

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Jeannette Pavlick and Craig Pavlick	:	
	:	
v.	:	C-2018-3002723
	:	
West Penn Power Company	:	

INITIAL DECISION

Before
Mary D. Long
Administrative Law Judge

INTRODUCTION

Complainants filed a Formal Complaint against Respondent objecting to the installation of a smart meter at their residence. This decision dismisses the Formal Complaint due to Complainants' failure to meet the burden of proof.

HISTORY OF THE PROCEEDINGS

Jeannette Pavlick and Craig Pavlick (Complainants) filed a Formal Complaint dated June 13, 2018, against West Penn Power Company (Respondent) alleging that Respondent threatened to shut off their electric service or shut off their service. Complainants objected to the installation of a smart meter at their home, expressing concern that the radiation from smart meters may put their family at risk for cancer. Complainants further alleged that they should be

permitted to opt-out of Respondent's smart meter program and that they should be permitted to keep their analog meter.¹

On July 5, 2018, Respondent filed an Answer and New Matter to the Complaint. Respondent admits that it provides residential retail electric service to Complainants. Respondent denied that it previously issued a service termination notice to Complainants. Respondent further averred that Complainants have refused to allow Respondent access to install a smart meter which constitutes legal grounds to terminate electric service. Respondent denied the remaining material allegations set forth in the Complaint. Respondent further averred it is required by Act 129 of 2008² (Act 129), to install a smart meter.

Respondent also filed preliminary objections. On August 7, 2018, the Commission assigned the matter to Administrative Law Judge Jeffrey A. Watson. On August 29, 2018, Judge Watson issued an Interim Order which denied the Respondent's Preliminary Objections.

Over the ensuing 27 months, Judge Watson issued numerous orders on discovery and scheduling motions. He also conducted a prehearing conference on June 25, 2019. The reader is directed to several of these orders which set forth the specific prehearing proceedings in this matter which culminated in a one-day hearing by telephone on September 29, 2020.

The Complainants appeared at the September 29, 2020, hearing representing themselves. Both Mr. Pavlick and Mrs. Pavlick offered their own testimony in support of their complaint. Judge Watson took official notice of a portion of the legislative history of Act 129, part of which the Complainants had labelled as Ex. 1-A.³ The Respondent appeared and was represented by Tori Geisler, Esquire and Lauren Lepkoski, Esquire. The Respondent offered the

¹ The Complainants amended their Formal Complaint on February 13, 2020, to remove their allegations regarding the health risks posed by radiation from smart meters stating that "health questions are no longer relevant." Respondent filed an Answer on March 16, 2020.

² 66 Pa.C.S. §§ 2806.1–2807.

³ Legislative Journal dated October 8, 2008.

testimony of John Ahr. The Respondent offered four exhibits which were admitted into the record as JCA-1 through JCA-4. Judge Watson also took official notice of four items offered by the Respondent and labelled as PD-1,⁴ PD-2,⁵ PD-3,⁶ PD-4⁷ and PD-5.⁸

The transcript and exhibits were filed on November 2, 2020.

Before the record was closed, the Commission issued a general stay of smart meter proceedings on November 4, 2020, in view of the litigation in the appellate courts related to smart meters. Following the Pennsylvania Supreme Court's decision in *Povacz v. Pennsylvania Public Utility Commission*,⁹ the Commission lifted the general stay of smart meter proceedings on November 14, 2023, and directed the Office of Administrative Law Judge to proceed with pending formal complaint proceedings as directed by the presiding administrative law judge.

By notice dated November 17, 2023, the Office of Administrative Law Judge reassigned this matter to me.

Given the passage of time and the clarification of the law, I directed the Complainants to file a brief on or before February 7, 2024, and the Respondent to file a reply brief by March 7, 2024. Both Parties filed timely briefs, and I closed the record by order entered on March 8, 2024. This matter is now ripe for decision.

⁴ Chapter 28 of Title 66 of the Public Utility Code.

⁵ *Smart Meter Procurement and Installation*, Docket No. M-2009-2092655 (Implementation Order entered June 24, 2009).

⁶ *Petition of West Penn Power Company d/b/a Allegheny Power for Expedited Approval of its Smart Meter Technology Procurement and Installation Plan*, Docket No. M-2009-2123951 (Order entered June 30, 2011).

⁷ *Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company for Approval of Their Smart Meter Deployment Plan*, Docket No. M-2013-2341990 (Opinion and Order entered June 25, 2014).

⁸ *Smart Meter Customer Policy for Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company*, Docket No. M-2013-2341990 (Secretarial Letter dated May 1, 2015).

⁹ 280 A.3d 975 (Pa. 2022) (*Povacz*).

FINDINGS OF FACT

1. The Complainants, Jeanette and Craig Pavlick, reside at 4200 Colonial Drive, Murrysville, Pennsylvania.
2. Respondent, West Penn Power, is a jurisdictional public utility.
3. The Commission approved the Respondent's Smart Meter Technology Procurement and Installation Plan on June 9, 2011. Tr. 201-202; *Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company Approval of Smart Meter Technology Procurement and Installation Plan*, Docket No. M-2009-2123950 (Opinion and Order entered June 9, 2010).
4. The Commission approved Respondent's Revised Smart Meter Deployment Plan on June 25, 2014. *Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company for Approval of Their Smart Meter Deployment Plan*, Docket No. M-2013-2341990 (Opinion and Order entered June 25, 2014).
5. The Respondent's smart meters comply with all applicable requirements and standards for smart meters adopted by the Federal Communications Commission and the American National Standards Institute Tests. Tr. 218.
6. The Respondent's AMI meter can only access a customer's usage increases and decreases; it can not determine the cause of usage increases or decreases. Tr. 213-14.
7. The Commission approved the Respondent's Smart Meter Privacy Policy on May 1, 2015. *Smart Meter Customer Policy for Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company*, Docket M-2013-2341990 (Secretarial Letter dated May 1, 2015).

DISCUSSION

Complainants contend that Respondent is in violation of the law by requiring them to accept the installation of a smart meter on their property. Section 701 of the Public Utility Code (Code) provides that any person may complain, in writing, about anything done or not done by a public utility which violates any laws which the Commission has the authority to administer, or any regulation or order of the Commission.¹⁰ A person who wants the Commission to do something to resolve their complaint has the burden of proof.¹¹

In this matter, Complainants are the party asking for relief from the Commission; therefore, they have the burden of proof. This means, that Complainants must present facts which support their claims and prove facts that show that Respondent violated the Public Utility Code, a regulation or Commission order by a preponderance of the evidence.¹² The term “preponderance of the evidence” means one party must present evidence which is more convincing, by even the smallest amount, than the evidence presented by the other party.¹³ This means that the Complainants must prove facts by a preponderance of the evidence, which show that Respondent violated the Public Utility Code or Commission regulations.

The Complainants’ argument rests largely on their position that they should be permitted to retain their analog meter. However, the position that they should be permitted to opt-out of the installation of a smart meter has been definitively resolved by the Pennsylvania Supreme Court. The Supreme Court, in *Povacz*,¹⁴ concluded that Act 129¹⁵ mandates smart meter deployment and requires the system-wide installation of smart meter technology by

¹⁰ 66 Pa.C.S. § 701.

¹¹ 66 Pa.C.S. § 332(a).

¹² *Popowsky v. Pa. Pub. Util. Comm’n*, 937 A.2d 1040 (Pa. 2007) (*Popowsky*); *Se-Ling Hosiery v. Margulies*, 70 A.2d 854 (Pa. 1950).

¹³ *Popowsky*.

¹⁴ *Povacz v. Pa. Pub. Util. Comm’n*, 280 A.3d 975 (Pa. 2022).

¹⁵ Act 129 of 2008 codified at 66 Pa.C.S. § 2807(f).

electric distribution companies (EDCs), such as Respondent.¹⁶ Specifically, the court found that Section 2807(f)(1), when read in conjunction with Section 2807(f)(2), provides instructions for furnishing smart meters to all customers. In short, the Supreme Court found that under Act 129, customers have no right to refuse smart meter installation.¹⁷ Accordingly, the Supreme Court affirmed the Commission's interpretation that Act 129 mandates universal smart meter installation.¹⁸ Therefore, Complainants' claim that the law does not require Respondent to install a smart meter at the property is dismissed.

In their brief, the Complainants' challenge this ruling on a variety of grounds, including a variety of arguments that mandating smart meters violates the state and federal constitutions. The interpretation of Act 129 by the Pennsylvania Supreme Court is binding upon the Commission. Moreover, the Commission has limited jurisdiction conferred upon it by the General Assembly¹⁹ and does not have the authority to declare Act 129 unconstitutional.²⁰

The Complainants also argue that smart meters are unsafe and therefore violate Section 1501 of the Public Utility Code. Section 1501 of the Public Utility Code requires that all utilities must furnish and maintain adequate, efficient, safe, and reasonable service and facilities, and must make such repairs, changes, alterations, substitutions, and improvements in or to such service and facilities as shall be necessary or proper for the accommodation, convenience and safety of its patrons and the public.²¹

The Complainants did not offer any admissible evidence to support the allegation that smart meters are unsafe. Indeed, they amended their complaint to remove their claim that smart meters posed a health risk to them. In contrast, the Respondent's witness testified that smart meters are safe and comply with all applicable requirements and standards for smart

¹⁶ *Povacz*, at 992.

¹⁷ *Id.* at 997.

¹⁸ *Id.*

¹⁹ *City of Pittsburgh v. Pa. Pub. Util. Comm'n*, 43 A.2d 348 (Pa. Super. 1945).

²⁰ *Hribal v. West Penn Power Co.*, Docket No. C-2019-3008050 (Final Order entered Dec. 16, 2023).

²¹ 66 Pa.C.S. § 1501.

meters adopted by the Federal Communications Commission and the American National Standards Institute Tests. Therefore, this claim will be dismissed.

The Complainants next contend that the Respondent violated 52 Pa. Code § 57.259, because the information provided by the company was incomplete.²² That regulation provides:

57.259. Customer education on advanced metering.

(a) EDC shall provide an initial summary statement to its customers which describes the availability and general uses of advanced metering. The initial summary statement may be distributed as part of a regularly scheduled customer electric usage bill or other regularly scheduled customer communications as applicable.

(b) The EGS shall ensure that a customer is informed as to the capabilities, advantages, and disadvantages of a qualified advanced meter prior to installation or participation in a generation service program utilizing advanced metering. An EGS shall provide to the customer a terms of service disclosure statement that addresses advanced metering.

(c) An EDC shall provide, as part of the customer education program, information addressing the use of an advanced meter, basic meter operations and capabilities, advantages, and disadvantages of advanced metering, including qualified advanced meter options, applicable costs/surcharges and methods to obtain additional information.

(d) The informational and promotional materials are required to:

(1) Comply with applicable requirements of the act and existing truth-in advertising requirements.

(2) Prominently disclose that additional information is available from either the local EDC, the customer's EGS or the Commission.

²² Respondent contends that this issue is raised for the first time in Complainants' brief and that I should consider the argument waived. However, the Complainants did address the issue of incomplete information and cited Section 57.259 in the hearing. *See* Tr. 166-67.

(3) State that the available advanced meters are qualified to meet current Commission performance and technical standards.^[23]

The Complainants specifically contend that Respondent did not provide them with information regarding the short life-expectancy of meters, the risk of fire, risk of surge damage to appliances, or costs associated with the smart meter that would be passed onto consumers. The Complainants do not say that they did not receive any educational literature at all. The Complainants reference “scant promotional literature,” but did not produce samples of the literature at the hearing that Respondent provided to support their claim that the literature was incomplete or deceptive.²⁴ The implication of their testimony and argument in their brief suggest that they did receive *some* information, but they allege that the information was incomplete or deceptive. Accordingly, the Complainants have the burden of proving this allegation by producing the materials that they allege were incomplete or deceptive in order to prove that the Respondent violated the Commission’s regulation. By failing to do more than make a bald statement that the materials that they received violated the regulation, the Complainants have not sustained their burden of proof and this claim will be dismissed as well.

Citing the U.S. Supreme Court decision in *Haines v. Kerner*,²⁵ the Complainants assert that they have been treated unfairly in the hearing process because they “are not a professional law firm, where they have specialized education, experience, significant staff, and resources.” They state that they “do not have any staff or means to carry out multiple, comprehensive, detailed tasks concurrently in a rapid manner, as has been required of us.”²⁶

In *Haines*, the U.S. Supreme Court held that self-represented litigants should be afforded some leeway in court proceedings. The case involved the dismissal of a complaint by a prisoner who sought damages from prison officials allegedly resulting from his solitary

²³ 52 Pa. Code § 57.259.

²⁴ Complainants’ Brief at ¶¶ 44.

²⁵ 404 U.S. 519 (1972) (*Haines*).

²⁶ Complainants’ Brief at ¶ 5

confinement. The Court reversed the dismissal of the prisoner complaint, noting that pleadings by self-represented litigants should be held to “less stringent standards than formal pleadings drafted by lawyers.”²⁷

However, in a later decision, the U.S. Supreme Court also held that the leeway granted to self-represented litigants is not without limits. In *McNeil v. United States*,²⁸ the Court reviewed the dismissal of a complaint by a prisoner which challenged prison conditions. Noting that pleadings by prisoners should be liberally construed, and that some procedural rules “must give way,” the Court explained that “we have never suggested that procedural rules in ordinary civil litigation should be interpreted so as to excuse mistakes by those who proceed without counsel. As we have noted before, ‘in the long run, experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law.’”²⁹

The principle that self-represented litigants should be provided with some leeway is well-established in Pennsylvania practice. Although the Pennsylvania Code of Judicial Conduct does not apply to administrative law judges, the Comment to Rule 2.2 (Impartiality and Fairness) notes that “reasonable accommodations” for self-represented litigants does not necessarily violate the requirement that a judge be fair and impartial to all participants in proceedings.

Commission practice echoes these principles. Section 1.2 of the Commission’s regulations permit an administrative law judge to waive procedural requirements, especially in matters involving self-represented litigants.³⁰

²⁷ *Haines* at 520.

²⁸ 508 U.S. 106 (1993).

²⁹ *Id.* at 112 (quoting *Mohasco Corp. v. Sliver*, 447 U.S. 807 (1980)).

³⁰ *See* 52 Pa. Code § 1.2(c), (d).

However, an administrative law judge must be fair and impartial to all parties. Any reasonable accommodations extended to one party without legal training cannot be at the expense of the party that is represented. Commission proceedings must be fair to *both* parties. Thus, an ALJ may provide enhanced explanations of the procedural and evidentiary requirements for proceedings, liberally construe pleadings, and permit narrative testimony for the benefit of the self-represented. But an ALJ may not accommodate unreasonable demands for assistance to a self-represented party to such a degree that it affects the substantive rights of the utility³¹ or create an unfair advantage to complainants. This means that self-represented complainants must meet procedural deadlines, answer appropriate discovery requests, and comply with the orders of the ALJ.

Here, the Complainants had over two years to develop their case. A review of the orders in this matter reveals that Judge Watson issued numerous orders that attempted to explain the procedure of the litigation, accommodate the Complainants, and attempt to secure their compliance with his orders. At least three orders directed the Complainants to serve full and complete answers to the Respondent's discovery, rather than sanctioning the Complainants for failing to comply with discovery rules and the orders of the administrative law judge.³² Judge Watson granted the Complainants' request for continuances for the prehearing conference³³ and extended the date of the hearing several times to accommodate the Complainants' schedule.³⁴

Further, Judge Watson convened a prehearing conference and spent an extensive amount of time attempting to explain evidentiary requirements, how to present evidence, discovery requirements and hearing procedures.³⁵ On March 6, 2020, Judge Watson issued a

³¹ 52 Pa. Code § 1.2(c) (the presiding officer may waive procedural requirements "if the waiver does not adversely affect a substantive right of a party.")

³² See Interim Orders entered November 28, 2019, October 1, 2019, January 4, 2020. By interim order entered February 3, 2020, Judge Watson held the Respondent's motion to dismiss for failure to comply with the motions to compel in abeyance and provided the Complainants' an additional opportunity to serve full and complete answers to discovery.

³³ Interim Order entered May 29, 2019.

³⁴ E.g., Interim Order entered March 16, 2020.

³⁵ E.g., Tr. 15-32.

detailed order scheduling a hearing for March 24, 2020, and setting forth detailed instructions regarding the requirements and procedure that would be employed for that proceeding. Judge Watson continued the March 2020 hearing twice at the request of the Complainants.

Reviewing the transcript for the Prehearing Conference and the Evidentiary Hearing also reveals that the Complainants were granted significant leeway in recognition of their lack of legal representation. They were permitted to ask procedural questions, offer explanations for their failure to comply with discovery orders and present their evidence to support their complaint. In response to objections by the Respondent, it is true that Judge Watson declined to admit much of the material that the Complainants wanted to introduce into the evidentiary record. As explained above, Judge Watson was required to be fair to both the Complainant and the Respondent. He was not obliged to admit inadmissible evidence into the hearing record as an accommodation to the Complainants.³⁶

In sum, there is no question that judges, particularly in administrative hearings, should make allowances for individuals who are representing themselves in Commission proceedings. However, there are limits. Both consumers and utilities have due process rights in Commission proceedings. Presiding ALJs are the stewards of these rights and must protect them by conducting fair hearings impartially. As the Commonwealth Court has observed many times, “any layperson choosing to represent himself in a legal proceeding must, to some reasonable extent, assume the risk that his lack of expertise and legal training will prove his undoing.”³⁷

³⁶ The Complainants claim that Judge Watson would not allow breaks during the hearing. However, reviewing the transcript, Judge Watson permitted Mrs. Pavlick to take a break in the middle of her direct testimony. Tr. 170. Judge Watson also recessed hearing on three additional occasions. Tr. 183, 245, 258. It appears that the length of the hearing was due, at least in part, to the lack of preparation on the part of the Complainants, as evidenced by the lengthy pauses between questions and inability to locate their paperwork. *See e.g.*, Tr. 250-56.

³⁷ *Arena Beverage Corp. v. Pa. Liquor Control Bd.*, 97 A.3d 444, 452 (Pa. Cmwlth. 2014) (quoting *Vann v. Unemployment Comp. Bd. of Rev.*, 494 A.2d 1081, 1086 (Pa. 1985)). *See also Borough of Chapman v. Charles*, 288 A.3d 138 (Pa. Cmwlth. 2022) (although pleadings by self-represented litigants will be construed liberally, self-represented litigants are not entitled to special privileges and must follow the rules regarding appellate briefs); *Smithson v. Columbia Gas of PA/NiSource*, 264 A.3d 755 (Pa. Super. 2021), reargument dismissed (Aug. 27, 2021) (although the court will construe materials filed by self-represented litigants liberally, the court cannot act as a litigant’s counsel.); *see also McKnight v. Pa. Publ. Util. Comm’n*, ___ A.3d ___ (1253 C.D. 2019 decided Mar. 20, 2024) (due process is not violated by the absence of counsel in civil litigation).

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the parties of this proceeding. 66 Pa.C.S. § 701.
2. Complainants bear the burden of proof. 66 Pa.C.S. § 332.
3. The Respondent is required to install smart meters in accordance with its Smart Meter Deployment Plan. *Povacz, v. Pa. Pub. Util. Comm'n*, 280 A.3d 975 (Pa. 2022).
4. Customers cannot “opt out” of the installation of a smart meter. *Povacz, v. Pa. Pub. Util. Comm'n*, 280 A.3d 975 (Pa. 2022).
5. Allegations that a smart meter would cause harm to a customer must be supported by expert scientific or medical testimony. *Povacz, v. Pa. Pub. Util. Comm'n*, 280 A.3d 975 (Pa. 2022).
6. Although self-represented complainants are afforded some leeway in pleadings and procedure, this leeway is not unlimited and may not create an unfair disadvantage to the utility. *Arena Beverage Corp. v. Pa. Liquor Control Bd.*, 97 A.3d 444 (Pa. Cmwlth. 2014) (quoting *Vann v. Unemployment Comp. Bd. of Rev.*, 494 A.2d 1081 (Pa. 1985)); *See also Borough of Chapman v. Charles*, 288 A.3d 138 (Pa. Cmwlth 2022); *Smithson v. Columbia Gas of PA/NiSource*, 264 A.3d 755 (Pa. Super. 2021), reargument dismissed (Aug. 27, 2021).
7. The Complainants failed to sustain their burden of proving that a smart meter would cause harm. *Povacz v. Pa. Pub. Util. Comm'n*, 280 A.3d 975 (Pa. 2022).
8. The Complainants failed to prove that their due process rights were violated. *McKnight v. Pa. Publ. Util. Comm'n*, __ A.3d __ (1253 C.D. 2019 decided Mar. 20, 2024) (due process is not violated by the absence of counsel in civil litigation).

ORDER

THEREFORE,

IT IS ORDERED:

1. That the Formal Complaint of Jeannett and Craig Pavlick against West Penn Power Company, Docket C-2018-3002723 is dismissed.
2. That the Secretary mark the docket closed.

Date: June 5, 2024

_____/s/_____
Mary D. Long
Administrative Law Judge