

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Heidi Fiedler	:	
	:	
v.	:	C-2018-3003642
	:	
Metropolitan Edison Company	:	

**INTERIM ORDER
GRANTING IN PART AND DISMISSING IN PART MOTION FOR SUMMARY
JUDGMENT AND SETTING REMAINING ISSUES FOR HEARING**

Initial Filings by the Parties

On July 23, 2020, Heidi Fiedler (Complainant or Ms. Fiedler) filed a Formal Complaint against Metropolitan Edison Company (Company, Respondent, Met-Ed) with the Pennsylvania Public Utility Commission (Commission). In her Complaint, Ms. Fiedler averred that Met-Ed was threatening to shut off her electric service because she objected to the installation of a smart meter at her residence at 432 E. Wesner Road, Blandon, PA (service location) due to health, safety, and privacy concerns. Ms. Fiedler averred that Met-Ed was violating Act 129 of 2008 and Section 1501 of the Public Utility Code. As relief, Ms. Fiedler requested, among other things, that she provided an “accommodation” and that she be allowed to continue to use her analog meter.

On August 13, 2018, Met-Ed filed an Answer, New Matter, and Preliminary Objections in response to the Complaint. In its Answer, Met-Ed admitted or denied the various averments Ms. Fiedler made in her Complaint. Met-Ed admitted that it provides residential retail electric service to Ms. Fiedler and that she refused the installation of a smart meter at her home. Met-Ed denied the remaining material allegations set forth in the Complaint. In its New Matter, which was accompanied by a Notice to Plead, Met-Ed averred that it is required by Act 129 to install a smart meter at Ms. Fiedler’s residence.

In the Preliminary Objections, the Company argued the Complaint is legally insufficient because the Commission lacks authority to grant the requested relief and the Complaint should be dismissed. Met-Ed argued it is required to install a smart meter at Ms. Fiedler's residence by Act 129 of 2008¹ (Act 129) and its Smart Meter Deployment Plan (SMP), which was approved by the Commission at docket No. M-2013-2341990 by Order entered June 5, 2014. Met-Ed argued there was no "opt-out" available to customers.

On September 11, 2018, the Commission issued a Motion Judge Assignment Notice, assigning this matter to Administrative Law Judge Jeffrey A. Watson (ALJ Watson).

On September 21, 2018, ALJ Watson issued an Interim Order, denying the Preliminary Objections.

On September 21, 2018, ALJ Watson issued a second Interim Order, establishing a litigation schedule. The Parties were directed to exchange fact and expert witness information by December 28, 2018; conclude discovery by February 28, 2019; file any dispositive motions by April 4, 2019; and file any response to any dispositive motions within 20 days of service of the motion.

On October 25, 2018, Met-Ed filed a certificate of service evidencing its service of Interrogatories and Requests for Production of Documents (discovery requests) upon Ms. Fiedler.

On November 5, 2018, Ms. Fiedler filed an Amended Formal Complaint and Objections to the discovery requests. Complainant indicated she was submitting a "blanket objection to the completion of the entire Met Ed Interrogatories and Request for production of documents dated October 25, 2018." Complainant objected that "[i]t is not possible to provide detailed information and comprehensive answers to the questions, and to provide documents be used in this case, without knowing the precise manufacturer and model of the smart meter system ... that MetEd and FirstEnergy seek to install at my home."

¹ 66 Pa. C.S. § 2806.1 *et seq.*

On November 13, 2018, the Company filed a Motion to Compel.

On November 27, 2018, the Company filed an Answer and New Matter to the Amended Complaint.

On November 27, 2018, Ms. Fiedler filed a response to the Motion to Compel.

On December 28, 2018, Met-Ed served its witness information upon Complainant.

On January 7, 2019, ALJ Watson issued an Interim Order, granting the Company's Motion to Compel, denying Complainant's objections, and requiring Complainant to file full and complete responses to all the discovery requests upon the Company by February 1, 2019.

On February 1, 2019, Complainant filed a Request for Extension of Time for Discovery. Complainant wrote, "On November 5, 2018, I filed an amended Complaint before the Pennsylvania Public Utilities Commission. As of February 1, 2019, I have not received a ruling from the Pennsylvania Public Utilities Commission on my amended complaint. I respectfully request a six-month extension of time for the discovery process." The document was accompanied by a cover letter from Complainant dated February 1, 2019, and a certificate of service dated February 1, 2019.

On February 13, 2019, Met-Ed filed a Motion to Dismiss the Complaint. It averred Complainant provided incomplete responses to the discovery requests to February 1, 2019, and untimely objected to other discovery requests, despite ALJ Watson already denying her objections. Met-Ed also averred Complainant failed to provide any witness information as required by ALJ Watson's Order.

On February 14, 2019, ALJ Watson issued an Interim Order denying Complainant's Request for an Extension of Time for Discovery. ALJ Watson noted the request

for an extension of time for discovery does not indicate what “ruling” Complainant anticipated receiving regarding the filing of her “amended complaint.” He explained that no “ruling” is required from the presiding officer regarding the filing of the “amended complaint” in this proceeding. In addition, he explained that the request from Complainant does not indicate if Complainant has initiated any discovery since the establishment of a litigation schedule by order entered on September 21, 2018, nor why discovery should be extended in this proceeding other than Complainant’s reference to the lack of a “ruling” on her “amended complaint.” ALJ Watson directed the Parties to comply with the litigation schedule set by the September 21, 2018, Interim Order. Therefore, discovery closed in this matter on February 1, 2019.

On February 25, 2019, Ms. Fiedler filed a response to the Motion to Dismiss. Notably, Ms. Feidler indicated that she “had not retained any expert witnesses and therefore was not able to furnish a list of expert witnesses that did not exist.” She further argued an evidentiary hearing was necessary so she could “present evidence and testimony regarding the negative consequences and safety issues, including Electro Magnetic Field (EMF) radiation, that would result from the installation smart meter on her property.” She explained that all of her proposed exhibits would be provided to the Company as soon as possible.

On February 28, 2019, the Complainant filed a Second Amended Complaint. In addition to averments related to the proposed installation of a smart meter, beginning at paragraph 15 of the Second Amended Complaint, Complainant avers that Respondent allowed its electrical equipment on Complainant’s property to severely deteriorate and that Respondent’s contractors caused damage to Complainant’s property upon removing a pole from the property. Complainant averred that Respondent did not contact Complainant regarding the alleged damage; Respondent made no effort to repair the damage; and that Respondent allowed its equipment to deteriorate and create an unsafe condition on Complainant’s property in violation of Section 1501 of the Public Utility Code and Section 57.194 of the Commission regulations. Complainant argued First Energy should be added as an additional respondent in this matter.

As relief, Complainant requested that Respondent abide by Section 1501 of the Public Utility Code and Section 57.194 of the Commission’s regulations; that the Company

retain a certified independent engineering firm to perform a company-wide inspection of the Company's entire electrical delivery system and equipment to ensure compliance with all safety codes and Commission regulations and promptly issue a report to the Commission; that Respondent pay \$7,469.78 to Complainant to cover the cost of repairs to her property allegedly caused by the Company's contractor; that an amended litigation schedule be issued to provide for 60 days of additional discovery; that the Company cease and desist from any attempts to install a wireless smart meter at Complainant's premises or that the Commission order a waiver of any rule, regulation or Commission Order that the Commission believes requires the Company to deploy a wireless EMF-emitting meter at Complainant's premises; and that the Commission order a comprehensive independent investigation into the cyber security of the Company's entire infrastructure, including computer networks and system communication systems.

On March 1, 2019, ALJ Watson issued an Interim Order scheduling a Prehearing Conference for April 19, 2019. ALJ Watson explained that the purpose of the conference was to provide the Parties with an opportunity to address any outstanding discovery issues, the Motion to Dismiss, and any other outstanding issues in this proceeding.

On March 5, 2019, the Commission issued a Notice for the Prehearing Conference.

On March 13, 2019, the Prehearing Conference was rescheduled to March 26, 2019, by an Interim Order and a Reschedule Notice.

On March 18, 2019, Complainant filed a Status Report and a Request to Cancel the Prehearing Conference and Amend the Litigation Schedule. Complainant noted that she had recently filed a Seconded Amended Complaint, and she requested an additional sixty days for discovery regarding new claims she raised for the first time in her Second Amended Complaint.

On March 25, 2019, ALJ Watson issued an Interim Order denying Complainant's Request to Cancel the Prehearing Conference and directing the Parties to appear and participate in the Prehearing Conference on April 19, 2019.

On March 27, 2019, the Company filed an Answer, New Matter, and Preliminary Objections to the Second Amended Complaint. Respondent averred that Complainant, in her Second Amended Complaint, requested, in part, that Respondent financially compensate her for damage allegedly incurred at the Service Location. Respondent further asserted the Commission does not have the power or legal authority to award monetary damages.

On April 1, 2019, the Commission issued a Notice, rescheduling the March 26, 2019, Prehearing Conference to April 19, 2019.

On April 9, 2019, the Complainant filed a Motion to Dismiss the Company's Preliminary Objections to the Second Amended Complaint. Complainant averred, *inter alia*, that the Preliminary Objections were not timely filed and therefore should be dismissed.

On April 19, 2019, the Prehearing Conference convened as scheduled. Ms. Fiedler appeared self-represented and objected to the conference being convened on that day, which was Good Friday. Lauren Lepkowski, Esq., and Tori Giesler, Esq., were present on behalf of the Company. After discussion with and agreement by the parties, ALJ Watson rescheduled the conference for May 2, 2019.

On April 22, 2019, Ms. Fiedler filed a Motion to Dismiss the Company's Answer and New Matter filed in response to the Second Amended Complaint, averring they were untimely filed.

On April 24, 2019, the Commission issued a Notice, scheduling the prehearing conference for May 2, 2019.

On April 24, 2019, the ALJ Watson issued an Interim Order rescheduling the conference and advising the parties that no further continuances would be granted.

On May 1, 2019, Complainant filed a certificate of service evidencing her service of additional discovery responses to the Company.

The May 2, 2019, prehearing conference convened as scheduled. Complainant appeared and participated. Ms. Giesler, Esq., appeared and participated on behalf of Respondent. The Parties were provided an opportunity to address all of the outstanding issues in this proceeding. At the conference, ALJ orally denied Complainant's request to join First Energy as an additional party, and Complainant made a request to reopen discovery. Additionally, Complainant failed to identify any of her fact and expert witnesses, and Respondent indicated that it was unable to access the additional discovery responses Complainant purportedly provided on May 1, 2019, on a USB drive.

On May 9, 2019, Ms. Fiedler filed a status report, confirming her status as a *pro se* complainant and noting she served additional discovery responses on the Company.

On October 10, 2019, ALJ Watson issued three Interim Orders. In one, he consider Complainant's Motion to Dismiss the Company's Preliminary Objection to the Second Amended Complaint, finding the Preliminary Objection was, in fact, timely filed. He further granted the Company's Preliminary Objection to the Second Amended Complaint, striking the Complainant's request for monetary damages from the Second Amended Complaint. Regarding Complainant's Motion to Dismiss the Company's Answer and New Matter to Second Amended Complaint, ALJ Watson held the pleadings were timely filed and denied Complainant's Motion.

In a second Interim Order issued October 10, 2019, ALJ Watson revised the litigation schedule. ALJ Watson granted in part and denied in part Complainant's request to reopen discovery. He wrote, "Complainant's request to permit additional discovery in this proceeding is granted in part, solely to permit Complainant to serve proper Discovery Requests upon Respondent solely related to the averments set forth in the Second Amended Complaint beginning at paragraph 15 of the Second Amended Complaint, and specifically that Respondent allowed its electrical equipment on Complainant's property to severely deteriorate and that Respondent's contractors caused damage to Complainant's property upon removing a pole from the property; that Respondent did not contact Complainant regarding the alleged damage; Respondent made no effort to repair the damage; and that Respondent allowed its equipment to deteriorate and create an unsafe condition on Complainant's property in violation of § 1501 of

the Public Utility Code and § 57.194 of the Commission regulations. Discovery regarding these issues shall be concluded on or before October 28, 2019.” ALJ Watson denied Complainant’s request in all other respects. He directed the Parties to exchange fact and expert witness information by November 1, 2019, and held that in the event that Complainant identified any fact or expert witnesses by the deadline, Respondent would be permitted to engage in discovery related to those named witnesses and their proposed or expected testimony, to be concluded on or before November 29, 2019. He also directed the Parties to file a status report by November 1, 2019.²

In the third Interim Order issued October 10, 2019, ALJ Watson considered outstanding discovery disputes and held the Company’s Motion to Dismiss the Complaint in abeyance. ALJ Watson, wrote, “under the circumstances and in order to provide Complainant with a final opportunity to comply with the order granting Respondent’s Motion to Compel Responses to Discovery Requests entered on June 28, 2019, the Motion to Dismiss will be held in abeyance, subject to the terms set forth in the ordering paragraphs below. **Complainant’s failure to provide timely as well as full and complete responses to the discovery responses may result in sanctions, up to and including dismissal of the Complaint.**”³ ALJ Watson ordered Complainant to serve full and complete responses to all of the interrogatories and requests for production of documents forwarded by Respondent to Complainant on November 1, 2019, and file and serve a certificate of service regarding said service, on or before November 1, 2019. He also directed the Parties to file a status report addressing the compliance of the Order by November 8, 2019. He explained the Motion to Dismiss would be held in abeyance.

On November 1, 2019, Ms. Fiedler filed a status report indicating that she provided paper copies of her discovery responses on May 6, 2019, served her own discovery requests upon the Company on October 28, 2019, and attached her witness information to the status report. She listed one fact witness, one expert witness to testify about electrical safety issues, and identified herself as providing both fact and expert testimony.

² ALJ Watson also directed a status report be filed by November 25, 2019, but this appears to have been a typo.

³ Emphasis in original.

On November 12, 2019, the Company filed a certificate of service evidencing its service of objections to Complainant's discovery requests.

On November 19, 2019, the Company filed a status report. It advised that it was still reviewing whether it would be issuing any additional discovery in accordance with the October 10, 2019, Interim Order, and requested the hearing be scheduled as an in-person hearing.

On November 22, 2019, the Commission issued a Judge Change Notice, changing the presiding officer to Administrative Law Judge Francis J. Brady (ALJ Brady).

On November 25, 2019, the Company filed a certificate of service evidencing its service of additional discovery requests upon Ms. Fiedler.

On November 26, 2019, the Company filed a status report advising that while Complainant had not yet filed full and complete discovery responses, it was no longer pursuing additional responses from Complainant. It further advised that it expected to serve additional discovery requests on Complainant by the November 29, 2019, deadline, and provide responses to discovery requests served by Complainant by December 6, 2019.

On November 25, 2019, Complainant filed a status report as well as a Motion to Dismiss Objections of Metropolitan Edison Company to her discovery requests. Complainant's Motion did not include copies of her requests, or the Company's objections thereto.

On December 3, 2019, the Company filed a response to Complainant's Motion to Dismiss Objections to her discovery requests.

On December 4, 2019, Company filed an amended response to Complainant's Motion to Dismiss Objections to her discovery requests, including the original discovery requests Complainant propounded upon the Company.

On December 5, 2019, the Commission issued a Hearing Notice, scheduling an in-person evidentiary hearing for February 5, 2020.

On December 6, 2019, the Company filed a certificate of service evidencing its service of discovery responses on Ms. Fiedler.

On December 11, 2019, ALJ Brady issued an Interim Order denying Complainant's Motion to Compel.

On December 19, 2019, ALJ Brady issued a Prehearing Order, scheduling an in-person evidentiary hearing for February 5, 2020, to be held in OALJ's office in Philadelphia.

On January 24, 2020, Ms. Fiedler filed a written request to continue the hearing because her witnesses were not available on February 5, 2020, and change the location of the hearing to Harrisburg.

On January 27, 2020, the Commission issued a Notice and ALJ Brady issued an Interim Order changing the February 5, 2020, proceeding to a telephone prehearing conference.

On February 3, 2020, ALJ Brady was served with Complainant's Third Amended Complaint, as well as her motion to extend discovery and revise the litigation schedule. Both documents were filed in the Commission's online docket on February 5, 2020.

On February 4, 2020, ALJ Brady issued an Interim Order Rejecting Complainant's Third Amended Complaint and Dismissing Her Motion for Discovery and Revised Litigation Schedule. ALJ Brady reminded the parties that the telephone conference would proceed as scheduled on February 5, 2020.

On February 7, 2020, the Company filed a letter stating it would not be filing a response to the Third Amended Complaint.

The conference convened as scheduled on February 5, 2020. Complainant appeared and represented herself. Tori Giesler, Esq., and Lauren Lepkoski, Esq., appeared on behalf of the Company. ALJ Brady explained to the parties that the purpose of the conference was to set a date and location for the evidentiary hearing. After discussion, the parties agreed to have an in-person hearing in Harrisburg, and ALJ Brady set the evidentiary hearing for April 28, 2020, at 10:00 a.m.

When the Complainant asked about his rejection of the Third Amended Complaint, ALJ Brady explained to her that the case would be transferred to a judge in Harrisburg, so she could refile her Third Amended Complaint after a new judge was assigned.

On February 12, 2020, then Deputy-Chief ALJ Joel Cheskis issued a Prehearing Order, scheduling the in-person evidentiary hearing for April 28, 2020, to be held in the OALJ office in Harrisburg.

On February 13, 2020, Complainant refiled her Third Amended Complaint, seeking reconsideration of ALJ Brady's rejection of it and again requesting an extension of discovery and a revised litigation schedule. Complainant served her filing on all the sitting Commissioners, and ALJs Brady and Cheskis. Although this was not styled as a Petition for Interlocutory Review, it was treated as such by the Company and the Commission.

On February 26, 2020, the Company filed a brief in opposition to Complainant's Petition for Interlocutory Review.

On May 12, 2020, the Commission issued a Notice, rescheduling the evidentiary hearing for July 30, 2020, as a telephone hearing.

On June 30, 2020, Ms. Fiedler filed a letter requesting that the hearing scheduled for July 30, 2020, be held in abeyance pending the resolution of a decision of the Commission that was appealed to the Commonwealth Court, noting that the court held oral argument on the appeal on June 10, 2020. Ms. Fiedler attached a copy of an order from the court holding other

similar appeals pending before it in abeyance. Ms. Fiedler also argued that the hearing scheduled for July 30, 2020, should be held in abeyance because the Commission had not acted on a petition for interlocutory review she filed on February 13, 2020. Ms. Fiedler added that the Commission has not yet acted on a petition for interlocutory review she filed. Finally, Ms. Fiedler stated that two of her witnesses are not available on July 30, 2020, and requested that the July 30, 2020, hearing be rescheduled as a result.

On July 14, 2020, Met-Ed filed an answer to Ms. Fiedler's motion to hold her case in abeyance. Met-Ed did not oppose Ms. Fiedler's request to reschedule the hearing because of her witnesses' lack of availability but did oppose Ms. Fiedler's request to hold her complaint in abeyance pending resolution of the appeal at the Commonwealth Court. Met-Ed argued, among other things, that this complaint has been pending for nearly two years and there is no reason to stay the proceeding until after the Commonwealth Court issues its decision. Met-Ed noted that Ms. Fiedler's petition for interlocutory review is deemed denied if the Commission does not act on it within 30 days, which it did not. Met-Ed also requested that a litigation schedule establishing a schedule for submission of pre-served written testimony be established.

On July 16, 2020, ALJ Cheskis denied Complainant's request to hold her Complaint in abeyance but did grant her request to reschedule the hearing. ALJ Cheskis also denied the Company's request to establish a litigation schedule for purposes of the submission of pre-served, written testimony. Finally, he directed the parties to confer and propose, within ten days of the date of the order, multiple dates the rescheduled hearing to occur.

On July 24, 2020, the Company filed a status report providing possible dates for the rescheduled hearing. The Company reported it had attempted to get dates for Ms. Fiedler but she did not have access to her witnesses' availability.

On July 27, 2020, the Commission scheduled a telephonic evidentiary hearing for October 30, 2020.

On July 30, 2020, Complainant filed a request for a new hearing date and that the hearing be held in-person. She argued that, as a *pro se* litigant, she would be at a disadvantage at a telephone hearing. She also requested the hearing be rescheduled to October 30, 2020.⁴

On October 16, 2020, the Company filed a Motion to Stay the proceedings.

On October 21, 2020, Attorney B. Myers filed a Motion for Admission Pro Hac Vice on behalf of Complainant. He represented he is a member of the bar in good standing in multiple jurisdictions, including Maryland and the District of Columbia, and notes he is a retired member of the Pennsylvania bar, with an original admission date of November 23, 1977.

On October 21, 2020, Attorney Myers filed a response to the Company's Motion for Stay, arguing it should be denied.

On October 22, 2020, ALJ Cheskis issued an Interim Order granting the Company's Motion for a Stay.

On October 23, 2020, the Commission issued Cancellation Notice, cancelling the evidentiary hearing for October 30, 2020.

Povacz I, Povacz II, and The Commission's Stay Order

On October 8, 2020, the Commonwealth Court of Pennsylvania (Commonwealth Court) issued an Opinion in *Povacz v. Pennsylvania Public Utility Commission*, 241 A.3d 481 (Pa. Cmwlth. 2020) (*Povacz I*), the first of several appeals involving PECO Energy Company's (PECO) deployment of smart meter technology pursuant to Act 129, codified at 66 Pa.C.S. § 2807(f). In the *Povacz I* consolidated opinion, the Commonwealth Court partially affirmed, and partially reversed and remanded, the Commission's March 28, 2019, and May 9, 2019, Orders. *Povacz I* at 495. Specifically, the Commonwealth Court, in *Povacz I*, held that Act 129 does not

⁴ This part of Complainant's filing is confusing, since this is the date the hearing had already been scheduled.

mandate the installation of smart meters, and that the Commission had the authority to grant customers accommodations based on their health concerns. *Id.* at 490. However, the Commonwealth Court affirmed: (1) the Commission’s application of the preponderance of evidence standard; (2) the Commission’s finding that the customers in the underlying cases failed to sustain their burden of proof; and (3) that the Commission’s findings of fact were supported by substantial evidence. *Id.* at 490-491, 493-495. The Commonwealth Court also declined to find that the deployment of smart meters violated the customers’ Fourteenth Amendment liberty interests in bodily integrity. *Id.* at 487- 488.

In light of the Commonwealth Court’s decision in *Povacz I*, the Commission entered an Order and Notice, at Docket No. M-2009-2092655, on November 4, 2020, 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 4, 2020, Stay Order*). The *November 4, 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. The *November 4, 2020, Stay Order* applied to and was docketed at the instant case.

The Commission, as well as all other parties in *Povacz I*, subsequently sought and were granted review of the Commonwealth Court’s *Povacz I* decision by the Supreme Court of Pennsylvania.

Previously, the Commonwealth Court stayed the proceedings in several other unconsolidated appeals that raised the same, or similar, smart meter issues pending its disposition of *Povacz I*. Upon application by the Commission, the Commonwealth Court continued the stay of these appeals pending the Supreme Court’s disposition of *Povacz II*.

On August 16, 2022, the Supreme Court issued an Opinion and Order, *Povacz v. Pennsylvania Public Utility Commission*, 280 A.3d 975 (Pa. 2022) (*Povacz II*). In its Opinion in *Povacz II*, the Supreme Court affirmed the Commission’s determinations in all respects. The

Supreme Court reversed the Commonwealth Court’s determination that Act 129 does not mandate smart meter installation and that Court’s remand to the Commission for consideration as to whether the installation of a smart meter was unreasonable service under Section 1501 of the Code, 66 Pa.C.S. § 1501.

The Supreme Court did, however, affirm the Commonwealth Court’s conclusion that the “Customers failed to meet their burden of proving, by a preponderance of the evidence, a conclusive causal connection between [radio frequency] emissions from smart meters and adverse human health effects.” *Id.* at 1014. The Supreme Court concluded that Act 129 mandates smart meter deployment and requires the system-wide installation of smart meter technology by EDCs. *Id.* at 992. The Supreme 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. *Id.* at 997. Accordingly, the Supreme Court reversed the Commonwealth Court, and affirmed the Commission’s interpretation in the underlying cases that Act 129 mandates universal smart meter installation. *Id.*

Given the Supreme Court’s decision in *Povacz II*, the Commission lifted the stay implemented by the *November 4, 2020, Stay Order* on November 9, 2023. The Commission entered an Order at Docket No. M-2009-2092655, explaining that cases pending before the Office of Administrative Law Judge, such as the instant case, would proceed as directed by the assigned presiding officer.

Proceeding Post-*Povacz II* in the Instant Case

After the Commission lifted the Stay, I carefully reviewed the extensive procedural history of this case. On January 5, 2024, I issued an Interim Order detailing the Supreme Court’s holding in *Povacz II*, and noted that in the instant case, discovery had closed, and the parties had exchanged witness information. I set a deadline for the filing of any appropriate motion, responses to motions, and directed the parties to submit a status report providing mutually agreeable dates for an evidentiary hearing. Motions were due by January 24,

2024, responses to motions were due by February 7, 2024, and the status report was also due by February 7, 2024. I instructed the parties, **“If a party fails to timely provide dates, I will deem it a waiver by that party to provide any input on the hearing date, and I will not consider any requests by that party to reschedule the hearing due to a scheduling conflict or unavailability of witnesses.”** (emphasis in original).

On January 24, 2024, Respondent filed a Motion for Summary Judgement, arguing, *inter alia*, that Complainant had failed to appropriately identify expert witnesses or demonstrate that she would be able to make a *prima facie* case to carry her burden of proof in an evidentiary hearing.

On February 7, 2024, Respondent filed a status report advising, *inter alia*, that a Motion for Admission *Pro Hac Vice* filed by Edward B. Myers, Esq. was still pending and the dates that the Company was available for an evidentiary hearing, which included April 24, 2024.

On February 12, 2024, Complainant filed a response to the Company’s Motion for Summary Judgement, arguing that the certificate of service erroneously indicated she was served by electronically, when she was in fact served by first class mail. Furthermore, Complainant argued the copy of the Motion served on her was date stamped on January 25, 2024, one day past the deadline set in my January 5, 2024, Interim Order. As such, Complainant argued the Motion should be dismissed as being untimely filed. Complainant did not respond substantively to the Motion to Dismiss. Complainant did not address her availability for an evidentiary hearing.

On March 19, 2024, I issued an Interim Order. As a preliminary matter, I granted the Motion for *Pro Hac Vice* filed by Edward B. Myers, Esq., noting that the Company did not file an objection to it. I also denied Complainant’s request to reject the Company’s Motion for Summary Judgment.

Upon a substantive review of the Motion for Summary Judgment, I noted that on November 1, 2019, Complainant filed a status report, attaching her witness information. She identified one fact witness, one expert witness, and herself as providing both fact and expert

testimony. She noted that the expert witness she identified, Frederick Fiedler, would provide testimony regarding electrical safety issues. She did not explain what expert testimony she would be providing or what her qualifications are to support her testifying as an expert.

I scheduled a hearing for April 24, 2024. I explained, “**The sole purpose of the proceeding on April 24, 2024, is allow for the *voire dire* of Complainant and Complainant’s proposed expert witnesses.** Complainant, the Company, and myself will have an opportunity to question Complainant and Complainant’s proposed expert witnesses about their education, experience, and training. Complainant must clearly identify the area(s) of expertise in which Complainant and each of her proposed expert witnesses is being offered as an expert. Then, I will allow the parties an opportunity to provide oral argument as to whether each proposed expert witness should be permitted to testify as an expert in the area of expertise identified by Complainant. **We will not take any substantive expert opinion testimony on the claims made in the Second Amended Complaint at the hearing on April 24, 2024.**” (emphasis in original).

I further explained, “After Complainant and all of her proposed expert witnesses have completed *voire dire* and the parties have presented oral argument, I will adjourn the proceeding. I will then render a written decision on the Company’s Motion for Summary Judgment, as well as any motion in limine that any party makes or files. If appropriate, I will schedule an evidentiary hearing for Complainant to present, and the Company to rebut, evidence on the substantive claims made in her Second Amended Complaint. I held the Company’s Motion for Summary Judgment in abeyance pending the hearing on April 24, 2024.

In my ordering paragraphs of the March 19, 2024, Interim Order, I ordered parties to serve upon me and the other party a curriculum vitae **and** either (a) a summary of expected testimony, or (b) a written expert report for all of the party’s proposed expert witnesses, they expect to testify as an expert at an evidentiary hearing (expert witness information). I also ordered parties to appear at the April 24, 2024, hearing, and explained, “**Complainant’s: (1) failure to appear at the April 24, 2024, hearing; or (2) her failure to produce her**

anticipated expert witnesses at the April 24, 2024, hearing; or (3) her failure to serve [the expert witness information] shall result in dismissal of the Complaint.”⁵

On March 24, 2024, the Commission issued a hearing notice, scheduling an evidentiary hearing for April 24, 2024. The Notice was served upon Complainant by first class mail and upon the Company by eService.

On March 22, 2024, Mr. Myers contacted me by email. Mr. Myers advised he was now 73 years old and had retired from the practice of law since filing the Motion for Admission *Pro Ha Vice*. He explained he was no longer a member of any bar association. He further explained he notified Ms. Fiedler of his decision to retire shortly after he filed the Motion for Admission *Pro Hac Vice*, and she did not object. He argued Ms. Fielder has had ample time to obtain replacement counsel since that time.

I issued an Interim Order on April 2, 2024, rescinding my decision to grant Mr. Myers’ Motion for Admission *Pro Hac Vice*. I ruled that, since Mr. Myers is no longer a licensed attorney, he was not eligible to represent Ms. Fiedler in this matter. I explained that the other terms of the March 19, 2024, Interim Order remained in effect in all other respects.

The hearing on April 24, 2024, convened as scheduled. James Meehan, Esq, Daniel Garcia, Esq., and Tori Giesler were present on behalf of the Company. Complainant was not present. Mr. Meehan requested that the Second Amended Complaint be dismissed and that the Motion for Summary Judgment no longer be held in abeyance. I informed the Company the Motion for Summary Judgment was no longer being held in abeyance and the I would issue an appropriate order.

The transcript of the April 24, 2024, hearing was filed, and on May 7, 2024, I issued an Interim Order closing the record. Upon closer review of this matter, it is appropriate to rule upon the Motion for Summary Judgment and schedule an evidentiary hearing on

⁵ Emphasis added.

Complainant's claims in the Second Amended Complaint that do not pertain to smart meters. On June 5, 2024, I entered an Interim Order re-opening the record.

It is now appropriate to rule on the Company's Motion for Summary Judgment.

DISCUSSION

Section 5.102 of the Commission's regulations provides the Commission's standard of review for a request for summary judgment:

(1) Standard for grant or denial on all counts. The presiding officer will grant or deny a motion for judgment on the pleadings or a motion for summary judgment, as appropriate. The judgment sought will be rendered if the applicable pleadings, depositions, answers to interrogatories and admissions, together with affidavits, if any, show that there is no genuine issue as to a material fact and that the moving party is entitled to a judgment as a matter of law.

(2) Standard for grant or denial in part. The presiding officer may grant a partial summary judgment if the pleadings, depositions, answers to interrogatories and admissions, together with affidavits, if any, show that there is no genuine issue as to a material fact and that the moving party is entitled to a judgment as a matter of law on one or more but not all outstanding issues.

52 Pa. Code § 5.102(d)(1)-(2).

Further, 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 Valley Power Comm. v. Pa. Pub. Util. Comm'n*, 563 A.2d 548 (Pa. Cmwlth. 1989); *Edan Transp. Corp. v. Pa. Pub. Util. Comm'n*, 623 A.2d 6 (Pa. Cmwlth. 1993).

In its Motion for Summary Judgment, Respondent argues the Complaint be dismissed in its entirety and with prejudice due to the Complainant's inability to carry her burden of proof in support of her claims. In smart meter cases such as this one, the Supreme Court, in *Povacz II*, made clear that a customer must present expert opinion rendered to a reasonable degree of scientific certainty that radio frequency emissions from smart meters cause adverse health effects, as well as expert opinion rendered to a reasonable degree of medical certainty that RF emissions from the smart meters, either alone or cumulative to other sources of RF emissions, caused or would cause them harm. Yet, Complainant has failed to demonstrate she will be able to provide any expert testimony evidencing, to a reasonable degree of scientific certainty, that smart meters emit a radio frequency and that such an emission would be a violation of 66 Pa.C.S. § 1501. Therefore, Complainant is unable to meet her burden of proof as a matter of law, and the Complaint must be dismissed.

In cases such as this one where a customer is challenging the installation of a smart meter, the Supreme Court has made clear that customers must present expert testimony, and that without it, customers are unable to meet their burden of proof as a matter of law. *See Povacz II*.

The Supreme Court noted that while Act 129 does not provide customers with the right to opt-out of smart meter installation at their residence, they may file a complaint with the Commission raising a claim that installation of a smart meter violates Section 1501 of the Code, 66 Pa.C.S. § 1501. The Supreme Court reiterated that complainants seeking relief from the Commission must satisfy their burden of proof by a preponderance of the evidence. The Supreme Court explained that inconclusive evidence – evidence that does not lead to a conclusion of a definite result one way or the other – does not meet even the minimal requirements of the preponderance of the evidence standard. *Id.* at 1005. The Supreme Court opined that while a customer's evidence does not need to prove their assertion beyond any doubt, evidence of a mere possibility that harm could result is insufficient to satisfy the preponderance of the evidence standard. *Id.* at 1008.

The Supreme Court noted that the burden of proof is two-fold for Section 1501 claims involving the safety of smart meters and RF emissions. First, a customer must present expert opinion rendered to a reasonable degree of scientific certainty that radio frequency emissions from smart meters cause adverse health effects. Next, a customer must present expert opinion rendered to a reasonable degree of medical certainty that RF emissions from the smart meter, either alone or cumulative to other sources of RF emissions, caused them harm. The utility may then refute the customer's evidence by providing scientific and/or medical expert testimony that, within a reasonable degree of certainty, the RF emissions from smart meters did not cause the alleged harm. *Id.* Once the parties have presented their evidence, the onus then falls on the fact finder to weigh the evidence and determine whether it is more likely than not that the smart meter caused the customer harm. *Id.* at 1006. The Supreme Court concluded that neither fear nor inconclusive scientific research was sufficient to prove that smart meter technology constitutes unsafe service under Section 1501. *Id.* at 1005. The Supreme Court held that if a customer establishes by a preponderance of the evidence, based on the totality of the circumstances, that smart meter service violates Section 1501, they are entitled to an accommodation to the extent allowed by Act 129 and a utility's tariff. However, given that Act 129 mandates smart meter deployment, the Supreme Court clarified that such accommodation may not rise to the level of an opt-out from smart meter installation. *Id.* at 1015.

In her November 1, 2019, status report, Complainant identified one fact witness, one expert witness, and herself as providing both fact and expert testimony. She noted that the expert witness she identified, Frederick Fiedler, would provide testimony regarding electrical safety issues. She did not explain what expert testimony she would be providing or what her qualifications are to support her testifying as an expert.

In my March 19, 2024, Interim Order, I directed Complainant to provide additional information about her proposed expert witnesses. I ordered her to serve upon me and the Company a curriculum vitae **and** either (a) a summary of expected testimony, or (b) a written expert report for all of her proposed expert witnesses, including herself. Complainant failed to provide this information.

My March 19, 2024, Interim Order also scheduled a hearing at which Complainant was required to appear and present all individuals who she intended to testify as expert witnesses. I wrote,

The sole purpose of the proceeding on April 24, 2024, is allow for the *voire dire* of Complainant and Complainant's proposed expert witnesses. Complainant, the Company, and myself will have an opportunity to question Complainant and Complainant's proposed expert witnesses about their education, experience, and training. Complainant must clearly identify the area(s) of expertise in which Complainant and each of her proposed expert witnesses is being offered as an expert. Then, I will allow the parties an opportunity to provide oral argument as to whether each proposed expert witness should be permitted to testify as an expert in the area of expertise identified by Complainant. **We will not take any substantive expert opinion testimony on the claims made in the Second Amended Complaint at the hearing on April 24, 2024.**" (emphasis in original).

The March 19, 2024, Interim Order was eServed on Mr. Myers, who was added to the service list as Complainant's attorney in the March 19, 2024, Interim Order.

The Hearing Notice scheduling the April 24, 2024, hearing was served on Complainant by first class mail.

My Interim Order dated April 2, 2024, removed Mr. Myers' from the case and made clear he was not able to represent Complainant in this matter. I also instructed the parties in my Ordering Paragraphs that they must comply with the provisions of the March 19, 2024, Interim Order that did not pertain to Mr. Myers' Motion for Admission *Pro Hac Vice*. The April 2, 2024, Interim Order was served on Complainant by first class mail. This mail was not returned to sender. Accordingly, I must presume that this mail, which was sent in the ordinary course of business, was received by Complainant. *Berkowitz v. Mayflower Securities, Inc.*, 317 A.2d 584 (Pa. 1974); *Meierdierck v. Miller*, 147 A.2d 406 (Pa. 1959); *Samaras v. Hartwick*, 698 A.2d 71 (Pa.Super. 1997); *Judge v. Celina Mutual Insurance Co.*, 444 A.2d 658 (Pa.Super. 1982).

Complainant had an opportunity to appear and be heard in this proceeding on the issue of whether her proposed expert witnesses were qualified as such, but voluntarily chose not to do so. Therefore, the due process rights of Complainant have been fully protected. *Sentner v. Bell Telephone Co. of Pa.*, Docket No. F-00161101 (Opinion and Order entered October 25, 1993); 52 Pa.Code § 5.245(a).

The Commission has held that parties must comply with the orders of an administrative law judge, and a complainant's failure to do so is a sufficient basis to support dismissal of the matter. *Snyderville Cmty. Dev. Corp. v. Phila. Gas Works*, Docket No. C-20055032 (Opinion and Order entered July 31, 2006). Complainant failed to comply with my March 19, 2024, Interim Order, by failing to submit her expert witness information and failing to appear for the evidentiary hearing on April 24, 2024.

As the record stands with regards to Complainant's claims regarding smart meters, Complainant had an opportunity to establish that the individuals she identified as experts actually were qualified to testify as expert witnesses, but failed to do so.

Without expert witness testimony, Complainant is unable to make a *prima facie* case (regarding her claims as to smart meters) as a matter of law at a hearing, if one were held. To proceed to a hearing in this case, where Complainant failed to demonstrate the individuals she identified were qualified to present expert witness testimony, and where the presentation of expert witness testimony is required as a matter of law, would violate Respondent's due process rights. The smart meter claims must be dismissed because Complainant failed to establish she would be able to make a *prima facie* case as a matter of law. A hearing in this matter on Complainant's smart meter claims is not necessary or appropriate and is not in the public interest. Accordingly, the Motion for Summary Judgment is granted in that the claims in the Second Amended Complaint regarding smart meters and smart meter installation are dismissed.

In her Second Amended Complaint, Complainant makes claims in addition to the claims regarding smart meters and smart meter installation. Beginning at paragraph 15 of the Second Amended Complaint, Complainant avers that Respondent allowed its electrical

equipment on Complainant's property to severely deteriorate and that Respondent's contractors caused damage to Complainant's property upon removing a pole from the property.

Complainant averred that Respondent did not contact Complainant regarding the alleged damage; Respondent made no effort to repair the damage; and that Respondent allowed its equipment to deteriorate and create an unsafe condition on Complainant's property in violation of Section 1501 of the Public Utility Code and Section 57.194 of the Commission regulations.

Complainant has not had an opportunity to be heard and present evidence on these claims. Therefore, the claims unrelated to smart meters and smart meter installation may proceed to an evidentiary hearing.

At the evidentiary hearing, Complainant shall bear the burden of proof. 66 Pa.C.S. § 332(a). As a matter of law, Complainant must show that the Company is responsible or accountable for the problem described in the Complaint in order to prevail. *Patterson v. Bell Tel. Co. of Pa.*, 72 Pa.P.U.C. 196 (1990); *Feinstein v. Phila. Suburban Water Co.*, 50 Pa.P.U.C. 300 (1976). The offense by Respondent must be a violation of the Public Utility Code, the Commission's regulations, or an outstanding order of the Commission. 66 Pa.C.S. § 701. Further, the burden of proof must be shown by a preponderance of the evidence. *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm'n*, 578 A.2d 600 (Pa. Cmwlth. 1990).

ORDER

THEREFORE,

IT IS ORDERED;

1. That the Motion for Summary Judgment filed by Metropolitan Edison Company to dismiss the Second Amended Complaint filed by Heidi Fiedler at Docket No. C-2018-30033642 is granted in part and denied in part.

2. That the Motion for Summary Judgment filed by Metropolitan Edison Company is granted in that all claims with regard to smart meters and smart meter installation are dismissed from the Second Amended Complaint.

3. That the Motion for Summary Judgment is denied in that all claims not previously dismissed by prior orders or by Ordering Paragraph 2 may proceed to a hearing.

4. That an evidentiary hearing be scheduled in this matter.

Date: June 5, 2024

_____/s/
Emily I. DeVoe
Administrative Law Judge

C-2018-3003642 - HEIDI FIEDLER v. METROPOLITAN EDISON COMPANY

Updated 04/03/2024

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