

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

Public Meeting held August 1, 2024

Commissioners Present:

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

Lloyd and Susan Horst

C-2021-3026448

v.

PPL Electric Utilities Corporation

OPINION AND ORDER

BY THE COMMISSION:

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition is the Exception filed by PPL Electric Utilities Corporation (PPL or Company) on December 6, 2021, in response to the Initial Decision (Initial Decision or I.D.) of Administrative Law Judge (ALJ) Eranda Vero, which was served on the Parties on November 16, 2021, in the above-captioned proceeding. Replies to Exceptions were filed by Lloyd and Susan Horst (the Complainants or the Horsts) on December 15, 2021. The Initial Decision granted PPL's Preliminary Objection (PO) filed by PPL on July 6, 2021. For the reasons discussed below, we shall grant PPL's

Exception, modify the Initial Decision of ALJ Vero, and dismiss the Complaint, consistent with this Opinion and Order.

I. Background

This case involves a second Complaint concerning, *inter alia*, the installation of the advanced metering infrastructure (AMI), or smart meter, that PPL proposes to install at the Complainants' residence and use in the ordinary course of business to measure the Complainants' electricity consumption.

Initially, the Complainants filed a Formal Complaint (Complaint 1) against PPL Electric Utilities Corporation on December 27, 2018, at Docket No. C-2018-3006774 in which they alleged that PPL was threatening to shut off their service. For the requested relief, the Complainants provided the following: “(1) a Violation of the 4th Amendment; (2) Health Reasons; (3) Dirty Electricity; (4) Radiation; (5) To force the people is not only a violation of property rights, it is Government Mandating purchases which is a violation personal rights and a form of fascism; and (6) We want to keep our Analog meter!!!” Complaint 1 at 3.

On January 16, 2019, PPL filed an Answer to Complaint 1 in which it admitted in part and denied in part the allegations raised in the complaint. PPL admitted that it: (1) had attempted to install a new automated metering infrastructure meter at the address; and (2) sent the Complainants a termination notice because they had refused access to PPL's representatives to the premises when they were trying to replace the meter. PPL denied, *inter alia*, that it in any way violated any applicable law and regulations by issuing a termination notice; that the new meters pose any health hazards. PPL also asserted that it is legally required to install the new AMI meter. Answer at 2-4.

A hearing was held as scheduled on January 23, 2020.

The Complainant Susan Horst appeared pro se with no exhibits. Respondent appeared represented by Devin Ryan, Esquire, Garrett Lent, Esquire, and Curtis Renner, Esquire with fifteen exhibits and four witnesses: Kevin Durkin, Michael Asbury, Christopher Davis, Ph.D., and Mark Israel, M.D. All statements and exhibits were admitted into the record.

On March 6, 2020, the Commission issued the Initial Decision of ALJ Eranda Vero wherein she recommended that the Commission dismiss the complaint for failure to prove by a preponderance of evidence that the installation of the smart meter constitutes unsafe or unreasonable service under 66 Pa.C.S. § 1501 or otherwise violates the Pennsylvania Public Utility Code (Code), a Commission order or regulation or a Commission-approved tariff of the company.

On July 8, 2020, the Initial Decision became final by operation of law under 66 Pa.C.S. § 332(h).

Currently before the Commission is the Complainants' Second Complaint (Complaint 2) filed on June 2, 2021. The Complainants refuse to have a smart meter installed. In their Complaint 2, the Complainants allege that their service is being or has been terminated and that PPL wants to switch out their analog meter for a smart meter in violation of the then Commonwealth Court's decision. The Complainants note that the Commission and utilities had appealed the Commonwealth Court's decision to the Pennsylvania Supreme Court. For relief the Complainants provided that "Act 129 does not mandate installation of wireless meters" and requested that: (1) they be allowed to keep their analog meter at least until the PA Supreme court ruled on the matter; and (2) that PPL be prevented from terminating service to the Complainants. Complaint 2 at 3.

PPL, an electric distribution company (EDC) subject to the jurisdiction of the Commission, furnishes, owns and maintains the meters in its distribution system. *See*, PPL's Tariff Electric Pa. P.U.C. No. 201, Rule 8 at 12.

The Complainants, Lloyd and Susan Horst are PPL customers. Complaint 2 at 1.

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

(f) *Smart Meter technology and time of use rates.*

(1) Within nine months after the effective date of this paragraph, electric distribution companies shall file a Smart Meter technology procurement and installation plan with the commission for approval. The plan shall describe the Smart Meter technologies the electric distribution company proposes to install in accordance with paragraph (2).

(2) Electric distribution companies shall furnish Smart Meter technology as follows:

(i) Upon request from a customer that agrees to pay the cost of the Smart Meter at the time of the request.

(ii) In new building construction.

(iii) In accordance with a depreciation schedule not to exceed 15 years.

66 Pa.C.S. § 2807(f). The General Assembly found that it was “in the public interest” to implement the measures set forth in Act 129 and that the universal installation of smart

meters would enhance the “health, safety and prosperity” of Pennsylvania’s citizens through the “availability of adequate, reliable, affordable, efficient and environmentally sustainable electric service at the least cost.” *See*, H.B. 2200, 192d Gen. Assemb., Reg. Sess. (Pa. 2008).

By Order entered in 2009, the Commission directed all EDCs subject to Act 129’s smart meter requirements, including PPL, to universally deploy smart meter technology within their respective service territories in the Commonwealth in accordance with a depreciation schedule not to exceed fifteen years and in accordance with other guidelines established therein. *See, Smart Meter Procurement and Installation*, Docket No. M-2009-2092655 (Implementation Order entered June 24, 2009) (*Smart Meter Installation Order*). PPL sought and obtained the Commission’s approval to complete the installation of AMI meters for substantially all customers within its service territory by the end of 2019. *See, Petition of PPL Electric Utilities Corporation for Approval of its Smart Meter Procurement and Installation Plan*, Docket No. M-2014-2430781 (Opinion and Order entered September 3, 2015) (*PPL 2015 Smart Meter Order*); *see also, Petition of PPL Electric Utilities Corporation for Approval of its Smart Meter Procurement and Installation Plan*, Docket No. M-2009-2123945 (Opinion and Order entered June 24, 2010) (*PPL 2010 Smart Meter Order*).

II. History of the Proceeding¹

On June 2, 2021, Lloyd and Susan Horst filed a second Formal Complaint (Complaint 2) with the Commission against PPL Electric Utilities Corporation, alleging that the Respondent continually threatens to shut off power to their property although they pay their electricity bills in full and on time and that PPL seeks to switch their

¹ The History of the Proceeding is summarized here. A more extensive History of the Proceeding can be found in the Initial Decision at 1-4.

analog meter with a smart meter in violation of the Commonwealth Court’s ruling in *Povacz v. Pa. PUC*, 241 A.3d 481 (Pa. Cmwlth 2020) (*Povacz I*), *rev’d*, *Povacz v. Pa. PUC*, 280 A.3d 975 (Pa. 2022) (*Povacz II*). I.D. at 1-2; Complaint 2 at 2.² As relief, the Complainants request that they be allowed to keep their analog meter until the Supreme Court of Pennsylvania rules on the appeal to the Commonwealth Court’s decision in *Povacz I*, and that PPL be prevented from terminating service to the Complainants.³

On July 6, 2021, Respondent filed an Answer and New Matter to the Complaint. In its Answer, the Respondent admitted, in part, and denied, in part the material allegations of Complaint 2. I.D. at 2. In particular, PPL admitted that the Complainants have made timely payments for their electric service and that they have no overdue payments as of July 6, 2021. *Id.* PPL also admitted that it sent the Complainants a termination notice because the Complainants have refused its representatives access to the premises to replace the meter. *Id.* PPL denied that its issuance of the termination notice was in any way unlawful under the applicable laws and regulations arguing that it is well-established that a public utility can terminate a customer’s service for failure to permit the utility access to its meter for purposes of, among other things, replacement. *Id.*; *see*, 66 Pa.C.S. § 1406(a)(4); 52 Pa. Code § 56.81(3); Tariff Rule 10(B)(2)(g),

² On October 8, 2020, the Commonwealth Court of Pennsylvania (Commonwealth Court) issued an Opinion in the first of several appeals before it that involve an EDC deployment of smart meter technology pursuant to Act 129 of 2008 (Act 129), codified at 66 Pa.C.S. § 2807(f). In this consolidated opinion, the Commonwealth Court partially affirmed, and partially reversed and remanded, the Commission’s March 28, 2019, and May 9, 2019, Orders in *Povacz v. PECO Energy Co.*, C-2015-2475023; *Sunstein Murphy v. PECO Energy Co.*, C-2015-2475726, and *Randall v. PECO Energy Co.*, C-2016-2537666. *Povacz I*.

³ On May 12, 2021, the Supreme Court of Pennsylvania granted Petitions for Allowance of Appeal from the Order of the Commonwealth Court in *Povacz v. Pa. PUC*, 253 A.3d 220 (Unpublished Opinion).

Supplement No. 227 to Electric Pa. P.U.C. No. 201, Fourteenth Revised Page No. 14A.
Answer at 4.

In its New Matter, PPL argued that on December 27, 2018, the Complainants filed a Formal Complaint against PPL Electric at Docket No. C-2018-3006774 wherein they disputed the Company's planned installation of its automated metering infrastructure (AMI) meter for the same customer service location and same service account as in Complaint 1. *Id.*; New Matter ¶ 4. On January 16, 2019, PPL Electric filed an Answer to Complaint 1 and an evidentiary hearing was held in that matter on January 23, 2020, producing a transcript of 40 pages. I.D. at 3. The record was closed on February 10, 2020. *Id.*; New Matter ¶¶ 5-6. Subsequently, on March 6, 2020, the Commission issued the Initial Decision of ALJ Elizabeth H. Barnes, which dismissed Complaint 1 for failing to prove by a preponderance of the evidence that the installation of the AMI meter constitutes unsafe or unreasonable service under Section 1501 of the Code, or that it violates any other provision of the Code, Commission Regulation, Commission Order, or Commission-approved Company tariff. *Id.*; New Matter ¶ 7, *see, Horst v. PPL Elec. Utils. Corp.*, Docket No. C-2018-3006774, pp. 1, 20, 21 (Initial Decision issued March 6, 2020). On July 8, 2020, the Commission issued a Final Order dismissing that Complaint on the merits. *Id.*, New Matter ¶ 30, *see, Horst v. PPL Elec. Utils. Corp.*, Docket No. C-2018-3006774 (Order entered July 8, 2020) (*Complaint 1 Order*). The Complainants did not file Exceptions or a petition for review with the Commonwealth Court. *Id.*; New Matter ¶¶ 8-9, 10-12. Consequently, PPL argues that pursuant to Section 316 of the Public Utility Code (66 Pa.C.S. § 316) and the doctrines of *res judicata* and collateral estoppel, the Commission's *Complaint 1 Order* is binding on the Complainants, and the Complainants can no longer dispute the installation of the AMI meter at this service address or any other service address. *Id.*

On July 6, 2021, PPL also filed a Preliminary Objection to Complaint 2 requesting that it be dismissed in its entirety because it is barred by Section 316 of the

Code, 66 Pa.C.S. § 316, as well as the doctrines of *res judicata* and collateral estoppel and, therefore, is legally insufficient. *Id.*; PPL’s Preliminary Objection at 4, 7; *see*, 52 Pa. Code § 5.101(a)(4). PPL argued in its Preliminary Objection that the Commission previously determined in response to Complaint 1 filed by the Horsts that the Horsts failed to prove by a preponderance of the evidence that the installation of a smart meter violates the Code or a Commission Order or Regulation.⁴

On July 30, 2021, the Complainants filed a response to PPL’s Preliminary Objection wherein they argued that reliance on the Commonwealth Court’s ruling in *Povacz I* distinguishes the present Complaint from the previous one, thereby invalidating PPL’s claim that the present Complaint is a rehash of Complaint 1. I.D. at 3. According to the Complainants, PPL’s attempt to replace their analog meter with a smart meter violates the Commonwealth Court’s decision in *Povacz I* which ruled that “Act 129 does not mandate that all customers get smart meters.” Complaint 2 at 3. The Complainants reiterated their request that, “[a]s the PUC and utilities have appealed this decision to the Supreme Court, we request that we be allowed to keep our present meter at least until the Supreme Court rules on this case.” The Complainants argued that Section 316 is not relevant. Response to Preliminary Objection at 2.

On July 30, 2021, the Complainants filed a Petition for Extension of Time to file their Answer to PPL’s New Matter. I.D. at 4.

On August 5, 2021, the Complainants filed their reply to PPL’s New Matter wherein they argue that the Commonwealth Court’s decision in [*Povacz I*] is “a new fact” that “alters the playing field.” According to the Complainants, neither the doctrine of *res judicata* nor that of collateral estoppel applies to the present Complaint as they “are not

⁴ As discussed, *supra*, Complaint 1 became final on July 8, 2020. *Horst v. PPL Elec. Utils. Corp.*, Docket No. C-2018-3006774 (Final Order entered July 8, 2020).

raising earlier claims or fact of law. Nor could [they] have raised the possibility of the [*Povacz I*] decision, as this occurred after [their] earlier complaint.” *Id.*; Reply to New Matter.

On August 27, 2021, the Commission assigned the matter to ALJ Vero as a Motion Judge to rule on PPL’s Preliminary Objection. *Id.*

The Complainants’ Complaint 2 was filed after the Commonwealth Court had reversed prior Commission precedent and held that Pennsylvania law permits consumers to “opt-out” of receiving a smart meter.⁵ After the filing of Complaint 2, however, the Pennsylvania Supreme Court reversed the Commonwealth Court and held that there is no provision in Pennsylvania law that allows consumers to “opt-out” of receiving a smart meter.⁶ In between the Commonwealth Court decision and the Supreme Court decision, the Commission stayed all cases involving smart meters pending resolution of the appellate proceedings.⁷

Despite the stay, on November 15, 2021, the Commission issued the Initial Decision of ALJ Vero wherein she granted PPL’s Preliminary Objections that sought dismissal of Complaint 2 on the grounds that the complaint was legally insufficient because it is barred by Section 316 of the Code, 66 Pa.C.S. § 316, and by the doctrines of *res judicata* and collateral estoppel. I.D. at 1, 6-9. In addition to granting PPL’s Preliminary Objection and dismissing Complaint 2, the presiding officer also directed the Secretary's Bureau to file Complaint 2 in the docket of the Horst's Complaint 1 and

⁵ *Povacz I.*

⁶ *Povacz II.*

⁷ *Smart Meter Procurement and Installation*, Docket Number M-2009-2092655 (Order entered November 4, 2020); *see also*, *Smart Meter Procurement and Installation*, Docket Number M-2009-209655 (Order entered November 14, 2023) (lifting stay).

identify Complaint 2 as a Petition for Reconsideration of the Commission's Final Order in that prior matter.

As noted above, on December 6, 2021, PPL filed Exceptions to the Initial Decision. On December 15, 2021, the Complainants filed Replies to Exceptions.

III. Discussion

A. Legal Standards

1. Preliminary Objections

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

1. Lack of Commission jurisdiction or improper service of the pleading initiating the proceeding.
2. Failure of a pleading to conform to this chapter or the inclusion of scandalous or impertinent matter.
3. Insufficient specificity of a pleading.
4. Legal insufficiency of a pleading.
5. Lack of capacity to sue, nonjoinder of a necessary party or misjoinder of a cause of action.

6. Pendency of a prior proceeding or agreement for alternative dispute resolution.
7. Standing of a party to participate in the proceeding.

52 Pa. Code § 5.101(a).

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

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

Here, PPL's Preliminary Objection asserted that the Complaint is legally insufficient pursuant to 52 Pa. Code § 5.101(a)(4), based upon the prior complaint

predicated upon the same issues and set of facts which the Commission ultimately dismissed.

The provision at 52 Pa. Code § 5.101(a)(4): (1) permits the filing of a Preliminary Objection to dismiss a pleading for legal insufficiency; and (2) serves judicial economy by avoiding a hearing where no factual dispute exists, and the matter in dispute is purely a legal question. If no factual issue pertinent to the resolution of a cases exists, a hearing is unnecessary. 66 Pa.C.S. § 703(a); *Lehigh Valley Power Committee v. Pa. PUC*, 563 A.2d 557, 564 (Pa. Cmwlth. 1989); *S.M.E. Bessemer Cement, Inc. v. Pa. PUC*, 540 A.2d 1006, 1008-9 (Pa. Cmwlth. 1988); *White Oak Borough Authority v. Pa. PUC*, 103 A.2d 502, 507 (Pa. Super. 1954).

2. Res Judicata

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

3. Collateral Estoppel

The doctrine of collateral estoppel is similar to the doctrine of *res judicata* however, it is a broader concept. Collateral estoppel prevents a question of law or an issue of fact that has been once litigated and adjudicated finally in a court of competent jurisdiction from being relitigated in a subsequent suit. The four requirements for a plea of collateral estoppel to prevail are: (1) the issue decided in the prior adjudication is identical with the one presented in the later action; (2) there was a final judgment on the merits; (3) the party against whom the plea is asserted was a party or in privity with the party to the prior adjudication; and (4) the party against whom the plea is asserted has had

a full and fair opportunity to litigate the issues in question in the prior action. *Day*, 464 A.2d at 1318-19. Collateral estoppel is a doctrine of issue preclusion that seeks to prevent the relitigation of a finally litigated issue in a subsequent proceeding between the same parties. *Baker v. Pa. Human Rels. Comm'n*, 462 A.2d 881 (Pa. Cmwlth. 1983).

4. Section 316

Section 316 of the Code provides, in pertinent part, that “[w]henver the commission shall make any rule, regulation, finding, determination or order, the same shall be *prima facie* evidence of the facts found and shall remain conclusive upon all parties affected thereby, unless set aside, annulled or modified on judicial review.”

66 Pa.C.S. § 316.

5. Burden of Proof Applied to Section 1501 Complaint Challenging Smart Meter Installation

In *Povacz II*, which dealt with consolidated appeals involving the deployment of smart meters by PECO Energy Company, the Supreme Court of Pennsylvania (Supreme Court) reversed the Commonwealth Court’s October 8, 2020 decision in *Povacz I*, and thereby affirmed the Commission’s March 28, 2019 and May 9, 2019 Orders in *Maria Povacz v. PECO Energy Company*, C-2015-2475023 (*Povacz 2019 Order*); *Laura Sunstein Murphy v. PECO Energy Company*, C-2015-2475726 (*Laura Sunstein Murphy*); and *Cynthia Randall and Paul Albrecht v. PECO Energy Company*, C-2016-2537666 (*Cynthia Randall*). By *Povacz II*, the Supreme Court affirmatively established that there is no “opt-out” provision for installation of a smart meter pursuant to Act 129 and that to raise a viable challenge to smart meter installation, a customer must satisfy the preponderance of evidence standard for a violation of Section 1501 of the Code. *Povacz II*, 280 A. 3d at 983-984.

Pursuant to Section 1501 of the Code, all public utilities have a duty to maintain “adequate, efficient, safe, and reasonable service⁸ and facilities” and to make repairs, changes, and improvements that are necessary or proper for the accommodation, convenience, and safety of its patrons, employees, and the public. *See*, 66 Pa.C.S.

§ 1501. Section 1501 of the Code, provides, in pertinent part, 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, 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 . . . Such service and facilities shall be in conformity with the regulations and orders of the commission.

66 Pa.C.S. § 1501.

As previously noted, in *Povacz II*, the Pennsylvania Supreme Court not only affirmed the Commission’s determination that there is no “opt-out” provision for smart meter installation in either Act 129, the Code, Commission Regulations, or Orders,

⁸ The term “service” is defined broadly under Section 102 of the Code to include any and all acts done or rendered or performed and any and all things furnished or supplied and any and all facilities, used, furnished or supplied by public utilities. *See*, 66 Pa.C.S. § 102. The statutory definition of “service” is also to be broadly construed by the Commission and the courts. *Country Place Waste Treatment Co., Inc. v. Pa. PUC*, 654 A.2d 72 (Pa. Cmwlth. 1995).

but also confirmed that challenges to smart meter installation, other than an “opt-out,” may arise under Section 1501⁹ of the Code. Therein, the Supreme Court stated:

[W]e conclude that 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 [of the Code].

Povacz II, at 983-984; *see, Povacz v. PECO Energy Company*, Docket No. C-2012-2317176 (Opinion and Order entered January 24, 2013); *see also, Frompovich v. PECO Energy Co.*, Docket No. C-2015-2474602 (Opinion and Order entered May 3, 2018).

In applying Section 1501 to a complaint challenging the installation of smart meter technology, the Supreme Court affirmed the Commission’s Opinion and Order in the *Povacz 2019 Order*, stating:

A customer seeking affirmative relief from the [Commission] 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 [Commission] regulation or [o]rder, or a violation of a [Commission]-approved tariff.

⁹ The Commission has also determined that if a customer’s formal complaint raises a claim under Section 1501, related to the safety of a utility’s installation and use of a smart meter at the customer’s residence, such a claim is legally sufficient to proceed to an evidentiary hearing before an ALJ. To satisfy the burden of proof a complainant may be required to present medical documentation and/or expert testimony demonstrating that the installation of a smart meter constitutes unsafe or unreasonable service. *Povacz II* at 1000, citing *Susan Kreider v. PECO Energy Company*, P-2015-2495064, 2016 WL 406549, at *14 (Pa. P.U.C. January 28, 2016).

[See] 66 Pa.C.S. §§ 332(a), 701; *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm'n*, . . . 134 Pa. Commw. 218, 578 A.2d 600 ([Pa. Cmwlth.] 1990)[.] . . .

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 [sic] may file a complaint raising a claim that installation of a smart meter violates Section 1501 of the Code.

. . . .
Pursuant to [S]ection [1501 of the Code], 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 [of the Code] 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 [of the Code] 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 II, 280 A. 3d at 999-1000 (emphasis added; footnote omitted).¹⁰

In applying the standard of proof to scientific or expert medical evidence in support of alleged adverse health effects, the Commission ruled in the *Povacz 2019 Order*, and was subsequently affirmed by the Supreme Court in *Povacz II*, that in order to prevail in a Section 1501 claim against an EDC alleging that an AMI meter caused or will cause adverse health effects or harm to human health, the Complainant must demonstrate

¹⁰ With respect to the evidence necessary to support a challenge to smart meter installation under Section 1501, the Commonwealth Court has held that at the hearing, a complainant may prove his/her claim through the complainant's own personal testimony and/or "the testimony of others as well as other evidence that goes to that issue." *Romeo v. Pa. PUC*, 154 A.3d 422, 430 (Pa. Cmwlth. 2017).

by a preponderance of the evidence a “conclusive causal connection” between the harm to human health and the radio frequency fields (RFs)¹¹ from the AMI meter.¹²

6. Other Relevant Legal Standards

In addition to establishing that a complaint challenging the installation of a smart meter may arise under Section 1501, the Supreme Court’s decision in *Povac II* acknowledged the Commonwealth Court’s rejection of a constitutional claim for exemption from smart meter installation predicated on a violation of “bodily integrity.” The Supreme Court noted the Commonwealth Court’s denial of a claim under the Fourteenth Amendment, stating:

The Commonwealth Court rejected Customers’ constitutional arguments, persuaded by the reasoning of *Naperville Smart Meter Awareness v. City of Naperville*, 69 F. Supp. 3d 830 (N.D. Ill. 2014) (“*Naperville I*”). Therein, a federal district court rejected the customers’ “*Fourteenth Amendment* bodily integrity argument because their complaint failed to identify an arbitrary deprivation of a recognized liberty or property interest” and to aver that the city’s decision to employ smart meters was arbitrary. *Id.* at 839 (internal quotations marks omitted).

Povac II at 985, fn. 8. As the Supreme Court denied allocatur as to any constitutional claims, the Commonwealth Court’s holding stands.

¹¹ RF is an abbreviation for radio frequency and is also used here to denote RF fields or RF signals.

¹² See, *Povac 2019 Order* slip op., at 28-29 (citing *Letter of Notification of Philadelphia Electric Company Relative to the Reconstructing and Rebuilding of the Existing 138 kV Line to Operate as the Woodbourne-Heaton 230 kV Line in Montgomery and Bucks Counties*, 1993 WL 855896 (Pa. P.U.C. 1993), Docket No. A-110550F0055 (Final Order entered November 12, 1993), slip op. at 11).

Further, the Supreme Court noted that a customer must be connected to the distribution system to receive electric service confirming that EDCs operate in a universal basis. *Povacz II* at 993. As such, the Court concluded that by obtaining service from their incumbent EDC, customers contractually accept the EDC's Commission-approved Tariff, including the installation of smart meter technology. *Id* at 994. Therefore, the Supreme Court found that "the authority to select and install a certain type of electric meter rests solely with the EDCs, [...] not the customer." *Id*.

B. ALJ's Initial Decision

In the Initial Decision, ALJ Vero made thirteen Findings of Fact and reached eleven Conclusions of Law. *See*, I.D. at 4-6, 9-11. The Findings of Fact and Conclusions of Law are incorporated herein by reference and are adopted without comment unless they are either expressly or by necessary implication rejected or modified by this Opinion and Order.

In its New Matter, PPL averred that the Complainants' Complaint 1 challenged the Company's planned installation of its AMI or smart meter for the same customer service location and same service account. On July 8, 2020, the Commission issued a Final Order, *i.e.* the *Complaint 1 Order*, dismissing that Complaint on the merits. Additionally, the Complainants did not file exceptions with the Commission or a petition for review with the Commonwealth Court. I.D. at 8.

The Complainants did not dispute these averments. However, the Complainants argued that their present Complaint does not challenge the Company's planned installation of its AMI or smart meter at their property. The Complainants explained that they instead seek a stay of the Commission's *Complaint 1 Order* and of the installation of the Company's AMI meter until the resolution of the *Povacz I* case by the Pennsylvania Supreme Court. *Id*.

The ALJ, *inter alia*, stated that to the extent that this Complaint represents an attempt on the part of the Complainants to relitigate the issues raised in the first Complaint, the present Complaint is barred by Section 316 of the Code, 66 Pa.C.S. § 316, as well as the doctrines of *res judicata* and collateral estoppel. In both this present complaint and Complaint 1, the identity and capacity of the parties is the same: Lloyd and Susan Horst and PPL. The issues and cause of action are also the same, *i.e.*, the propriety of the installation of an AMI meter in Complainants' property. Additionally, Complaint 1 was fully litigated and the final valid judgment on the merits of that case was entered by the Commission on July 8, 2020 and bars any future suit between the same parties on the same cause of action. Consequently, the ALJ recommended that the Commission grant PPL's Preliminary Objection and dismissed the Complaint at this docket. I.D. at 9.

The ALJ reasoned that Complaint 2 seeks only a temporary stay of the *Complaint 1 Order* and "the cause of the Complainants should not be hindered by the filing of the wrong form, *i.e.*, a formal complaint instead of a petition for relief." I.D. at 8. The ALJ ordered that the Secretary's Bureau file Complaint 2 under Docket No. C-2018-3006774 and identify it as a petition for reconsideration of the Commission's Final Order in that matter. I.D. at 8-9.

C. Exception, Replies, and Disposition

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

a. Exception

In its Exception No. 1, PPL contends that the ALJ erred by determining to identify Complaint 2 as a Petition for Reconsideration in response to the Complaint 1 proceeding and instructing the Secretary's Bureau to docket the petition in that proceeding. PPL argues that the Complainants filed a Formal Complaint, not a petition for reconsideration and "[t]he Commission should not refashion a Formal Complaint as a petition *sua sponte*, especially when it affects the legal standards by which the pleading will be adjudicated." Exc. at 3-4 (citing *Mattu v. West Penn Power Co.*, Docket No. C-2016-2547322, Opinion and Order entered October 25, 2018 at 17-18).

PPL contends that even if it were a petition for reconsideration, it should be dismissed as it would be exceptionally untimely. PPL notes that Complaint 2 was filed 328 days after the *Complaint 1 Order* was entered. Exc. at 4.

PPL avers that the relief requested by the Complainants is a stay of PPL's AMI meter installation, not the *Complaint 1 Order*, as the ALJ characterized the relief sought in Complaint 2. PPL provides that in Complaint 1, the Complainants requested that they keep their analog meter and in Complaint 2, the Complainants requested to keep their analog meter until the Supreme Court rules on the consolidated appeals in *Povacz II*. Thus, PPL concludes, Complaint 2 is barred by Section 316 of the Code. Exc. at 5.

Finally, PPL argues that it has already demonstrated through its Preliminary Objection that Complaint 2 should be dismissed in its entirety. PPL argues that there is no reason to treat Complaint 2 as a Petition for Reconsideration and doing so would not be in the interest of administrative efficiency and judicial economy. According to PPL, if Complaint 2 is docketed as a petition for reconsideration, PPL "may be forced to incur the undue time and expense of having to respond to the same meritless pleading twice."

Id. PPL did not except to the underlying determination of the Initial Decision to dismiss Complaint 2 on the basis of Section 316, *res judicata* and collateral estoppel.

b. Replies

In Reply to PPL’s Exception No. 1, the Complainants do not contend that their Complaint 2 should be a petition for reconsideration. Rather, the Complainants argue that “[a] administrative efficiency and judicial economy would dictate, in our view, that we dispense with more filings until the PA Supreme Court decides on the case.” R. Exc. at 1.

c. Disposition

The Company takes exception to the ALJ’s *sua sponte* treatment of the Complaint as a Petition for Reconsideration of the Commission’s Final Order denying the Complaint and requests that the ALJ’s recommendation be modified to strike the treatment of the Complaint as a Petition for Reconsideration.

We agree with PPL and believe that its Exception should be granted. The presiding officer's *sua sponte* treatment of Complaint 2 as a Petition for Reconsideration of Complaint 1 was improper in these circumstances.

The standard for a Petition for Reconsideration is different than the preponderance of the evidence standard by which complaints are examined.¹³ In addition, we agree with PPL that PPL has already demonstrated through its Preliminary Objection that Complaint 2 should be dismissed in its entirety on the basis of Section 316,

¹³ *Samuel J. Lansberry, Inc. v. Pa. PUC*, 578 A.2d 600 (Pa. Cmwlth 1990), *alloc. denied*, 602 A.2d 863 (1992); *see also, Duick v. Pa. Gas and Water Co.*, 56 Pa. P.U.C. 553, 559 (1982).

res judicata and collateral estoppel and that by re-docketing Complaint 2 as a Petition for Reconsideration, the same pleading may have to be responded to and addressed twice. Such efforts are inefficient.

Had the Horsts determined to seek reconsideration of the dismissal of Complaint 1, they could have filed for such reconsideration. They did not do so and it was improper for the presiding officer to make that determination *sua sponte*.

We find no merit to the Complainant's arguments in the Replies. We note that the Complainants' claims, which were predicated upon the Commonwealth Court's holding in *Povacz I*, are now moot, based upon the Pennsylvania Supreme Court's holding in *Povacz II*.

Accordingly, we shall modify the ALJ's Initial Decision and grant the Company's Exception.

IV. Conclusion

In light of the above discussion, we shall: (1) grant PPL's Exception; (2) modify the ALJ's Initial Decision; and (3) dismiss the Complaint, consistent with this Opinion and Order; **THEREFORE,**

IT IS ORDERED:

1. That the Exception filed by PPL Electric Utilities Corporation on December 6, 2021, to the Initial Decision of Administrative Law Judge Eranda Vero issued on November 16, 2021, at Docket No. C-2021-3026448, is granted, consistent with this Opinion and Order.

2. That the Initial Decision of Administrative Law Judge Eranda Vero, issued on November 16, 2021, at Docket No. C-2021-30264483, is modified, consistent with this Opinion and Order.

3. That the Formal Complaint filed by Lloyd and Susan Horst, on June 2, 2021, at Docket No. C-2021-3026448, is dismissed.

4. That this proceeding be marked closed.

BY THE COMMISSION,

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

Rosemary Chiavetta
Secretary

(SEAL)

ORDER ADOPTED: August 1, 2024

ORDER ENTERED: August 8, 2024