

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Anthony Giamonti	:	
	:	
v.	:	C-2019-3007637
	:	
Metropolitan Edison Company	:	

INTERIM ORDER REOPENING RECORD

Anthony Giamoni (Complainant) filed a Formal Complaint (Complaint) with the Pennsylvania Public Utility Commission (Commission) against Metropolitan Edison Company (Respondent) on January 31, 2019, questioning a security deposit¹ assessed on his account and objecting to the installation of a smart meter at his residence at 1647 Alpine Drive, Pen Argyl, Pennsylvania 18072 (service location), due to health concerns. As relief, Complainant requested he be permitted to opt-out of the smart meter installation.

On February 25, 2019, Respondent filed an Answer and New Matter to the Formal Complaint. Respondent admitted that it provides residential retail electric service to Complainant at the service location. Respondent also admitted it assessed a security deposit in the amount of \$270 on Complainant's account. Respondent stated that Complainant refused to allow the Company access to the Company's meter in order to install a smart meter, which constitutes legal grounds to terminate service to the service location. Respondent averred it is required by Act 129 of 2008 (Act 129) to install a smart meter. Respondent further averred that its Smart Meter Deployment Plan (SMP), which was approved by the Commission, contemplates the deployment of approximately 584,000 smart meters beginning in January of 2016 through mid-2019 and includes all customers. Additionally, Respondent stated that neither its tariff, Act 129 or its SMP permits the Company to forbear from the smart meter installation requirement or

¹ Complainant averred that he always pays his bills, that he may be late a few times, but always pays and Respondent puts an extra amount on his bill that he cannot pay, like a security deposit.

enable the Commission or Company to permit the opt-out of smart meter installation or delay installation in contradiction to the SMP. Respondent essentially denied the remaining material averments set forth in the Formal Complaint. Respondent requested that a prehearing conference be scheduled in this proceeding.

In its New Matter, Respondent argued the Complaint should be dismissed because it is required by Act 129 and its SMP to install a smart meter at the service location; neither Act 129 nor the SMP permit Complainant to opt-out of smart meter installation; and that the Commission is unable to grant the relief requested by Complainant.

On February 25, 2019, Respondent also filed Preliminary Objections to the Complaint. Respondent averred that the request to opt-out of smart meter installation is not legally recoverable and Complainant failed to allege that Respondent violated any Commission statute, regulation, order, or tariff provision with regard to the installation of the smart meter at the service location. Respondent further averred it is required by Act 129 and its SMP to install a smart meter at the service location, and the Complaint is legally insufficient because it fails to state a claim upon which the Commission can grant relief. Respondent argued a hearing is not in the public interest and the Complaint does not meet the standards set forth in recent Commission decisions in order to survive preliminary objections.

On April 1, 2019, the Commission issued a Motion Judge Assignment Notice, assigning this proceeding to the undersigned.

On April 3, 2019, Complainant and his spouse, Kelly K. Giamoni, filed a response to Respondent's Answer and New Matter. The response does not address the averment regarding the security deposit and solely addressed Complainant's objection to the installation of a smart meter.

On April 30, 2019, an Interim Order was entered denying Respondent's Preliminary Objections.

On May 16, 2019, Respondent filed a certificate of service regarding its service of Interrogatories and Requests for Production of Documents (Discovery Requests) upon Complainant. Objections were due by May 27, 2019, and responses were due by June 5, 2019.

On July 22, 2019, Respondent filed a Motion to Compel Responses to Interrogatories and Document Requests (Motion to Compel), averring that it had not received any response to its Discovery Requests. The Motion to Compel contained a Notice to Plead, requiring Complainant to file a response within five days of service. Complainant did not file a response to the Motion to Compel.

On July 23, 2019, concurrent Interim Orders were entered; granting Respondent's Motion to Compel, directing Complainant to serve upon counsel for Respondent full and complete responses to all Discovery Requests not later than August 16, 2019, and establishing an initial litigation schedule which set forth the schedule for discovery, the identification of witnesses, and filing of motions in this proceeding. Parties were ordered to, *inter alia*, provide the names, addresses, and written summaries of the expected testimony for each witness (witness information) to the other party by October 1, 2019; and to conclude discovery by November 15, 2019.

On August 28, 2019, Respondent filed a Motion to Dismiss Complaint of Anthony Giamoni for Failure to Comply with Orders (Motion to Dismiss), averring, *inter alia*, Complainant failed to comply with the Interim Order dated July 23, 2019, requiring Complainant to provide responses to Respondent's discovery requests by August 16, 2019. Respondent averred Complainant, at no point, contacted Respondent to discuss the Discovery Requests or to seek an extension of time to respond to the Discovery Requests. Respondent argued the Complaint should be dismissed in its entirety, because Complainant's failure to respond to the Discovery Requests demonstrates Complainant's lack of cooperation and willingness to participate in the proceeding as required by the Commission's regulations.

On September 4, 2019, an Interim Order was entered rescinding the July 23, 2019, Interim Order, to provide Complainant with an opportunity to file a response to the Motion to Compel not later than September 12, 2019.

Complainant did not file a response to the Motion to Compel by the September 12, 2019, deadline.

On October 1, 2019, in accordance with the Interim Order establishing initial litigation schedule, Respondent provided notice and summaries of testimony for its factual and expert witnesses.

On October 11, 2019, a Second Interim Order was entered granting Respondent's Motion to Compel, ordering Complainant to serve full and complete responses to all of the Discovery Requests not later than October 30, 2019.

On October 25, 2019, an Interim Order was entered requiring the Parties to file a status report, including potential dates for an evidentiary hearing on or before December 6, 2019. Respondent filed a status report dated December 6, 2019; Complainant did not file a status report.

On November 20, 2019, Respondent filed an Amended Motion to Dismiss averring, Complainant repeatedly failed to comply with numerous Interim Orders, to respond to Discovery Requests and to exchange witness information. The Amended Motion to Dismiss included a Notice to Plead. No responsive pleading was filed by Complainant.

In its Motion to Dismiss and Amended Motion to Dismiss, Respondent argued that the Complaint should be dismissed due to Complainant's failure to provide witness information and respond to Discovery Requests, in violation of Interim Orders dated July 23, 2019, and October 11, 2019, respectively. Respondent argued Complainant's actions demonstrate a consistent lack of cooperation and willingness to prosecute his Complaint as required under the Commission's regulations.

In this case, as directed by the October 11, 2019, Interim Order, Complainant's objections, if any, to the Discovery Requests and his full and complete responses were due by October 30, 2019.

In its Motion to Dismiss and Amended Motion to Dismiss, Respondent averred it did not receive Complainant's witness information or discovery responses in violation of the July 23, 2019, Interim Order and the October 11, 2019, Interim Order, respectively.

Complainant did not file a certificate of service showing his service of full and complete responses to the Discovery Requests or his witness information upon Respondent, in violation of the Interim Orders entered July 23, 2019, and October 11, 2019. Further, Complainant did not file a status report in violation of the Interim Order entered October 25, 2019.

Complainant also objected to the assessment of a security deposit by Respondent on his bill.

On March 16, 2020, the Public Utility Commission Office of the undersigned presiding officer was closed as a result of the COVID-19 pandemic. The office remained closed at the time of the hearing in this proceeding, however, hearings were conducted telephonically.

On April 30, 2020, an Interim Order was entered granting the Amended Motion of Metropolitan Edison Company to Dismiss the Complaint, as it relates to all smart meter claims identified by Complainant. The Amended Motion of Metropolitan Edison Company to Dismiss the Complaint, solely limited to the claim regarding the assessment of a security deposit on Complainant's bill, was denied.

On August 5, 2020, a Initial Call-In Telephone Hearing Notice (Hearing Notice) was issued scheduling the evidentiary hearing for October 7, 2020. The Hearing Notice provided the Parties with the Toll-Free Bridge Number and the PIN to dial on the morning of the hearing to participate in the telephonic hearing. The Hearing Notice further advised the Parties that they

could lose their case if they did not take part in the hearing and present evidence on the issue(s) raised and that the case could be dismissed with prejudice.

The hearing convened as scheduled. Complainant did not appear. Attorney Tori Giesler and Attorney Lauren Lepkoskie appeared along with their witness on behalf of Respondent and made a motion to dismiss the Complaint. No request for a continuance was made by any party and no explanation was provided by Complainant regarding his failure to attend the hearing.

On October 8, 2020, the Commonwealth Court of Pennsylvania (Commonwealth Court) issued an Opinion in *Povacz, et al. v. Pa. Public Utility Commission*,² (*Povacz I*), the first of several appeals involving PECO Energy Company's (PECO) deployment of smart meter technology pursuant to Act 129 of 2008 (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 in Maria Povacz, Laura Sunstein Murphy, and Cynthia Randall. *Povacz I* at 495. Specifically, the Commonwealth Court, in *Povacz I*, held that Act 129 does not mandate the installation of smart meters, and that the Commission had the authority to grant customers accommodations based on their health concerns.³ 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 Maria Povacz, Laura Sunstein Murphy, and Cynthia Randall failed to sustain their burden of proof; and (3) that the Commission's findings of fact were supported by substantial evidence.⁴ The Commonwealth Court also declined to find that the deployment of smart meters violated the customers' Fourteenth Amendment liberty interests in bodily integrity.⁵

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

² *Povacz, et al. v. Pa. Public Utility Commission*, 241 A.3d 481 (Pa. Cmwlth. 2020).

³ *Id.* at 490.

⁴ *Id.* at 490, 491, 493-495.

⁵ *Id.* at 487- 488.

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*. Since the Supreme Court's issuance of its *Povacz II* decision, the Commonwealth Court has lifted the stays on the remaining unconsolidated smart meter appeals and directed the parties to submit briefs, supplemental briefs, and other appropriate filings as warranted. The Commonwealth Court has ultimately affirmed the Commission in several unpublished and published opinions.⁶

The record closed on October 19, 2020, upon receipt of the hearing transcript.

On August 16, 2022, the Supreme Court issued its Opinion in *Povacz II*, affirming 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

⁶ See *Hoffman-Lorah v. Pa. Pub. Util. Comm'n*, 2023 Pa. Cmwlth. Unpub. LEXIS 325, 2023, WL 4144399; *Branagh v. Pa. Pub. Util. Comm'n*, 2023 Pa. Cmwlth. Unpub. LEXIS 352, 2023, WL 4363414; *Hess v. Pa. Pub. Util. Comm'n*, 2023 Pa. Cmwlth. Unpub. LEXIS 371, 2023, WL 4540460; *Mary Paul v. Pa. Pub. Util. Comm'n*, No. 460 C.D. 2019, 2023 Pa. Cmwlth. LEXIS 113; *Schmukler v. Pa. Pub. Util. Comm'n*, No. 1102 C.D. 2019, 2023 Pa. Commw. LEXIS 136. The following smart meter appeals were dismissed by the Commonwealth Court on procedural grounds: *Sunstein v. Pa. Pub. Util. Comm'n*, No. 1581 C.D. 2019; *Ulmer v. Pa. Pub. Util. Comm'n*, No. 967 C.D. 2020; and *Lucey v. Pa. Pub. Util. Comm'n*, No. 1212 C.D. 2020.

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."⁷ The Supreme Court concluded that Act 129 mandates smart meter deployment and requires the system-wide installation of smart meter technology by EDCs.⁸ 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.⁹ The Supreme Court reversed the Commonwealth Court, and affirmed the Commission's interpretation in *Maria Povacz*, *Laura Sunstein Murphy*, and *Cynthia Randall* that Act 129 mandates universal smart meter installation.¹⁰

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.¹¹ 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.¹²

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

⁷ *Id.* at 1014.

⁸ *Povacz II* at 992.

⁹ *Id.* at 28.

¹⁰ *Id.*

¹¹ *Id.* at 1005.

¹² *Id.* at 1008.

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 meters, 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.¹³ 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.¹⁴ The Supreme Court concluded that neither fear nor inconclusive scientific research was sufficient to prove that smart meter technology constitutes unsafe service under Section 1501.¹⁵ 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.¹⁶

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.

In the instant case, on April 30, 2020, the Amended Motion of Metropolitan Edison Company to Dismiss the Complaint, as it relates to all smart meter claims identified by Complainant was granted and the Amended Motion to Dismiss the Complaint, solely limited to the claim regarding the assessment of a security deposit on Complainant's bill, was denied.

¹³ *Id.*

¹⁴ *Id.* at 1006.

¹⁵ *Id.* at 1005.

¹⁶ *Id.* at 1015.

On August 5, 2020, a Initial Call-In Telephone Hearing Notice (Hearing Notice) was issued scheduling the evidentiary hearing for October 7, 2020 to consider the claim regarding the assessment of a security deposit on Complainant's bill. The Parties were provided with notice and the hearing convened as scheduled. Complainant did not appear. Respondent made a motion to dismiss the Complaint. No request for a continuance was made by any party and no explanation was provided by Complainant regarding his failure to attend the hearing.

The Commission entered an Order and Notice, at Docket No. M-2009-2092655, staying the proceeding, on November 4, 2020. The stay was lifted by Order of the Commission on November 9, 2023. Under the circumstances, it is appropriate to provide the parties with an opportunity to file any appropriate requests for relief, if any, and to proceed with the disposition of this proceeding consistent with the history of this case and the Commonwealth Court and Supreme Court rulings discussed above.

THEREFORE,

IT IS ORDERED:

1. That the Record is reopened consistent with this Interim Order.
2. That Complainant shall file any appropriate requests for relief, if any, on or before December 13, 2024.
3. That Respondent shall file any responsive pleading or reply to any timely request for relief filed by Complainant, on or before January 17, 2025.
4. That any pleadings or requests for relief or replies thereto, shall be filed with the Commission Secretary and served upon the opposing Party, or counsel if represented.

C-2019-3007637 - ANTHONY GIAMONI v. METROPOLITAN EDISON COMPANY

ANTHONY GIAMONI
1647 ALPINE DRIVE
PEN ARGYL PA 18072
610.597.1995
brutus18064@gmail.com

LAUREN M LEPKOSKI ESQUIRE
TORI L GIESLER ESQUIRE
FIRSTENERGY
2800 POTTSVILLE PIKE
PO BOX 16001
READING PA 19612-6001
610.921.6203
610.921.6658
Accepts eService
tgiesler@firstenergycorp.com
llepkoski@firstenergycorp.com