

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

Public Meeting held December 19, 2024

Commissioners Present:

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

Deree J. Norman

C-2024-3048777

v.

PECO Energy Company

**OPINION AND ORDER**

**BY THE COMMISSION:**

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition are the Exceptions of Deree J. Norman (Complainant or Mr. Norman), filed on October 24, 2024, in the above-captioned proceeding.<sup>1</sup> The

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<sup>1</sup> By Secretarial Letter dated November 7, 2024 (*November 7 2024 Secretarial Letter*), the Commission's Secretary: (1) issued a notice to the Parties indicating that there was an indication that the Exceptions had not been served on the Parties; and (2) enclosed the Exceptions, in order to constitute service under 52 Pa. Code §§ 1.54, 1.57-1.58. *November 7 2024 Secretarial Letter*. Therefore, pursuant to 52 Pa. Code § 5.535, PECO Energy Company (PECO, the Company, or Respondent) was given ten days, or until November 18, 2024, to file Reply Exceptions.

Exceptions were filed in response to the Initial Decision (I.D. or Initial Decision) of Administrative Law Judge (ALJ) Darlene Heep, which the Commission served on the Parties on October 4, 2024. PECO filed Reply Exceptions on November 18, 2024. In the Initial Decision, the ALJ recommended that the Commission dismiss the Formal Complaint (Complaint) filed by the Complainant on April 29, 2024. For the reasons discussed below, we shall deny the Complainant’s Exceptions, adopt the Initial Decision of ALJ Heep, and dismiss the Complaint, consistent with this Opinion and Order.

Also before us for consideration is a document entitled “Petition for Emergency Order,” (Petition for Stay),<sup>2</sup> filed by the Complainant on October 14, 2024, in response to the ALJ’s Initial Decision issued on October 4, 2024.<sup>3</sup> The Complainant’s Petition for Stay was served on the Parties on November 15, 2024, in the above-captioned proceeding.<sup>4</sup> We shall deny the Complainant’s Petition for Stay, both because it is not properly before us for disposition, and because the interim relief sought in the Petition for Stay has already been provided as a function of procedure.

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<sup>2</sup> As a matter within our discretion under Section 1.2 of the Commission’s regulations (Regulations), 52 Pa. Code § 1.2, in view of the fact that the Complainant appears *pro se*, we shall construe the Petition as a Petition for Stay, pursuant to 52 Pa. Code § 5.572.

<sup>3</sup> By Secretarial Letter dated November 15, 2024 (*November 15 2024 Secretarial Letter*), the Commission’s Secretary issued a notice to the Parties advising that the Commission was perfecting service of the Complainant’s filings which may not have been properly served which included a Petition for Clarification filed on October 8, 2024, a Petition for Stay filed on October 14, 2024, and a cease and desist letter filed on October 25, 2024. *November 15 2024 Secretarial Letter*. Therefore, pursuant to 52 Pa. Code § 5.572, *Petitions for relief*, PECO was given ten days, or until November 25, 2024, to make responsive filings.

<sup>4</sup> PECO did not reply to the Petition.

## I. Background

This case involves a Complaint arising out of PECO's correspondence to Mr. Norman indicating an intent to terminate electric service at his service address. In his Complaint, Mr. Norman, a PECO electric customer, indicated that he wanted his Complaint to be resolved in the following manner: "[s]top threatening to terminate my service. My payments are up to date and I Do Not have an outstanding balance." Complaint at 3. In response to the Complaint, PECO admitted that on April 26, 2024, it served Mr. Norman with a 10 Day Termination Notice for failure to allow access for PECO to install a smart meter at his property. Answer and New Matter at 2.

PECO, an electric distribution company (EDC) subject to the jurisdiction of the Commission, furnishes, owns, and maintains the meters in its distribution system. *See*, PECO Energy Company Tariff Electric Pa. P.U.C. No. 7 (PECO Tariff), Rule 14.1 at Original Page No. 24, effective January 1, 2022. (PECO Tariff, Rule 14.1).<sup>5</sup> Additionally, PECO's tariff also contains a Right of Access provision that provides as follows:

The Company's identified employees shall have access to the premises of the customer at all reasonable times for the purpose of reading meters, and for installing, testing, inspecting, repairing, removing or changing any or all equipment belonging to the Company.

PECO Tariff, Rule 10.5 at Original Page No. 20, effective January 1, 2022. (Right of Access provision).

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<sup>5</sup> PECO Tariff Rule, 14.1, Supply of Meters, provide for PECO to furnish and install meters subject to Rules 14.3 and 14.9. Rules 14.3 and 14.9 relate to electric generation suppliers that provide services in accordance with PECO's Electric Generation Supplier Coordination Tariff, and these provisions are not applicable in this Complaint proceeding. *See* PECO Tariff at Original Page No. 24, effective January 1, 2022, and Second Revised Page No. 25, effective February 20, 2024.

According to PECO, the Complainant disputed the installation of an advanced metering infrastructure (AMI) smart meter that PECO proposed to install at the Complainant's residence in accordance with the Right of Access provision, *supra*. PECO also indicated that Mr. Norman currently has a legacy automatic meter reading (AMR) meter which PECO's system no longer supports. Answer to the Complaint and New Matter (Answer and New Matter) at 3-5.

Act 129 of 2008 (Act 129 or Act), *inter alia*, amended Chapter 28 of the Public Utility Code (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 PECO, 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 Implementation Order*). PECO sought and obtained the Commission’s approval to complete the installation of AMI meters with substantially all customers to receive an AMI meter by the end of 2019. *See, Petition of PECO Energy Company for Approval of Its Smart Meter Universal Deployment Plan*, Docket No. M-2009-2123944 (Final Order entered August 15, 2013, adopting Recommended Decision issued July 18, 2013) (*2013 PECO Smart Meter Order*).

## **II. History of the Proceeding**

On April 29, 2024, Mr. Norman filed the instant Complaint. In his Complaint, the Complainant indicated, *inter alia*, that PECO is threatening to shut off his electric service. As previously noted, as relief, the Complainant requested that PECO stop threatening to terminate his service. The Complainant also asserted that his payments for electric service were up to date and that he had no outstanding balance with PECO. Complaint at 3.

On May 20, 2024, PECO filed its Answer and New Matter, which was properly endorsed with a Notice to Plead. Also, on May 20, 2024, PECO filed

Preliminary Objections in response to the Complaint (Preliminary Objections or POs), which were properly endorsed with a Notice to Plead. I.D. at 2-3.

In its Answer and New Matter, PECO admitted, in part, and denied, in part, various material allegations in the Complaint. PECO asserted, *inter alia*, that the Complainant challenged the Company's installation of a smart meter at his service address in a prior formal complaint proceeding. Specifically, PECO claimed that "this matter has been previously litigated." Answer and New Matter at 3. In support, PECO referred to the following: the Initial Decision of Administrative Law Judge Mary D. Long, issued at Docket No. C-2015-2472605; a Commonwealth Court Appeal affirming the Commission's decision at 1053 CD 2017; the Initial Decision of Administrative Law Judge Marta Guhl at F-2018-2640713; and the Commonwealth Court Appeal affirming the Commission's decision at 690 CD 2020 (collectively, the Complainant's prior cases). PECO asserted that the outcomes of the Complainant's prior cases have previously resolved the issue raised in the instant Complaint, which is therefore now without merit. Answer and New Matter at 3-6. PECO also asserted that: (1) the Complainant is barred from filing a new formal complaint with the Commission regarding the same issues of fact and law; and (2) the instant Complaint is barred by the doctrine of *res judicata*. Answer and New Matter at 5-6.

Finally, PECO argued that the Complaint was also without merit because the Pennsylvania Supreme Court ruled that Act 129 does not provide an opt out for Smart Meters. Answer and New Matter at 5-6 (citing *Povacz v. Pa. PUC*, 280 A.3d 975 (Pa. 2022) (*Povacz II*)). As relief, PECO requested that the Complaint be dismissed. Answer and New Matter at 7; I.D. at 2.

In its Preliminary Objections, PECO alleged that the Complaint was legally insufficient for the following reasons: (1) the Complaint should be dismissed on the

grounds of *res judicata*, because the Complainant’s prior cases involved the same issues,<sup>6</sup> causes of action, parties, and the same quality and capacity of the parties as those alleged in the Complaint; and (2) the Complainant’s requested relief (*i.e.*, avoiding service termination while denying PECO access to replace the existing legacy meter) cannot be granted by the Commission since PECO is legally required to install smart meters and customers are not permitted to opt-out of smart meter installation. Preliminary Objections at 2-6. Finally, PECO also indicated that the Right of Access provision of its tariff requires customers to provide PECO with access to meters for purposes that include changing meters, and that Commission precedents provide for commencement of termination proceedings where customers refuse to provide such access. Preliminary Objections at 6 (citing [*Smart Meter Procurement and Installation*, Docket No. M-2009-2092655 (Order entered November 14, 2023)] (*November 2023 Lifting Stay Order*<sup>7</sup>)).

On May 31, 2024, the Complainant submitted a reply in opposition to PECO’s New Matter (Reply to New Matter). In the Reply to New Matter, the Complainant, *inter alia*, argued that 52 Pa. Code § 57.255(a) requires that PECO obtain a written request from the Complainant for an Advanced Smart Meter prior to installation.

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<sup>6</sup> The “same issues” that PECO alleged included the Complainant’s dispute regarding the installation of a smart meter at his property and the Complainant’s assertion that smart meter algorithms allow PECO to create fictitious and/or inaccurate charges. Preliminary Objections at 3-4.

<sup>7</sup> In the *November 2023 Lifting Stay Order*, the Commission lifted its stay of certain formal complaint proceedings presently before the Commission, which it had issued on November 4, 2020 at Docket No. M-2009-2092655, pursuant to 66 Pa.C.S. § 501. These proceedings involved challenges to an EDC’s safe and reasonable service under Section 1501 of the Code, 66 Pa.C.S. § 1501, because of the EDC’s installation of smart meter technology. *November 2023 Lifting Stay Order* at 1. The *November 2023 Lifting Stay Order* also provided, *inter alia*, that as of the date of the *November 2023 Lifting Stay Order*, EDCs may commence termination proceedings due to a customer’s refusal to allow the utility access to their meter for purposes of replacement. *Id.* at 9, Ordering Paragraph No. 2.

The Complainant also disputed PECO’s claims that the issues raised in his Complaint had been previously litigated, and specifically denied that the current Complaint referenced any claims regarding smart meter algorithms. Additionally, the Complainant contended that while Act 129 does not provide a smart meter opt-out for customers, it also does not require the installation of an Advanced Smart Meter. Reply to New Matter at 1-7; I.D. at 2.

On June 3, 2024, the Complainant filed a Praecipe to Supplement the Reply to New Matter (Praecipe to Supplement), which included an Exhibit 1 comprised of a copy of one of the Complainant’s PECO electric bills. Praecipe to Supplement; I.D. at 2.

On June 7, 2024, ALJ Heep was assigned as the Presiding Officer in this proceeding.

On June 10, 2024, the Complainant filed an Answer to PECO’s Preliminary Objections (the Answer to POs).<sup>8</sup> The Complainant’s Answer to POs included the following four attachments labeled as Exhibits 1 through 4, respectively: (1) a copy of a ten-day shut off notice that the Complainant received from PECO on April 26, 2024; (2) a copy of a 72-hour shut off notice that the Complainant received on May 20, 2024, and (3) a picture of a FlexNet AMI Smart Meter that the Complainant alleged PECO is proposing to install at his service address; and (4) a picture of a Centron Smart Meter that the Complainant alleged is currently installed at his service address.

In the Answer to POs, the Complainant largely reasserted the arguments contained in the Reply to New Matter, including that the matters raised in his Complaint were not previously litigated, and that the doctrine of *res judicata* should therefore not apply. Answer to POs at 1-9. The Complainant also alleged that there is an “indisputable

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<sup>8</sup> We note that the I.D. inadvertently identified the filing date as June 19 2024.

distinction” between an Advanced Smart Meter and a Smart Meter, and that PECO is regulatorily prohibited from forcing the installation of an Advanced Smart Meter at his service address. *Id.* at 3 (citing 52 Pa. Code §57.255(a)). The Complainant concluded the Answer to POs by requesting that the Commission issue an order prohibiting PECO from both terminating his electric service and from forcing the installation of an Advanced Smart Meter at his residence. Answer to POs at 9; I.D. at 3.

On July 29, 2024, the Complainant filed a Motion for Sanctions against PECO.

On August 5, 2024, ALJ Heep issued an Order indicating that the record in this proceeding was closed and dismissing Complainant’s Motion for Sanctions as moot.

On October 4, 2024, the Commission issued the Initial Decision of ALJ Heep, wherein the ALJ recommended that the Commission sustain PECO’s Preliminary Objections and that it dismiss the Complaint.

As previously noted, after the Initial Decision was issued, the Complainant made a series of filings that included the following:<sup>9</sup> a Petition for Clarification filed on October 8, 2024; a Petition for Stay filed on October 14, 2024; Exceptions filed on October 24, 2024; and a cease and desist letter directed to PECO on October 25, 2024.<sup>10</sup>

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<sup>9</sup> Although the Complainant included certificates of service for each of the filings referenced, verifying service upon PECO’s counsel, it appeared that service may not have been executed; therefore, to ensure due process, the Commission’s Secretary made service of all three filings upon PECO’s counsel on November 15, 2025.

<sup>10</sup> Because the Complainant is appearing *pro se* and because the Complaint’s Petition for Clarification and Exceptions contain common claims and arguments, we will exercise our discretion pursuant to 52 Pa Code § 1.2(a) to consider them both simultaneously in the context of Exceptions. Additionally, as the Complainant’s cease and desist letter is immaterial to our disposition, we will decline to consider it in our disposition. *See*, 52 Pa. Code § 1.4(e).

The Commission's Secretary served Exceptions upon PECO's counsel on November 7, 2024 and served the Petition for Clarification, Petition for Stay, and cease and desist letter on November 15, 2024.

As previously noted, PECO filed Reply Exceptions on November 15, 2024. On November 21, 2024, the Complainant filed a Response in Opposition to Reply Exceptions of PECO.<sup>11</sup>

### **III. Discussion**

#### **A. Legal Standards**

##### **1. Burden of Proof**

As a matter of law, to establish a legally sufficient claim, a complainant must show that the named utility is responsible or accountable for the problem described in the complaint in order to prevail. *Patterson v. The Bell Telephone Company of Pennsylvania*, 72 Pa. P.U.C. 196 (1990). The offense must be a violation of the Code, a Commission Regulation or Order or a violation of a Commission-approved tariff. 66 Pa.C.S. § 701.

Section 332(a) of the Code provides that a complainant, as the party seeking affirmative relief from the Commission, has the burden of proof. 66 Pa.C.S. § 332(a). The evidentiary burden of proof for actions before the Commission is the

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<sup>11</sup> While our Regulations at 52 Pa. Code §§ 5.533 and 5.535 set forth the procedure to file Exceptions and Reply Exceptions, such Regulations do not contemplate or permit the filing of a reply or response to Reply Exceptions. As a result, the Complainant's Response in Opposition to Reply Exceptions is in violation of the Commission's Rules of Practice and, therefore, are immaterial to our disposition, and will not be considered. *See*, 52 Pa. Code § 1.4(e).

“preponderance of the evidence” standard. *Suber v. Pennsylvania Com’n on Crime and Delinquency*, 885 A. 2d 678, 682 (Pa. Cmwlth. 2005) (*Suber*); *Samuel J. Lansberry, Inc. v. Pa. PUC*, 578 A.2d 600 (Pa. Cmwlth. 1990), *alloc. denied*, 602 A.2d 863 (1992) (*Lansberry*); *see also, North American Coal Corporation v. Air Pollution Commission*, 279 A.2d 356 (Pa. Cmwlth. 1971). To establish a fact or claim by a preponderance of the evidence means to offer the greater weight of the evidence, or evidence that outweighs, or is more convincing than, by even the smallest amount, the probative value of the evidence presented by the other party. *See Se-Ling Hosiery, Inc. v. Margulies*, 70 A.2d 854, 855 (Pa. 1950).

The burden of proof comprises two distinct burdens: the burden of production and the burden of persuasion. *Hurley v. Hurley*, 754 A.2d 1283 (Pa. Super. 2000). The burden of production, also called the burden of going forward with the evidence, determines which party must come forward with evidence to support a particular claim or defense. *Scott and Linda Moore v. National Fuel Gas Distribution*, Docket No. C-2014-2458555 (Final Order entered August 25, 2015) (*Moore*). The burden of production goes to the legal sufficiency of a party’s claim or affirmative defense. *Id.* It may shift between the parties during a hearing. If a complainant introduces sufficient evidence to establish the legal sufficiency of the claim, also called a *prima facie* case, the burden of production shifts to the utility to rebut the complainant’s evidence. *See Id.* If the utility introduces evidence sufficient to balance the evidence introduced by the complainant, that is, evidence of co-equal value or weight, the complainant’s burden of proof has not been satisfied and the burden of going forward with the evidence shifts back to the complainant. The complainant then must provide some additional evidence favorable to the complainant’s claim. *Milkie v. Pa. PUC*, 768 A.2d 1217 (Pa. Cmwlth. 2001) (*Milkie*); *Burleson v. Pa. PUC*, 443 A.2d 1373 (Pa. Cmwlth. 1982), *aff’d*, 461 A.2d 1234 (Pa. 1983) (*Burleson*).

Having produced sufficient evidence to establish the legal sufficiency of a claim, the party with the burden of proof must also carry the burden of persuasion to be entitled to a favorable ruling. *See Moore*. While the burden of production may shift back and forth during a proceeding, the burden of persuasion never shifts; it always remains on a complainant as the party seeking affirmative relief from the Commission. *See Milkie, Burluson; see also, Riedel v. County of Allegheny*, 633 A.2d 1325, 1328, n.11 (Pa. Cmwlth. 1993). It is entirely possible for a party to carry the burden of production but not be entitled to a favorable ruling because the party did not carry the burden of persuasion. *See Moore*. In determining whether a complainant has met the burden of persuasion, the ultimate factfinder<sup>12</sup> may engage in determinations of credibility, may accept or reject testimony of any witness in whole or in part, and may accept or reject inferences from the evidence. *See Moore* (citing *Suber*).

Finally, adjudications by the Commission must be supported by substantial evidence in the record. 2 Pa.C.S. § 704. “Substantial evidence” is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion. *Consolidated Edison Company of New York v. National Labor Relations Board*, 305 U.S. 197, 229, 59 S. Ct. 206, 217 (1983). More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk & Western Railway Company v. Pa. PUC*, 413 A.2d 1037 (Pa. 1980); *Erie Resistor Corporation v. Unemployment Compensation Board of Review*, 166 A.2d 96 (Pa. Super. 1961); *Murphy v. Commonwealth Department of Public Welfare, White Haven Center*, 480 A.2d 382 (Pa. Cmwlth. 1984).

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<sup>12</sup> In formal complaint proceedings, the Commission, not the ALJ, is the ultimate fact-finder; it weighs the evidence and resolves conflicts in testimony. When reviewing the initial decision of an ALJ, the Commission has all the powers that it would have had in making the initial decision except as to any limits that it may impose by notice or by rule. *Milkie*, 768 A.2d at 1220, n. 7 (citing, inter alia, 66 Pa.C.S. § 335(a)).

## 2. 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*, Docket No. C-00935435 (Opinion and Order entered 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 of 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, PECO asserted in its Preliminary Objections that the Complaint is legally insufficient pursuant to 52 Pa. Code § 5.101(a)(4) based upon three grounds. First, PECO argued that the Complaint is legally insufficient based upon the Complainant's prior cases being predicated upon the same issues and set of facts which the Commission ultimately dismissed, and which were denied on appeal. Additionally, PECO alleged that the Complainant is also legally insufficient because it is without merit, as the Pennsylvania Supreme Court has ruled that Act 129 does not provide a customer opt-out for utility smart meters. Finally, PECO submitted that both its Commission-approved tariff and the Commission's Regulations permit the Company to terminate service when it is denied access to a meter for purposes of replacement. Preliminary Objections at 3-7.

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).

### **3. *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*).

### **4. *Judgment on the Pleadings***

The Commission will grant a Motion for Judgment on the Pleadings only if the pleadings demonstrate that there is no genuine issue as to a material fact and the moving party is entitled to judgment as a matter of law. 52 Pa. Code § 5.102(d)(1). When considering a motion for judgment on the pleadings, all of the non-movant's well-pled allegations must be accepted as true, and only the facts that are specifically admitted by the non-movant are considered against it. *Ridge v. State Employees' Retirement Board*, 690 A.2d 1312 (Pa. Cmwlth. 1997). Judgment on the pleadings may be properly granted only where the pleadings show there are no material facts in dispute, such that a hearing is unnecessary. *Travelers Casualty & Surety Company v. Castegnaro*, 772 A.2d 456 at 459 (Pa. 2001). Finally, in determining whether to grant a motion for judgment on the pleadings, only the pleadings and any documents properly attached to them may be considered. *Id.*

## **B. The ALJ's Initial Decision**

In the Initial Decision, ALJ Heep made five (5) Findings of Fact (FOF) and reached eight (8) Conclusions of Law (COL). I.D. at 3, 9-10. The FOF and COL 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.

At the outset, the ALJ acknowledged that although PECO raised the doctrine of *res judicata*, both in its preliminary objections, and as an affirmative defense in its new matter, the claim would have been more appropriately asserted as a motion for judgment on the pleadings. Nevertheless, the ALJ also explained that, pursuant to the Commission's Regulations, the Commission, or the presiding officer, at any stage of an action or proceeding may disregard an error or defect of procedure which does not affect the substantive rights of the parties. I.D. at 4, n. 2 (citing 52 Pa. Code § 1.2(a)). Accordingly, the ALJ determined to treat PECO's Preliminary Objection asserting the doctrine of *res judicata* as a motion for judgment on the pleadings, and she thereafter evaluated the argument in that context. I.D. at 4-6.

### **1. *Res Judicata***

Next, the ALJ addressed PECO's Preliminary Objection that the instant Complaint is legally insufficient and that it should be dismissed on the grounds that the Complaint is barred by the doctrine of *res judicata*. The ALJ acknowledged that for the doctrine of *res judicata* to prevail, four conditions must exist. The four conditions include the following: (1) identity of issues; (2) identity of causes of action; (3) identity of persons and parties to the action; and (4) identity of the quality and capacity of the parties suing or sued. I.D. at 6 (citing *Day*).

Next, the ALJ considered PECO’s claim that the Complainant is seeking to re-litigate a prior claim challenging “algorithms” used by PECO in its metering system. PECO claimed that the Complainant previously litigated a claim challenging “algorithms” that PECO uses in its metering system in *Norman v PECO Energy Co.*, C-2015-2472605 (Opinion and Order entered July 13, 2017). I.D. at 6. The ALJ also recognized the fact that the Complainant contended that he has not raised claims pertaining to “algorithms” as part of this case. *Id.* (citing Reply to New Matter at 2; Answer to POs at 8). Applying the standards for judgment on the pleadings, which required the ALJ’s acceptance of all well-pleaded statements as true, the ALJ accepted the fact that the Complainant had not raised claims regarding algorithms in this case. Because the ALJ accepted the Complainant’s factual averment that he had not raised algorithm-based claims in this case, the ALJ determined that two of the four *res judicata* conditions, the identity of issues and the identity of causes of action, were not met. On this basis, the ALJ found that the doctrine of *res judicata* did not apply; therefore, it did not form the basis for dismissal of the Complaint. I.D. at 6.

## **2. Smart Meter Opt-Out**

The ALJ then considered and rejected the Complainant’s argument that customers can prevent installation of a smart meter by “opting out.” Upon review of the averments contained in the Complainant’s pleadings, the ALJ recognized that the Pennsylvania Supreme Court has affirmatively established that Act 129 does not provide a customer “opt-out” provision for installation of a smart meter, and that any viable customer challenge raised against smart meter installation must satisfy the preponderance of evidence standard for a violation of Section 1501 of the Code. I.D. at 7 (citing *Povacz II*). The ALJ indicated that to prevail on a Section 1501 complaint challenging PECO’s smart meter installation for health and safety reasons, a complainant must establish that PECO installing a smart meter is unsafe or unreasonable by providing supporting medical documentation and/or expert testimony in support. I.D. at 7 (citing

*Kreider v. PECO Energy Co.*, Docket. No. P-2015-2495064 (Opinion and Order entered January 28, 2016)). In this case, the ALJ found that the Complainant did not present evidence, as necessary to prevail on a Section 1501 claim. To the contrary, the ALJ found that the Complainant unambiguously stated that he “makes no assertions of possible harm from radio waves emitted by any type of meter.” I.D. at 7 (citing Reply to New Matter at ¶14). Accordingly, the ALJ determined that the Complainant cannot prevent installation of a smart meter at his service address and that any claims seeking such a remedy would be dismissed. I.D. at 7.

### **3. Termination Notice for Refusal to Allow PECO to Change the Meter**

Finally, the ALJ addressed PECO’s termination notices to the Complainant, noting that both notices were submitted in pleadings filed by the Complainant. I.D. at 8 (citing Answer to POs, Exhs. 1 and 2). The ALJ acknowledged that both termination notices stated that the Complainant did not provide access to PECO’s meters. Namely, the ALJ noted that although the Complainant stated that he has permitted PECO to read the meter, inspect the meter, or test the meter, he admitted that he has refused to allow PECO to change the meter. I.D. at 8 (citing Reply to New Matter at 3, 6, 7). The ALJ acknowledged that the Commission has expressly permitted PECO to terminate service for a customer’s refusal to permit PECO to change a meter, as set forth below:

[E]lectric electric distribution companies may commence termination proceedings due to the customer’s refusal to allow the utility access to their meter for purposes of replacement, consistent with the Pennsylvania Public Utility Code, Commission Regulations, Commission Orders and Commission-approved Tariff.

I.D. at 8 (citing *November 2023 Lifting Stay Order*).

The ALJ further recognized that PECO's tariff contains a provision that requires PECO to have access to its meters:

[E]mployees shall have access to the premises of the customer at all reasonable times for the purpose of reading meters, and for installing, testing, inspecting, repairing, removing or changing any or all equipment belonging to the Company.

I.D. at 8 (citing PECO's Right of Access tariff provision).

In recognition of PECO's tariff, the ALJ noted that a public utility's Commission-approved tariff is *prima facie* reasonable, has the full force of law, and is binding upon both the utility and the customer. I.D. at 9 (citing 66 Pa.C.S. § 316; *Kossman v. Pa. Pub. Util. Comm'n*, 694 A.2d 1147 (Pa. Cmwlth. 1997); *Stiteler v. Bell Tel. Co. of Pa.*, 379 A.2d 339 (Pa. Cmwlth. 1977)). The ALJ also acknowledged that the Code and the Commission's Regulations provide that a utility company may notify a customer and terminate service where the customer does not permit access to the company's meters for replacement. I.D. at 9 (citing 52 Pa. Code § 56.81(3) and 66 Pa.C.S. § 1406(a)(4)).

After reviewing the applicable Commission precedent, PECO's tariff, and the provisions of the Code and Commission Regulations, the ALJ applied them to the pleadings. Ultimately, the ALJ concluded that PECO committed no violations when it issued notices to the Complainant advising that his service would be terminated because PECO's required access to its equipment and to change the meter was denied. On these facts, the ALJ determined that the Complainant cannot prevail. I.D. at 8-9. As such, the ALJ sustained PECO's Preliminary Objection due to the legal insufficiency of the Complaint and because the Complainant cannot prevail even if the averments of the Complaint are read in the light most favorable to the Complainant. I.D. at 1.

Based on the foregoing, the ALJ dismissed the Complaint. I.D. at 9.

## C. Exceptions and Replies

### 1. Complainant's Exceptions<sup>13</sup>

The Complainant's Exceptions identify virtually all the Findings of Fact and Conclusions of Law set forth in the Initial Decision as a basis for exception on grounds that are predominantly grounded in objections asserting claims of bias and prejudice. Petition for Clarification at 1-2; Exc. at 1-15. Alongside the general objections, the Complainant also asserts two overarching bases for exception. The Complainant first contends that the ALJ erred by failing to address cited authority demonstrating that Smart Meters and Advanced Smart Meters are distinct in that customers must expressly opt in to Advanced Smart Meter installation. Petition for Clarification at 1-2; Exc. at 3-11, 13. Additionally, the Complainant argues that the ALJ erred by construing PECO's improperly raised affirmative defense as a preliminary objection into a judgment on the pleadings. Exc. at 5-7.

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<sup>13</sup> We acknowledge that the Complainant submitted a Petition for Clarification on October 8, 2024, prior to the submissions of his Exceptions on October 24, 2024. Although titled differently than Exceptions, the Complainant's Petition for Clarification raised many of the same arguments he later raised in his Exceptions. As previously noted, because the Complainant's Petition for Clarification can reasonably be construed as Exceptions, we will consider it as being incorporated into his Exceptions, and we will therefore consider the totality of arguments raised in both filings in our disposition of the Complainant's Exceptions. Our consideration recognizes the fact that the Complainant is appearing *pro se*, and that we are exercising our discretion to accept the Petition for Clarification as though it is incorporated into the Claimant's Exceptions, pursuant to Section 1.2(a) and (d) of our Regulations, 52 Pa. Code § 1.2(a) and (d), to secure a just, speedy, and inexpensive determination. Finally, to the extent the Complainant raises interpretations of law or items that are not responsive to the issues, the Complainant's Exceptions are denied.

First, the Complainant alleges that the ALJ erred by failing to recognize that the Complainant relies upon “Title 52 §57.255(a),”<sup>14</sup> to support his argument that Advanced Smart Meters and Smart Meters are distinct devices that trigger distinctions in customers’ right to opt-out. Petition for Clarification at 1-2; Exc. at 1-15. More specifically, the Complainant alleges that he already has a “Smart Meter” at his residence, as required by Act 129, and that PECO is now seeking to install an “Advanced Smart Meter.” Petition for Clarification at 1-2. According to the Complainant, both customers and the customers’ electric generation supplier (EGS)<sup>15</sup> must request an “Advanced Smart Meter” in writing, “as required by Pennsylvania Code at Title 52 § 57.255(a).” Exc. at 6. Although the Complainant does not include the text of the cited regulation, the Complaint appears to reference and incorporate the following regulation:

Upon written request from both a customer and the EGS of that customer, the EDC shall make available and install for use a qualified advanced meter or meter-related device. The qualified advanced meter shall be the customer's billing meter and shall meet certain standards established by the

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<sup>14</sup> Based upon the Complainant’s description, it appears that the Complainant references the Commission’s regulation at 52 Pa. Code § 57.255(a), *EDC responsibilities regarding advanced metering*, and we will therefore identify all further references as 52 Pa. Code § 57.255(a).

<sup>15</sup> The Commission’s Regulations regarding Advanced Meter Deployment define an “EGS” as follows: [a] person or corporation, including municipal corporations which choose to provide service outside their municipal limits except to the extent provided prior to January 1, 1997, brokers, and marketers, aggregators or other entities, that sells to end-use customers electricity or related services utilizing the jurisdictional transmission or distribution facilities of an EDC or that purchases, brokers, arranges or markets electricity or related services for sale to end-use customers utilizing the jurisdictional transmission and distribution facilities of an EDC. The term excludes building or facility owner/operators that manage the internal distribution system serving the building or facility. The term excludes electric cooperative corporations except as provided in 15 Pa.C.S. Chapter 74 (relating to generation choice for customers of electric cooperatives). 52 Pa. Code § 57.252.

Commission in § 57.254 (relating to advanced meter standards).

52 Pa. Code § 57.255(a).

The Complainant also argues that the Commission has failed to acknowledge, comprehend, and/or address the above regulation that prohibits PECO from changing his current Smart Meter to an Advanced Smart Meter without his written request. Exc. at 3-4, 5. The Complainant avers that the ALJ erred by failing to require PECO to provide an explanation as to why PECO insists on installing an Advanced Smart Meter at his service address without a written request, as required by 52 Pa. Code § 57.255(a). The Complainant further argues that the ALJ erred in failing to consider the requirements imposed by 52 Pa. Code § 57.255(a) despite the Complainant's reference to the requirement twelve separate times in prior pleadings. Exc. at 4.

Finally, the Complainant alleges that the ALJ improperly construed PECO's inappropriately raised affirmative defense as a judgment on the pleadings despite the fact that "neither party filed a Motion for Judgment on the Pleadings." Exc. at 12. The Complainant further argues that ALJ Heep committed an abuse of discretion by converting PECO's improperly raised affirmative defense into a Motion for Judgment on the Pleadings. *Id.* at 13-14. By doing this, the Complainant argues, the ALJ has deprived the Complainant of an opportunity to respond to the Motion, which is highly prejudicial and a clear violation of the Complainant's Constitutional Rights. *Id.* at 12-13.

## **2. PECO's Reply Exceptions**

In its Replies, PECO argues that the Complainant's claim is barred by Pennsylvania law, and PECO largely relies upon *Povacz II, supra*, as support for its position. PECO avers that in *Povacz II*, the Pennsylvania Supreme Court not only

mandated that EDCs furnish smart meters to all electric customers they serve, but it also established that there is no ability for customers to “opt-out” of smart meter installation. PECO also relies upon *Povacz II* as a basis to rebut the Complainant’s challenge to the definition of a smart meter versus an advanced smart meter. PECO asserts that *Povacz II* also clarified that EDCs hold the authority to select and install a certain type of meter “regardless of a customer’s preference.” PECO R. Exc. at 3-4 (citing *Povacz II* [at 972]).

According to PECO, the Complainant’s arguments challenging the definition of smart meter are meritless. PECO indicates that it previously advised the Complainant that PECO’s system no longer supports a non-AMI meter and that a new smart meter must be installed. PECO also cites the Commission’s Regulations that, subject to notice procedures, permit it to terminate a customer’s service when that customer fails to permit the Company to access meters for the purpose of replacement, maintenance, repair, or meter readings. PECO R. Exc. at 4 (citing 52 Pa. Code §§ 56.91-56.100). PECO avers that the ALJ’s Initial Decision was well-reasoned and amply supported by law. PECO concludes by asserting that Pennsylvania law is clear and the Complainant has failed to carry his burden of proof; therefore, dismissal of the Complaint is warranted. PECO R. Exc. at 4.

#### **D. Disposition**

At the outset, 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) (*Consolidated Rail Corp. v. Pa. PUC*); *see also, generally, University of Pennsylvania v. Pa. PUC*, 485 A.2d 1217 (Pa. Cmwlth. 1984).

In this case, we will adopt the ALJ's Initial Decision and dismiss the Complaint, because the ALJ correctly concluded that the Complaint is legally insufficient and that PECO's Preliminary Objections should be sustained. We agree with the ALJ that even when the averments raised in the Complaint are read in the light most favorable to the Complainant, as they must be, the Complainant still cannot prevail. The Complainant's pleadings have neither asserted, nor established, a basis under Section 1501 of the Code which would be necessary to prevail. *See, Povacz II* at 983-84.

Instead, the crux of the Complainant's argument is that he must affirmatively, in writing, request to "opt in" for PECO to install a new smart meter. The Complainant's argument is predicated upon an alleged distinction between an "Advanced Meter" and a smart meter, and we find that this argument is both erroneous and legally insufficient. Finally, contrary to the Complainant's claim, we find that the ALJ applied the appropriate standard in dismissing the Complaint on the grounds of legal insufficiency.

As a threshold matter, the Complainant's Exceptions largely rely upon an erroneous legal argument. As explained above, the Complainant argues that the ALJ erred by failing to recognize that, because PECO sought to install an "Advanced Meter" at his service address, 52 Pa. Code § 57.255(a) provides that he must affirmatively *opt in* to the installation, and he has not so opted.<sup>16</sup> In essence, the Complainant's argument

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<sup>16</sup> At the outset, we acknowledge that the ALJ did not explicitly address the Complainant's argument regarding 52 Pa. Code § 57.255(a), but we also recognize that the ALJ was not required to expressly address the argument. As noted, precedent establishes that 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*. Although we agree with the ALJ's determination that the Complaint is legally insufficient, we will address the Complainant's argument regarding 52 Pa. Code § 57.255(a).

hinges upon whether 52 Pa. Code § 57.255(a) is applicable to the present circumstances. Section 57.255(a) provides, in pertinent part, as follows:

Upon written request from both a customer and the EGS of that customer, the EDC shall make available and install for use a qualified advanced meter or meter-related device. The qualified advanced meter shall be the customer's billing meter and shall meet certain standards established by the Commission in § 57.254 (relating to advanced meter standards).

52 Pa. Code § 57.255(a).

Upon review, we conclude that 52 Pa. Code § 57.255(a) is inapplicable here for multiple reasons. First, 52 Pa. Code § 57.255, *EDC responsibilities regarding advanced metering*, which was adopted on December 26, 1998, is not applicable for purposes of PECO's universal smart meter deployment obligations. Instead, both Act 129 and PECO's approved smart meter procurement and installation plan approved in the *2013 PECO Smart Meter Order* are the applicable statutory and regulatory provisions.

By way of further context, Act 129 was enacted almost a decade after 52 Pa. Code § 57.255 was adopted. Therefore, the provisions of Act 129 superseded that of Section 57.255 of our Regulations. Act 129 culminated, *inter alia*, in the Pennsylvania General Assembly directing that EDCs with more than 100,000 customers file smart meter technology procurement and installation plans with the Commission for approval. 66 Pa.C.S. § 2807(f); *Smart Meter Implementation Order* at 34-35. Act 129 defined "smart meters," as follows:

As used in this section, the term "**smart meter technology**" means technology, including metering technology and network communications technology capable of bidirectional communication, that records electricity usage on at least an

hourly basis, including related electric distribution system upgrades to enable the technology. The technology shall provide customers with direct access to and use of price and consumption information. The technology shall also:

- (1) Directly provide customers with information on their hourly consumption.
- (2) Enable time-of-use rates and real-time price programs.
- (3) Effectively support the automatic control of the customer's electricity consumption by one or more of the following as selected by the customer:
  - (i) the customer;
  - (ii) the customer's utility; or
  - (iii) a third party engaged by the customer or the customer's utility.

66 Pa.C.S. § 2807(g).

Accordingly, as the more recent enactment, Act 129's statutory definition of "smart meter technology" is controlling. "Smart meter technology" includes meters that are capable of bidirectional communication, and which also meet the enumerated criteria necessary to provide customers with hourly consumption information, facilitate time of use rates and real time price programs, and effectively support automatic control of the customer's electricity consumption. Simply put, there is no basis to support that in enacting Act 129, the legislature intended to exempt "Advanced Meters" from the definition of "smart meter technology."

While the Complainant argues that PECO seeks to install an "Advanced Meter," a distinction that he argues requires PECO to obtain his written consent as a condition of such installation, his argument relies upon an inapplicable regulation

adopted in 1998 regarding advanced metering. *See* Exc. (citing 52 Pa. Code § 57.255). We find that 52 Pa. Code § 57.255 is inapplicable here, as Act 129 is the prevailing statutory authority governing smart metering technology for PECO’s customers. *See*, 66 Pa.C.S. § 2807(f). Act 129 recognizes no distinction or exception for “Advanced Meters.” *Id.*

Although we do not find that any conflict exists between Act 129, a later enacted statute, and the Commission’s regulation at 52 Pa. Code § 57.255, even assuming, arguendo, there were such a conflict, the statute would prevail. *See, e.g., Equitable Gas Co. v. Wade*, 812 A.2d 715 (Pa. Super. 2002). Furthermore, basic statutory construction would require resolution of a conflict by giving effect to the clear and unambiguous statutory language. *Statutory Construction Act*, 1 Pa.C.S. §1501 *et seq.* Here, the Pennsylvania Supreme Court has determined that “it is clear that [66 Pa.C.S. 2807](f)(2) sets forth the protocols for furnishing smart meters to the universe of customers considered in the Procurement and Installation Plan [of PECO].” *Povacz II* at 995. Accordingly, as the Complainant is within PECO’s customer base, PECO is required to install a smart meter<sup>17</sup> at his service address in compliance with PECO’s approved Smart Meter Technology Procurement and Installation Plan (PECO Smart Meter Plan), which the Commission approved in the *2013 PECO Smart Meter Order*.

For these reasons, we agree with PECO that there is no merit to the Complainant’s challenge to the definition of “smart meter.” Accordingly, the Complainant’s assertion of a distinction in the definition of “Advanced Meters” predicated on the language of 52 Pa. Code § 57.255 is without merit.

The Complainant’s arguments also ignore the fact that the Commission has extensively reviewed, and ultimately approved, PECO’s Smart Meter Plan that provides

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<sup>17</sup> PECO indicates that the Complainant currently has a legacy AMR meter, which the Company’s system no longer supports. Answer and New Matter at 2-3.

for the universal deployment of smart meters. The Commission's *Smart Meter Implementation Order* required PECO to propose a universal metering program and to obtain the Commission's approval prior to implementation. *Smart Meter Implementation Order* at 14-15. PECO initially submitted its Smart Meter Plan on August 14, 2009 at Docket No. M-2009-2123944. PECO's Smart Meter Plan was proposed over several phases, with Phase One (Phase 1) to focus on, *inter alia*, selecting, testing, and validating the smart meter technology to be deployed, and with Phase Two (Phase 2) to focus on, *inter alia*, universal deployment of smart meters throughout PECO's service territory. PECO Smart Meter Plan, Phase 1, ¶6.

Over the course of the two phases of its Smart Meter Plan litigation, PECO sought, and ultimately obtained, the Commission's approval to complete the installation of AMI meters with substantially all customers to receive an AMI meter by the end of 2019. *2013 PECO Smart Meter Order*. Thus, the Commission has previously approved PECO's installation of smart meters for all customers, including the Complainant, and it has previously determined that the meters that PECO plans to install are "smart meter technology," as that term is defined in Act 129. Here too, the Complainant cannot prevail in reliance upon 52 Pa. Code § 57.255 as a basis to prevent smart meter installation at his service address because that reliance is inconsistent with PECO's approved Smart Meter Plan.

Moreover, the Complainant cannot prevail in his attempt to maintain electric service while simultaneously denying PECO access to replace his meter. PECO's tariff contains the following Right of Access provision, which provides as follows:

The Company's identified employees shall have access to the premises of the customer at all reasonable times for the purpose of reading meters, and for installing, testing,

inspecting, repairing, removing or changing any or all equipment belonging to the Company.<sup>18</sup>

I.D. at 8-9 (citing PECO Right of Access tariff provision). As the ALJ acknowledged, as a public utility, PECO's tariff has the full force of law, and it is binding upon both PECO and its customers. I.D. at 9 (citing 66 Pa.C.S. § 316; *Kossman v. Pa. PUC*, 694 A.2d 1147 (Pa. Cmwlth. 1997); *Stiteler v. Bell Telephone Company of Pennsylvania*, 379 A.2d 339 (Pa. Cmwlth. 1977)). Furthermore, both the Code and the Commission's Regulations provide that, subject to customer notification, a public utility may terminate service in circumstances where the customer does not permit the company to access the meter for replacement. I.D. at 8-9 (citing 66 Pa.C.S. § 1406(a)(4); 52 Pa. Code § 56.81(3)). Additionally, as an EDC, PECO has been authorized by the Commission to "commence termination proceedings due to the customer's refusal to allow the utility access to their meter for purposes of replacement," provided it does so in a manner that is consistent with the Code, Commission Regulations, Commission Orders and the Company's Commission-approved Tariff. PECO R. Exc. at 4; I.D. at 8 (citing *November 2023 Lifting Stay Order*); *see also, Frompovich v. PECO Energy Co.*, Docket No. C-2015-2474602 (Opinion and Order entered May 3, 2018).

Our review of the Complainant's pleadings demonstrates both that the Complainant has denied PECO access to the meter at his service address, and that PECO has indicated that it would refrain from terminating his electric service if he provided PECO with access to the meter. Answer to POs, Exhs. 1-2. The Complainant's election to continue to deny PECO access provides a viable legal basis for PECO to terminate service at his address; accordingly, we find that the ALJ appropriately determined that the Complainant cannot prevail and that the Complaint should be dismissed. I.D. at 9.

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<sup>18</sup> PECO owns, and maintains the meters in its distribution system. *See*, PECO Tariff, Rule 14.1.

Finally, the ALJ correctly recognized that while Act 129 does not provide a customer “opt-out” provision for installation of a smart meter, customers may raise viable challenges against smart meter installation by satisfying the preponderance of evidence standard for a violation of Section 1501 of the Code. I.D. at 7 (citing *Povacz II* at 975). To carry the burden of proof necessary to support a claimed violation of Section 1501 predicated on health and safety, a Complainant challenging smart meter installation may be required to present medical documentation and/or expert testimony to demonstrate that “furnishing of a smart meter constitutes unsafe or unreasonable” service. *Povacz II* at 1000. We agree with the ALJ that the Complainant has not alleged any violation of Section 1501, and that the Complainant cannot prevail even when the averments raised in the Complaint are read in a light most favorable to the Complainant. For these reasons, we adopt the ALJ’s Initial Decision and affirm the dismissal of the Complaint.

We will also deny the Complainant’s Exception alleging that the ALJ violated his Constitutional rights by inappropriately construing PECO’s argument asserting the doctrine of *res judicata* as a judgment on the pleadings. *See*, Exc. at 12-13. While the Complainant is correct in his claim that “neither party filed a Motion for Judgment in the Pleadings,” it was not an abuse of discretion by the ALJ, as the Complainant alleges. *Id.* at 12-14. Instead, the ALJ’s decision to construe PECO’s affirmative defense of *res judicata*, which PECO asserted in its New Matter, is grounded in the Commission’s regulation at 52. Pa Code § 1.2(a), *Liberal construction*. *See*, I.D. at 4, n. 2. 52. Pa Code § 1.2(a) provides, in pertinent part, that the presiding officer at any stage of an action or proceeding may disregard an error or defect of procedure which does not affect the substantive rights of the parties. *Id.* (citing 52. Pa Code § 1.2(a)).

We also note that the ALJ’s decision to treat PECO’s *res judicata* defense as a motion for judgment on the pleadings is consistent with Commission precedent that is directly applicable to the circumstances presented here. For example, the Commission

has previously determined that a respondent's argument asserting the doctrine of *res judicata* in the context of a new matter and in preliminary objections would be considered as motion for judgment on the pleadings. *See Spirat v. Metropolitan Edison Company*, C-2018-3005589, Order at 1 (Final Order entered March 28, 2019, adopting Initial Decision issued January 11, 2019) (*Spirat*).

In *Spirat*, the Commission adopted the Initial Decision of ALJ Benjamin Myers, including the determination that the Metropolitan Edison Company's (Met Ed) preliminary objections would be considered and granted as a motion for summary judgment. *Id.* at 1-2. In *Spirat*, ALJ Myers' Initial Decision invoked 52 Pa. Code § 1.2(a) as a basis to treat Met Ed's preliminary objections asserting the defense of *res judicata* as a judgment on the pleadings. *Spirat*, Initial Decision at 6-8. In the Initial Decision, ALJ Myers explained that because Met Ed raised the issue of *res judicata* in both its new matter, and then again in its preliminary objections, the complainants had ample notice and opportunity to respond. *Id.* at 7.

Similarly, in this present case, PECO, also raised the affirmative defense of *res judicata* in the context of both its New Matter and its Preliminary Objections. Answer and New Matter at ¶¶ 4-12; Preliminary Objections at ¶¶ 15-22. The Complainant not only had notice and opportunity to respond to PECO's *res judicata* argument, but he did so in multiple responsive filings. *See*, Reply to New Matter at 2-6; Answer to POs at 2-6. Significantly, by accepting the responsive averments raised by the Complainant, the ALJ ultimately determined that the doctrine of *res judicata* was inapplicable; consequently, PECO was not awarded judgment on the pleadings. I.D. at 6. Therefore, in accordance with our review of the facts of this case, the pleadings submitted, Commission precedent, and the outcome in the Complainant's favor, we will deny the Complainant's Exception alleging a denial of his Constitutional rights.

Accordingly, for all the forgoing reasons, we shall deny the Complainant's Exceptions, adopt the ALJ's Initial Decision, and dismiss the instant Complaint in this proceeding.

#### **E. Petition for Stay**

Also before us in this matter is the Petition for Stay filed by the Complainant on October 14, 2024, in response to the ALJ's Initial Decision entered on October 4, 2024. In the Petition for Stay, the Complainant requests that the Commission issue an Emergency Order preventing PECO from interrupting his electric service prior to the finalization of the matter currently before the Commission. Petition for Stay at 2, 7. The Complainant's Petition for Stay includes Exhibits A- I, which are comprised of copies of the following documents, respectively: a 72-hour shut-off notice from PECO dated May 20, 2024; PECO's Answer with New Matter, PECO's Preliminary Objections; the Complainant's Response in Opposition; the Complainant's Praeceptum to Supplement; the Complainant's Answer to POs; the Initial Decision; the Complainant's Petition for Clarification; and an apparent screenshot of the Commission's public docket entries listed in this case from May 20, 2024 through October 4, 2024. The Complainant's Petition for Stay largely incorporates the arguments raised in his Exceptions, discussed, *supra*.

As a threshold matter, the Complainant's Petition for Stay is not properly before the Commission for disposition because it seeks relief from termination of the Complainant's electric service *before* the Commission has entered an order in this matter. The Complainant's request for premature relief is evident in that he is seeking relief "prior to the finalization of the matter before the Commission." Petition for Stay at 6. The timing of the Complainant's Petition for Stay is determinative because, while the Commission's Regulations at 52 Pa. Code § 5.572 do provide for the consideration of petitions for relief, including petitions seeking a stay, such petitions are only appropriately considered *after* the Commission enters a final order in the underlying case.

The requirement for the Commission to have previously entered a final order in a case prior to considering a petition for relief is demonstrated in the following provision contained in the Commission’s regulation regarding Petitions for relief: “Petitions for reconsideration, rehearing, reargument, clarification, supersedeas or others shall be filed within *15 days after the Commission order involved is entered or otherwise becomes final.*” 52 Pa. Code § 5.572(c) (emphasis added). Here, the ALJ’s Initial Decision is not a final order entered by the Commission from which a petition for relief may be granted.

Additionally, although the Complainant has sought premature relief “prior to the finalization of the matter before the Commission,” the nature of the relief he requests also renders a stay unnecessary. *See* Petition for Stay at 6. By seeking a stay of an Initial Decision until a final Commission order is entered, and by filing Exceptions, the Complainant has “assured the very stay [he] seek[s].” *Application of the New Yellow Cab LLC, A Ltd. Liab. Co. of the Commonwealth of Pennsylvania for the Right to Begin to Transp., As A Common Carrier, by Motor Vehicle, Persons, Upon Call or Demand, in the Counties of Dauphin, Cumberland & York, A-2008-2034920* at 4, (Opinion and Order entered March 2, 2009). In essence, a *de facto* stay has been in place, as once a party files exceptions, the ALJ’s decision will not become final until the Commission takes further action. *See Id.*

The Complainant’s Petition for Stay was filed on October 14, 2024, and it indicated that Exceptions to the Initial Decision would be “forthcoming.” Petition for Stay at ¶16. The Complainant’s Exceptions were submitted on October 24, 2024, and while the Exceptions are now appropriately before the Commission for disposition, the Complainant’s Petition for Stay is not. Both because the Complainant’s Petition for Stay is not properly before the Commission for disposition, and because the interim relief it seeks has already been provided as a function of procedure, we will dismiss the Petition for Stay as moot.

#### IV. Conclusion

Based upon our review of the record and the applicable law, we shall: (1) deny the Complainant's Exceptions; (2) adopt the Initial Decision; (3) deny and dismiss the Complaint; (4) deny the Petition for Clarification; and (5) dismiss the Petition for Stay as moot, consistent with this Opinion and Order; **THEREFORE,**

#### **IT IS ORDERED:**

1. That the Exceptions filed by Deree J. Norman on October 24, 2024, at Docket No. C-2024-3048777, are denied, consistent with this Opinion and Order.

2. That the Initial Decision of Administrative Law Judge Darlene Heep, issued on October 4, 2024, at Docket No. C-2024-3048777, is adopted, consistent with this Opinion and Order.

3. That the Formal Complaint, filed on April 29, 2024, by Deree J. Norman against PECO Energy Company, at Docket No. C-2024-3048777, is denied and dismissed.

4. That the Petition for Clarification, filed on October 8, 2024, by Deree J. Norman at Docket No. C-2024-3048777, is denied.

5. That the Petition for Emergency Order, filed on October 14, 2024, by Deree J. Norman at Docket No. C-2024-3048777, is dismissed as moot.

6. That this proceeding at Docket No. C-2024-3048777 be marked closed.

**BY THE COMMISSION,**

A handwritten signature in black ink, appearing to read "Rosemary Chiavetta". The signature is written in a cursive, flowing style.

Rosemary Chiavetta  
Secretary

(SEAL)

ORDER ADOPTED: December 19, 2024

ORDER ENTERED: December 19, 2024