

PENNSYLVANIA PUBLIC UTILITY COMMISSION
Harrisburg, Pennsylvania 17120

Orpheus and Kimberly Hanley
vs.
Pennsylvania Power Company

Public Meeting held May 9, 2024
3041147-OSA
Docket No. C-2023-3041147

STATEMENT OF VICE CHAIR KIMBERLY BARROW

The matter before us for disposition involves allegations against Pennsylvania Power Company (Penn Power) relating to a smart meter at the residence of Orpheus and Kimberly Hanley. Administrative Law Judge (ALJ) Alphonso Arnold III's February 7, 2024 Initial Decision dismisses the Formal Complaint, with prejudice, based upon the doctrines of *res judicata*,¹ collateral estoppel,² and Section 316 of the Public Utility Code.³ Specifically, the ALJ determined that the Hanleys' claims were barred due to a Commission order dismissing the Hanleys' 2016 Formal Complaint (2016 Complaint) averring similar claims.⁴ The Hanleys filed Exceptions.

The Hanleys' 2016 Complaint argued that the Hanleys' decision not to participate in the smart meter program was based upon concerns regarding health, privacy, safety, and property protection. The matter was fully litigated, however, the ALJ limited the Hanleys' testimony and presentation of evidence during the evidentiary hearing. Specifically, the ALJ ordered a discovery sanction against the Hanleys and prohibited them from raising any issues related to the impact of a smart meter on their health.⁵

¹ *Res judicata*, or claim preclusion, reflects the refusal of the law to allow the re-litigation of a claim in a subsequent cause of action arising between the same parties on the same claim after a court of competent jurisdiction has rendered a *final judgment on the merits* in a previous case. *Hopewell Estates, Inc. v. Kent*, 646 A.2d 1192 (Pa. Super. 1994). Four conditions must be met to apply the doctrine of *res judicata*: (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. *Mendozav. Peoples Nat. Gas Co. LLC*, Docket Number F-2019-3015189 (Order entered July 15, 2021) (citing *Winston v. Phila. Gas Works*, Docket C-2010-2181504 (Order entered April 16, 2012)); *O'Toole v. Bell Telephone Company of Pennsylvania*, 77 Pa. P.U.C. 98 (1992); *Day v. Volkswagenwerk Aktiengesellschaft*, 464 A.2d 1313 (Pa. Super. 1983).

² Collateral estoppel, or issue preclusion, prevents the 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. Four conditions must be met to apply the doctrine of collateral estoppel: (1) the issue decided in the prior adjudication is identical with the one presented in the later action; (2) *there was a final judgement 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 1313 (Pa. Super. 1983)(emphasis added).

³ 66 Pa.C.S. § 316. Relevant portion provides 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.” (emphasis added).

⁴ See generally *Orpheus and Kimberly Hanley v. Pennsylvania Power Company*, Docket No. C-2016-2557487 (Order dated December 19, 2019 and Order dated August 27, 2020).

⁵ Hearing Transcript, pg. 36 (May 2, 2018).

Notably, a prohibition from allowing complainants to pursue or present evidence on a specific claim does not result in a final judgement on the merits which triggers the doctrines of *res judicata* or collateral estoppel.⁶ Moreover, Section 316 does not apply as the Commission did not render a finding or determination regarding the Hanleys' health claims.⁷ Accordingly, I disagree with part of the ALJ's findings in the instant matter. The Hanleys should be permitted to pursue their Section 1501 health allegations because this claim was not decided on the merits in the 2016 Complaint proceeding.

May 9, 2024



Kimberly Barrow, Vice Chair

⁶ Notably, the ALJ in the 2016 Complaint did not make any findings of fact related to health and simply stated that the Hanleys failed to carry their burden of proof establishing that Penn Power provided *unsafe or unreasonable* service in violation of Section 1501. *Orpheus and Kimberly Hanley v. Pennsylvania Power Company*, Docket No. C-2016-2557487 (Initial Decision issued October 24, 2018). The ALJ did not issue a finding of fact or conclusion of law related to the Hanleys' health concerns.

⁷ The December 19, 2019 Order noted that the Hanleys were afforded the ability to provide claims related to unsafe and unreasonable service and found that the ALJ's initial Decision relating to privacy concerns and unsafe and unreasonable service were well-reasoned. *Orpheus and Kimberly Hanley v. Pennsylvania Power Company*, Docket No. C-2016-2557487, pgs. 23-24 (Order dated December 19, 2019). It also explicitly highlighted the discovery limitations placed by the ALJ, noting that the ALJ sustained objections to Ms. Hanley's lay and opinion testimony regarding health effects on the basis of the overall sanction restricting evidence of purported health effects. *Id.* The August 27, 2020 Order again noted that the Hanleys were afforded the ability to present evidence regarding their safety concerns, i.e., belief that smart meters were carcinogenic and could explode and cause fires, but were not allowed to present evidence relating to their health concerns. *Orpheus and Kimberly Hanley v. Pennsylvania Power Company*, Docket No. C-2016-2557487, pgs. 8-9 (Order dated August 27, 2020). Neither the December 19, 2019 Order nor the August 27, 2020 Order rendered a finding or determination on the Hanleys' health concerns, just the privacy, unsafe, and unreasonable service allegations. *Orpheus and Kimberly Hanley v. Pennsylvania Power Company*, Docket No. C-2016-2557487 (Order dated December 19, 2019 and Order dated August 27, 2020). As the Hanleys were not afforded the ability to provide evidence on their health claims, and the fact that safety concerns do not equate to health concerns, logic dictates that Section 316 does not apply in this matter.