

**PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17105-3265**

Public Meeting held November 9, 2023

Commissioners Present:

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

Smart Meter Procurement and Installation

No. M-2009-2092655

ORDER

BY THE COMMISSION:

On August 16, 2022, the Supreme Court of Pennsylvania (Supreme Court) issued an Opinion and Order, *Povacz, et al. v. Pa. Public Utility Commission*, 280 A.3d 975 (Pa. 2022) (*Povacz II*), which dealt with consolidated appeals involving the deployment of smart meters by PECO Energy Company. In *Povacz II*, the Supreme Court reversed the Commonwealth Court's October 8, 2020 decision in *Povacz v. Pa. PUC* (241 A.3d 481) (*Povacz I*), and thereby affirmed the Commission's March 28, 2019 and May 9, 2019 Orders in *Maria Povacz v. PECO Energy Company*, C-2015-2475023 (*Maria Povacz*); *Laura Sunstein Murphy v. PECO Energy Company*, C-2015-2475726 (*Laura Sunstein Murphy*); and *Cynthia Randall and Paul Albrecht v. PECO Energy Company*, C-2016-2537666 (*Cynthia Randall*). By this Order, the Commission lifts the stay of certain formal complaint proceedings presently before the Commission involving challenges to an electric distribution company's (EDC's) safe and reasonable service under Section 1501 of the Pennsylvania Public Utility Code (Code), 66 Pa. C.S. § 1501, because of the EDC's installation of smart meter technology.

DISCUSSION

Background

On October 8, 2020, the Commonwealth Court of Pennsylvania (Commonwealth Court) issued an Opinion in *Povacz, et al. v. Pa. Public Utility Commission*, 241 A.3d 481 (Pa. Cmwlth. 2020) (*Povacz I*), the first of several appeals involving PECO Energy Company's (PECO) deployment of smart meter technology pursuant to Act 129 of 2008 (Act 129), codified at 66 Pa. C.S. § 2807(f). In the *Povacz I* consolidated opinion, the Commonwealth Court partially affirmed, and partially reversed and remanded, the Commission's March 28, 2019 and May 9, 2019 Orders in *Maria Povacz, Laura Sunstein Murphy*, and *Cynthia Randall*. *Povacz I* at 495. Specifically, the Commonwealth Court, in *Povacz I*, held that Act 129 does not mandate the installation of smart meters, and that the Commission had the authority to grant customers accommodations based on their health concerns. *Id.* at 490. However, the Commonwealth Court affirmed: (1) the Commission's application of the preponderance of evidence standard; (2) the Commission's finding that the customers in *Maria Povacz, Laura Sunstein Murphy*, and *Cynthia Randall* failed to sustain their burden of proof; and (3) that the Commission's findings of fact were supported by substantial evidence. *Id.* at 490, 491, 493-495. The Commonwealth Court also declined to find that the deployment of smart meters violated the customers' Fourteenth Amendment liberty interests in bodily integrity. *Id.* at 487-488.

In light of the Commonwealth Court's decision in *Povacz I*, the Commission entered an Order and Notice, at this docket, on November 4, 2020, pursuant to 66 Pa. C.S. § 501, instituting a stay of certain formal complaint proceedings then-pending before the Commission involving challenges to EDC deployment of smart meter technology as being in violation of Section 1501 of the Code (*November 4, 2020 Stay Order*). The *November 4, 2020 Stay Order* also directed that the stay would apply to any new formal complaints filed with the Commission claiming that EDC deployment of smart meter

technology was a violation of Section 1501, and that the stay would remain in place until it was lifted by further Commission action.

The Commission, as well as all other parties in *Povacz I* subsequently sought and were granted review of the Commonwealth Court's *Povacz I* decision by the Supreme Court of Pennsylvania.

Previously, the Commonwealth Court stayed the proceedings in several other unconsolidated appeals that raised the same, or similar, smart meter issues pending its disposition of *Povacz I*. Upon application by the Commission, the Commonwealth Court continued the stay of these appeals pending the Supreme Court's disposition of *Povacz II*. Since the Supreme Court's issuance of its *Povacz II* decision, the Commonwealth Court has lifted the stays on the remaining unconsolidated smart meter appeals and directed the parties to submit briefs, supplemental briefs, and other appropriate filings as warranted. The Commonwealth Court has ultimately affirmed the Commission in several unpublished and published opinions.¹

The Supreme Court's Decision in *Povacz II*

On August 16, 2022, the Supreme Court issued its Opinion in *Povacz II*, affirming the Commission's determinations in all respects. The Supreme Court reversed the Commonwealth Court's determination that Act 129 does not mandate smart meter installation and that Court's remand to the Commission for consideration as to whether the installation of a smart meter was unreasonable service under Section 1501 of the Code, 66 Pa.C.S. § 1501. The Supreme Court did, however, affirm the Commonwealth

¹ See *Hoffman-Lorah v. Pa. Pub. Util. Comm'n*, 2023 Pa. Cmwlth. Unpub. LEXIS 325, 2023, WL 4144399; *Branagh v. Pa. Pub. Util. Comm'n*, 2023 Pa. Cmwlth. Unpub. LEXIS 352, 2023, WL 4363414; *Hess v. Pa. Pub. Util. Comm'n*, 2023 Pa. Cmwlth. Unpub. LEXIS 371, 2023, WL 4540460; *Mary Paul v. Pa. Pub. Util. Comm'n*, No. 460 C.D. 2019, 2023 Pa. Cmwlth. LEXIS 113; *Schmukler v. Pa. Pub. Util. Comm'n*, No. 1102 C.D. 2019, 2023 Pa. Commw. LEXIS 136. The following smart meter appeals were dismissed by the Commonwealth Court on procedural grounds: *Sunstein v. Pa. Pub. Util. Comm'n*, No. 1581 C.D. 2019; *Ulmer v. Pa. Pub. Util. Comm'n*, No. 967 C.D. 2020; and *Lucey v. Pa. Pub. Util. Comm'n*, No. 1212 C.D. 2020.

Court's conclusion that the "Customers failed to meet their burden of proving, by a preponderance of the evidence, a conclusive causal connection between [radio frequency] emissions from smart meters and adverse human health effects. *Id.* at 1014.

The Supreme Court concluded that Act 129 mandates smart meter deployment and requires the system-wide installation of smart meter technology by EDCs. *Povacz II* at 992.

The Supreme Court found that Section 2807(f)(1), when read in conjunction with Section 2807(f)(2), provides instructions for furnishing smart meters to *all* customers. *Id.* at 28. In short, the Supreme Court found that under Act 129, customers may choose what to do with smart meter technology but have no right to refuse smart meter installation. *Id.* at 997.

Accordingly, the Supreme Court reversed the Commonwealth Court, and affirmed the Commission's interpretation in *Maria Povacz, Laura Sunstein Murphy, and Cynthia Randall* that Act 129 mandates universal smart meter installation. *Id.*

The Supreme Court noted that while Act 129 does not provide customers with the right to opt-out of smart meter installation at their residence, they may file a complaint with the Commission raising a claim that installation of a smart meter violates Section 1501 of the Code, 66 Pa.C.S. § 1501. The Supreme Court reiterated that complainants seeking relief from the Commission must satisfy their burden of proof by a preponderance of the evidence. The Supreme Court explained that inconclusive evidence – evidence that does not lead to a conclusion of a definite result one way or the other – does not meet even the minimal requirements of the preponderance of the evidence standard. *Id.* at 1005. The Supreme Court opined that while a customer's evidence does

not need to prove their assertion beyond any doubt, evidence of a mere possibility that harm could result is insufficient to satisfy the preponderance of the evidence standard. *Id.* at 1008.

The Supreme Court noted that the burden of proof is two-fold for Section 1501 claims involving the safety of smart meters and RF emissions. First, a customer must present expert opinion rendered to a reasonable degree of scientific certainty that radio frequency emissions from smart meters cause adverse health effects. Next, a customer must present expert opinion rendered to a reasonable degree of medical certainty that RF emissions from the smart meters, either alone or cumulative to other sources of RF emissions, caused them harm. The utility may then refute the customer's evidence by providing scientific and/or medical expert testimony that, within a reasonable degree of certainty, the RF emissions from smart meters did not cause the alleged harm. *Id.* Once the parties have presented their evidence, the onus then falls on the fact finder to weigh the evidence and determine whether it is more likely than not that the smart meter caused the customer harm. *Id.* at 1006.

The Supreme Court concluded that neither fear nor inconclusive scientific research was sufficient to prove that smart meter technology constitutes unsafe service under Section 1501. *Id.* at 1005.

The Supreme Court held that if a customer establishes by a preponderance of the evidence, based on the totality of the circumstances, that smart meter service violates Section 1501, they are entitled to an accommodation to the extent allowed by Act 129

and a utility's tariff.² However, given that Act 129 mandates smart meter deployment, the Supreme Court clarified that such accommodation may not rise to the level of an opt-out from smart meter installation. *Id.* at 1015.

Subsequently, on July 25, 2023, the Commonwealth Court issued a published Opinion affirming the Commission's Order in *Mary Paul v. PECO Energy Company*, Docket No. C-2015-2475355 (Opinion and Order entered June 14, 2018). *Mary Paul v. Pa. Pub. Util. Comm'n*, No. 460 C.D. 2019, 2023 Pa. Cmwlth. LEXIS 113 (*Mary Paul*). In *Mary Paul*, the Commonwealth Court addressed Ms. Paul's claims as to whether the Commission properly interpreted Act 129 and its legislative intent. The Commonwealth Court, citing *Povacz II*, noted that the Supreme Court had held that "the plain language of Section 2807(f)(2) [of Act 129] mandates the system-wide installation of smart meter technology, including smart meters, with no opt-out provision," and accordingly found no statutory support for the claim that customers could opt out of smart meter installation and choose a different meter. As such, the Commonwealth Court concluded that Ms. Paul's arguments pertaining to the Commission's interpretation of Act 129 were foreclosed by the Supreme Court's decision in *Povacz II*. *Mary Paul* at 15 (citing *Povacz II*, 280 A.3d at 993 and 998).

On September 9, 2023, the Commonwealth Court issued its published Opinion in *Schmukler v. Pa. Pub. Util. Comm'n*, No. 1102 C.D. 2019, 2023 Pa. Commw. LEXIS 136 (*Schmukler*). The Commonwealth Court found no error in the Commission's disposition of Mr. Schmukler's complaint against PPL Electric Utilities Corporation, and

² The Court overturned the Commonwealth Court's holding that the Commission's denial of accommodations was based on its "erroneous conclusion that Act 129 does not allow accommodations," for three reasons. First, the Court noted that Act 129 does not mention accommodations. Second, the Court noted that the Commission denied accommodations because Act 129 does not provide customers the ability to opt-out of receiving smart meter technology, which was the relief the customers were seeking. Finally, the Court found that the Commission denied accommodations because the customers failed to establish a violation of Section 1501 that would have entitled them to an administrative remedy, and not because of any provision of Act 129. *Id.* at 59.

therefore affirmed the Commission's July 23, 2019 Order at Docket No. C-2017-2621285.

On November 3, 2023, the Commonwealth Court issued its published Opinion in *Myers v. Pa. Pub. Util. Comm'n*, No. 1337 CD 2019, 2023 Pa. Commw. LEXIS 181 (*Myers*). The Commonwealth Court concluded that Mr. Myers' issues on appeal have been resolved by the Pennsylvania Supreme Court's *Povacz II* decision, and affirmed the Commission's August 29, 2019 Order at Docket No. C-2017-2620710.

As of the date of this Order, there are two smart meter appeals pending before the Commonwealth Court: *McKnight v. Pa. Pub. Util. Comm'n*, No. 1253 C.D. 2019 and *Hughes v. Pa. Pub. Util. Comm'n*, 827 CD 2020.

Lifting the Stay on Smart Meter Proceedings Pending Before the Commission

Given the Supreme Court's decision in *Povacz II*, and the Commonwealth Court's pattern of affirming the Commission and dismissing the remaining smart meter appeals that were stayed pending the disposition of *Povacz II*, we now find it appropriate to lift the stay implemented with the *November 4, 2020 Stay Order* and proceed with processing and disposition of all formal complaints claiming that EDC deployment of smart meter technology the Code, Commission Regulation or Commission Order.

Due to the number of smart meter formal complaints pending before the Commission, and the significant length of time since the *November 4, 2020 Stay Order* was entered, we direct the Secretary to issue a notice with this Order, listing all smart meter formal complaint proceedings before the Commission that were previously stayed and for which we are lifting the stay with this Order. This notice should include all cases listed in the notice accompanying the *November 4, 2020 Stay Order*, along with all subsequent smart meter formal complaints received, docketed, and stayed by the Commission since November 4, 2020.

We also direct the Secretary to serve by first-class mail individual notices of this Order on the parties of each affected complaint proceeding. We further direct that the information contained in each individual notice shall reflect the procedural status of the respective formal complaint proceedings, as follows:

- a. **For formal complaints pending before the Office of Administrative Law Judge (OALJ):** Cases will proceed accordingly as directed by the assigned presiding Administrative Law Judge (ALJ).
- b. **For formal complaints where an Initial Decision has been issued by the presiding ALJ, but exceptions had not been filed:** Parties shall have 20 days from the date of the notice to file exceptions, and 10 days thereafter to file reply exceptions, pursuant to 52 Pa. Code §§ 5.533 and 5.535.
- c. **For formal complaints where only exceptions have been filed:** Parties shall have 10 days from the date of the notice to file reply exceptions, pursuant to 52 Pa. Code § 5.535.
- d. **For formal complaints where exceptions and reply exceptions have been filed:** The Commission will proceed with disposition of the case without the filing of further pleadings.

These individual notices give affected parties notice that the stay implemented by the *November 4, 2020 Stay Order* is now lifted, and clarifying their respective rights and obligations going forward. For the sake of expediency and consistency, we direct that the Secretary serve all individual notices on the impacted parties immediately following the issuance of this Order.

CONCLUSION

Accordingly, with this Order, we direct that the stay be lifted on all formal complaint proceedings stayed by this Commission in the *November 4, 2020 Stay Order*, and that all parties to the affected formal complaints be served with notice of our lifting

of this stay and the relevant procedure for the proceedings related to their respective claims. The Commission takes this action to resume disposition of formal complaints concerning smart meter deployment, consistent with the Supreme Court's guidance in *Povacz II*, as well as the guidance provided by the Commonwealth Court;

THEREFORE,

IT IS ORDERED:

1. That as of the date of this Order the stay is lifted on all formal complaint proceedings pending before the Commission challenging an electric distribution company's deployment of smart meter technology as being in violation of the Pennsylvania Public Utility Code, Commission Regulations or Commission Order.

2. That as of the date of this Order, 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.

3. That this Order be served on all electric distribution companies, the Office of Consumer Advocate, the Office of Small Business Advocate and the Commission's Bureau of Investigation and Enforcement.


4. That the Secretary shall, upon entry of this Order, issue a notice, at this Docket, listing all smart meter formal complaint proceedings pending before the Commission that were previously stayed and for which we are lifting the stay with this Order.

5. That immediately upon entry of this Order, the Secretary shall serve a notice by first-class mail on each party in formal complaint proceedings affected by our lifting of the stay, unless the party has an e-filing account which means they have agreed to e-service, informing each party of the lifting of the stay and their procedural rights and obligations under our regulations, and shall enter a copy of that notice in the record of each proceeding.

6. That the Secretary shall deposit this Order with the Legislative Reference Bureau for publication in the *Pennsylvania Bulletin*.

7. That this Docket be marked closed.

BY THE COMMISSION



Rosemary Chiavetta
Secretary

(SEAL)

ORDER ADOPTED: November 9, 2023

ORDER ENTERED: November 14, 2023