

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

James R. Dummett	:	
William A. Dummett, Sr.	:	
	:	
v.	:	C-2023-3042086
	:	
Pennsylvania Electric Company	:	

INITIAL DECISION

Before
Emily I. DeVoe
Administrative Law Judge

INTRODUCTION

This Initial Decision grants the Motion for Summary Judgment filed by Pennsylvania Electric Company and dismisses the Complaint filed by Complainants. Complainants failed to identify their expert witnesses and cannot prevail as a matter of law on their smart meter Complaint without the testimony of expert witnesses. Additionally, Complainants failed to appear at a status conference.

HISTORY OF THE PROCEEDING

Initial Filings by the Parties

August 7, 2023, James R. Dummett and William A. Dummett, Sr. (Complainants or the Dummetts) filed a Formal Complaint with the Pennsylvania Public

Utility Commission (Commission) against Pennsylvania Electric Company (Penelec, Company, or Respondent).¹ Complainants averred that they are experiencing reliability, safety or quality problems with their electric service at 3360 Cedar Avenue, Oil City, PA (service location). The Complainants explain that James Dummett is the tenant of the service location, and William Dummett is the owner of the service location.

Complainants aver James Dummett has been suffering from EMF exposure from the smart meter installed at the service location. Complainants aver James Dummett has spent thousands of dollars addressing the issue over the last five years. Complainants aver James Dummett has had numerous medical tests done to confirm his issues are not from any other disease or underlying condition or illness. They aver they have routinely documented the EMF levels and their effects on the house's electrical wiring. As relief, Complainants request they be allowed to opt out of the smart meter program and have an analog meter installed.

On August 25, 2023, Respondent filed an Answer, New Matter, and Preliminary Objection to the Complaint. Respondent admits that it provides residential retail electric service to Complainants, but denies the smart meter installed poses a health, safety, or privacy risk. Further, Penelec avers it is legally required to install and retain the smart meter by the Public Utility Code, the Commission's orders, and the Company's Commission-approved Smart Meter Deployment Plan. *See* 66 Pa.C.S. § 2807(f); *Joint Petition of Metro. Edison Co., Pa. Elec. Co., and Pa. Power Co. for Approval of Smart*

¹ On January 1, 2024, FirstEnergy's Pennsylvania operating companies (i.e., Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company, and West Penn Power Company) merged into FirstEnergy Pennsylvania Electric Company. Due to the merger transaction, the affected operating companies' tariffs were consolidated into a single tariff, with each former operating company's rates becoming its own rate district. As such, the customers of the former Pennsylvania Electric Company have their own separate and distinct rate district under FirstEnergy Pennsylvania Electric Company's tariff.

Meter Tech. Procurement and Installation Plan, Docket No. M-2009-2123950 (Order June 9, 2010).

In its New Matter, Penelec avers the Pennsylvania Supreme Court (Supreme Court) has recently ruled that the Commission is unable to provide the requested relief sought by Complainants, opt-out of the smart meter program. *See Povacz v. Pa. Pub. Util. Comm'n*, 280 A.3d 975 (Pa. 2022).

The New Matter included a Notice to Plead, directing Complainants to file a response within twenty days of service.

In the Preliminary Objection, Penelec argues the Complaint is legally insufficient because Complainants seek relief the Commission is unable to provide as a matter of law.

The Preliminary Objection included a Notice to Plead, directing Complainants to file a response within ten days of service.

Complainants did not file a response to either the New Matter or the Preliminary Objection.

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

The Commission's handling of complaints challenging the installation of smart meters on consumer's residences has been the subject of recent appellate litigation. On October 8, 2020, the Commonwealth Court of Pennsylvania (Commonwealth Court) issued an Opinion in *Povacz v. Pennsylvania Public Utility Commission*, 241 A.3d 481 (Pa. Cmwlth. 2020) (*Povacz I*), the first of several appeals involving PECO Energy Company's (PECO) deployment of smart meter technology pursuant to Act 129, codified

at 66 Pa.C.S. § 2807(f).² 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 and related cases. *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. *Id.* at 490. However, the Commonwealth Court affirmed: (1) the Commission’s application of the preponderance of evidence standard; (2) the Commission’s finding that the customers in those cases failed to sustain their burden of proof; and (3) that the Commission’s findings of fact were supported by substantial evidence. *Id.* at 490, 491, 493-495. The Commonwealth Court also declined to find that the deployment of smart meters violated the customers’ Fourteenth Amendment liberty interests in bodily integrity. *Id.* at 487-488.

In light of the Commonwealth Court’s decision in *Povacz I*, the Commission entered an Order and Notice, at Docket No. M-2009-2092655, on November 4, 2020, pursuant to 66 Pa.C.S. § 501, instituting a stay of certain formal complaint proceedings then-pending before the Commission involving challenges to electric distribution company (EDC) deployment of smart meter technology as being in violation of Section 1501 of the Public Utility Code, 66 Pa.C.S. § 1501 (*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.

² 66 Pa.C.S. §§ 2803, 2806.1, 2807, 2811, 2813-2815 (Act 129).

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 I*.

On August 16, 2022, the Supreme Court issued an Opinion and Order, *Povacz v. Pennsylvania Public Utility Commission*, 280 A.3d 975 (Pa. 2022) (*Povacz II*). 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.³

In its Opinion in *Povacz II*, the Supreme Court affirmed the Commission's determinations in all respects. The Supreme Court reversed the Commonwealth Court's determination that Act 129 does not mandate smart meter installation and that Court's

³ See *Hoffman-Lorah v. Pa. Pub. Util. Comm'n*, No. 712 C.D. 2019, 2023 WL 4144399 (Pa. Cmwlth. June 23, 2023) (unpub. disposition); *Branagh v. Pa. Pub. Util. Comm'n*, No. 1857 C.D. 2019, 2023 WL 4363414 (Pa. Cmwlth. July 6, 2023) (unpub. disposition); *Hess v. Pa. Pub. Util. Comm'n*, No. 1155 C.D. 2020, 2023 WL 4540460 (Pa. Cmwlth. July 14, 2023); *Paul v. Pa. Pub. Util. Comm'n*, 299 A.3d 1069 (Pa. Cmwlth. 2023); *Schmukler v. Pa. Pub. Util. Comm'n*, 302 A.3d 247 (Pa. Cmwlth. 2023). 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.

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 (Section 1501).

The Supreme Court did, however, affirm the Commonwealth Court’s conclusion that the “Customers failed to meet their burden of proving, by a preponderance of the evidence, a conclusive causal connection between [radio frequency] emissions from smart meters and adverse human health effects.” *Id.* at 1014. The Supreme Court concluded that Act 129 mandates smart meter deployment and requires the system-wide installation of smart meter technology by EDCs. *Id.* at 992. The Supreme Court found that Section 2807(f)(1), when read in conjunction with Section 2807(f)(2), provides instructions for furnishing smart meters to all customers. In short, the Supreme Court found that under Act 129, customers have no right to refuse smart meter installation. *Id.* at 997. Accordingly, the Supreme Court reversed the Commonwealth Court, and affirmed the Commission’s interpretation that Act 129 mandates universal smart meter installation. *Id.*

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. The Supreme Court reiterated that complainants seeking relief from the Commission must satisfy their burden of proof by a preponderance of the evidence. The Supreme Court explained that inconclusive evidence – evidence that does not lead to a conclusion of a definite result one way or the other – does not meet even the minimal requirements of the preponderance of the evidence standard. *Id.* at 1005. The Supreme Court opined that while a customer’s evidence does not need to prove their assertion beyond any doubt, evidence of a mere possibility that harm could result is insufficient to satisfy the preponderance of the evidence standard. *Id.* at 1008.

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

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

Proceeding Post-*Povacz II* in the Instant Case

The instant case was assigned to me via a Motion Judge Assignment Notice issued November 20, 2023, and I carefully reviewed the procedural history of this case.

On November 28, 2023, I prepared an Interim Order denying the Preliminary Objection and setting a litigation schedule. In that same order, I also provided an *extensive* review and discussion of *Povacz II*, and what the Supreme Court established as the criteria for a complainant to succeed in a case challenging the installation of a smart meter. I explained that, per the Supreme Court, Complainants could not successfully present a *prima facie* case of an alleged violation of 66 Pa.C.S. § 1501 unless they present expert scientific and/or medical testimony. I wrote,

Therefore, a customer **cannot** successfully present a *prima facie* case involving an alleged violation of 66 Pa.C.S. § 1501 unless that customer presents **expert scientific and medical testimony**.

In this case, if Complainants present expert medical and scientific evidence to support the averments made in the Complaint, they may be able to meet their burden of proof. If they are able to meet their burden of proof, they may be entitled to an accommodation to the extent allowed by Act 129 and the Company's tariff. However, that accommodation may not rise to the level of an opt-out from smart meter installation. While the Commission is not able to grant the specific relief requested in the Complaint (opt-out), Complainants, if able to meet their burden of proof, may be entitled to an "accommodation." While the Supreme Court did not expound upon what such an "accommodation" may be, the fact remains that such an "accommodation" exists as a matter of law.

See November 28, 2023, Interim Order, pg. 7; February 14, 2024, Interim Order, pgs. 7-8.

As part of the litigation schedule, I directed the parties to exchange the names of fact and expert witnesses by December 22, 2023, conclude discovery by January 12, 2024, file status reports and dispositive motions by January 24, 2024, and file responses to any dispositive motions within 20 days of service of the motion.

After receiving no response or filings from the parties,⁴ I issued an Interim Order on February 8, 2024, referencing the November 28, 2023, Interim Order, and directing the parties to file a status report by February 16, 2024. The February 8, 2024, Interim Order was eServed on the Complainants consistent with their registration of an eService account with the Commission. It was also served on counsel for the Company.

On February 13, 2024, the Company reached out to the Office of Administrative Law Judge (OALJ) seeking assistance in locating the November 28, 2023, Interim Order. After investigation, I was alerted to the fact the November 28, 2023, Interim Order was not served on the parties.

Therefore, on February 14, 2024, I issued an Interim Order that was identical to the one I intended to serve on November 28, 2023, but with the exception of updated dates for the deadlines. Parties were directed to exchange fact and expert witness information by March 1, 2024, conclude discovery by April 12, 2024, file a status report and any dispositive motions by April 24, 2024, and file responses to any dispositive motions within 20 days of service of the motion. Finally, I explained that after considering any dispositive motions filed in this proceeding, I would set a hearing date in the event that an evidentiary hearing was necessary.

⁴ Due to an administrative error and unbeknownst to me, the November 28, 2023, Interim Order was attached to the Commission's online docket, but was not served on the parties.

The February 14, 2024, Interim Order was eServed on both Complainants and the Company.

On March 1, 2024, the Company filed its witness information as directed.

On April 24, 2024, the Company filed its status report as directed. It advised it had not received any witness information from Complainants and requested that a prehearing conference be scheduled.

Consequently, by Notice issued May 8, 2024, I scheduled a Status Conference to be held on June 10, 2024. The Notice was eServed on both Complainants and the Company.

The June 10, 2024, conference convened as scheduled. Complainants did not appear for the conference. Daniel Garcia, Esq., and Tori Giesler, Esq., were present on behalf of the Company. The Company expressed its intent to file a dispositive motion. I told the Company to file its motion by July 12, 2024, and advised I would set a deadline of July 26, 2024, for Complainants to file a response.

On June 11, 2024, I issued an Interim Order memorializing the deadlines for the filing of dispositive motions and responses to any motions. The June 11, 2024, Interim Order was eServed upon Complainants and the Company.

On July 12, 2024, Respondent filed a Motion for Summary Judgment (Motion). Respondent argued that Complainants bore the burden of proof in this matter and failed to provide their witness information as required. The Company further argued the Complainants have failed to present any evidence as part of their direct case, and as a result, no opportunity exists for the Complainants to present any evidence in support of

their direct case. Thus, Penelec argues there are no disputed issues of material fact in this proceeding, and the Company is entitled to judgment as a matter of law. As relief, Respondent requests the Complaint be dismissed with prejudice.

A certificate of service was attached to the Motion, indicating that Complainants were served with a copy.

Complainants did not file a response to the Motion.

By Interim Order dated August 23, 2024, the record was closed. This matter is now ripe for adjudication.

FINDINGS OF FACT

1. Complainants are James R. Dummett and William A. Dummett, Sr.
2. Respondent is Pennsylvania Electric Company, a jurisdictional public utility.
3. On August 7, 2023, Complainants filed a Complaint with the Commission, alleging, *inter alia*, that they wanted to opt-out of smart meter installation at the service location and have the smart meter removed.
4. In their Complaint, Complainants argued, *inter alia*, the installation of a smart meter constitutes unsafe and unreasonable service.
5. On August 25, 2023, Respondent filed an Answer and New Matter to the Complaint, averring, *inter alia*, that Respondent was required to install a smart

meter at the service location and the Commission was unable to provide the requested relief.

6. On August 25, 2023, Respondent filed a Preliminary Objection arguing, *inter alia*, the Complaint was legally insufficient because Complainants sought relief the Commission was unable to provide as a matter of law.

7. The Preliminary Objection included a Notice to Plead, directing Complainants to file a response within ten days of service.

8. Complainants did not file a response to either the New Matter or the Preliminary Objection.

9. On February 14, 2024, I issued an Interim Order, denying the Preliminary Objection and setting a litigation schedule.

10. In the February 14, 2024, Interim Order, I provided an *extensive* review and discussion of *Povacz II*, and what the Supreme Court established as the criteria for a complainant to succeed in a case challenging the installation of a smart meter.

11. The February 14, 2024, Interim Order, set the following deadlines for the parties: exchange fact and expert witness information by March 1, 2024, conclude discovery by April 12, 2024, file a status report and any dispositive motions by April 24, 2024, and file responses to any dispositive motions within 20 days of service of the motion.

12. The February 14, 2024, Interim Order was eServed on both Complainants and the Company.

13. On March 1, 2024, the Company filed its witness information as directed.
14. On April 24, 2024, the Company filed its status report as directed, advised it had not received any witness information from Complainants, and requested that a prehearing conference be scheduled.
15. By Notice issued May 8, 2024, a Status Conference was scheduled to be held on June 10, 2024.
16. The Notice scheduling the Status Conference was eServed upon Complainants.
17. Complainants did not appear for the June 10, 2024, conference.
18. On June 11, 2024, I issued an Interim Order establishing deadlines for the filing of dispositive motions – July 12, 2024 – and responses to any motions – July 26, 2024.
19. The June 11, 2024, Interim Order was eServed upon the parties.
20. On July 12, 2024, Respondent filed a Motion for Summary Judgment, arguing that Complainants bore the burden of proof in this matter and failed to provide their witness information as required.
21. A certificate of service was attached to the Motion, indicating that Complainants were served with a copy.

22. Complainants did not file a response to the Motion.

DISCUSSION

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

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

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

52 Pa. Code § 5.102(d)(1)-(2).

Further, the Commission is granted discretion to dismiss any complaint without a hearing if, in its opinion, a hearing is not necessary in the public interest. 66 Pa.C.S. § 703(b); 52 Pa. Code § 5.21(d). A hearing is necessary only to resolve disputed questions of fact, and when the question presented is one of law, the Commission need not hold a hearing. *Lehigh Valley Power Comm'n v. Pa. Pub. Util. Comm'n*, 563 A.2d 548 (Pa. Cmwlth. 1989); *Edan Transp. Corp. v. Pa. Pub. Util. Comm'n*, 623 A.2d 6 (Pa. Cmwlth. 1993).

In its Motion for Summary Judgment, Respondent argues the Complaint should be dismissed in its entirety and with prejudice due to the Complainants' inability to carry their burden of proof in support of their claims. The Company argued that, in smart meter cases such as this one, the Supreme Court, in *Povacz II*, made clear that a customer must present expert opinion rendered to a reasonable degree of scientific certainty that radio frequency emissions from smart meters cause adverse health effects, as well as expert opinion rendered to a reasonable degree of medical certainty that RF emissions from the smart meters, either alone or cumulative to other sources of RF emissions, caused or would cause them harm. Yet, Complainants have failed to indicate they plan to provide any expert testimony. Therefore, Penelec argues Complainants are unable to meet their burden of proof as a matter of law, and the Complaint must be dismissed.

I will consider the Respondent's Motion for Summary Judgment as a Motion to dismiss the Complaint.

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

The Supreme Court reiterated that complainants seeking relief from the Commission must satisfy their burden of proof by a preponderance of the evidence. The Supreme Court explained that inconclusive evidence – evidence that does not lead to a conclusion of a definite result one way or the other – does not meet even the minimal requirements of the preponderance of the evidence standard. *Id.* at 1005. The Supreme Court opined that while a customer's evidence does not need to prove their assertion beyond any doubt, evidence of a mere possibility that harm could result is insufficient to satisfy the preponderance of the evidence standard. *Id.* at 1008.

The Supreme Court noted that the burden of proof is two-fold for Section 1501 claims involving the safety of smart meters and RF emissions. *Povacz II* at 1006. First, a customer must present expert opinion rendered to a reasonable degree of scientific certainty that radio frequency emissions from smart meters cause adverse health effects. Next, a customer must present expert opinion rendered to a reasonable degree of medical certainty that RF emissions from the smart meter, either alone or cumulative to other sources of RF emissions, caused them harm. The utility may then refute the customer's evidence by providing scientific and/or medical expert testimony that, within a reasonable degree of certainty, the RF emissions from smart meters did not cause the alleged harm. *Id.* The Supreme Court concluded that neither fear nor inconclusive scientific research was sufficient to prove that smart meter technology constitutes unsafe service under Section 1501. *Id.* at 1005.

Complainants have been given an opportunity to identify their expert witnesses. On February 14, 2024, I issued an Interim Order establishing a litigation schedule, directing parties to exchange witness information by March 1, 2024. Further, by Notice issued May 8, 2024, a Status Conference was scheduled to be held on June 10, 2024.

The February 14, 2024, Interim Order and the May 8, 2024, Notice were eServed on Complainants, consistent with their registration in the Commission's eService program. As of the date of this Initial Decision, Complainants have failed to provide any expert witness information as required by my February 14, 2024, Interim Order. If Complainants had questions about my Orders or the necessity of identifying expert witnesses, or if they needed additional time, they could have appeared at the June 10, 2024, conference. I note that, other than filing the Complaint, Complainants have not engaged in this case in any way.

The Commission has held that parties must comply with the orders of an administrative law judge, and a complainant's failure to do so is a sufficient basis to support dismissal of the matter. *Snyderville Cmty. Dev. Corp. v. Phila. Gas Works*, Docket No. C-20055032 (Opinion and Order entered July 31, 2006). Complainants failed to comply with my February 14, 2024, Interim Order and failed to appear for the status conference.

Well-established Commission precedent tends to afford unrepresented complainants the opportunity to orally set forth their cases on the record and cautions against dismissing cases on a preliminary basis. *Carlock v. The United Tel. Co. of Pa.*, Docket No. F-00163617 (Opinion and Order entered July 14, 1993). In *Carlock*, the complainant alleged, *inter alia*, the utility suspended his telephone service without prior notice. *Id.* The utility filed an answer concurrent with a Motion for Summary Judgement, averring, *inter alia*, that Mr. Carlock had made only four payments on his account during the period of time at issue, and a suspension notice was mailed in accordance with the Commission's rules and regulations. *Id.* The Administrative Law Judge recommended the utility's Motion for Summary Judgement be granted and complainant's complaint be dismissed without a hearing because the complainant did not dispute any facts set forth in the utility's motion, the facts did not rise to an inference of a genuine pertinent fact being at issue (i.e. a fact tending to show that the utility had violated the law or a regulation or order of the Commission), and the complaint was not substantively directed against the utility's conduct but rather sought a change in the Commission's regulations. *Id.*

The Commission reversed the ALJ's recommendation. In its Opinion and Order, the Commission explained,

[A] Motion to Dismiss and a Motion for More Specific Pleading should not be granted against unrepresented complainants who are pursuing small claims until they have

had a least an oral opportunity to explain their position. **We did not...and do not now, rule out the possibility that pretrial motions can be granted in such cases, only that such motions should not be granted on the pleadings.** The ALJ must first develop a sufficient record.

In more complex cases with counsel participating, the record is likely to include depositions, answers to interrogatories, admissions and supporting affidavits. Answers to the motion may include similar filings. Certainly, in our view, unrepresented complainants cannot be expected to navigate through such complex procedural territory. **Rather than relying on the pleadings, the ALJ has an affirmative duty to ensure the development of a record that reasonably presents the underlying grievance.**

In this case, the ALJ has recommended that we grant Respondent's Motion for Summary Judgement on the pleadings ... [T]he Complainant is unrepresented by Counsel and did not file an answer to the pre-trial motion. We recognize that unrepresented plaintiffs often are not able to file an effective response to a pre-hearing motion. Yet, in many cases unrepresented complainants can explain their dispute orally much better than they can communicate their grievance in written form. Therefore, to deny unrepresented complainants a meaningful opportunity to be heard in such cases, can be viewed as a gross abuse of our authority.

Id. at 2 (citations omitted) (emphasis added).

In the instant case, a hearing was not held, but a status conference was. Complainants had an opportunity to be heard orally. Notice of the status conference was eServed on Complainants, consistent with their registration in the Commission's eService program. Once notice is provided, it is the responsibility of the parties to appear. *Sentner v. Bell Tel. Co. of Pa.*, Docket No. F-00161106 (Opinion and Order entered Oct. 25, 1993).

Further, unlike the ALJ in *Carlock*, I am not dismissing the Complaint on the pleadings; I am dismissing the Complaint due to Complainants' failure to provide expert witness information, which is required, *as a matter of law*, for them to be able to make a *prima facie* case and have any chance of meeting their burden of proof. *Povacz II*.

Consistent with the Commission's holding in *Carlock*, I denied the Preliminary Objection and set a litigation schedule, moving the case toward a hearing, wherein the parties would have had the opportunity to develop the record envisioned by the Commission in *Carlock*. I then gave Complainants an opportunity to provide their expert witness information. Since filing the Complaint, Complainants have failed to participate in the litigation process.

While unrepresented complainants cannot be expected to comply with every procedural rule, the lenience afforded to the complainants must be weighed against the due process rights of the respondent.⁵ While an unrepresented complainant has an interest in proceeding to a hearing where he may be better able to express his grievance, the respondent cannot be expected to expend resources and incur the expense

⁵ “[A]djudicatory action cannot be validly taken by any tribunal, whether judicial or administrative, except upon a hearing wherein each party shall have opportunity to know of the claims of his opponent, to hear the evidence introduced against him, to cross-examine witnesses, to introduce evidence in his own behalf, and to make argument.” *Pa. State Athletic Comm’n v. Bratton*, 112 A.2d 422, 425 (Pa. Super. 1955) (*Bratton*). Further, “[t]he Commission, as an administrative body, is bound by the due process provisions of constitutional law and by the principles of common fairness. Among the requirements of due process are notice and an opportunity to be heard on the issues, to be apprised of the evidence submitted, to cross-examine witnesses, to inspect documents, and to offer evidence in explanation or rebuttal.” *Hess v. Pa. Pub. Util. Comm’n*, 107 A.3d 246, 266 (Pa. Cwlth. 2014) (citing *Shenandoah Suburban Bus Lines, Inc.*, 46 A.2d 26 (Pa. Super. 1946) (internal citations omitted)) (*Hess*).

of a hearing in cases such as this one, where Complainants have failed to demonstrate they will be able to make a *prima facie* case as a matter of law at a hearing, if one were held. To proceed to a hearing in this case, where Complainants have not only failed to participate in the litigation process, but have also failed to identify expert witnesses, when expert witness testimony is required as a matter of law, would require Respondent expend time and resources in a case where Complainants could not meet their burden of proof, violating Respondent's due process rights. *See Bratton; Hess*. The case cannot move forward at this juncture because Complainants have failed to identify their expert witnesses as they were ordered to do.

Carlock does not excuse an unrepresented complainant from complying with a presiding officer's interim orders. Nor does *Carlock* prohibit a presiding officer from dismissing a complaint if a complainant fails to demonstrate he will be able to make a *prima facie* case as a matter of law. Complainants failed to provide their witness information as ordered by the Interim Orders and failed to appear at the status conference. A hearing in this matter is not necessary or appropriate and is not in the public interest. Accordingly, the Complaint will be dismissed. Nevertheless, as Complainants' failure to retain expert witnesses is curable, I will dismiss the Complaint without prejudice.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the subject matter of this Complaint. 66 Pa.C.S. § 701.
2. Section 5.102 of the Commission's regulations provide the standard of review for summary judgment. 52 Pa. Code §§ 5.102(d)(1)-(2).

3. The Commission is granted discretion to dismiss any complaint without a hearing if, in its opinion, a hearing is not necessary in the public interest. 66 Pa.C.S. § 703(b); 52 Pa. Code § 5.21(d).

4. Act 129 mandates the systemwide installation of smart meters. *Povacz v. Pa. Pub. Util. Comm'n*, 280 A.3d 975 (Pa. 2022).

5. 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 66 Pa.C.S. § 1501. *Povacz v. Pa. Pub. Util. Comm'n*, 280 A.3d 975 (Pa. 2022).

6. The burden of proof is two-fold for Section 1501 claims involving the safety of smart meters and RF emissions. First, a customer must present expert opinion rendered to a reasonable degree of scientific certainty that radio frequency emissions from smart meters cause adverse health effects. Next, a customer must present expert opinion rendered to a reasonable degree of medical certainty that RF emissions from the smart meters, either alone or cumulative to other sources of RF emissions, caused them harm. *Povacz v. Pa. Pub. Util. Comm'n*, 280 A.3d 975 (Pa. 2022).

7. Complainants seeking relief from the Commission in smart meter cases must satisfy their burden of proof by a preponderance of the evidence. *Povacz v. Pa. Pub. Util. Comm'n*, 280 A.3d 975 (Pa. 2022).

8. 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. *Povacz v. Pa. Pub. Util. Comm'n*, 280 A.3d 975 (Pa. 2022).

9. Neither fear nor inconclusive scientific research is sufficient to prove that smart meter technology constitutes unsafe service under Section 1501. *Povacz v. Pa. Pub. Util. Comm'n*, 280 A.3d 975 (Pa. 2022).

10. The Commission has held that parties must comply with the orders of an administrative law judge, and a complainant's failure to do so is a sufficient basis to support dismissal of the matter. *Snyderville Cmty. Dev. Corp. v. Phila. Gas Works*, Docket No. C-20055032 (Opinion and Order entered July 31, 2006).

11. The due process rights of Complainants have been fully protected in this proceeding. *Sentner v. Bell Tel. Co. of Pa.*, Docket No. F-00161106 (Opinion and Order entered Oct. 25, 1993).

ORDER

THEREFORE,

IT IS ORDERED:

1. That the Motion for Summary Judgment filed by Pennsylvania Electric Company is granted.

2. That the Complaint filed by James R. Dummett and William A. Dummett, Sr. against Pennsylvania Electric Company at Docket No. C-2023-3042086 is dismissed without prejudice.

3. That the Secretary's Bureau mark Docket No. C-2023-3042086 as closed.

Date: November 20, 2024

/s/
Emily I. DeVoe
Administrative Law Judge