**BEFORE THE**

**PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Roberto Castellano :

:

v. : C-2015-2465142

:

PECO Energy Company and :

Public Power LLC :

**INITIAL DECISION**

Before

Susan D. Colwell

Administrative Law Judge

INTRODUCTION

This Initial Decision grants the Preliminary Objections of the PECO Energy Company to a customer's complaint seeking a refund for electricity purchased from an electric generation supplier (EGS) because PECO is not a named party to the complaint, and the remedy sought is from the EGS alone.

HISTORY OF THE PROCEEDING

On or about January 5, 2015, Roberto Castellano (Complainant) filed a formal Complaint against Public Power, LLC (Public Power). Complainant alleges that Public Power is his electric supplier and that he has incorrect charges on his electricity bill. Complainant alleges that, on April 5, 2013, he spoke with someone named “Mike” from Public Power, who made a verbal representation to Complainant that if he switched to Public Power for his electrical generation supplier (EGS), Complainant’s electricity bills would be much lower than the rate of 8 cents per kilowatt that Complainant was being charged by PECO Energy Company (PECO or Respondent), who was Complainant’s electric supplier at the time. Complainant switched to Public Power for his EGS, and on April 2014, Complainant was billed 17.5 cents per kilowatt by Public Power. Complainant feels that these bills are “extremely high” for a house as small as the one he resides in and claims that he is unable to sustain payments. He asks the Pennsylvania Public Utility Commission (Commission) to direct Public Power to reimburse him for the difference between what he would have paid at the 8 cents per kilowatt rate and the actual 17.5 cents per kilowatt rate he paid during the time period during which Public Power was his EGS. Complainant requests a telephone hearing to resolve the Complaint. This is an untimely appeal of a Bureau of Consumer Services (BCS) informal decision, BCS Decision Report #003224304, issued September 16, 2014.

This formal Complaint was served on February 2, 2015, to Public Power by certified mail with a notice to plead, and to PECO electronically[[1]](#footnote-1).

On February 3, 2015, PECO filed an Answer to the Complaint. PECO avers that Complainant chose Public Power as his electric supplier and that PECO is not a proper party to the Complainant’s Complaint regarding the rates charged by Public Power. PECO states that Public Power and PECO are not the same company, that PECO is not a party to the contract between the Complainant and Public Power, and furthermore that PECO has no control over the rates charged by Public Power. PECO states that Complainant enrolled with Public Power as his EGS on May 3, 2013, and subsequently dropped Public Power as his EGS on May 5, 2014. Complainant is currently enrolled with PECO as his default supplier. PECO refers to its tariff, which states that electric generation suppliers (EGSs) bear sole responsibility for contractual agreements with their customers, and that PECO has no responsibility to monitor, review, or enforce such agreements. Therefore, PECO states that the Complaint is improperly placed against PECO and should be filed against Public Power only. PECO further states that it is required by the Commission and its own tariff to be the billing agent for EGSs.

On February 3, 2015, PECO also filed Preliminary Objections (POs) to the Complaint on the grounds that the Complaint is legally insufficient because PECO is not a party to the electric generation transaction between Complainant and Public Power. PECO also points out that Complainant has not alleged that PECO incorrectly read his meter; that PECO incorrectly billed him; that he disputes the PECO’s charges on his bill; or that PECO violated the Public Utility Code, Commission regulations, or PECO’s Electric Service Tariff. PECO accordingly requests that the Complaint should be dismissed.

By Motion Judge Assignment Notice dated March 10, 2015, the matter was assigned to me.

On March 25, 2015, Public Power filed a Certificate of Satisfaction.

More than ten days has run since the filing of the Preliminary Objections, and no responsive pleading has been filed. 52 Pa.Code § 5.101(f)(1). The matter is ripe for disposition.

FINDINGS OF FACT

1. Complainant is Roberto Castellano, 151 Woodland Dell Road, Delta, PA 17314.

2. Respondent is PECO Energy Company, a jurisdictional public utility providing electric distribution service in the Commonwealth of Pennsylvania.

3. Respondent is Public Power, LLC, an electric generation supplier licensed to do business in the Commonwealth of Pennsylvania.

4. On or about January 5, 2015, Complainant filed a formal Complaint alleging that Public Power LLC had misrepresented the amount of money Complainant would save on his electricity bill if he switched from PECO Energy Company to Public Power LLC for his electric generation supplier.

5. On February 2, 2015, PECO Energy Company was served with a copy of the Complaint.

6. On February 3, 2015, PECO filed its Answer as well as Preliminary Objections to the formal Complaint.

7. The Complaint sets forth a single count, seeking a refund for charges on his electricity bill.

DISCUSSION

PECO’s preliminary objections seek to dismiss the Complaint because PECO alleges that (1) the Complaint involves a transaction between Complainant and Public Power, and therefore PECO is not a party to the Complaint; and (2) that Complainant has not alleged that PECO has provided unreasonable service, or taken any action that would be in violation of its tariff or any applicable laws and regulations.

Commission preliminary objection practice is similar to Pennsylvania civil practice. *Equitable Small Transportation Interveners v. Equitable Gas Company,* 1994 Pa. PUC LEXIS 69, PUC Docket No. C-000935435 (July 18, 1994). When considering the preliminary objection, the Commission must determine “whether the law says with certainty, based on well-pleaded factual averments . . . that no recovery or relief is possible. *P. J. S. v. Pa. State Ethics Commission,* 669 A.2d 1105 (Pa. Cmwlth. 1996). Any doubt must be resolved in favor of the non-moving party by refusing to sustain the preliminary objections. *Boyd v. Ward,* 802 A.2d 705 (Pa. Cmwlth. 2002).” *Dept. of Auditor General, et al. v. State Employees’ Retirement System, et al.,* 836 A.2d 1053, 1064 (Pa. Cmwlth. 2003).

The rules regarding preliminary objections are as follows:

**§ 5.101. Preliminary objections.**

(a) *Grounds.*  Preliminary objections are available to parties and may be filed in response to a pleading except motions and prior preliminary objections. Preliminary objections must be accompanied by a notice to plead, must state specifically the legal and factual grounds relied upon and be limited to the following:

(1) Lack of Commission jurisdiction or improper service of the pleading initiating the proceeding.

(2) Failure of a pleading to conform to this chapter or the inclusion of scandalous or impertinent matter.

(3) Insufficient specificity of a pleading.

(4) Legal insufficiency of a pleading.

(5) Lack of capacity to sue, nonjoinder of a necessary party or misjoinder of a cause of action.

(6) Pendency of a prior proceeding or agreement for alternative

dispute resolution.

(7) Standing of a party to participate in the proceeding.

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52 Pa.Code § 5.101(a).

In reviewing preliminary objections, only the facts in the Complaint can be presumed to be true in order to determine whether recovery is possible. In order for Complainant to prevail ultimately, there must be a statute, regulation or order which the Commission is authorized to enforce. The Complaint must set forth anything done or omitted to be done by the utility company in violation of any law which the Commission has jurisdiction to administer. 66 Pa.C.S. § 701; 52 Pa.Code § 5.21(a).

The regulation at 52 Pa.Code §5.101(a)(4) permits the filing of a preliminary objection to dismiss a pleading for legal insufficiency. The provision at 52 Pa.Code §5.101(a)(4) serves judicial economy by avoiding a hearing where no factual dispute exists. If no factual issue pertinent to the resolution of a case exists, a hearing is unnecessary. 66 Pa.C.S. §703(a); *Lehigh Valley Power Committee v. Pa. Pub. Util. Comm’n*., 563 A.2d 557 (Pa. Cmwlth. 1989); *Lehigh Valley Power Committee v. Pa. Pub. Util. Comm’n*., 563 A.2d 548 (Pa. Cmwlth. 1989); *S.M.E. Bessemer Cement, Inc. v. Pa. Pub. Util. Comm’n.,* 540 A.2d 1006 (Pa. Cmwlth. 1988); *White Oak Borough Authority v. Pa. Pub. Util. Comm’n*., 103 A.2d 502 (Pa. Super. 1954).

In order to be legally sufficient, a complaint must set forth “an act or thing done or omitted to be done or about to be done or omitted to be done by the respondent in violation, or claimed violation, of a statute which the Commission has jurisdiction to administer, or of a regulation or order of the Commission.” 52 Pa.Code §5.22(a)(4). Here, the Complaint does not allege any facts that could be construed as a violation by PECO of any statute, regulation or order which the Commission has jurisdiction to administer. The Complaint is therefore legally insufficient as against PECO. *Donald Mulzet v. PPL Electric Utilities Corporation*, Docket No. C-2013-2367132 (Order entered July 22, 2013).

With regard to PECO’s allegation that it is not properly a party to the Complaint, it is informative to refer to the Complaint itself. In Paragraph 2 of the Complaint, marked “Name of Utility or Company (Respondent),” Complainant has hand-written “Public Power Energy PA.” Nowhere in the Complaint does Complainant name PECO as a respondent or otherwise a party to the Complaint. Complainant mentions PECO in Paragraph 5 of the Complaint under “Relief Requested” purely as part of a narrative addressing his grievance against Public Power. The bills reflect rates that are disputed by the Complainant, and set by Public Power, the named Respondent.

In addition, the allegations are against Public Power, and the remedy sought is from Public Power. PECO has no role in this case.

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. As PECO is not properly a party to the Complaint, and there is no other count alleged, there is no reason to hold a hearing involving PECO. In addition, the other Respondent, Public Power, has filed a Certificate of Satisfaction, meaning that there is no reason to hold a hearing at all. Accordingly, the POs are granted and the Complaint is dismissed as against PECO.

CONCLUSIONS OF LAW

1. Commission preliminary objection practice is similar to Pennsylvania civil practice. *Equitable Small Transportation Interveners v. Equitable Gas Company,* 1994 Pa. PUC LEXIS 69, PUC Docket No. C-000935435 (July 18, 1994).

2. When considering the preliminary objection, the Commission must determine “whether the law says with certainty, based on well-pleaded factual averments . . . that no recovery or relief is possible. *P. J. S. v. Pa. State Ethics Commission,* 669 A.2d 1105 (Pa. Cmwlth. 1996). Any doubt must be resolved in favor of the non-moving party by refusing to sustain the preliminary objections. *Boyd v. Ward,* 802 A.2d 705 (Pa. Cmwlth. 2002).” *Dept. of Auditor General, et al. v. State Employees’ Retirement System, et al.,* 836 A.2d 1053, 1064 (Pa. Cmwlth. 2003).

3. The regulation at 52 Pa.Code §5.101(a)(4) permits the filing of a preliminary objection to dismiss a pleading for legal insufficiency. The provision at 52 Pa.Code §5.101(a)(4) serves judicial economy by avoiding a hearing where no factual dispute exists. If no factual issue pertinent to the resolution of a case exists, a hearing is unnecessary. 66 Pa.C.S. §703(a); *Lehigh Valley Power Committee v. Pa. Pub. Util. Comm’n*., 563 A.2d 557 (Pa. Cmwlth. 1989); *Lehigh Valley Power Committee v. Pa. Pub. Util. Comm’n*., 563 A.2d 548 (Pa. Cmwlth. 1989); *S.M.E. Bessemer Cement, Inc. v. Pa. Pub. Util. Comm’n*., 540 A.2d 1006 (Pa. Cmwlth. 1988); *White Oak Borough Authority v. Pa. Pub. Util. Comm’n*., 103 A.2d 502 (Pa. Super. 1954).

4. In order to be legally sufficient, a complaint must set forth “an act or thing done or omitted to be done or about to be done or omitted to be done by the respondent in violation, or claimed violation, of a statute which the Commission has jurisdiction to administer, or of a regulation or order of the Commission.” 52 Pa.Code §5.22(a)(4).

5. 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.

6. In this case, a hearing is not necessary in the public interest.

ORDER

THEREFORE,

IT IS ORDERED:

1. That PECO’s Preliminary Objections filed in the case captioned Roberto Costellano v. Public Power LLC and PECO Energy Companyat Docket No. C-2015-2465142, are granted.

2. That the Complaint filed by Roberto Costellano against PECO Energy Company and Public Power LLC at Docket No. C-2015-2465142, is dismissed as against PECO Energy Company.

3. That the Secretary mark this docket closed.

Dated: March 27, 2015 /s/

Susan D. Colwell

Administrative Law Judge

1. PECO has signed a waiver of the Section 702 requirements for service of formal complaints, 66 Pa.C.S. 702, and has agreed to electronic service instead under the Commission’s Waiver of 702 program. Service is listed in the Audit History of the case as having been effected electronically on February 2, 2015. [↑](#footnote-ref-1)