**PENNSYLVANIA**

**PUBLIC UTILITY COMMISSION**

**Harrisburg, PA 17105-3265**

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|  | Public Meeting held September 26, 2013 |
| Commissioners Present:  Robert F. Powelson, Chairman  John F. Coleman, Jr., Vice Chairman  Wayne E. Gardner  James H. Cawley  Pamela A. Witmer |  |
| Thomas A. McCarey and  Margery H. McCarey | C-2013-2354862 |
| v. |  |
| PECO Energy Company |  |

**OPINION AND ORDER**

**BY THE COMMISSION:**

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition are the Exceptions (Exceptions) of Thomas A. McCarey and Margery H. McCarey (Complainants) filed on May 6, 2013, to the Initial Decision (I.D.) of Administrative Law Judge (ALJ) Joel H. Cheskis, which was issued on April 29, 2013, in the above-captioned proceedings. Replies to Exceptions were filed by PECO Energy Company (PECO) on May 13, 2013. For the reasons stated below, we will deny the Exceptions, adopt the Initial Decision and dismiss the Complaint.

**History of the Proceeding**

On February 11, 2013, the Complainants filed the instant Formal Complaint against PECO. The Complainants included a 14-page, single-spaced, typed attachment explaining that they do not want a smart meter installed on their property.[[1]](#footnote-1) The attachment included significant detail regarding twenty-five separate reasons why the Complainants believe that smart meters are bad and why they do not want one on their property. The Complainants included, among other things, a “Notice of No Consent to Trespass and Surveillance,” stating “be advised, you and all other parties are hereby denied consent for installation and use of any and all ‘Smart Meters’ or any other surveillance and activity monitoring device, or devices, at the above property.” On March 28, 2013, the Complaint was served on PECO by Secretarial Letter.

On April 1, 2013, PECO filed a Preliminary Objection in response to the Complaint. In its Preliminary Objection, PECO argued that the Complaint should be dismissed because it is legally insufficient. PECO argued that there are no genuine issues of material fact and that PECO is entitled to judgment as a matter of law with respect to all allegations in the Complaint. In support of its argument, PECO provided extensive legal discussion and background detailing requirements that PECO must install smart meters for all its customers. PECO concluded its Preliminary Objection by stating that “as the law currently stands, pursuant to Act 129 and the Commission’s Implementation Order, customers do not have the ability to ‘opt out’ of smart meter installation.” PECO added that there is therefore no legal basis for the Complaint and that the Complaint should be dismissed as a matter of law.

The Preliminary Objection included a Notice to Plead. The Complainant’s Answer to PECO’s Preliminary Objection was due no later than April 15, 2013. 52 Pa. Code §§ 5.101(f)(1), 1.12(a), 1.56(a)(1) and (b). The Complainants did not file an Answer to PECO’s Preliminary Objection.

On April 29, 2013, the Initial Decision of ALJ Cheskis was issued in this proceeding. The ALJ determined that the Complainants “would not be entitled to relief under any circumstances as a matter of law.” I.D. at 7. Accordingly, he granted PECO’s Preliminary Objection and dismissed the Complaint with prejudice. *Id*. at 9. On May 6, 2013, the Complainants filed their Exceptions arguing that the ALJ erred by dismissing their Complaint.[[2]](#footnote-2) On May 13, 2013, PECO filed Reply Exceptions.

**Discussion**

Section 5.101 of the Commission’s Regulations, 52 Pa. Code § 5.101, sets forth the grounds for granting preliminary objections. That section provides 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.

52 Pa. Code § 5.101(a).

Commission procedure regarding the disposition of preliminary objections is similar to the procedure utilized in Pennsylvania civil practice. A preliminary objection in civil practice seeking dismissal of a pleading will be granted only where relief is clearly warranted and free from doubt. *Interstate Traveller Services, Inc. v. Pa. Dep’t of Environmental Resources*, 486 Pa. 536, 406 A.2d 1020 (1979). The moving party may not rely on its own factual assertions, but must accept for the purposes of disposition of the preliminary objection all well-pleaded, material facts of the other party, as well as every inference fairly deducible from those facts. *County of Allegheny v. Commonwealth* *of Pa.*, 507 Pa. 360, 490 A.2d 402 (1985). The preliminary objection may be granted only if the moving party prevails as a matter of law. *Rok v. Flaherty*, 527 A.2d 211 (Pa. Cmwlth. 1987). Any doubt must be resolved in favor of the non-moving party by refusing to sustain the preliminary objections. *Dep’t of Auditor General, et al. v. State Employees’ Retirement System, et al.*, 836 A.2d 1053, 1064 (Pa. Cmwlth. 2003) (citing *Boyd v. Ward*, 802 A.2d 705 (Pa. Cmwlth. 2002)).

ALJ Cheskis made six Findings of Fact and reached ten Conclusions of Law. The Findings of Fact and Conclusions of Law are incorporated herein by reference and are adopted without comment unless they are either expressly or by necessary implication rejected or modified by this Opinion and Order.

Before addressing the Exceptions, we note that any issue or Exception that we do not specifically delineate shall be deemed to have been duly considered and denied without further discussion. The Commission is not required to consider expressly or at length each contention or argument raised by the parties. [Consolidated Rail Corp. v. Pa. PUC, 625 A.2d 741 (Pa. Cmwlth. 1993);](file://C:\research\buttonTFLink?_m=69761b6202cb4178e2a6e6fe02f5751b&_xfercite=%3ccite%20cc=%22USA%22%3e%3c!%5bCDATA%5b2000%20Pa.%20PUC%20LEXIS%2067%20%5d%5d%3e%3c\cite%3e&_butType=3&_butStat=242&_butNum=5&_butInline=1&_butinfo=%3ccite%20cc=%22USA%22%3e%3c!%5bCDATA%5b625%20A.2d%20741%5d%5d%3e%3c\cite%3e&_fmtstr=FULL&docnum=5&_startdoc=1&_startchk=1&wchp=dGLSzS-lSlbz&_md5=ad2b02d95c2a9216e83b92a3570d4785) *also* see, generally, [University of Pennsylvania v. Pa. PUC, 485 A.2d 1217 (Pa. Cmwlth. 1984).](file://C:\research\buttonTFLink?_m=69761b6202cb4178e2a6e6fe02f5751b&_xfercite=%3ccite%20cc=%22USA%22%3e%3c!%5bCDATA%5b2000%20Pa.%20PUC%20LEXIS%2067%20%5d%5d%3e%3c\cite%3e&_butType=3&_butStat=242&_butNum=6&_butInline=1&_butinfo=%3ccite%20cc=%22USA%22%3e%3c!%5bCDATA%5b485%20A.2d%201217%5d%5d%3e%3c\cite%3e&_fmtstr=FULL&docnum=5&_startdoc=1&_startchk=1&wchp=dGLSzS-lSlbz&_md5=9b1cc8319afd12440738bb82d74455ef)

**ALJ’s Initial Decision**

The ALJ discussed the Commission’s rules pertaining to Preliminary Objections as set forth above. I.D. at 3-4. He also correctly set forth the standards to be followed regarding accepting all well-pleaded facts of the nonmoving party and viewing the Complaint in the light most favorable to the Complainants. *Id*. at 4. The ALJ observed that PECO’s Preliminary Objection should only be granted “if it appears that the McCarey’s would not be entitled to relief under any circumstances as a matter of law.” *Id*.

The ALJ discussed PECO’s Preliminary Objection, noting that the Objection argued that the Complaint was legally insufficient. PECO argued that Section 2807(f)(2) of the Public Utility Code (Code), 66 Pa. C.S. § 2807(f)(2), mandated that PECO furnish smart meters to its customers. That Section provides, in pertinent part:

(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.

(Emphasis added).

The ALJ agreed with PECO that the foregoing statute mandated the provision of smart meters to all customers. The ALJ also observed that there is no provision in the statute that would permit a customer to “opt-out” of smart meter installation as requested by the Complainants. I.D. at 5.

The ALJ also found that this Commission’s Orders which implemented the smart meter provision of Act 129 and approved PECO’s own implementation plan do not provide that customers can opt out of smart meter installation. The ALJ quoted this Commission’s statement in the *Smart Meter Procurement and Installation Implementation Order*, Docket No. M-2009-2092655 (Order entered June 24, 2009) (*Smart Meter Procurement Order*):

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.”

I.D. at 5, quoting *Smart Meter Procurement Order* at 14.

The ALJ further found that this precise issue has been addressed by the Commission before. I.D. at 6. In *Maria Povacz v. PECO Energy Company*, Docket No.   
C-2012-2317176 (Order entered January 24, 2013) (*Povacz*), the Complainant argued that she did not give permission for the installation of a smart meter and requested that she be allowed to opt out of the program. PECO filed Preliminary Objections, citing Section 2807(f)(2) of the Code and the *Smart Meter Procurement Order*. This Commission granted PECO’s Preliminary Objection and dismissed that Complaint stating:

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. The Complainant’s smart meter was installed by PECO in accordance with a plan approved by this Commission. Therefore, installation of the smart meter was consistent with, rather than a violation of, the Code, a Commission regulation or Order.

*Id*. at 10 (citations omitted). The ALJ also noted that the Commission stated in *Povacz* that there was no provision for a customer to opt out of PECO’s smart meter installation program. *Id*.

The ALJ discussed this Commission’s policy announced in *Carlock v.   
United Telephone Company of Pennsylvania*, Docket No. F-00163617 (Order entered July 14, 1993) (*Carlock*). In *Carlock*, the Commission held that, in the ordinary course, the Commission would not dismiss a complaint filed by a *pro se* complainant without first providing a hearing during which the complainant could explain the factual basis for his complaint. The Commission subsequently clarified *Carlock* and held that ALJs had the discretion to dispose of the pleadings in a proceeding provided the action was neither arbitrary nor capricious, and that it was in accordance with the law. *John Graham, Jr. v. Philadelphia Suburban Water Company and Bell Atlantic-Pennsylvania*, Docket No.   
C-00957557 (Order entered June 12, 1996). The ALJ also found that, in *Povacz*, the Commission held “that there are some cases where a hearing would not enable the complainant to better explain his position or provide additional facts such as alter inevitable conclusions and, in those cases, a hearing need not be held.” I.D. at 7, citing *Povacz* at 9.

The ALJ held that the Commission’s holding in *Povacz* controlled this proceeding, both as to PECO’s Preliminary Objections and the dismissal of a *pro se* complaint without a hearing. The ALJ stated:

Such is the case with the Complaint filed by the McCarey’s in this case where it is clear that, even when viewing the Complaint in the light most favorable to the McCarey’s, and accepting as true all well pleaded material facts, as well as every reasonable inference from those facts, the McCarey’s would not be entitled to relief under any circumstances as a matter of law. PECO’s Preliminary Objection should therefore be granted, and the McCarey’s Complaint dismissed, without a hearing.

I.D. at 7.

**Exceptions, Replies and Disposition**

The Complainants’ first Exception argues that the ALJ erred when he found that the Complainants had failed to respond to PECO’s Preliminary Objection. The Complainants aver that they sent an Answer to PECO’s counsel because that is who sent them PECO’s Preliminary Objections. PECO responds that its Preliminary Objection contained a “Notice to Plead” which gave notice to the Complainants that a response to the Preliminary Objection must be filed with the Commission. R.Exc. at 2.

We will deny this Exception. The record clearly reflects that the Complainants did not file a response to the Preliminary Objection with this Commission, as required by our Regulations. 52 Pa. Code §§ 5.101(f) and 1.4. The ALJ committed no error.

The Complainants’ next Exception argues that they will refuse a smart meter until 2017, at which point their analog meter will be fifteen years old. According to the Complainants, that places them in compliance with Section 2807(f)(2) of the Code, 66 Pa. C.S. § 2807(f)(2). We will deny this Exception. Contrary to the Complainant’s assertion, Section 2807(f)(2) provides the time within which PECO must complete its system-wide deployment of smart meters. *See*, *Smart Meter Procurement Order* at 15. It is not intended to provide a customer with the ability to postpone that customer’s installation of a smart meter according to a depreciation schedule. Section 2807(f)(2)(i) does provide that a customer may request installation of a smart meter, but that is intended to provide customers with the opportunity to obtain a smart meter in advance of the electric distribution company’s schedule for system-wide deployment. *Id*. at 10.

The Complainants next argue that Act 129 “is contrary to the Federal Mandate.” They further assert that PECO must obtain their permission to install a smart meter, again referencing a federal mandate. PECO replies that the Complainants have failed to show how PECO has violated any portion of the Code, Commission Regulations or Orders. PECO states that, absent any allegation that they have acted in violation of any of those authorities, the Complaint is legally insufficient and must be dismissed. R.Exc. *passim*.

We will deny this Exception. In their Complaint and their Exceptions, the Complainants refer to a federal mandate, but do not identify what the mandate is or in what manner various federal pronouncements on smart grid applications conflict with either Act 129 or our *Smart Meter Procurement Order*. To the contrary, our research reveals a wide array of federal programs designed to support and advance the development and deployment of smart grid technology. However, none of the federal actions serve to restrict in any way the deployment of smart meters.

The Complainants’ fourth Exception asserts that our holdings in *Povacz* are inapplicable to their situation. The Complainants state that, unlike the complainant in *Povacz*, they are not seeking to opt out of the advanced meter deployment. Rather, the Complainants argue they are refusing permission for PECO to install a smart meter. The Complainants are engaged in semantics. We find that the circumstances in *Povacz* are on all fours with the Complainants’ Complaint. There is simply no provision in the Code, Act 129 or our Orders on smart meter deployment which provide for the Complainants to opt out or refuse permission to PECO to update its meters in accordance with Act 129 and our directives. Our holdings in *Povacz* do control this case. This Exception is denied.

The Complainants’ final two Exceptions assert that wireless smart meter technology increase the likelihood of cancer and other health risks associated with microwave broadcast signals. The Complainants also complain that PECO’s smart meter technology does not meet the Federal Communications Commission’s guidelines for safe levels of radiation exposure. PECO responds that the Complainants do not assert any error in the ALJ’s Initial Decision; rather, the Complainants are attempting to make basic policy arguments already decided by the General Assembly and this Commission. PECO reiterates its position that the Complainants have failed to identify any act on the part of PECO which violates the Code, including Act 129, this Commission’s Regulations or our Orders. R.Exc. 2-3. We agree and will deny this Exception.

**Conclusion**

Based upon the foregoing discussion, we shall deny the Complainants’ Exceptions and adopt the Initial Decision consistent with the foregoing discussion; **THEREFORE,**

**IT IS ORDERED:**

1. That the Exceptions of Thomas A. McCarey and Margery H. McCarey are denied, consistent with this Opinion and Order.
2. That the Initial Decision of Administrative Law Judge Joel H. Cheskis is adopted, consistent with this Opinion and Order.

3. That the Complaint filed at Docket No. C-2013-2354862 by Thomas A. McCarey and Margery H. McCarey is dismissed with prejudice.

4. That the record in this proceeding be marked closed.



**BY THE COMMISSION,**

Rosemary Chiavetta

Secretary

(SEAL)

ORDER ADOPTED: September 26, 2013

ORDER ENTERED: September 26, 2013

1. 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-1)
2. The Complainants attached a document purporting to address health risks from the use of smart meters to their Exceptions. Subsequent to the filing of their Exceptions, the Complainants filed “Additional Information to Exceptions” on May 10, 2013, and a “Special Report Regarding Exceptions” on June 26, 2013. A party cannot introduce new evidence at the exceptions stage of the proceeding. *Pa. PUC v. Philadelphia Gas and Water Company Water Division*, 1988 Pa. PUC LEXIS 511. We may, however, take judicial notice of published articles and reports. Consequently, the unpublished documents submitted by the Complainants were not considered in our disposition of the Complainant’s Exceptions. [↑](#footnote-ref-2)