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June 5, 2024

VIA E-FILING

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, Second Floor
Harrisburg, PA 17120

**RE: Nancy Colbert v. PECO Energy Company
Docket No. C-2022-3036933**

Dear Ms. Chiavetta:

Enclosed for filing with the Commission is *Respondent, PECO Energy Company's Motion to Dismiss*.

I have enclosed a Certificate of Service showing that a copy of the above document was served on the interested parties. Thank you for your time and attention on this matter.

Very truly yours,

A handwritten signature in blue ink that reads "Khadijah Scott".

Khadijah Scott, Esquire
Assistant General Counsel, PECO Energy Company

Encl.

Cc: Honorable Arlene Ashton, ALJ (via email)

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

| | | |
|----------------------------|---|----------------------------------|
| NANCY COLBERT | : | |
| Complainant | : | |
| v. | : | DOCKET NO. C-2022-3036933 |
| | : | |
| PECO ENERGY COMPANY | : | |
| Respondent | : | |

NOTICE TO PLEAD

Pursuant to 52 Pa. Code §§ 5.101 and 5.62(c), you are hereby notified that, if you do not file a written response denying or correcting the enclosed Motion for Judgment on the Pleadings of PECO Energy Company within 20 days from service of this notice, a decision may be rendered against you. All pleadings, such as a Reply to Motion for Judgment on the Pleadings, must be filed with the Secretary of the Pennsylvania Public Utility Commission, with a copy served to counsel for PECO Energy Company, Khadijah Scott, and where applicable, the Administrative Law Judge presiding over the issue.

File with:
Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, Second Floor
Harrisburg, PA 17120

With a copy to:
Khadijah Scott, Esq.
PECO Energy Company
2301 Market Street, S-23
Philadelphia, PA 19103



Dated: June 5, 2024

Khadijah Scott
Counsel for PECO Energy Company
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(267) 533-1830
Khadijah.scott@exeloncorp.com

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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| NANCY COLBERT | : | |
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| v. | : | DOCKET NO. C-2022-3036933 |
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| PECO ENERGY COMPANY | : | |
| Respondent | : | |

**RESPONDENT, PECO ENERGY COMPANY’S
MOTION TO DISMISS**

Respondent, PECO Energy Company (“PECO”), pursuant to 52 Pa. Code §5.102(a) respectfully petitions this Honorable Commission to dismiss the instant Complaint for the following reasons:

I. PROCEDURAL HISTORY:

1. On December 3, 2020, PECO was served with a Formal Complaint filed by Nancy Colbert (hereafter “Complainant”). *See*, Complainant’s Complaint.
2. On December 13, 2022, PECO filed its Answer to the Complaint.
3. On December 16, 2022, PECO filed an Amended Answer with New Matter to the Complainant’s Complaint. *See*, PECO’s Amended Answer.
4. On December 23, 2022, the Complainant filed a Reply to PECO’s Amended Answer with New Matter.
5. On January 10, 2023, this matter was Stayed pursuant to Smart Meter Procurement and Installation, Docket No. M-2009-2092655 (Order entered November 4, 2020).
6. By Order entered November 14, 2023, at Smart Meter Procurement and Installation Docket No. M-2009-2092655 (November 2023 Order), the Commission lifted the November 4, 2020 general stay of smart meter proceedings.
7. On January 12, 2024, the Honorable Administrative Law Judge, Arlene Ashton, issued an

Interim Order Establishing Initial Litigation Schedule, specifically ordering:

That on or before March 1, 2024, any Party wishing to present expert testimony (including but not limited to medical, technical, etc.) must provide to the other Party in writing, the name and business address of that expert and a written summary of the expected testimony of that expert. Each Party shall provide notice to me, via email to my legal assistant, that they have identified an expert and provided the other Party the expert information and summary of expected testimony.

See, Interim Order.

8. On March 1, 2024, PECO filed its letter identifying its expert witness with the Public Utility Commission. On March 1, 2024, the letter was served on the Complainant.

9. The Complainant did not file or submit a letter of intent to present expert testimony.

10. On March 11, 2024, the Complainant filed a Motion for Special Appearance, a Motion for Demand of Oaths and a document titled “Judicial Notice.” To the extent a response is required, PECO denies all material allegations of fact and conclusions of law, to which no response is required. However, to the extent that the Motion for Special Appearance and Motion for Demand of Oaths requires an answer, they are denied.

11. On March 26, 2024, the PECO filed a Motion to Dismiss the Complainant’s Complaint.

12. On May 7, 2024, the Honorable Arlene Ashton entered an Interim Order #2 Granting in Part and Denying in Part Motion For Judgement On The Pleadings and Directing a More Specific Complaint.

13. The Complainant was directed to file an Amended Complaint on or before May 31, 2024.

14. The Complainant’s Amended Complaint was to:

...clearly articulating in detail and with specificity: a. her concerns regarding the impact on her own health relating to the installation of a smart meter by PECO; and b. what accommodation relating to the installation by PECO of a smart meter would be acceptable to her, if any.

That on or before May 31, 2024, Nancy Colbert shall provide to PECO and the presiding officer provide to PECO and the presiding officer the name and business address of the expert who will provide expert testimony in support of the claims made in the Complaint, as amended and a written summary of the expected testimony of that expert.

See, Interim Order #2, dated May 7, 2024 at pp. 14-15.

II. RELEVANT FACTS:

15. In 2015, the Complainant filed a Formal Complaint regarding the refusal of an AMI meter. *See*, Formal Complaint Docket Nos. C-2015-2515607¹ and C-2016-2561993. In that Complaint, the Complainant disputed the installation of an AMI smart meter. *See*, Final Order and Opinion granting Petition for Rescission or Amendment of the Pennsylvania Public Utility Commission's Final Order entered in *Nancy and Jim Colbert v. PECO Energy Company*, Docket No. 2015-2515607.

16. On February 15, 2019, the Initial Decision granted the request of the Complainant to withdraw the Formal Complaint. *See*, Complainant's Request for Withdrawal.

17. On February 15, 2019, PECO Energy filed Exceptions, specifically seeking dismissal with prejudice to establish that the 2016 Formal Complaint proceeding, and all the matters raised herein, could not be raised in any future action to prohibit PECO's installation of a smart meter at the Complainant's service address.

¹ The docket number was subsequently changed to C-2016-2561993.

18. On September 19, 2019, the Public Utility Commission (“PUC”) granted PECO’s Exceptions and dismissed the Complainant’s Complaint with prejudice. See, PUC Opinion and Order dated September 19, 2019.

19. PECO Energy avers that the Complainant’s Complaint is barred by Pennsylvania law.

III. LEGAL ARGUMENT

A. Standard of Review

16. The Commission’s regulations at 52 Pa. Code §5.102(a) permits any party to move for summary judgment or judgment on the pleadings after the pleadings are closed, but within such time as to not delay a hearing.

17. Under 52 Pa. Code §5.102(d)(1), the presiding officer will grant the motion if the pleadings, depositions, answers to interrogatories, admissions and affidavits show that there is no genuine issue as to a material fact and that the moving party is entitled to judgment as a matter of law.

18. The “filing of a formal complaint entitles the complainant to a formal hearing before the Commission except that the Commission may dismiss any complaint without a hearing if, in its opinion, a hearing is not necessary in the public interest.” 52 Pa. Code. §5.21 (d).

19. The moving party bears the burden of showing that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law. The Commission must view the record in the light most favorable to the non-moving party, giving that party the benefit of all reasonable inferences. *First Mortgage Co. of Pennsylvania v. McCall*, 459 A.2d 406 (Pa. Super. 1983).

20. The provisions at 52 Pa. Code §5.102(c) and 52 Pa. Code. §5.21 (d) serve judicial economy by avoiding a hearing where no factual dispute exists. If no factual issue pertinent to the resolution of the case exists, a hearing is unnecessary. *Lehigh Valley Power Committee v. Pennsylvania Public Utility Commission*, 563 A.2d. 557 (Pa. Cmwlth. 1989).

C. The Complainant’s claim is barred by Pennsylvania law.

In this matter, PECO Energy avers that the company is required to install AMI meters for the company’s electric distribution customers subject to the requirements of Act 129. On August 16, 2022, the Pennsylvania Supreme Court issued its Opinion asserting that Section 2807(f) of the Public Utility Code mandates that EDCs furnish smart meters to **all** electric customers in their service areas and **does not** provide the ability for customers to “opt-out”. *Povacz v. Pa. Pub. Util. Comm’n*, Nos. 34-45, 280 A.3d 975 (Pa. 2022) (*Povacz* Opinion). (*emphasis added*)

The court specifically stated:

Act 129 does mandate that EDCs furnish smart meters to **all** electric customers within an electric distribution service area and **does not provide electric customers the ability to opt out of having a smart meter installed.** An electric customer with concerns about smart meters may seek an accommodation from the PUC or EDC, but to obtain one the customer must establish by a preponderance of the evidence that installation of a smart meter violates Section 1501.

See, Povacz Opinion at 7. (*emphasis added*)

The Court further held that the authority to select and install a certain type of electric meter rests solely with EDCs, in this case PECO, not the customer, “regardless of a customer’s preference.” *Id.* at 22, 26-27. The Complainant was advised that PECO Energy’s system no longer supports a non-AMI meter and that a new smart meter must be installed. In addition, the PUC’s regulations provide that [a] public utility may notify a customer and terminate service provided to a customer after notice as provided in §§ 56.91- 56.100 (relating to notice procedures

prior to termination) for any of the following actions by the customer ... failure to permit access to meters, service connections or other property of the public utility for the purpose of replacement, maintenance, repair or meter reading. Pennsylvania law is clear. A customer does not have the ability to opt out of the installation of an AMI meter. *See, Povacz. See also, Mary Paul v. Pennsylvania Public Utility Commission*, 460 C.D. 2019 (2023)(holding there is not an opt-out provision. Finding all other arguments, including those regarding burden of proof, were without merit); *Janice Denito Branagh, v. Pennsylvania Public Utility Commission* 1857 C.D. 2019 (2023))(holding there is not an opt-out provision).

Moreover, the Complainant has failed to make a prima facie case for an accommodation. The Complainant has failed to set forth any evidence to support a claim that that installation of a smart meter violates Section 1501. The Pennsylvania Supreme Court has held that:

A customer seeking affirmative relief from the PUC must prove by a preponderance of the evidence that the named utility was responsible or accountable for the problem described in the complaint and that the offense was a violation of the Code, a PUC regulation or Order, or a violation of a PUC-approved tariff. 66 Pa.C.S. §§ 332(a), 701; *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm'n*, 578 A.2d 600 (Pa. Commw. 1990), alloc. denied, 602 A.2d 863 (Pa. 1992). Although Act 129 **does not provide an electric customer with the right to opt-out** of the installation of a smart meter at their residence, they may file a complaint raising a claim that installation of a smart meter violates Section 1501 of the Code.

Relevant to this matter, Section 1501 provides as follows: Every public utility shall furnish and maintain adequate, efficient, safe, and reasonable service and facilities, and shall make all such repairs, changes, alterations, substitutions, To establish a claim by a preponderance of the evidence means to offer evidence that outweighs or is more convincing than, by even the smallest amount, the probative value of the evidence presented by the opposing party. *Stacey Weaver v. PPL Electric Utilities Corp.*, No. C-2018-3005382, 2020 WL 5876967 (Pa. P.U.C. Sept. 17, 2020); see also *Popowsky v. Pa. Util. Comm'n*, 937 A.2d 1040, 1057 (Pa. 2007) (acknowledging that “the PUC properly applies a preponderance of the evidence standard to make factually-based determinations”). extensions, and improvements in or to such service and facilities as shall be necessary or proper for the accommodation, convenience, and safety of its patrons, employees, and the public. 66 Pa.C.S. § 1501. Pursuant to this section, an EDC (as a public utility) must provide service that is, *inter alia*, both safe and reasonable.

To carry their burden of proof on a Section 1501 claim, a smart meter challenger may be required to present **medical documentation and/or expert testimony** demonstrating that the furnishing of a smart meter constitutes unsafe or unreasonable service in violation of Section 1501 under the circumstances presented. *Susan Kreider v. PECO Energy Co.*, P-2015-2495064, 2016 WL 406549, at *14 (Pa. P.U.C. Jan. 28, 2016).

Povacz at 36-37. (*emphasis added*)

Pursuant to 52 Pa. Code §5.22(5), a “clear and concise statement of the act or omission being complained of including the result of any informal complaint or informal investigation” is required to be included in a formal complaint. Accordingly, the Complainant was ordered by this court to file an Amended Complaint with specificity of the issues complained of on or before May 31, 2024. The Complainant failed to do so. The Complainant was ordered to provide the name of the expert witness who she intended to present before the court on or before May 31, 2024. The Complainant failed to do so. The Complainant was ordered to provide a written summary of the expected testimony of that expert on or before May 31, 2024. The Complainant failed to do so. Thus, the Complainant cannot meet her burden of proof. In order to meet a burden of proof, “specific to smart meters and RF emissions, the burden is two-fold.” *Povacz* at 49. The Pennsylvania Supreme Court has held that “first, a customer must present **expert opinion rendered to a reasonable degree of scientific certainty** that smart meters emit RFs and that RF emissions cause adverse health effects and, second, 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 them harm.” *Id.* (*emphasis added*)

In this case, the Complainant has not proffered any expert evidence in support of her claim. The Complainant failed to comply with the January 12, 2024, Interim Order of this Court by not providing proposed expert testimony on her behalf on or before March 1, 2024. The

Complainant failed to comply with the May 7, 2024, Interim Order #2 of this Court by not providing a specified Amended Complaint on or before May 31, 2024. The Complainant failed to comply with the May 7, 2024, Interim Order #2 of this Court by not providing proposed expert testimony on her behalf on or before May 31, 2024. In doing so, she has also failed to meet the minimum criteria as required by Pennsylvania law for the first required prong of an accommodation claim. Pennsylvania law is clear, “evidence that does not support a conclusion (or is inconclusive) cannot meet that minimal burden.” *Povacz* at 50. “The generic versus specific nature of a claim does not diminish the need to prove, by a preponderance of the evidence — **with expert opinion** within a reasonable degree of certainty — that the service or facility is unsafe and that a causal connection exists between the allegedly unsafe service or facility and harm, either to the public at large or to specific individuals.” *Id.* at 50. (*emphasis added*)

Inasmuch as a finding of a Section 1501 violation cannot be found without expert testimony, the Complainant is barred from seeking an accommodation. *See, Povacz. See also, Alexia and Lawrence McKnight v. Pennsylvania Public Utility Commission*, 1253 C.D. 2019 (2024) (affirming PUC decision holding as in *Povacz*, the PUC properly found the scientific evidence of potential harm inconclusive and determined that the McKnights’ failed to sustain their burden of proof). The Complainant has failed to put forth evidence that PECO is in violation of Title 66 Section 1501. Therefore, this issue is without merit and should be dismissed.

IV. Conclusion

In the matter *sub judice*, the Complainant has failed to state a specified claim upon which relief may be granted. The Complainant has failed to proffer evidence in support of a smart

meter claim. The Complainant's Complaint is barred by Pennsylvania law. Accordingly, this Complaint is without merit and should be dismissed.

WHEREFORE, PECO Energy Company respectfully requests that your Honorable Commission dismiss the Complainant's Complaint with prejudice.

Respectfully Submitted,



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VERIFICATION

I, Khadijah Scott, hereby declare that I am counsel for PECO Energy Company; that as such I am authorized to make this verification on its behalf; that the facts set forth in the foregoing Pleading are true to the best of my knowledge, information and belief, and that I make this verification subject to the penalties of 18 Pa. C.S. §4904 pertaining to false statements to authorities.



Date: June 5, 2024

Khadijah Scott

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CERTIFICATE OF SERVICE

I, Khadijah Scott, hereby certify that I have this day served a copy of PECO Energy Company's Motion to Dismiss the Complainant's Complaint in the above matter upon all interested parties by E-mailing a copy to:

NANCY COLBERT
142 PENNSYLVANIA AVE
PHOENIXVILLE PA 19460
Via email: nrcc1@protonmail.com

June 5, 2024



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