

**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 PRELIMINARY OBJECTIONS**

I. INTRODUCTION

Pursuant to Sections 5.61 and 5.101(f) of the Commission’s Regulations, 52 Pa. Code §§ 5.61 and 5.101(f), the Complainant in the above-captioned matter respectfully submits this Answer to Respondent’s Preliminary Objections. In support of her Answer, Complainant respectfully submits the following.

II. ANSWER TO PRELIMINARY OBJECTIONS

1. Admitted.

2. Admitted. By way of further answer, PECO’s summary of Complainant’s Amended Complaint is incomplete. The Amended Complaint alleges that PECO’s compulsory installation of a smart meter in this disabled customer’s premises is a violation of Section 1501 of the Public Utility Code.

3. Admitted.

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.
6. Admitted. By way of further answer, the claims made in the Amended Complaint are legally sufficient, and Preliminary Objections are not appropriate in this case.
7. Admitted.
8. Admitted. By way of further answer, the factual averments in the Amended Complaint present a claim where relief is not only possible, but also just and proper.
9. Admitted. By way of further answer, the factual averments in the Amended Complaint present a claim where relief is not only possible, but is also just and proper.
10. Admitted.
11. Admitted. By way of further answer, the Amended Complaint in this matter does not contain any unwarranted inferences, argumentative allegations or expressions of opinion.
12. Admitted. By way of further answer, it is not appropriate for the Commission to dismiss the Amended Complaint in this matter, and an in-person hearing is necessary to adjudicate the legitimate claims presented and to advance the public interest.
13. Admitted. By way of further answer, the Amended Complaint raises questions of fact regarding Complainant's disability, medical condition and the potential effects of a smart meter on her health and well-being. Unless those factual questions are resolved by the fact finder after an in-person hearing, the Commission cannot determine whether PECO is failing to provide safe and reasonable service in accordance with Section 1501 of the Public Utility Code.
14. Denied. The Amended Complaint presents genuine issues of material fact and PECO is not entitled to judgment as a matter of law with respect to any of the allegations in the Amended Complaint. An in-person hearing is necessary to adjudicate the genuine issues of material fact raised by the Amended Complaint.

15. Admitted in part, denied in part. It is admitted that PECO's smart meter plan was approved by the Commission. It is specifically denied that the Complainant is requesting an "opt-out." In fact, the phrase "opt-out" does not appear anywhere on the Amended Complaint. PECO uses the term in its Preliminary Objections to fit the utility's desired result in this case. The Complainant has requested an accommodation based on her medical disability and for PECO to abstain from providing unsafe and unreasonable service in accordance with Section 1501 of the Public Utility Code. *See*, Amended Complaint at ¶¶ 27-32.

16. Admitted. By way of further answer, it should be noted that Act 129 does not require universal deployment of smart meters. Also, Act 129 does not require utilities to install smart meters in the homes of disabled customers in a manner that violates Section 1501 of the Public Utility Code.

17. Admitted.

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

19. Admitted. By way of further answer, and as explained in paragraph 15 of this Answer, the Complainant is not seeking an "opt-out." The Complainant seeks an accommodation based on medical disability and for PECO to abide by the requirements of Section 1501 of the Public Utility Code to provide safe and reasonable service.

20. Admitted.

21. Admitted in part, denied in part. It is admitted that then-Chairman Powelson believes that customers benefit from advanced meters. It is specifically denied that Complainant would benefit from a smart meter that will negatively affect her health and well-being.

22. Admitted.

23. Admitted.

24. Admitted.

25. Admitted. By way of further answer, Complainant is not seeking an “opt-out.” In addition, Complainant believes that PECO erred in not making an allowance for accommodations based on her medical disability as part of its smart meter implementation plan.

26. Admitted.

27. Admitted. By way of further answer, Complainant is not seeking an “opt-out.” Any reference to an “opt-out” is irrelevant to this proceeding.

28. Denied. Complainant lacks knowledge or information sufficient to form a belief as to the truth of PECO’s allegations in Paragraph 28. Therefore, the averment is denied.

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. Any reference to an “opt-out” is irrelevant to this proceeding. 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. HB 394 speaks for itself. Any reference to an “opt-out” is irrelevant to this proceeding. 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.

32. Denied. Complainant lacks knowledge or information sufficient to form a belief as to the truth of PECO's allegations in Paragraph 32. Therefore, the averment is denied. 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.

33. Denied. Complainant lacks knowledge or information sufficient to form a belief as to the truth of PECO's allegations in Paragraph 33. Therefore, the averment is denied.

34. Admitted in part, denied in part. Although ALJ Cheskis agreed with PECO in the *Povacz* proceeding, that matter is different and distinguishable from this case. It is specifically 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.

35. Admitted in part, denied in part. The Initial Decision of ALJ Cheskis speaks for itself. By way of further answer, ALJ Cheskis's decision deals with an "opt-out" request, and as such, it is irrelevant to this proceeding. It is specifically 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.

36. Admitted in part, denied in part. The Commission's Final Order in the *Povacz* matter speaks for itself. By way of further answer, the Commission Order deals with the "opt-out" issue, and as such, it is irrelevant to this proceeding. It is specifically 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 PUC has ruled in favor of PECO in the referenced matters. It is specifically denied that the instant case is "similar" to the cited cases in Paragraph 37. The Commission rulings cited deal with the "opt-out" issue, and as such, they are irrelevant to this proceeding. 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.

38. Denied. The averments in Paragraph 38 constitute a legal conclusion to which no response is required. To the extent that Paragraph 38 contains any factual averments, the same are denied. By way of further answer, Commission rulings that deal with the "opt-out" issue are irrelevant to this proceeding.

39. Denied. The averments in Paragraph 39 constitute a legal conclusion to which no response is required. To the extent that Paragraph 39 contains any factual averments, the same are denied. By way of further answer, Commission rulings that deal with the "opt-out" issue are irrelevant to this proceeding.

40. Denied. The averments in Paragraph 40 constitute a legal conclusion to which no response is required. To the extent that Paragraph 40 contains any factual averments, the same are denied. Although the *Paul, 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 *Paul, 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.

41. Admitted in part, denied in part. It is admitted that the Complainant in *Paul* complained of electrohypersensitivity and that the matter dealt with a request for an “opt-out.” It is specifically denied that the *Paul* 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. .

42. Admitted in part, denied in part. The decision of ALJ Cheskis speaks for itself. It is specifically denied that the *Paul* 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.

43. Admitted in part, denied in part. The decision of ALJ Cheskis speaks for itself. It is specifically 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.

44. Admitted. The Amended Complaint speaks for itself. By way of further answer, the Complainant maintains that PECO's compulsory installation of a smart meter that emits excessive levels of electromagnetic field radiation for this disabled customer, is a violation of the Company's obligation to provide safe and reasonable service under Section 1501 of the Public Utility Code.

45. Denied. The averments in Paragraph 45 constitute a legal conclusion to which no response is required. To the extent that Paragraph 45 contains any factual averments, the same are denied. By way of further answer, assuming that the allegation of the Amended Complaint are true, PECO is violating Section 1501 of the Public Utility Code by installing, in compulsory fashion, a device that is harmful to this disabled customer.

46. Denied. It is specifically denied that Complainant has failed to allege violations of law. In fact, Complainant has alleged that PECO's compulsory installation of a smart meter that is harmful to Complainant's health and well-being is a violation of Section 1501 of the Public Utility Code. Violations of Section 1501 can be, and have been, a sufficient basis of a finding against PECO and other utilities.¹

47. Denied. The averments of Paragraph 47 constitute a legal conclusion to which no response is required. To the extent that Paragraph 47 contains any factual averments, the same

¹ In *PUC BIE v. West Penn Power Co.*, Docket No. C-2012-2307244 (Order issued Jan. 9, 2014), the Commission approved a settlement that imposed an \$86,000.00 fine on the utility for failure to provide safe and reasonable service in accordance with Section 1501 of the Public Utility Code. In the *West Penn Power* case, a customer was killed as a result of an unsafe condition that the utility failed to correct (Carrie Goretzka was killed when a high voltage line fell on her yard after the customer had complained repeatedly about unsafe conditions at the premises).

are denied. By way of further answer, the issue of “opt-outs” is not relevant to this proceeding because Complainant is not requesting an “opt-out.”

48. Denied. The averments in Paragraph 48 constitute a legal conclusion to which no response is required. To the extent that Paragraph 48 contains any factual averments, the same are denied. By way of further answer, the issue of “opt-outs” is not relevant to this proceeding because Complainant is not requesting an “opt-out.” The Complainant has requested an accommodation based on her medical disability and for PECO to abstain from providing unsafe and unreasonable service in accordance with Section 1501 of the Public Utility Code. *See*, Amended Complaint at ¶¶ 27-32.

49. Denied. The averments in Paragraph 49 constitute a legal conclusion to which no response is required. To the extent that Paragraph 49 contains any factual averments, the same are denied. By way of further answer, PECO does not have a right to terminate a customer’s service for her reasoned refusal to have an unsafe device installed on her premises. Further, Complainant has provided PECO with a medical certification to stay the threatened termination in accordance with 66 Pa. C.S. § 1406(f), and termination in light of this medical certification and all bills having been paid on time would be a violation of Section 1406(f). Compulsory installation of a smart meter that is harmful to a customer’s health and well-being is a violation of PECO’s obligation to provide safe and reasonable service under Section 1501 of the Public Utility Code.

50. Admitted in part, denied in part. It is admitted that, under its Tariff, PECO has a right to access customers’ premises to change its meter. It is specifically denied that PECO has the right to install a smart meter that is harmful to a customer’s health and well-being in violation

of the Company's obligation to provide safe and reasonable service under Section 1501 of the Public Utility Code.

51. Admitted in part, denied in part. It is admitted that PECO can terminate a customer for denying access to the Company's meter. It is specifically denied that PECO has a right to terminate a customer for her reasoned refusal to have an unsafe device installed on her premises. It is specifically denied that PECO has the requisite "cause" to terminate Complainant's service under the Company's own tariff. Further, Complainant has provided PECO with a medical certification to stay the threatened termination in accordance with 66 Pa. C.S. § 1406(f), and termination in light of this medical certification and all bills having been paid on time would be a violation of Section 1406(f). Compulsory installation of a smart meter that is harmful to a customer's health and well-being is a violation of PECO's obligation to provide safe and reasonable service under Section 1501 of the Public Utility Code. PECO cannot avoid a violation of Section 1406(f) or Section 1501 of the Public Utility Code by hiding behind its asserted right to terminate service pursuant to its tariff.

52. Denied. The averments in Paragraph 52 constitute a legal conclusion to which no response is required. To the extent that Paragraph 52 contains any factual averments, the same are denied.

53. Denied. The averments in Paragraph 53 constitute a legal conclusion to which no response is required. To the extent that Paragraph 53 contains any factual averments, the same are denied.

54. Denied. The averments in Paragraph 54 constitute a legal conclusion to which no response is required. To the extent that Paragraph 54 contains any factual averments, the same are denied.

55. Denied. The averments in Paragraph 55 constitute a legal conclusion to which no response is required. To the extent that Paragraph 55 contains any factual averments, the same are denied.

III. LEGAL ARGUMENT

The Commission's regulations permit the filing of preliminary objections. 52 Pa. Code § 5.101 provides that:

(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.

52 Pa. Code § 5.101.

PECO's preliminary objections are predicated on the alleged legal insufficiency of the Amended Complaint. 52 Pa. Code § 5.101(a)(4). The regulation at 52 Pa. Code § 5.101(a)(4) permits the filing of a preliminary objection to dismiss a pleading for legal insufficiency. The provision at 52 Pa. Code § 5.101(a)(4) is intended to serve judicial economy by avoiding a hearing where no factual dispute exists. If no factual issue pertinent to the resolution of a case exists, a hearing is unnecessary. 66 Pa. C.S. § 703(a); *Lehigh Valley Power Comm. v. Pa. Pub.*

Util. Com, 563 A.2d 557 (Pa. Commw. Ct. 1989); *Lehigh Valley Power Comm. v. Pa. Pub. Util. Com.*, 563 A.2d 548 (Pa. Commw. Ct. 1989); *SME Bessemer Cement, Inc. v. Pa. Pub. Util. Com.*, 540 A.2d 1006 (Pa. Commw. Ct. 1988); *White Oak Borough Auth. v. Pa. Pub. Util. Com.*, 103 A.2d 502 (Pa. Super. Ct. 1954).

Commission preliminary objection practice is analogous to Pennsylvania civil practice regarding preliminary objections. *Eq. Small Transp. Intervenors v. Eq. Gas Co.*, No. Docket No. C-00935435, 1994 Pa. PUC LEXIS 69 (July 18, 1994). 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 Servs., Inc. v. Commonwealth, Dep't of Env'tl. Res.*, 406 A.2d 1020 (Pa. 1979); *Rivera v. Phila. Theol. Seminary of St. Charles Borromeo*, 595 A.2d 172 (Pa. Super. Ct. 1991). The Commission follows this standard. *Dolores Montague v. Phila. Elec. Co.*, No. C-871540, 1988 Pa. PUC LEXIS 299 (Jan. 6, 1988).

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*, 490 A.2d 402 (Pa. 1985); *Commonwealth by Zimmerman v. Bell Tel. Co.*, 551 A.2d 602 (Pa. Commw. Ct. 1988). The Commission must view the complaint in this case 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. *Eq. Small Transp. Intervenors*, 1994 Pa. PUC LEXIS 69, Docket No. C-00935435 (July 18, 1994) (emphasis added).

Viewing the Amended Complaint in the light most favorable to the Complainant, the Complainant is entitled to the relief sought, and an in-person hearing is necessary to resolve

genuine issues of material fact. Complainant has alleged that PECO's compulsory installation of a smart meter on her premises will exacerbate medical conditions that have rendered her disabled. Further Complainant has alleged that it is unsafe for her to have an EMF-emitting smart meter because she suffers from medical conditions that are negatively affected by these types of emissions. If the smart meter is installed, PECO will have created an unsafe condition that violates the utility's obligations to provide safe and reasonable service under Section 1501 of the Public Utility Code. A violation of Section 1501 of the Public Utility Code entitles Complainant to relief, and consequently, PECO's preliminary objections must be rejected.

In this matter, there are genuine issues of material fact that require an in-person hearing. An in-person evidentiary hearing is necessary for Complainant to present evidence regarding her unique health issues, her disability and the effects of Electro Magnetic Field (EMF) radiation 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 in-person evidentiary hearing is essential to determine the validity of the parties' claims in this matter.

IV. CONCLUSION

Based on the foregoing, Complainant respectfully requests that the Commission deny Respondent's Preliminary Objections and issue an Order allowing this matter to proceed to an in-person hearing and granting any other relief the Commission deems just and proper.

Respectfully submitted,



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Date: August 27, 2015

Counsel for Complainant

CERTIFICATE OF SERVICE

I hereby certify that this day I served a copy of the Complainant's Answer to Respondent's Preliminary Objections upon the persons listed below in the manner indicated in accordance with the requirements of 52 Pa. Code Section 1.54.

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Date: August 27, 2015



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