

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM THE PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA

Case No. 2020-001445

Mr. Randy Gilchrist and Mrs. Cheryl Gilchrist
Appellants

v.

Duke Energy Carolinas, LLC
Respondent

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JUN 17 2021

SC Court of Appeals

FINAL BRIEF

Appeal from final judgment of the Public Service Commission of South Carolina dismissing Plaintiff's complaint and denial of hearing.

June 14th, 2021

Randy and Cheryl Gilchrist
Appearing Pro Per/Appellant

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TABLE OF AUTHORITIES

Cases

Cases incorporated herein by reference /Record pp. 59-73

Byars v. U.S. 273 U.S. 28, 32 (1927) P. 4

It is the duty of the courts to be watchful for the Constitutional rights of the citizen. R. pp. 63, 78, 89

Davis v. Wechsler, 263 U.S. 22 at 24 P. 4

“The assertion of federal rights when plainly and reasonably made, is not to be defeated under the name of local practice.”

R. pp. 57, 67, 82, 93

Gamillion v. Lightfoot, 364 U.S. 155 (1966) P. 4

“Constitutional rights would be of little value if they could be indirectly denied.”

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Hurtado v. California, 110 U.S. 516 P. 4

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“Where rights secured by the Constitution are involved, there can be no rule making or legislation which would abrogate them.”

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Boyd v. United States, 116 U.S. 616 P. 11

“It is the duty of the courts to be watchful for the Constitutional rights of the citizen and against any stealthy encroachments thereon.”

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Statement of Issues on Appeal

1. Was it error for the Public Service Commission (PSC) to dismiss the Gilchrists' complaint, failing to protect persons and property?
2. Was it error for the Public Service Commission to deny the Gilchrists a hearing on the issue of the right to privacy, and thus resulting in a denial of due process of law guaranteed by the U. S. Constitution, Fifth Amendment?
3. Is the installation of a data collection device, in this case a smart meter, without the consent of the homeowner, a violation of the Gilchrists' right to privacy under the Fourth Amendment to the United States Constitution and under the Constitution of the State of South Carolina, Article 1, Section 10? And, is this a taking of private property under Article 1, Section 13 of the Constitution of the State of South Carolina?

Statement of the Case

This is an appeal from the Public Service Commission's Dismissal of our Complaint and Denial of Hearing of said complaint. R. pp 1-3, an individual complaint filed with Public Service Commission of South Carolina (hereinafter PSC), PSC Directives/orders , R. pp. 33,34,45 and Order Dismissing Complaint R. pp. 46-49 and Order Denying Hearing, R. pp. 50, 51.

The Appellants, hereinafter "we" informed Duke Energy Carolinas, LLC (hereinafter DEC) as early as July 3, 2017, that we did not consent to the installation of a smart meter at our residence located at 3010 Lake Keowee Lane in Seneca, SC (removed from record by court order). On April 10, 2018, and again on May 18, 2018, (removed from record by court order) we received letters from DEC attempting to obtain consent for the installation of a smart meter, and acknowledging the existence of privacy issues associated with these meters.

We responded to these letters on June 7, 2018, (removed from record by court order) with a Notice of No Consent and Notice of Liability which listed numerous concerns regarding our right to privacy, followed by a Demand for Removal of All Digital Electric Meters, Notice of No Consent and Notice of Liability on July 18, 2018, (removed from record by court order) and a Notice of Right of Self-Defense and Demand that DEC Cease and Desist on August 25, 2018, (removed from record by court order). On October 4, 2018, we sent a

sworn affidavit (removed from record by court order). DEC did not respond to these letters.

On November 21, 2018, we found a door hanger from Duke Energy (removed from record by court order) which threatened service disconnection, a 24-hour notice. To reiterate, we had never consented to the installation of the smart meter. The notice states that they were unable to access the meter due to a fence, physical structure, or animal. None of these exist at the meter box which is easily accessible. Perhaps they were referring to the Constructive Contract (removed from record by court order) posted on the meter box.

On November 24, 2018, we contacted State Senator Thomas Alexander, (removed from record by court order), to see if he might be able to help with this issue. On December 4, 2018, DEC mailed a final notice (removed from record by court order) claiming they were unable to access the meter (which is in an unfenced area and easily accessible to anyone) and also that DEC would disconnect service if we did not schedule an appointment for the installation of a smart meter. Again, the only "obstruction" was the Constructive Contract (removed from record by court order) taped to the meter box.

On December 14, 2018, we responded to the threatened cut-off of electricity (removed from record by court order) informing DEC of medical issues with the residents and again restating that they do not consent to the installation of a smart meter. In a letter to Duke Energy on October 23, 2019,

(removed from record by court order) we complained that a smart meter was installed without our consent. DEC responded on November 11, 2019, (removed from record by court order) acknowledging that a smart meter was installed on October 10, 2019. We then contacted the Public Service Commission on October 10, 2019. We contacted the PSC on November 29, 2019, (removed from record by court order) regarding DEC's installation of a smart meter over our objections.

A letter dated December 12, 2019, and copied to us, the Gilchrists, sent by DEC to Bruce Kirby, Investigator with the Office of Regulatory Staff, (removed from record by court order) explained that their efforts to obtain consent from the Gilchrists failed – so they installed the smart meter on October 10, 2019; the privacy concerns had been ignored!

We filed a complaint with the PSC on June 1, 2020, R. pp. 1-3. DEC responded with a Motion to Dismiss to which we filed an Objection and Demand for Hearing on July 13, 2020, R. pp. 52-58. On July 18, 2020, R. p. 108, we responded to the July 14, 2020, letter from the attorneys for Duke Energy R. p. 107, requesting a hearing on DEC's Motion to Dismiss be held with us present, R. p. 108.

On July 24, 2020, we filed a motion objecting to DEC's Motion to Dismiss R. pp. 59-73 and again we demanded a hearing R. pp. 59-73. Included with this filing is a copy of DEC's Motion to Dismiss dated July 20, 2020. Our complaint was dismissed by the PSC on August 24, 2020 R. pp. 46-49. We

then filed a Petition for a Hearing on August 6, 2020, R. pp. 74-83, which was premature, but refiled on August 24, 2020. The Petition for Rehearing was denied by the PSC on October 1, 2020, R. pp. 50, 51. On September 15, 2020, prior to the Petition for Rehearing being denied, we had written to the Commission regarding a letter from DEC's attorneys objecting to our Petition for rehearing, and demanding a hearing on this matter, (removed from record by court order).

On October 31, 2020, we sent a letter requesting transcripts of Commission meetings regarding the Gilchrist complaint R. p. 109 for an appeal to the SC Court of Appeals.

Standard of Review for Each Issue

For issues 1, 2 and 3 the Standard of Review is de novo as such are errors of law. *U.S. v. Campa* 529 f. 3d 980 992 (11th Cir. 2008)

Argument

We respectfully request the court to review our briefs to the PSC R. pp. 52-58, 59-73, 74-83, and 84-97, incorporated herein by reference to said documents. Issues #1 and #2 amount to a denial of due process and a failure of the administrative court to protect persons and property. We would also like to point out that this case is not about DEC being – or not being – a state actor.

This is irrelevant to the issues at hand. It is our contention that DEC violated the law in the installation of a smart meter which is also a surveillance and data collection device on our residence over our objections and without our consent.

In the PSC order which dismisses our complaint R. pp. 46-49, the PSC is in error on several points:

- 1) We compared the DEC smart meter to the data collection devices offered by insurance companies to their insured. It would be unlawful to force these devices on their customers without their consent. PSC claims that the smart meter is used to meter a service that is billed on a consumption basis, and is therefore a necessary part of the provision of electric service. An analog meter for many years worked just fine for that purpose, recording only the amount of electricity consumed. Smart meters collect much more data... data that can be hacked, sold, and used by government agencies – for good or bad – data that is owned by the homeowner. See R. pp. 52-58, 59-73, 74-83, 84-97, 105-109. This data is being stolen by DEC absent the informed consent of the homeowners. It is unlawful to install a surveillance device on a person's car, home, phone, or other device or property without the consent of the owner. We repeat: a smart meter is a surveillance device! See (removed from record by court order) R. pp. 126-129, 130-142.

2) DEC may not be a state actor. DEC is however a state-regulated utility. The PSC's purpose is to regulate the activities of the electric provider. As a state agency, with administrative court functions, their number one job is to protect person and property. PSC is a state actor, and when notified of criminal activity by a utility company that they regulate, it is expected by the people that they will act in the peoples' interest. See R. pp. 59-73, and SC Code of Laws, Title 58, Chapter 27, Article 1, Sec. 5827210 entitled *Actions to prevent or discontinue violations of law or orders of Commission*.

The Office of Regulatory Staff is charged with prosecuting violations of law by electric utilities in order to prevent or have the violation(s) discontinued.

3) Criminal acts by DEC are not necessary, nor proper. DEC asserts SC Code Ann. Regs. 103-344. It is not acceptable for DEC to install surveillance devices without the informed consent of the homeowner in order to provide electric service. DEC convenience is not an acceptable reason for customers to be required to pay a fee in order to prevent unlawful acts by DEC. This is known as extortion. We are aware that DEC has allowed customers in other jurisdictions to keep their analog meters and have the customer read the meters monthly with no opt-out fee. We were never offered this option.

The PSC and DEC rely on SC Code Ann. Regs. 103-344 as the authority for DEC to install surveillance devices on the homes of customers without informing them of the capabilities of these devices or the intended use of the data collected, private data to be used and sold without the consent of the owners of the data. Analog meters can still be purchased and manufactured. Advancing technology should not be allowed to override people's rights. See 16 Am. Jur. 2nd Section 70 – "No public policy of a state can be allowed to override the positive guarantees of the U. S. Constitution." It can be argued that the electric grid is more susceptible to hostile attacks with smart meters, and therefore puts the people in harm's way and at great risk of damage, which can easily be avoided with the older technology – like analog meters.

None of the regulations cited by PSC or DEC authorizes unlawful activity. PSC Commissioners take an oath to support and defend the Constitution of the United States and the South Carolina State Constitution. The PSC administrative court is bound by those Constitutions. See SC Code of Laws, Title 58, Chapter 3, Article 1 Section 58330, *Oaths....*

SC Code of Laws, Title 58, Chapter 27, Sec. 58271990 states that a hearing should be held if the commission determines it is necessary for the protection of substantial rights and in the public interest. If the right to privacy is not a substantial right or in the public interest according to the PSC, then what is? We contend that the right to privacy is a fundamental

right – an inalienable right – and therefore a substantial right and certainly in the public interest. See U. S. Constitution, Fourth Amendment.

The PSC Commissioners have violated their oath of office and have failed to support and defend the Constitutions of both this state of South Carolina and the United States. Issues #1 and #2 raised in this appeal should be unequivocally answered YES. It was error to dismiss our complaint and deny us a hearing where we could be physically present and afforded an opportunity to present evidence and be given due process to the fullest extent of the law.

Regarding issue #3: Is the installation of a smart meter, a data collection device, on our property without our consent, a violation of our right to privacy? This is also answered YES.

Our right to privacy is protected by the U. S. Constitution's Fourth Amendment. It's also protected by the South Carolina State Constitution, Article 1, Section 10. The installation of the smart meter on our property is also a violation of our SC Constitution's Article 1 Section 13, taking of private property for private use. In addition to these protections, SC Code of Laws Title 16, Chapter 5, entitled *Offenses against civil rights*, Section 16510, *Conspiracy against civil rights*, provides for felony criminal penalties

“... or violates the person or property of a citizen... or attempts by any means, measures or acts to hinder, prevent, or obstruct a citizen in the free exercise or enjoyment of any right or privilege

secured to him by the Constitution and laws of the United States or by the Constitution and laws of this state.”

SC Code of Laws Title 16, Chapter 17, Article 7, *Miscellaneous offenses*, Section 1617410 defines conspiracy. The Common Law crime known as “conspiracy” is defined as a combination between two or more persons for the purpose of accomplishing an unlawful object or lawful object by unlawful means. This is also a criminal felony. Furthermore: Title 16, Chapter 17, Section 1617470 *Eaves dropping* ...

D(1) “Place where a person would have a reasonable expectation of privacy” means: ... (b) a place where one would reasonably expect to be safe from hostile intrusion or surveillance.

D(2) “Surveillance” means secret observation of the activities of another person for the purpose of spying upon and invading the privacy of the person.

The United States Supreme Court, in *Carpenter v. United States*, 585 U.S. __ 2018, cites a third party doctrine:

The third party doctrine rests on “the notion that an individual has a reduced expectation of privacy in information knowingly shared with another,” Judge Michael Kanne wrote, citing *Carpenter v. United States*, 138 S. Ct. 2219 (2018) but in this context a choice to share data imposed by fiat is no choice at all.

United States Court of Appeals, 7th Circuit
No. 16 – 3766, August 16, 2018
Naperville Smart Meter Awareness v. City of Naperville
See R. pp. 126-142.

If our home is not a place where we have a reasonable expectation of privacy, then we obviously have no privacy at all, and this flies in the face of fundamental Constitutional principles. We do not want to share our personal information with DEC. We should not be forced to allow DEC to collect this information in order to be provided with electric service.

To reiterate, #1: Non-invasive, analog meters are available to meter electric usage. They have been used for many years.

#2: There is no federal mandate for the use of smart meters.

#3: Smart meters can be hacked.

#4: Government can buy that data from third parties without 4th Amendment protections/warrants. Charging a fee to allow us to keep our information private amounts to extortion. We are aware that DEC has allowed customers to keep analog meters and also allows customers to read meters monthly with no opt-out fee. We were never offered this option.

#5: In addition to the privacy issue, we have raised concerns about the meter's effect on health and the environment which we do not believe DEC has properly addressed.

DEC believes it is not a state actor; but, because, quoting from *The Indiana Lawyer*, (removed from record by court order)... utilities have statutory powers to condemn property and install power lines on private rights of way, they can be considered as 'quasi-governmental entities.' This

would subject them to prohibitions against unreasonable searches and seizures....”

Even if DEC is not a state actor, South Carolina citizens have rights to privacy under S.C. law, especially in their own homes. DEC is violating those laws and our rights by forcibly, under threat of service disconnect, without the owner’s informed consent and in our case, over our repeated objections. The PSC has failed in their duty to protect our rights. In other words, they failed in fulfilling their reason and purpose for existence, which is the protection of persons and property.

In the transcripts of the meetings that were held regarding our complaint, the Commission seems to conclude that Constitutional provisions don’t apply – only regulations apply and therefore they feel that we have failed to state a claim upon which relief may be granted by the Commission. This is obvious error of law. See Transcripts, R. pp. 110-118.

As we have stated, “It is the duty of the courts to be watchful for the Constitutional rights of the citizen and against any stealthy encroachments thereon.”

– *Boyd vs. United States* 116 US 616


The Administrative Court of the PSC is bound by oath to both State and Federal Constitutions. Also, see *Marbury v. Madison*, 5 U.S. 137, as paraphrased here: the Constitution is the Supreme Law of the land. Any law in conflict with the Supreme Law of the land is null and void, and all courts are bound by this U.S. Constitution [See U.S. Constitution, Article 6]

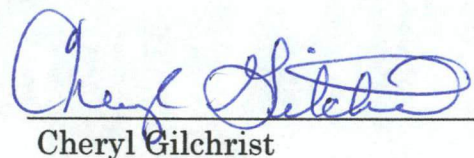
Therefore any laws, regulations, and/or statutes in conflict with the U.S. Constitution are null and void. The PSC's claim that we have failed to state a claim is bogus. We have brought to their attention violations of state law and violations of constitutional provisions for privacy on numerous occasions. Dismissing our complaint and denying us the opportunity to be heard and present evidence is a denial of the due process clause of the U. S. Constitution's 5th Amendment.

Conclusion

Wherefore we respectfully move the court to affirm Issues #1, #2 and #3 raised in this appeal, and order the PSC to schedule a hearing to address the issues raised in this appeal, and further order the PSC to direct DEC to remove the smart meter currently in use at the Gilchrist residence, replacing it with an analog meter.

Dated: June 14th, 2021


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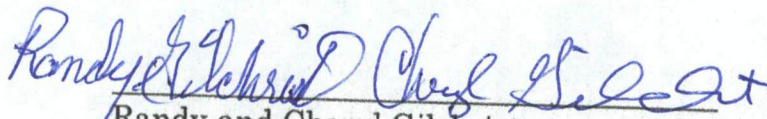
JUN 17 2021

SC Court of Appeals

CERTIFICATION OF FINAL BRIEF

The undersigned hereby certifies that the Appellants' Final Brief
complies with Rule 211(b).

June 14, 2021


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