**PENNSYLVANIA**

**PUBLIC UTILITY COMMISSION**

**Harrisburg, PA 17105-3265**

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|  | Public Meeting held April 21, 2016 |
| Commissioners Present:  Gladys M. Brown, Chairman  Andrew G. Place, Vice Chairman  Pamela A. Witmer, Statement, dissent  John F. Coleman, Jr.  Robert F. Powelson |  |
| Catherine J. Frompovich | C-2015-2474602 |
| v. |  |
| PECO Energy Company |  |

**OPINION AND ORDER**

**BY THE COMMISSION:**

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition are the Exceptions filed by Catherine J. Frompovich (Complainant or Ms. Frompovich) on June 26, 2015, in response to the Initial Decision (I.D.) of Administrative Law Judge (ALJ) Elizabeth H. Barnes issued on June 15, 2015. PECO Energy Company (PECO or Company) filed Replies to Exceptions on July 13, 2015. For the reasons stated below, we grant, in part, Ms. Frompovich’s Exceptions.

**History of the Proceeding**

On March 24, 2015, the Complainant filed a Formal Complaint (Complaint) with the Commission against PECO in which she alleged that PECO was threatening to shut off her service or had already shut off her service and referred to attached typed pages. In her request for relief, the Complainant expounded on the nature of her Complaint, and she averred that she was pursuing the Complaint upon PECO’s referral. Complaint at 5. Ms. Frompovich also summarized a ten-page letter dated March 16, 2015, that she averred she had provided to PECO, and which she enclosed with her Complaint. In addition to expressing concerns, generally, over health and safety risks arising from the installation of smart meters and questioning the legality of Act 129,[[1]](#footnote-1) the authority under which smart meters are being installed, Ms. Frompovich also addressed her personal health concerns.

As she described herself in the Complaint, Ms. Frompovich is “a 76-year old widow, living off Social Security, and a breast cancer survivor, who cannot tolerate [radio frequency] RF electromagnetic radiation coming into my house 24/7 from a Smart Meter.” *Id.* at 3. Ms. Frompovich also attached a letter from her personal managing physician. In this letter the physician stated his opinion that radio frequencies emitted by the smart meter would “interfere with [the Complainant’s] ability to heal and live Cancer [sic] free” and that it was his “professional and medical opinion that the Smart Meter technology has been researched enough that microwave energy has been proven to be detrimental to human health.” *Id.* at 11 (unnumbered). Ms. Frompovich stated that she “beat breast cancer without chemo or radiation, and [was] grateful that [she could] be well.” *Id.* at 3.

On April 10, 2015, PECO filed an Answer and New Matter (Answer) to the Complaint. In its Answer, PECO averred that the Complainant had presented an inquiry to the Company “with a request to ‘opt out’ of meter installation due to health concerns.” Answer at 2. The Company also averred that it is required to install smart meters for its electric distribution customers under Act 129 and its smart meter deployment plans approved by the Commission, and that pursuant to its tariff, the Company may terminate service to customers who, after repeated requests, fail to give the Company access to install the smart meter. Accordingly, claimed PECO, the Complaint should be dismissed as a matter of law as set forth more fully in its New Matter and Preliminary Objection. *Id.* at 3.

In its New Matter, PECO again averred that in accordance with Act 129 and its deployment plans filed with the Commission, the Company is required to deploy smart meters and that the law provides no opt out for customers. The absence of an opt out under existing law, explained PECO, was underscored by the General Assembly’s introduction of House Bill 2188 in February 2012, which would provide for an opt out but which has yet to be scheduled for a vote. According to PECO, the Complainant simply averred that she opposed the installation of a smart meter because of health concerns, but under existing law, including the Commission’s Smart Meter Implementation Order,[[2]](#footnote-2) customers lack the ability to opt out and the Complaint must be dismissed as a matter of law. *Id.* at 4-7.

Also, on April 10, 2015, PECO filed a Preliminary Objection to the Complaint in which the Company averred that the Complaint should be dismissed pursuant to Section 5.101(a)(4) of our Regulations, 52 Pa. Code § 5.101(a)(4), as legally insufficient. Identifying the legal standard for review of preliminary objections, PECO reiterated in its Preliminary Objection the legislative and regulatory authority that requires the Company to install smart meters throughout its service territory and that does not provide for an opt out. Citing various prior cases in which PECO contends the Commission dismissed upon preliminary objection complaints in which customers desired to opt out of PECO’s smart meter deployment, PECO argues that Commission precedent supports dismissing Ms. Frompovich’s Complaint as a matter of law. *See* Preliminary Objection at 8-9, citing *Povacz v. PECO Energy Company*, Docket No. C-2012-2317176 (Order entered January 24, 2013) (*Povacz*); *Gavin v. PECO Energy Company*, Docket No. C-2012-2325258 (Order entered January 24, 2013); *Morgan v. PECO Energy Company*, Docket No. C-2013-2356606 (Final Order entered July 23, 2013); *McCarey v. PECO Energy Company*, Docket No. C-2013-2354862 (Final Order entered September 26, 2013); *Thomas v. PECO Energy Company*, Docket No. C‑2012-2336225 (Final Order entered December 31, 2013); *Donnelly v. PECO Energy Company*, Docket No. F-2013-2330663 (Final Order entered March 18, 2014); and *Francis v. PECO Energy Company*, Docket No. C-2014-2451351 (Order entered March 3, 2015).

Even if the Complainant’s averments were true, concluded PECO, Ms. Frompovich failed to allege a violation of any order, law, or tariff that could form the basis of any finding against the Company. Accordingly, PECO concluded, the Company was entitled to judgment as a matter of law with respect to all allegations in the Complaint.

The Complainant failed to file a timely answer to either PECO’s New Matter or its Preliminary Objection, both of which were accompanied by a Notice to Plead. *See* 52 Pa. Code §§ 5.63(a); 1.12(a); 1.56(a)(1) and (b); and 5.101(f)(1). By letter received at the Commission on May 13, 2015, however, and generated, as the Complainant asserted, by the Commission’s April 28, 2015 notice to the parties of the assignment of the ALJ as a motion judge, the Complainant reiterated her concerns with PECO’s smart meter installation. The ALJ acknowledged but did not consider the letter in her disposition of PECO’s Preliminary Objection because the Commission’s Regulations do not provide for this type of filing. I.D. at 3 n.2. For the same reason, we will not consider this filing in reaching our disposition.

In an Initial Decision issued on June 15, 2015, the ALJ granted PECO’s Preliminary Objection and dismissed the Complaint, finding that PECO was under an obligation to deploy smart meters and that there was no provision in law or Commission precedent allowing for an opt out. As previously stated, the Complainant filed Exceptions to the Initial Decision on June 26, 2015, and PECO filed Replies to Exceptions on July 13, 2015.

**Discussion**

Initially, we note that any issue or Exception that we do not specifically address shall be deemed to have been duly considered and denied without further discussion. It is well-settled 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, 625 A.2d 741 (Pa. Cmwlth. 1993);](file://C:\research\buttonTFLink?_m=69761b6202cb4178e2a6e6fe02f5751b&_xfercite=%3ccite%20cc=%22USA%22%3e%3c!%5bCDATA%5b2000%20Pa.%20PUC%20LEXIS%2067%20%5d%5d%3e%3c\cite%3e&_butType=3&_butStat=242&_butNum=5&_butInline=1&_butinfo=%3ccite%20cc=%22USA%22%3e%3c!%5bCDATA%5b625%20A.2d%20741%5d%5d%3e%3c\cite%3e&_fmtstr=FULL&docnum=5&_startdoc=1&_startchk=1&wchp=dGLSzS-lSlbz&_md5=ad2b02d95c2a9216e83b92a3570d4785) *also* see, generally, [University of Pennsylvania v. Pa. PUC, 485 A.2d 1217 (Pa. Cmwlth. 1984).](file://C:\research\buttonTFLink?_m=69761b6202cb4178e2a6e6fe02f5751b&_xfercite=%3ccite%20cc=%22USA%22%3e%3c!%5bCDATA%5b2000%20Pa.%20PUC%20LEXIS%2067%20%5d%5d%3e%3c\cite%3e&_butType=3&_butStat=242&_butNum=6&_butInline=1&_butinfo=%3ccite%20cc=%22USA%22%3e%3c!%5bCDATA%5b485%20A.2d%201217%5d%5d%3e%3c\cite%3e&_fmtstr=FULL&docnum=5&_startdoc=1&_startchk=1&wchp=dGLSzS-lSlbz&_md5=9b1cc8319afd12440738bb82d74455ef)

In her Initial Decision, the ALJ made six Findings of Fact and reached eight Conclusions of Law. I.D. at 3-4, 9-11. The Findings of Fact and Conclusions of Law are incorporated herein by reference and are adopted without comment unless they are either expressly or by necessary implication rejected or modified by this Opinion and Order.

**Legal Standards**

No hearing was held in this case. Instead, the ALJ recommended granting the Company’s Preliminary Objections pursuant to Section 5.101 of our Regulations, 52 Pa. Code § 5.101, which sets forth the grounds for granting preliminary objections. That section provides as follows:

**§ 5.101. Preliminary objections.**

(a) *Grounds.* Preliminary objections are available to parties and may be filed in response to a pleading except motions and prior preliminary objections. Preliminary objections must be accompanied by a notice to plead, must state specifically the legal and factual grounds relied upon and be limited to the following:

(1) Lack of Commission jurisdiction or improper service of the pleading initiating the proceeding.

(2) Failure of a pleading to conform to this chapter or the inclusion of scandalous or impertinent matter.

(3) Insufficient specificity of a pleading.

(4) Legal insufficiency of a pleading.

(5) Lack of capacity to sue, nonjoinder of a necessary party or misjoinder of a cause of action.

(6) Pendency of a prior proceeding or agreement for alternative dispute resolution.

(7) Standing of a party to participate in the proceeding.

52 Pa. Code § 5.101(a).

Commission procedure regarding the disposition of preliminary objections is similar to the procedure utilized in Pennsylvania civil practice. A preliminary objection in civil practice seeking dismissal of a pleading will be granted only where relief is clearly warranted and free from doubt. *Interstate Traveller Services, Inc. v. Pa. Dep’t of Environmental Resources*, 486 Pa. 536, 406 A.2d 1020 (1979). The moving party may not rely on its own factual assertions, but must accept for the purposes of disposition of the preliminary objection all well-pleaded, material facts of the other party, as well as every inference fairly deducible from those facts. *County of Allegheny v. Commonwealth* *of Pa.*, 507 Pa. 360, 490 A.2d 402 (1985). The preliminary objection may be granted only if the moving party prevails as a matter of law. *Rok v. Flaherty*, 527 A.2d 211 (Pa. Cmwlth. 1987). Any doubt must be resolved in favor of the non-moving party by refusing to sustain the preliminary objection. *Dep’t of Auditor General v. State Employees’ Retirement System*, 836 A.2d 1053, 1064 (Pa. Cmwlth. 2003).

**ALJ’s Initial Decision**

In her Initial Decision, the ALJ granted PECO’s Preliminary Objection and dismissed the Complaint. The ALJ summarized Ms. Frompovich’s Complaint as requesting that PECO perform onsite broadcasting tests at each customer’s smart meter, that her service not be terminated, and that the Commission consider the health effects of smart meters particularly in conjunction with the Americans with Disabilities Act and the U.S. Constitution. Accepting as true all facts alleged by the Complainant for purposes of disposing of the Company’s objection, the ALJ concluded that the Complaint was legally insufficient. According to the ALJ, Act 129 requires large electric distribution companies to deploy smart meters in accordance with a plan submitted to the PUC. PECO submitted such plan, which was approved by the Commission on May 6, 2010. As the ALJ concluded, “[t]here is neither an ‘opt-out’ provision nor a requirement to perform onsite broadcasting tests provided for in the Commission’s order.… Therefore, there can be no basis for sustaining Ms. Frompovich’s Complaint.” I.D. at 6. The ALJ further stated as follows:

To the extent that Ms. Frompovich desires the ability to opt out of the smart meter installation, she should advocate for such ability before the General Assembly. The Commission simply does not have the authority, absent a directive in the form of legislation, to prohibit the Respondent from installing a smart meter where a customer does not want one. Similarly, the Respondent would be in violation of law if it did not install a smart meter at the Complainant’s residence. The Commission cannot grant the relief requested by the Complainant.

*Id.* at 6-7.

The ALJ further found that dismissing this Complaint was consistent with Commission precedent, citing *Povacz* as well as several ALJ Initial Decisions that became final Commission Orders as a matter of law.[[3]](#footnote-3) According to the ALJ, although the Complainant “is genuine in her concerns,” the cited Commission decisions control, “and because there is no opt out provision either in the Act or the Commission’s orders, the Complaint is dismissed for legal insufficiency.” I.D. at 8.

**Exceptions and Replies**

The Complainant raises four Exceptions to the ALJ’s Initial Decision. In Exception No. 1, the Complainant refers to page six of the Initial Decision and quotes the ALJ’s statement that “[t]here is neither an ‘opt-out’ provision nor a requirement to perform onsite broadcasting tests provided for [in] the Commission’s order.” Exc. at 2. In support of this Exception, Ms. Frompovich recites the comments of several state legislators from the February 2008 Pennsylvania House Journal and the October 2008 Senate Journal debating Act 129, which she contends question the mandatory deployment of smart meters without consumer choice in contradiction of what she characterizes as the Commission’s misinterpretation of the Act and overreaching administrative powers. *Id.* at 2-4. The debate, the Complainant contends, may and should be considered contemporaneous legislative history evincing legislative intent not to mandate deployment without exception. *Id*. at 5. Further, contends the Complainant, the Commission’s interpretation of Act 129 raises serious constitutional and ethical issues, including alleged violations of the First and Fourth Amendments to the U.S. Constitution as well as of the Consumer Products Safety Act. *Id*. at 5-6.

In Exception No. 2, the Complainant refers to page 8, paragraph 1, of the Initial Decision, in which the ALJ described the Complainant’s concern as genuine but found the Complaint to be without Commission redress because Act 129 provides no opt out.[[4]](#footnote-4) Referring to her argument in support of her first Exception, Ms. Frompovich again describes the Commission precedent relied on by the ALJ as overreaching and overstepping the agency’s statutory authority. Further, the Complainant alleges that PECO’s constant threat to consumers that their electric service will be terminated if they do not relent to installation despite legitimate health and safety concerns comprises emotional injury for which PECO and the Commission may be held liable. *Id.* at 7.

In her third Exception, the Complainant refers to the Initial Decision at page 6, specifically the ALJ’s discussion that if Ms. Frompovich desires an opt out, she should advocate for such before the General Assembly. In support of this Exception, the Complainant notes the introduction of various bills over the 2013-14 and 2015-16 legislative sessions in which she contends various House bills that would have “repeal[ed] the Smart Meter mandate” or provide an opt out were introduced or referred to committee but never called for a vote. Exc*.* at 8. Ms. Frompovich again asserts that the Commission has misinterpreted Act 129 and must “rethink the error of its ways” by correcting “this grave legal, moral, and social injustice it has caused for Pennsylvanians and, in particular, Complainant who fears for her health status having been a breast cancer patient who knows that RF/EMF frequencies are classified as a Class 2B carcinogen by the World Health Organization[.]” *Id.* at 9.

In her final Exception, the Complainant contests Conclusion of Law No. 3, in which the ALJ concluded that PECO’s Commission-approved smart meter deployment plan does not include an opt out provision. Referring to her argument in support of her first Exception, Ms. Frompovich again contends that legislative intent, as evidenced by the legislative debate of Act 129, obviated the need for an express opt out because deployment was not intended to be mandatory. Exc. at 9.

In its Replies to Exceptions, PECO contends that none of the Complainant’s arguments challenge the “key question of law – whether Act 129 or any other legislation permits the Complainant to refuse the smart meter installation.” R. Exc. at 2. The Exceptions, argues PECO, neither allege any misstatement of facts nor misapplication of the law by the ALJ. Rather, they consist solely of policy arguments and raise “irrelevant legislative comments that were not enacted into law[.]” *Id.* As PECO states:

The issues the Complainant raises in her Exceptions are not pertinent to (1) whether she has the ability to refuse meter installation pursuant to state law; and (2) whether PECO Energy violated [t]he Public Utility Code, a Commission Order or Commission-approved tariff by following the Act 129 provision to install a meter at her property.

*Id.*

As to the Complainant’s arguments regarding the health effects of smart meters, PECO similarly asserts that these arguments do not challenge the ALJ’s ruling that there is no opt out provision that would allow the Complainant to prevail. Consequently, according to PECO, the ALJ properly applied the standards applicable to the disposition of preliminary objections and the Initial Decision should be adopted. R. Exc. at 3-4.

**Disposition**

Upon our review and consideration of the Initial Decision and the specific allegations in the parties’ pleadings, we grant, in part, the Complainant’s Exceptions. We find that the relief sought by PECO in its Preliminary Objections is not clearly warranted and free from doubt based upon our review of the particular facts pleaded in this case. Those specific allegations that we conclude warrant providing the Complainant a hearing are her status as a breast cancer survivor with concerns over smart meter emissions, who fears for her health status if a smart meter is installed, and who remains under medical care for her condition by a physician prepared to offer his medical opinion that the radio frequencies emitted by a smart meter installed in the Complainant’s home will interfere with her ability to heal and live cancer free. Exc. at 9; Complaint at 3, 11 (unnumbered).

In past cases involving smart meter installation, we have evaluated on an individual case-by-case basis the specific allegations presented in each complaint and reached a conclusion based on those particular circumstances. While PECO is correct that as adopted Act 129 does not provide a general opt out provision, where a complainant’s objection to installation of a smart meter was not based upon a general objection to smart meters *per se*, but rather upon facts specific to the individual complainant, we have denied preliminary relief and allowed the complaint to proceed to hearing. *See Kreider v. PECO Energy Company*, Docket No. P-2015-2495064 (Order on Material Question entered September 3, 2015; Order on Reconsideration entered January 28, 2016) (*Kreider*); *Paul v. PECO Energy Company*, Docket No. C-2015-2475355 (Order entered March 17, 2016). As we stated previously, “the law does not prohibit us from considering or holding a hearing on issues related to the safety of smart meters, consistent with our statutory authority in Section 1501 of the Code, when a legally sufficient claim is presented.” *Kreider*, Order on Material Question at 17.

As in *Kreider* and *Paul*, Ms. Frompovich has alleged factual averments specific to her that, if proven, could implicate, under her particular circumstances, a violation of Section 1501 of the Code, a statute the Commission has jurisdiction to administer. *See* Complaint at 3. We caution both parties that in granting, in part, the Complainant’s Exception No. 3 regarding her individual and specific health issues, the operative words are “if proven.”

We previously provided a complainant a hearing in order to provide an opportunity to prove allegations of specific safety concerns, as opposed to opposition to smart meters in general, only to see the complaint dismissed because of the complainant’s failure of proof. *See Thomas v. PECO Energy Company*, Docket No. C-2012-2336225 (Final Order entered December 31, 2013) (although provided an opportunity to be heard on the alleged safety issue, the complainant did not provide any evidence to support his contentions and the complaint was dismissed). A hearing does not guarantee relief. The burden will be upon Ms. Frompovich to prove, by a preponderance of the evidence, that PECO is responsible or accountable for the problem described in the Complaint. 66 Pa. C.S. § 332(a); *Patterson v. The Bell Telephone Company of Pennsylvania*, 72 Pa. P.U.C. 196 (1990); *Samuel J. Lansberry, Inc. v. Pa. PUC*, 578 A.2d 600 (Pa. Cmwlth. 1990). Ms. Frompovich’s failure to meet that burden may result in dismissal of her Complaint.

In view of our prior decisions, especially in *Kreider* and *Paul*, and the fact that the Complainant is appearing *pro se*, we find that providing her with the opportunity to fully present her case is consistent with due process requirements and legal precedent. *See* *Carlock v. The United Telephone Company of Pennsylvania*, Docket No. F-00163617 (Order entered July 14, 1993) (holding that, in the normal course, we would not dismiss a *pro se* complaint without first providing a hearing during which the *pro se* complainant could further explain his or her position and the factual basis for the complaint). Because there are disputed questions of fact in the instant case, a hearing is necessary. 52 Pa. Code § 5.21(d); *Dee-Dee Cab v. Pa. PUC*, 817 A.2d 593 (Pa. Cmwlth. 2003).

For all of these reasons, we grant the Complainant’s Exceptions, in part, on the basis that Ms. Frompovich’s Complaint, alleging a specific deleterious impact on her medical condition if a smart meter were to be installed, was improperly dismissed without a hearing.

**Conclusion**

In light of the above discussion, we shall grant, in part, the Complainant’s Exceptions; reverse the ALJ’s Initial Decision; deny PECO’s Preliminary Objection; and return this matter to the Office of Administrative Law Judge for such proceedings as may be necessary, all consistent with this Opinion and Order; **THEREFORE,**

**IT IS ORDERED:**

1. That the Exceptions filed by Catherine J. Frompovich on June 26, 2015, are granted, in part, consistent with this Opinion and Order.

2. That the Initial Decision of Administrative Law Judge Elizabeth H. Barnes, issued on June 15, 2015, is reversed.

3. That the Preliminary Objection filed by PECO Energy Company on April 10, 2015, is denied.

4. That this matter is returned to the Office of Administrative Law Judge for such proceedings as may be necessary.

 **BY THE COMMISSION,**

Rosemary Chiavetta

Secretary

(SEAL)

ORDER ADOPTED: April 21, 2016

ORDER ENTERED: April 21, 2016

1. Act 129 of 2008, Sections 2806.1 to Section 2807 of the Public Utility Code (Code), 66 Pa. C.S. §§ 2806.1-2807. [↑](#footnote-ref-1)
2. *Smart Meter Procurement and Installation*, Docket No. M‑2009‑2092655 (Implementation Order entered June 24, 2009). [↑](#footnote-ref-2)
3. *See* *Corbett v. Pennsylvania Power Company*, Docket No. C-2011-2219898 (Final Order entered May 27, 2011); *Negley v. Metropolitan Edison Company*, Docket No. C-2010-2205305 (Final Order entered March 3, 2011); *Lutherschmidt v. Metropolitan Edison Company*, Docket No. C‑2010‑2200353 (Final Order issued March 25, 2011); *Jones v. Metropolitan Edison Company*, Docket No. C‑2011-2224380 (Final Order entered June 28, 2011); *Griffin v. Metropolitan Edison Company*, Docket No. C-2012-2300172 (Final Order entered July 31, 2012); *Brake v. West Penn Power Company*, Docket No. C-2013-2367308 (Final Order entered November 14, 2013). [↑](#footnote-ref-3)
4. The Complainant refers to this part of the ALJ’s decision as a finding of fact although this particular part of the ALJ’s decision is not specifically included in the ALJ’s Findings of Fact, which appear at pages 3-4 of the Initial Decision. [↑](#footnote-ref-4)