

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Laura E. Farina	:	
	:	
v.	:	C-2022-3030803
	:	
Metropolitan Edison Company	:	

ORDER
STAY OF PROCEEDING

By Order entered November 4, 2020, the Pennsylvania Public Utility Commission (Commission) ordered that any formal complaint filed with the Commission on or after November 4, 2020, challenging an electric distribution company’s deployment of smart meter technology as being in violation of Section 1501 of the Public Utility Code, 66 Pa.C.S. § 1501, is to be stayed until the Commission takes further action to lift the stay. *See, Smart Meter Procurement and Installation*, Docket No. M-2009-2092655 (Order entered November 4, 2020) (*November 2020 Order*). The full Order is attached to this Order as Attachment A.

THEREFORE, pursuant to the Commission’s *November 2020 Order*, the proceeding in this case is hereby STAYED until further direction by the Commission. You will be notified when the stay is lifted.

In addition, pursuant to the Commission’s *November 2020 Order*, the “electric distribution companies may not terminate electric service to any customer who has a pending proceeding before the Commission challenging an electric distribution company’s deployment of smart meter technology as being in violation of Section 1501 of the Public Utility Code, 66 Pa.C.S. § 1501, due to the customer’s refusal to allow the utility access to their meter for purposes of replacement pending a final Commission Order on that proceeding.”

Date: May 11, 2023

/s/
John M. Coogan
Administrative Law Judge

ATTACHMENT A
PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17105-3265

Public Meeting held October 29, 2020

Commissioners Present:

Gladys Brown Dutrieuille, Chairman
David W. Sweet, Vice Chairman
John F. Coleman, Jr.
Ralph V. Yanora

Smart Meter Procurement and Installation

M-2009-2092655

ORDER

BY THE COMMISSION:

On October 8, 2020, the Commonwealth Court of Pennsylvania (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 Court partially affirmed, and partially reversed and remanded, the Commission's March 28, 2019 and May 9, 2019 Orders in *Maria Povacz v. PECO Energy Co.*, C-2015-2475023; *Laura Sunstein Murphy v. PECO Energy Co.*, C-2015-2475726, and *Cynthia Randall and Paul Albrecht v. PECO Energy Co.*, C-2016-2537666. *Povacz, et al. v. Pa. Public Utility Commission*, 492 C.D. 2019 (Slip Op. filed October 8, 2020) (*Povacz*).

By this Order, the Commission issues a stay of certain formal complaint proceedings presently before the Commission involving challenges to electric distribution company (EDC) deployment of smart meter technology as being in violation of Section 1501 of the Pennsylvania Public Utility Code (Code), 66 Pa. C.S. § 1501. Furthermore, the Commission directs that this stay shall apply to any new formal complaints filed with the Commission claiming that EDC deployment of smart meter technology is in violation of Section 1501.

We further direct, however, that this stay not apply to any complaint proceeding where an initial decision has been issued by an Administrative Law Judge (ALJ) dismissing a smart meter technology deployment complaint based on procedural grounds (e.g., a complainant’s failure to appear or to respond to discovery orders) where the merits of the dispute were not addressed. Any such initial decision dismissing a complaint on procedural grounds may become final by operation of law, as prescribed herein, if no exceptions are filed. If exceptions are filed, the Office of Special Assistants (OSA) shall prepare a recommendation for Commission consideration at a Public Meeting. This caveat to the Commission’s general stay of smart meter complaint proceedings only applies to initial decisions where a decision by an ALJ has not already become final through operation of law pursuant to 66 Pa.C.S. § 335 and 52 Pa. Code § 5.536.

DISCUSSION

Following the Commonwealth Court’s decision in *Povacz*, it is unclear whether the parties in that proceeding will seek an appeal to the Supreme Court of Pennsylvania (Supreme Court) and whether such appeal will be accepted. It is likewise unclear at this time how the Commission will address the cases in the consolidated *Povacz* appeal when the records are remanded to the Commission for further proceedings. Thus, it is reasonable and appropriate to stay certain proceedings currently pending before the Commission while the Commission assesses the impact of the *Povacz* decision and any subsequent related proceedings of those matters on complaints raising the same or similar issues.

Legal Basis for Stay

Section 501 of the Code, 66 Pa. C.S. § 501, affords the Commission general powers. In particular, Section 501 states that “[i]n addition to any powers expressly enumerated in this part, the commission shall have full power and authority, and it shall be its duty to enforce, execute and carry out, by its regulations, orders, or otherwise, all and singular, the provisions of this part, and the full intent thereof.” 66 Pa. C.S. § 501.

Parties to a proceeding before the Commission frequently bring requests or motions for stay in the context of interlocutory review, under the Commission’s regulations at 52 Pa. Code §§ 5.301-5.306, or pursuant to 52 Pa. Code § 1.15(a)(1). Section 1.15(a)(1) states:

[W]henever under this title or by order of the Commission, or notice given thereunder, an act is required or allowed to be done at or within a specified time, the time fixed or the period of time prescribed may, by the Commission, the presiding officer or other authorized person, for good cause be extended upon motion made before expiration of the period originally prescribed or as previously extended.

52 Pa. Code § 1.15(a)(1). The Commission has recognized the Supreme Court’s definition of good cause as “conduct which is reasonable under all the circumstances, thereby justifying the [c]laimaint’s actions.” *See In re Application of Penn Access Corporation and Digital Direct of Pittsburgh, Inc.*, Docket No. A-310006, 1992 Pa. PUC LEXIS 56, at *9 (1992) (citing *Frumento v. Unemployment Comp. Bd. of Review*, 351 A.2d 631 (Pa. 1976)).

In *Pa. Public Utility Commission v. Process Gas Consumers Grp.*, 467 A.2d 805 (Pa. 1983) (*Process Gas*), the Supreme Court of Pennsylvania provided criteria to

identify when a stay pending appeal is warranted.¹ While these regulatory provisions and cases identified above do not directly address the Commission's *sua sponte* authority to stay smart meter complaint cases as prescribed below, they are instructive of the Commission's considerations in making this decision pursuant to its broader authority under Section 501 of the Code. A stay is appropriate at this time as it will not adversely affect the public interest or substantially harm the parties to these proceedings, and it maintains the status quo for each complaint. A complaint proceeding that is pending before the Commission or that is initiated and then stayed will prevent installation of a smart meter, if one has not already been installed, for the duration of the stay. Additionally, a complainant's service will not be terminated for failure to give the EDC access to the meter to install a smart meter during the pendency of the stay and any subsequent proceedings on the complaints.

Separately, judicial efficiency and economy weigh in favor of staying action at the Commission until such time that the Supreme Court can act on any Petition for Allowance of Appeal filed with it regarding the Commonwealth Court's *Povacz* decision. Furthermore, the stay will give the Commission and interested parties an opportunity to determine how to handle the issues the Court directed the Commission to address on remand, if no appeal is filed with, or granted by, the Supreme Court. For these reasons, we find that a stay of certain complaints, both currently before the Commission and those yet to be filed, challenging an EDC's deployment of smart meter technology as being in violation of Section 1501 of the Code, 66 Pa. C.S. § 1501, is reasonable under the current circumstances, will not harm the parties to these proceedings and is in the public interest.

Impact of the *Povacz* Decision

The Court's decision in *Povacz* impacts eight Commission smart meter complaint decisions currently on appeal at the Commonwealth Court that were stayed pending the *Povacz* disposition.² Two additional appeals of Commission smart meter complaint decisions have been

¹ The grant of a stay pending appeal is warranted if the petitioner makes a strong showing that he is likely to prevail on the merits, the petitioner has shown that without the requested relief he will suffer irreparable injury, the issuance of a stay will not substantially harm other interested parties in the proceedings, and the issuance of a stay will not adversely affect the public interest. *Process Gas* at 809.

² By Order dated April 8, 2020, the Court stayed seven other smart meter appeals in various stages pending the disposition of *Povacz: Mary Paul v. Pennsylvania Public Utility Commission*

filed with the Court since it issued its stay order: *Jeffrey Ulmer v. Pennsylvania Public Utility Commission* (967 C.D. 2020) and *Paula Hughes v. Pennsylvania Public Utility Commission* (827 C.D. 2020).

In *Povacz*, the Court addressed the following six issues: (1) whether the Commission’s interpretation of Act 129 violates Petitioners’ constitutional interest in bodily integrity, (2) whether Act 129 mandates smart meter installation and precludes the Commission from granting Petitioners’ relief, (3) whether the Commission erred by requiring Petitioners to prove that smart meters are unsafe and unreasonable, (4) whether Petitioners proved that the installation of smart meters in their homes is unreasonable due to their medical concerns, (5) whether the Commission erred by requiring Petitioners to demonstrate a conclusive causal connection between radio frequency (RF) exposure and adverse health effects, and (6) whether the Commission erred in finding that Petitioners’ claims were not supported by substantial evidence. *Povacz* at 4-5. The Court affirmed the Commission’s decision regarding the first, fifth, and sixth issues.

With respect to remanding issues to the Commission, the Court reversed the Commission’s decision that it lacks authority to accommodate the petitioners’ requests to avoid RF emissions and remanded the matter to allow consideration of petitioners’ requests for accommodations and a determination on what, if any, accommodations are appropriate. *Id.* at 13. To the extent that the Commission applied a “conjunctive burden of proof,” as Section 1501 of Code, 66 Pa.C.S. § 1501, requires every public utility to furnish “safe, and reasonable service,” the Court vacated and remanded the decision for reconsideration under the “disjunctive burden of proof,” finding that petitioners only had to show that installing smart meters in their homes is unsafe *or* unreasonable. *Id.* at 15 (emphasis added). Third, the Court vacated the

(460 C.D. 2019), *Evangeline Hoffman-Lorah v. Pennsylvania Public Utility Commission* (712 C.D. 2019), *Alexia and Lawrence McKnight v. Pennsylvania Public Utility Commission* (1253 C.D. 2019), *Richard N. Myers v. Pennsylvania Public Utility Commission* (1337 C.D. 2019), *Willard and Elsbeth Sunstein v. Pennsylvania Public Utility Commission* (1581 C.D. 2019), *Janice Denito Branagh v. Pennsylvania Public Utility Commission* (1857 C.D. 2019), and *Orpheus and Kimberly Hanley v. Pennsylvania Public Utility Commission* (172 C.D. 2020).² By Order dated May 11, 2020, the Court also stayed another smart meter appeal: *Alan Schmuckler v. Pennsylvania Public Utility Commission* (1102 C.D. 2019).

decision that an EDC may not or need not offer accommodations to petitioners and remanded the matter to consider whether accommodations are appropriate without proof of harm. *Id.* at 17.

The Court's decision in *Povacz* also impacts several Commission Orders and actions at different stages and across multiple bureaus. The Office of Administrative Law Judge (OALJ) currently has 48 complaint proceedings challenging EDC smart meter deployment pending before its judges. Similarly, the OSA has 26 complaint proceedings challenging EDC smart meter deployment pending before its staff on exceptions. Even now, some EDCs have begun filing Motions to Stay Proceedings in pending complaint proceedings before the OALJ based on the *Povacz* decision and its status.³ Presently, there is significant uncertainty surrounding further Commission proceedings in the *Povacz* matter due to the 30-day period in which any party to that matter may petition the Supreme Court seeking an appeal of the Commonwealth Court decision and a remand⁴ of that matter should no party seek appeal or the Supreme Court deny such a petition or affirm the Commonwealth Court if an appeal is granted.

For EDCs, while this stay of active and newly-initiated complaint proceedings that challenge smart meter deployment is in effect, it will delay installation of smart meter technology and will prohibit terminations of service for any complainant with a pending proceeding before the Commission, and that will maintain the status quo to avoid negatively affecting the rights and obligations of the parties which will be addressed by the ultimate disposition of the Commonwealth Court's Order in *Povacz*, by either the Supreme Court, or this Commission on remand. Accordingly, the Commission finds that it is reasonable and in the public interest to stay certain complaints, those both currently before the Commission and those yet to be filed, which proceed on the merits of the complaint challenging an EDC's deployment of smart meter technology as being in violation of Section 1501 of the Pennsylvania Public

³ See e.g., *Gilbert Martinez v. Metropolitan Edison Company*, Docket No. C-2019-3013798, (Motion to Stay the Proceeding filed October 16, 2020).

⁴ The Commission does not have jurisdiction to address any remand from the Commonwealth Court until after the Court remands the records in the cases. See *Stanton v. Lackawanna Energy, LTD*, 915 A.2d 668 (Pa. Super. 2007), and *In re Tax Sale Pursuant to Real Estate Tax Sale of 1947, as Amended*, 2012 WL 8681493 (Pa. Cmwlth. 2012) (Unreported Decision). Pennsylvania Rule of Appellate Procedure (Pa. R.A.P.) 2572(a)(2) directs the Commonwealth Court to remand the record in the *Povacz* cases 30 days after issuing the final order.

Utility Code (Code), 66 Pa. C.S. § 1501; under the current circumstances, this action will not harm the parties to these proceedings and is in the public interest.

Staying Commission Proceedings

Given the wide-ranging impact of the *Povacz* decision and the current uncertainties surrounding that decision and its impact on complaint proceedings challenging the deployment of smart meter technology pending before the OALJ and OSA, the Commission finds it reasonable and in the public interest to issue this Order to address these matters in a comprehensive manner. Therefore, the Commission issues a general stay of certain formal complaint proceedings presently before an ALJ that involve challenges to smart meter technology deployment where no initial decision has yet been issued by an ALJ. This stay also applies to proceedings where an ALJ has issued an initial decision addressing the merits of the formal complaint and the initial decision has not become final by operation of law as of the date of this Order. The Commission also issues a general stay of formal complaints that involve challenges to smart meter technology deployment currently before the OSA on exceptions to an initial decision addressing the merits of the complaint. Specifically, this stay applies to certain complaints, those both currently before the Commission and those yet to be filed, proceeding on the merits of the complaint challenging an EDC's deployment of smart meter technology as being in violation of Section 1501 of the Code, 66 Pa. C.S. § 1501.

The Commission recognizes that not all smart meter related complaints are adjudicated on the merits of the complaint; in some cases, an initial decision dismisses a complaint based on purely procedural grounds such as a complainant's failure to appear for a hearing or to respond to discovery requests. In these cases, which could become final without further Commission action pursuant to Section 5.536 of our regulations, 52 Pa. Code § 5.536, the Commission finds no reason to grant a stay absent the filing of timely exceptions under Section 5.533 of our regulations (re: procedure to except to initial, tentative and recommended decisions), 52 Pa. Code § 5.533. Thus, in any smart meter complaint proceeding wherein an initial decision has been issued by an ALJ based on procedural grounds, rather than the merits of the complaint, and where no exceptions are filed, no stay is applied through this order and the initial decision may become final by operation of law without further Commission action.

Regarding formal complaint proceedings challenging the deployment of smart meter technology where an initial decision was issued prior to the date of this Order, whether exceptions are filed or not, the proceeding is stayed if the initial decision ruled on the merits of the complaint. Where, however, the initial decision dismissed the complaint on procedural grounds alone, that proceeding is not stayed and is to become final by operation of law, or if exceptions are filed, the OSA is to prepare a recommendation for Commission consideration at a Public Meeting.

To further clarify the mechanism for the application of this Order staying several complaints challenging smart meter deployment, the Commission directs the OALJ and the OSA to identify each case pending before it that is affected by this stay and to serve a notice of the stay on all parties entered in each case informing the parties of this stay and shall enter the notice into the record of each proceeding.

The stays ordered herein shall remain in effect until further direction by the Commission. The Commission takes this action to ensure that the Commission responds in a consistent manner regarding smart meter deployment as the Commission responds to the Commonwealth Court's decision in *Povacz*.

THEREFORE,

IT IS ORDERED:

1. That all active formal complaint proceedings before the Commission challenging an electric distribution company's deployment of smart meter technology as being in violation of Section 1501 of the Public Utility Code, 66 Pa. C.S. § 1501, in which an ALJ has not issued an initial decision, or an ALJ has issued an initial decision addressing the merits of the formal complaint and the initial decision has not become final by operation of law, as of the date of this Order are stayed until the Commission takes further action to lift the stay.

2. That any formal complaints filed with the Commission on or after the entry date of this Order challenging an electric distribution company's deployment of smart meter

technology as being in violation of Section 1501 of the Public Utility Code, 66 Pa. C.S. § 1501, are to be stayed until the Commission takes further action to lift the stay.

3. That electric distribution companies may not terminate electric service to any customer who has a pending proceeding before the Commission challenging an electric distribution company's deployment of smart meter technology as being in violation of Section 1501 of the Public Utility Code, 66 Pa. C.S. § 1501, due to the customer's refusal to allow the utility access to their meter for purposes of replacement pending a final Commission Order on that proceeding.

4. That this stay does not apply to any smart meter formal complaint proceeding where an initial decision has been issued by an Administrative Law Judge dismissing the complaint based on procedural grounds rather than the merits of the complaint, and where no exceptions have been filed.

5. That any smart meter complaint proceeding where an initial decision has been issued dismissing the complaint on procedural grounds and where exceptions have been filed, the Office of Special Assistants shall prepare a recommendation for Commission consideration at a Public Meeting.

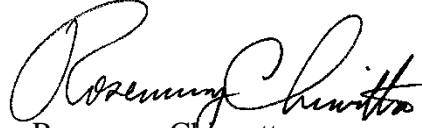
6. That within 30 days of the entry date of this Order the Office of Administrative Law Judge shall identify each case pending before it that is affected by this stay, serve a notice on each party entered in each proceeding informing each party of the stay, and shall enter a copy of that notice in the record of each proceeding.

7. That within 30 days of the entry date of this Order the Office of Special Assistants shall identify each case pending before it that is affected by this stay, serve a notice of the stay, via a Secretarial Letter, on each party entered in each proceeding informing each party of the stay, and shall enter a copy of the Secretarial Letter in the record of each proceeding.

8. That this Order be served on all electric distribution companies and all parties to formal complaints challenging an electric distribution company's deployment of smart meter

technology as being in violation of Section 1501 of the Public Utility Code, 66 Pa. C.S. § 1501, pending either before the Office of Administrative Law Judge, the Office of Special Assistants, or awaiting final determination by the Commission.

BY THE COMMISSION


Rosemary Chavetta
Secretary

(SEAL)

ORDER ADOPTED: October 29, 2020

ORDER ENTERED: November 4, 2020

C-2022-3030803 – LAURA E. FARINA v. METROPOLITAN EDISON COMPANY

LAURA E FARINA

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