

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

NORBERT SLIWINSKI,

Complainant,

No: C-2016-2559985

v.

DUQUESNE LIGHT COMPANY,

Respondent.

**BRIEF IN SUPPORT OF MOTION FOR  
SUMMARY JUDGMENT**

Served on Behalf of Respondent  
Duquesne Light Company

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Complainant,	:	
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v.	:	No: C-2016-2559985
	:	
DUQUESNE LIGHT COMPANY,	:	
	:	
Respondent.	:	

**BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

Respondent Duquesne Light Company (“Duquesne Light” or the “Company”), by and through its attorneys, Tucker Arensberg, P.C., submits this Brief in Support of its Motion for Summary Judgment:

**I. INTRODUCTION**

The Pennsylvania Public Utility Commission (“Commission”) has made clear that Duquesne Light is required by Act 129 of 2008 (“Act 129”) to install smart meters throughout its service territory and that customers may not opt out of receiving a smart meter. Complainant, a Duquesne Light customer, does not want the Company to install a smart meter at his home. He thinks they emit harmful radiofrequency radiation, are prone to explode or catch fire, invade customer privacy, and lead to higher bills. He argues that the law does not require him to receive one because there is no federal mandate for smart meters.

Complainant has produced no evidence through discovery to support his allegations. Discovery established that he plans to call no lay or expert witnesses at the hearing (assuming one is necessary). He identified no experts and produced no expert reports. He provided no documents that address Duquesne Light’s smart meters or its smart meter program. In fact, he admits that Duquesne Light’s smart meters have never caught on fire and that the Company’s

smart meter program has never violated its customers' privacy rights. Instead, Complainant merely claims, through his personal beliefs and an array of internet articles and videos having nothing to do with Duquesne Light, that smart meters in general are unhealthy, unsafe, an invasion of privacy, expensive, and not required by law.

The question thus presented by this Motion is whether a complainant who does not want a smart meter, but at whose property the utility is required to install one, can survive summary judgment on a case in which he must prove that Duquesne Light violated a provision of the Public Utility Code (the "Code"), an associated regulation, or its tariff, merely by objecting to smart meter technology in general without producing any evidence in discovery showing that Duquesne Light's smart meter practices are unsafe, unreasonable, or inadequate.

The answer must be no. The undisputed evidence establishes that Complainant cannot satisfy his burden of proof in this case. The Commission has approved Duquesne Light's smart meter procurement and installation plan, which is *prima facie* evidence that the plan is reasonable. The smart meters being deployed by Duquesne Light comply with the applicable limits for radiofrequency emissions established by the Federal Communications Commission ("FCC") by a wide margin. Duquesne Light's smart meters also meet the standards set by the American National Standards Institute ("ANSI").

In addition, the undisputed facts establish that: (1) Pennsylvania law requires Duquesne Light to install a smart meter at Complainant's property; (2) there is no evidence that Duquesne Light's smart meters violate customers' privacy and Complainant admits that the Company has not done so; and (3) there is no evidence that Duquesne Light's smart meters pose a health or safety threat to Complainant.

Despite being specifically challenged by Duquesne Light and being given months of discovery to procure and produce evidence in support of his claims, Complainant has produced none. Thus, there is nothing he could offer at a hearing through which he could carry his

burden of proving that Duquesne Light's smart meters violate the Code, an associated regulation, or a tariff provision, and so Duquesne Light is entitled to judgment as a matter of law. Complainant is not entitled to a hearing merely because he objects to smart meter technology as a whole. As the Presiding Administrative Law Judge has already ruled, Complainant cannot prevail in this case unless he proves that Duquesne Light has violated the Code, an associated regulation, or a tariff provision. See Prehearing Order dated March 22, 2018. Based upon all evidence produced in this proceeding, Complainant can do no such thing. All Complainant has shown is that Duquesne Light plans to install a smart meter -- a technology he distrusts -- at his property. But that does not violate the Code; it complies with it. And since there is no evidence demonstrating that the manner in which Duquesne Light is deploying its smart meter network violates any provision of the Code, any regulation, or any tariff provision, Complainant's claims fail as a matter of law.

While Duquesne Light does not doubt that Complainant's concerns about smart meter technology are heartfelt, he has presented no actual evidence to substantiate his claims that Duquesne Light has violated the Code, an associated regulation, or a tariff provision, which are the only issues before the Commission. Duquesne Light thus requests that summary judgment be entered in its favor.

## II. UNDISPUTED FACTS

### *The Pennsylvania Legislature Enacts Act 129*

On October 15, 2008, the Pennsylvania legislature enacted Act 129, which requires electric distribution companies with more than 100,000 customers, including Duquesne Light, to deploy smart meter technology (including smart meters) throughout their service territory. 66 Pa. C.S. § 2807. As the Commission has repeatedly noted, Act 129 does not contain an "opt out" provision; in other words, Duquesne Light must install a smart meter for all customers in its service territory. See Francis v. PECO Energy Co., Docket No. C-2014-2451351, 2015 WL

5011620, at \*6 (Pa. P.U.C. Aug. 20, 2015) (Act 129 and the Commission's Orders do not allow a customer to opt out of having a smart meter installed); Evans v. PECO Energy Co, Docket No. C-2017-2628542, 2017 WL 6766256, at \*4 (Pa. P.U.C. Dec. 12, 2017) (Heep, ALJ) (the Commission determined in 2013 that there is no provision in the Code, the Commission's Regulations or Orders that allows a customer to "opt out" of smart installation). An administrative law judge is bound by Commission precedent. See 1-A Realty v. PPL Elec. Utilities Corp., Docket No. F-2010-2166554 and F-2010-2166976, 2012 WL 1453948, at \*7 (Pa. P.U.C. Apr. 12, 2012).

*The Commission Approves Duquesne Light's Smart Meter Plan*

Act 129 required all electric distribution companies with more than 100,000 customers, including Duquesne Light, to file a smart meter technology procurement and installation plan with the Commission for approval. See 66 Pa. C.S. § 2807(f)(1). Duquesne Light filed such a plan, and the Commission approved it. Duquesne Light Company Final Smart Meter Technology Procurement and Installation Plan, June 29, 2012, Tab 1; Opinion and Order, May 6, 2013, Tab 2. The Commission later approved the Company's amended smart meter plan ("Smart Meter Plan"), which provides that the Company shall complete deployment of residential smart meters by the end of 2018. Opinion and Order, Apr. 7, 2017, Tab 3. Pursuant to the Smart Meter Plan, Duquesne Light is installing smart meters manufactured by Itron Inc. throughout its service territory.<sup>1</sup>

*Duquesne Light's Smart Meters Comply with Applicable FCC Regulations and ANSI Standards*

Duquesne Light's smart meters comply with FCC limits for the general public at frequencies of smart meter transmissions (900M Hz and 2.4 GHz). Affidavit of Benjamin Cotts,

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<sup>1</sup> The model of residential smart meter installed at most residential premises, and to be installed at the Complainant's residence, is the Itron HW 3.1 OpenWay CENTRON singlephase smart meter, model SK9AMI7. For the sake of simplicity, Duquesne Light will refer to this meter as "Duquesne Light's smart meter" throughout this Brief.

PhD., P.E. in Support of Motion for Summary Judgment at ¶ 8, Tab 4. In fact, using the average duty cycle for a typical Duquesne Light smart meter (identified as 0.06 percent in the RF exposure for the LAN Radio, which emits more frequently than the Zigbee Radio) at one yard directly in front of the smart meter outside is **0.0029 percent (1/35,000th) of the FCC limit**; one yard behind the smart meter inside is only **0.00013 percent (1/780,000th) of the FCC limit**. Affidavit of Benjamin Cotts, PhD., P.E. in Support of Motion for Summary Judgment at ¶¶ 9-11, Tab 4. It also is undisputed that Duquesne Light's smart meters meet the ANSI standards. Duquesne Light's Responses to Complainant's First Set of Discovery Requests at ¶ 3, Tab 5. Complainant has offered no evidence contradicting those facts.

*Complainant Does Not Want a Smart Meter*

Complainant is a Duquesne Light customer who resides at 856 Cottonwood Drive, Monroeville, Pennsylvania 15146 (the "Property"). Compl. at ¶¶ 1-2, Tab 6. Complainant has not received a smart meter from Duquesne Light yet, but he objects to one being installed at the Property. Attachment to Compl., Tab 6. Complainant offered no evidence that Duquesne Light's smart meters fail to satisfy an applicable safety standard, such as the FCC or ANSI. Instead, he generically claims among other things, that smart meters have not undergone any long term testing or environmental studies; create health problems by emitting radiofrequency; are prone to catch fire and explode; violate customer's privacy; and unduly create increased costs for consumers. See Attachment to Compl., Tab 6; Official Exceptions to the PUC's Initial Decision Sustaining Motion for Judgment on the Pleadings, Tab 7. He also asserts that there is no "federal mandate" for smart meter installation. Official Exceptions to the PUC's Initial Decision Sustaining Motion for Judgment on the Pleadings, Tab 7. Complainant, however, does not mention Act 129 in his Formal Complaint or Official Exceptions or explain how the lack of a "federal mandate" would preempt this Pennsylvania law.

Complainant also raises generic health concerns about smart meter technology as a whole. However, he has no medical training and has never engaged in a course of study or

performed any job responsibilities relating to radiofrequency or low frequency radiation. Complainant's Responses to Duquesne Light's First Set of Discovery Requests at ¶ 12, Tab 8; Complainant's Responses to Duquesne Light's Second Set of Discovery Requests at ¶ 15, Tab 9. Complainant produced some medical records during discovery that list various ailments, but none of these records state that the installation or operation of a smart meter at the Property will cause any harm or aggravate his existing medical conditions. He also keeps several other appliances in his home that emit radiofrequency, including a microwave, two phones, and a WiFi Router. Complainant's Responses to Duquesne Light's Second Set of Discovery Requests at ¶ 1, Tab 9. Complainant claims to suffer from hemochromatosis and alleges that his family has a history of heart problems. Complainant's Responses to Duquesne Light's Second Set of Discovery Requests at ¶ 26, Tab 9. He thus contends that "prolonged exposure to EMF [electromagnetic frequency] by a SM [smart meter] would be serious and could lead to premature death." Complainant's Responses to Duquesne Light's Second Set of Discovery Requests at ¶ 26, Tab 9.

Complainant also claims that smart meters in general are prone to explode and thus create a fire hazard (Complainant's Responses to Duquesne Light's First Set of Discovery Requests at ¶ 5, Tab 8), although he is admittedly unaware of any instance in which Duquesne Light's smart meter has ever caught fire or exploded. Complainant's Responses to Duquesne Light's Second Set of Discovery Requests at ¶ 10, Tab 9. He fails to identify any specific problem in the construction of Duquesne Light's smart meters and does not name any industry standards that Duquesne Light is allegedly violating. Complainant also has not obtained any expert witness to testify about the safety of Duquesne Light's smart meter or offered an expert report about that issue. Complainant himself is not a certified electrician and has never inspected, installed, or even witnessed the installation of a Duquesne Light smart meter. Complainant's Responses to Duquesne Light's Second Set of Discovery Requests at ¶¶ 4, 6, 8, 17, Tab 9.

Complainant also claims that smart meters in general violate customer's privacy because "due to their design and function . . . [they] have the ability to both send and receive signals via WiFi" and "any meter can be breached by a hacker . . . [because] a SM [smart meter] is in essence a computer." Complainant's Responses to Duquesne Light's Second Set of Discovery Requests at ¶¶ 12-13, Tab 9. He admittedly is unaware of any instance in which Duquesne Light's smart meters actually have been involved in a privacy, data, or security breach. Complainant's Responses to Duquesne Light's Second Set of Discovery Requests at ¶ 12, Tab 9. Complainant does not identify any specific industry standard that Duquesne Light's cybersecurity practices allegedly violate. He has not obtained an expert witness to testify about cybersecurity issues, nor has he produced any documents during discovery that even address Duquesne Light's cybersecurity policies. Complainant's Responses to Duquesne Light's Second Set of Discovery Requests at ¶ 13, Tab 9.

Finally, Complainant generically asserts in his Official Exceptions that smart meters create increased costs for consumers. Official Exceptions to the PUC's Initial Decision Sustaining Motion for Judgment on the Pleadings, Tab 7. He did not raise this issue in the Formal Complaint. Nonetheless, Complainant does not identify any specific charge that Duquesne Light is assessing that is not permitted by the Company's Tariff, the Code, or the applicable regulations. Complainant has not even received a smart meter yet, so he cannot claim that he has received any incorrect charges relating to Duquesne Light's smart meter.<sup>2</sup>

*Complainant Does Not Plan to Call Any Witnesses or Submit Any Documents Relating to Duquesne Light's Smart Meters at the Hearing*

Complainant plans to call no lay or expert witnesses at the hearing. Complainant's Responses to Duquesne Light's First Set of Discovery Requests at ¶¶ 8-9, Tab 8. He produced

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<sup>2</sup> The Commission has authorized Duquesne Light to impose a Smart Meter Charge to recover the costs associated with its smart meter system. The Smart Meter Charge appears on the bills of all Duquesne Light customers. Given that the Commission has already approved the Smart Meter Charge, Complainant cannot use this proceeding as a means to collaterally attack it.

no expert reports during discovery. Complainant's Responses to Duquesne Light's First Set of Discovery Requests at ¶ 10, Tab 8. He produced several articles and reports authored by other people about smart meter technology in general, but none of them identify any flaws in Duquesne Light's smart meters or the Company's smart meter program, let alone establish that they violate the Code.

### III. SUMMARY JUDGMENT STANDARD

The summary judgment process challenges the sufficiency of the evidence that the non-moving party has to support its claim. Scott Luellen v. Maroadi Transfer & Storage, Inc., C-2016-2539599, 2017 WL 876281, at \*5 (Pa. P.U.C. Feb. 6, 2017) (Haas, ALJ). It saves judicial resources by avoiding a hearing when no factual dispute exists. 66 Pa. C.S. § 703(a); Lehigh Valley Power Comm. v. Pa. Pub. Util. Comm'n., 563 A.2d 557, 564 (Pa. Cmwlth. 1989) (a hearing is necessary only to resolve disputed questions of fact and is not required to decide questions of law, policy, or discretion).

Under 52 Pa. Code § 5.102(c), the Commission must grant a motion for summary judgment if the applicable pleadings, depositions, answers to interrogatories and admissions, and affidavits show that there is no genuine issue as to a material fact and that the moving party is entitled to a judgment as a matter of law. Further, the Commission has interpreted its summary judgment rules in conformity with the Pennsylvania Rule of Civil Procedure 1035 (now Rule 1035.1). Centre Park Historic District, Inc. v. UGI Utilities, Inc. – Gas Div. City of Reading, Docket No. C-2015-2516051, 2017 WL 4119754, at \*4 (Pa. P.U.C. Aug. 28, 2017) (Long, ALJ). Under this rule, summary judgment should be granted if, after the completion of discovery, the evidentiary record (1) shows the material facts are undisputed, or (2) contains insufficient evidence of facts to make out a *prima facie* cause of action. Pa.R.C.P. 1035; McCarthy v. Dan Depore & Sons Co., Inc., 724 A.2d 938, 940 (Pa. Super. Ct. 1998).

#### IV. LAW & ARGUMENT

- A. *Complainant's claim that he is not required to receive a smart meter because there is no federal mandate for smart meter installation should be dismissed because Pennsylvania law requires Duquesne Light to install a smart meter at his property and, thus, the absence of a federal mandate is irrelevant.*

Complainant claims that Duquesne Light cannot install a smart meter at his property because "there is no federal mandate" authorizing the same. Official Exceptions to the PUC's Initial Decision Sustaining Motion for Judgment on the Pleadings, Tab 7. In other words, Complainant essentially argues that the absence of a federal law preempts Act 129, which the Pennsylvania legislature enacted in 2008 and specifically requires that electric distribution companies like Duquesne Light install smart meters throughout its service territory. This argument should be rejected as a matter of law.

Federal law preempts state law only where (1) compliance with both federal and state regulations is a physical impossibility, or (2) state law stands as an obstacle to the accomplishment and execution of the full purposes and grievance of Congress. Gade v. Nat'l. Solid Wastes Mgmt. Ass'n., 505 U.S. 88, 98 (1992). Here there is no actual, existing federal law at issue, let alone one that is inconsistent with Act 129, so preemption is not applicable. See McCarey v. PECO Energy Co., Docket No. C-2013-2354862, 2013 WL 5488631, at \*6 (Pa. P.U.C. Scpt. 26, 2013) (finding that no federal law restricts the deployment of smart meters under Pennsylvania law). Therefore, Complainant's claim that Duquesne Light cannot install a smart meter at his residence because there is no federal mandate has no merit.

- B. *Complainant's claim that Duquesne Light's installation of a smart meter will cause him to receive incorrect or overstated bills should be dismissed because he provides no evidence to support this claim.*

Next, Complainant claims that Duquesne Light cannot install a smart meter at his property because smart meters lead to incorrect or overstated bills. This argument also fails as a matter of law.

Complainant fails to present any evidence to support this allegation or identify any cost that Duquesne Light imposed in violation of the Code, a regulation, a tariff provision, or Commission order. In addition, he cannot possibly claim that Duquesne Light's smart meter has led to incorrect, higher charges for him personally because he has not even received a smart meter yet. Duquesne Light's billing practices have already been approved by the Commission, and Complainant will be billed in accordance with Duquesne Light's Smart Meter Plan and the Company's Tariff. Complainant's allegation regarding Duquesne Light's billing practices is generic and speculative. This claim should be dismissed.

- C. *Complainant's claim that the installation of a smart meter will violate his right to privacy should be dismissed because (1) he has presented no evidence to support this claim, and (2) he admits that he is unaware of any instance in which Duquesne Light's smart meters have experienced a data, privacy, or security breach.*

Complainant's claim that the installation of a smart meter will violate his right to privacy should be dismissed as well. Complainant has presented no evidence to support this allegation; has identified no regulation, industry standard, or best practice that Duquesne Light's cybersecurity protections violate; and has not identified any specific flaw in any particular part of Duquesne Light's cybersecurity practices. He has produced no expert reports on the subject and identified no lay or expert witnesses for the hearing to testify on this issue. Complainant's Responses to Duquesne Light's First Set of Discovery Requests at ¶¶ 8-10, Tab 8. In fact, Complainant admits that he is unaware of any privacy, data, or security breach to Duquesne

Light's customers caused by Duquesne Light's smart meter. Complainant's Responses to Duquesne Light's Second Set of Discovery Requests at ¶ 12, Tab 9.

Rather than presenting evidence to support this allegation, Complainant relies on his personal opinion that all smart meters are vulnerable to hacking and that Duquesne Light must be violating customers' privacy because it allows customers to access their usage data through an online portal. Complainant's Responses to Duquesne Light's Second Set of Discovery Requests at ¶¶ 12-13, Tab 9. Complainant's personal beliefs, however, are not evidence from which Complainant can satisfy his burden of proof. See PA Bureau of Corrections v. City of Pittsburgh, 532 A.2d 12, 14 (Pa. 1987) ("bald assertions, personal opinions, and perceptions" did not constitute evidence). As one Administrative Law Judge recently explained:

These assertions, regardless of how honest or strong, cannot form the basis of a finding in his favor. Assertions, personal opinions or perceptions do not constitute factual evidence. Even pro se complainants must provide relevant and necessary information. The Complainant in this case proceeded pro se by choice and bore the risk of doing so.

Matt Bernardini v. Penn. Electric Co., C-2017-2605686, 2017 WL 6508766, at \*6 (Pa. P.U.C. Nov. 7, 2017) (Salapa, ALJ) (internal citations omitted); see also, Tina Featherston v. Penn. Power Co., F-2016-2576019, 2017 WL 6508784, at \*8 (Pa. P.U.C. Nov. 7, 2017) (Calvelli, ALJ) ("Regardless of how earnestly Complainant believes the Complaint allegations to be true, personal opinions or perceptions do not constitute substantial evidence sufficient to permit him to sustain his burden of proof") (citing authority).

Further, Complainant cannot offer an expert opinion about Duquesne Light's data security measures because he does not qualify as an expert<sup>3</sup> and has produced no expert report.

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<sup>3</sup> Under Pennsylvania law, a person qualifies as an expert witness if, through education, occupation or practical experience, the witness has a reasonable pretension to specialized knowledge on the matter at issue. Ruzzi v. Butler Petroleum Co., 588 A.2d 1, 10 (Pa. 1991); Kursis v. Baldwin-Lima-Hamilton Corp., 319 A.2d 914, 924 (Pa. 1974). An expert witness may testify about in the form of an opinion about scientific or technical matters. Pa.R.E. 702. A lay witness, by contrast, cannot offer opinion testimony about scientific, technical, or other specialized knowledge. Pa.R.E. 701. Complainant has offered no

Given that Pennsylvania law requires Duquesne Light to install a smart meter at Complainant's property, he must do more than simply allege without offering proof that all smart meters are susceptible to hacking. He instead must point to something in particular about Duquesne Light's smart meter program that violates the Code or another legal provision. He has identified no legal or industry standard to demonstrate that there is something inadequate about how Duquesne Light protects customer data. In fact, the undisputed evidence shows that Duquesne Light's smart meter system uses advanced and open standard data encryption and authentication techniques to protect customer information that have been approved internationally by organizations like the National Institute of Standards and Technology and the National Security Agency. Duquesne Light's Responses to Complainant's First Set of Discovery Requests at ¶ 11, Tab 5. Again, Complainant has offered nothing to the contrary.

Simply put, Complainant distrusts smart meter technology and demands that Duquesne Light install a meter that cannot possibly be hacked. But if he had identified any evidence that Duquesne Light's smart meters may be hacked (which he has not), he still would not be entitled to this demand. Duquesne Light is not required to provide perfect service, which is an impossible standard to meet; rather, the Company must provide safe, adequate, and reasonable service. See Kremer v. PPL Elec. Utilities Corp., F-2016-2523765, 2016 WL 4162588, at \*3 (Pa. P.U.C. July 5, 2016) (Long, ALJ) (utility is not required to provide perfect service or the best possible service); Iro-Nwokeukwu v. Phila. Gas Works, C-2011-2247079, 2015 WL 1291552, at \*1 (Pa. P.U.C. Jan. 20, 2015) (Johnson, ALJ) (Section 1501 does not mandate perfect service nor must a public utility provide the best possible service). Complainant has produced no evidence suggesting that Duquesne Light's cybersecurity measures are not safe, adequate, and reasonable. Accordingly, this claim should be dismissed with prejudice.

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evidence suggesting that he possesses any educational, occupational, or practical experience about cybersecurity matters and thus does not have a reasonable pretension to specialized knowledge about Duquesne Light's data security measures.

- D. *Complainant's claim that smart meters are unsafe and will cause health problems should be dismissed because (1) he has presented no evidence to support this claim, and (2) it is undisputed that Duquesne Light's smart meters satisfy all applicable industry standards.*

Complainant's claim that Duquesne Light should not be permitted to install a smart meter at his property because smart meters may catch fire or explode and cause health problems by emitting harmful radiofrequency is speculative, unresponsive to documentary evidence or expert report, and should be dismissed.

Once again, Complainant has presented no evidence to support his allegations, other than his own personal opinion and a variety of internet articles and reports that do not even mention Duquesne Light's smart meters or its smart meter program. Complainant has identified no lay or expert witnesses to support these claims. He has not produced any expert reports. In fact, Complainant has produced no documents at all that identify any flaws in Duquesne Light's smart meters or smart meter program. Rather, the publications that he produced echo Complainant's general concerns about smart meter technology. The Pennsylvania legislature plainly rejected these types of arguments by choosing to enact Act 129. The Commission affirmed such rejection by approving Duquesne Light's smart meter plans, including as recently as 2016. The articles and reports produced by Complainant are irrelevant in evaluating whether Duquesne Light's smart meter program violates the Code because they have nothing to do with Duquesne Light.<sup>4</sup>

Further, the internet articles and reports produced by Complainant are textbook hearsay. See Larson v. PECO Energy Co., C-2014-2451754, 2015 WL 3763836, at \*1 (Pa. P.U.C. June

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<sup>4</sup> For example, Complainant produced a report from Dr. Andrew A. Marino during discovery to support his allegations. Complainant's Responses to Duquesne Light's First Set of Discovery Requests at ¶ 1, Tab 8. Dr. Marino's report, however, was prepared during litigation involving PECO Energy Company. It does not address Duquesne Light or explain how the Company's smart meter program violates the Code, its tariff, or another regulation. Furthermore, as noted earlier, Complainant has not identified Dr. Marino – or, indeed, anyone – as a witness in this proceeding. Complainant produced other similar reports during discovery that discuss smart meter technology in general but do not address Duquesne Light or its smart meter program.

11, 2015) (newspaper articles and website printouts are generally inadmissible at a hearing and, even if admitted, would be insufficient to support a finding of fact unless corroborated by competent evidence); Raintree Homes, Inc. v. Birkbeck, No. 2643 EDA 2011, 2013 WL 5234255, at \*11 (Pa. Super. Ct. Aug. 7, 2013) (internet articles are classic example of hearsay); Pa.R.E. 801(c) (hearsay is a statement that the declarant does not make while testifying at the current trial or hearing and that a party offers to prove the truth of the matter asserted in the statement). Hearsay cannot be used to sustain Complainant's burden of proof. Anderson v. Pa. Department of Public Welfare, 468 A.2d 1167, 1169 n.5 (Pa. Cmwlth. 1983); Larson, 2015 WL 3763836 at \*1; Karen Pace v. PECO Energy Co., Docket No. F-2016-2538084, 2016 WL 7336588, at \*8 (Pa. P.U.C. Nov. 16, 2016) (a finding of fact based solely on hearsay will not stand). So even if these articles were somehow relevant to Complainant's claims or beliefs, they could not sustain his burden of proof at the hearing.

Complainant also has offered no medical evidence to establish that his health would be negatively affected by the installation of Duquesne Light's smart meters at the Property. Complainant does not claim to be a doctor or medical professional. Instead, Complainant asserts that he is vulnerable to RF from Duquesne Light's smart meter because his family has a history of heart problems and he suffers from hemochromatosis. Complainant's Responses to Duquesne Light's Second Set of Discovery Requests at ¶ 26, Tab 9. Only a medical expert, however, can testify about whether someone with these conditions would worsen if Duquesne Light installed a smart meter at their property. See Cominsky v. Donovan, 846 A.2d 1256, 1259 (Pa. Super. Ct. 2004) (a lay witness may not testify about the existence or non-existence of a disease because such diagnosis requires medical training). Complainant is not a medical professional, so his claim that he is vulnerable to RF exposure is not admissible or competent evidence.

The few pages of medical records produced by Complainant during discovery also do not support his claim that the installation of a smart meter would harm him as they provide no

tangible connection between the conditions listed in the record and the smart meter. And even if they did, Complainant still would need to offer the testimony of a medical expert to substantiate his claims. To prove this claim, Complainant must prove some connection between the installation of the smart meter and his declining health. See, e.g., Paul v. PECO Energy Co., Docket No. C-2015-2475355, 2017 WL 2861405 (Pa. P.U.C. June 19, 2017) (Heep, ALJ) (denying complaint where "there was no showing that the concerns that [Complainant and her expert] have about Smart Meters in general pertain to the Smart Meters utilized by PECO in particular."); Ottaviano v. PECO Energy Co., F-2016-2542081, 2018 WL 937069, at \*11 (Pa. P.U.C. Jan. 17, 2018) (Heep, ALJ) (denying health effects claim where complainant was concerned about that smart meters would cause health problems based on articles he read but offered no evidence in support of his belief).<sup>5</sup>

The medical records that Complainant produced in discovery do not support that contention. Rather, they merely show that Complainant suffers from certain ailments, as do most people in the community. Complainant has not produced any evidence, other than his own opinion, to show that those medical conditions would be aggravated by the installation of a smart meter at the Property. As a result, the medical records produced by Complainant do not support his allegations that the installation of a smart meter at the Property by Duquesne Light would harm his health.

In fact, contrary to Complainant's allegations, the undisputed evidence actually establishes that Duquesne Light's smart meters comply with all applicable health and safety standards. Duquesne Light's smart meters comply with FCC limits for the general public at frequencies of smart meter transmissions (900M Hz and 2.4 GHz). Affidavit of Benjamin Cotts, PhD., P.E. in Support of Motion for Summary Judgment at ¶ 8, Tab 4. They also comply with

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<sup>5</sup> Unlike this case, the respondents in Paul and Ottaviano did not move for summary judgment. The Commission thus did not have the opportunity to address whether those cases should have been dismissed at the summary judgment stage.

standards set by the Institute of Electrical and Electronics Engineers (IEEE) and the International Commission on Non-Ionizing Radiation Protection (ICNIRP). Affidavit of Benjamin Cotts, PhD., P.E. in Support of Motion for Summary Judgment at ¶¶ 8-9, Tab 4.

In fact, when the average duty cycle of 0.06 percent for a typical Duquesne Light smart meter is applied, the RF exposure for the 900 MHz LAN radio (which is the higher-power radio of the two that are in Duquesne Light's smart meters) at 1 yard directly in front of the smart meter outside is just 0.0029% of the FCC limit; at one yard behind the smart meter, RF exposure for the 900 MHz LAN radio is just 0.00013% of the FCC limit. Affidavit of Benjamin Cotts, PhD., P.E. in Support of Motion for Summary Judgment at ¶ 11, Tab 4.

Even if Duquesne Light's smart meters transmitted all day long (i.e. a 100% duty cycle) – which they cannot do – the 900 MHz LAN radio on the meters still would only constitute 38% of the FCC limit; the 2.4 GHz Zigbee radio would amount to only 3.1% of the FCC limit. Affidavit of Benjamin Cotts, PhD., P.E. in Support of Motion for Summary Judgment at ¶ 10, Tab 4. Unsurprisingly, the Commission has already held that it is reasonable to install smart meters that comply with the FCC limits. Laura Sunstein Murphy v. PECO Energy Company, C-2015-2475726, 2018 WL 1745254, at \*21 (Pa. P.U.C. Feb. 21, 2018) (Heep, ALJ).<sup>6</sup>

In short, even after discovery, Complainant has not produced any actual evidence that he has a condition that would be exacerbated by the installation of a Duquesne Light smart meter. As such, his health effects claims fall as a matter of law. See, e.g., Paul, 2017 WL

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<sup>6</sup> The Commission has repeatedly held that a complainant cannot meet his or her burden of proof simply by proclaiming that a smart meter emits unsafe amounts of RF without refuting evidence that the meter's RF emissions comply with FCC safety standards. See, e.g., Frompovich v. PECO Energy Co., Docket No. C-2015-2474602, 2017 WL 2406620, at \*10-14 (Pa. P.U.C. May 11, 2017) (dismissing Formal Complaint, in part, because complainant offered no evidence other than her opinion to refute the utility's expert testimony, which established that RF emissions from its smart meters complied with FCC exposure limits.); Ottaviano, 2018 WL 937069 at \*9-10 (dismissing Formal Complaint because, among other reasons, the complainant presented no evidence to refute expert testimony showing that RF exposure from the utility's smart meters was well below FCC limits). While the Frompovich and Ottaviano cases went to hearing, the respondent did not move for summary judgment in those cases. Therefore, while inapposite to this case's procedural posture, the ultimate holdings of those cases -- both of which were affirmed by the Commission -- support the dismissal of Complainant's Formal Complaint.

2861405 (Pa. P.U.C. June 19, 2017) (Heep, ALJ) (denying complaint where "there was no showing that the concerns that [Complainant and her expert] have about Smart Meters in general pertain to the Smart Meters utilized by PECO in particular."); Ottaviano, 2018 WL 937069, at \*11 (denying health effects claim where complainant was concerned that smart meters would cause health problems based on articles he read but offered no evidence in support of his belief). Those decisions demonstrate that a hearing here would be fruitless since Complainant has no medical evidence he could offer at a hearing from which he could sustain his burden of proof.

Complainant also claims that Duquesne Light's smart meters are unsafe because they allegedly are prone to catch fire or explode. The Presiding Administrative Law Judge should reject this argument as well. Complainant has produced no evidence to support this claim. He has produced no documentary evidence that addresses Duquesne Light's smart meters. He has identified no lay or expert witnesses to testify about this issue. In fact, even Complainant admits that Duquesne Light's smart meters have never caught on fire; he just claims that "a number of SM [smart meters] basically all around the Globe have spontaneously caught on fire." Complainant's Responses to Duquesne Light's Second Set of Discovery Requests at ¶ 10, Tab 9.

This case is about whether Duquesne Light's smart meters or its smart meter programs violate the Code or another law; it is not a referendum on smart meter technology in general or whether another company's smart meters are inadequate. By failing to present any evidence to support his claims about the safety of Duquesne Light's smart meters, Complainant has failed to present establish any factual dispute that would require a hearing.

E. *Complainant's personal belief that smart meters are unsafe does not constitute evidence from which he can sustain his burden of proof.*

Complainant argues throughout the pleadings and discovery about the alleged dangers that he believes come with the use of smart meters. But those beliefs, and Complainant's arguments that flow from them, are not evidence from which he can carry his burden of proof. This hearing is not an appropriate forum to litigate Complainant's personal beliefs about the safety of smart meter technology in general or other companies' practices.

As an initial matter, Complainant has no professional experience relating to smart meters or radio frequency or low frequency radiation and has never performed work or been employed in the scientific or medical fields (see Response to Respondent's First Set of Discovery Requests at ¶ 13, Tab 8); Response to Respondent's Second Set of Discovery Requests at ¶ 15, Tab 9), and his personal opinion about the supposed dangers of smart meters do not constitute evidence under Pennsylvania law and Commission precedent. See PA Bureau of Corrections, 532 A.2d at 14 ("bald assertions, personal opinions, and perceptions" did not constitute evidence).

It should also be noted that Complainant cannot offer expert opinions in his own right because he does not qualify as an expert, has produced no expert report, and even if his discovery responses or prior pleadings were considered to be expert reports (and they should not be), as explained above, Complainant does not identify anything about Duquesne Light's smart meter program that violates the Code.

For example, the support Complainant offers for his argument that Duquesne Light's smart meters will endanger his health is that all smart meters use "pulsed radiation" and an AC/DC circuit to produce high voltage transient currents that cause allegedly harmful radiofrequency radiation. Attachment to Complaint, Tab 6; Response to Respondent's Second Set of Discovery Requests at ¶ 17, Tab 9. But that is merely a description of how smart meters work. In other words, Complainant makes the circular argument that Duquesne Light's smart

meters are unsafe because they operate like a smart meter. But since installing a smart meter is not a violation of the Code, Complainant must prove more than that; he must prove that there is something about Duquesne Light's smart meter program in particular that violates the Code. Complainant, however, identified no legal or industry standard that there is something inadequate or unsafe about the manner in which Duquesne Light's smart meters operate.

Although Complainant's concerns about smart meter technology may be heartfelt, a party cannot evade summary judgment with speculation, regardless of how sincerely or strongly such beliefs are held. See InfoSAGE, Inc. v. Mellon Ventures, L.P., 896 A.2d 616, 639 (Pa. Super. Ct. 2006) (affirming grant of summary judgment because evidence adduced by plaintiff to support claims was based on speculation and conjecture); Fisher v. Sexauer, 53 A.3d 771, 779-80 (Pa. Super. Ct. 2012) (affirming grant of summary judgment because plaintiff's claims relied on speculation and guesswork). Personal perceptions and beliefs are not evidence that Duquesne Light violated the Code, a Commission regulation, or the Company's tariff. Complainant failed to produce any evidence to support his claims, even though Duquesne Light repeatedly requested during discovery that Complainant produce evidence demonstrating that the Company's smart meters violate some applicable law, regulation, or safety standard. He produced no such evidence and failed to challenge other evidence showing that Duquesne Light's smart meters are safe.

*F. The Commonwealth Court's Romeo decision does not allow Complainant to evade summary judgment where he marshaled no evidence in support of his claims.*

Finally, it bears noting that the Commonwealth Court's decision in Romeo v. Pa. Public Util. Comm'n, 154 A.3d 422 (Pa. Commw. Ct. 2017) does not allow Complainant to survive summary judgment where he garnered no evidence in discovery to support his claims. In Romeo, the Commonwealth Court simply held that a complaint could survive the pleadings stage if the complainant alleged that the installation of a smart meter at their property could

harm because the complainants could conceivably marshal evidence in discovery to carry their burden of proof. Here, however, the parties engaged in extensive discovery but Complainant failed to produce any evidence suggesting that Duquesne Light violated the Code, a Commission Order or Regulation, or its tariff.

Romeo did not relieve Complainant of his obligation to obtain the evidence necessary to carry his burden of proof, it did not create an opt out provision in Act 129, nor did it reverse well-established Commission precedent that a hearing is not required where it would be fruitless. See, e.g., 66 Pa. C.S. § 703(b) (the Commission "may dismiss any complaint without a hearing if, in its opinion, a hearing is not necessary in the public interest"); Kish v. West Penn Power Co., Docket No. F-2017-2619183, 2017 WL 6018113 (Pa. P.U.C. Nov. 7, 2017) (Cheskis, ALJ) (granting respondent's dispositive motion where there was "no genuine issue as to a material fact and [the respondent] is entitled to judgment as a matter of law because a hearing would be a fruitless exercise since the record shows no facts are at issue and the law is clear"). Since the law is clear that Complainant cannot prevail absent evidence that Duquesne Light violated the Code, an associated regulation, or a tariff provision, and Complainant has offered no such evidence despite being challenged to do so in discovery, this case is appropriately dismissed at summary judgment.

## **V. CONCLUSION**

A complainant cannot survive summary judgment and proceed to a hearing merely by objecting to smart meter technology in general. Instead, they must produce actual evidence through the discovery process to, at a minimum, create a *prima facie* case that the utility has violated the Code or another law.

Complainant simply has not done that here. He has not offered any evidence to support his claims. Rather, he relies on his personal opinion and an assortment of internet articles and reports that do not identify any flaws in Duquesne Light's smart meters or smart meter plan and

constitute hearsay. Complainant's personal opinions and internet articles about smart meter technology in general is just not enough to meet his burden of proof. Thus, the Formal Complaint should be dismissed with prejudice. Alternatively, if the Motion for Summary Judgment is not granted in full, Duquesne Light respectfully requests that the Presiding Administrative Law Judge grant the Company's Motion for Summary Judgment and dismiss all parts of Complainant's claims found to be legally deficient so that the hearing is properly narrowed to the actual disputed issues (of which Duquesne Light submits there are none, thus making full dismissal appropriate).

Respectfully submitted,

TUCKER ARENSBERG, P.C.



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**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

NORBERT SLIWINSKI	:	
	:	
Complainant,	:	
vs.	:	No: C-2016-2559985
	:	
DUQUESNE LIGHT COMPANY,	:	
	:	
Respondent.	:	

**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served a true copy of the foregoing Brief in Support of Motion for Summary Judgment and accompanying Appendix to Brief upon the participant listed below in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant):

Norbert Sliwinski  
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Administrative Law Judge Jeffrey Watson  
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Dated this 15<sup>th</sup> day of October, 2018

  
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