**BEFORE THE**

**PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Joe and Danielle Steffe :

:

v. : C-2015-2472173

:

PECO Energy Company :

**INITIAL DECISION**

Before

Susan D. Colwell

Administrative Law Judge

INTRODUCTION

This initial decision grants the Respondent’s Preliminary Objections and dismisses the formal Complaint because it seeks removal of a smart meter, which is the only remedy sought and which cannot be granted.

HISTORY OF THE PROCEEDING

On March 5, 2015, Joe and Danielle Steffe (Complainants) filed a formal Complaint (Complaint) against PECO Energy Company (PECO or Respondent). The Complainants, who are customers of PECO, allege that they are having a reliability, safety, or quality problem with their utility service. Specifically, they allege that the smart meter installed at their home is exacerbating their child’s medical conditions. They allege that since the meter was installed, the child is having problems sleeping, focusing, and regulating. Complainants claim that the presence of the smart meter is affecting their child’s life in a negative fashion and that they would like the Pennsylvania Public Utility Commission (Commission) to direct PECO to remove the smart meter. The Complainants also state that they are willing to pay any additional expenses per month that would be necessary to compensate for the inconvenience caused by their request. The Complaint makes no other allegations, nor demands any other form of relief. This case is an untimely appeal of a Bureau of Consumer Services (BCS) informal decision, Case #003248586.

On March 20, 2015, PECO filed its Answer, New Matter and Preliminary Objections (POs) properly accompanied by a Notice to Plead. PECO denies the allegations contained in the Complaint. PECO it is required to install AMI meters for its electric distribution customers pursuant to the requirements of Act 129, and that it must install AMI meters for all current AMR customers by the end of 2014. In New Matter, PECO states that Complainants have requested permission to opt out of the smart meter installation at their residence for health reasons. PECO states that its Smart Meter installation plan was approved by the Commission on May 6, 2010, and that Act 129, along with Commission orders governing Smart Meter installation, do not include an opt out provision. Therefore, PECO states that the Complaint should be dismissed as a matter of law.

In its POs, PECO asserts that Respondent is entitled to judgment as a matter of law and seeks for the Commission to dismiss the Complaint on the grounds that it is legally insufficient.

On March 27, 2015, the matter was assigned to me by Motion Judge Assignment Notice.

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. Complainants are Joe and Danielle Steffe, of 3718 Powder Horn Drive, Furlong, Pennsylvania 18925.

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

3. On March 5, 2015, Complainants filed a formal Complaint against Respondent, alleging that the smart meter installed at their residence by Respondent is exacerbating their daughter’s medical condition. They request that the smart meter be removed.

4. On March 20, 2015, Respondent filed its Answer and New Matter, as well as Preliminary Objections to the formal Complaint.

5. No responsive pleading was filed to the Answer and New Matter, or to the Preliminary Objections.

DISCUSSION

Complainants ask the Commission to direct PECO to remove the smart meter from their home because it is exacerbating the medical conditions of one of their children. Complainants offer to pay any extra monthly charge that this may entail.

Respondent’s POs seek to dismiss the case on the grounds that the Complaint is legally insufficient and there are no genuine issues of fact because is it prohibited by law from granting an exception to any customer.

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).

In its Answer and POs, Respondent asserts that the Complaint is legally insufficient because there is allegation that PECO violated a statute, regulation, or order of the Commission. Rather, the action that PECO has taken in placing a smart meter in the Complainants' home and refusing to replace it with a meter that does not have the technological capabilities of a smart meter is consistent with the requirements of the Public Utility Code and Commission regulations and orders.

Act 129 of 2008 requires that electric distribution companies (EDCs) such as PECO furnish smart meter technology and does not provide for an exception to that requirement. 66 Pa.C.S. § 2807. The Commission adopted an Implementation Order on June 18, 2009, which established the procedures that the EDCs were to use in developing and implementing their smart meter plans. Docket No. M-2009-2092655 (Order of June 18, 2009).

The PECO smart meter installation plan was approved by the Commission on May 6, 2010 at Docket No. M-2009-2123944, and was the result of a litigated proceeding which was open to the participation of all customers.

PECO does not have the legal ability to grant an exception to the Act 129 requirements and neither does the Commission have the legal ability to order PECO to grant an exception. There is no outstanding issue of fact, because both parties agree that PECO has installed a smart meter and that PECO refuses to remove it. Accordingly, the Complaint does not state a violation of the Public Utility Code, any Commission Order or regulation, or any Commission-approved Company tariff. PECO’s Preliminary Objection will be granted.

Section 703(b) of the Public Utility Code allows the Commission to dismiss any complaint without a hearing if, in its opinion, a hearing is not necessary in the public interest. 66 Pa. C.S. § 703(b). As there is no issue of material fact, holding a hearing in this case would be a fruitless exercise.

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. 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).

4. Act 129 of 2008 requires that electric distribution companies (EDCs) such as PECO furnish smart meter technology and does not provide for an exception to that requirement. 66 Pa.C.S. § 2807.

5. The Commission adopted an Implementation Order on June 18, 2009, which established the procedures that the EDCs were to use in developing and implementing their smart meter plans. Docket No. M-2009-2092655.

6. The PECO smart meter installation plan was approved by the Commission on May 6, 2010 at Docket No. M-2009-2123944, and was the result of a litigated proceeding which was open to the participation of all customers.

7. 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(b).

8. The Complaint fails to state a violation for which relief can be granted.

ORDER

THEREFORE,

IT IS ORDERED:

1. That the Preliminary Objections filed in the case captioned Joe and Danielle Steffe v. PECO Energy Company at Docket No. C-2015-2472173 are granted.

2. That the Complaint filed by Joe and Danielle Steffe against PECO Energy Company at Docket No. C-2015-2472173 is dismissed.

3. That the Secretary mark this docket closed.

Dated: April 13, 2015 /s/

Susan D. Colwell

Administrative Law Judge