**BEFORE THE**

**PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Catherine J. Frompovich :

:

v. : C-2015-2474602

:

PECO Energy Company :

**INITIAL DECISION GRANTING PRELIMINARY OBJECTIONS**

Before

Elizabeth H. Barnes

Administrative Law Judge

INTRODUCTION

A residential customer filed a complaint seeking to prevent an electric distribution company (EDC) from attaching a smart meter to her residence. The complaint will be dismissed because under the current law in Pennsylvania, there is no customer opt out option for smart meters and the EDC is required to deploy and install smart meters in accordance with its Commission-approved Smart Meter Plan as of May 6, 2010. To the extent the customer wishes to opt out of the smart meter installation, she should advocate for such ability before the General Assembly of Pennsylvania. The Commission has no authority, absent a directive in the form of legislation, to prohibit the EDC from installing a smart meter where a customer does not want one.

HISTORY OF THE PROCEEDING

On March 24, 2015, Catherine J. Frompovich (Complainant) filed a formal Complaint with the Pennsylvania Public Utility Commission (Commission) against PECO Energy Company (Respondent) alleging that the Respondent was threatening to terminate her service because she would not allow access to her meter in order for the Respondent to replace it with a smart meter. In her Complaint, the Complainant asserted that, as a 76 year old who had previously had breast cancer, she could not tolerate the radiation from a smart meter. She attached a letter from her physician to support her assertion.

Additionally, Complainant alleged the following: 1) smart meters cause fires; 2) there is a trend of insurance providers denying coverage for fires caused by smart meters; 3) smart meters cause health issues; and 4) smart meters are associated with higher utility bills. Complainant asked that the Commission instruct PECO to perform onsite broadcasting tests at each customer’s smart meter, that her electric service not be turned off, and that the Commission consider the health implications of smart meters as well as the legal implications in conjunction with the American with Disabilities Act and the U.S. Constitution. Finally, attached to the Complaint was a copy of a letter from the Complainant to the Respondent further detailing her concerns with smart meters and why she did not want one attached to her residence.

On March 31, 2015[[1]](#footnote-1), the Complaint was served on the Respondent. On April 10, 2015, the Respondent filed an Answer with New Matter and Preliminary Objections. The Answer admits that the Respondent provides electric service to the Complainant at the address shown on the Complaint. The Answer contends that the Respondent is required to install AMI, or smart, meters for all AMR customers by the end of 2014 and that it has the right to terminate service for failure of the customer to permit access to the meter.

The New Matter states that Act 129 of 2008 directed the Respondent and other electric distribution companies to file smart meter procurement and installation plans with the Commission. The Respondent filed a smart meter procurement and installation plan on August 14, 2009 with the Commission which was approved by Commission order entered May 6, 2010, at docket number M-2009-2123944. The New Matter contends that the Respondent is required to install smart meters throughout its service territory and that neither Act 129 nor any Commission order provide for the ability of customers to opt out of having a smart meter installed. The Answer and New Matter request that the Commission dismiss the Complaint.

Also on April 10, 2015, the Respondent filed Preliminary Objections. The Preliminary Objections contend that the Complaint is legally insufficient pursuant to 52 Pa.Code § 5.101(a)(4). The Preliminary Objections assert that the Respondent is installing smart meters in compliance with Act 129 of 2008 and the Commission’s order approving the Respondent’s smart meter procurement and installation plan. The Preliminary Objections further assert that although the Complainant wants to opt out of having a smart meter installed for health reasons, she may not opt out and is subject to termination of service for refusing access to her meter and installation of a smart meter.

The Preliminary Objections contend that no genuine issues of fact are present and the Respondent is entitled to judgment as a matter of law. The Preliminary Objections request that the Commission dismiss all issues raised in the complaint.

By notice dated April 28, 2015, the Commission notified the parties that it had assigned the case to me as motion judge. As of the date of this decision, the Complainant has not filed an answer to the Respondent’s Preliminary Objections.[[2]](#footnote-2) The Preliminary Objections are now ripe for a decision. For the reasons set forth below, I will sustain the Preliminary Objections.

FINDINGS OF FACT

1. The Complainant in this proceeding is Catherine J. Frompovich, who receives residential electric service at 23 Cavendish Drive, Ambler, Pennsylvania 19002.

2. The Respondent in this proceeding is PECO Energy Company, an electric distribution company.

3. On March 24, 2015, Complainant filed a complaint against Respondent averring that PECO erroneously notified her that her service would be terminated because she refused the company access to replace her meter with a smart meter.

4. Complainant requests that the Commission preclude the Respondent from terminating service and installing a smart meter.

5. On April 10, 2015, the Complaint was served on Respondent.

6. On April 10, 2015, Respondent filed an Answer with New Matter and Preliminary Objections to the Complaint.

DISCUSSION

Preliminary objections are appropriate under Commission regulations. 52 Pa. Code §5.101. Commission preliminary objection practice is similar to Pennsylvania civil practice respecting the filing of preliminary objections. *Equitable Small Transportation Interveners v. Equitable Gas Company,* 1994 Pa. PUC LEXIS 69, PUC Docket No. C‑000935435 (July 18, 1994).

Preliminary objections are limited to the following:

**§ 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).

When considering the preliminary objection, the Commission must determine “whether the law says with certainty, based on well-pleading 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).

Preliminary objections in civil practice requesting dismissal of a pleading will be granted only where the right to relief is clearly warranted and free from doubt. *Interstate Traveller Services, Inc. v. Pa. Dept. of Environment Resources,* 406 A.2d 1020 (Pa. 1979); *Rivera v. Philadelphia Theological Seminary of St. Charles Borromeo, Inc.*, 595 A.2d 172 (Pa. Super 1991). The Commission follows this standard. *Montague v. Philadelphia Electric Company,* 66 Pa.PUC 24 (1988).

Viewing the Complaint in the instant case in the light most favorable to the Complainant, the Complainant asks that the Commission instruct PECO to perform onsite broadcasting tests at each customer’s smart meter, that her electric service not be turned off, and that the Commission consider the health implications of smart meters as well as the legal implications in conjunction with the American with Disabilities Act and the U.S. Constitution. The Complainant contends that smart meters are a health and safety risk. Accepting these facts as alleged as true for the purpose of disposing of preliminary objections, Respondent avers that the Complaint fails to allege that Respondent has violated the Public Utility Code, Commission regulations or orders. The Respondent contends that the complaint is legally insufficient. I agree.

On October 15, 2008, Governor Edward G. Rendell signed Act 129 of 2008 into law, which directed electric distribution companies with at least 100,000 customers to file, with the Commission, a smart meter deployment and installation plan. Thus, there is a statute requiring smart meter deployment by large electric distribution companies operating within the Commonwealth. 66 Pa. C.S. § 2807(f). On August 14, 2009, the Respondent filed with the Commission a Petition for Approval of its Smart Meter Technology Procurement and Installation Plan, which was the subject of a publicly litigated proceeding. Many parties with varying interests evaluated and discussed issues raised by the installation and recovery of costs for smart meters, including privacy issues and third party access to data.

The Commission approved the Respondent’s Smart Meter Plan by order entered May 6, 2010. There is neither an “opt-out” provision nor a requirement to perform onsite broadcasting tests provided for in the Commission’s order. The implementation of the Respondent’s Smart Meter Deployment Plan and the approval of the costs associated with its implementation have been found by the Commission to be in accordance with Act 129 of 2008, 66 Pa. C.S. § 2807(f). The Respondent is required by statute and Commission Order to implement a Smart Meter Program, install smart meters throughout is service territory, and to charge a SMT Surcharge to all of its metered customers. Therefore, there can be no basis for sustaining Ms. Frompovich’s Complaint.

To the extent that Ms. Frompovich desires the ability to opt out of the smart meter installation, she should advocate for such ability before the General Assembly. The Commission simply does not have the authority, absent a directive in the form of legislation, to prohibit the Respondent from installing a smart meter where a customer does not want one. Similarly, the Respondent would be in violation of law if it did not install a smart meter at the Complainant’s residence. The Commission cannot grant the relief requested by the Complainant.

Section 703 of the Public Utility Code, 66 Pa.C.S.A. § 703(b), provides that the Commission may dismiss any complaint without a hearing if, in its opinion, a hearing is not necessary in the public interest. See also, 52 Pa. Code § 5.21(d). A hearing is necessary only to resolve disputed questions of fact, and is not required to resolve questions of law, policy or discretion. *Dee-Dee Cab, Inc. v. Pa. Pub. Util. Comm’n*, 817 A.2d 593 (Pa. Commw. Ct. 2003), petition for allowance of appeal denied, 836 A.2d 123 (Pa. 2003). The public interest does not require a hearing in this case. The Respondent’s right to prevail at hearing is so clear that having a hearing would be a fruitless exercise. Therefore, the Respondent’s Preliminary Objections shall be granted.

The Commission reached a similar conclusion in the case of *Gloria Corbett v. Pennsylvania Power Company*, Docket No. C-2011-2219898, (Final Order entered May 27, 2011), wherein the Complainant objected to the installation of smart meters at her two properties in Mercer County. The Commission sustained Pennsylvania Power’s Preliminary Objection to the Complaint holding that the Complaint failed to state a claim upon which relief can be granted. See also *Richard Negley v. Metropolitan Edison Company*, Docket No. C-2010-2205305, (Final Order entered March 3, 2011). See also *Lutherschmidt v. Metropolitan Edison Company*, Docket No. C‑2010‑2200353 (Final Order issued March 25, 2011); *Jones v. Metropolitan Edison Company*, Docket No. C‑2011-2224380 (Final Order entered June 28, 2011); *Griffin v. Metropolitan Edison Company*, Docket No. C-2012-2300172 (Final Order entered July 31, 2012); *Brake v. West Penn Power Company*, Docket No. C-2013-2367308 (Final Order entered November 14, 2013). Additionally, in *Povacz v. PECO Energy Company*, Docket No. C-2012-2317176 (Opinion and Order entered January 24, 2013), the Commission stated there is no statutory provision, regulation, or order that allows a customer to opt out of smart meter installation.

Although the Complainant is genuine in her concerns, the Commission’s decisions cited above are controlling. Because Act 129 of 2008 and the Commission’s orders direct the Respondent to develop and implement a smart meter procurement and installation plan and because there is no opt out provision either in the Act or the Commission’s orders, the Complaint is dismissed for legal insufficiency.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the parties and the subject matter in this proceeding. 52 Pa. C.S. §331.

2. Commission regulations provide for the filing of preliminary objections. 52 Pa. Code § 5.101.

3. PECO Energy Company’s smart meter procurement and installation plan, which was approved by Commission Order entered May 6, 2010 at Docket No. M-2009-2123944, does not contain a provision for customers to opt out of smart meter installation.

4. Neither Act 129 of 2008 nor any Commission orders provide for the ability of customers to opt out of having a smart meter installed.

5. Neither Act 129 of 2008 nor any Commission orders require or provide for onsite broadcasting tests at each customer’s smart meter.

6. The Complaint should be dismissed as legally insufficient under 52 Pa. Code § 5.101(a)(4).

7. The Commission may dismiss a complaint without a hearing if a hearing in this matter is neither necessary nor in the public interest. *Dee-Dee Cab, Inc. v. Pa. Pub. Util. Comm’n*, 817 A.2d 593 (Pa. Commw. Ct. 2003), petition for allowance of appeal denied, 836 A.2d 123 (Pa. 2003).

ORDER

THEREFORE,

IT IS ORDERED:

1. That the Preliminary Objections filed by PECO Energy Company seeking dismissal of the Complaint filed by Catherine J. Frompovich at Docket No. C-2015-2474602 are sustained.

2. That the Formal Complaint filed by Catherine J. Frompovich at Docket No. C-2015-2474602 is dismissed.

3. That the docket in this proceeding be marked closed.

Date: May 27, 2015 /s/

Elizabeth H. Barnes

Administrative Law Judge

1. PECO signed a waiver of the Section 702 requirement for registered or certified mail service of formal complaints, 66 Pa. C.S. § 702, and agreed to electronic service under the Commission’s waiver of 702 program. *See In Re: Electronic Service of Formal Complaints,* Secretarial Letter Dated December 22, 2014, at Docket Nos. M‑2013-2398153 *et al.* Service is listed in the electronic Audit History of the case as entered by the Secretary’s Bureau as having been effected on March 31, 2015. In its Answer, PECO stated it was served the Complaint on April 10, 2015, the same date it filed an Answer and Preliminary Objections. Regardless, the Answer and Preliminary Objections were timely filed. [↑](#footnote-ref-1)
2. On May 13, 2015, the Complainant sent a letter to the Commission addressed to me. To cure any *ex parte*, I forwarded a copy of the letter to the Respondent and sent the letter to the Commission’s Secretary’s Bureau to be filed at this docket. Although the letter reiterates the Complainant’s health concerns and provides a summary of other complaints regarding smart meters filed with the Commission, the Commission’s regulations do not provide for this type of filing. Neither can the letter be treated as an answer to the Preliminary Objections as the contents do not offer a response to the Preliminary Objections and the letter was filed well past the ten day period for filing an answer as provided for in 52 Pa. Code §5.61(a)(2). For these reasons, the letter will not be considered in the disposition of PECO’s Preliminary Objections. [↑](#footnote-ref-2)