#  PENNSYLVANIA

 **PUBLIC UTILITY COMMISSION**

 **Harrisburg, PA 17105-3265**

 Public Meeting held May 4, 2017

Commissioners Present:

Gladys M. Brown, Chairman

Andrew G. Place, Vice Chairman

John F. Coleman, Jr.

Robert F. Powelson, Joint Statement, dissenting

David W. Sweet, Joint Statement, dissenting

Susan Kreider C-2015-2469655

 v.

PECO Energy Company

**TENTATIVE OPINION AND ORDER**

**BY THE COMMISSION:**

 Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition are the Exceptions of Susan Kreider (Complainant or Ms. Kreider), filed on October 10, 2016, to the Initial Decision (I.D.) of Administrative Law Judges (ALJs) Darlene D. Heep and Christopher P. Pell, issued on September 22, 2016. PECO Energy Company (PECO, Respondent, or Company) filed Replies to Exceptions on October 24, 2016. For the reasons stated below, we will tentatively dismiss the Formal Complaint filed by Ms. Kreider at this Docket. However, we will not dismiss that Complaint if Ms. Kreider’s personal representative, the Administrator of her estate, timely substitutes for Ms. Kreider in this proceeding.

**History of the Proceeding**

On February 5, 2015, Ms. Kreider filed a Formal Complaint against PECO objecting to the installation of a smart meter at her residence. The Complainant alleged the following: (1) the Respondent was threatening to terminate her service; (2) the Respondent would not respect her notice of self help or offer any alternative; (3) there were incorrect charges on her bill; and (4) the Respondent did not seem to be accepting her monthly readings. The Complainant also alleged that she experienced “deleterious health symptoms” related to the smart meter after it was installed outside of her bedroom. More specifically, the Complainant testified that she suffers from Guillain-Barre Syndrome, a disorder in which the body’s immune system attacks part of the peripheral nervous system. She averred that her medical condition makes her more sensitive to the electromagnetic fields (EMFs) and/or radiation frequency (RF) fields emanating from smart meters that, in turn, aggravate her condition. As relief, the Complainant requested permission to keep her analog meter until 2023 or to opt out of having a smart meter installed.

On March 10, 2015, the Respondent filed an Answer with New Matter and Preliminary Objections. In its Answer, PECO denied the material allegations in the Complaint. PECO averred that it was required to install Automatic Metering Infrastructure (AMI) meters for all of its current Automated Meter Reading (AMR) customers by the end of 2014 and that it had the right under its tariff to terminate service for failure of the customer to permit access to install the meter. Answer at 3.

In its New Matter, PECO averred that the Complainant requested to “opt out” of smart meter installation, but that an opt out is not an option under any controlling authority. PECO stated that an opt out is not provided for under PECO’s smart meter installation plan[[1]](#footnote-1) that was approved by the Commission,[[2]](#footnote-2) under Act 129 of 2008 (Act 129) under which PECO’s smart meter plan was compelled, or under the Commission’s Order establishing standards for which each electric distribution company (EDC) with more than 100,000 customers must file smart meter technology procurement and installation plans.[[3]](#footnote-3) New Matter at 4-5.

 In its Preliminary Objections, PECO argued that the Complaint should be dismissed under 52 Pa. Code § 5.101(a)(4) for legal insufficiency. PECO reiterated its position that its installation of smart meters was compelled by its Smart Meter Plan, the *PECO Smart Meter Plan Order*, the Commission’s *Smart Meter Procurement and Installation Order*, and Act 129, none of which allowed for a customer to opt out of smart meter installation. Preliminary Objections at 6-8. PECO also further addressed the fact that lack of action by the General Assembly on draft legislation to provide for an opt out underscored its position. *Id*. at 8. PECO cited numerous Commission Orders in which

complaints against smart meter installation were dismissed upon preliminary objection.[[4]](#footnote-4) *Id*. at 9-10. Based on its averment that it has the right to terminate service to a customer who fails to permit access to Company property for purposes of installation or removal, PECO contended that the Complainant is subject to termination consistent with its tariff and that the Complainant is not entitled to relief under the law. *Id.* at 11.

 On March 30, 2015, the Complainant filed a letter Answer to the Preliminary Objections. Among other things, the Complainant stated that she purchased an analog meter that was installed by a licensed electrician on August 26, 2014, to use in place of the smart meter PECO had installed outside of her bedroom due to the health issues she was experiencing as a result of the smart meter. She indicated that she began to report her meter readings to PECO on a monthly basis.

By Order dated April 8, 2015 (*April 2015 Order*), ALJ David A. Salapa sustained, in part, and dismissed, in part, the Preliminary Objections.[[5]](#footnote-5) ALJ Salapa determined that the allegations in the Complaint concerning smart meter installation and termination of service notices were dismissed for legal insufficiency on the basis that the law does not permit a customer to opt out of smart meter installation. Additionally, ALJ Salapa concluded that the remaining allegations concerning incorrect charges and the failure of PECO to accept the Complainant’s meter readings would be scheduled for a hearing before an ALJ. ALJ Salapa observed that these allegations directly implicated Statutes and Regulations that the Commission has jurisdiction to administer. *April 2015 Order* at 5, 6, 7.

By notice dated May 27, 2015, the presiding ALJ was changed to ALJ Heep, and the hearing was scheduled in Philadelphia in order to accommodate the Complainant’s request for an in-person hearing.

By Prehearing Order dated June 3, 2015 (*June 2015 Prehearing Order*), ALJ Heep indicated that ALJ Salapa ruled that the issues related to the installation of a smart meter and termination of service notices in the Complaint were dismissed for legal insufficiency. ALJ Heep then stated that Ms. Kreider had the burden of proving the remaining claims, which ALJ Heep indicated were the following:

(1) that the Respondent was threatening to terminate her service or has already terminated her service;

(2) that the Respondent would not respect her notice of self-help or offer any alternative, including whether PECO has provided or is providing unreasonable service given Complainant’s allegations of “deleterious health symptoms” caused by the Smart Meter;

(3) that there are incorrect charges on her bill; and

(4) that the Respondent did not seem to be accepting her monthly readings.

*June 2015 Prehearing Order* at 1.

 In response to the *June 2015 Prehearing Order*, PECO filed a Motion in Limine on July 1, 2015. In the Motion, PECO requested that the issues to be developed at hearing be limited to those pertaining to billing and the ability of PECO to accept the Complainant’s meter readings, consistent with ALJ Salapa’s *April 2015 Order*. By Order dated July 23, 2015 (*July 2015 Order*), ALJ Heep granted, in part, and denied, in part, the Motion in Limine. ALJ Heep ruled that the Complainant is precluded from introducing any evidence concerning whether a statutory provision, Regulation, or Order allows a customer to opt out of smart meter installation. The ALJ denied the Motion regarding the previously enumerated four claims in the *June 2015 Prehearing Order* which the ALJ indicated would be addressed at an evidentiary hearing.

*July 2015 Order* at 1-2.

On July 28, 2015, PECO filed a Petition for Interlocutory Review and Answer to Material Question (Petition for Interlocutory Review) at Docket No. P-2015-2495064, as well as a Brief in Support of the Petition. In its Petition for Interlocutory Review, PECO requested interlocutory Commission review and answer to the following material questions:

(1) Should Administrative Law Judge Darlene Davis Heep’s June 3, 2015 Pre-Hearing Order and July 23, 2015 Order denying PECO’s Motion in Limine allowing Complainant’s claims of health effects and disability arising from the smart meter be revised because the Orders are inconsistent with the Commission’s previous Orders, Regulations and case law?

 (2) Should the question of whether PECO has provided or is providing unreasonable service given Complainant’s allegations of “deleterious health symptoms” caused by the Smart Meter be excluded from the hearing as well as any evidence, testimony or discussion to support this claim?

PECO requested that the Commission answer the material questions in the affirmative. Petition at 2.

By Order entered September 3, 2015 (*September 2015 Order*), the Commission answered the material questions presented by PECO in the negative and returned this matter to the Office of Administrative Law Judge (OALJ).

PECO filed a Petition for Reconsideration on September 18, 2015, at Docket No. P-2015-2495064. By Order entered January 28, 2016, the Commission denied the Petition for Reconsideration and returned the matter to the OALJ for such proceedings as may be necessary.

A hearing was held on March 7, 2016, as scheduled. The Complainant appeared *pro se* and testified. The Complainant offered fifteen Exhibits which were admitted into the record. The Complainant did not present any other witnesses. PECO was represented by counsel who presented four witnesses and offered seventeen exhibits which were admitted into the record. The hearing generated a 217-page transcript.

Ms. Kreider and PECO filed Main Briefs on April 29, 2016 and May 3, 2016, and Reply Briefs on May 19, 2016 and May 23, 2016, respectively. The record closed on May 23, 2016.

In the Initial Decision issued on September 22, 2016, the ALJs dismissed the Complaint, finding that, while the Complainant established a *prima facie* case, the Complainant ultimately did not meet the burden of proving that PECO installing a smart meter at her home constituted unsafe or unreasonable service. Exceptions and Replies to Exceptions were filed as previously noted.

On January 27, 2017, PECO filed correspondence with the Commission stating that it had become aware that Ms. Kreider passed away on November 10, 2016. Also on January 27, 2017, the Commission’s Secretary sent correspondence to the Register of Wills in Philadelphia, Pennsylvania, requesting contact information for the Administrator of Ms. Kreider’s estate. On February 7, 2017, the Register of Wills provided information to the Commission indicating that Benjamin A. Kreider, Jr., was the estate Administrator. By Secretarial Letter issued February 10, 2017, the Secretary informed Mr. Kreider that any further service of documents in this Complaint proceeding would be sent to him.

**Discussion**

 After the Parties filed Exceptions and Replies to Exceptions, we learned that Ms. Kreider unfortunately passed away. Under the circumstances, we have determined that the most appropriate course of action is to issue a Tentative Opinion and Order to dismiss the Complaint, but provide Ms. Kreider’s personal representative with an opportunity to substitute for Ms. Kreider in this proceeding.

 Neither the Code nor the Commission’s Regulations appear to specifically address the circumstance where a complainant passes away following the filing of exceptions. Nor did we find any Commission cases addressing such a circumstance. However, we note that in civil actions, it appears that the death of a party divests a court of subject matter jurisdiction over claims brought by that party until such time as the deceased’s personal representative is substituted in his or her place. *Grimm v. Grimm*, 149 A.3d 77 (Pa. Super. 2016). We believe we should follow the rule employed by civil courts and find that the Commission does not have subject matter jurisdiction to rule on the merits of Ms. Kreider’s Complaint, absent a personal representative substituting for Ms. Kreider. Here, the personal representative is the Administrator of Ms. Kreider’s estate. To date, no such substitution has occurred.

 Consequently, we will tentatively dismiss the Complaint for lack of jurisdiction via this Tentative Opinion and Order that provides the personal representative with an opportunity to substitute for Ms. Kreider.[[6]](#footnote-6) If the personal representative does not file a substitution with the Commission within forty-five days of the entry date of this Tentative Opinion and Order, then this Tentative Opinion and Order shall become final, and the Complaint shall be dismissed with prejudice. With such a dismissal, the Commission would not rule on the merits of the Exceptions and Replies, and the Initial Decision issued in this case would not have any precedential value. Otherwise, if the personal representative timely files a substitution, this Tentative Opinion and Order does not become final, and the Commission retains jurisdiction to proceed with a decision on the merits of the Complaint. If a substitution occurs, no further action by the Parties would be required, and the Commission would proceed with an Opinion and Order addressing the Exceptions and Replies.

 We find that a dismissal of the Complaint via a Tentative Opinion and Order serves several important objectives. A dismissal in this manner reflects that the Commission does not have specific rules governing the substitution of a personal representative for a deceased party. A dismissal in this manner also puts the personal representative formally on notice of the dismissal on jurisdictional grounds and provides the personal representative formally with an opportunity to substitute for Ms. Kreider and receive a ruling on the merits of the Complaint. This process ensures that all interested Parties or their representatives are afforded due process.

C**onclusion**

Consistent with this Tentative Opinion and Order, we (1) tentatively dismiss the Complaint filed by Ms. Kreider for lack of jurisdiction, but (2) provide Ms. Kreider’s personal representative with the opportunity to substitute for Ms. Kreider in this proceeding; **THEREFORE,**

**IT IS ORDERED:**

1. That the Formal Complaint filed by Susan Kreider on February 5, 2015, at Docket No. C-2015-2469655, is tentatively dismissed for lack of jurisdiction.

2. That Susan Kreider’s personal representative may file a substitution with the Commission’s Secretary within forty-five (45) days of the entry date of this Tentative Opinion and Order.

3. That, if the personal representative does not file a substitution with the Commission within forty-five (45) days of the entry date of this Tentative Opinion and Order, then this Tentative Opinion and Order shall become final, and the Formal Complaint filed by Susan Kreider on February 5, 2015, at Docket No. C-2015-2469655, shall be dismissed with prejudice.

4. That, if the personal representative files a substitution with the Commission within forty-five (45) days of the entry date of this Tentative Opinion and Order, then this Tentative Opinion and Order will not become final, and the Commission will proceed with a decision on the merits of the Formal Complaint filed by Susan Kreider on February 5, 2015, at Docket No. C-2015-2469655.

5. That a copy of this Tentative Opinion and Order be served on Susan Kreider’s personal representative, the Administrator of Susan Kreider’s estate.

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 **BY THE COMMISSION,**

 Rosemary Chiavetta

 Secretary

(SEAL)

ORDER ADOPTED: May 4, 2017

ORDER ENTERED: May 23, 2017

1. *See* *Petition of PECO Energy Company for Approval of its Smart Meter Technology Procurement and Installation Plan*, Docket No. M-2009-2123944 (Smart Meter Plan). [↑](#footnote-ref-1)
2. *See* *Petition of PECO Energy Company for Approval of its Smart Meter Technology Procurement and Installation Plan*, Docket No. M-2009-2123944 (Order entered May 6, 2010) (*PECO Smart Meter Plan Order*). [↑](#footnote-ref-2)
3. *See Smart Meter Procurement and Installation*, Docket No.
M-2009-2092655 (Implementation Order entered June 24, 2009) (*Smart Meter Procurement and Installation Order*). [↑](#footnote-ref-3)
4. *See Maria Povacz v. PECO Energy Company*, Docket No. C-2012-2317176 (Order entered January 24, 2013); *Theresa Gavin v. PECO Energy Company*, Docket No. C-2012-2325258 (Order entered January 24, 2013); *Jeff Morgan v. PECO Energy Company*, Docket No. C-2013-2356606 (Final Order entered July 23, 2013); *Thomas McCarey v. PECO Energy Company*, Docket No. C-2013-2354862 (Final Order entered September 26, 2013); *Renney Thomas v. PECO Energy Company*, Docket No.
C-2012-2336225 (Final Order entered December 31, 2013); and *Ellen Donnelly v. PECO Energy Company*, Docket No. F-2013-2330663 (Final Order entered March 18, 2014). [↑](#footnote-ref-4)
5. ALJ Salapa was assigned as the motion judge by notice dated March 27, 2015. [↑](#footnote-ref-5)
6. We do not believe the Complaint should be dismissed as moot. We acknowledge that even if a substitution is filed, the Commission would be unable to provide personal relief to Ms. Kreider. However, the primary issue in the case, which is whether PECO’s attempts to install a smart meter at the Complainant’s property constituted unsafe or unreasonable service under Section 1501 of the Code, 66 Pa. C.S. § 1501, would remain. Moreover, we believe that a proceeding is not solely a private matter between the parties following the issuance of an Initial Decision. *See Kaufman v.* *Verizon Pennsylvania Inc.*, Docket No. C-20055680 (Order entered November 19, 2008). The public has an interest that must be protected. In our view, it would not be in the public interest to dismiss the Complaint as moot, considering the time and resources the Parties and the Commission have invested in this case.   [↑](#footnote-ref-6)