

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Lloyd and Susan Horst	:	
	:	
v.	:	C-2021-3026448
	:	
PPL Electric Utilities Corporation	:	

INITIAL DECISION

Before
Eranda Vero
Administrative Law Judge

INTRODUCTION

This Initial Decision grants PPL Electric Utilities Corporation’s Preliminary Objection that seeks the dismissal of the formal Complaint filed by Lloyd and Susan Horst on June 2, 2021, as legally insufficient because it is barred by Section 316 of the Public Utility Code, 66 Pa.C.S. § 316, as well as the doctrines of *res judicata* and collateral estoppel. In addition, this Initial Decision instructs the Secretary’s Bureau to file the formal Complaint under Docket No. C-2018-3006774 and identify it as a petition for reconsideration of the Commission’s Final Order in that matter.

HISTORY OF THE PROCEEDING

On June 2, 2021, Lloyd and Susan Horst (the Horsts or Complainants) filed a Formal Complaint (Complaint) with the Pennsylvania Public Utility Commission (Commission) against PPL Electric Utilities Corporation (PPL Electric, Respondent, or the Company), alleging that the Respondent continually threatens to shut off power to their property although they pay

their electricity bills in full and on time. They aver that PPL Electric seeks to switch their analog meter with a smart meter in violation of the Commonwealth Court's ruling in *Povacz v. Pa. Pub. Util. Comm'n*, 492 C.D. 2019 (Slip Op. filed October 8, 2020) (*Povacz*).¹ As relief, the Complainants request that they be allowed to keep their analog meter until the Supreme Court of Pennsylvania rules on the appeal to the Commonwealth Court's decision in *Povacz*.²

On July 6, 2021, Respondent filed an Answer and New Matter to the Complaint. In its Answer, the Respondent admitted in part, and denied in part the material allegations of the Complaint. In particular, PPL Electric admitted that the Complainants have made timely payments for their electric service and that they have no overdue payments as of July 6, 2021. Respondent also admitted that it sent the Complainants a termination notice because the Complainants have refused PPL Electric's representatives access to the premises to replace the meter. The Respondent denied that the Company's issuance of the termination notice is in any way unlawful under the applicable laws and regulations arguing that it is well-established that a public utility can terminate a customer's service for failure to permit the utility access to its meter for purposes of, among other things, replacement. *See* 66 Pa.C.S. § 1406(a)(4); 52 Pa. Code § 56.81(3); Tariff Rule 10(B)(2)(g), Supplement No. 227 to Electric Pa. P.U.C. No. 201, Fourteenth Revised Page No. 14A. Answer ¶ 4.

In its New Matter, Respondent argues that on December 27, 2018, the Complainants filed a Formal Complaint against PPL Electric at Docket No. C-2018-3006774 wherein they disputed the Company's planned installation of its automated metering infrastructure (AMI) meter for the same customer service location and same service account (First Complaint). New Matter ¶ 4. On January 16, 2019, PPL Electric filed an Answer to the

¹ On October 8, 2020, the Commonwealth Court of Pennsylvania (Commonwealth Court) issued an Opinion in the first of several appeals before it that involve an electric distribution company's (EDC) deployment of smart meter technology pursuant to Act 129 of 2008 (Act 129), codified at 66 Pa.C.S. § 2807(f). In this consolidated opinion, the Commonwealth Court partially affirmed, and partially reversed and remanded, the Commission's March 28, 2019, and May 9, 2019, Orders in *Povacz v. PECO Energy Co.*, C-2015-2475023; *Sunstein Murphy v. PECO Energy Co.*, C-2015-2475726, and *Randall v. PECO Energy Co.*, C-2016-2537666. *Povacz v. Pa. Pub. Util. Comm'n*, 492 C.D. 2019 (Slip Op. filed October 8, 2020).

² On May 12, 2021, the Supreme Court of Pennsylvania granted Petitions for Allowance of Appeal from the Order of the Commonwealth Court in *Povacz v. Pa. Pub. Util. Comm'n*, 253 A.3d 220 (Unpublished Opinion).

First Complaint, and an evidentiary hearing was held in that matter on January 23, 2020, producing a transcript of 40 pages. The record was closed on February 10, 2020. New Matter ¶¶ 5-6. On March 6, 2020, the Commission issued the Initial Decision of Administrative Law Judge (ALJ) Elizabeth H. Barnes, which dismissed the First Complaint for failing to prove by a preponderance of the evidence that the installation of the AMI meter constitutes unsafe or unreasonable service under Section 1501 of the Code, or that it violates any other provision of the Code, Commission Regulation, Commission Order, or Commission-approved Company tariff. New Matter ¶ 7, *see Horst v. PPL Elec. Utils. Corp.*, Docket No. C-2018-3006774, pp. 1, 20, 21 (Initial Decision issued March 6, 2020). On July 8, 2020, the Commission issued a Final Order dismissing that Complaint on the merits. New Matter ¶ 30, *see Horst v. PPL Elec. Utils. Corp.*, Docket No. C-2018-3006774 (Order entered July 8, 2020) (First Complaint Order). The Complainants did not file Exceptions or a petition for review with the Commonwealth Court. New Matter ¶¶ 8-9, 10-12. Consequently, the Respondent argues that pursuant to Section 316 of the Public Utility Code (66 Pa.C.S. § 316) and the doctrines of *res judicata* and collateral estoppel, the Commission's First Complaint Order is binding on the Complainants, and the Complainants can no longer dispute the installation of the AMI meter at this service address or any other service address.

On July 6, 2021, Respondent also filed Preliminary Objections to the Complaint requesting that the Complaint be dismissed in its entirety because it is barred by Section 316 of the Public Utility Code, 66 Pa.C.S. § 316, as well as the doctrines of *res judicata* and collateral estoppel and, therefore, is legally insufficient. See 52 Pa. Code § 5.101(a)(4).

On July 30, 2021, the Complainants filed a response to Respondent's Preliminary Objection wherein they argued that reliance on the Commonwealth Court's ruling in *Povacz* distinguishes the present Complaint from the previous one, thereby invalidating PPL Electric's claim that the present Complaint is a rehash of the First Complaint. According to the Complainants, Respondent's attempt to replace their analog meter with a smart meter violates the Commonwealth Court's decision in *Povacz* which ruled that "Act 129 does not mandate that all customers get smart meters." The Complainants reiterated their request that, "[as] the PUC and utilities have appealed this decision to the Supreme Court, we request that we be allowed to keep

our present meter at least until the Supreme Court rules on this case.” Response to Preliminary Objection.

On July 30, 2021, the Complainants filed a Petition for Extension of Time to file their Answer to Respondent’s New Matter.

On August 5, 2021, the Complainants filed their reply to Respondent’s New Matter wherein they argue that the Commonwealth Court’s decision in [*Povacz*] is “a new fact” that “alters the playing field.” According to the Complainants, neither the doctrine of *res judicata* nor that of collateral estoppel applies to the present Complaint as they “are not raising earlier claims or fact of law. Nor could [they] have raised the possibility of the [*Povacz*] decision, as this occurred after [their] earlier complaint.” Reply to New Matter.

On August 27, 2021, the Commission issued a Motion Judge Assignment Notice, assigning this proceeding to me.

Respondent’s Preliminary Objection is procedurally ready to be ruled upon.

FINDINGS OF FACT

1. The Complainants are Lloyd and Susan Horst, who reside at 2151 Thoroughbred Lane, Lancaster, PA 17601. Complaint ¶ 1.
2. The Respondent is PPL Electric Utilities Corporation.
3. On December 27, 2018, the Complainants filed the First Complaint against PPL Electric at Docket No. C-2018-3006774 wherein they disputed the Company’s planned installation of its AMI meter for the same customer service location and same service account that is at issue in the present matter. New Matter ¶ 4.

4. On January 16, 2019, PPL Electric filed an Answer to the First Complaint, and an evidentiary hearing was held in that matter on January 23, 2020, producing a transcript of 40 pages.

5. The record on the First Complaint was closed on February 10, 2020. New Matter ¶¶ 5-6.

6. On March 6, 2020, the Commission issued the Initial Decision of ALJ Barnes, which dismissed the First Complaint for failing to prove by a preponderance of the evidence that the installation of the AMI meter constitutes unsafe or unreasonable service under Section 1501 of the Code, or that it violates any other provision of the Code, Commission Regulation, Commission Order, or Commission-approved Company tariff. New Matter ¶ 7.

7. On July 8, 2020, the Commission issued a Final Order dismissing that Complaint on the merits. New Matter ¶ 30.

8. The Complainants did not file Exceptions or a petition for review with the Commonwealth Court. New Matter ¶¶ 8-9, 10-12.

9. On June 2, 2021, the Complainants filed the present Complaint against PPL Electric alleging that the Respondent threatens to shut off power to their property in order to force them to switch their analog meter with a smart meter. Complaint ¶¶ 4-5.

10. As relief, the Complainants request that they be allowed to keep their analog meter until the Supreme Court of Pennsylvania rules on the appeal to the Commonwealth Court's decision in *Povacz*. Complaint ¶ 5.

11. On July 6, 2021, Respondent filed an Answer and New Matter to the Complaint.

12. On July 6, 2021, Respondent also filed Preliminary Objections to the Complaint requesting that the Complaint be dismissed in its entirety because it is barred by Section 316 of the Public Utility Code, 66 Pa.C.S. § 316, as well as the doctrines of *res judicata* and collateral estoppel and, therefore, is legally insufficient.

13. On July 30, 2021, the Complainants filed a response to Respondent's Preliminary Objection wherein they argued that reliance on the Commonwealth Court's ruling in *Povacz* distinguishes the present Complaint from the previous one.

DISCUSSION

The Commission's Rules of Administrative Practice and Procedure provide for the filing of preliminary objections. Commission preliminary objection practice is comparable to Pennsylvania civil practice respecting the filing of preliminary objections. *Equitable Small Transp. Intervenors v. Equitable Gas Co.*, 1994 Pa. PUC LEXIS 69, Docket No. C-00935435 (July 18, 1994) (*Equitable*). The Commission's Rules at 52 Pa. Code § 5.101(a) limit preliminary objections to the following grounds:

- (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.

For purposes of disposing of the preliminary objections, the Commission must accept as true all well-pleaded material facts of the nonmoving party, as well as every reasonable inference deducible from those facts. *Cnty. of Allegheny v. Commonwealth*, 490 A.2d 402 (Pa. 1985); *Commonwealth v. Bell Tel. Co. of Pa.*, 551 A.2d 602 (Pa. Cmwlth. 1988). The Commission must view the Complaint in this case in the light most favorable to Complainant

and should dismiss the Complaint only if it appears that Complainant would not be entitled to relief under any circumstances as a matter of law. *Equitable*; see also, *Interstate Traveler Servs., Inc. v. Commonwealth, Dep't of Env't Res.*, 406 A.2d 1020 (Pa. 1979). “For purposes of testing the legal sufficiency of the challenged pleading, a [motion to dismiss] ... admits as true all well-pleaded, material, relevant facts, and every inference deducible from those facts.” *Marinoff v. Bell Tel. Co. of Pa.*, 75 Pa. PUC 489, 491 (1991).

In this case, Respondent argues that the present Complaint is barred by Section 316 of the Public Utility Code, 66 Pa.C.S. § 316, as well as the doctrines of *res judicata* and collateral estoppel and, therefore, is legally insufficient. See 52 Pa. Code § 5.101(a)(4).

Section 316 of the Public Utility Code provides, in pertinent part, that “[w]hensoever the commission shall make any rule, regulation, finding, determination or order, the same shall be *prima facie* evidence of the facts found and shall remain conclusive upon all parties affected thereby, unless set aside, annulled or modified on judicial review.” 66 Pa C.S. § 316.

The doctrine of *res judicata* reflects the refusal of the law to tolerate the relitigation of a matter decided by a court of competent jurisdiction. A final valid judgment on the merits by a court of competent jurisdiction bars any future suit between the same parties on the same cause of action. For the doctrine to prevail, four conditions must be met: (1) identity of issues, (2) identity of causes of action, (3) identity of persons and parties to the action, and (4) identity of the quality and capacity of the parties suing or sued. *Day v. Volkswagenwerk Aktiengesellschaft*, 464 A.2d 1313 (Pa. Super. 1983) (*Day*); *O’Toole v. Bell Tel. Co. of Pa.*, 77 Pa. P.U.C. 98 (1992).

Similar to the doctrine of *res judicata* is the doctrine of collateral estoppel. However, collateral estoppel is a broader concept. Collateral estoppel prevents a question of law or an issue of fact that has been once litigated and adjudicated finally in a court of competent jurisdiction from being relitigated in a subsequent suit. The four requirements for a plea of collateral estoppel to prevail are: (1) the issue decided in the prior adjudication is identical with

the one presented in the later action; (2) there was a final judgment on the merits; (3) the party against whom the plea is asserted was a party or in privity with the party to the prior adjudication; and (4) the party against whom the plea is asserted has had a full and fair opportunity to litigate the issues in question in the prior action. *Day*, 464 A.2d at 1318-19. Collateral estoppel is a doctrine of issue preclusion that seeks to prevent the relitigation of a finally litigated issue in a subsequent proceeding between the same parties. *Baker v. Pa. Human Rels. Comm'n*, 462 A.2d 881 (Pa. Cmwlth. 1983).

In its New Matter, Respondent avers that the Complainants' First Complaint challenged the Company's planned installation of its AMI or smart meter for the same customer service location and same service account. On July 8, 2020, the Commission issued a Final Order dismissing that Complaint on the merits. Additionally, the Complainants did not file exceptions with the Commission or a petition for review with the Commonwealth Court.

The Complainants do not dispute these averments. However, the Complainants argue that the present Complaint does not challenge the Company's planned installation of its AMI or smart meter at their property. The Complainants explained that they instead seek a stay of the Commission's First Complaint Order and of the installation of the Company's AMI meter until the resolution of the *Povacz* case by the Pennsylvania Supreme Court.

In essence, the Complainants have filed the present Complaint seeking relief from the Commission's Final Order in the First Complaint, at Docket No. C-2018-3006774. Under the circumstances, the appropriate vehicle for their purpose is a petition for relief filed pursuant to 66 Pa.C.S. §§ 703(f) and 703(g), and 52 Pa. Code § 5.572. Pursuant to Commission Regulations and administrative precedent, the Commission often engages in a liberal interpretation of its Rules of Practice in recognition of *pro se* participants like the Horsts. *See* 52 Pa. Code § 1.2(a). Section 1.2(a) of the Commission's Rules of Practice requires a liberal construction in order to accomplish the "just, speedy and inexpensive" determination of applicable matters. *Id.* To the extent that the present Complaint seeks only a temporary stay of the Commission's First Complaint Order, the cause of the Complainants should not be hindered by the filing of the wrong form, *i.e.*, a formal complaint instead of a petition for relief. To that

end, I shall instruct the Commission's Secretary's Bureau to file the present Complaint, filed by Lloyd and Susan Horst on June 2, 2021, under the Docket No. C-2018-3006774 for the First Complaint and identify it as a petition for reconsideration of the Commission's Final Order in that matter.

However, to the extent that the present Complaint represents an attempt on the part of the Complainants to relitigate the issues raised in the first Complaint, the present Complaint is barred by Section 316 of the Public Utility Code, 66 Pa. C.S. § 316, as well as the doctrines of *res judicata* and collateral estoppel. In both the present and the First Complaint the identity and capacity of the parties is the same, Lloyd and Susan Horst are the Complainant and PPL Electric Utilities Corporation is the Respondent. The issues and cause of action are also the same, *i.e.*, the propriety of the installation of an AMI meter in Complainant's property. Additionally, the First Complaint was fully litigated and the final valid judgment on the merits of that case was entered by the Commission on July 8, 2020 and bars any future suit between the same parties on the same cause of action. Consequently, PPL Electric's Preliminary Objection will be granted, and the present Complaint will be dismissed.

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 Commission's Rules of Administrative Practice and Procedure provide for the filing of preliminary objections. 52 Pa. Code § 5.101.

3. Commission preliminary objection practice is comparable to Pennsylvania civil practice respecting the filing of preliminary objections. *Equitable Small Transp. Intervenor v. Equitable Gas Co.*, 1994 Pa. PUC LEXIS 69, Docket No. C 00935435 (July 18, 1994).

4. For purposes of disposing of the preliminary objections, the Commission must accept as true all well-pleaded material facts of the nonmoving party, as well as every reasonable inference deducible from those facts. *Cnty. of Allegheny v. Commonwealth*, 490 A.2d 402 (Pa. 1985); *Commonwealth v. Bell Tel. Co. of Pa.*, 551 A.2d 602 (Pa. Cmwlth. 1988).

5. The Commission must view the Complaint in this case in the light most favorable to Complainant and should dismiss the Complaint only if it appears that Complainant would not be entitled to relief under any circumstances as a matter of law. *Equitable Small Transp. Intervenors v. Equitable Gas Co.*, 1994 Pa. PUC LEXIS 69, Docket No. C-00935435 (July 18, 1994); *see also, Interstate Traveler Servs., Inc. v. Commonwealth, Dep't of Env't Res.*, 406 A.2d 1020 (Pa. 1979).

6. For purposes of testing the legal sufficiency of the challenged pleading, a [motion to dismiss] ... admits as true all well-pleaded, material, relevant facts, and every inference deducible from those facts. *Marinoff v. Bell Tel. Co. of Pa.*, 75 Pa. PUC 489 (1991).

7. Whenever the Commission shall make any rule, regulation, finding, determination, or order, the same shall be *prima facie* evidence of the facts found and shall remain conclusive upon all parties affected thereby, unless set aside, annulled, or modified on judicial review. 66 Pa.C.S. § 316.

8. For the doctrine of *res judicata* to prevail, four conditions must be met: (1) identity of issues, (2) identity of causes of action, (3) identity of persons and parties to the action, and (4) identity of the quality and capacity of the parties suing or sued. *Day v. Volkswagenwerk Aktiengesellschaft*, 464 A.2d 1313 (Pa. Super. 1983); *O'Toole v. Bell Tel. Co. of Pa.*, 77 Pa. P.U.C. 98 (1992).

9. The four requirements for a plea of collateral estoppel to prevail are: (1) the issue decided in the prior adjudication is identical with the one presented in the later action; (2) there was a final judgment on the merits; (3) the party against whom the plea is asserted was a party or in privity with the party to the prior adjudication; and (4) the party against whom the

plea is asserted has had a full and fair opportunity to litigate the issues in question in the prior action. *Day v. Volkswagenwerk Aktiengesellschaft*, 464 A.2d 1318 (Pa. Super. 1983).

10. Collateral estoppel is a doctrine of issue preclusion that seeks to prevent the relitigation of a finally litigated issue in a subsequent proceeding between the same parties. *Baker v. Pa. Human Rels. Comm'n*, 462 A.2d 881 (Pa. Cmwlth. 1983).

11. Section 1.2(a) of the Commission's Rules of Practice requires a liberal construction in order to accomplish the "just, speedy and inexpensive" determination of applicable matters. 52 Pa. Code § 1.2.

ORDER

THEREFORE,

IT IS ORDERED:

1. That the Secretary's Bureau shall file the present formal Complaint under Docket No. C-2018-3006774 and identify it as a petition for reconsideration of the Commission's Final Order in that matter.

2. That the Preliminary Objection filed by PPL Electric Utilities Corporation in the above-captioned proceeding at Docket No. C-2021-3026448 is granted.

3. That the Complaint filed by Lloyd and Susan Horst against PPL Electric Utilities Corporation at Docket No. C-2021-3026448 is dismissed.

