parties that a hearing would not be necessary if both parties agreed to waive cross-examination and had no objections to the testimony or exhibits becoming a part of the record. This option was given to the parties based upon the Complainants' continuing insistence that even telephone participation by Ms. Bolte in a hearing of even such a short duration would not be feasible. The parties were advised that my decision would be based on the record as it stood at that time – which was all of the pre-served testimony and exhibits which the parties had submitted up until that point.

By email dated April 24, 2020, Ms. Bolte indicated that, “Performing a hearing by phone would be difficult for me because of my ongoing poor health. Therefore I agree to what you suggest: to waive cross-examination and have you enter my and Met-Ed's written testimony and exhibits into the record to use as a basis for your decision. “

In response, Met Ed indicated that it agreed with this approach to conclude this matter with one condition. As Met Ed would ordinarily lodge admissibility objections to certain portions of Ms. Bolte's pre-served testimony and exhibits at a hearing, in an effort to avoid a hearing, Met Ed proposed that both parties be permitted to submit written objections so that such objections could be preserved and included in the evidentiary record of this matter. If that was acceptable to both parties, Met Ed would agree to the admission of all items subject to any such objections with the appropriate weight given to the testimony and exhibits submitted by both parties.

By email dated April 24, 2020, the Complainants indicated agreement with this approach.

By email dated April 27, 2020, I advised that the parties were in agreement that a hearing in this matter was not necessary and cross-examination would be waived. The testimony and evidence already provided by the parties would be admitted to the record – subject to any objections the parties wish to make and place into the record as well. The parties were directed that any objections to the testimony or exhibits should be submitted by May 1, 2020.

By email dated April 28, 2020, Ms. Bolte asked that the submission deadline for objections be extended to May 8, 2020 and wished to confirm that the exhibits she had submitted by mail in anticipation of the January 21, 2020 hearing would be included in the record.¹

On April 27, 2020, the parties agreed to forgo the conduct of an evidentiary hearing and waive cross-examination.

On May 1, 2020, Met Ed submitted written testimony Statement 1-R with 2 attached exhibits labeled JCA-1 and JCA-2 consisting of 84 pages.

On May 8, 2020, both parties filed written objections to the written testimony and exhibits presented by the other party. The testimony and exhibits were moved into the record subject to those respective objections.

The record in this matter closed on May 8, 2020 when the parties' objections were submitted. This matter is now ready for disposition. For the reasons discussed below, the complaint will be denied and dismissed.

¹ Three copies of these exhibits were mailed to the Office of Administrative Law Judge (OALJ) in early January 2020 in anticipation of the January 21, 2020 hearing. As of March 16, 2020, the Commission's physical offices were closed as a result of the Covid-19 pandemic, but OALJ continued to work remotely. On July 16, 2020, I went into my office in the Keystone Building in Harrisburg, Pennsylvania, to retrieve these documents from OALJ and delivered them to the Secretary's Bureau for inclusion in the record.

FINDINGS OF FACT

1. The Complainants in this proceeding are Charles and Sylvia Bolte.
2. The Respondent in this proceeding is Metropolitan Edison Company.
3. The Complainants' service address is 108 Pinebrook Road, Milford, Pennsylvania.
4. The Complainant, Ms. Bolte, suffers from a variety of health issues including chemical sensitivity, vertigo and sensitivity to electromagnetic fields. March 31, 2020 Bolte Statement at 1-3.
5. The smart meters deployed by Met Ed comply with all safety requirements and standards established by agencies such as the Federal Communications Commission. Met Ed Statement 1-R at 11.
6. The smart meters deployed by Met Ed are subjected to the required American National Standards Institute testing and are Underwriters Laboratories certified to confirm compliance to UL 2735. Met Ed Statement 1-R at 11-12.
7. A smart meter cannot transmit names, addresses, social security numbers or similar account numbers through the smart meter network - only a customer's usage data. Met Ed Statement 1-R at 13.
8. The smart meters deployed by Met Ed comply with Met Ed's privacy policy which has been approved by the Commission. Met Ed Statement 1-R at 12.
9. The privacy policy prohibits Met-Ed from sharing sensitive customer information, including the customer's name, address, usage levels, social security, driver's license number, employer identification number, date of birth, credit card number, passport

number, or bank account number with third parties without the customer's informed consent. Met Ed Statement 1-R at 13.

DISCUSSION

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 be given an opportunity at 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, Complainants have argued that the installation of a smart meter at their home raises issues regarding safety and privacy. The burden of proof is therefore upon the Complainants to demonstrate, by a preponderance of the evidence, that Met Ed is responsible or accountable for the safety or privacy concerns described in their complaint. *Id.* at 18. In order to establish that burden, the Complainants must present sufficient evidence to support a finding that they would be adversely affected by a smart meter or that Met Ed’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 Complainants provided both the written testimony of Ms. Bolte as well as numerous exhibits regarding Ms. Bolte’s health and the adverse health and privacy concerns which the Complainants assert are inherent in smart meters. In particular, Ms. Bolte argued that the installation of a smart meter at her residence would exacerbate her sensitivity to

electromagnetic signals thereby causing her a variety of health issues. In support of this argument, the Complainants submitted various articles and other forms of written materials including letters from Ms. Bolte's doctor.

Although the Complainants may be firmly convinced that the installation of a smart meter at their home poses an unreasonable risk to their health safety and privacy, they have failed to produce competent evidence to substantiate their beliefs in that regard. In *Kirby v. PPL Electric Utilities Corporation*, the Commission ruled that,

Complainant's testimony consisted solely of his opinion ... Regardless of how earnestly Complainant believes the Complaint allegations to be true, personal opinions or perceptions do not constitute substantial evidence sufficient to permit him to sustain his burden of proof.

Kirby v. PPL Electric Utilities Corp., 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)).

The Complainants cited to numerous sources such as articles or letters written by others to corroborate Ms. Bolte's testimony. However, I give these proposed sources little or no weight since they are hearsay. Many of the exhibits which the Complainants submitted were objected to by Met Ed on admissibility grounds relating to relevance and hearsay.² Met Ed's objections are well placed given that most, if not all, of these exhibits are out-of-court statements from individuals other than the Complainants which are being presented as to the truth of the matter asserted--i.e., that smart meters are a risk to health, safety and privacy. Even letters supplied to Ms. Bolte fall under this definition. Hearsay which has been properly objected to may not serve as a basis for a finding of fact. *Walker v. Unemployment Compensation Bd. of Review*, 367 A.2d 366, 370 (Pa. Cmwlth. 1976) (*Walker*). Therefore, the evidence offered by the Complainants which is left to be considered in this matter is comprised almost entirely of Ms. Bolte's testimony. Ms. Bolte's testimony alone, consisting of the Complainants' beliefs and opinions, is insufficient to satisfy their burden.

² The Complainants also submitted objections to the testimony and evidence presented by Met Ed. However, these objections while voluminous, were either misplaced legal objections or additional testimony of Ms. Bolte.

In response to the testimony presented by the Complainants, Met Ed's witness testified to the health safety and privacy risks which Complainants have raised. Mr. Ahr testified that the smart meters deployed by Met Ed comply with all safety requirements and standards established by agencies such as the Federal Communications Commission. Met Ed Statement 1-R at 11. The smart meters are subjected to the required American National Standards Institute testing and are Underwriters Laboratories certified to confirm compliance to UL 2735. Met Ed Statement 1-R at 11-12. Mr. Ahr further testified that a smart meter cannot transmit names, addresses, social security numbers or similar account numbers through the smart meter network - only a customer's usage data and comply with Met Ed's privacy policy which has been approved by the Commission. Met Ed Statement 1-R at 12, 13. This privacy policy prohibits Met-Ed from sharing sensitive customer information, including the customer's name, address, usage levels, social security, driver's license number, employer identification number, date of birth, credit card number, passport number, or bank account number with third parties without the customer's informed consent. Met Ed Statement 1-R at 13.

Based upon the totality of the testimony and evidence presented, the Complainants have failed to provide the substantial evidence necessary to establish a *prima facie* case or otherwise meet their burden. Even if the Complainants had done so, Met Ed has presented credible testimony which contradicts the Complainants' arguments.

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. *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. Hearsay which has been properly objected to may not serve as a basis for a finding of fact. *Walker v. Unemployment Compensation Board of Review*, 367 A.2d 366, 370 (Pa. Cmwlth. 1976)

6. 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).

7. 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).

8. Complainants have 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 Charles and Sylvia Bolte against Metropolitan Edison Company at Docket No. C-2019-3011287 is denied and dismissed.
2. That the docket in this proceeding be marked closed.

Date: August 11, 2020

/s/
Benjamin J. Myers
Administrative Law Judge