

**BEFORE THE PENNSYLVANIA
PUBLIC UTILITY COMMISSION**

Laura Sunstein Murphy,

Complainant,

v.

Docket No. C-2015-2475726

PECO Energy Company

Respondent

**COMPLAINANT’S ANSWER TO
RESPONDENT’S MOTION FOR JUDGMENT ON THE PLEADINGS**

I. INTRODUCTION

Pursuant to Section 5.102(b) of the Commission’s Regulations, 52 Pa. Code § 5.102(b), the Complainant in the above-captioned matter respectfully submits this Answer to Respondent’s Motion for Judgment on the Pleadings (“Motion”).

Complainant opposes the Motion because there are genuine issues of material fact that necessitate an in-person hearing before the Presiding Officer. In addition, PECO is not entitled to summary judgment as a matter of law. First, Complainant has alleged the PECO would not provide safe and reasonable service if it was allowed to compel Complainant to have a smart meter in her home. Complainant is disabled and the Electro Magnetic Frequencies (“EMF”) emitted by PECO’s smart meters would have a significant negative effect on Complainant’s many serious health conditions. In order for the Commission to adjudicate these claims, an evidentiary hearing is necessary.

In addition, PECO is not entitled to judgment as a matter of law in this case. PECO argues that there are no opt-outs allowed to the utility’s plan to install smart meters to all customers. However, this case is not about opt-outs. This matter is about whether PECO would violate Section 1501 of the Public Utility Code if it installs a harmful device on the premises of a

disabled customer. This is a legal issue that can only be decided by the Commission after a full evidentiary hearing. For these reasons, as set forth in more detail below, Complainant respectfully requests that PECO's Motion be denied.

II. ANSWER TO MOTION

1. Admitted. By way of further answer, it should be noted that the Complainant filed an Amended Complaint at this docket on July 28, 2015.

2. Admitted in part, denied in part. It is admitted that the Formal Complaint filed *pro se* on or about April 7, 2015 makes the allegations set forth in the Motion. The original Formal Complaint was filed under extreme duress as Complainant was recuperating from her most recent surgery when PECO sent Complainant a ten-day shut off notice. It is specifically denied that the Formal Complaint is limited to the allegations highlighted by Respondent in its Motion. As stated above, an Amended Complaint was filed by Complainant on July 28, 2015, and said Complaint includes additional allegations regarding PECO's violation of Section 1501 of the Public Utility Code, 66 Pa. C.S. § 1501.

3. Admitted in part, denied in part. It is admitted that the original Formal Complaint, docketed at the Commission on or about April 7, 2015, mentioned that Complainant's son and his wife in California have the option to request no smart meter in their home, and therefore, her son and his wife are not required to file a complaint with their local PUC in order to not have their health impaired by a Smart Meter in their home. It is specifically denied that the Complainant's mention of other states which offer smart meter opt-outs as a customer right, without having to prove medical fragility of the individual customer, was a request for an opt out in her case. The Complainant mentioned other states and other utility commissions around the country as being intrinsically more concerned with delivering safe electricity to medically fragile

individuals than PECO. Complainant denies that the relief requested is limited to the language set forth in the Motion. In her Amended Complaint, Complainant has set forth a number of measures that PECO should take to address the issues raised by the Formal Complaint.

4. Denied. It is specifically denied that Complainant is seeking to “opt out” of PECO’s smart meter installation program. The Complainant is seeking an accommodation to prevent unsafe and unreasonable service by PECO in violation of Section 1501 of the Public Utility Code.

5. Admitted in part, denied in part. It is admitted that PECO filed an Answer and New Matter. It is specifically denied that this case should be dismissed pursuant to Act 129 or that said legislation provides legitimate grounds to dismiss the Complaint in this matter.

6. Admitted in part, denied in part. It is admitted that Complainant filed a response to PECO’s New Matter. It is specifically denied that this case is about Complainant wanting to “opt out” of PECO’s smart meter program. The Amended Complaint alleges that to the extent PECO forces a disabled customer to have a device at her home that emits harmful radiation to the customer, the utility violates Section 1501 of the Public Utility Code.

7. Admitted. By way of further answer, Complainant has requested that the hearing be moved from a telephonic hearing in Pittsburgh, to an in person hearing in Philadelphia, because Complainant's disabilities will not be readily apparent in a telephonic hearing, and Complainant has expert witnesses who will testify on her behalf as to her genetic disabilities and post-concussion syndrome, and the increased harm to her physical conditions that will result from increased radiation, which would be emitted in her rural home by a smart meter.

8. Admitted. By way of further answer, Complainant respectfully submits that this case is not an appropriate subject of a Motion for Judgment on the Pleadings.

9. Admitted. By way of further answer, Complainant respectfully submits that it is inappropriate for the Presiding Officer to grant the Motion because there are genuine issues of material fact and PECO is not entitled to judgment as a matter of law. By way of further answer, Complainant has not had the time or opportunity to submit affidavits or depositions or expert witness testimony as to her medical conditions and Smart Meter health effects as to her unique medical conditions. Due process under the law requires the Complainant to be permitted to submit evidence in order for the judge to rule, after weighing the evidence under the facts and under the law.

10. Admitted. By way of further answer, Complainant respectfully submits that, viewing the record so far in the light most favorable to Complainant, there are genuine issues of material fact in this matter, and PECO is not entitled to judgment as a matter of law.

11. Admitted. By way of further answer, there are genuine issues of fact in this matter as to PECO's obligations to deliver safe service to Complainant under Pa.66 Section 1501, and a hearing is necessary to present evidence in support of the Complainant's allegations.

12. Admitted. By way of further answer, a hearing is necessary in this matter, and therefore, the Complaint should not be dismissed.

13. Admitted. By way of further answer, a hearing is required in this matter because there are disputed questions of fact and a hearing is required to resolve questions of law. The *Dee Dee Cab* matter cited by Respondent is inapplicable to this case. Complainant's case is one of medically fragility and the impact of a smart meter on safe service for Complainant. Although safe service has been addressed by the PUC before (*see e.g., Bureau of Investigation and Enforcement v. West Penn Power Company*, Docket No. C-2012-2307244), Complainant's

unique medical history sets forth a set of facts not contemplated by the PUC before in the instance of smart meters.

14. Denied. Complainant is not requesting to “opt out” of PECO’s smart meter program. Complainant is requesting that the Company make an accommodation for a disabled customer whose health would be negatively affected by emissions which would emanate from a PECO smart meter if one were to be installed in her home. Complainant simply wants PECO to fulfill its obligations under Section 1501 of the Public Utility Code to provide safe and reasonable service.

15. Admitted. By way of further answer, the Commission’s approval of PECO’s smart meter plan does not compel PECO to provide unsafe or unreasonable service to Complainant.

16. Admitted in part, denied in part. It is admitted that Act 129 required PECO to file a smart meter plan with the Commission. It is denied that the statute compels utilities to install a smart meter in every home in the Commonwealth. Further, Act 129 does not obligate the Commission or PECO to insist on installing smart meters in homes where they would create an unsafe condition.

17. Admitted.

18. Admitted. By way of further answer, the Commission’s Implementation Order speaks for itself.

19. Admitted in part, denied in part. Although, technically, there is no “opt out” provision in the Commission’s smart meter implementation order, this case is not about an opt-out, it is about whether PECO provides safe and reasonable service when it installs a smart meter that is harmful to a disabled customer in violation of Section 1501 of the Public Utility Code.

20. Admitted.

21. Admitted in part, denied in part. It is admitted that Chairman Powelson made the statement quoted in the Motion. To the extent that PECO is implying that the statement means that all customers benefit from the installation of smart meters, that implication is denied. Complainant is a disabled customer who will be harmed by the continual electro-magnetic frequency (“EMF”) emitted by a smart meter if installed in her home, and PECO installation of a harmful device in Complainant’s premises is a violation of the utility’s obligation to provide safe and reasonable service pursuant to Section 1501 of the Public Utility Code.

22. Admitted.

23. Admitted.

24. Admitted.

25. Admitted in part, denied in part. Although, technically, there is no “opt out” provision in the Commission’s implementation plan, this case is not about an opt-out, it is about whether PECO provides safe and reasonable service when it insists on installing a smart meter that is harmful to a disabled customer in violation of Section 1501 of the Public Utility Code or disconnecting the customer’s electric service.

26. Admitted.

27. Admitted in part, denied in part. Although, technically, there is no “opt out” provision in the Commission’s PECO smart meter order, this case is not about an opt-out, it is about whether PECO would provide safe and reasonable service if it installs a smart meter that is harmful to a disabled customer in violation of Section 1501 of the Public Utility Code.

28. Denied. Complainant lacks sufficient information to ascertain the truth of PECO’s claim regarding the number of smart meters installed in its territory.

29. Admitted in part, denied in part. Although, technically, there is no “opt out” provision in Act 129, the Commission’s smart meter implementation order and PECO’s smart meter plan, this case is not about an opt-out, it is about whether PECO would provide safe and reasonable service if it installs a smart meter that is harmful to a disabled customer in violation of Section 1501 of the Public Utility Code.

30. Denied. Although, the legislative history of Act 129 does not contemplate "opt out" because it specifically requires "opt in" for old construction. Technically, there is no “opt out” provision in Act 129, the Commission’s smart meter implementation order or PECO’s smart meter plan, this case is not about an opt-out, it is about whether PECO provides safe and reasonable service when it installs a smart meter that is harmful to a disabled customer in violation of Section 1501 of the Public Utility Code. By way of further answer, HB 394 is relevant only to the extent that it shows that legislators have recognized that the PUC has not taken any action to accommodate the needs of disabled customers in the furnishing of reasonable and safe service in light of the Smart Meter roll out despite numerous individual requests.

31. Admitted. By way of further answers, HB 394 is relevant only to the extent that it shows that legislators recognize that in the absence of PUC action to accommodate the needs of disabled customers who will be harmed by Smart Meter emissions, the legislature is attempting to act.

32. Admitted. By way of further answer, HB 394 is relevant only to the extent that it shows that legislators recognize that certain Pennsylvanians require opt outs from smart meter deployment for health and safety reasons, and the PUC has not allowed for those opt outs, therefore, to allow reasonable accommodations for disabled customers. The neighboring state of Maryland utility commission, NOT the Maryland legislature, granted a temporary opt out of

Smart Meter deployment to its residents in light of customer urging on May 24, 2012, followed by a permanent opt out possibility for its residents on February 14, 2014.

33. Denied. Complainant lacks sufficient information to ascertain the truth of PECO's claims regarding the status of HB 394. By way of further answer, HB 394 is relevant only to the extent that it shows that legislators recognize that the PUC has not acted by regulation to allow reasonable accommodations for disabled customers who have been or who will be harmed by smart meters.

34. Denied. By way of further answer, this case is not about an opt-out, it is about whether PECO will be providing safe and reasonable service if it installs a smart meter that is harmful to a disabled customer in violation of Section 1501 of the Public Utility Code.

35. Denied. ALJ Cheskis agreed with PECO regarding the opt-out claim in a matter (*Povacz*) that is distinguishable from this Formal Complaint case. Complainant's case is not about an opt-out, it is about whether PECO will provide safe and reasonable service if it installs a smart meter that is harmful to a disabled customer in violation of Section 1501 of the Public Utility Code.

36. Admitted in part, denied in part. It is admitted that ALJ Cheskis ruled in favor of PECO in the *Povacz* matter. It is denied that the *Povacz* decision is applicable or relevant to the instant matter. This case is not about an opt-out, it is about whether PECO would provide safe and reasonable service if it installs a smart meter that is harmful to a disabled customer in violation of Section 1501 of the Public Utility Code.

37. Admitted in part, denied in part. It is admitted that the Commission ruled in favor of PECO in the *Povacz* matter. It is denied that the *Povacz* decision is applicable or relevant to the instant matter. This case is not about an opt-out, it is about whether PECO provides safe and

reasonable service when it installs a smart meter that is harmful to a disabled customer in violation of Section 1501 of the Public Utility Code.

38. Admitted in part, denied in part. It is admitted that the Commission has ruled in favor of PECO in the listed matters on the opt-out issue. It is denied that the listed decisions are applicable or relevant to the instant matter. This case is not about an opt-out, it is about whether PECO provides safe and reasonable service when it installs a smart meter that is harmful to a disabled customer in violation of Section 1501 of the Public Utility Code. None of the cases cited by PECO, (*Gavin, Morgan, McCarey, Renney Thomas, Donnelly, or Smith*) involved a disabled PECO customer who alleged violations of PECO's obligations under Section 1501 of the Public Utility Code.

39. Admitted in part, denied in part. Although the *Gavin* and *Thomas* matters raised health issues in the Complaints, the cases were decided on the opt-out issue in favor of PECO. It is denied that the *Gavin* and *Thomas* decisions are applicable or relevant in the instant matter. This case is not about an opt-out, it is about whether PECO provides safe and reasonable service when it installs a smart meter that is harmful to a disabled customer in violation of Section 1501 of the Public Utility Code.

40. Denied. By way of further answer, the cited decisions are not applicable or relevant to the instant matter because those cases dealt with the issue of whether there was an opt-out provision that customers could use to object to the installation of smart meters. This case is not about an opt-out, it is about whether PECO provides safe and reasonable service when it installs a smart meter that is harmful to a disabled customer in violation of Section 1501 of the Public Utility Code.

41. Admitted. By way of further answer, Complainant has alleged that PECO will fail to provide safe and reasonable service to Complainant if it installs a harmful EMF-emitting smart meter in the premises of a disabled customer.

42. Denied. By way of further answer, Complainant has alleged that PECO will fail to provide safe and reasonable service to Complainant if it is permitted to install a harmful EMF-emitting smart meter in the premises of a disabled customer. There is nothing in Act 129 or the Commission's Orders that obligates PECO to violate the mandate of Section 1501 of the Public Utility Code to provide safe and reasonable service to customers, including disabled customers.

43. Denied. The Complainant has alleged violations of Section 1501 of the Public Utility Code in her Amended Complaint.

44. Admitted in part, denied in part. Although, technically, there is currently no "opt out" provision in Act 129 or the Commission's smart meter implementation order, this case is not about an opt-out, it is about whether PECO provides safe and reasonable service when it installs a smart meter that is harmful to a disabled customer in violation of Section 1501 of the Public Utility Code.

45. Denied. Even if PECO is deploying smart meters in compliance with the Commission's smart meter order, and even if there is no opt-out, this case is not about an opt-out, it is about whether PECO provides safe and reasonable service when it installs a smart meter that is harmful to a disabled customer in violation of Section 1501 of the Public Utility Code. The legal basis for the Complaint is that PECO is violating the safe and reasonable service provisions of Section 1501 of the Public Utility Code when it installs an EMF-emitting smart meter in the premises of a disabled customer, namely Complainant.

46. Denied. Nothing in the applicable statutes, regulations or Commission orders grants PECO the right to install a harmful device in the premises of a disabled customer. Further, PECO has no right to terminate a customer who objects to PECO's violations of Section 1501 of the Public Utility Code.

47. Admitted in part, denied in part. Although PECO's tariff authorizes the Company to access a customer's premises to change the meter, there is nothing in the applicable statutes, regulations or Commission orders that grants PECO the right to install harmful devices in the premises of a disabled customer.

48. Admitted in part, denied in part. Although PECO's tariff authorizes termination for denial of access to the Company's meter, nothing in the tariff authorizes PECO to terminate a customer who objects to PECO's violation of Section 1501 of the Public Utility Code. Further, Complainant has provided PECO with a medical certification to stay the threatened termination in accordance with 66 Pa. C.S. § 1406(f).

49. Admitted in part, denied in part. Although PECO's tariff has the force of law, nothing in the tariff authorizes PECO to violate Section 1501 of the Public Utility Code. To the extent that implementation of the tariff leads to a violation of the statute, the statute must prevail.

50. Denied. Complainant is requesting an accommodation based on her disability and the health effects of a smart meter in her premises. Nothing in PECO's tariff authorizes termination of a customer who objects to PECO's violations of Section 1501 of the Public Utility Code. Further, Complainant has provided PECO with a medical certification to stay the threatened termination in accordance with 66 Pa. C.S. § 1406(f)

51. Denied. The Complainant is entitled to relief under the law where she is able to show that PECO has violated Section 1501 of the Public Utility Code when it attempted to install

a harmful EMF radiation-emitting smart meter in the premises of a disabled customer under threat of termination of electric supply, when the customer has always paid her bill on time.

52. Denied. As set forth in greater detail herein, there are genuine disputes of material fact in this case and the Complainant has stated a claim for which relief can be granted necessitating an in-person hearing on the matter.

III. LEGAL ARGUMENT

The Commission's Rules of Administrative Practice and Procedure permit parties to file preliminary motions. 52 Pa. Code §§ 5.101-103. Section 5.102(a) of the Commission's regulations permits any party to move for judgment on the pleadings or summary judgment after the pleadings are closed, but within such time as not to delay a hearing. 52 Pa. Code § 5.102(a). In addition to the pleadings, a motion for summary judgment must be based on depositions, answers to interrogatories, admissions and supporting affidavits. 52 Pa. Code § 5.102(c). The standard for granting both motions is the same. The Presiding Officer will grant a preliminary motion if the record shows that there is no genuine issue as to a material fact and that the moving party is entitled to judgment as a matter of law. 52 Pa. Code § 5.102(d)(1).

The standard of review for both a motion for judgment on the pleadings and a motion for summary judgment is the same. The moving party bears the burden of showing that no genuine issue of material fact exists and that it is entitled to a judgment as a matter of law. The Commission must view the record in the light most favorable to the non-moving party, giving that party the benefit of all reasonable inferences. *First Mortgage Co. of Pennsylvania v. McCall*, 459 A.2d 406 (Pa. Super. 1983); *Mertz v. Lakatos*, 381 A.2d 497 (Pa. Cmwlth. 1976). All doubts as to the existence of a genuine issue of material fact must be resolved against the

moving party. *Thomson Coal Company v. Pike Coal Company*, 412 A.2d 466 (Pa. 1979). Judgment will be granted only where the right to relief is clear and free from doubt. *Id.*

The Commission has interpreted Section 5.102(c) of its regulations in conformity with Rule 1035 (now Rule 1035.1) of the Pennsylvania Rules of Civil Procedure. *South River Power Partners, L.P. v. West Penn Power Company*, Docket No. C-00935287 (Order entered November 6, 1996). Accordingly, a non-moving party may not rest upon mere allegations or denials of the pleadings, but must submit some materials to establish that a genuine issue of material fact exists. Pa. R.C.P. No. 1035.3; *Stover v. The United Telephone Co. of Pennsylvania*, Docket No. C-00923833 (Order entered July 21, 1992); see also *Nicastro v. Cuyler*, 467 A.2d 1218 (Pa. Cmwlth. 1983); *Pennsylvania Gas & Water Co. v. Nenna & Frain, Inc.*, 467 A.2d 330 (Pa. Super. 1983); *Geriot v. Council of Borough of Darby*, 457 A.2d 202 (Pa. Cmwlth. 1983).

In this matter, PECO has failed to meet its burden of showing that there is no genuine issue of material fact. An evidentiary hearing is necessary for Complainant to present evidence regarding her unique health issues, her disability and the effects of Electro Magnetic Radiation (EMR) on her fragile health. This evidence is necessary to support Complainant's allegations that forcing a smart meter upon Complainant under threat of termination constitutes unsafe and unreasonable service by PECO in violation of Section 1501 of the Public Utility Code. It is important to know that this type of case has not been brought before the Commission, and the issue of smart meter deployment and PECO's obligation to provide reasonable service has not been adjudicated by the Commission. An evidentiary hearing is essential to determine the validity of the parties' claims in this matter.

In addition, PECO has failed to show that it is entitled to a dismissal without a hearing as a matter of law. In its Motion, PECO repeatedly, and erroneously, claims that this is an opt-out

case, and the Commission should dismiss it as it has done other opt-out cases. In reality, this is a case about whether PECO is rendering safe and reasonable service to Complainant where it insists on installing a smart meter that causes significant negative health effects to a disabled customer. Again, this is an issue of first impression for the Commission, and there is no precedent that mandates that this Complaint be dismissed outright. On the contrary, the Commission has consistently required public utilities to offer safe and reasonable service and has held utilities responsible for their failures to do so. Where, as here, health and safety issues are raised, the public interest is better served by granting an open and transparent hearing for adequate proof and public assurance, not only that the utility's actions are safe but also that the Commission is giving the Complainant an opportunity to be heard. *See, Pickford, et al. v. PAWC*, Docket No. C-20078029, 2008 Pa. PUC LEXIS 29 (Order issued March 20, 2008).

IV. CONCLUSION

Based on the foregoing, Complainant respectfully requests that the Commission deny Respondent's Motion for Judgment on the Pleadings and issue an Order allowing this matter to proceed to hearing and granting any other relief the Commission deems just and appropriate.

Respectfully submitted,



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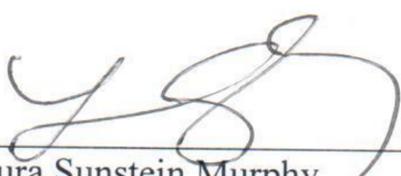
Date: August 5, 2015

Counsel for Complainant

VERIFICATION

I, Laura Sunstein Murphy, hereby state that the facts above set forth are true and correct to the best of my knowledge, information and belief and that I expect to be able to prove the same at a hearing held in this matter.

I understand that the statements herein are made subject to the penalties of 18 Pa. C.S. § 4904 (relating to unsworn falsification to authorities).



Laura Sunstein Murphy
Complainant

Date: Aug. 5, 2015

CERTIFICATE OF SERVICE

I hereby certify that this day I served a copy of the Entry of Appearance upon the persons listed below in the manner indicated in accordance with the requirements of 52 Pa. Code Section 1.54.

Via Electronic Mail and/or First Class Mail

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