#  PENNSYLVANIA

 **PUBLIC UTILITY COMMISSION**

 **Harrisburg, PA 17105-3265**

 Public Meeting held January 24, 2013

Commissioners Present:

 Robert F. Powelson, Chairman

 John F. Coleman, Jr., Vice Chairman

 Wayne E. Gardner

 James H. Cawley

 Pamela A. Witmer

Maria Povacz C-2012-2317176

 v.

PECO Energy Company

**OPINION AND ORDER**

**BY THE COMMISSION:**

 Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition are the Exceptions filed by Maria Povacz (Complainant) on October 22, 2012, in response to the Initial Decision (I.D.) of Administrative Law Judge (ALJ) Joel H. Cheskis issued herein on October 4, 2012.[[1]](#footnote-1) Also before the Commission are the Reply Exceptions filed by PECO Energy Company (PECO or the Company) on November 2, 2012. For the following reasons, we will deny the Complainant’s Exceptions, adopt the ALJ’s Initial Decision and dismiss the Complaint with prejudice.

**History of the Proceedings**

 On July 13, 2012, the Complainant filed a Formal Complaint with the Commission against the Company in which she averred, *inter alia*, that she did not give permission for the Company to install a “smart meter.”[[2]](#footnote-2) The Complainant also requested that she be allowed to “opt out” from the smart meter installation program.

 On August 22, 2012, PECO filed an Answer with New Matter to the Complaint. In its Answer, PECO denied all material allegations of fact and conclusions of law in the Complaint. In its New Matter, which was accompanied by a Notice to Plead, PECO provided extensive background regarding the advent of smart meters, including the legislation signed by Governor Rendell that directed the installation of smart meters, known as Act 129, and the Implementation Order adopted by the Commission.[[3]](#footnote-3) PECO concludes its New Matter by averring that there is no legal basis for the Complaint and that, accordingly, it should be dismissed.

 Also on August 22, 2012, PECO filed a Preliminary Objection. The Preliminary Objection was accompanied by a Notice to Plead. In its Preliminary Objection, PECO argued that the Complaint should be dismissed because it is legally insufficient. Specifically, PECO averred that the Complaint does not allege any violation of any Order, law or tariff that can be the basis of any finding against the Company. PECO requested dismissal of the Complaint on this basis as well.

On August 30, 2012, the Complainant filed an Answer to PECO’s Preliminary Objection in which she argued, *inter alia*, that smart meters are, by definition, surveillance devices which violate federal and state wiretapping laws. She also argued that smart meter installation is not mandatory. The Complainant concluded by requesting that the matter be presented in front of an administrative law judge.

The Complainant’s Answer to PECO’s New Matter was due no later than September 14, 2012. 52 Pa. Code §§ 5.63(a), 1.12(a), 1.56(a)(1) and (b). The Complainant did not file an Answer to PECO’s New Matter.

 ALJ Cheskis was assigned as the Presiding Officer in this matter and was made responsible for resolving any issues which may arise during the preliminary phase of this proceeding.

 In his Initial Decision, issued on October 4, 2012, ALJ Cheskis recommended that: (1) the Preliminary Objection filed by PECO herein be granted; and (2) that the Complaint be dismissed with prejudice. I.D. at 10-11. Exceptions and Reply Exceptions were filed as above noted.

**Discussion**

Initially, we are reminded that we are not required to consider expressly or at great length each and every contention raised by a party to our proceedings.

*University of Pennsylvania v. Pa. PUC*, 485 A.2d 1217 (Pa. Cmwlth. 1984). Any exception or argument that is not specifically addressed herein shall be deemed to have been duly considered and denied without further discussion.

In his Initial Decision, ALJ Cheskis reached nineteen Findings of Fact, I.D. at 3-5, and nine Conclusions of Law, *Id.* at 9-10. We shall adopt and incorporate herein by reference the ALJ’s Findings of Fact and Conclusions of Law unless they are either expressly or by necessary implication overruled or modified by this Opinion and Order.

**Legal Standards**

As the proponent of a rule or order, the Complainant in this proceeding bears the burden of proof pursuant to Section 332(a) of the Public Utility Code (Code). 66 Pa. C.S. § 332(a). To establish a sufficient case and satisfy the burden of proof, the Complainant must show that the Respondent is responsible or accountable for the problem described in the Complaint. *Patterson v. The Bell Telephone Company of Pennsylvania*, 72 Pa. P.U.C. 196 (1990).

No hearing was held in this case. Instead, the ALJ recommended granting the Respondent’s Preliminary Objections. The rules regarding preliminary objections are simple and specific:

**§ 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.

52 Pa. Code § 5.101(a).

Commission preliminary objection practice is similar to Pennsylvania civil practice. *Equitable Small Transportation Intervenors v. Equitable Gas Company,*

1994 Pa. PUC LEXIS 69 (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).

Additionally, in considering preliminary objections, the Commission may not rely upon the factual assertions of the moving party, but must accept as true for purposes of disposing of the motion all well pleaded, material facts of the nonmoving party, as well as every inference from those facts. *County of Allegheny v. Commonwealth of Pennsylvania*, 507 Pa. 360, 490 A.2d 402 (1985); *Commonwealth of Pennsylvania v. Bell Telephone Co. of Pa.*, 551 A.2d 602 (Pa. Cmwlth. 1988). In this case, the Commission must view the Complaint in the light most favorable to the Complainant, and should dismiss the Complaint only if it appears that the Complainant would not be entitled to relief under any circumstances as a matter of law. *Equitable Small Transportation Intervenors, supra*. Only the facts in the Complaint and the Response to Preliminary Objections can be presumed to be true in order to determine whether recovery is possible.

**ALJ’s Decision**

 The ALJ began his analysis by citing Section 2807 of the Code, 66 Pa. C.S. § 2807, which provides, in pertinent part, as follows:

**(f) Smart meter technology and time of use rates.—**

\* \* \*

 (2) Electric distribution companies ***shall*** furnish smart meter technology as follows:

 (i) Upon request from a customer that agrees to pay the cost of the smart meter at the time of the request.

 (ii) In new building construction.

 (iii) In accordance with a depreciation schedule not to exceed 15 years.

66 Pa. C.S. § 2807(f)(2)(emphasis added). The ALJ stated that the use of the word “shall” in the statute indicates the General Assembly’s direction that all customers will receive a smart meter. I.D. at 6-7. Furthermore, noted the ALJ, there is no provision in the statute that allows customers to “opt out” of smart meter installation, as the Complainant desires to do. *Id.* at 7.

The ALJ continued that neither the Commission’s Orders implementing this provision of Act 129, nor PECO’s specific implementation plan, allow customers to “opt out” of smart meter installation. *Id.* PECO relies, in part, on the following language from the Commission’s *Smart Meter Implementation Order, supra,* to support its argument that the Complainant cannot opt out of the smart meter installation:

The Commission believes that it was the intent of the General Assembly to require all covered [Electric Distribution Companies] to deploy smart meters system-wide when it included a requirement for smart meter deployment ‘in accordance with a depreciation schedule not to exceed 15 years.”

Preliminary Objection at 5, *quoting* *Smart Meter Implementation Order* at 14. PECO adds that “the Commission’s Order does not have a provision for customers to ‘opt out’ of the smart meter installation.” Preliminary Objection at 6.

Based on the above, the ALJ concluded that, even accepting as true all of the Complainant’s well pleaded material facts, and every reasonable inference from those facts, the Complaint does not demonstrate a violation of the Code, any Commission Order or Regulation, or any Commission-approved Company tariff. I.D. at 6-7. Accordingly, since the Complainant has not carried her burden of proof in this matter, the ALJ concluded PECO’s Preliminary Objection should be granted and that the Complaint should be dismissed. *Id.*

Finally, the ALJ noted that a bill has been introduced in the General Assembly that, if passed, would allow customers to opt out of smart meter installation. *See*, House Bill 2188 (introduced on February 8, 2012). I.D. at 8. The ALJ reiterated that, unless and until such legislation is passed, or some other provision is put in place that specifically allows customers to opt out of smart meter installation, PECO has not violated any provision of the Code, any Commission Order or Regulation or any Commission-approved Company tariff by prohibiting the Complainant from opting out. *Id.* The ALJ added that, to the extent that she desires the ability to opt out of the smart meter installation, she should advocate for such ability before the General Assembly.

**Exceptions and Replies**

The Complainant filed nine Exceptions to the Initial Decision. Exc. at 4‑16. However, eight of those Exceptions (Exception Nos. 2-8) are public policy arguments on the subject of why the smart meter should not be installed. We further note that those policy arguments were not raised in the Complainant’s Formal Complaint.

In response to those Exceptions, PECO avers that the arguments raised by the Complainant, even if true, are not pertinent to the issue of whether PECO violated the Code, any Commission Order or Regulation or Commission-approved tariff by installing a smart meter at her property. R. Exc. at 2-3.

In her Exception No. 1, the Complainant argues that the Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005), makes meter installation optional. Exc. at 4.

In response, PECO avers that the Energy Policy Act of 2005 is not controlling here. R. Exc. at 2. As correctly noted by the ALJ, continues PECO, Section 2807(f)(2) of the Code, *supra*, is the controlling statute in this case. *Id.*

**Disposition**

We will first address the fact that the Complainant is unrepresented in this proceeding. On review, we find that the ALJ’s granting of PECO’s Preliminary Objections was correct even though Maria Povacz is a *pro se* Complainant. In *Carlock v. The United Telephone Company of Pennsylvania*, Docket No. F-00163617 (Order entered July 14, 1993), we held that, in the normal course, we would not dismiss a *pro se* complaint without first providing a hearing during which the *pro se* complainant could further explain his or her position and the factual basis for the complaint. The concern was expressed that, in general, *pro se* complainants may find it difficult to navigate through pre-hearing motions and should be given the chance to orally describe their basic issue and supporting facts. There are some cases, such as this one, where we find that a hearing would not enable the Complainant to better explain his position or provide additional facts such as to alter the inevitable conclusions. In those cases, we need not direct that a hearing be held. On this basis, we distinguish *Carlock* from the case now before us.

Next, we note that Section 5.533(b) of our Regulations, 52 Pa. Code
§ 5.533(b), states as follows:

Each exception must . . . identify the finding of fact or conclusion of law to which exception is taken and cite relevant pages of the decision. Supporting reasons for the exceptions shall follow each specific exception.

On review of Exceptions Nos. 2-8, we find they lack merit. We note that the Complainant does not allege that the ALJ made an error of law or abused his discretion in any manner. Instead, the Complainant merely objects in very general terms to the ALJ’s decision because she disagrees with him. In this connection, the Complainant cites additional public policy arguments, including European Union studies related to smart meter technology, fires and property damage, cyber security findings, and the Customer Bill of Rights. R. Exc. at 3. None of those arguments challenge the key question herein, which is whether Act 129 or any other legislation permits the Complainant to opt out of the smart meter installation. For the above reasons, Exceptions Nos. 2-8 are denied.

Additionally, we conclude that Exception No. 1 lacks merit. The Complainant avers in that Exception that the Energy Policy Act of 2005 makes smart meter installation optional. Exc. at 4. We note initially that, as noted by PECO, the Energy Policy Act of 2005 is not controlling here. R. Exc. at 2. We also note that, under that Act, the states are free to apply a stricter policy than mandated in the Act. Additionally, as noted by the ALJ, Section 2807(f)(2) of the Code, *supra*, is controlling here, and the use of the word “shall” in the statute indicates the General Assembly’s direction that all customers will receive a smart meter. I.D. at 6-7. The Complainant’s smart meter was installed by PECO in accordance with a plan approved by this Commission. *Petition of PECO Energy Company for Approval of Smart Meter Technology Procurement and Installation Plan,* Docket No. M-2009-2123944 (Order entered May 6, 2010). Therefore, the installation of the smart meter was consistent with, rather than a violation of, the Code, a Commission Regulation or Order.

Furthermore, there is no provision in the Code, the Commission’s Regulations or Orders that allows a PECO customer to “opt out” of smart meter installation, as the Complainant desires to do. Accordingly, unless and until House Bill 2188, *supra*, passes the General Assembly, or some other provision is put in place that specifically allows customers to opt out of smart meter installation, PECO has not violated any provision of the Code, any Commission Order or Regulation or any Commission-approved Company tariff by prohibiting the Complainant from opting out. For the above reasons, Exception No. 1 is denied.

## Conclusion

We have reviewed the record as developed in this proceeding, including the Initial Decision and the Complainant’s Exceptions, as well as PECO’s Reply Exceptions. Premised upon our review, we shall: (1) deny the Complainant’s Exceptions; (2) adopt the ALJ’s Initial Decision; and (3) dismiss the Complaint with prejudice, consistent with this Opinion and Order; **THEREFORE,**

IT IS ORDERED:

1. That the Exceptions filed by Maria Povacz on October 22, 2012, to the Initial Decision of Administrative Law Judge Joel H. Cheskis, are denied.

2. That the Initial Decision of Administrative Law Judge

Joel H. Cheskis, issued on October 4, 2012, herein is adopted.

3. That the Preliminary Objections filed by PECO Energy Company at Docket No. C-2012-2317176 are granted.

 4. That the Formal Complaint filed by Maria Povacz against PECO Energy Company, on July 13, 2012, at Docket No. C-2012-2317176, is dismissed with prejudice.

5. That the proceeding at Docket No. C-2012-2317176 is marked closed.

 **BY THE COMMISSION,**

 Rosemary Chiavetta

 Secretary

(SEAL)

ORDER ADOPTED: January 24, 2013

ORDER ENTERED: January 24, 2013

1. By Secretarial Letter of October 25, 2012, the Commission noted that the Complainant apparently had not served a copy of her Exceptions on any other Party. Accordingly, the Secretarial Letter included a copy of the Exceptions and afforded the Parties ten days from the date of the Letter in which to file Reply Exceptions, pursuant to 52 Pa. Code § 5.535. [↑](#footnote-ref-1)
2. A “smart meter” is an electric meter that records consumption of electric energy in increments of an hour or less and communicates that information at least daily back to the utility for monitoring and billing purposes. [↑](#footnote-ref-2)
3. *Smart Meter Procurement and Installation Implementation Order*, Docket No. M-2009-2092655 (Order entered June 24, 2009) (*Smart Meter Implementation Order*). [↑](#footnote-ref-3)