

Legal Department
2301 Market Street / S23-1
P.O. Box 8699
Philadelphia, PA 19101-8699

Direct Dial: 215-841-6863

April 14, 2016

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, Second Floor
Harrisburg, PA 17120

RE: Laura Sunstein Murphy v. PECO Energy Company
Docket No. C-2015-2475726

Dear Ms. Chiavetta:

Enclosed for filing with the Commission is *PECO Energy Company's Motion for Partial Judgment on the Pleadings*.

Very truly yours,



Ward L. Smith
Counsel for PECO Energy Company

WS/ab
Enclosure

cc: Christopher P. Pell, ALJ (via electronic mail)
Darlene D. Heep, ALJ (via electronic mail)
Ed Lanza, Esquire (via electronic mail)
Ward Smith (via electronic mail)
Shawane Lee (via electronic mail)
Tom Watson (via electronic mail)

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Laura Sunstein Murphy

v.

PECO Energy Company

:
:
:
:
:

Docket No. C-2015-2475726

PECO Energy Company's Motion for Partial Judgment on the Pleadings

On April 5, 2016, an *Order Granting in Part and Denying in Part Respondent's Preliminary Objections* was issued in the case of *Charles and Barbara Tucker v. PECO*, C-2015-2515592. The complaint in *Tucker* and the complaint in the instant proceeding are materially the same. The purpose of this Motion is to have the *Tucker* rule applied to the pleadings in this case.

1. On February 24, 2016, PECO Energy Company ("PECO") filed a Preliminary Objection in the case of *Charles and Barbara Tucker v. PECO*, C-2015-2515592. A copy of that Preliminary Objection is attached to this Motion, and incorporated herein as if set forth in full.
2. The gravamen of the Preliminary Objections is that the requested relief includes an "opt out" request, which is not permissible under Pennsylvania law.
3. The Tucker Order (p. 5) granted PECO's request, stating that:

Relief sought by the Tuckers includes an "opt out" of installation of a smart meter. 5 The Commission has stated that 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. *See Maria Povacz v. PECO Energy Company*, Docket No. C-2012-2317176 (Order adopted January 24, 2013). The opt-out remedy sought by the Tuckers is not available as the law stands today. Therefore, the Preliminary Objection is sustained, the relief request seeking an order preventing meter installation is stricken.

4. The request for relief in the Amended Complaint in the instant proceeding is materially the same as the request for relief in Amended Complaint in Tucker.
5. PECO therefore requests that Your Honors issue an Order in the Instant Proceeding stating that any "opt out" relief sought by the Complainant is not available as the law stands today, and that the relief request seeking an order preventing meter installation is stricken.



Ward L. Smith
Counsel for PECO Energy Company
2301 Market Street, S23-1
Philadelphia, PA 19101-8699
(215) 841-6863
Fax: 215.568.3389
Ward.Smith@exeloncorp.com

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

BARBARA AND CHARLES TUCKER	:	
Complainant	:	
v.	:	DOCKET NO. C-2015-2515592
	:	
PECO ENERGY COMPANY	:	
Respondent	:	

**PRELIMINARY OBJECTION OF RESPONDENT,
PECO ENERGY COMPANY**

Respondent, PECO Energy Company (“PECO Energy”), pursuant to 52 Pa. Code § 5.101(a)(4) respectfully petitions this Honorable Commission to dismiss the instant Complaint as legally insufficient. PECO recognizes that, after the Commission’s January 28, 2016 order in *Laura Kreider v. PECO Energy*, P-2015-2495064, the Commission scheduled this matter for an evidentiary hearing. As described in more detail below, however, the *Kreider* Order did not alter the body of existing law holding that universal installation of AMI meters is required by statute and Commission Order. The Amended Formal Complaint in this matter is replete with requests for precisely that relief. For the reasons set forth below, PECO respectfully submits that, whatever the proper scope of the hearing in this matter may ultimately be determined to be, by law it cannot result in an order that an AMI meter will not be installed at the Tucker residence – the Commission simply does not have jurisdiction or authority to grant that relief. The requests for such relief should therefore be stricken on a preliminary basis.

1. On February 4, 2016, PECO Energy was served with an Amended Formal Complaint in this matter.

2. In the Complaint, the Complainants request, in numerous “Relief Sought” paragraphs that they should not be required to have an AMI meter installed at their residence.

Specifically:

- a. Paragraph 30 requests that: “The Commission should compel PECO to cease and desist from any attempts to install a smart meter or other harmful equipment at Complainants’ premises”
- b. Paragraph 31 requests that: “The Commission should compel PECO to cease and desist from any attempts to install any equipment that would exacerbate Mrs. Tucker’s medical conditions.”
- c. Paragraph 32 requests that: “PECO should be compelled by the Commission to install only an analog meter or similar device that does not produce EMF or RF emissions at or near the Complainants’ residence.
- d. Paragraph 33 requests that: “The Commission should order a permanent stay of any termination on the part of PECO against Complainants for any alleged denial of access to the meter at the subject premises.”
- e. Paragraph 34 requests that: “In the alternative, and pursuant to Pa. Code § 1.91, Complainants respectfully request that the Commission order the waiver of any rule, regulation or Commission Order that requires PECO to install smart meters in the Complainants’ premises.

3. Individually or collectively, these requests for relief are requesting that no AMI meter be installed at the Tucker residence.

4. PECO Energy simultaneously filed an Answer and the instant Preliminary Objection.
5. Pursuant to 52 Pa. Code § 5.101, preliminary objections may be filed against a complaint requesting that the complaint be dismissed for legal insufficiency. 52 Pa. Code § 5.101(a)(4).
6. Commission procedure regarding the disposition of preliminary objections is similar to that utilized in Pennsylvania civil procedure. Equitable Small Transportation Intervenor. v. Equitable Gas Co., 1994 Pa.PUC LEXIS 69, Docket No. C-00935435 (July 18, 1994).
7. In deciding preliminary objections, the Public Utility Commission must determine, based on the factual pleadings of the petitioner, if relief or recovery is possible. Roc v. Flaherty, 527 A.2d 211 (Pa. Cmwlth 1985).
8. A complaint must be able to recover under the law to survive a preliminary objection. Milliner v. Enck, 709 A.2d 417, 418 (Pa. Super. Ct. 1998) (“preliminary objection should be sustained only where it appears with certainty that, upon the facts averred, the law will not allow the plaintiff to recover”).
9. All of the non-moving party’s averments must be taken as true for the sake of deciding the preliminary objection. County of Allegheny v. Commw. of Pa., 490 A.2d 402 (Pa. 1985).
10. The court does not, however, need to accept, “unwarranted inferences from facts, argumentative allegations, or expressions of opinions.” Feingold v. McNulty, 2009 Phila. Ct. Com. Pl LEXIS 167, *3.

11. 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 to the public interest.

12. A hearing is required only when there is a disputed question of fact, and is not required to resolve questions of law. Dee-Dee Cab. Inc. v. Pa. Pub. Util. Comm'n, 817 A.2nd 593 (Pa. Commw. Ct. 2003), petition for allowance of appeal denied, 836 A.2d 123 (Pa. 2003).

13. Here, there are no genuine issues of fact and PECO Energy is entitled to judgment as a matter of law with respect to all of the allegations in the Complaint.

I. Legal Insufficiency – Prior Commission Approval of Smart Meter Installation

14. The Complainant has requested that she be permitted to “opt out” of smart meter installation at her residence for safety concerns. PECO Energy’s Smart Meter installation plan was approved by the Pennsylvania Utility Commission on May 6, 2010, as a part of the Smart Meter Technology Procurement and Installation Plan, (“Smart Meter/Smart Grid Plan”) at docket number M-2009-2123944.

15. By way of background, Governor Edward Rendell signed Act 129 of 2008 into law on October 15, 2008. The Act took effect 30 days thereafter on November 14, 2008, and amended Section 2807 of the Public Utility Code. Among other things, the Act specifically directed that electric distribution companies (such as PECO Energy) with more than 100,000 customers file smart meter technology procurement and installation plans with the Commission for approval. See 66 Pa. C.S. § 2807(f). The statute does not provide customers with an option to “opt out” of smart meter installation.

16. On June 18, 2009, the Commission adopted a Smart Meter Procurement and Installation Implementation Order (“Implementation Order”) to establish the standards each plan must meet and to provide guidance on the procedures to be followed for submittal, review and approval of all aspects of each smart meter plan. See Smart Meter Procurement and Installation Implementation Order, entered on June 24, 2009, at Docket No. M-2009-2092655.

17. Specifically, the Commission’s Implementation Order states:

Act 129 requires EDCs to furnish smart meter technology (1) upon request from a customer that agrees to pay the cost of the smart meter at the time of the request, (2) in new building construction, and (3) in accordance with a depreciation schedule not to exceed 15 years. 66 Pa.C.S. § 2807(f)(2).

The Commission believes that it was the intent of the General Assembly to require all covered EDCs 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.”

**THEREFORE,
IT IS ORDERED:**

1. That the Commission establishes specific smart meter technology minimum capabilities and procedures for submittal, review and approval of all aspects of each smart meter plan to include cost recovery.

2. That electric distribution companies with greater than 100,000 customers adhere to the guidelines for smart meter technology procurement and installation identified in this Implementation Order.

3. That the Director of Operations convene a stakeholder meeting no later than July 17, 2009, to discuss issues related to the costs and benefits associated with the Commission imposed smart meter capability requirements.

4. That all electric distribution companies that are required to file a smart meter technology procurement and installation plan file such a plan consistent with the directives contained in this order by August 14, 2009.

See id.

18. The Commission’s Order does not have a provision for customers to “opt out” of the smart meter installation.

19. Through its Implementation Order and policies, the Commission has approved the smart meter implementation process required by Act 129.

20. Indeed, Pennsylvania PUC Chairman, Robert F. Powelson stated:

Act 129 of 2008 has really paved the way for the rollout of smart meters, also referred to as Advanced Metering Infrastructure (AMI), and the implementation of Act 129 continues to benefit Pennsylvania customers. As I see it, smart meter technology is a “win-win” situation for the Commonwealth – both electricity customers and electricity providers alike reap the benefits of advanced meters.

See PaPUC Chairman Powelson on Smart Meters and Pennsylvania’s Energy Future at <http://www.smartgridlegalnews.com/interviews/papuc-chairman-powelson-on-smart-meters-and-pennsylvanias-energy-future/>

21. On August 14, 2009, PECO Energy filed with the Commission its Petition of PECO Energy Company for Approval of its Smart Meter/Smart Grid Plan.

22. Amongst other things, PECO Energy's Petition requested that the Commission approve the deployment of up to 600,000 smart meters. See PECO Energy's Smart Meter/Smart Grid Petition.

23. As a part of PECO Energy's meter deployment plan, the company committed to deploy 600,000 meters by March 2013, upon receiving American Recovery and Reinvestment Act funding from the Department of Energy. See id.

24. PECO Energy's Implementation plan does not give customers the option to "opt out" of smart meter installation.

25. By Order entered May 6, 2010 at Docket No. M-2009-2123944, the Commission approved PECO Energy's Smart Meter/Smart Grid Plan.

26. The Commission's Order approving PECO Energy's plan does not provide an "opt out" provision.

27. In conjunction with the Commission's Implementation Order; the Commission-approved Smart Meter/Smart Grid Plan and continuing compliance with Act 129, PECO Energy has deployed over 194,000 Advanced Metering Infrastructure ("AMI") meters in customer's homes and businesses.

28. Act 129, the Commission's Implementation Order; and PECO Energy's Commission-approved Smart Meter/Smart Grid Plan do not provide customers the ability to "opt out" of having a smart meter installed in their homes or businesses. See 66 Pa. C.S. § 2807(f). See also Smart Meter Procurement and Installation Implementation Order, at Docket No. M-2009-

2092655. See PECO Energy's Smart Meter/Smart Grid Plan at docket number M-2009-2123944.

29. The absence of an "opt out" provision in the existing statute; Implementation Order; and Smart Meter/Smart Grid Plan is underscored by a recent bill introduced at the General Assembly.

30. House Bill 394, which was introduced on February 9, 2015, seeks to change the existing law by adding a "opt out" provision. Specifically, House Bill 394 reads as follows:

Section 1. Section 2807(f)(2)(iii) of Title 66 of the Pennsylvania Consolidated Statutes is amended to read:

§ 2807. Duties of electric distribution companies.

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

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

(iii) In accordance with a depreciation schedule not to exceed 15 years. Customers may opt out of receiving smart meter technology under this subparagraph by notifying, in writing, the electric distribution company. The following shall apply:

A) The electric distribution company shall provide an opt-out form to consumers upon request and may provide a method for consumers to opt out electronically through the electric distribution company's Internet website.

31. House Bill 394 attempts to address individual customer concerns about the smart meter (such as the Complainant's concerns) by allowing individual customers to "opt out" of receiving smart meter technology on the mandatory schedule established by Act 129.

32. The "opt out" provision; however, has not been scheduled for a vote by the General Assembly, and the ability to opt out of smart meter installation is not currently permissible under the law.

33. Accordingly, the Complainant's formal complaint, requesting the ability to "opt out" of smart meter installation should be dismissed as a matter of law.

34. Administrative Law Judge Joel H. Cheskis reached a similar conclusion in the matter Maria Povacz v. PECO Energy, Docket No. C-2012-2317176 (Order entered September 28, 2012). In that case, the Complainant, Maria Povacz requested to "opt out" of installation of the smart meter at her residence. Id.

35. ALJ Cheskis issued an Initial Decision wherein he determined:

To the extent that Ms. Povacz desires the ability to opt out of the smart meter installation, she should advocate for such ability before the General Assembly.....The formal Complaint process against one Electric Distribution Company, PECO, is not the appropriate avenue for this issue to be addressed.

Id.

On January 24, 2013, the Commission issued a Final Order, adopting ALJ Cheskis' Initial Decision. In the Order, the Commission specifically addressed whether a PECO customer could "opt out" of meter installation at their property as follows: 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.

See Maria Povacz v. PECO Energy, Docket No. C-2012-2317176 (Order adopted January 24, 2013).¹

36. The PUC precedent for formal complaints filed against PECO Energy in similar cases, requesting smart meter "opt out" have been dismissed on Preliminary Objection as a matter of law. See e.g. Theresa Gavin v. PECO Energy, Docket No. C-2012-2325258 (Order

¹ The Povacz case has been set for prehearing, in front of Your Honors, on the same schedule as the instant proceeding. To the extent that Ms. Povacz requests an "opt out" form of relief, PECO will also make the arguments in text in that docket.

entered January 24, 2013); Jeff Morgan v. PECO Energy, Docket No. C-2013-2356606 (Final Order entered July 23, 2013); Thomas McCarey v. PECO Energy, Docket No. C-2013-2354862 (Final Order entered September 26, 2013); Renney Thomas v. PECO Energy, Docket No. C-2012-2336225 (Final Order entered December 31, 2013); Ellen Donnelly v. PECO Energy, Docket No. F-2013-2330663 (Final Order Entered March 18, 2014); Gerald H. Smith v. PECO, Docket No. C-2014-2443198 (Opinion and Order entered April 23, 2015); Charles Schoefer, Docket No. C-2015-2497438 (Final Order entered November 6, 2015); Vincent Feldman v. PECO, Docket No. C-2015-2442308 (Initial Decision entered, April 1, 2015); Margaret Hager, M.D. v. PECO Energy, C-2014-2444961 (Final Order entered, March 12, 2015) Ellen Donnelly v. PECO Energy, Docket No. F-2013-2330663 (Final Order Entered March 18, 2014); Douglas Evans v. PECO Energy, Docket No. C-2013-2368477 (Final Order entered, February 6, 2014); Theresa Gavin v. PECO Energy, Docket No. C-2012-2325258 (Final Order entered January 24, 2013); Jeff Morgan v. PECO Energy, Docket No. C-2013-2356606 (Final Order entered July 23, 2013); Thomas McCarey v. PECO Energy, Docket No. C-2013-2354862 (Final Order entered September 26, 2013); Renney Thomas v. PECO Energy, Docket No. C-2012-2336225 (Final Order entered December 31, 2013); Maria Povacz v. PECO Energy, Docket No. C-2012-2317176 (Order entered September 28, 2012); Donna Campisi v. PECO Energy, Docket No. C-2014-2434501 (Final Order entered November 5, 2014); Robert and Patricia Bubb v. PECO Energy, Docket No. C-2015-2481756 (Final order entered August 28, 2015) and Joe and Danielle Steffe v. PECO Energy, Docket No. C-2015-2472173 (Final Order entered June 5, 2015).

37. The Complainants' Amended Formal Complaint alleges that they do not want the meter installed due to health concerns.

38. Assuming that everything the Complainants allege in their Amended Formal Complaint is true, PECO Energy is operating under the basis of Act 129 and the specific direction given to the company by the legislature and the Commission through the Commission's Implementation Order.

39. Further, 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.

40. Because PECO Energy's smart meters are being deployed in compliance with the Commission-approved Smart Meter/Smart Grid Plan, and the law does not provide for the Complainant to "opt out" of smart meter installation, there is no legal basis to grant the relief sought of not being required to have a meter installed at their residence.

41. The *Kreider* Order does not disturb that existing body of law. While the *Kreider* Order did allow that docket to proceed to hearing, the Commission clearly stated that remedies relating to "opt out" would not be within the scope of the hearing in that case. The Commission stated (pp. 22-23):

Furthermore, for purposes of the hearing in this matter, we would like to make some clarifications to address PECO's argument that Act 129 does not provide a remedy or relief for the Complainant in this case. First, as we expressed in the *September 2015 Order*, while we find that the Complainant should have the opportunity to be heard on her averments regarding the "deleterious health symptoms" related to the smart meter, the Complainant will have the burden of proof during the proceeding to demonstrate, by a preponderance of the evidence, that PECO is responsible or accountable for the problem described in the Complaint. 66 Pa. C.S. § 332(a); *Samuel J. Lansberry, Inc. v. Pa. PUC*, 578 A.2d 600 (Pa. Cmwlth. 1990), *alloc. denied*, 529 Pa. 654, 602 A.2d 863 (1992). In order to carry this burden of proof, the Complainant may be required to present evidence in the form of medical documentation and/or expert testimony. The ALJ's role in the proceeding will be to determine, based on the record in this particular case, whether there is sufficient evidence to support a finding that the Complainant was adversely affected by the smart meter or whether PECO's use of a smart meter to measure this Complainant's usage will constitute unsafe or unreasonable service in

violation of Section 1501 under the circumstances in this case. *See, Letter of Notification of Philadelphia Electric Company, supra*, at * 12-13 (stating that the ALJ's role was to determine whether there was sufficient record evidence to support a finding that the petitioners would be adversely affected by the reconductoring of the transmission line at issue).

PECO essentially argues that the Commission cannot grant the Complainant any conceivable remedy, and therefore, the Complainant should not receive a hearing. In our view, this analysis puts the cart before the horse. It only becomes necessary to reach a determination regarding the remedies available to the Complainant in this case if the ALJ finds, after a full evidentiary hearing, that the facts establish a violation of the Code, a Commission Order, or Regulation. Given the state of the record at this point in the proceeding, we believe it is premature to conclude that the facts and the law absolutely preclude any possible remedy.[FN] It may be possible, for example, for the Respondent to install the smart meter in a different location other than outside of the Complainant's bedroom or to use a different type of smart meter at this Complainant's home. In any event, it is for the ALJ to determine what remedy to recommend, in the event that she finds a violation after a full evidentiary hearing.

FN: We note that ALJ Heep ruled that the Complainant was precluded from introducing evidence concerning whether a statutory provision, Regulation, or Order allows a customer to opt out of smart meter installation. Therefore, remedies relating to this issue do not appear to be within the scope of the hearing in this case.

42. In other words, in *Kreider*, ALJ Heep had already ordered that "opt out" is not an available remedy; the Commission's *Kreider* Order left that ruling intact and concluded that opt-out remedies are not within the scope of the hearing in the *Kreider* case. Similarly, in the instant proceeding, Your Honors should conclude that the requested "opt out" relief is not available to the Tuckers, and dismiss those requests for relief on preliminary objection.

REQUEST FOR RELIEF

WHEREFORE, for the reasons set forth above, PECO Energy Company respectfully requests that your Honorable Commission summarily dismiss the Complainant's formal complaint insofar as it requests that the Complainants will not be required to have a meter

installed at their residence. Regardless of the ultimate scope of the hearing in this case, the Commission does not have jurisdiction or authority to issue such "opt out" relief.

Respectfully submitted,



Ward Smith
Counsel for PECO Energy Company
2301 Market Street, S23-1
P.O. Box 8699
Philadelphia, PA 19101-8699
(215) 841-6863
Fax: 215.568.3389
ward.smith@exeloncorp.com

Shawane L. Lee
Counsel for PECO Energy Company
2301 Market Street, S23-1
P.O. Box 8699
Philadelphia, PA 19101-8699
(215) 841-6841
Fax: 215.568.3389
Shawane.Lee@exeloncorp.com

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Laura Sunstein Murphy

v.

PECO Energy Company

:
:
:
:
:

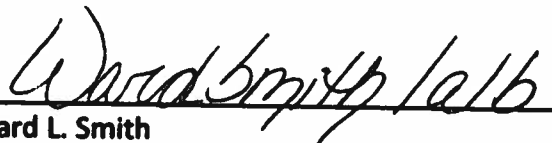
Docket No. C-2015-2475726

CERTIFICATE OF SERVICE

I, Ward L. Smith, hereby certify that I have this day served a copy of PECO Energy Company's Motion for Partial Judgment on the Pleadings e-mail to:

Ed Lanza, Esquire
The Lanza Firm, LLC
P.O. Box 61336
Harrisburg, PA 17106

Dated at Philadelphia, Pennsylvania, April 14, 2016



Ward L. Smith
Counsel for PECO Energy Company
2301 Market Street, S23-1
Philadelphia, PA 19101-8699
(215) 841-6863
Fax: 215.568.3389
Ward. Smith@exeloncorp.com