

**PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17120**

Public Meeting held May 9, 2024

Commissioners Present:

Stephen M. DeFrank, Chairman
Kimberly Barrow, Vice Chair, Dissenting Statement
Ralph V. Yanora
Kathryn L. Zerfuss, Dissenting
John F. Coleman, Jr.

Orpheus and Kimberly Hanley

C-2023-3041147

v.

Pennsylvania Power Company

OPINION AND ORDER

BY THE COMMISSION:

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition are the Exceptions of Orpheus and Kimberly Hanley (collectively, the Complainants or the Hanleys), filed on February 27, 2024, in the above-

captioned proceeding.¹ The Exceptions were filed in response to the Initial Decision (I.D. or Initial Decision) of Administrative Law Judge (ALJ) Alphonso Arnold III, served on the Parties on February 7, 2024. On March 27, 2024, Pennsylvania Power Company (Penn Power or the Company) timely filed Replies to Exceptions.² The Initial Decision denied the Formal Complaint (Complaint) filed by the Complainants on June 5, 2023. For the reasons discussed below, we shall deny the Complainants' Exceptions, adopt the Initial Decision of ALJ Arnold, and dismiss the Complaint, consistent with this Opinion and Order.

I. Background

This case involves a Complaint concerning the safety of the advanced metering infrastructure (AMI), or smart meter, that Penn Power proposes to install at the Complainant's residence and use in the ordinary course of business to measure the Complainant's electricity consumption. The Complainant requested that Penn Power not install a smart meter at their residence due to privacy, safety, and property protection concerns. Complaint at 3.

Penn Power is an electric distribution company (EDC) subject to the jurisdiction of the Commission. Penn Power furnishes, owns, and maintains the meters in its distribution system. *See*, Pennsylvania Power Company Tariff Electric Pa. P.U.C. No. 36, Section 7 at 34.

¹ By Secretarial Letter issued March 13, 2024 (*March 2024 Secretarial Letter*), the Commission's Secretary: (1) notified the Parties that the Complainant failed to properly serve Pennsylvania Power Company (Penn Power or the Company) with a copy of the Exceptions; and (2) enclosed the Exceptions, in order to constitute service. Therefore, pursuant to 52 Pa. Code § 5.535, Penn Power was given until the close of business (4:30 p.m. EST) March 27, 2024, to file Reply Exceptions. *See*, *March 2024 Secretarial Letter*.

² Initially, on February 27, 2024, Penn Power filed a letter stating that it would not be filing Exceptions to the matter.

The Complainants are Penn Power customers who have been notified of Penn Power's intent to install a smart meter at their residence that provides the function of automatic meter reading (AMR).

Act 129 of 2008 (Act 129 or Act), *inter alia*, amended Chapter 28 of the Public Utility Code (Code) and required EDCs with more than 100,000 customers to file smart meter technology procurement and installation plans for Commission approval and to furnish smart meter technology within its service territory in accordance with the provisions of the Act. Section 2807(f) of the Code provides as follows:

(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 General Assembly found that it was “in the public interest” to implement the measures set forth in Act 129 and that the universal installation of smart meters would enhance the “health, safety and prosperity” of Pennsylvania’s citizens through the “availability of adequate, reliable, affordable, efficient and environmentally

sustainable electric service at the least cost.” *See*, H.B. 2200, 192d Gen. Assemb., Reg. Sess. (Pa. 2008).

By Order entered in 2009, the Commission directed all EDCs subject to Act 129’s smart meter requirements, including Penn Power, to universally deploy smart meter technology within their respective service territories in the Commonwealth in accordance with a depreciation schedule not to exceed fifteen years and in accordance with other guidelines established therein. *See, Smart Meter Procurement and Installation*, Docket No. M-2009-2092655 (Implementation Order entered June 24, 2009) (*Smart Meter Implementation Order*). Penn Power sought and obtained the Commission’s approval to complete the installation of AMI meters with substantially all customers to receive an AMI meter by mid-2019. *See, Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company for Approval of Its Smart Meter Deployment Plan*, Docket Nos. M-2013-2341990, M-2013-2341991, M-2013-2341993, M-2013-2341994 (Opinion and Order entered June 25, 2014) (*2014 Smart Meter Order*).

II. History of the Proceeding

On June 5, 2023, the Hanleys filed the instant Complaint.³ In their Complaint, the Complainants alleged that Penn Power is threatening to, or already has, shut off their electric service. The Complainants provided that they do not want a smart meter installed, have not requested participation in the smart meter program, and exercise their right not to participate in the program based on 66 Pa. C.S. § 2807(f)(2)(i), 52 Pa. Code § 57.251(a), and the Public Utility Regulatory Policies Act of 1978

³ We note that the Commission’s case management system indicates the Complaint was received June 5, 2023, but was not served on the Parties until June 7, 2023. We further note that the Complaint is stamped “DATE OF DEPOSIT” by the Commission’s Secretary’s Bureau on May 31, 2023. *See*, Complaint at 1-3, 5.

(PURPA) standards Section 111(d)(11), (14). Further, the Complainants emphasize that their reason for refusing smart meter installation is based on health, privacy, safety, and property protection concerns. As relief, the Complainants request that Penn Power cease in their attempts to install a smart meter. Complaint at 2-3; I.D. at 1-2.

On June 27, 2023, Penn Power filed an Answer to the Complaint and New Matter (Answer and New Matter), which was properly endorsed with a Notice to Plead.⁴ Also, on June 27, 2023, Penn Power filed a Preliminary Objection in response to the Complaint (Preliminary Objection), which was properly endorsed with a Notice to Plead.⁵ I.D. at 2-3.

In its Answer and New Matter, Penn Power admitted, in part, and denied, in part, various material allegations in the Complaint. *Inter alia*, Penn Power admitted that it provides electric service to the Complainants and sent the Complainants a termination notice on May 1, 2023, but denied that it has terminated their service. Further, Penn Power denied that the Complainants are permitted to opt-out of smart meter installation. Answer and New Matter at 1-4; I.D. at 2. Moreover, Penn Power asserted that the Complainants challenged the Company's installation of a smart meter at their service address in a prior formal complaint proceeding. Specifically, Penn Power provided that at Docket No. C-2016-2557487, the Commission dismissed with prejudice the formal complaint filed by the Hanleys against the Company which challenged the Company's planned installation of a smart meter at the service address (2016 Complaint). I.D. at 2; Answer and New Matter at 10 (citing *Orpheus and Kimberly Hanley v. Pennsylvania Power Company*, Docket No. C-2016-2557487 (Initial Decision issued November 2, 2018) (*2018 Hanley Initial Decision*), request to reopen proceedings denied

⁴ We note that a Certificate of Service is attached to Penn Power's Answer and New Matter. *See*, Answer and New Matter at 17.

⁵ We note that a Certificate of Service is attached to Penn Power's Preliminary Objection. *See*, Preliminary Objection at 11.

(Opinion and Order entered December 19, 2019) (*2019 Hanley Order*), petition for rehearing or reconsideration denied (Opinion and Order entered August 27, 2020) (*2020 Hanley Order*)). Therefore, Penn Power asserted that: (1) the Complainants are barred from filing a new formal complaint with the Commission regarding the same issues of act and law; and (2) the instant Complaint is barred by 66 Pa. C.S. § 316, and the doctrines of *res judicata* and collateral estoppel. As relief, Penn Power requested that the instant Complaint be dismissed. Answer and New Matter at 11-15; I.D. at 2.

In its Preliminary Objection, Penn Power argued that pursuant to 52 Pa. Code § 5.101(a)(4), the instant Complaint is legally insufficient because: (1) the Complaint is the second formal complaint that the Complainants filed against the Company concerning smart meter installation and arguing that the installation of a smart meter would violate Section 1501 of the Code, 66 Pa. C.S. § 1501; and (2) the Complainants' requested relief (*i.e.*, to opt-out of smart meter installation) cannot be granted by the Commission because the Company is legally required to install smart meters and customers are not permitted to opt-out of the installation. Preliminary Objection at 6-8 (citing 52 Pa. Code § 5.101(a)(4); 66 Pa. C.S. § 1501); I.D. at 3.

On July 18, 2023, the Complainants filed a document labeled "Never Requested, Never Agreed to Pay for Installation," in which the Complainants, *inter alia*, repeated their argument that they never requested participation in the smart meter program and argued that they never opted out of smart meter installation because they never opted in.⁶ I.D. at 3. On July 26, 2023, the Complainants filed their document

⁶ Upon review of the Commission's case management system, this document is labeled as an Answer to Preliminary Objection (Answer to P.O.). Further, according to the Initial Decision, the Complainants' Answer to P.O. was filed untimely. *See*, I.D. at 3. Pursuant to Sections 5.101(f)(1) and 1.56(b) of the Code, answers to the preliminary objection were due on July 8, 2023 (*i.e.*, within ten days after the date of service; July 4, 2023, was a holiday). *See*, 52 Pa. Code §§ 5.101(f)(1); 1.56(b).

labeled “Never Requested, Never Agreed to Pay for Installation” a second time, with a Certificate of Service attached.⁷

On July 28, 2023, the ALJ issued an Order staying this proceeding, which was issued in compliance with the Commission Order and Notice entered November 4, 2020, at Docket No. M-2009-2092655, pursuant to 66 Pa. C.S. § 501, instituting a stay of certain formal complaint proceedings then pending before the Commission involving challenges to EDC deployment of smart meter technology as being in violation of Section 1501 of the Code (*November 2020 Stay Order*). The *November 2020 Stay Order* also directed that the stay would apply to any new formal complaints filed with the Commission claiming that EDC deployment of smart meter technology was a violation of Section 1501, and that the stay would remain in place until it was lifted by further Commission action. I.D. at 3-4.

By Order entered November 14, 2023, at Docket No. M-2009-2092655, the Commission lifted the stay of pending smart meter complaints. On November 20, 2023, the ALJ issued an Order lifting the stay in this proceeding. I.D. at 4.

In the Initial Decision issued on February 7, 2024, the ALJ granted Penn Power’s Preliminary Objection and dismissed the Complaint because the Complaint raises the same issues that were previously addressed by the Commission in dismissing a prior complaint (*i.e.*, the 2016 Complaint) with prejudice. Therefore, the Complainants are barred from bringing their Complaint by the doctrines of *res judicata*, collateral estoppel, and by 66 Pa. C.S. § 316. I.D. at 1, 12, 15.

⁷ According to the Commission’s case management system, the Complainant’s filing on 7/26/23 is labeled as “Letter re smart meter installation – Hanley.”

As previously noted, the Complainants timely filed Exceptions on February 27, 2024, and Penn Power timely filed Replies to Exceptions on March 27, 2024.

III. Discussion

A. Legal Standards

1. Preliminary Objections

Section 5.101(a) of our Rules of Practice and Procedure states that preliminary objections are available to parties and may be filed in response to a pleading. 52 Pa. Code § 5.101(a). Preliminary objections must be accompanied by a notice to plead, must state specifically the legal and factual grounds relied upon, and be limited to the following:

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.

52 Pa. Code § 5.101(a).

The Commission's preliminary objection practice is analogous to Pennsylvania civil practice regarding preliminary objections. *Equitable Small Transportation Intervenors v. Equitable Gas Company*, 1994 Pa. PUC Lexis 69, Docket No. C-00935435 (July 18, 1994) (*Equitable Small*). Preliminary objections in civil practice requesting dismissal of a pleading will be granted only where the right to relief is clearly warranted and free from doubt. *Interstate Traveller Services, Inc. v. Pa. Department of Environmental Resources*, 406 A.2d 1020 (Pa. 1979); *Rivera v. Philadelphia Theological Seminary of St. Charles Borromeo, Inc.*, 595 A.2d 172 (Pa. Super. 1991). The Commission follows this standard. *Montague v. Philadelphia Electric Company*, 66 Pa. PUC 24 (1988).

The Commission may not rely upon the factual assertions of the moving party but must accept as true for purposes of disposing the motion, all well-pleaded, material facts of the non-moving party, as well as every inference from those facts. *County of Allegheny v. Commonwealth of Pennsylvania*, 490 A.2d 402 (Pa. 1985); *Commonwealth of Pennsylvania v. Bell Telephone Company of Pa.*, 551 A.2d 602 (Pa. Cmwlth. 1988). Thus, the Commission must view a complaint only in the light most favorable to the complainant and should dismiss the complaint only if it appears that the complaint would not be entitled to relief under any circumstances as a matter of law. *Equitable Small*.

Here, Penn Power's Preliminary Objection asserted that the Complaint is legally insufficient pursuant to 52 Pa. Code § 5.101(a)(4), based upon the prior complaint predicated upon the same issues and set of facts which the Commission ultimately dismissed.

The provision at 52 Pa. Code § 5.101(a)(4): (1) permits the filing of a preliminary objection to dismiss a pleading for legal insufficiency; and (2) serves judicial economy by avoiding a hearing where no factual dispute exists, and the matter in dispute

is purely a legal question. If no factual issue pertinent to the resolution of a cases exists, a hearing is unnecessary. 66 Pa. C.S. § 703(a); *Lehigh Valley Power Committee v. Pa. PUC*, 563 A.2d 557, 564 (Pa. Cmwlth. 1989); *S.M.E. Bessemer Cement, Inc. v. Pa. PUC*, 540 A.2d 1006, 1008-9 (Pa. Cmwlth. 1988); *White Oak Borough Authority v. Pa. PUC*, 103 A.2d 502, 507 (Pa. Super. 1954).

2. *Res Judicata*

Res judicata is appropriately raised as a defense if all the issues between the parties in the current proceeding have been previously decided in a prior proceeding, where the parties had an opportunity to appear and be heard. *Day v. Volkswagenwerk Aktiengesellschaft*, 464 A.2d 1313 (Pa. Super. 1983) (*Day*)

3. Dismissal with Prejudice

The public interest is prejudiced by the wasteful use of the agency's and the respondent's time and resources in addressing a complaint. *See, Jefferson v. UGI Utilities, Inc.*, Docket No. Z-00269892 (Opinion and Order entered December 26, 1995); *see also, e.g., Nichols, III v. Bell Atlantic-Pennsylvania, Inc.*, Docket No. C-00956667 (Opinion and Order entered August 4, 1995).

B. ALJ's Initial Decision

In the Initial Decision, ALJ Arnold made eleven Findings of Fact (FOF) and reached seventeen Conclusions of Law (COL). I.D. at 4-5, 13-15. The FOF and COL are incorporated herein by reference and are adopted without comment unless they are either expressly or by necessary implication rejected or modified by this Opinion and Order.

First, the ALJ addressed the grounds that permit parties to file preliminary objections, as set forth in 52 Pa. C.S. §5.101(a). I.D. at 5-6. The ALJ noted that upon consideration of preliminary objections, the Commission must determine “whether the law says with certainty, based on well-pleaded factual averments ... that no recovery or relief is possible.” I.D. at 6 (citing *P.J.S. v. Pa. State Ethics Commission*, 669 A.2d 1105 (Pa. Cmwlth. 1996)). The ALJ continued that “[a]ny doubt must be resolved in favor of the non-moving party by refusing to sustain the preliminary objections.” I.D. at 6 (citing *Department of the Auditor General v. State Employees’ Retirement System*, 836 A.2d 1053, 1064 (Pa. Cmwlth. 2003)). The ALJ further noted that all of the non-moving party’s averments in the complaint must be viewed as true for purposes of deciding the preliminary objections, and only those facts specifically admitted must be considered against the non-moving party. I.D. at 6 (citing *Ridge v. State Employees’ Retirement Board*, 690 A.2d 1312 (Pa. Cmwlth. 1997)).

The ALJ noted that the Complainants, based on their health, privacy, safety, and property protection concerns, seek to refuse, or “opt-out,” of smart meter installation at their home, based on Act 129, the Commission’s Regulations, and the Public Utility Regulatory Policies Act of 1978.⁸ I.D. at 7. The ALJ also addressed Penn Power’s argument that the Complaint is legally insufficient because the Complainants cannot opt-out of smart meter installation given that the Company is required by Act 129 to install a smart meter at the Complainant’s home and, thus, the Complainants’ request to opt-out of the smart meter installation cannot be granted by the Commission. I.D. at 7 (citing 52 Pa. Code §5.101(a)(4)).

⁸ The ALJ noted that although the Complainants argue that they are not “opting out” because they never “opted in,” attempting to refuse smart meter installation under the belief that the smart meter installation is not mandatory and is voluntary is, essentially, an attempt to opt-out of smart meter installation. I.D. at 7.

The ALJ agreed with Penn Power that the Complainants cannot refuse or “opt-out” of smart meter installation because, in *Povacz v. Pa. PUC*, 280 A.3d 975 (Pa. 2022) (*Povacz*), the Supreme Court of Pennsylvania (Supreme Court) concluded that Act 129 mandates the system wide installation of smart meter technology by EDCs. However, the ALJ continued, the Supreme Court stated that customers may file a complaint with the Commission raising a claim that installation of a smart meter at their address violates Section 1501 of the Code. I.D. at 7. As such, the ALJ found that the Complaint will not be dismissed on the ground of legal insufficiency because the Complainants raised health, privacy, safety, and property protection concerns (*i.e.*, an argument that installation of a smart meter at their home violates Section 1501 of the Code). I.D. at 7. The ALJ also noted that the Commission may direct an EDC to provide a customer with a reasonable accommodation if the customer meets their burden of proof as it relates to the installation of a smart meter at their home being in violation of Section 1501. I.D. at 7-8.

The ALJ then turned to *res judicata*, collateral estoppel, and Section 316 of the Code. The ALJ pointed out that the Complainants did not make mention of the 2016 Complaint in their Complaint or Answer to P.O. The ALJ continued that in its Answer and New Matter, Penn Power noted that: (1) in the 2016 Complaint, the Complainants sought to prevent smart meter installation at the same property under the same customer account that is the subject of the instant Complaint; and (2) the 2016 Complaint was dismissed by the Commission with prejudice. I.D. at 8. The ALJ also cited 52 Pa Code § 5.63(b) to note that the facts alleged in Penn Power’s Answer and New Matter are deemed admitted because the Complainants failed to timely file an answer to the Answer and New Matter. I.D. at 8 (citing 52 Pa. C.S. § 5.63(b)). The ALJ also noted that in its Answer and New Matter, Penn Power argued that because the Commission dismissed the 2016 Complaint with prejudice, the Complainants are barred from relitigating the same or related factual and legal issues, and therefore, the instant Complaint is barred, pursuant to the doctrines of *res judicata* and collateral estoppel, and 66 Pa. C.S. § 316. I.D. at 8.

The ALJ cited *O'Toole v. Bell Telephone Company of Pennsylvania*, 77 Pa. P.U.C. 98 (1992) (*O'Toole*), to explain that the doctrines of *res judicata* and collateral estoppel apply to preclude collateral attack of final orders rendered in proceedings brought before the Commission. The ALJ continued that *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. I.D. at 8-9 (citing *Hopewell Estates, Inc. v. Kent*, 646 A.2d 1192 (Pa. Super. 1994)). Further, the ALJ noted that four conditions must be met to apply the doctrine *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. I.D. at 9 (citing *Day*, 464 A.2d 1313, 1316; *O'Toole*).

The ALJ also explained that the doctrine of 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. The ALJ noted that 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. I.D. at 9 (citing *Day*, 464 A.2d at 1319). The ALJ continued that as a doctrine of issue preclusion, collateral estoppel seeks to prevent the re-litigation of a finally litigated issue in a subsequent proceeding between the same parties. I.D. at 9 (citing *Baker v. Pa. Human Relations Commission*, 462 A.2d 881 (Pa. Cmwlth. 1983)).

The ALJ also cited 66 Pa. C.S. § 316 to note that it is well-settled that a party is precluded from relitigating that which has been litigated and for which a final

Commission Order has been issued. I.D. at 9 (citing 66 Pa. C.S. § 316). The ALJ further noted that Section 316 precludes a collateral attack upon a Commission Order that has not been reversed upon appeal. I.D. at 9 (citing *Lehigh Valley Power Committee v. Pa. PUC*, 563 A.2d 548 (Pa. Cmwlth. 1989) (*Lehigh*)).

The ALJ reasoned that because Penn Power properly raised the affirmative defenses of *res judicata* and collateral estoppel in its Answer and New Matter, pursuant to 52 Pa. Code § 5.62(b), Penn Power's Preliminary Objection will be treated as a Motion for Judgment on the Pleadings filed, pursuant to 52 Pa. Code § 5.102. I.D. at 10 (citing 52 Pa. Code §§ 5.62(b), 5.102). The ALJ added that pursuant to 52 Pa. Code § 1.2(a), he will consider the issue of the previously litigated case, at Docket No. C-2016-2557487, in order to secure a just, speedy, and inexpensive determination of this proceeding. I.D. at 10 (citing 52 Pa. Code § 1.2(a)). Further, the ALJ referred to the Notice to Plead included in Penn Power's Answer and New Matter, which raised the aforementioned affirmative defenses, to note that the Complainants' substantive rights, pursuant to 52 Pa. Code § 1.2(c), will not be adversely affected because the Complainants had notice of the issues and an opportunity to respond. I.D. at 10.

The ALJ noted that the Commission will grant a Motion for Judgment on the Pleadings only if the pleadings show that there is no genuine issue as to a material fact and the moving party is entitled to a judgment as a matter of law. I.D. at 10 (citing 52 Pa. Code § 5.102(d)(1)). The ALJ continued that judgement on the pleadings should be granted only in a case where the moving party's right to prevail is so clear that a trial would be a fruitless exercise. I.D. at 10 (citing *Williams v. Lewis*, 466 A.2d 682 (Pa. Super. 1983); *Service Employees International Union, Local 69, AFL-CIO v. The Peoples Natural Gas Company, d/b/a/ Dominion Peoples*, Docket No. C-20028539 (Opinion and Order entered December 19, 2003)). The ALJ further noted that in ruling on a Motion for Judgment on the Pleadings, the tribunal must consider as true all well-pleaded averments of the party against whom the motion is directed and consider against

them only those facts that they specifically admit. The ALJ added that judgements on the pleadings should be entered only when the case is clear and free from doubt.

I.D. at 10-11 (citing *Reuben v. O'Brien*, 496 A.2d 913 (Pa. Super. 1985)).

The ALJ summarized that: (1) the instant Complaint concerns the same property under the same customer account that was the subject of the 2016 Complaint; (2) the Complainants in both complaints request to opt-out of Penn Power's installation of a smart meter at their property, arguing that the law does not require smart meter installation and that installation of a smart meter at their home would raise privacy, health, and safety concerns, resulting in unsafe and unreasonable service, pursuant to Section 1501 of the Code; and (3) an evidentiary hearing was held concerning the 2016 Complaint, where the Complainants presented testimony and argument about their claim pertaining to the smart meter mandate and opting out of the smart meter installation, their privacy allegations, and were afforded the opportunity to present testimony about their health and safety concerns. I.D. at 11. The ALJ further noted that following the hearing concerning the 2016 Complaint, the assigned ALJ issued the *2018 Hanley Initial Decision*, which dismissed the 2016 Complaint with prejudice, finding that the Complainants failed to satisfy their burden of proof. I.D. at 11 (citing *2018 Hanley Initial Decision*). The ALJ also noted that subsequently, the Commission entered the *2019 Hanley Order*, which denied the Complainants' request to reopen the 2016 Complaint proceedings and adopted the ALJ's decision, and the *2020 Hanley Order*, which further denied the Complainants' petition for rehearing or reconsideration of the 2016 Complaint. I.D. at 11 (citing *2020 Hanley Order*; *2019 Hanley Order*).

The ALJ found that all four conditions of *res judicata* have been met. Specifically, the ALJ reasoned that: (1) the issues are identical - both the 2016 Complaint and the instant Complaint pertain to the installation of a smart meter at the Complainants' home; (2) the causes of action are identical – in both the 2016 Complaint and the instant Complaint, the Complainants wish to opt-out of smart meter installation,

arguing that Act 129 does not mandate smart meter installation and that installation of a smart meter would violate Section 1501 of the Code; (3) the persons and parties to the action are identical – both the 2016 Complaint and the instant Complaint involve the Hanleys as the Complainants, and Penn Power as the Respondent; and (4) the quality and capacity of the parties suing or sued are also identical – as the parties are the same in both the 2016 Complaint and the instant Complaint, the quality and capacity of the parties suing or sued are identical. I.D. at 11-12.

The ALJ also found that all four conditions required for a finding of collateral estoppel have also been met. Specifically, the ALJ reasoned that: (1) the issue decided in the prior adjudication is identical with the one presented in the later action – both the 2016 Complaint and the instant Complaint pertain to the installation of a smart meter at the Complainants’ home; (2) there was a final judgment on the merits – the Commission entered an Opinion and Order dismissing the 2016 Complaint with prejudice; (3) the party against whom the plea is asserted was a party or in privity with the party to the prior adjudication – both the 2016 Complaint and the instant Complaint involve the Hanleys as Complainants; 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 – the Complainants participated in an evidentiary hearing in the 2016 Complaint matter, where they had the opportunity to present their case. I.D. at 12.

The ALJ also found that the Complainants’ instant Complaint is also barred, pursuant to 66 Pa.C.S. § 316, because it raises the same issues before the Commission a second time. Further, the ALJ found that the Commission’s Opinion and Order dismissing the 2016 Complaint with prejudice remains conclusive upon all parties to that proceeding, which includes the Hanleys and Penn Power. I.D. at 12.

The ALJ concluded that the Complainants are barred from bringing the instant Complaint by virtue of the Commission’s final action at Docket No.

C-2016-2557487. As such, the ALJ granted Penn Power's Preliminary Objection, treated as a Motion for Judgment on the Pleadings. The ALJ noted that the Commission is granted discretion to dismiss any complaint without a hearing if, in its opinion, a hearing is not necessary in the public interest. I.D. at 12 (citing 66 Pa. C.S. § 703(b), 52 Pa. Code § 5.21(d)). The ALJ continued that a hearing is necessary only to resolve disputed questions of fact, but when the question presented is one of law, the Commission need not hold a hearing. I.D. at 12 (citing *Lehigh; Edan Transportation Corp. v. Pa. PUC*, 623 A.2d 6 (Pa. Cmwlth 1993)).

C. Exceptions⁹

In their Exceptions, the Hanleys repeat several of the same arguments put forth in their Complaint, including, *inter alia*, that they never requested a smart meter, they never agreed to participate in the smart meter program, PURPA and Act 129 do not require participation in the smart meter program, and a utility company must offer the customer the option to participate in the advanced meter program. The Complainants also dispute the outcome of the proceeding for the 2016 Complaint. Exc. at 2-17.

⁹ We acknowledge that the format of the Complainants' Exceptions does not strictly comply with Section 5.533(b) of our Regulations, 52 Pa. Code § 5.533(b), which requires that exceptions be numbered, identify the finding of fact and conclusions of law to which exceptions is taken, and cite to the relevant pages of the Initial Decision. Nevertheless, particularly because the Complainants are appearing *pro se*, we will exercise our discretion to accept the Exceptions as filed, pursuant to Section 1.2(a) and (d) of our Regulations, 52 Pa. Code § 1.2(a) and (d), to secure a just, speedy, and inexpensive determination.

Attached to the Exceptions are several pages from the Complainants' Brief, which was submitted in the proceeding for the 2016 Complaint.¹⁰ Exc. at 18-36.

D. Replies to Exceptions

In its Replies to Exceptions, Penn Power avers that the Complainants' Exceptions neither contemplate nor address the basis for the dismissal of the Complaint with prejudice. Specifically, Penn Power highlights that the Complainants do not: (1) address or dispute that the Complaint is barred by collateral estoppel; and (2) contend that the ALJ mistakenly applied 66 Pa. C.S. § 316 to the instant Complaint. As such, Penn Power submits that the Complainants' Exceptions should not be considered because the Complainants failed to take Exception to the ultimate grounds for dismissal of the Complaint. Penn Power continues that if the Exceptions are considered, then the Exceptions are meritless. R. Exc. at 2-3.

Penn Power cites Section 316 of the Code, 66 Pa. C.S. § 316, to repeat its argument that the instant Complaint is barred by the Orders in the proceeding for the 2016 Complaint. Specifically, Penn Power argues that under 66 Pa. C.S. § 316, a complainant is prohibited from raising issues that were previously decided. R. Exc. at 3-4 (citing 66 Pa. C.S. § 316; *Moore, Jr. v. PECO Energy Company*, Docket No. C-2012-2309932 (Opinion and Order entered October 24, 2012); *Denlinger v. PPL Electric Utilities Corp.*, Docket No. C-2019-3014786 (Initial Decision issued February 24, 2020), *adopted without modification* (Opinion and Order entered

¹⁰ Additionally, we note that the document attached to the end of the Exceptions appears to be from the proceeding for *Lamagna v. Pennsylvania Electric Co.*, Docket No. C-2017-2608014 (Opinion and Order entered December 19, 2019). *See*, Exc. at 37-40. We are unable to determine any relevance of this document to the instant proceeding or the proceeding for the 2016 Complaint. To the extent the Complainants' Exceptions include matters deemed to be immaterial, impertinent, and otherwise irrelevant to the disposition of this matter, they are stricken from our consideration of the Exceptions, pursuant to 52 Pa. Code § 1.4(e).

May 21, 2020); 66 Pa. C.S. § 316). Further, Penn Power argues that Section 316 precludes a collateral attack upon a Commission Order which has not been reversed upon appeal. R. Exc. at 4 (citing *Lehigh*; 66 Pa. C.S. § 316). Moreover, Penn Power argues that the 2016 Complaint rejecting the Complainants' arguments relating to the Company's installation of a smart meter at the service address has not been set aside, annulled, or otherwise overturned. R. Exc. at 4 (citing *2018 Hanley Initial Decision*; *2019 Hanley Order*; *2020 Hanley Order*). Furthermore, Penn Power posits that the ALJ correctly held that the Complainants' claims in the instant Complaint are barred by Section 316 of the Code. R. Exc. at 4 (citing I.D. at 12; 66 Pa. C.S. § 316). Additionally, Penn Power notes that the Complainants do not take issue with this holding and, to the extent that the Complainants' Exceptions are considered to take issue with the ALJ's finding regarding 66 Pa. C.S. § 316, such arguments are meritless and should be rejected. R. Exc. at 4 (66 Pa. C.S. § 316).

Penn Power also contends that the Complainants do not dispute that the Complaint is barred by the doctrine of *res judicata* (*i.e.*, a ground on which the Complaint was dismissed), given that the Complainants' claims related to the Company's planned installation of a smart meter at the service address were, or could have been, raised and ruled on in the 2016 Complaint. R. Exc. at 5. Penn Power continues that *res judicata*, or claim preclusion: (1) prevents a future suit between the same parties on the same cause of action after a final judgment is entered on the merits of the action; (2) prohibits parties involved in a prior litigation from asserting claims in a later action that were, or could have been raised, in the prior adjudication; and (3) protects parties from re-litigating claims with the same parties, or parties in privity with the original litigant, and serves to protect the courts from inefficiency and confusion that re-litigation fosters. R. Exc. at 5 (citing *PMA Insurance Group v. Workmen's Compensation Appeal Board (Kelley)*, 665 A.2d 538 (Pa. Cmwlth. 1995), *appeal denied*, 1996 Pa. LEXIS 619 (Pa. 1999); *Hillgartner v. Port Auth.*, 936 A.2d 131, 141(Pa. Cmwlth. 2007)). Further, Penn Power notes that for the doctrine of *res judicata* to apply, a party must demonstrate the identity

of: (1) issues; (2) causes of action; (3) persons and parties to the action; and (4) the quality or capacity of the parties suing or being sued. R. Exc. at 5 (citing *Day v. Volkswagenwerk Aktiengesellschaft*, 464 A.2d 1313, 1316-17 (Pa. Super. 1983)). Moreover, Penn Power agrees with the ALJ that the instant Complaint is barred by *res judicata* because, in both the 2016 Complaint and the instant Complaint: (1) the issues relate to the Company's planned installation of a smart meter at the service address; (2) the cause of action is a formal complaint involving the Company's planned installation of a smart meter at the service address; (3) the parties are the same (*i.e.*, the Hanleys and the Company) and, therefore, have identical quality or capacity. I.D. at 5-6. Accordingly, Penn Power asserts that the ALJ correctly walked through a *res judicata* analysis and, therefore, the instant Complaint should be dismissed on *res judicata* grounds. R. Exc. at 6 (citing I.D. at 11-12).

Penn Power also repeats its argument that the Complaint is barred by the doctrine of collateral estoppel, or issue preclusion, which prevents re-litigation of an issue of fact or law between the same parties upon a different claim or demand. R. Exc. at 6 (citing *Fiore v. Commonwealth*, 508 A.2d 371, 374 (Pa. Cmwlth. 1986)). Penn Power continues that the doctrine of collateral estoppel applies where: (1) “[a]n issue decided in a prior action is identical to the one presented in a later action;” (2) “[t]he prior action resulted in a final judgment on the merits;” and (3) the party against whom collateral estoppel is asserted: (a) was a party to the prior action, or is in privity with a party to the prior action; and (b) had a full and fair opportunity to litigate the issue in the prior action. R. Exc. at 6-7 (citing *Rue v. K-Mart Corporation*, 713 A.2d 82, 84 (Pa. 1998)). Further, Penn Power argues that the instant Complaint is barred by collateral estoppel because: (1) in both the 2016 Complaint and the instant Complaint, the issues are about the Company's planned installation of a smart meter at the service address; (2) the 2016 Complaint was adjudicated on the merits; (3) the parties in both the 2016 Complaint and the instant Complaint are the same (*i.e.*, the Hanleys and the Company); and (4) in the previous action, the Complainants had a full and fair opportunity to raise claims and

litigate issues regarding the Company's planned installation of a smart meter at the service address. R. Exc. at 7. Accordingly, Penn Power asserts that the ALJ correctly walked through a collateral estoppel analysis and, to the extent that the Complainants take issue with the ALJ's findings related to collateral estoppel, the ALJ clearly and correctly applied the concept of collateral estoppel barring the instant Complaint. Therefore, Penn Power submits that given that the fully litigated 2016 Complaint involved the same issue(s), the same Parties, and the same service address, the ALJ's findings and dismissal of the Complaint on collateral estoppel grounds should be adopted without modification. R. Exc. at 7-8.

Penn Power also counters that contrary to the Complainants' assertions, the Commission cannot grant the Complainants' requested relief because the Company's customers are not permitted to opt-out of or rescind smart meter installation. R. Exc. at 8 (citing Exc. at 5-16). Penn Power avers that the Company is legally required to install the smart meters by Code, the Commission's Orders, and the Company's Commission-approved Smart Meter Deployment Plan. R. Exc. at 8-9 (citing *Smart Meter Implementation Order; Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company, and Pennsylvania Power Company for Approval of Smart Meter Technology Procurement and Installation Plan*, Docket No. M-2009-2123950 (Opinion and Order June 9, 2010); *2014 Smart Meter Order*; 66 Pa.C.S. § 2807(f)). Further, Penn Power refers to *Povacz, et al. v. Pa. PUC*, 280 A.3d 975, 1012-1014 (Pa. 2022) (*Povacz II*) to note that the Supreme Court issued its Opinion affirming in part and reversing in part the Commonwealth Court's decision in *Povacz v. Pa. PUC* (241 A.3d 481) (*Povacz I*). R. Exc. at 9-10 (citing *Povacz I*; *Povacz II*). Specifically, Penn Power notes that, in *Povacz II*, the Supreme Court held that: (1) Act 129 mandates the systemwide installation of smart meters; (2) the Commission applied the correct burden of proof standard in the smart meter complaint cases arising under Section 1501 of the Code; (3) an EDC cannot be required to provide an accommodation to a customer absent a Section 1501 violation; and (4) even if a smart meter complainant meets their

burden of proof, the complainant is only “entitled to an accommodation to the extent allowed by Act 129 and a utility’s tariff.” R. Exc. at 10 (citing *Povacz II*). Moreover, Penn Power argues that the Complainants’ Exceptions do not consider the Supreme Court’s holding in *Povacz II*, adding that the Complainants’ reliance on their reading of Act 129 is meritless. R. Exc. at 10 (citing Exc. at 5-16; *Povacz II* at 998).

Additionally, Penn Power argues that even if the Complainants were to prove a Section 1501 violation, which they did not do in the proceeding for the 2016 Complaint, they would only be entitled to “an accommodation to the extent allowed by Act 129 and a utility’s tariff.” R. Exc. at 10 (citing *Povacz II* at 1014). Penn Power continues that the only accommodation permitted under the Company’s Commission-approved tariff is the option of installing the smart meter at a different location at the customer’s expense. Therefore, Penn Power asserts that the Complainants’ Exception related to the mandatory installation of smart meters should be denied and the Initial Decision should be adopted without modification. R. Exc. at 10-11.

E. Disposition

At the outset, we note that any argument or Exception that we do not specifically delineate shall be deemed to have been duly considered and denied without further discussion. The Commission is not required to consider, expressly or at length, each contention or argument raised by the parties. *Consolidated Rail Corp. v. Pa. PUC*, 625 A.2d 741 (Pa. Cmwlth. 1993); *see also, generally, University of Pennsylvania v. Pa. PUC*, 485 A.2d 1217 (Pa. Cmwlth. 1984).

In this case, the ALJ concluded the Complainants are barred from bringing this Complaint by virtue of the Commission’s final action at Docket No. C-2016-2557487, a prior Complaint between the same parties, raising the identical issues which were finally decided against the Complainants, and dismissed with prejudice.

I.D. at 12. On that basis, the ALJ concluded that the Respondent's Preliminary Objections, treated as a Motion for Judgment on the Pleadings, should be granted and the Complaint should be dismissed. *Id.*

On Exception, the Complainants do not challenge the ALJ's basis for granting the Company's Preliminary Objections, treated as a Motion for Judgment on the Pleadings and dismissing the Complaint. Rather the Complainants reiterate the substantive arguments raised in the Complaint. Exc. at 3-16. To the extent that the Complainants' Exceptions may be construed to challenge the ALJ's finding that the Complaint is barred by Section 316 of the Code, we find the Complainants' arguments to be without merit and, therefore we shall deny Complainant's Exceptions.

We agree with Penn Power that the instant Complaint is barred by the Orders in the proceeding for the 2016 Complaint. Specifically, under Section 316 of the Code, a complainant is prohibited from raising issues that were previously decided. 66 Pa. C.S. § 316; *Moore, Jr. v. PECO Energy Company*, Docket No. C-2012-2309932 (Opinion and Order entered October 24, 2012); *Denlinger v. PPL Electric Utilities Corp.*, Docket No. C-2019-3014786 (Initial Decision issued February 24, 2020), *adopted without modification* (Opinion and Order entered May 21, 2020); 66 Pa. C.S. § 316).

Further, we agree that Section 316 of the Code precludes a collateral attack upon a Commission Order which has not been reversed upon appeal. 66 Pa. C.S. § 316. We expressly adopt the ALJs analysis of requisite elements of *res judicata* and collateral estoppel, and thorough examination of the identity of the parties and issues raised in the present Complaint and the 2016 Complaint, finding:

All four conditions required for a finding of *res judicata* have been met: 1) the issues are identical (both complaints pertain to the installation of a smart meter at Complainants' home); 2) the causes of action are identical (complainants in both

complaints wish to opt-out of smart meter installation, arguing that Act 129 does not mandate smart meter installation and that installation of a smart meter would violate Section 1501 of the Code); 3) the persons and parties to the action are identical (both complaints involve Orpheus and Kimberly Hanely as Complainants and the Pennsylvania Power Company as Respondent); and 4) the quality and capacity of the parties suing or sued are also identical (as the parties are the same in both complaints, the quality and capacity of the parties suing or sued are identical).

Additionally, all four conditions required for a finding of collateral estoppel have also been met: 1) the issue decided in the prior adjudication is identical with the one presented in the later action (both complaints pertain to the installation of a smart meter at Complainants' home); 2) there was a final judgment on the merits (the Commission entered an Opinion and Order dismissing the 2016 complaint with prejudice); 3) the party against whom the plea is asserted was a party or in privity with the party to the prior adjudication (both complaints involve Orpheus and Kimberly Hanely as Complainants); 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 (the Complainants participated in an evidentiary hearing in the 2016 complaint matter where they had the opportunity to present their case).

I.D. at 11-12.

Moreover, as Penn Power argued, the 2016 Complaint rejecting the Complainants' arguments relating to the Company's installation of a smart meter at the service address has not been set aside, annulled, or otherwise overturned. *See, 2018 Hanley Initial Decision; 2019 Hanley Order; 2020 Hanley Order.* We find that the ALJ correctly held that the Complainants' claims in the instant Complaint are barred by Section 316 of the Code. I.D. at 12 (citing 66 Pa. C.S. § 316).

We find that the ALJ properly applied the provision of Section 316 of the Code and the doctrines of *res judicata* and collateral estoppel as a bar to the present Complaint and to preclude a hearing on the Complaint. We note that the Commission is granted discretion to dismiss any complaint without a hearing if, in its opinion, a hearing is not necessary in the public interest. 66 Pa.C.S. § 703(b), 52 Pa. Code § 5.21(d). A hearing is necessary only to resolve disputed questions of fact, and when the question presented is one of law, the Commission need not hold a hearing. *Lehigh; Edan Transp. Corp. v. Pa. PUC*, 623 A.2d 6 (Pa. Cmwlth 1993). Because the Complaint was properly precluded under Section 316 of the Code, no hearing was necessary as a matter of law.

Accordingly, for all the forgoing reasons, we shall adopt the ALJ's Initial Decision, and dismiss the instant Complaint.

IV. Conclusion

Based upon our review of the record and the applicable law, we shall deny the Complainant's Exceptions and adopt the Initial Decision, consistent with this Opinion and Order; **THEREFORE,**

IT IS ORDERED:

1. That the Exceptions filed by Orpheus and Kimberly Hanley on February 27, 2024, at Docket No. C-2023-3041147, are denied, consistent with this Opinion and Order.

2. That the Initial Decision of Administrative Law Judge Alphonso Arnold III, issued on February 7, 2024, at Docket No. C-2023-3041147, is adopted, consistent with this Opinion and Order.

3. That the Formal Complaint filed on June 5, 2023, by Orpheus and Kimberly Hanley against Pennsylvania Power Company, at Docket No. C-2023-3041147, is denied.

4. That this proceeding at Docket No. C-2023-3041147 be marked closed.

BY THE COMMISSION,

A handwritten signature in black ink, appearing to read "Rosemary Chiavetta". The signature is fluid and cursive, with the first letter of each word being capitalized and prominent.

Rosemary Chiavetta
Secretary

(SEAL)

ORDER ADOPTED: May 9, 2024

ORDER ENTERED: May 9, 2024