

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Janice Denito Branagh	:	
	:	
v.	:	C-2016-2576738
	:	
PECO Energy Company	:	

**NON-PROPRIETARY**

**INITIAL DECISION**

Before  
Darlene D. Heep  
Administrative Law Judge

**INTRODUCTION**

The Complainant, Janice Denito Branagh, does not want an AMI or "smart meter" installed at her home and would like the AMI gas meter module currently installed on her gas meter removed due to health concerns. This decision finds that the Complainant did not meet her burden of showing by a preponderance of the evidence that PECO smart meters have adversely affected or will adversely affect her health. However, this decision finds that PECO did not provide reasonable service with respect to the procedures involved in installing the gas meter module at the residence of the Ms. Branagh. A \$500 penalty is imposed.

**HISTORY OF THE PROCEEDINGS**

On November 16, 2016, Janice Denito Branagh ("the Complainant" or "Ms. Branagh") filed a Formal Complaint (Complaint) with the Commission against PECO Energy Company ("PECO") and checked on the Complaint Form that PECO was threatening to shut off

her service or had already shut it off. She further explained in a handwritten statement that she does not want an electric AMI or "smart meter" installed in her home due to health reasons. She also averred that PECO installed a gas smart meter against her wishes when she was at work. Ms. Branagh further stated that she would like to keep her current electric meter until 2023-2024, contending that is the end of a 15-year period that was mandated for completion of installment of smart meters. She anticipates that the legislature will provide an opt out of smart meters in the future. She also would like the AMI gas meter module removed. Attached to her Complaint was a letter from a physician stating that **START PROPRIETARY** [REDACTED] [REDACTED] **END PROPRIETARY** (Complaint).

PECO filed Preliminary Objections on December 7, 2016, in which PECO averred that the Complaint should be dismissed pursuant to 52 Pa.Code § 5.101(a)(4) as legally insufficient. PECO contended that legislative and regulatory legal authority requires PECO to install smart meters throughout its service territory. PECO concluded that there are no genuine issues of material fact and that PECO is entitled to judgment as a matter of law. The Complainant did not file a response to the Preliminary Objections.

The matter was assigned to Administrative Law Judges Christopher Pell and Darlene Heep on February 2, 2017.

On March 1, 2017, Administrative Law Judges Pell and Heep issued a ruling on the Preliminary Objection in which the Preliminary Objection was sustained in so far as the request for relief constitutes a request to "opt-out" of a smart meter for PECO service. The Order noted 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). It was further ordered that a hearing would be held to address whether installation of a smart meter at the Complainant's residence, in light of her health concerns, constitutes unsafe and unreasonable service in violation of 66 Pa.C.S. § 1501.

Also on March 1, 2017, the hearing was rescheduled for June 6-7, 2017. On March 24, 2017, a Judge Change Notice assigned the matter to Administrative Law Judge Darlene Heep.

The hearing was held on June 6, 2017 as scheduled. Ms. Branagh appeared *pro se*. She presented no witnesses.

PECO was represented by Ward Smith, Esq., Shawane Lee, Esq. and Thomas Watson, Esq., and four witnesses were presented.

Three Complainant Exhibits and 23 PECO Exhibits were admitted into the record. The record closed on October 5, 2017, upon the Reply Brief filing deadline.

#### FINDINGS OF FACT

1. Complainant is Janice Denito Branagh, a PECO customer in Norristown, Pennsylvania (service address). (Tr. 11).
2. Respondent is PECO Energy Company (PECO), a utility under the jurisdiction of the Pennsylvania Public Utility Commission.
3. The Complainant is an Environmental Health Specialist. (Tr. 47).
4. The Complainant has resided at the service address for about 12 years. (Tr. 11).
5. The term “AMR” stands for Automatic Meter Reading. (Tr. 98).
6. Advanced Metering meters are known as AMI or smart meters (AMI or smart meter). (Tr.117).

7. PECO is replacing its AMR meters with AMI meters. (Tr. 128 - 133).
8. Complainant has an AMR electric meter at the service address. (Tr. 63).
9. The Complainant has an AMI gas meter module at the service address (Tr. 63).
10. The gas meter module was added to the gas meter to allow remote communication of usage. (Tr. 120).
11. In June of 2012, PECO sent letters to customers in the geographic area of the service address informing them that PECO would be in the area to install AMI electric meters in approximately 45-days. (45-day letter). (Tr. 64).
12. PECO then later sent out a letter stating that PECO would be in the area installing AMI meters within 21-days. (21-day letter) (Tr. 64).
13. On July 23, 2012, Ms. Branagh contacted PECO and stated that she did not want an AMI electric meter due to health reasons. (Tr. 65; PECO Exhibit BU-1).
14. PECO internally identified the account of Ms. Branagh as AMI health refusal. (Tr. 65).
15. On August 11, 2015, PECO sent out a letter to Ms. Branagh stating the company was installing the gas meter modules. (Tr. 65; PECO Exhibit BU-4).
16. Ms. Branagh called PECO on August 26, 2015 to refuse the AMI gas meter module due to health concerns. (Tr. 67).

17. PECO Customer contact records for the Complainant contain the notation: "AMI gas refusal. Do Not field until cleared." Dated 8/26/15. (PECO Exhibit BU-1).

18. On January 22, 2016, PECO sent the Complainant a letter again discussing installment of the AMI electric meter and AMI gas meter module. (Tr. 67; PECO Exhibit BU-9).

19. On February 1, 2016, Ms. Branagh contacted PECO and again reiterated that she did not want an AMI meter(s). (Tr. 68; PECO Exhibit BU-1).

20. On February 5, 2016, Brenda Elison, then a Senior Manager at PECO, called Ms. Branagh to discuss installment of the AMI electric meter and gas meter module. (Tr. 68; PECO Exhibit BU-1).

**BEGIN PROPRIETARY**

21. [REDACTED]

**END PROPRIETARY**

22. PECO again sent the Complainant a letter on September 20, 2016 seeking to reengage Ms. Branagh in discussions concerning AMI meter installment. (Tr. 74).

23. PECO customer contact records dated September 20, 2016 pertaining to the Complainant states: REFUSAL- DO NOT FIELD UNTIL CLEAR. (PECO Exhibit BU-1).

24. The Complainant sent PECO an email again stating her concerns about AMI meters on September 27, 2016. (Tr. 73).

25. The AMI gas meter module was installed on September 28, 2016. (Tr. 63; PECO Exhibit BU-1, p. 4).

26. On September 28, 2016, the Complainant again contacted Ms. Elison by leaving a telephone message and by email to discuss her concerns about the AMI meters. (Tr. 72; PECO Exhibit BU-10).

27. PECO sent the Complainant a ten-day termination notice on October 4, 2016. (Tr. 74).

28. On October 5, 2016, the Complainant again left a telephone message for PECO stating that she does not want a smart meter installed. (Tr. 73).

29. The neighbor next door to the Complainant has an AMI meter installed across the driveway from the home of the Complainant. (Tr. 51).

30. On October 14, 2016, the Complainant called PECO and again stated that she did not want the new devices and to discuss a shut off notice that she received. (Tr. 75).

31. On October 17, 2016, the Complainant filed an Informal Complaint stating that she did not want a smart meter due to health concerns. (Tr. 75; PECO Exhibit BU-13).

32. The instant Formal Complaint was filed on November 16, 2016.

33. On December 20, 2016, PECO contacted the Complainant to discuss relocation of the meter. (Tr. 77).

34. PECO contacted Ms. Branagh again to discuss relocating the meter on February 21, 2016.

**BEGIN PROPRIETARY**

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

**END PROPRIETARY**

44. Complainant does not use her cellular phone often and has wired internet and a land line at home. (Tr. 19, 41).

45. Complainant's cell phone is not a smart phone and she uses it for texts or with a speaker phone. (Tr. 43).

46. Complainant's husband uses a cell phone. (Tr. 47).

47. Complainant has a microwave in her home that is used by her husband. (Tr. 42).

48. The Complainant works on a computer at work. (Tr. 48).

49. The AMR or Landis and Gyr Automatic reading system, or AMI meter, was utilized by PECO beginning in 2000. (Tr.98).

50. The AMR system was one-way communication to the PECO Network. (Tr. 99).

51. The AMR system was terminated in 2017. (Tr. 60).

52. Although the AMR system is no longer employed by PECO, the AMR meter at the service address transmits every five minutes and will continue to do so until removed because it is connected to the electric system. (Tr. 101-102).

53. The gas meter module is battery operated and transmits through the module every 15 minutes. (Tr. 105).

54. PECO installed the gas meter modules for cost efficiency so that both sets of meters could operate on the same communications system. (Tr. 108).

55. The AMI electric meter is configured to transmit every 240 minutes. (Tr. 106).

56. The AMI meter contains two radios- the Flexnet, which transmits to PECO, and the Zigby, which is designed to provide price and consumption data to the customer. (105-106).

57. The gas meter module does not have a Zigby radio. (Tr. 107).

58. The Zigby radio transmits every 30 seconds seeking a device with which to connect. (Tr. 122).

59. Both the gas and electric meters utilized by PECO are compliant with the standards set by ANSI, Underwriters Laboratories and the Federal Communications Commission ("FCC"). (Tr. 123).

60. The radio frequency field (RF or electromagnetic fields) exposure from the PECO electric AMI meter Flexnet radio is 7.8 million times smaller than the maximum permissible exposure level of the FCC. (Tr. 149).

61. The radio frequency exposure of the PECO electric AMI meter Zigby radio is 165 million times smaller than the FCC's maximum permissible exposure level. (Tr. 149).

62. The PECO gas meter module radio frequency level is 11.6 million times smaller than the FCC. (Tr. 150).

63. Combined, the PECO electric AMI meter and gas meter module radio frequency level is 4.4 million times smaller than the FCC's maximum permissible exposure level. (Tr. 150).

64. If an AMI meter is installed at the home of the Complainant, her radio frequency exposure would be 83% less than that to which she is exposed by the AMR meter currently installed. (Tr. 157).

## DISCUSSION

The Pennsylvania Public Utility Code requires each public utility to provide the following:

Every public utility shall furnish and maintain adequate, efficient, safe, and reasonable service and facilities, . . . Such service and facilities shall be in conformity with the regulations and orders of the commission.

66 Pa.C.S. § 1501.

The statutory definition of “service” is to be broadly construed. *Country Place Waste Treatment Co., Inc. v. Pa. Publ. Util. Comm'n*, 654 A.2d 72 (Pa.Cmwlth. 1995).

“Service, used in its broadest and most inclusive sense, includes any and all acts done, rendered, or performed, and any and all things furnished or supplied, and any and all facilities used, furnished, or supplied by public utilities, or contract carriers by motor vehicle, in the performance of their duties under this part to their patrons, employees, other public utilities, and the public, as well as the interchange of facilities between two or more of them.”

66 Pa.C.S.A. § 102.

Section 332(a) of the Public Utility Code, 66 Pa.C.S. § 332(a), provides that the party seeking relief from the Commission has the burden of proof. Complainants seek relief from the Commission, and, therefore, has the burden of proof in this proceeding.

“Burden of proof” means a duty to establish a fact by a preponderance of the evidence, or evidence more convincing, by even the smallest degree, than the evidence presented by the other party. *Se-Ling Hosiery v. Margulies*, 364 Pa. 54, 70 A.2d 854 (1950).

If a complainant establishes a *prima facie* case, the burden of going forward with the evidence shifts to the utility. If a utility does not rebut that evidence, a complainant will prevail. If the utility rebuts complainant’s evidence, the burden of going forward with the

evidence shifts back to a complainant, who must rebut the utility's evidence by a preponderance of the evidence. The burden of going forward with the evidence may shift from one party to another, but the burden of proof never shifts; it always remains on a complainant. *Replegle v. Pennsylvania Electric Company*, 54 Pa. PUC 528 (1980), and *Waldron v. Philadelphia Electric Company*, 54 Pa. PUC 98 (1980).

If Respondent submits evidence of “co-equal” weight to counter Complainant’s evidence, Complainant has not satisfied the burden of proof unless additional evidence opposing Respondent’s evidence is presented. *Morrissey v. PA Dept. of Highways*, 424 Pa. 87, 225 A.2d 895 (1967), and *Burleson v. Pa. Pub. Util. Comm’n*, 66 Pa.Cmwlth. Ct. 282, 443 A.2d 1373 (1982), *aff’d*, 501 Pa. 443, 461 A.2d 1234.

Any decision of the Commission must be supported by substantial evidence. See, e.g., Section 704 of the Administrative Agency Law, 2 Pa.C.S. § 704. “Substantial evidence” is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk & Western Ry. Co. v. Pa. Pub. Util. Comm’n*, 489 Pa. 109, 413 A.2d 1037 (1980); *Erie Resistor Corp. v. Unemployment Comp. Bd. of Review*, 194 Pa. Superior Ct. 278, 166 A.2d 96 (1961); and *Murphy v. Comm., Dept. of Public Welfare, White Haven Center*, 85 Pa. Commonwealth Ct. 23, 480 A.2d 382 (1984).

Act 129 of 2008 (“the Act” or “Act 129”) required electric distribution companies (“EDCs”) to file smart meter technology procurement and installation plans with the Commission for approval. The Act provided:

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

(1) Within nine months after the effective date of this paragraph, electric distribution companies shall file a smart meter technology procurement and installation plan with the commission for approval. The plan shall describe the smart meter technologies the electric distribution company proposes to install in accordance with paragraph (2).

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

- (i) Upon request from a customer that agrees to pay the cost of the smart meter at the time of the request.
- (ii) In new building construction.
- (iii) In accordance with a depreciation schedule not to exceed 15 years.

66 Pa.C.S. § 2807(f). The Act requires that any smart meter technology utilized have bidirectional or two-way communication technology. § 2807(g).

On June 18, 2009, the Commission ordered EDCs with greater than 100,000 customers to adhere to the guidelines established for smart meter technology procurement and installation. The Commission also ordered EDCs to file a smart meter technology procurement and installation plan.<sup>1</sup>

Under the PECO Tariff Electric, Section 6.4 provides that the company owns and maintains the meters. Section 14.5 provides that the company will select the type and make of the metering equipment to be used for meters supplied by the company and may from time to time change or alter the equipment. The Tariff provides for the same ownership and control of gas meters. See Gas Sections 6.4 and 14.1.

PECO developed a smart meter installation plan<sup>2</sup> that was approved by the Commission.<sup>3</sup> Under that plan, PECO is replacing AMR<sup>4</sup> meters with AMI<sup>5</sup> or “smart meters.”

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<sup>1</sup> See *Smart Meter Procurement and Installation*, Docket No. M-2009-2092655 (Implementation Order entered June 24, 2009) (*Smart Meter Procurement and Installation Order*).

<sup>2</sup> See *Petition of PECO Energy Company for Approval of its Smart Meter Technology Procurement and Installation Plan*, Docket No. M-2009-2123944 (*Smart Meter Plan*).

<sup>3</sup> See *Petition of PECO Energy Company for Approval of its Smart Meter Technology Procurement and Installation Plan*, Docket No. M-2009-2123944 (Order entered May 6, 2010) (*PECO Smart Meter Plan Order*).

<sup>4</sup> AMR is an acronym for “automatic meter reading.”

<sup>5</sup> AMI is an acronym for “advanced metering infrastructure.”

Complainant asserts that a plain reading of § 2807(f)(2) suggests an “opt in” or “opt out.” In 2013, however, the Commission concluded that there is no provision in the Code, the Commission’s Regulations or Orders that allows a PECO customer to “opt out” of smart installation (*See Maria Povacz v. PECO Energy Company*, Docket No. C-2012-2317176 (Order and Opinion entered January 24, 2013)).

Uncontested is that Ms. Branagh is a PECO gas and electric customer at the service address, the Complainant's home. Also, not in dispute is that PECO is seeking to install an AMI electric meter at Complainant's home and that PECO added an AMI module to its gas meter on September 28, 2016.

Established through the testimony of Mr. Pritchard, who was qualified as an expert in design, operations and technology of advanced meter installations, is that the electric AMI meter will transmit usage information to PECO through its Flexnet radio and communicate with the consumer through its Zigby radio transmissions. Mr. Pritchard further testified that the gas meter module added to the Complainant's gas meter transmits usage information to PECO. (Tr. 105-107). It is not in dispute that radio frequencies (RFs) emanate from these devices. (Tr. 103-105).

While not explicitly stated in her Complaint, it became clear during the hearing that Ms. Branagh is concerned about any RFs emanating from the AMI electric meter and gas meter module. She essentially contends that installation of smart meters at her home constitutes unsafe and unreasonable service in violation of 66 Pa.C.S. § 1501 because RFs that emanate from smart meter and the gas meter module may cause or aggravate her health problems which include chemical sensitivity, heart issues and Grave's disease. (Tr. 21-22). In accordance with 66 Pa.C.S. § 332(a), Ms. Branagh, as the Complainant, has the burden of proving her claim.

**BEGIN PROPRIETARY** [REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED]

**END PROPRIETARY**

Ms. Branagh testified that she tries to mitigate damage to her health by eliminating or reducing contact with items that emanate RFs. She considers her home a refuge and a place to recover from exposures given her chemical sensitivity. (Tr. 20). Complainant based her concern about the smart meter on what she has read and on her knowledge as an Environmental Health Specialist. She testified that although members of her household use cell phones and she works on a computer at her job, she has taken steps to reduce RFs in her home by having wired internet service and a land line telephone (Tr. 19, 41-48).

**BEGIN PROPRIETARY**

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] **END PROPRIETARY.** She further

contends that studies used to "justify" the installation of smart meters are obsolete and do not address nonthermal aspects of RF exposure. (Tr. 20-21).

Ms. Branagh is seeking removal of the gas meter module and a postponement of installation of the AMI electric meter until 2023 or 2024, which she believes is the final date by which PECO must install smart meters and which she derived from the 15-year depreciation

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<sup>6</sup> Title 7 Pa. Code § 128.111(a) provides that The Department of Agriculture of the Commonwealth "will maintain a list of individuals who have been verified as being hypersensitive to pesticides. The list will be referred to as the Pesticide Hypersensitivity Registry."

schedule found at 66 Pa.C.S. § 2807(f)(2)(iii). She also stated that she would like the postponement to allow time for her to work through the legislative process toward passage of a bill that allows a customer to opt out of having smart meters. (Tr. 54).

In response, PECO presented four witnesses. - Bryan Uber, Supervisor for Customer Field Operations; Glenn Pritchard, then Manager of Advanced Grid Operations and Technology; Dr. Christopher Davis, Ph.D., Professor of Electrical and Computer Engineering at the University of Maryland and; Dr. Mark Israel, M.D.

According to Dr. Davis, who was qualified as an expert,<sup>7</sup> one must distinguish the RFs of AMI meters from other kinds of RFs. Ionizing radiation and electromagnetic waves are at higher frequencies and are visible through x-rays, ultraviolet light and gamma rays and exposure can lead to chemical change and health consequences. (Tr. 139). However, Dr. Davis testified, electromagnetic fields that emanate from the PECO smart meters is non-ionizing radiation, which cannot directly lead to chemical change. (Tr. 139). He further stated that there is no ionizing radiation from smart meters. (Tr. 143).

Dr. Davis also specified that there is a distinction between exposure to chemicals that can enter the body and radiofrequency radiation which "cannot create any chemistry in the body and produce any change that's going to cause a health effect unless the levels are so high as to heat you up." (Tr. 160-161). According to Dr. Davis, the exposures from the smart meters at issue are "incredibly tiny" (Tr. 161) and the generally accepted scientific view is that there is no evidence of health effect from exposure to the electromagnetic fields emanating at the frequency found in smart meters (Tr. 167-168). Relative to other exposure, Dr. Davis testified that if a neighbor is talking on a cell phone, one has more exposure to electromagnetic fields than all of the smart meters in a given home. (Tr. 169). Dr. Davis also noted that any warmth that the Complainant may feel when using a cell phone is likely emanating from the battery, not RFs. (Tr. 169-170).

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<sup>7</sup> Dr. Davis was qualified as an expert in physics, biophysics, chemistry, electrical engineering, electromagnetics, bioelectromagnetic, radio frequency, dosimetry and Smart Meter electromagnetics.

Dr. Israel also testified on behalf of PECO and was qualified as an expert in medicine, biology and medical research related to radio frequency fields. In the course of his work, he has developed an expertise in electromagnetic fields and whether they cause or contribute to adverse health effects or illness. (Tr. 181).

**BEGIN PROPRIETARY**

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] **END**

**PROPRIETARY** This gives one pause with respect to finding no effect from AMI meters.

However, looking at the evidence overall and given the testimony of the PECO experts regarding the low-level radio frequency of the gas meter module installed at the home of the Complainant and the low level of the electric meter proposed to be installed at the time of the hearing, it is unlikely that the meters have had or will have an adverse effect upon the **BEGIN PROPRIETARY** [REDACTED] **END PROPRIETARY** Also, according to Mr. Pritchard, the gas meter module transmits less often and therefore creates RFs at an even lower level than the electric AMI because it relies on a battery for power. Further, Mr. Pritchard testified, the gas meter module does not have a Zigby radio, which further reduces any RF exposure. (Tr. 107).

Mr. Pritchard also noted that all components that PECO seeks to install are compliant with nationally accepted standards including standards by ANSI, by Underwriters Laboratories and the FCC. (Tr. 123). As Dr. Davis testified, a customer’s RF exposure from the meters that PECO seeks to install is millions of times less than the maximum permissible exposure level of the FCC. (Tr. 149-150).

**BEGIN PROPRIETARY**

[REDACTED]

[REDACTED] **END PROPRIETARY**

PECO talked with the Complainant about moving her electric meter away from the house structure. (Tr. 52,78,103). Ms. Branagh declined, stating that she would be not be comfortable with relocation. (Tr. 52). She expressed a concern about "harmonics," distortions and deviations of electrical waveforms, that may emanate from the AMI meters as long as it is attached to her home from any distance.

Dr. Davis explained that harmonics exist in the electrical grid and can be found from lighting, appliances and the like and are not extraordinary. He further noted that any energy from the AMI meters is "intensively small" and may equate to that of a night light. (Tr. 109-110).

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<sup>8</sup> It is also noteworthy that since the hearing, PECO has changed the type of meter that it is installing at residences and that meter, the Aclara, does not have a Zigby radio, which, based on the testimony of Dr. Davis, would substantially reduce the already extremely small RF exposure. See *Ottaviano v PECO*, Docket Number F-2016-2542081 hearing transcript at 120-124.

He also stated that while harmonics dissipate with distance, the amount of harmonics that an electric meter can generate are so small that there would not be an appreciable difference in the household if the meter is moved, given the harmonics from appliances and the like. (Tr. 110). He also stated that no harmonics arise from the gas meter and module because they are not connected to the electrical grid. No record evidence showed that the harmonics of concern to the Complainant, in general, or any that arise from the PECO meters, in particular, would cause or worsen a medical condition.

Given the evidence of record, no violation can be found here with respect to installation of the gas meter module and the proposed installation of an AMI electric meter.

The Complainant is seeking a postponement of installation, anticipating future legislation that would allow an opt-out or, in the alternative, allowing her an opportunity to work towards enactment of such a law. The law can only be applied as it exists. As the Commission has noted, action should not be taken based on speculation. See *Pennsylvania Public Utility Commission; United States Steel Division of USX Corporation; David M. Barasch, Consumer Advocate; City of Pittsburgh; Duquesne Industrial Intervenors; J&L Specialty Products Corp.; Pennsylvania Alliance for Jobs and Energy v. Duquesne Light Company*, 1987 Pa. PUC LEXIS 342 (Pa. PUC 1987). As held in *Commonwealth v. Thomas*, 2012 PA Super 169 (Pa. Super. Ct. 2012), current statutory law applies until the Legislature repeals or amends it. The remedy sought by the Complainant is not available.

However, PECO apparently did not communicate to its AMI installers that Ms. Branagh had refused AMI meters and specifically the AMI gas meter module on several occasions. As Mr. Uber testified, this included refusals on August 26, 2016 and between September 25 and September 27, 2016, by email.<sup>9</sup> And yet, the AMI gas meter module was installed on September 28, 2016. (Tr. 63; PECO Exhibit BU-1, p. 4).

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<sup>9</sup> Check formatting Mr. Uber was not in his current position at the time that this occurred but testified based on PECO records kept in the regular course of PECO's business and his knowledge of the program. See Pa.R.E. 901; Pa.R.E. 902(11).

PECO offers that it installed the meter in spite of the Complainant's refusal because the letter from her physician did not indicate a medical condition with respect to radio frequency. (Tr. 78). This does not excuse the installation of the meter and is not a valid reason to not forestall installation of the gas meter module as it had with the electric AMI meter. (Tr. 78). As the Complainant noted, PECO did not contact the Complainant and inform her that the letter from her physician was not sufficient to prevent installation - it simply installed the gas meter module without any notice (Tr. 79). Further, PECO's records contain the statement "AMI gas refusal. Do Not field until cleared." Dated 8/26/15, as well the same notation entered and dated September 20, 2016. PECO Exhibit BU-1. PECO installed the gas meter module despite these notations in its own records and in spite of the contemporaneous communications with the Complainant that prevented installation of the electric AMI meter. Therefore, with respect to this issue, the company did not provide reasonable service, in violation of 66 Pa.C.S. § 1501.

### **PENALTY**

The Public Utility Code provides for penalties where there is a Code violation. It states in relevant part:

If any public utility ... shall violate any of the provisions of this part, or shall do any matter or thing herein prohibited; or shall fail, omit, neglect or refuse to obey, observe, and comply with any regulation or final direction, requirement, determination or order made by the Commission, ... such public utility, person or corporation for such violation, omission, failure, neglect, or refusal, shall forfeit and pay to the Commonwealth a sum not exceeding \$1,000, to be recovered by an action of assumpsit instituted in the name of the Commonwealth. In construing and enforcing the provisions of this section, the violation, omission, failure, neglect, or refusal of any officer, agent, or employee acting for, or employed by, any such public utility, person, or corporation shall, in every case be deemed to be the violation, omission, failure, neglect, or refusal of such public utility, person or corporation.

66 Pa.C.S. § 3301(a). Here, PECO installed the gas meter module in violation of 66 Pa.C.S. § 1501.

The factors to be considered in determining a penalty are set out in 52 Pa.Code § 69. 1201(c). See also *Joseph A. Rosi v. Bell Atlantic-Pennsylvania, Inc.*, Docket No. C-00992409 (Order entered March 16, 2000), 2000 WL 1407936 (Pa. P.U.C.). On November 29, 2007, the Commission adopted, *Final Policy Statement for Litigated and Settled Proceedings Involving Violations of the Public Utility Code and Commission Regulations*; Docket No. M-00051875, 37 Pa. B. 6755 (Order published December 22, 2007) (52 Pa.Code Chapter 69).

Each is addressed below.

- (1) Whether the conduct at issue was of a serious nature... such as willful fraud or misrepresentation, the conduct may warrant a higher penalty. When the conduct is less egregious, such as administrative filing, or technical errors, it may warrant a lower penalty.

This installation appears to be an instance of the right hand not knowing what the left hand is doing rather than a deliberate fraud or misrepresentation. The action was not egregious or one resulting in long term grave harm. Therefore, this suggests a low penalty.

- (2) Whether the resulting consequences of the conduct at issue were of a serious nature such as personal injury or property damage, the consequences may warrant a higher penalty.

While the Complainant states that she believes that the installation of the meter may have **BEGIN PROPRIETARY** [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] **END**

**PROPRIETARY** (Tr. 39). There was no direct evidence that the Complainant's

cardiac condition was related to the gas meter module installation and therefore this suggests a low penalty.

- (3) Whether the conduct at issue was deemed intentional or negligent. This factor may only be considered in evaluating litigated cases. When conduct has been deemed intentional, the conduct may result in a higher penalty.

Given the high volume of meters being installed and the administrative processes, this was likely not intentional but a matter of negligence, suggesting a low penalty.

- (4) Whether the regulated entity made efforts to modify internal practices and procedures to address the conduct at issue and prevent similar conduct in the future. These modifications may include activities such as training and improving company techniques and supervision. The amount of time it took the utility to correct the conduct once it was discovered and the involvement of top-level management in correcting the conduct may be considered.

This factor is not applicable.

- (5) The number of customers affected and the duration of the violation.

Only one customer was affected by PECO's actions here, supporting a low penalty.

- (6) The compliance history of the regulated entity which committed the violation. An isolated incident from an otherwise compliant utility may result in a lower penalty, whereas frequent, recurrent violations by a utility may result in a higher penalty.

Nothing in the record suggests a finding that the company regularly acts in the same manner, which supports a low penalty.

- (7) Whether the regulated entity cooperated with the Commission's investigation. Facts establishing bad faith, active concealment of violations or attempts to interfere with Commission investigations may result in a higher penalty.

This factor is not applicable.

- (8) The amount of the civil penalty or fine necessary to deter future violations. The size of the utility may be considered to determine an appropriate penalty amount.

As this appears to have been a matter of negligence of miscommunication, it is unlikely that his will occur in the future.

- (9) Past Commission decision in similar situations.

In another case where the company action appeared more negligent than deliberate or in bad faith, \$300 penalty was assessed. *Nellom v Aqua Pennsylvania*, 2015 Pa. PUC LEXIS 563 (Pa. PUC 2015).

Where the Administrative Law Judge found that the company needed to develop checks and balances to prevent repeating oversights leading to the violation, a higher penalty of \$900 was imposed. See *Lachele Logan v. Philadelphia Gas Works*, 2016 Pa. PUC LEXIS 206 (Pa. PUC 2016)

- (10) Other relevant factors.

The Complainant's concerns regarding and opposition to the AMI electric meter and the AMI gas meter module were essentially concurrent and identical. That PECO withheld installation of the electric AMI device in light of the Complainant's position and yet installed the gas meter module supports a higher penalty.

The facts here support a finding of negligence rather than malice. However, a fine of \$500 will be imposed to encourage communication between the various departments, particularly when a customer expressed concerns about PECO activities.

### CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the parties and the subject matter of this proceeding. 66 Pa.C.S. § 701.

2. The Complainant must establish her case by a preponderance of the evidence. *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm'n*, 578 A.2d 600 (Pa.Cmwlth. 1990), alloc. den., 602 A.2d 863 (Pa. 1992).

3. Any decision of the Commission must be supported by substantial evidence. See, e.g., Section 704 of the Administrative Agency Law, 2 Pa.C.S. § 704.

4. Act 129 of 2008 required electric distribution companies to file smart meter technology procurement and installation plans with the Commission for approval. 66 Pa.C.S. § 2807(f).

5. In 2013, the Commission concluded that there is no provision in the Code, the Commission's Regulations or Orders that allows a PECO customer to "opt out" of smart installation. *Maria Povacz v. PECO Energy Company*, Docket No. C-2012-2317176 (Order and Opinion entered January 24, 2013).

6. Utility companies are required to furnish and maintain adequate, efficient, safe, and reasonable service and facilities. 66 Pa.C.S. § 1501.

7. The Complainant has not met her burden of proof of establishing with substantial evidence that PECO committed an offense in violation of the Public Utility Code, the Commission's regulations or an outstanding order of the Commission with respect to health concerns regarding PECO meters. 66 Pa.C.S. § 701; 66 Pa.C.S. § 1501; *Norfolk & Western Ry.*

*Co. v. Pa. Pub. Util. Comm'n.*, 489 Pa. 109, 413 A.2d 1037 (1980); *Erie Resistor Corp. v. Unemployment Comp. Bd. of Review*, 194 Pa. Superior Ct. 278, 166 A.2d 96 (1961); and *Murphy v. Comm., Dept. of Public Welfare, White Haven Center*, 85 Pa. Commonwealth Ct. 23, 480 A.2d 382 (1984).

8. The Complainant did meet her burden of proof of establishing an offense in violation of the Public Utility Code with respect to installation of the gas meter. 66 Pa.C.S. § 701; 66 Pa.C.S. § 1501.

9. Pursuant to Section 3301 of the Code, 66 Pa. C.S. § 3301, and in accordance with the standards set out in *Joseph A. Rosi v. Bell Atlantic-Pa., Inc.*, 94 PUC 103 (February 10, 2000), the Commission may impose a maximum civil penalty of \$ 1,000 per day for each violation of the Code, its regulations or its orders.

### ORDER

THEREFORE,

IT IS ORDERED:

1. That the formal Complaint filed by Janice Denito Branagh versus PECO Energy Company at Docket No. C-2016-2576738 is sustained in part and denied in part.

2. That the Complainant is granted with respect to the claim regarding installation of the gas meter module.

3. That all other claims in the Complaint are denied.

4. That PECO Energy Company pay a civil penalty of Five Hundred Dollars (\$500.00) as provided for in section 3301 of the Public Utility Code, 66 Pa. C.S. §3301, by

