

Pa. Justices Question If State Mandated 'Smart' Power Meters



By [Matthew Santoni](#)

Law360 (December 7, 2021, 5:22 PM EST) -- The justices of the [Supreme Court of Pennsylvania](#) questioned Tuesday whether the state legislature had clearly mandated the deployment of "smart" electric meters 13 years ago and whether some consumers' alleged sensitivities to radio frequency emissions should allow them to opt out.

Some on the court lamented the wording of Act 129 of 2008, which the [Pennsylvania Public Utility Commission](#) had interpreted as requiring a 15-year rollout of new meters that could wirelessly send and receive data about electricity usage based on a section of the law referring to a "depreciation schedule."

"What an obtuse way for the legislature to say 'and everybody else has to sign onto this,'" said Justice Christine Donohue. Chief Justice Max Baer later called the law "horribly drafted."

The Commonwealth Court of Pennsylvania had heard concerns from four [PECO Energy Co.](#) customers in Philadelphia who feared or complained of health effects from RF exposure, and ordered their cases be sent back to the PUC in October 2020 for reconsideration of whether the customers could seek accommodations. A number of appeals followed and were consolidated for argument before the state Supreme Court.

Tiffany Tran, representing the PUC, said that the law said utility companies "shall furnish" smart meters in three groups: early-adopter customers who requested and paid for replacement meters, smart meters for all new construction, and "in accordance with a depreciation schedule not to exceed 15 years," which Tran said referred to all previously existing meters and indicated that they should be phased out within that period.

"My lean is that the Commonwealth Court got it right," Justice Baer said. "The legislature doesn't speak in code; you're grasping at this depreciation schedule as a mandate."

Four PECO customers had asked to be exempted from the smart meter installations, arguing that they had health conditions that were caused by or aggravated by RF exposure, and so they subsequently took steps to minimize that exposure in their homes and daily lives.

The PUC had overruled their requests for exceptions to the new smart meters, but the Commonwealth Court had ruled that, even though the customers hadn't proven they would be harmed by the meters' transmissions, the law wasn't a mandate and PUC hadn't adequately addressed the customers' requests for exemptions.

Stephen G. Harvey of [Steve Harvey Law LLC](#), representing two of the four customers, said that, while his clients hadn't convinced the PUC, science still had not proven that RF exposure was completely safe. As a regulatory agency, the PUC was supposed to protect customers against harm, not make them prove they were harmed before allowing them the accommodations they sought, he said.

Some justices gave credence to the customers' claims that they suffered or could suffer ill effects from exposure to the meters' RF emissions, and pressed the PUC and PECO on whether it was right to require proof of harm rather than the mere possibility.

"What makes you believe the government should impose medical concerns on its citizens?" Justice Kevin M. Dougherty said, citing reports of "Havana syndrome" possibly caused by RF energy being directed at U.S. diplomats and staff abroad.

"Do you have to wait for someone's pacemaker to stop working?" asked Justice Debra Todd.

Kenneth Kulak of [Morgan Lewis & Bockius](#), representing PECO, said the company did offer to relocate customers' meters up to 30 feet away from their homes to further reduce their exposure — RF concentrations shrink rapidly with distance, he said — though some of the justices questioned how feasible that accommodation was in densely populated areas like parts of Philadelphia, where moving 30 feet would put the meter on a neighbor's property.

Allowing total opt-outs, like the customers in this case wanted, would open the door to reducing the "economies of scale" PECO sought by uniformly installing \$730 million worth of identical meters, Kulak said. But Justice Baer said the number of requests for opt-outs that PECO had gotten compared to the number of customers it had — approximately 70 complaints out of 1.6 million — were thousandths of a percentage point.

Tracey S. Lewis, representing the other two customers challenging the law, said the General Assembly couldn't have intended or mandated that residents accept smart meters in contradiction with their doctors' orders to avoid RF emissions, and said interpreting Act 129 as a mandate violated customers' rights. She compared it to government approval of penicillin — even though regulators might certify that penicillin is safe, it doesn't mean that some people aren't allergic to it, so they shouldn't be forced to take it.

Other court cases and studies had questioned whether the "safe" level of RF exposure set by the [FCC](#) was still too high, Lewis said.

Tran said that RF emissions come from plenty of sources other than the meters, including Wi-Fi networks, cell phones and their associated infrastructure. Kulak noted that even the older meters had one-way transmitters allowing remote collection of usage data that put out more RF emissions than the bi-directional meters PECO was replacing them with.

"If the consumers prove that RF is harmful, we have far greater concerns than PECO smart meters," Tran said. "RF is pervasive."

The justices took Tuesday's arguments under consideration. Justice Thomas G. Saylor, who will reach the mandatory retirement age before the court is likely to issue its ruling, did not participate in the hearing.

The customers are represented by Stephen G. Harvey of Steve Harvey Law LLC and Tracey S. Lewis.

PECO Energy Co. is represented by Kenneth Kulak of Morgan Lewis & Bockius LLP.

The Pennsylvania Public Utility Commission is represented in-house by Tiffany L. Tran.

The consolidated cases are Maria Povacz et al. v. Pennsylvania Public Utility Commission et al., case numbers 34 MAP 2021 through 45 MAP 2021, in the Supreme Court of Pennsylvania.

--Editing by Dave Trumbore.

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