

Alert

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What's at Stake When the Supreme Court of Pennsylvania Takes on Smart Meters? Issues and Impacts

At its December 2021 Oral Argument Session, the Supreme Court of Pennsylvania will hear arguments in three consolidated cases involving the installation of smart meters by electric utilities. A smart meter is part of a network that includes a meter, two-way communication, computer hardware and software, and trained support personnel. Pennsylvania's Act 129 of 2008 amended the Pennsylvania Public Utility Code to require electric utilities with 100,000 or more customers to furnish smart meter technology upon request from a customer, in new building construction, and in accordance with a depreciation schedule not to exceed 15 years in length.

The Supreme Court agreed to consider several issues in these cases, but the critical issues are: (1) whether the code mandates universal deployment of smart meters or instead allows consumers to opt out of smart meter installation; and (2) the burden of proof that a consumer must satisfy to prove a violation of Section 1501 of the code.¹ This Alert briefly discusses the events leading up to the Supreme Court's consideration of these issues and then discusses the potential impacts of the Supreme Court's decision.

Background

Act 129 was enacted to reduce energy consumption and demand. Smart meters help achieve this objective by providing customers with direct access to, and the ability to use, price and consumption information. Smart meters support time-of-use and real-time pricing programs. Smart meters also support the automatic control of electricity consumption by the customer, the electric utility, or a third party (at the customer's request). Some customers have resisted the installation of smart meters at their homes and businesses, however, based on privacy, safety, and other concerns.

As early as 2013, the Pennsylvania Public Utility Commission (PUC) held that the General Assembly intended to require all covered electric utilities to deploy smart meters throughout their systems. The PUC held that the code does not provide customers with a general right to opt out of smart meter installation, but a customer could claim that the installation of a smart meter at his residence or business would constitute unsafe or unreasonable service. Consequently, the PUC held that a customer who files a complaint alleging that the installation of a smart meter would violate Section 1501 is entitled to a hearing, but has the burden of proving that the installation and use of a smart meter at his home or business will exacerbate or adversely affect his health.²

In the cases that will be heard by the Supreme Court, the electric utility (PECO Energy Company) sought to replace existing automatic meter reading meters with wireless smart meters. Several residential customers refused to allow the utility to replace their meters, claiming that they were medically sensitive to emissions of radiofrequency electromagnetic energy (RF) from the wireless meters. The utility's tariff offered the customers options, such as relocating the meter on the customer's property, but the customers rejected those options. The utility threatened to terminate the customers' service and the customers filed complaints at the PUC. After trials with extensive medical and expert testimony, the PUC concluded that the customers did not demonstrate that their health would be adversely affected by the smart meter. Therefore, the PUC concluded that



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these customers did not demonstrate that the utility failed to provide them with safe and reasonable service.

On review, a divided Commonwealth Court of Pennsylvania found that the code requires that utilities offer smart meters to all customers, but does not require that all consumers accept that offer. Consequently, the majority found that the code does not preclude utilities — or the PUC — from accommodating customers' requests to avoid RF emissions.

In terms of the burden of proof, the Commonwealth Court placed the issue in context as follows (emphasis in original):

The question here is much murkier than simply stating the correct burden of proof. What is the proper course when RF emissions ***do have known dangers***, but research has not yet determined the extent of those dangers? Should Consumers bear the risk that RF emissions are more harmful to them than to others because of their sensitivity and underlying health conditions? Conversely, should PECO be required to accommodate Consumers' fears even though medical research has not yet definitively determined the degree of risk posed by the level of RF exposure at issue?

The Commonwealth Court held that the customers' burden of proof was to show that the utility's service was *either* unsafe *or* unreasonable; the customers did not need to prove that the service was *both* unsafe *and* unreasonable. In addition, the Commonwealth Court held that the consumers had to demonstrate, by a preponderance of the evidence, that the smart meters would cause adverse health effects to them. It was not enough for them to prove the potential for, or risk of, harm from smart meters; they needed to demonstrate a "conclusive causal connection" between RF exposure and adverse health consequences.

The Commonwealth Court concluded that the PUC's decision was based primarily on the conclusion that the code mandated universal deployment of smart meters. Finding this conclusion erroneous, the Commonwealth Court ordered the case to be remanded so the PUC could consider whether accommodations are appropriate (even without proof of harm to the customer). The Commonwealth Court encouraged the PUC, on remand, to explore ways of balancing the parties' interests, such as by allowing the use of wired smart meters or the deactivation of the RF-emitting functions of a wireless smart meter.

Possible Outcomes and Consequences of the Supreme Court's Decision

One possible outcome of this case is that the Supreme Court could agree with the PUC that the code mandates universal smart meter deployment. Such a decision, whether it is "right" or "wrong" as a matter of statutory construction or public policy, would seem to effect little change in the electric industry because it would uphold the PUC's long-standing interpretation of the code. A Supreme Court decision adopting the PUC's position would eliminate lingering uncertainty on the issue, but would otherwise have little apparent impact on the *status quo*.

If, on the other hand, the Supreme Court finds that customers can opt out of smart meter installation, the Supreme Court would need to address — or would need to remand the case to the Commonwealth Court or the PUC to address — the circumstances in which customers can opt out. Could customers opt out for any reason or could customers opt out only for certain, specified reasons such as health impacts? Will customers be required to prove harm, or will utilities be required to make accommodations even without proof of harm? Will customers be permitted to opt out if they prove, after a smart meter has been installed, that they suffered adverse health effects from that smart meter?

The practical consequences of a decision allowing customers to opt out could be significant. Electric utilities have invested hundreds of millions of dollars into smart meter systems. The Supreme Court's decision might require them to make extensive additional investments. An electric utility might need to have multiple networks in place simultaneously in order to provide electric service to customers who use wireless smart meters as well as customers who use an analog meter or a wired smart meter. There could also be an increased administrative burden on utilities due to increased numbers of customer requests to opt out and the need to accommodate more of those requests. The PUC could also face an increased caseload if consumers file more complaints at the PUC because their requests to opt out are denied. All of these possible outcomes would

have a financial impact — on electric utilities and their rates and on the PUC and its assessments to fund its operations. This is not to say that the Supreme Court should affirm the PUC's position to avoid these consequences; it is simply to acknowledge that the Supreme Court's decision on the proper interpretation of the code has real world consequences.

Nevertheless, the Supreme Court's decision on the customer's burden of proof might have an even greater impact than its decision on whether customers can opt out of smart meter installation. This is because the Supreme Court's decision on the burden of proof would apply to a much greater variety of cases; it would not just apply to cases involving electric utilities' smart meters, but would apply to any case involving a public utility (electric, natural gas, pipeline, water, wastewater, telecommunications, or transportation utility) in which the complainant alleges that the utility will violate Section 1501 of the code if that utility does (or does not) take certain specified action in the future.

The cases before the Supreme Court were unusual in that they involved trials that lasted several days and involved expert testimony by both parties. That is unusual for PUC consumer complaint proceedings, but will that become more common in the future as consumers try to satisfy a tort case-like burden of proof? If so, will that create backlogs in the PUC or require that the PUC hire additional administrative law judges?

Another possible outcome of the Supreme Court's decision, no matter what the Supreme Court decides, is that the General Assembly could amend the code in response to the decision. Perhaps the Supreme Court's decision will — in the eyes of the legislature — misinterpret the legislature's intent in adopting Act 129, or perhaps the legislature has changed its collective thinking in the 13 years since Act 129 amended the code. Of course, if the legislature amends the code to clarify its intent regarding a customer's right to opt out of smart meter installation, the legislature could seize the opportunity to make other changes to the code as well.

Conclusion

Much is at stake when the Supreme Court decides the smart meter cases listed on the December Oral Argument Session. Legislators, regulators, electric industry executives, and public utility practitioners should watch for the results of these cases in 2022.

¹ In pertinent part, 66 Pa. C.S. § 1501 states: "Every public utility shall furnish and maintain adequate, efficient, safe, and reasonable service and facilities, and shall make all such repairs, changes, alterations, substitutions, extensions, and improvements in or to such service and facilities as shall be necessary or proper for the accommodation, convenience, and safety of its patrons, employees, and the public."

² In some respects, cases involving safety challenges to smart meters are reminiscent of cases from the 1990s in which consumers, residents, and others alleged that they might be harmed by electro-magnetic fields from electric transmission lines. See, e.g., *Letter of Notification of Philadelphia Electric Company Relative to the Reconstructing and Rebuilding of the Existing 138 kV Line to Operate as the Woodbourne-Heaton 230 kV Line in Montgomery and Bucks Counties*, 1993 WL 855896 (Pa. P.U.C. 1993), Docket No. 110550F0055 (Final Order entered November 12, 1993).