

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Deree J. Norman

v.

PECO Energy Company

:
:
:
:
:

C-2024-3048777

INITIAL DECISION

Before
Darlene Heep
Administrative Law Judge

INTRODUCTION

The Preliminary Objection of PECO Energy Company is sustained due to the legal insufficiency of the Complaint and because the Complainant cannot prevail even if the averments of the Complaint are read in the light most favorable to the Complainant.

HISTORY OF THE PROCEEDINGS

On April 29, 2024, Deree J. Norman (Complainant) filed a Formal Complaint with the Pennsylvania Public Utility Commission (Commission) against PECO Energy Company (PECO or Company) stating that the Company was threatening to shut off or had already shut off service, noting that his bills are timely paid and that he has no outstanding balance with PECO. As relief, the Complainant requested that PECO “[s]top threatening to terminate my service.”

On May 20, 2024, PECO filed an Answer and New Matter. In the Answer, PECO admitted that the Company issued the Complainant a 10-day Termination Notice for failure to allow PECO access to install a smart meter. In the New Matter, PECO stated that the Complainant disputes the installation of a smart meter, and that the Complainant previously litigated this issue before the Commission. PECO further argued that this matter should be dismissed due to *res judicata* and because it is without merit given that the Pennsylvania Supreme Court has held that Act 129¹ does not provide an opt out for utility smart meter installation.

Also on May 20, 2024, PECO filed Preliminary Objections. Therein, PECO asserted that the matter should be dismissed due to legal insufficiency because the same issue was previously litigated by the Complainant before the Commission. PECO further averred the matter should be dismissed because the Complainant seeks to prevent installation of a smart meter at his residence and no relief is possible for the Complainant because the Pennsylvania Supreme Court has ruled that there is no opt out for smart meter installation. PECO also asserted that its tariff and the Commission allow the company to terminate service if access to its meters is refused.

On May 31, 2024, the Complainant replied to the New Matter. In the Reply, he stated that this matter should not be dismissed because the requirements of *res judicata* are not met and that installation of smart meters is not required.

On June 3, 2024, the Complainant filed a “Complainant’s Praecipe to Supplement” response in opposition to the New Matter which consisted of a copy of a utility bill.

¹ 66 Pa.C.S. §§ 2803, 2806.1, 2807, 2811, 2813-2815 (Act 129).

On June 19, 2024, the Complainant filed a Response to PECO Energy Company's Preliminary Objection, with attachments, again contending that the matter should not be dismissed, and that PECO should not terminate his service because he does not have an outstanding balance. He further states that he refuses to allow PECO to exchange his meter, that the requirements to dismiss a matter under the doctrine of *res judicata* are not present and that installation of smart meters is not required.

This matter was assigned to me for a decision on the Preliminary Objection on June 7, 2024. After review of the record, it was determined that the Preliminary Objection would be sustained and an Initial Decision issued. This matter is ready for a decision

FINDINGS OF FACT

1. The Complainant is Deree J. Norman, a PECO electric customer at 5367 Thomas Avenue, Philadelphia, Pennsylvania 19143 (service address).
2. The Respondent is PECO Energy Company.
3. PECO issued termination notices to the Complainant on April 26, 2024, and May 20, 2024. Complainant's Answer to Preliminary Objection, Exhibits 1 and 2.
4. PECO issued termination notices to the Complainant because the Complainant refused PECO access to its meter at the service address. *Id.*
5. The Complainant is refusing PECO access to change his meter. Complainant's Answer to Preliminary Objection, Exhibit 3; *Id.* at pp. 7-8.

DISCUSSION

Section 332(a) of the Code, 66 Pa.C.S. § 332(a), provides that the party seeking relief from the Commission has the burden of proof. PECO has filed Preliminary Objections seeking dismissal of this action.²

If it is determined that a moving party is entitled to a judgment as a matter of law, and there is no genuine issue of material fact, a motion for judgment on the pleadings or summary judgment will be granted. 52 Pa. Code § 5.102(d)(1). The Commission's Rules of Practice and Procedure at 52 Pa. Code § 5.102 govern motions for judgment on the pleadings. Generally, the moving party bears a heavy burden of showing that no genuine issue of material fact exists and that it is entitled to a judgment as a matter of law.

The Commission must view the record in the light most favorable to the non-moving party, giving that party the benefit of all reasonable inferences. *First Mortg. Co. of Pa. v. McCall*, 459 A.2d 406 (Pa. Super. 1983); *Mertz v. Lakatos*, 381 A.2d 497 (Pa. Cmwlth. 1978). It must accept as true all well-pleaded statements of fact of the non-moving party and consider only those facts that the non-moving party specifically admits. *Weik v. Estate of Brown*, 794 A.2d 907 (Pa. Super. 2002). All doubts as to the existence

² I note that PECO's Preliminary Objections raise three issues: 1) *res judicata*; 2) mandatory implementation of smart meter installation; and 3) termination of service permitted for a customer's failure to allow PECO access to its meter. *Res judicata* is an affirmative defense and as such is not properly raised as a preliminary objection. However, PECO also raised this defense in its new matter. As an affirmative defense asserted in new matter, PECO's claim would have been more appropriately presented as a motion for judgment on the pleadings. Nevertheless, the Commission or presiding officer at any stage of an action or proceeding may disregard an error or defect of procedure which does not affect the substantive rights of the parties. 52 Pa. Code § 1.2(a). Accordingly, I will treat PECO's preliminary objections as a motion for judgment on the pleadings.

of a genuine issue of material fact must be resolved against the moving party. *Thomson Coal Co. v. Pike Coal Co.*, 412 A.2d 466 (Pa. 1979). Only in a case where the moving party's right to prevail is so clear that a trial would be a fruitless exercise should judgment on the pleadings be granted. *Williams v. Lewis*, 466 A.2d 682 (Pa. Super. 1983); *Service Emps. Int'l Union, Local 69, AFL-CIO v. The Peoples Nat. Gas Co., d/b/a Dominion Peoples*, Docket No. C-20028539 (Opinion and Order entered December 19, 2003). Judgment on the pleadings should be entered only when the case is clear and free from doubt. *Reuben v. O'Brien*, 496 A.2d 913 (Pa. Super 1985). Finally, the Commission may dismiss any complaint without a hearing if, in its opinion, a hearing is not necessary in the public interest. 66 Pa.C.S. § 703.

Commission Regulations provide that failure to file a timely reply to New Matter may be deemed in default, and relevant facts stated in the New Matter may be deemed to be admitted. 52 Pa. Code § 5.63(b); *Jones v. Phila. Gas Works*, Docket Number C-2019-3007984 (Order and Opinion entered July 16, 2020).

While the Complainant does not directly state it in the Complaint here, it is clear in the Complainant's Reply to the New Matter and Response to the Preliminary Objection that the Complainant is seeking to prevent installation of a smart meter at the service address. Complainant's Reply to New Matter at 2, 6; Complainant's Answer to Preliminary Objection at 7-8.

PECO contends that the matter should be dismissed because: 1) under the doctrine of *res judicata*, the Complainant cannot relitigate previously litigated issues; and 2) the Complainant cannot opt out of a smart meter installation and therefore cannot prevail on his claims.

Res Judicata

The doctrine of *res judicata* bars the filing and relitigating of claims previously litigated before the Commission. *See Hanley v. Penn Power Co.*, Docket No. C-2023-3041147 (Opinion and Order entered May 9, 2024). For the doctrine to prevail, four conditions must be met. They are: (1) Identity of issues; (2) Identity of causes of action; (3) Identity of persons and parties to the action; and (4) Identity of the quality and capacity of the parties suing or sued. *Day v. Volkswagenwerk Aktiengesellschaft*, 474 A.2d 1313 (Pa. Super. 1983).

Here, PECO contends that the Complainant is seeking to litigate a claim challenging “algorithms” used by PECO in its metering system and that this was previously litigated by the Complainant in *Norman v PECO Energy Co.*, C-2015-2472605 (Opinion and Order entered July 13, 2017). The Complainant contends that he, in this matter, is not raising claims pertaining to “algorithms.” *See* Complainant Reply to New Matter at 2; Complainant Answer to Preliminary Objection at 8.

When considering a motion for judgment on the pleadings, the Commission must accept as true all well-pleaded statements of fact of the non-moving party and consider only those facts that the non-moving party specifically admits. *Weik v. Estate of Brown*, 794 A.2d 907 (Pa. Super. 2002). The Complainant’s framing of his claims as not including the previously litigated issue of “algorithms” is accepted. Therefore, the *res judicata* conditions of identity of issues and identity of causes of action are not met. The doctrine of *res judicata* does not apply and cannot form the basis for dismissal.

Smart Meter Opt Out

Mr. Norman is seeking to prevent installation of a Smart Meter at the service address. *See* Complainant’s Response to New Matter, Request for Relief. The Commission has concluded that there is no provision in the Code or the Commission’s Regulations or Orders that allows a customer to “opt out” of smart meter installation. *See Povacz v. PECO Energy Co.*, Docket No. C-2012-2317176 (Opinion and Order entered Jan. 24, 2013). In *Povacz v. Pennsylvania Public Utility Commission*, 280 A.3d 975 (Pa. 2022) (“*Povacz II*”), the Pennsylvania Supreme Court affirmatively established that there is no "opt-out" provision for installation of a smart meter pursuant to Act 129 and that to raise a viable challenge to smart meter installation, a customer must satisfy the preponderance of evidence standard for a violation of Section 1501 of the Code. *Povacz II* at 983-984.

To prevail on a Section 1501 claim, a Complainant challenging smart meter installation must establish that PECO installing a smart meter is unsafe or unreasonable. To meet that burden, a complainant may be required to present medical documentation and/or expert testimony in support. *See Kreider v. PECO Energy Co.*, Docket. No. P-2015-2495064 (Opinion and Order entered Jan. 28, 2016). In the instant Complaint and Response to New Matter, the Complainant has presented no basis upon which he can prevail in an evidentiary hearing. In fact, he unambiguously states that he “makes no assertions of possible harm from radio waves emitted by any type of meter.” Complainant’s Response to New Matter ¶14. The Complainant cannot prevent installation of a smart meter at the service address and therefore any claims seeking that remedy are dismissed. *Povacz II* at 999.

Termination Notice for Refusal to Allow PECO to Change the Meter

PECO issued termination notices to the Complainant. Complaint ¶¶ 4-5, Response to New Matter at 2, Response to Preliminary Objections Exhibits 1 and 2. Both notices state that the Complainant did not provide access to PECO meters. Response to Preliminary Objections Exhibits 1 and 2.

While the Complainant states that he has allowed PECO to read the meter, inspect the meter, or test the meter, he acknowledges that he has refused to allow PECO to change his meter. Response to New Matter at 7. Mr. Norman makes very clear in his response to the New Matter that he has not allowed PECO to change the meter at the service address. *Id.* at 3, 6.

Termination of service for refusal to permit PECO to change a meter is allowed by the Commission. As the Commission has stated:

electric distribution companies may commence termination proceedings due to the customer's refusal to allow the utility access to their meter for purposes of replacement, consistent with the Pennsylvania Public Utility Code, Commission Regulations, Commission Orders and Commission-approved Tariff.

Pennsylvania Public Utility Commission Order, Smart Meter Procurement and Installation, Docket No. M-2009-2092655 (Order entered Nov. 14, 2023). Also, PECO's tariff states:

employees shall have access to the premises of the customer at all reasonable times for the purpose of reading meters, and for installing, testing, inspecting, repairing, removing or changing any or all equipment belonging to the Company.

PECO Energy Company Electric Tariff, 10.5 Right of Access. A public utility's Commission-approved tariff is *prima facie* reasonable, has the full force of law, and is binding on the utility and the customer. 66 Pa.C.S. § 316; *Kossmann v. Pa. Pub. Util. Comm'n*, 694 A.2d 1147 (Pa. Cmwlth. 1997); *Stiteler v. Bell Tel. Co. of Pa.*, 379 A.2d 339 (Pa.Cmwlth. 1977). Additionally, the Public Utility Code and regulations provide that a utility company may notify a customer and terminate service where the customer does not permit access to the company's meters for replacement. *See* 52 Pa. Code § 56.81(3) and 66 Pa.C.S. § 1406(a)(4).

Here, the Complainant cannot prevail. PECO committed no violations when it issued notices to the Complainant advising that the service would be terminated because the required access to PECO equipment and change the meter was not allowed. This matter will be dismissed.

CONCLUSIONS OF LAW

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

2. The party seeking relief from the Commission has the burden of proof. 66 Pa.C.S. § 332(a).

3. A preliminary objection will be granted only where relief is clearly warranted and free from doubt. *Interstate Traveller Servs., Inc. v. Pa. Dep't of Env't Res.*, 406 A.2d 1020 (Pa. 1979).

4. The Commission or presiding officer at any stage of an action or proceeding may disregard an error or defect of procedure which does not affect the substantive rights of the parties. 52 Pa. Code § 1.2(a).

5. A motion for judgment on the pleadings will be rendered if the applicable pleadings show that there is no genuine issue as to a material fact and that the moving party is entitled to a judgment as a matter of law. 52 Pa. Code § 5.102

6. There is no provision in the Code or the Commission's Regulations or Orders that allows a customer to "opt out" of smart meter installation. *Povacz v. Pa. Pub. Util. Comm'n*, 280 A.3d 975 (Pa. 2022)

7. PECO may commence termination proceedings due to the Complainant's refusal to allow the utility access to their meter for purposes of replacement, *Pennsylvania Public Utility Commission Order, Smart Meter Procurement and Installation*, Docket No. M-2009-2092655 (Order entered Nov. 14, 2023).

8. Based on the Complainant's averments, recovery or relief is not possible for the Complainant, and he is not entitled to judgment as a matter of law. 52 Pa. Code § 5.102; *Ridge v. State Emps.' Ret. Bd.*, 690 A.2d 1312 (Pa. Cmwlth. 1997).

ORDER

THEREFORE

IT IS ORDERED

1. That the Preliminary Objection of PECO in the matter of Deree J. Norman v. PECO Energy Company at Docket Number C-2024-3048777 is sustained.

2. That the Formal Complaint of Deree J. Norman at Deree J. Norman v. PECO Energy Company at Docket Number C-2024-3048777 is dismissed.

