

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Christie Brzostowski	:	
	:	
v.	:	C-2021-3024568
	:	
	:	
PPL Electric Utilities Corporation	:	

INITIAL DECISION

Before
Charece Z. Collins
Administrative Law Judge

INTRODUCTION

This Initial Decision grants PPL Electric Utilities Corporation’s preliminary objections that seek dismissal of the Formal Complaint filed by Christie Brzostowski on February 24, 2021, because the Commission previously issued an order on the merits dismissing a Formal Complaint filed by Ms. Brzostowski that similarly challenged PPL’s authority to install a smart meter at Complainant’s residence.

HISTORY OF THE PROCEEDING

On February 24, 2021, Christie Brzostowski (Ms. Brzostowski or Complainant) filed a Formal Complaint (2021 Complaint) with the Pennsylvania Public Utility Commission (Commission) against PPL Electric Utilities Corporation (PPL), at Docket No. C-2021-3024568. In her 2021 Complaint, Ms. Brzostowski averred that PPL was threatening to shut off her service or had already shut off her service. Ms. Brzostowski acknowledged the Commission’s decision that dismissed a prior Complaint that she filed regarding the same issue at Docket No. C-2019-3009320. As relief for her 2021 Complaint, she asked that the Commission reconsider its

decision at Docket No. C-2019-3009320. On March 9, 2021, Ms. Brzostowski filed “additional information” for her 2021 Complaint, attaching to the Complaint what appears to be googled medical information and various medical records.

On April 1, 2021, PPL filed an answer and new matter to Ms. Brzostowski’s 2021 Complaint. In its answer, PPL admitted or denied the various averments in the 2021 Complaint. Moreover, PPL asserted that the Complainant previously filed a Formal Complaint at Docket No. C-2019-3009320 challenging its planned installation of its automated metering infrastructure (“AMI”) meter for the same customer service location (2019 Complaint), and that the Commission issued a Final Order dismissing the 2019 Complaint on the merits. *See Brzostowski v. PPL Elec. Utils. Corp.*, Docket No. C-2019-3009320 (Opinion and Order entered May 21, 2020) (2020 O&O). PPL further asserted that the Complainant never filed a petition for reconsideration with the Commission or a petition for review with the Commonwealth Court. Therefore, PPL argued that Ms. Brzostowski is barred from filing the 2021 Complaint with the Commission. PPL’s new matter asserted that the 2021 Complaint is barred by 66 Pa.C.S. § 316 and the doctrines of *res judicata* and collateral estoppel. PPL’s new matter also alleged that the 2021 Complaint concerned electric service at the same property under the same customer account that was the subject of the 2019 Complaint. The answer and new matter contained a notice to plead requiring Complainant to respond within 20 days of service of the new matter. PPL attached to its answer documentation related to Complainant’s 2019 Complaint.

Ms. Brzostowski did not file a response to PPL’s new matter.

Also on April 1, 2021, PPL filed preliminary objections, requesting that the Commission dismiss Ms. Brzostowski’s 2021 Complaint. PPL asserted that the 2021 Complaint should be dismissed pursuant to 66 Pa.C.S. § 316 because the issues raised are barred by the 2020 O&O. The preliminary objections contained a notice to plead requiring Complainant to respond within 10 days of service of the same.

Ms. Brzostowski did not file a response to PPL’s preliminary objections.

On May 11, 2021, Administrative Law Judge (ALJ) Charece Z. Collins issued an order staying this proceeding because by order entered November 4, 2020, the Commission ordered that any formal complaint filed with the Commission on or after November 4, 2020, challenging an electric distribution company's deployment of smart meter technology as being in violation of Section 1501 of the Public Utility Code, 66 Pa.C.S. § 1501, was to be stayed until the Commission takes further action to lift the stay. *See, Smart Meter Procurement and Installation*, Docket No. M-2009-2092655 (Order entered Nov. 4, 2020) (*November 2020 Order*).

On November 9, 2023, the Commission entered an order lifting the stay implemented by the *November 2020 Order. Smart Meter Procurement and Installation*, Docket no. M-2009-2092655 (Order entered Nov. 9, 2023) (*November 2023 Order*). On November 14, 2023, the Commission issued a notice to the parties in this proceeding that the stay in this proceeding has been lifted, pursuant to the *November 2023 Order*.

PPL's preliminary objections are procedurally ready to be ruled upon and, for the reasons discussed below, PPL's preliminary objections will be granted.

FINDINGS OF FACT

1. The Complainant is Christie Brzostowski.
2. The Respondent is PPL Electric Utilities Corporation.
3. On April 22, 2019, Ms. Brzostowski filed a formal complaint, challenging PPL's authority to install a smart meter at 1 East Avenue, Mt. Carmel, PA 17851 (service address). 2019 Complaint.
4. On May 21, 2020, the Commission entered an order finding that Ms. Brzostowski's request to opt-out of a smart meter must be denied and dismissing the 2019 Complaint. *2020 O&O*.

5. In her 2019 Complaint, Ms. Brzostowski requested that PPL be prevented from installing an AMI meter at her residence for health reasons related to the meter's radiofrequency (RF) fields and precluded from terminating her electric service. 2019 Complaint at 4.

6. In its disposition of the 2019 Complaint, the Commission affirmed the Administrative Law Judge's finding that the Complainant failed to demonstrate a conclusive causal connection between the low-level RF fields from a PPL smart meter and any adverse health effects for the Complainant. 2020 O&O at 18.

7. In the 2019 Complaint proceeding, the Commission also found that it lacked jurisdiction, absent directive in the form of legislation, to prohibit an EDC from installing a smart meter where a customer does not want one simply due to the customer's preference. 2020 O&O at 19.

8. No appeal of the 2020 O&O was filed.

9. Ms. Brzostowski's 2021 Complaint regards PPL threatening to terminate her electric service at the service address for failure to install a smart meter. 2021 Complaint ¶¶ 4-5.

10. In the 2021 Complaint, Ms. Brzostowski is challenging PPL's authority to install a smart meter at the service address. 2021 Complaint ¶¶ 4-5.

11. Ms. Brzostowski's 2021 Complaint raises the same claims that were raised in her 2019 Complaint.

DISCUSSION

Section 5.101 of the Commission's Rules of Administrative Practice and Procedure provides for the filing of preliminary objections. 52 Pa. Code § 5.101. Commission preliminary objection practice is comparable to Pennsylvania civil practice. *Equitable Small*

Transp. Intervenors v. Equitable Gas Co., 1994 Pa.P.U.C. LEXIS 69 (Pa.P.U.C. 1994) (*Equitable*). Section 5.101(a) provides:

(a) *Grounds*. Preliminary objections are available to parties and may be filed in response to a pleading except motions and prior preliminary objections. 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 a proceeding.

52 Pa. Code § 5.101(a)(1)-(7).

For purposes of disposing of preliminary objections, the Commission must accept as true all well pleaded, material facts of the nonmoving party, as well as every reasonable inference from those facts. *Cnty. of Allegheny v. Commonwealth*, 490 A.2d 402 (Pa. 1985); *Commonwealth v. Bell Tel. Co. of Pa.*, 551 A.2d 602 (Pa. Cmwlth. 1988). The Commission must view the complaint in this case in the light most favorable to Ms. Brzostowski and should dismiss the complaint only if it appears that Ms. Brzostowski would not be entitled to relief under any circumstances as a matter of law. *Equitable*; see also, *Interstate Traveler Servs., Inc. v. Pa. Dep't of Env't Res.*, 406 A.2d 1020 (Pa. 1979).

PPL's preliminary objections assert that the 2021 Complaint should be dismissed on the basis of legal insufficiency. *See* 52 Pa. Code § 5.101(a)(4). Specifically, pursuant to 66 Pa.C.S. § 316, PPL argues the current issues raised by Ms. Brzostowski are barred by the 2020 *O&O* dismissing the same claims regarding the same installation of the same AMI meter at her property that she alleged in her 2019 Complaint.¹ PPL preliminary objections at 6 (citing *Moore, Jr. v. PECO Energy Co.*, Docket No. C-2012-2309932 (Order entered Oct. 24, 2012); *see also Denlinger v. PPL Elec. Utils. Corp.*, Docket No. C-2019-3014786 (Order entered May 21, 2020)). In relevant part, Section 316 of the Public Utility Code states:

Whenever 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.

PPL also asserts that 66 Pa.C.S. § 316 precludes a collateral attack upon a Commission order that has not been reversed upon appeal. PPL preliminary objections at 7 (citing *Lehigh Valley Power Comm. v. Pa. Pub. Util. Comm'n*, 563 A.2d 548 (Pa. Cmwlth. 1989) (*Lehigh*)).

In the 2019 Complaint proceeding, Ms. Brzostowski requested that PPL be prevented from installing an AMI meter at her residence due to health reasons and that PPL be prevented from terminating her electric service due to her opt-out. 2019 Complaint at 4. In the

¹ PPL notes that, to the extent that this argument regarding legal insufficiency is found to be more appropriately addressed in a motion for judgment on the pleadings, PPL Electric has raised this affirmative defense in its new matter to the Complaint and respectfully requests that its preliminary objections be treated as a motion for judgment on the pleadings in the interest of administrative and judicial efficiency. PPL preliminary objections at 6, fn. 4 (citing *Raintree Farm Solar v. PPL Elec. Utils. Corp.*, Docket No. C-2017-2621826 (Final Order entered Jan. 16, 2018)) (*Raintree*). In *Raintree*, ALJ David A. Salapa stated that *res judicata* is an affirmative defense that should be raised in new matter, not preliminary objections. However, the Commission has also recently stated that preliminary objections on the ground of legal insufficiency may raise the issue of *res judicata* where the complaint makes references to the prior action or the complaint contains facts and issues pled in the prior action. *Stillwater Lakes Coal. of Indep. Owners c/o Ruben Collazo v. Stillwater Sewer Corp.*, Docket No. C-2022-3031532 (Opinion and Order entered Dec. 22, 2022). In this case, PPL cites to 66 Pa.C.S. § 316, not *res judicata* or collateral estoppel, as the basis for its preliminary objections on legal insufficiency.

2020 O&O, the Commission cited *Povacz v. PECO Energy Co.*, Docket No. C-2015-2475023 (Opinion and Order entered Mar. 28, 2019) for the proposition that, in order to prevail in a Section 1501, 66 Pa.C.S. § 1501, claim against an electric distribution company alleging that an AMI meter caused or will cause adverse health effects or harm to human health, the Complainant must demonstrate by a preponderance of the evidence a “conclusive causal connection” between the harm to human health and the RFs from the AMI meter. 2020 O&O at 9.

In its disposition of the 2019 Complaint proceeding, the Commission agreed with the ALJ that Ms. Brzostowski did not meet her burden of proof regarding the claim that the smart meter will cause adverse health effects. *Id* at 18. Specifically, the Commission affirmed the ALJ’s finding that the Complainant failed to demonstrate a conclusive causal connection between the low-level RF fields from a PPL smart meter and any adverse health effects for the Complainant. *Id*. The Commission also found that it lacked jurisdiction, absent a directive in the form of legislation, to prevent an electric distribution company from installing a smart meter where a customer does not want one simply due to the customer’s preference. *Id* at 19. The Commission ultimately found that Ms. Brzostowski’s request to opt out of a smart meter installation must be denied and her complaint was dismissed. *Id* at 19-20.

Similar to the 2019 Complaint proceeding, Ms. Brzostowski’s 2021 Complaint is again challenging PPL’s authority to install an AMI or smart meter at her residence. I agree with PPL that Ms. Brzostowski’s 2021 Complaint is an impermissible attempt to collaterally attack the Commission’s 2020 O&O. 66 Pa.C.S. § 316; *Lehigh*. Ms. Brzostowski is again disputing PPL’s authority to install a smart meter at her residence based on the same grounds she raised in the 2019 Complaint proceeding. Ms. Brzostowski did not appeal the 2020 O&O and therefore, pursuant to 66 Pa.C.S. § 316, the 2020 O&O remains conclusive upon all parties to the 2019 Complaint proceeding, which includes Ms. Brzostowski and PPL. *Id*.

It is apparent from Ms. Brzostowski’s pleadings in her 2021 Complaint that she is seeking review of the 2020 O&O because of the Commonwealth Court’s October 8, 2020 decision that partially affirmed and partially reversed and remanded prior Commission decisions regarding smart meter technology. *Povacz v. Pa. Pub. Util. Comm’n*, 241 A.3d 481 (Pa.

Cmwlth. 2020) (*Povacz I*). However, subsequent to *Povacz I*, the Pennsylvania 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 under 66 Pa.C.S. § 1501. *Povacz v. Pa. Pub. Util. Comm'n*, 280 A.3d 975 (Pa. 2022) (*Povacz II*).

When accepting as true all well pleaded material facts in the 2021 Complaint, as well as every reasonable inference from those facts, and viewing the 2021 Complaint in this case in the light most favorable to Ms. Brzostowski, it is clear as matter of law that Ms. Brzostowski is not entitled to relief from the Commission for any claims in her 2021 Complaint, as they have already been decided on the merits by the Commission in the 2020 *O&O*. Therefore, PPL's preliminary objections are granted, and the 2021 Complaint is dismissed.

CONCLUSIONS OF LAW

1. The Commission's Rules of Administrative Practice and Procedure permit the filing of preliminary objections. 52 Pa. Code § 5.101.

2. Commission preliminary objection practice is comparable to Pennsylvania civil practice. *Equitable Small Transp. Intervenors v. Equitable Gas Co.*, 1994 Pa.P.U.C. LEXIS 69 (Pa.P.U.C. 1994).

3. For purposes of disposing of preliminary objections, the Commission must accept as true all well pleaded, material facts of the nonmoving party, as well as every reasonable inference from those facts. *Cnty. of Allegheny v. Commonwealth*, 490 A.2d 402 (Pa. 1985); *Commonwealth v. Bell Tel. Co. of Pa.*, 551 A.2d 602 (Pa. Cmwlth. 1988).

4. The Commission must view the complaint in this case in the light most favorable to the Complainant and should dismiss the complaint only if it appears that the Complainant would not be entitled to relief under any circumstances as a matter of law. *Equitable Small Transp. Intervenors v. Equitable Gas Co.*, 1994 Pa.P.U.C. LEXIS 69 (Pa.P.U.C.

1994); *see also, Interstate Traveler Servs., Inc. v. Pa. Dep't of Env't. Res.*, 406 A.2d 1020 (Pa. 1979).

5. Whenever 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.

6. 66 Pa.C.S. § 316 precludes a collateral attack upon a Commission order that has not been reversed upon appeal. *Lehigh Valley Power Comm. v. Pa. Pub. Util., Comm'n*, 563 A.2d 548 (Pa. Cmwlth. 1989).

7. Ms. Brzostowski's Formal Complaint is an impermissible attempt to collaterally attack the Commission's order entered on May 21, 2020 at Docket No. C-2019-3009320. 66 Pa.C.S. § 316.

8. When accepting as true all well pleaded material facts in the complaint, as well as every reasonable inference from those facts, and viewing the complaint in this case in the light most favorable to Ms. Brzostowski, it is clear as matter of law that Ms. Brzostowski is not entitled to relief from the Commission for any claims in her Formal Complaint, as they have already been decided on the merits by the Commission in the 2019 Complaint proceedings.

ORDER

THEREFORE,

IT IS ORDERED:

1. That the Preliminary Objections filed by PPL Electric Utilities Corporation at docket number C-2021-3024568 are granted.

