RECEIVED
Jun 30 2021
SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA PUBLIC SERVICE COMMISSION

South Carolina Public Service Commission Docket No. 2020-147-E

Appellate Case No. 2020-001445

Randy and Cheryl Gilchrist.....Appellants,

v.

Duke Energy Carolinas, LLC .....Respondent.

BRIEF OF RESPONDENT

Frank R. Ellerbe, III (Bar No. 1866)
Samuel J. Wellborn (Bar No. 101979)
ROBINSON GRAY STEPP & LAFFITTE, LLC
1310 Gadsden Street (29201)
Post Office Box 11449
Columbia, South Carolina 29211
Telephone: 803-929-1400
Email: fellerbe@robinsongray.com
swellborn@robinsongray.com

Attorneys for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS

OTHER AUTHORITIES

STATEMENT OF ISSUES ON APPEAL

1. Did the Commission correctly dismiss Appellants' complaint, which did not allege a violation of any law which the South Carolina Public Service Commission has jurisdiction to administer or a violation of any order or rule of the Commission?

STATEMENT OF THE CASE

This appeal arises out of a complaint filed by Appellants with the South Carolina Public Service Commission (the "Commission") related to their aversion to "smart" meters, otherwise sometimes known as advanced metering infrastructure meters. Rather than enrolling in the Company's opt-out program approved by the Commission, Appellants filed the complaint underlying this appeal alleging unspecified privacy and health concerns. Thereafter, the Company filed a Motion to Dismiss the complaint because the complaint did not allege that the Company had violated any Commission-jurisdictional statute, order, or rule. The Commission granted the Company's Motion to Dismiss. The Commission denied Appellants' request for rehearing and this appeal followed.

STANDARD OF REVIEW

On appeal, the Court may reverse or modify the Commission's decision if substantial rights of the appellant have been prejudiced only if the administrative findings, inferences, conclusions, or decisions are:

> (a) in violation of constitutional or statutory provisions;
> (b) in excess of the statutory authority of the agency;
> (c) made upon unlawful procedure;
> (d) affected by other error of law;
> (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. § 1-23-380(5).

"The construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons." *CFRE, LLC v. Greenville County Assessor*, 395 S.C. 67, 77, 716 S.E.2d 877, 882 (2011) (citing *Dunton v. S.C. Bd. of Exam'rs in Optometry*, 291 S.C. 221, 223, 353 S.E.2d 132, 133 (1987)). "[T]he Court generally gives deference to an administrative agency's interpretation of an applicable statute or its own regulation." *Brown v. Bi-Lo, Inc.*, 354 S.C. 436, 440, 581 S.E.2d 836, 838 (2003) (citing *Brown v. South Carolina Dep't of Health and Envtl. Control*, 348 S.C. 507, 560 S.E.2d 410 (2002)).

ARGUMENT

The sole issue on appeal is whether the South Carolina Public Service Commission (the "Commission") correctly dismissed Appellants' complaint, which did not allege a violation of any law which the Commission has jurisdiction to administer or a violation of any order or rule of the Commission. There is no statute, regulation, or Commission order that prohibits the use of a smart meter,[1] a fact that is fatal to the appeal in this case, and the Commission acted under its statutory authority to dismiss the complaint, as discussed below. *See* S.C. Code Ann. § 58-27-1990. While the Commission does regulate the terms of service provided by a utility, the Commission has already exercised that regulatory authority to permit the use of smart meters and also to approve options that allow customers to opt out and instead be served by a manually read meter.

Further, the dismissal of a complaint that does not allege a violation of a law, regulation, or order of the Commission does not amount to a denial of due process, and Appellants have made a series of filings with the Commission in this case, which amount to process commensurate with the issues alleged and rights asserted by Appellants. Pursuant to the Commission's enabling act and governing statutes, the Commission regulates utility service through the establishment of standard terms of service. This mode of regulation precludes the kind of one-off treatment that Appellants appear to be seeking. While Appellants may be philosophically opposed to opting out, such does not create a justiciable controversy that is jurisdictional to the Commission or appealable to this Court. Finally, this appeal is not about Appellants' right to privacy as they have been repeatedly informed and reminded of their ability to opt out, including in the Commission's orders

[1] A smart meter, otherwise sometimes known as an Advanced Metering Infrastructure or AMI meter, is a device that automatically measures and transmits to the utility, via a secure network, each customer's electricity usage data, typically at more frequent intervals than once per month.

in this case, while Appellants have repeatedly declined to avail themselves of that option. For these reasons, the Commission's order should be affirmed.

I. The Commission found that Appellants' complaint does not allege a Commission-jurisdictional violation, and such is fatal to the appeal.

There is no statute, regulation, or Commission order that prohibits the use of a smart meter. This fact is fatal to the appeal in this case. While the Commission has authority to regulate the terms of service provided by a utility, the Commission has already exercised that authority to permit the use of smart meters and also to approve options that allow customers to opt out and instead be served by a manually read meter.

The federal Energy Policy Act of 2005 required each state utility regulatory authority to "conduct an investigation and issue a decision whether or not it is appropriate for electric utilities to provide and install time-based meters and communications devices for each of their customers which enable such customers to participate in time-based pricing rate schedules and other demand response programs." Energy Policy Act of 2005, Pub. L. No. 109-58 § 1252(b)(3)(i) (R. pp. 120-125). The docket initiated by the Commission in compliance with this directive was Docket No. 2005-386-E. After a hearing in that proceeding, the Commission found as follows

> [W]e note the conspicuous lack of focus on residential and commercial customers with respect to smart metering. One reason for the low usage of smart meters by residential and commercial customers may be a lack of knowledge on the part of those customers with respect to the availability and capability of smart meters. We therefore order the utilities to continue to make smart meters available to all customers, and also order the utilities to propose, within 180 days from the date of this Order, a communications plan to inform all customers of the availability and capability of smart meters, how they may use those capabilities to better manage their power requirements, and any additional costs and available payment arrangements for those costs.

Order No. 2007-618 at 4, Docket No. 2005-386-E (Aug. 30, 2007) (R. pp. 4-8). The Company filed its communications plan on February 26, 2008, in which it informed the Commission that it had begun offering customers time of use rate options, which included smart metering, as early as

1981, and that smart meters were available under certain rate schedules available to customers. Duke Energy Carolinas, LLC's Smart Meter Communications Plan at 1, Docket No. 2005-386-E (Feb. 26, 2008) (R. p. 95).

Years later, in 2016, the Company began to deploy smart meters on a broader scale, and it acknowledged that some customers may have concerns about smart meters. Duke Energy Carolinas, LLC's Request for Approval of AMI Opt-Out Rider at 2, Docket No. 2016-354-E (Oct. 10, 2016) (R. pp. 99). The Company stated, however, that there are added costs to being served by a manually read meter, including "a set-up fee associated with costs including but not limited to customer enrollment, information technology ('IT') enhancements, installation of a manually-read meter, and assignment to a manual meter reading route," and it proposed that customers choosing to opt out be required to cover those costs as provided in the proposed Manually Read Meter ("MRM") Rider. *Id.* (R. p. 102). The Commission approved the Company's proposal, finding as follows:

> As more smart meters are deployed, drive-by routes are being discontinued which necessitates the need for a long-term solution for those customers that object to the installation of a smart meter. Upon implementation of Rider MRM, customers objecting to the installation of a smart meter will be provided with the option to receive a manually read meter.

Order No. 2016-791 at 2-3, Docket No. 2016-354-E (Nov. 17, 2016) (R. pp. 27-30). In 2019, the Company proposed a revision to the MRM Rider that would permit the associated fees to be waived upon the provision of a statement from a licensed physician that the customer must avoid exposure to radio frequency emissions, to the extent possible, to protect their health. That proposal was approved by the Commission. Order No. 2019-429, Docket No. 2016-354-E (June 12, 2019) (R. pp. 31-32); Duke Energy Carolinas, LLC, Manually Read Meter Rider (effective June 12, 2019), *available at* https://etariff.psc.sc.gov/Attachments/tariffFile/4fb1b847-1212-4c68-a42e-c2b260c45e88 (R. p. 119).

As explained above, the Commission has authorized the use of smart meters by the Company; it has approved an opt-out option through the MRM Rider for customers who would prefer to be served by a manually read meter; and it has approved a fee-free option for appropriate customers. Appellants have failed to explain how, in spite of the Commission's approval of these options, the Company has violated the law. S.C. Code Ann. § 58-27-1940 requires that complaints set forth "any act or thing done or omitted to be done by any electrical utility in violation, or claimed violation, of any law which the commission has jurisdiction to administer or of any order or rule of the commission." S.C. Code Ann. § 58-27-1940 (emphasis added). The Commission's regulations likewise provide as follows: "Any person complaining of anything done or omitted to be done by any person under the statutory jurisdiction of the Commission in contravention of any statute, rule, regulation or order administered or issued by the Commission, may file a written complaint with the Commission, requesting a proceeding." S.C. Code Ann. Regs. 103-824 (emphasis added). Appellants may not agree with the series of prior Commission decisions permitting the use of smart meters, or they may not care to "opt out" and instead be served by a manually read meter,[2] but such does not create a basis under the law for filing a complaint against the Company, or for challenging the Commission when it dismisses that complaint.

Complementing the statutory requirement that complaints actually allege a violation of law or order or regulation of the Commission, S.C. Code Ann. § 58-27-1990 authorizes the Commission to dismiss a complaint without a hearing if a hearing is "not necessary in the public interest or for the protection of substantial rights." Certainly, if the complaint does not allege a

[2] Appellants stated the following in a June 1, 2020 letter filed with the Commission: "We did not wish to opt out; we did not see any reason to opt out. The question that Duke Energy should be asking is if their customers want to opt in. In our case we do not want to opt in . . . ." Appellants' Letter to Commission (June 1, 2020) (R. p. 105).

Commission-jurisdictional violation, the public interest would not be served by wasting resources on a hearing. Likewise, when there is no Commission-jurisdictional allegation to be adjudicated, there can be no "substantial right" to be protected by the Commission. Although Appellants make reference to "conspiracy against civil rights" and "eaves dropping" in their appellate brief, these matters were not raised in their complaint and are therefore not preserved for appeal, and are in any case—as criminal statutes—not jurisdictional to the Commission. Appellant's Initial Brief at 8-9 (citing S.C. Code Ann. §§ 16-5-10, 16-17-470).

As found by the Commission:

> Regulation 103-320, when read in conjunction with Regulation 103-344, which recognizes that Company's ability and duty to furnish electric meters, it is clear that the Company has not only permission for access for necessary business purposes, but also a duty to use that permission to furnish meters to its customers. Therefore, it is a proper exercise of business purpose by the Company to access the property and install the new meter.
>
> ***
>
> [The Company] has not violated any statute, nor Commission rule or regulation. Therefore, there is no relief available to the Complainants in this case, and the case must be dismissed. However, the Commission notes that, pursuant to tariffs filed with the Commission, for those customers wishing to have a manually read meter, the MRM Rider is available.

Order No. 2020-562 at 3-4, Docket No. 2020-147-E (Aug. 24, 2020); *see also* Order No. 2016-34 at 16, Docket No. 2013-119-S (Jan. 8. 2016) ("This matter was ripe for dismissal at the outset of its filing because it failed to allege any matter cognizable under S.C. Code Ann. § 58-5-270."). Put simply, Appellants failed to allege a "violation, or claimed violation, of any law which the commission has jurisdiction to administer or of any order or rule of the commission" as required by S.C. Code Ann. § 58-27-1940, and the complaint was therefore appropriately dismissed.

II. The Commission's dismissal of a complaint that does not allege a jurisdictional violation does not amount to a denial of due process.

The dismissal of a complaint that does not allege a violation of a law, regulation, or order of the Commission does not amount to a denial of due process. Because the complaint filed by Appellants failed to allege any violation, it did not meet the plain requirements of S.C. Code Ann. § 58-27-1940 and S.C. Code Ann. Regs. 103-824, and was therefore appropriately dismissed pursuant to the Commission's statutory authority to dismiss complaints under S.C. Code Ann. § 58-27-1990. Further, Appellants have had multiple opportunities to be heard with the Commission, making no fewer than seven filings with the Commission between June and September 2020 when the complaint was pending, including a series of filings prior to the Commission dismissing the complaint, and a request for rehearing after the Commission dismissed the complaint. These multiple opportunities for the Commission to review and consider Appellants' positions are consistent with the Commission's provision of due process in this case. *See Harbit v. City of Charleston*, 382 S.C. 383, 394, 675 S.E.2d 776, 781-82 (Ct. App. 2009) ("The existence of review is an indication of the presence of procedural due process, rather than its absence. . . . Because [Appellant] was provided with both pre-deprivation and post-deprivation remedies, his procedural due process rights were not violated.") (citing *Sunrise Corp. of Myrtle Beach v. City of Myrtle Beach*, 420 F.3d 322, 328 (4th Cir. 2005)). This case law is consistent with the Commission's similar treatment of a complaint in 2016. In that case, the complainant had cried foul because the Commission had not scheduled oral arguments on a motion to dismiss, which it had granted. The Commission held as follows:

> It is not a mandatory requirement that oral argument be held for every motion, which would also violate the tenant of judicial economy and ignore the common practice of courts deciding matters based on the filings. The Commission has consistently applied Regulation 103-829(B) in this way since its promulgation in 2007, entertaining oral argument, or not, in its discretion.

***

> In this case, the Commission received a Motion to Dismiss, a Return to Motion to Dismiss, a Reply to Response to Motion to Dismiss, and a Petition for Rehearing and Reconsideration. Accordingly, it is evident by these filings that [Complainant] had a full opportunity to be heard through written filings, and no oral hearing on the Motion to Dismiss was required, especially since the written filings clearly showed that the Complainant was not entitled to any relief.

Order No. 2016-34 at 14, Docket No. 2013-119-S (Jan. 8, 2016). Likewise, in this case, Appellants did not show that they were entitled to any relief, and the complaint was therefore appropriately dismissed.

Due process is flexible and calls for such procedural protections as the particular situation demands. *Kurschner v. City of Camden Planning Comm'n*, 376 S.C. 165, 172, 656 S.E.2d 346, 350 (2008); *see also S.C. Nat'l Bank v. Cent. Carolina Livestock Market, Inc.*, 289 S.C. 309, 345 S.E.2d 485, 488 (1986) ("Due process does not mandate any particular form of procedure."). The Commission in this case agreed with the Company that the complaint did not allege a Commission-jurisdictional violation, and that the complaint could be dismissed without further process. As long as due regard has been afforded to the "practicalities and peculiarities" of the case, the constitutional requirements are satisfied. *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314-15, 70 S. Ct. 652, 657, 94 L. Ed. 865 (1950). In this case, the practicalities and peculiarities are that the Commission has approved the Company's use of smart meters; the Commission has established a readily available opt out alternative for customers who choose to have their meter manually read; Appellants have failed to avail themselves of that option; and then Appellants filed a complaint that did not allege a Commission-jurisdictional violation to be adjudicated. Due process has been satisfied.

Where a complaint does not allege a violation of law, regulation, or order that is jurisdictional to the Commission, it is appropriately dismissed by the Commission. Additionally,

Appellants had multiple opportunities to be heard with the Commission in their series of seven filings, including before and after the Commission denied the relief sought, and therefore due process was not compromised in this case. Instead, the process afforded in this case was commensurate with the issues alleged and rights asserted by Appellants; i.e., due regard was afforded to the "practicalities and peculiarities" of this case.

III. The Commission regulates through the offering of standard terms of service, and the Company and the Commission have no duty to entertain Appellants' request for special treatment.

Were the complaint to have been granted and the Commission to have required the Company to install whatever meter Appellants choose, such would upend the regulatory model the Commission and the utilities it regulates have operated under for decades. S.C. Code Ann. § 58-27-820 provides as follows:

> Under rules and regulations prescribed by the commission, every electrical utility must file with the commission and provide to the Office of Regulatory Staff, within such time and in such form as the commission may designate, schedules showing all rates, service rules and regulations, and forms of service contracts established by the electrical utility and collected or enforced or to be collected or enforced within the jurisdiction of the commission. . . . Each electrical utility, distribution electric cooperative, and consolidated political subdivision must keep copies of the schedules open to public inspection under rules and regulations prescribed by the commission.

Further, S.C. Code Ann. § 58-27-840(A) provides that "[n]o electrical utility, or consolidated political subdivision shall, as to rates or services, make or grant any unreasonable preference or advantage to any person, corporation, municipality or consolidated political subdivision to its unreasonable prejudice or disadvantage." The Commission exercises its authority under this regulatory framework through the review and approval of standard rates and terms of service as memorialized in generally applicable tariffs filed by utilities with the Commission. *See, e.g.*, *Miller v. Cent. Carolina Tel. Co.*, 194 S.C. 327, 8 S.E.2d 355, 358 (1940) (holding that public utilities must furnish service on uniform and nondiscriminatory basis pursuant to terms approved

by the Public Service Commission) (*Miller*). This is consistent with the jurisdiction granted by the General Assembly in the Commission to "fix just and reasonable standards, classifications, regulations, practices, and measurements of service to be furnished, imposed, or observed, and followed by every public utility in this State." S.C. Code Ann. § 58-3-140(A). Such "regulation by tariff" lends efficiency to service regulation and gives assurance that customers are receiving and will receive nondiscriminatory treatment. *See, e.g.*, *Miller*, 8 S.E.2d at 358 ("[S]pecial contract[s] . . . which are not in accord with the general rules and regulations of the Commission, would altogether destroy the uniformity which the law demands, and defeat the object intended"); S.C. Code Ann. § 58-27-850 (providing for the investigation into and modification of terms of service that are "unjust, unreasonable, insufficient, unreasonably discriminatory, or in any way in violation of any provision of law").

Consistent with these principles, the Commission found as follows in the order on rehearing in the underlying proceeding:

> The terms and conditions under which a utility provides service are governed by its tariff and service regulations, not by contracts between the utility and individual customers. Service regulations and tariff provisions approved by the Public Service Commission have the force and effect of law and are binding on utility customers, regardless of whether an individual customer agreed to them.

Order No. 2020-644 at 2, Docket No. 2020-147-E (Oct. 1, 2020) (citing *Carroway v. Carolina Power & Light Co.*, 226 S.C. 237, 84 S.E. 2d 728 (1954)) (R. p. 51); *see also* Order No. 2020-342 at 8, Docket No. 2019-331-E (R. p. 42). As described above, the Commission has approved the use of smart meters, and it has approved an alternative through which customers may be served by a manually read meter. That Appellants may be philosophically opposed to opting out does not create a justiciable controversy that is jurisdictional to the Commission. "A justiciable controversy is a real and substantial controversy which is ripe and appropriate for judicial determination, as distinguished from a contingent, hypothetical or abstract dispute." *Waters v. S.C. Land Res.*

Conservation Comm'n, 321 S.C. 219, 227, 467 S.E.2d 913, 917–18 (1996) (quoting *Pee Dee Elec. Coop., Inc. v. Carolina Power & Light Co.*, 279 S.C. 64, 66, 301 S.E.2d 761, 762 (1983)); *see Pee Dee Elec. Coop., Inc. v. Carolina Power & Light Co.*, 279 S.C. 64, 66, 301 S.E.2d 761, 762 (1983) ("The court may refuse to render a declaratory judgment when the judgment would not terminate the uncertainty or controversy giving rise to the proceeding.") (citing S.C. Code Ann. § 15-53-70 (1976)).

Rather than present to the Commission a justiciable controversy and allege a violation of a Commission-jurisdictional statute, regulation, or Commission order as required by S.C. Code Ann. § 58-27-1940 and S.C. Code Ann. Regs. 103-824, Appellants have presented a policy question: Should customers who object to being served by a smart meter be required to opt out? The Commission has already answered this question in the affirmative by its approval of the opt out rider, the MRM Rider, and the additional provision of the medical opt out. *See* Order No. 2016-791, Docket No. 2016-354-E (Nov. 17, 2016) (R. pp. 27-30); Order No. 2019-429, Docket No. 2016-354-E (June 12, 2019) (R. pp. 31-32); Duke Energy Carolinas, LLC, Manually Read Meter Rider (effective June 12, 2019), *available at* https://etariff.psc.sc.gov/Attachments/tariffFile/4fb1b847-1212-4c68-a42e-c2b260c45e88 (R. p. 119). The General Assembly has vested the Commission with the power to regulate the terms of service of public utilities. S.C. Code Ann. § 58-3-140(A). The Commission has used this power to approve of the use of smart meters and to approve of the availability of an opt out program, which Appellants have refused to take advantage of. Because the Commission has authorized the use of smart meters and approved an alternative for customers who do not wish to be served by smart meters, the instant matter on appeal is hypothetical or abstract and does not comprise a justiciable controversy.

IV. Appellants' privacy claims are of no moment.

This appeal is not about Appellants' rights to privacy as they been repeatedly informed and reminded of their ability to opt out, and they have repeatedly declined to exercise that option. *See* Complaint at 3 ("We do not want to be charged a fee for opting out . . . .") (R. p. 3); Appellant's June 1, 2020 Letter at 1 ("We did not wish to opt out; we did not see any reason to opt out.") (R. p. 105). While Appellants appear to oppose the fees associated with the Manually Read Meter Rider, these fees were lawfully established by the Commission and were established—per the Commission's order in that case—to cover the added costs of manually read meters, as opposed to smart meters that are automatically read. Order No. 2016-791 at 2-3, Docket No. 2016-354-E (Nov. 17, 2016) (R. pp. 28-29); Duke Energy Carolinas, LLC, Manually Read Meter Rider (effective June 12, 2019), *available at* https://etariff.psc.sc.gov/Attachments/tariffFile/4fb1b847-1212-4c68-a42e-c2b260c45e88 (R. p. 119). The Commission has also approved a fee-free opt out for customers with medical issues. Order No. 2019-429, Docket No. 2016-354-E (June 12, 2019) (R. pp. 3-4). The Commission reiterated these options to Appellants in the order dismissing the complaint. Order No. 2020-562 at 4, Docket No. 2020-147-E (Aug. 24, 2020) ("[T]he Commission notes that, pursuant to tariffs filed with the Commission, for those customers wishing to have a manually read meter, the MRM Rider is available. The MRM Rider provides for fee-free opt out for customers with medical issues, provided certain requirements are met.") (R. p. 49). The ready availability of the Manually Read Meter option makes this a philosophical debate rather a justiciable controversy. Further, the Commission has already resolved that philosophical debate, in its jurisdiction as the utility regulator, in favor of a fee for opting out.

Appellants cite to the case of *City of Naperville* to support their privacy claim. *Naperville Smart Meter Awareness v. City of Naperville*, 900 F.3d 521 (7th Cir. 2018) (*City of Naperville*). *City of Naperville* is an interesting comparison to this one. In that case, the City of Naperville—a

state actor—owned and operated the utility and required that its customers be served by smart meters, providing no ability for customers to opt out. In that case, the Seventh Circuit approved of the smart meter program, finding as follows:

> Residents certainly have a privacy interest in their energy-consumption data. But its collection—even if routine and frequent—is far less invasive than the prototypical Fourth Amendment search of a home. Critically, Naperville conducts the search with no prosecutorial intent. Employees of the city's public utility—not law enforcement—collect and review the data.
>
> In *Camara v. Municipal Court*, the Supreme Court noted that this consideration lessens an individual's privacy interest. 387 U.S. 523, 530, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967).
> * * *
>
> Of course, even a lessened privacy interest must be weighed against the government's interest in the data collection. That interest is substantial in this case. Indeed, the modernization of the electrical grid is a priority for both Naperville, (R. 120-1, Smart Meter Agreement between Naperville and the Department of Energy), and the Federal Government, *see Smart Grid*, Federal Energy Regulatory Commission (Apr. 21, 2016), https://www.ferc.gov/industries/electric/indus-act/smart-grid.asp.
>
> Smart meters play a crucial role in this transition. See *id.* For instance, they allow utilities to restore service more quickly when power goes out precisely because they provide energy-consumption data at regular intervals. *See, e.g.*, Noelia Uribe-Pérez et al., *State of the Art and Trends Review of Smart Metering in Electricity Grids*, 6 Applied Sci., no. 3, 2016, at 68, 82. The meters also permit utilities to offer time-based pricing, an innovation which reduces strain on the grid by encouraging consumers to shift usage away from peak demand periods. *Id.* In addition, smart meters reduce utilities' labor costs because home visits are needed less frequently. *Id.*
>
> With these benefits stacked together, the government's interest in smart meters is significant. Smart meters allow utilities to reduce costs, provide cheaper power to consumers, encourage energy efficiency, and increase grid stability. We hold that these interests render the city's search reasonable, where the search is unrelated to law enforcement, is minimally invasive, and presents little risk of corollary criminal consequences.

Naperville Smart Meter Awareness v. City of Naperville, 900 F.3d 521, 528-29 (7th Cir. 2018).

In this case, in contrast to *City of Naperville*, the Company is not a state actor and therefore Appellants' constitutional privacy claims do not apply. It is well-settled that "most rights secured

by the Constitution are protected only against infringement by governments" and not private actors. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936, 102 S. Ct. 2744, 2753, 73 L. Ed. 2d 482 (1982) (citing *Flagg Brothers Inc. v. Brooks*, 436 U.S. 149, 156 (1978)). Such includes constitutional protections against unreasonable searches and seizures,[3] as well as against violations of due process.[4] As a limited liability company organized under the laws of North Carolina, the Company is a private actor, and no state action is conducted in the Company's provision of electric service. *See Benlian v. PECO Energy Corp.*, No. CV 15-2128, 2016 WL 3951664, at *7 (E.D. Pa. July 20, 2016) ("The installation of smart meters, and the provision of electricity to customers such as Benlian, is a business activity, and not a state function or a state action.") (*Benlian*). In *Benlian*, as in *City of Naperville*, the installation and utilization of smart meters was mandated by state law, and customers could not opt out. Nevertheless, as the Court in *Benlian* points out, even detailed regulation does not equate to state action, and the Court determined that the provision of electricity using smart meters is a business activity and not state action. *Id.* at *6 (citing *Crissman v. Dover Downs Entm't Inc.*, 289 F.3d 231, 243 (3d Cir. 2002); *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982)). In this case, there is no state law requiring the installation of smart meters, and customers have available to them an opt out alternative. It is therefore clear that no state action is conducted

[3] *See City of Ontario, Cal. v. Quon*, 560 U.S. 746, 755–56 (2010) ("'The [Fourth] Amendment guarantees the privacy, dignity, and security of persons against certain arbitrary and invasive acts *by officers of the Government*,' without regard to whether the government actor is investigating crime or performing another function.") (quoting *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602, 613-14 (1989)) (emphasis added).

[4] *See Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 930 (1982) ("Because a due process violation was alleged and because the Due Process Clause protects individuals only from governmental and not from private action, plaintiffs had to demonstrate that the sale of their goods was accomplished by state action.").

in the Company's provision of electricity to its customers, and these constitutional issues are not implicated by the Company's use of smart meters.

CONCLUSION

Inasmuch as Appellants did not allege a violation of any law that the Commission has jurisdiction to administer or allege a violation of any order or rule of the Commission, and because adequate process was provided in this case, the Commission's order should be affirmed.

Respectfully submitted,

s/Samuel J. Wellborn
Frank R. Ellerbe, III, Esquire
Samuel J. Wellborn, Esquire
ROBINSON GRAY STEPP & LAFFITTE, LLC
1310 Gadsden Street
Columbia, South Carolina 29201
803.929.1400

Attorneys for Respondent

Columbia, South Carolina
June 24, 2021