

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Donna Bervinchak	:	
	:	
v.	:	C-2016-2572824
	:	
PPL Electric Utilities Corporation	:	
J. Jude Bervinchak	:	
	:	
v.	:	C-2016-2577527
	:	
PPL Electric Utilities Corporation	:	

INITIAL DECISION

Before
Elizabeth H. Barnes
Administrative Law Judge

INTRODUCTION

Two residential customers filed separate Complaints seeking to prevent an electric distribution company (EDC) from installing smart meters a/k/a “Advanced Metering Infrastructure (AMI) meters” or “Radio Frequency (RF) meters” at their respective residences. These consolidated Complaints will be dismissed for failure to prove by a preponderance of evidence that the installation of the smart meter constitutes unsafe or unreasonable service under 66 Pa. C.S. § 1501.

HISTORY OF THE PROCEEDING

Donna and J. Jude Bervinchak (Complainants) are siblings who initially filed separate Complaints on October 21, 2016 and November 21, 2016, respectively, seeking declaratory

relief precluding PPL Electric Utilities Corporation (PPL, PPL Electric, Company or Respondent) from installing smart meters on their service properties. At the time they filed their Complaints, Donna Bervinchak resided at 3645 Marietta Ave., Apt. 1, Lancaster Pennsylvania and J. Jude Bervinchak resided at 825 Christine Lane, Lancaster, Pennsylvania. PPL was served with Ms. Bervinchak's Complaint on October 26, 2016 and with Mr. Bervinchak's Complaint on November 29, 2016.¹ Ms. Bervinchak claims she suffers from electromagnetic hypersensitivity (EHS), which is exacerbated by electromagnetic fields distributed by smart meters. Complainants object to the installation of a smart meter on the grounds of data privacy issues, and because smart meters are a health and safety risk.

PPL filed Answers and Preliminary Objections to Ms. Bervinchak's Complaint on November 15, 2016 and to Mr. Bervinchak's Complaint on December 19, 2016. On May 17, 2017, Notices were issued assigning me as motion judge. The Answers contended that Respondent is required to install AMI or smart meters and that it has the right to terminate service for failure of the customer to permit access to the meter. On May 25, 2017, PPL filed Amended Preliminary Objections to Ms. Bervinchak's Complaint. Also on May 25, 2017, Orders Denying Preliminary Objections were issued.

On May 26, 2017, Notices were issued scheduling telephonic hearings at 10:00 a.m. for Ms. Bervinchak's case and at 2:00 p.m. for Mr. Bervinchak's case on August 1, 2017. On May 30, 2017, Prehearing Orders were issued denying the Amended Preliminary Objections and setting forth rules and requirements for the proceedings.

On July 7, 2017, Notices were issued re-scheduling the telephonic hearing in the Donna Bervinchak proceeding for October 3, 2017, at 10:00 AM, and the telephonic hearing in the J. Jude Bervinchak proceeding for October 3, 2017, at 2:00 PM. On July 25, 2017, a Second Prehearing Order was issued in both proceedings.

¹ PPL signed a waiver of the Section 702 requirement for registered or certified mail service of formal complaints, 66 Pa. C.S. § 702, and agreed to electronic service under the Commission's waiver of 702 program. *See In Re: Electronic Service of Formal Complaints*, Secretarial Letter Dated December 22, 2014, at Docket Nos. M-2013-2398153 *et al.*

On September 6, 2017, Donna Bervinchak filed a “Notice of Default” seeking summary relief. On September 21, 2017, PPL filed letters in both proceedings requesting that the hearings be rescheduled. On September 27, 2017, Notices were issued re-scheduling the telephonic hearing in the Donna Bervinchak proceeding for January 30, 2018, at 10:00 AM, and the telephonic hearing in the J. Jude Bervinchak proceeding for January 30, 2018, at 2:00 PM. On September 29, 2017, PPL filed an Answer to Donna Bervinchak’s “Notice of Default,” which the Company treated as a Motion for Summary Judgment. On October 3, 2017, an Order Denying Donna Bervinchak’s Motion for Default and/or Summary Judgment was issued. Third Prehearing Orders in the Donna Bervinchak and J. Jude Bervinchak proceedings were issued on October 3, 2017, and October 4, 2017, respectively.

On December 18, 2017, PPL filed a Motion to admit Curtis S. Renner, Esquire, *pro hac vice* and represent the Company as additional counsel. On December 21, 2017, PPL filed a letter in the Donna Bervinchak proceeding requesting that the hearing be rescheduled for March 8, 2018. On December 22, 2017, a Fourth Prehearing Order was issued in the Donna Bervinchak proceeding. On January 3, 2018, a Notice was issued re-scheduling the telephonic hearing in the Donna Bervinchak proceeding for March 8, 2018, at 10:00 AM.

On January 4, 2018, PPL filed a letter in the J. Jude Bervinchak proceeding requesting that the hearing be rescheduled for March 23, 2018. On January 5, 2018, the Fourth Prehearing Order in the J. Jude Bervinchak proceeding was issued. On January 12, 2018, a Notice was issued re-scheduling the telephonic hearing in the J. Jude Bervinchak proceeding for March 23, 2018, at 10:00 AM. On January 8, 2018, an Interim Order admitting Curtis S. Renner, Esquire, *pro hac vice* was entered.

On January 29, 2018, PPL filed letters requesting that all expert witnesses submit written direct testimony in the Donna Bervinchak proceeding on or before February 15, 2018, and in the J. Jude Bervinchak proceeding on or before February 28, 2018, both of which were the due dates established by the ALJ for the parties to exchange their exhibits, reports, and statements. On January 31, 2018, PPL filed a Motion to Compel responses to discovery in the Donna Bervinchak

proceeding. On February 8, 2018, PPL filed a Motion to Compel responses to discovery in the J. Jude Bervinchak proceeding.

On February 9, 2018, Donna Bervinchak filed a letter in response to the Motion to Compel and filed a “Notice of Move,” indicating that she had moved into J. Jude Bervinchak’s residence located at 825 Christine Lane, Lancaster, Pennsylvania. On February 14, 2018, PPL filed Notices in both proceedings to enter the appearance of Garrett P. Lent, Esquire, and to withdraw the appearance of Christopher T. Wright, Esquire, as counsel on behalf of PPL.

On February 15, 2018, PPL served its potential hearing exhibits and its written direct expert testimony and exhibits in the Donna Bervinchak proceeding. On February 20, 2018, PPL filed a Motion to Consolidate the Donna and J. Jude Bervinchak proceedings because, as a result of Donna Bervinchak moving into J. Jude Bervinchak’s residence, both proceedings concerned the planned installation of a new AMI meter at the same location. On February 15, 2018, PPL served its potential hearing exhibits and its written direct expert testimony and exhibits in the J. Jude Bervinchak proceeding. On March 1, 2018, I issued an Interim Order consolidating the Donna and J. Jude Bervinchak proceedings. On March 9, 2018, a corrected Notice was issued scheduling the evidentiary hearing in the consolidated proceeding for March 23, 2018, at 10:00 AM.

On March 23, 2018, a telephonic evidentiary hearing was held as scheduled in the consolidated proceeding. Complainants appeared *pro se*. Devin Ryan, Esquire and Curtis Renner, Esquire, appeared on behalf of Respondent with four witnesses: William Hennegan, Scott Larson, Christopher Davis, Ph.D., and Mark Israel, M.D. At the hearing Complainants’ Exhibits Nos. 1 and 2 were admitted. PPL Electric Exhibits Nos. 2A, 2B, 3-7, and PPL Electric Statements 1A, 2A, 1B and 2B were also admitted. A Briefing Order was issued after the hearing giving the parties until April 27, 2018 to file main briefs and until May 11, 2018 to file reply briefs. Tr. 73. On April 13, 2018, a transcript consisting of 77 pages was filed. On April 27, 2018, PPL filed a Main Brief. Complainants did not file any briefs. The record closed on May 11, 2018, the date reply briefs were due. This case is ripe for a decision.

FINDINGS OF FACT

1. Complainants in this proceeding are Donna and J. Jude Bervinchak, sister and brother, who currently reside at 825 Christine Lane, Lancaster, Pennsylvania. Tr. 7-16. PPL Exhibit No. 2, Complainants Exhibits Nos. 1 and 2.²

2. Complainant Donna Bervinchak resided at 3645 Marietta Ave., Apt. 1, Lancaster Pennsylvania in October 2016, at the time she filed her Complaint at C-2016-2572824. Complaint. Tr. 7.

3. Donna Bervinchak moved to reside with her brother, J. Jude Bervinchak, on or about February 9, 2018 at 825 Christine Lane, Lancaster, Pennsylvania. Tr. 7, 13. PPL Electric Exhibit No. 2A.

4. Donna Bervinchak no longer has an electric service account with PPL. Tr. 38, PPL Electric Exhibit No. 2A.

5. Respondent in this proceeding is PPL Electric Utilities Corporation, an electric distribution company (EDC).

6. On June 30, 2014, PPL filed its new Smart Meter Plan intended to comply with all the requirements of Act 129 and the Commission's Smart Meter Implementation Order. PPL Electric Exhibit No. 3.

7. PPL selected Radio Frequency (RF) Mesh meters and metering system because the Company determined that the RF Mesh system would support the 15 capabilities required by Act 129 and the Smart Meter Implementation Order. PPL Electric Exhibit No. 3 at 5-6.

² Hereinafter "Complainants Exhibits" will be referred to as "C Exhibits."

8. The RF Mesh system allows the Company to receive data from the customer's meter wirelessly, unlike PPL's previous powerline carrier (PLC) system that used the customer's actual wires. Tr. 29-32.

9. The individual RF Mesh meters are used as relay points to transmit data back to PPL. Tr. 31-32.

10. Under the Smart Meter Plan, the RF Mesh meters are to be deployed between 2017 and 2019 for all of PPL's 1.4 million customers. PPL Electric Exhibit No. 3 at 3, 32, Tr. 33.

11. On May 16, 2017, PPL sent Complainants letters notifying them that it intended to install the new AMI meter on their respective properties within approximately the next three weeks. PPL Electric Exhibit No. 2, Tr. 15.

12. PPL intends to install an RF Mesh Meter, Landis + Gyr Focus AXR-SD meter at 825 Christine Lane. Tr. 51.

13. Complainants wish to maintain the current meter on the property at 825 Christine Lane with continued electric service. Tr. 8-10.

14. Complainants do not currently have an AMI meter at 825 Christine Lane. Tr. 8-10, Exhibits C-1 and C-2.

15. PPL Witness Davis has a Ph.D. in Physics and is a fulltime Professor with an endowed Chair at the University of Maryland, where for over 30 years he has taught Physics, Electrical Engineering, Electromagnetics, and RF Electromagnetics to undergraduate and graduate students. PPL Electric Statement Nos. 1A at 1-5 and 1B at 1-5.

16. In addition to his teaching, Dr. Davis is an active scientific researcher in the fields of Physics, Biophysics, Electrical Engineering, Bioelectromagnetics and RF

Bioelectromagnetics, conducting many scientific studies in these fields and publishing over 250 studies in peer-reviewed scientific journals. PPL Electric Statement Nos. 1A and 1B at 2.

17. Dr. Davis conducted a substantial amount of research on RF fields of the type produced by the AMI meters being used by the Company. PPL Electric Statement Nos. 1A and 1B at 3.

18. RF fields are part of the lower energy, non-ionizing portion of the electromagnetic spectrum which consists of lower frequency signals that do not have enough energy to break chemical bonds in cells or DNA. PPL Electric Statement Nos. 1A and 1B at 5-6.

19. RF fields come from many sources in our everyday environments, including AM/FM radio, television broadcast, cell phones and their communication networks, portable phones, garage door openers and Wi-Fi networks. PPL Electric Statement No. 1A and 1B at 5-6, 12-17.

20. The Federal Communications Commission (FCC) has determined safe public exposure levels for RF fields from devices that transmit RF signals, such as the AMI meters. PPL Electric Statement Nos. 1A and 1B at 8.

21. The FCC safe public exposure limits are based on evaluations of the body of scientific research on RF fields and were adopted in consultation with other federal agencies, including the Food and Drug Administration (FDA) and the Environmental Protection Agency (EPA). PPL Electric Statement Nos. 1A and 1B at 8-9.

22. The levels of RF fields from the Landis + Gyr Focus AXR-SD meters are 98,000 times lower than the RF exposure safety limits established by the FCC. PPL Electric Statement Nos. 1A and 1B at 11-12, PPL Electric Exhibit CD2.

23. RF signals from the AMI meter are of very short duration and will occur for only a total of 84 seconds over a 24-hour period. PPL Electric Statement Nos. 1A and 1B at 7.

24. There are eight television broadcast towers within a 50 mile radius of Complainants' location in Lancaster, Pennsylvania. PPL Electric Statement Nos. 1A and 1B at 11.

25. Based on the locations of each tower and their RF power outputs, the constant background level of RF fields at Complainants' residence is 35 times higher than the RF signals from the AMI meter. PPL Electric Statement Nos. 1A and 1B at 11, PPL Electric Exhibit CD-5.

26. The RF exposure from a cell phone used at a person's head is 260,000 times higher than the average RF levels 1 meter away from the Company's new smart meter. PPL Electric Statement Nos. 1A at 10 and 1B at 11, PPL Electric Exhibit CD-4.

27. PPL Witness Israel received his undergraduate degree from Hamilton College and his medical degree from the Albert Einstein College of Medicine, and he completed his medical training at Harvard Medical School. PPL Electric Statement No. 2A at 1.

28. Dr. Israel is a Professor of Medicine, Pediatrics, and Molecular and Systems Biology at the Dartmouth Medical School and the Executive Director of the Israel Cancer Research Fund in New York, an international charitable fund for medical and scientific research programs. PPL Electric Statement No. 2A at 1.

29. Dr. Israel is board certified and licensed to practice medicine. PPL Electric Statement No. 2 at 3.

30. Dr. Israel has conducted medical research for 40 years in a wide variety of areas, including systems biology, biochemistry, cell biology, cancer, molecular biology, and

molecular genetics and has published over 245 medical research studies in leading peer-reviewed scientific journals. PPL Electric Statement No. 2A at 3-4.

31. Dr. Israel also has taught medicine and science for more than 30 years to medical students, graduate students, interns, residents, and practicing physicians in a number of fields, including endocrinology, immunology, hematology, neurology, cardiology, biochemistry, cell biology, genetics, molecular genetics, medical oncology, and radiation oncology. PPL Electric Statement No. 2A at 3.

32. Claimed symptoms related to electromagnetic hypersensitivity (EHS) are more accurately described as “Idiopathic Environmental Intolerance” (IEI), in which “idiopathic” means “cause unknown,” rather than electromagnetic hypersensitivity. PPL Electric Statement Nos. 2A and 2B at 11-12.

33. There are no established medical criteria for the diagnosis or treatment of IEI. PPL Electric Statement No. 2A at 13-16.

34. IEI and the variety of symptoms attributed to it are not caused by exposure to RF fields. PPL Electric Statement Nos. 2A at 13-16 and 2B at 12.

35. The World Health Organization and a number of other public health authorities have concluded that the scientific research on RF exposures from cell phone use, which are far higher than the RF from PPL’s smart meters, has not shown that RF fields cause adverse health effects. PPL Electric Statement Nos. 2A at 9-11 and 2B at 10-14.

36. Several U.S. state public health authorities also have investigated claims about health effects from smart meters and have concluded that there is no credible scientific evidence that RF fields from smart meters will cause or contribute to any adverse health effects. PPL Electric Statement Nos. 2A at 12 and 2B at 14-20.

37. There is no reliable medical basis to conclude that RF fields from the AMI meters being used by PPL will cause or contribute to the development of illness or disease. PPL Electric Statement No. 2 at 15.

38. There is no reliable medical basis to conclude that RF fields from the AMI meter being used by PPL would cause, contribute to, or exacerbate any of the symptoms claimed by the Complainants, or any other adverse health effects. PPL Electric Statement No. 2A at 1516.

39. PPL's new AMI meters are equipped with software and mechanisms that better alert the Company if there is an issue with overheating. Specifically, there is a heat alarm set within the meter software program, so when the temperature of the meter hits an established level, the Company is alerted of the issue. Tr. 54.

40. PPL takes 15-minute interval temperature readings from the meter, so it can track the meter's temperature and identify any current issues or problematic trends. Tr. 54.

41. PPL has conducted substantial research and taken many steps to prevent fire incidents. Tr. 54.

42. Complainants raise privacy and cybersecurity issues in their complaint. Exhibit C-1, Tr. 7-10.

43. As a part of its Smart Meter Plan proceeding, PPL filed a detailed AMI Customer Privacy Policy, which sets forth the data PPL will collect through the new smart meter, the steps the Company will take to protect the data, and the ways in which PPL will use the data. Tr. 41-43, PPL Electric Exhibit No. 5.

44. PPL is collecting data on the amount of electricity used and significant event information, such as outages, voltage, heat alarms, and meter tampering alerts. Tr. 41-42, PPL Electric Exhibit No. 5, Section 1.2.

45. PPL protects customer data from public disclosure through the use of firewalls, encryption, digital signatures, authentication and access controls. Tr. 42.

46. PPL's steps to protect data are consistent with recognized industry standards including those issued by the National Institute of Standards and Technology. Tr. 42, PPL Electric Exhibit No. 3.

DISCUSSION

Legal Standards

Under Section 332(a) of the Public Utility Code, 66 Pa. C.S. § 332(a), “the proponent of a rule or order has the burden of proof.” It is well-established that “[a] litigant’s burden of proof before administrative tribunals as well as before most civil proceedings is satisfied by establishing a preponderance of evidence which is substantial and legally credible.” *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm’n*, 578 A.2d 600, 602 (Pa. Cmwlth. 1990). The preponderance of evidence standard requires proof by a greater weight of the evidence. *Commonwealth v. Williams*, 557 Pa. 207, 732 A.2d 1167 (1999). This standard is satisfied by presenting evidence more convincing, by even the smallest amount, than that presented by another party. *Brown v. Commonwealth*, 940 A.2d 610, 614 n.14 (Pa. Cmwlth. 2008).

If the party seeking a rule or order from the Commission sets forth a *prima facie* case, then the burden shifts to the opponent. *MacDonald v. Pa. R.R. Co.*, 348 Pa. 558, 36 A.2d 492 (1944). Establishing a *prima facie* case requires either evidence sufficient to make a finding of fact permissible or evidence to create a presumption against an opponent which, if not met, results in an obligatory decision for the proponent. Once a *prima facie* case has been established, if contrary evidence is not presented, there is no requirement that the party seeking a rule or order from the Commission must produce additional evidence to sustain its burden of proof. *See Replogle v. Pa. Elec. Co.*, 54 Pa. PUC 528, 1980 Pa. PUC LEXIS 20 (Order entered Oct. 9, 1980); *see also Application of Pennsylvania-American Water Co. for Approval of the Right To Offer, Render, Furnish or Supply Water Serv. to the Pub. in Additional Portions Of Mahoning*

Twp., Lawrence County, Pa., Docket No. A-212285F0148, 2008 Pa. PUC LEXIS 874 (Order entered Oct. 29, 2008).³

In addition, a person does not sustain his or her burden of proof in an electric and magnetic field exposure case when the record evidence, “taken as a whole, leads to the ultimate finding and conclusion that the scientific studies at present are inconclusive.” *Letter of Notification of Phila. Elec. Co. 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*, 1992 Pa. PUC Lexis 160, at *210-11 (June 29, 1992) (Initial Decision) (“*Woodbourne-Heaton*”). Rather, the person must demonstrate by a preponderance of the evidence that such exposure actually causes adverse health effects. *Id.* at *211. Specifically, in AMI meter-related matters, the Commission has held that “[t]he Complainant will have the burden of proof during the proceeding to demonstrate, by a preponderance of the evidence, that [the utility] is responsible or accountable for the problem described in the Complaint.” *Kreider v. PECO Energy Co.*, Docket No. P-2015-2495064, p. 18 (Order entered Sept. 3, 2015); *see also Romeo v. Pa. Pub. Util. Comm’n*, 154 A.3d 422, 429 (Pa. Cmwlth. 2017) (finding that the smart meter complainant should have a hearing to try to prove his claim through “the testimony of others as well as other evidence that goes to that issue”).

Section 701 of the Public Utility Code provides that “any person . . . having an interest in the subject matter . . . may complain in writing, setting forth any act or thing done or omitted to be done by any public utility in violation, or claimed violation, of any law which the commission has jurisdiction to administer, or of any regulation or order of the commission.” 66 Pa. C.S. § 701. Therefore, a complainant must generally demonstrate that the public utility violated the Public Utility Code or a Commission regulation or order.

³ In addition, any finding of fact necessary to support an adjudication of the Commission must be based upon substantial evidence. *Met-Ed Indus. Users Grp. v. Pa. Pub. Util. Comm’n*, 960 A.2d 189, 193 n.2 (Pa. Cmwlth. 2008) (citing 2 Pa.C.S. § 704). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Borough of E. McKeesport v. Special/Temporary Civil Serv. Comm’n*, 942 A.2d 274, 281 n.9 (Pa. Cmwlth. 2008) (citation omitted). Although substantial evidence must be “more than a scintilla and must do more than create a suspicion of the existence of the fact to be established,” *Kyu Son Yi v. State Bd. of Veterinary Med.*, 960 A.2d 864, 874 (Pa. Cmwlth. 2008) (citation omitted), the “presence of conflicting evidence in the record does not mean that substantial evidence is lacking.” *Allied Mech. and Elec., Inc. v. Pa. Prevailing Wage Appeals Bd.*, 923 A.2d 1220, 1228 (Pa. Cmwlth. 2007) (citation omitted).

The Commission has exclusive jurisdiction to adjudicate “issues involving the reasonableness, adequacy, and sufficiency” of a public utility’s facilities and services. *See Elkin v. Bell Telephone Co. of Pa.*, 420 A.2d 371, 374 (Pa. 1980) (citations omitted). Section 1501 of the Public Utility Code states, in pertinent part, that:

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. Such service also shall be reasonably continuous and without unreasonable interruptions or delay. Such service and facilities shall be in conformity with the regulations and orders of the commission. Subject to the provisions of this part and the regulations or orders of the commission, every public utility may have reasonable rules and regulations governing the conditions under which it shall be required to render service. . .

66 Pa. C.S. § 1501.

When presented with a challenge to an AMI meter installation, the Commission has pronounced that “[t]he ALJ’s role . . . will be to determine based on the record in this particular case, whether there is sufficient evidence to support a finding that the Complainant was adversely affected by the smart meter or whether [the utility’s] use of a smart meter will constitute unsafe or unreasonable service in violation of Section 1501 under the circumstances in this case.” *Kreider v. PECO Energy Co.*, Docket No. P-2015-2495064 at 23 (Opinion and Order entered January 28, 2016) (citing *Woodbourne-Heaton*, 1992 Pa. PUC Lexis 160, at *12-13). *Frompovich v. PECO Energy Co.*, Docket No. C-2015-2474602 at 10 (Opinion and Order entered May 3, 2018).

Health and Safety Concerns

Complainants claim Donna Bervinchak is electromagnetically hypersensitive in that she lived in an apartment in San Francisco for 20 years and within four months’ time of having smart meters installed on the building she was no longer able to work. Exhibit C-2. Ms.

Bervinchak stated that smart meters were installed on her apartment building in October 2011 and she immediately experienced the following symptoms: fatigue, headaches, sleep disorders, anxiety and difficult memory recall. She additionally broke out in hives and had heart palpitations and shortness of breath. On or about January 29, 2012, Ms. Bervinchak moved out of her apartment and on March 3, 2012, she moved to 3645 Marietta Ave., Apt. 1, Lancaster Pennsylvania. She lives now with her brother as of February 9, 2018. Exhibit C-1, No. 7 Statement of Donna Bervinchak, Exhibit C-2, Tr. 5-20. J. Jude Bervinchak does not allege any specific adverse health effect to himself; however, he alleges RF fields from Smart Meters cause him harm, injury and financial loss and exacerbate his sister's symptoms of EHS. Tr. 14.

Conversely, PPL contends radiofrequency fields are part of the lower energy, non-ionizing portion of the electromagnetic spectrum, which consists of lower frequency signals that do not have enough energy to break chemical bonds in cells or DNA. PPL Electric Statement No. 1A and 1B at 5-6. PPL contends RF fields come from many sources in our everyday environments, including AM/FM radio, television broadcast towers, cell phones and their communications networks, portable phones, garage door openers and wi-fi networks. PPL Electric Statement No. 1A at 5-6, 13-17, PPL Electric Exhibit CD1.

PPL argues Complainants did not present any expert medical or scientific evidence to support their claims that AMI meters present a risk to human health. PPL further argues that Complainants hearsay documents in Exhibits C-1 and C-2 are unreliable and lack scientific merit. PPL MB at 9.

Disposition

The assertions of Complainants that Ms. Bervinchak suffers from Electromagnetic Hypersensitivity Syndrome (EHS) that will become exacerbated by radiofrequency fields emitted by an AMI meter are bald assertions, which do not constitute evidence. *Pennsylvania Bureau of Corrections v. City of Pittsburgh*, 532 A.2d. 12 (Pa. 1987). Exhibit C-1 at 15 and C-2 (No. 7 Statement of Donna Bervinchak). Complainants offered as evidence written statements of: Eleanor Gomez, Katherine Sandoval, Margie Lucas, Geraldine Cybulski, Daniel Frankston,

Eileen and Neil Crone and Donna Bervinchak. Exhibit C-2. Also in support of their allegations, Complainants submitted documents from websites regarding studies showing adverse health effects from RF fields. Exhibits C-1 and C-2. However, as PPL objected to the admission of these exhibits on the ground of hearsay evidence, they are given no weight.

Under Pennsylvania’s “Walker Rule,” it is well-established that “[h]earsay evidence, properly objected to, is not competent evidence to support a finding.” *Walker v. Unemployment Comp. Bd. of Review*, 367 A.2d 366, 370 (Pa. Cmwlth. 1976) (citations omitted). Even if hearsay evidence is “admitted without objection,” the ALJ must give the evidence “its natural probative effect and may only support a finding . . . if it is corroborated by any competent evidence in the record;” as “a finding of fact based solely on hearsay will not stand.” *Id.* at 370 (citations omitted).

In the instant case, the written statements are hearsay because they are out-of-court statements offered to prove the truth of the matter asserted. F.R.E. 801. PPL objected to these documents because they are hearsay and not subject to a hearsay exception. Tr. 20-21, 28. Although these exhibits were admitted into the record, I am giving them no weight. Tr. 23, 28. PPL has a statutory right to cross-examine persons “as may be required for a full and true disclosure of the facts.” 66 Pa. C.S. § 332(c). Because the authors of these hearsay statements did not testify, the Company was denied this right and unable to test the veracity of their statements. It is for this reason such hearsay is generally inadmissible and should not be relied upon in this proceeding. I am giving some weight to the written statement of Donna Bervinchak in Exhibit C-1 as it is signed by Complainant and she was available to testify at the hearing.

However, other than the testimony of J. Jude Bervinchak, Complainants have presented no competent evidence to corroborate Ms. Bervinchak’s health claims. Exhibits C-1 and C-2 contain hearsay information and cannot be relied upon to find that the new AMI meters cause, contribute to, or exacerbate any illnesses. Even if I were persuaded to find Complainant Donna Bervinchak suffered from medical conditions of extreme fatigue, sleep disorders, anxiety, difficult memory recall, hives, shortness of breath and heart palpitations when she was exposed

to RF or AMI meters, there is insufficient evidence to show RF fields emitted from an AMI meter will exacerbate or cause such medical conditions.

I am persuaded by the credible testimony of Dr. Davis, who testified the levels of RF fields from AMI meters are 98,000 times lower than the RF exposure safety limits established by the FCC. PPL Electric Statement No. 1A at 11, PPL Electric Exhibit CD2. These levels are well below the standard and the RF signals are of a short duration, occurring a total of 84 seconds over a 24-hour period. PPL Electric Statement No. 1A at 7. Additionally, RF fields from television towers in the Lancaster area are 35 times higher than RF signals from an AMI meter attached to 825 Christine Drive, Lancaster, would be. Thus, the background level of RF fields weighs in favor of a finding that an AMI RF mesh meter would not exacerbate EMH, IEI, heart palpitations, sleep disorders, hives or other chronic disease. PPL Electric Statement Nos. 1A and 1B at 11, PPL Electric Exhibit CD-5.

I am also persuaded by the credible testimony of Dr. Israel, who testified he examined scientific studies and opined RF fields have no adverse effects on genetics, fertility, reproduction, growth or development in animals exposed to RF fields. PPL Electric Statement No. 2A and 2B at 8-12.

In forming his medical opinion, Dr. Israel relied upon studies from the United Kingdom Health Protection Agency (2012), the Royal Society of Canada (2013), the New Zealand Ministry of Health (2015), and the European Commission's Scientific Committee on Emerging and Newly Identified Health Risks (2015). These entities concluded there is no reliable scientific evidence that exposure to RF fields causes claimed IEI symptoms. The World Health Organization has found that "no adverse health effects have been established as being caused by mobile phone use." PPL Electric Statement No. 2A at 14-15. There is little scientific evidence to support the idea of electromagnetic hypersensitivity. These findings from public health entities and expert panels show that the theory of IEI caused by exposure to RF fields has not been generally accepted in the medical community. PPL Electric Statement No. 2 at 10-12.

Dr. Israel also evaluated scientific research on RF fields and adverse health effects generally. He examined controlled animal laboratory studies, which provide a reliable basis for determining whether RF fields have the capability to cause or contribute to adverse health effects in animals, such as cancer or adverse effects on growth, development, or reproduction. PPL Electric Statement No. 2A at 9-14. These studies found no such adverse health effects. PPL Electric Statement No. 2A at 9-14. Dr. Israel further reported that the World Health Organization and a number of other public health authorities have concluded that the scientific research on RF exposures from cell phone use, which are far higher than the RF from PPL's smart meters, has not shown that RF fields cause adverse health effects.

Overall, as an expert in medicine and medical research, particularly as related to RF fields and health, Dr. Israel found, based on his medical education, training and experience, and his evaluation of the scientific research, and to a reasonable degree of medical certainty, that there is no reliable medical basis to conclude that RF fields from the AMI meter intended to be used by PPL at the Bervinchak residence will cause, exacerbate or contribute to any adverse health effects. PPL Electric Statement Nos. 2A at 17 and 2B at 15. Therefore, I find in favor of PPL on the health and safety concerns issue.

Fire Concerns

In her Complaint, Ms. Bervinchak alleged that PPL's actions "violate the law and threaten health, safety, privacy." Ms. Bervinchak Complaint and Attachment (Letter from Donna Bervinchak to William Spence dated June 4, 2016). Complainants produced no evidence to show the AMI meter to be installed is unsafe or a fire hazard. Tr. 7. I find credible the testimony of PPL Witness Larson that the Landis + Gyr AMI meter meets all national standards, including those issued by the American National Standards Institute (ANSI) and is certified by Underwriters Laboratories. Tr. 54-55.

In the *Frompovich* case, the Commission recognized PECO Energy Company (PECO) did have an issue with the initial deployment of Sensus smart meters. The Commission held:

Specifically, as to the Complainant's fire hazard claim, PECO satisfied its burden of production, or the burden of going forward with the evidence, to show that the brand of AMI to be installed at the Complainant's home – the Landis + Gyr meter – does not present a fire hazard. PECO presented evidence in this case that previously there was a fire hazard problem with a particular brand of meter PECO had initially used in the AMI deployment. However, in approximately 2012, those meters were all removed and replaced with the Landis + Gyr Focus meters. PECO showed that since the installation of over 1.2 million of Landis + Gyr Focus meters, there have been no reports of fire incidents related to the meters. Tr. at 143. PECO showed that a Landis + Gyr meter would be installed at Ms. Frompovich's home.

Additionally, we take judicial notice here that the fire hazard issue involving the prior brand of AMI meter was raised to our attention during PECO's Smart Meter Phase II Plan proceeding at Docket No. M-2009-2123944, discussed *supra*, fn 3. In the Recommended Decision for that case, it was noted that PECO had experienced several meter events involving overheating during the Phase I deployment. PECO initiated corrective action including replacement of the installed smart meters with meters manufactured by a different contractor, Landis + Gyr. PECO had completed replacing the meters on or before January 18, 2013, the date PECO filed its Smart Meter Phase II Plan. *See* Phase II R.D. at 9.

Moreover, the Complainant did not present any competent evidence in this record to show that the Landis + Gyr brand of meters causes fires or otherwise presents a fire hazard. Therefore, we agree with the ALJ's conclusion that the Complainant did not satisfy her burden of proving that the type of AMI meter to be installed at her home would constitute an unsafe fire hazard in violation of 66 Pa. C.S. § 1501.

Frompovich at 56-57.

PECO had an overheating issue with its initial deployment of Sensus AMI meters; however, these Sensus AMI meters were eventually removed by PECO and replaced with Landis + Gyr Focus AXR-SD meters, the same make and model PPL intends to install at the instant service property. *Id.* at 56, Tr. 51. It appears the metrology, the system of measurement, between the meters currently being deployed in both service territories is the same. Tr. 51.

The Commission has already deemed it to be reasonable and not a fire hazard within the meaning of 66 Pa. C.S. § 1501 to allow another electric distribution company to install the Landis + Gyr Focus AXR-SD meter on residential dwellings within its service territory. Tr. 45. The Commission has found that since the installation of over 1.2 million Landis + Gyr Focus meters, there have been no reports of fire incidents related to the meters. *Frompovich at 56-57*. Similarly, there is no evidence to show PPL has had any fire incidents regarding the same make and model meter during its current deployment. Therefore, I find in favor of PPL on the fire concerns issue.

Privacy Concerns

The Complainants also raised privacy issues with the new AMI meter. Tr. 7, 10. I am persuaded to find credible the testimony of PPL Witness Hennegan, who testified that the meter does not collect detailed data of in-home activities relating to electric, water and gas usage as alleged by Complainants. The only electric usage data that the Company collects is for the entire premises. Tr. 41-43. As part of its Smart Meter Plan proceeding, PPL filed a detailed AMI Customer Privacy Policy, which sets forth the data PPL will collect through the new smart meter, the steps the Company will take to protect the data, and the ways in which PPL will use the data. Tr. 41-43, PPL Electric Exhibit No. 5. Consistent with that policy, the Company claims that it will collect data on the total amount of electricity used at the premises as well as significant event information, such as outages, voltage, heat alarms, and meter tampering alerts. Tr. 41-42; PPL Electric Exhibit No. 5, Section 1.2.

PPL has taken steps to protect data from public disclosure including: firewalls, encryption, digital signatures, authentication and access controls. Tr. 42. These steps are consistent with recognized industry security standards, including those issued by the National Institute of Standards and Technology. Tr. 42. For these reasons, I find in favor of PPL on the privacy issue.

Termination of Service

Complainants claim PPL has no right to terminate their electric service if they deny PPL access to replace their existing meter. Tr. 10, 23, 33 Exhibit C-1 at 2-8; Exhibit C-2 at 10-17. If the Commission denies and dismisses this Complaint, PPL will have a legal right to initiate termination procedures if it is denied reasonable access to the Company's meter per its tariff, the Commission's Regulations, and Chapter 14 of the Public Utility Code. See 66 Pa. C.S. § 1406(a)(4); 52 Pa. Code § 56.81(3). PPL Electric Exhibits Nos. 6, and 7.

A public utility's Commission-approved tariff is prima facie reasonable, has the full force of law and is binding on the utility and the customer. 66 Pa.C.S. § 316, *Kossmann v. Pa. Pub. Util. Comm'n*, 694 A.2d 1147 (Pa.Cmwlth. 1997) (*Kossmann*); and *Stiteler v. Bell Telephone Co. of Pennsylvania*, A.2d 339 (Pa.Cmwlth. 1977) (*Stiteler*).

Rule 10(B)(2)(g) of PPL Electric's tariff states that the Company is authorized to terminate service when: (1) its representatives cannot gain admittance or are refused admittance to the premises for the purpose of reading meters, making repairs, making inspections, or removing Company property; (2) the customer interferes with Company representatives in the performance of their duties; or (3) the meters or other equipment of the Company are not accessible during reasonable hours. PPL Electric Exhibit No. 7 at 2. Similarly, Rule 2F of PPL's Tariff, Supplement No. 42, Electric Pa. PUC No. 201 provides that PPL "shall have access at all reasonable hours to customer's premises, without charge for the purpose of inspecting, installations, installing meters, reading, testing, removing, replacing, or otherwise maintaining or disposing of any of Company's property." PPL Electric Exhibit No. 6.

It is well-settled that where a customer refuses a utility access to its meter, the utility may terminate service after required notice is provided. The Commission's Regulations, at 52 Pa. Code § 56.81(3), provide, in pertinent part, the following:

A public utility may notify a customer and terminate service provided to a customer after notice as provided in §§ 56.91-56.100 (relating to notice procedures prior to termination) for any of the following actions by the

customer . . . Failure to permit access to meters, service connections or other property of the public utility for the purpose of replacement, maintenance, repair or meter reading.

52 Pa. Code § 56.81(3). Additionally, the Commission held in *Frompovich*,

Based on our adjudication of Ms. Frompovich's claims herein, we find that PECO's proposed termination of electric service to the Complainant's service address for the Complainant's refusal to permit PECO access to its meter, so that PECO's employees can replace the existing AMR meter with an AMI meter, to be consistent with and authorized under Section 1501 of the Code, the Commission's Regulations at 52 Pa. Code § 56.81(3), and the Company's Tariff. We remind PECO, however, that prior to taking any steps related to such termination of service, it must adhere to the applicable provisions of the Commission's Regulations relating to Notice Procedures Prior to Termination at 52 Pa. Code §§ 56.91-100. In the applicable written notice(s) required under the Commission's Regulations, PECO is requested to inform or instruct Ms. Frompovich as to how she may avoid termination related to the meter.

Frompovich at 59. Accordingly, given this *stare decisis* precedent, I find in favor of PPL on this issue.

Opting Out of Smart Meter Installation

The Commission has ruled that there is no provision in the Code, the Commission's Regulations or Orders that allows a customer to "opt-out" of smart meter installation. 66 Pa.C.S. § 2807(f); *See Frompovich v. PECO Energy Co.*, Docket No. C-2015-2474602, (Opinion and Order entered May 3, 2018); *Povacz v. PECO Energy Company*, Docket No. C-2012-2317176 (Order adopted January 24, 2013 at 10); *Povacz v. PECO Energy Company*, Docket No. C-2015-2475023 (ALJ Heep Initial Decision dated January 26, 2018). Moreover, the Commonwealth Court has held that federal law does not preempt the Commission's interpretation. *See Romeo v. Pa. Pub. Util. Comm'n*, 154 A.3d 422 (Pa. Cmwlth. 2017). The Commonwealth Court did not expressly address whether Mr. Romeo could opt-out of a smart meter installation. The Court held that Mr. Romeo's claim, that smart meters cause safety and fire hazards and have a negative health impact, was not legally insufficient pursuant to

66 Pa. C.S. § 1501, which requires utilities to maintain adequate, efficient, safe and reasonable service and facilities for their customers. *Id.*

I infer from the *Romeo* decision, that it is legally sufficient to plead the injunctive relief requested in the instant case and claim that smart meters are generally unsafe, unhealthy, and the installation of them is unreasonable service in violation of 66 Pa. C.S. § 1501. However, the Commonwealth Court did not expressly address the opt-in versus opt-out argument. Although Complainants similarly situated to Mr. Romeo are entitled to an evidentiary hearing, there is still horizontal *stare decisis* precedent at the Commission level to hold there is no opt-out provision in the current law in Pennsylvania. Accordingly, given this *stare decisis* precedent, I find in favor of PPL on this issue.

CONCLUSION

For all of these aforementioned reasons, the complaint will be dismissed for failure to prove by a preponderance of evidence that the installation of this smart meter constitutes unsafe or unreasonable service under 66 Pa. C.S. § 1501. Although the Complainants are genuine in their concerns, the Commission's decisions cited above are controlling.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the parties and the subject matter in this proceeding. 66 Pa. C.S. §701.
2. PPL Electric Utilities Corporation's smart meter procurement and installation plan, which was approved by Commission Order in the case of *Petition of PPL Electric Utilities Corp. for Approval of Its Smart Meter Technology Procurement and Installation Plan*, Docket No. M-2014-2430781, p. 24 (Order Entered Sept. 3, 2015) does not contain a provision for customers to opt out of smart meter installation.

3. Neither Act 129 of 2008 nor any Commission or Commonwealth Court orders expressly provide for the ability of customers to opt out of having a smart meter installed.

4. Under Section 332(a) of the Pennsylvania Public Utility Code, the proponent of a rule or order has the burden of proof. 66 Pa. C.S. § 332(a). It is well established that “[a] litigant’s burden of proof before administrative tribunals as well as before most civil proceedings is satisfied by establishing a preponderance of evidence which is substantial and legally credible.” *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm’n*, 578 A.2d 600, 602 (Pa. Cmwlth. 1990).

5. The preponderance of evidence standard requires proof by a greater weight of the evidence. *Commonwealth v. Williams*, 557 Pa. 207, 732 A.2d 1167 (1999). This standard is satisfied by presenting evidence that makes the existence of a contested fact more likely than its nonexistence. *Brown v. Commonwealth*, 940 A.2d 610, 614 n.14 (Pa. Cmwlth. 2008) (citation omitted).

6. A person does not sustain his or her burden of proof in an electric and magnetic field exposure case when the record evidence, “taken as a whole, leads to the ultimate finding and conclusion that the scientific studies at present are inconclusive,” rather, the person must demonstrate by a preponderance of the evidence that such exposure actually causes adverse health effects. *Letter of Notification of Phila. Elec. Co. 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*, 1992 Pa. PUC Lexis 160, at *210-11 (June 29, 1992) (Initial Decision) (“Woodbourne-Heaton”).

7. In AMI meter-related matters, the Commission has held that “[t]he Complainant will have the burden of proof during the proceeding to demonstrate, by a preponderance of the evidence, that [the utility] is responsible or accountable for the problem described in the Complaint.” *Kreider v. PECO Energy Co.*, Docket No. P-2015-2495064, p. 18 (Order entered Sept. 3, 2015).

8. Section 701 of the Public Utility Code provides that “any person . . . having an interest in the subject matter . . . may complain in writing, setting forth any act or thing done or omitted to be done by any public utility in violation, or claimed violation, of any law which the commission has jurisdiction to administer, or of any regulation or order of the commission.” 66 Pa. C.S. § 701.

9. The Commission has exclusive jurisdiction to adjudicate “issues involving the reasonableness, adequacy, and sufficiency” of a public utility’s facilities and services. See *Elkin v. Bell Telephone Co. of Pa.*, 420 A.2d 371, 374 (Pa. 1980) (citations omitted).

10. When presented with a challenge to an AMI meter installation, the Commission has pronounced that “[t]he ALJ’s role . . . will be to determine based on the record in this particular case, whether there is sufficient evidence to support a finding that the Complainant was adversely affected by the smart meter or whether [the utility’s] use of a smart meter will constitute unsafe or unreasonable service in violation of Section 1501 under the circumstances in this case.” *Kreider v. PECO Energy Co.*, Docket No. P-2015-2495064, p. 23 (Order entered Jan. 28, 2016) (citing *Woodbourne-Heaton*, 1992 Pa. PUC Lexis 160, at *12-13).

11. Complainants have failed to sustain their burden of proof that installing the new AMI meter would violate the Public Utility Code or any Commission regulation or order. See 66 Pa. C.S. §§ 332(a), 701.

12. PPL is legally required to install the RF Mesh meter on the Complainants’ property by Act 129 and Commission orders. See 66 Pa. C.S. § 2807(f); Smart Meter Procurement and Installation, Docket No. M-2009-2092655, pp. 9, 14 (Order entered June 24, 2009)

13. Under the Company’s Commission-approved Smart Meter Plan, PPL must replace all of the PLC meters with the RF Mesh meters, which the Commission declared as meeting all of the requirements of Act 129 and the Commission’s Smart Meter Implementation Order. See *Petition of PPL Electric Utilities Corp. for Approval of Its Smart Meter Technology*

Procurement and Installation Plan, Docket No. M-2014-2430781, p. 24 (Order Entered Sept. 3, 2015) .

14. The Complainants have failed to demonstrate that the new AMI meter causes, contributes to, or exacerbates any adverse health effect.

15. The Complainants have failed to sustain their burden of proof that installing the new AMI meter would constitute unsafe or unreasonable service in violation of 66 Pa. C.S. § 1501.

16. PPL Electric is permitted under Rule 2F of its Commission-approved tariff to access the Complainants' property for the purpose of installing the new AMI meter. PPL Electric Exhibit No. 6.

17. Public utilities' tariffs have the full force and effect of law and are binding on the utilities and their customers. *See PPL Elec. Utils. Corp. v. Pa. Pub. Util. Comm'n*, 912 A.2d 386, 402 (Pa. Cmwlth. 2006) (citing 66 Pa. C.S. § 1303 and *Pa. Elec. Co. v. Pa. Pub. Util. Comm'n*, 663 A.2d 281, 284 (Pa. Cmwlth. 1995)).

18. The Public Utility Code, the Commission's regulations, and PPL Electric's tariff expressly permit the Company to terminate service if a customer fails to provide the Company with access to the property in order to replace the meter. *See* 66 Pa. C.S. § 1406(a)(4); 52 Pa. Code § 56.81(3); PPL Electric Exhibit No. 7.

ORDER

THEREFORE,

IT IS ORDERED:

1. That the Formal Complaint filed by Donna Bervinchak against PPL Electric Utilities Corporation at Docket No. C-2016-2572824 is hereby dismissed.
2. That the Formal Complaint filed by J. Jude Bervinchak against PPL Electric Utilities Corporation at Docket No. C-2016-2577527 is hereby dismissed.
3. That PPL Electric Utilities Corporation's Motion to Compel Discovery is denied as moot.
4. That the dockets in this consolidated proceeding be marked closed.

Date: August 16, 2018

/s/

Elizabeth H. Barnes
Administrative Law Judge