

Tori L. Giesler, Esq.
(610) 921-6658
(330) 315-9263 (Fax)

September 30, 2019

VIA ELECTRONIC FILING

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor
Harrisburg, PA 17120

Re: Jan and Jack Milburn v. West Penn Power Company
Docket No. C-2018-3002756

Dear Secretary Chiavetta:

Attached please find the Main Brief on behalf of West Penn Power Company regarding the above-referenced matter. This document has been served on the all parties as shown in the Certificate of Service.

Please contact me if you have any questions.

Very truly yours,



Tori L. Giesler

Enclosures

c: As Per Certificate of Service

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

JAN AND JACK MILBURN

v.

WEST PENN POWER COMPANY

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DOCKET NO. C-2018-3002756

**MAIN BRIEF
ON BEHALF OF
WEST PENN POWER COMPANY**

Tori L. Giesler, Attorney No. 207742
Lauren M. Lepkoski, Attorney No. 94800
2800 Pottsville Pike
P.O. Box 16001
Reading, Pennsylvania 19612-6001

Counsel for West Penn Power Company

Dated: September 30, 2019

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I. PROCEDURAL HISTORY

On or about June 14, 2018, Jan and Jack Milburn (“Complainants”) filed a Formal Complaint with the Pennsylvania Public Utility Commission (“Commission”) to dispute the installation of a smart meter by West Penn Power Company (“West Penn” or “Company”) at 114 Mountain Road, Ligonier, Pennsylvania 15658 (“Service Location”).

On July 5, 2018, the Company filed its Answer denying the material allegations within the Formal Complaint, as well as submitting Preliminary Objections.

On August 22, 2018, a Motion Judge Assignment Notice was issued assigning Administrative Law Judge (“ALJ”) Jeffrey A. Watson as the Presiding Officer in this proceeding.

On August 30, 2018, ALJ Watson issued a Preliminary Order denying the Company’s Preliminary Objections.

On October 16, 2018, ALJ Watson issued an Interim Order Establishing Procedural Schedule.

On May 3, 2019, an Interim Order Scheduling Prehearing Conference was issued scheduling a prehearing conference for June 18, 2019.

On June 18, 2019, the Company and Complainants attended the scheduled prehearing conference.

On June 19, 2019, an Interim Order Confirming Requirements for Evidentiary Hearing was issued requiring the Company and Complainants to provide their proposed exhibits and other documentary materials for hearing by no later than July 10, 2019 and scheduling an evidentiary hearing for July 16, 2019.

On July 16, 2019, an evidentiary hearing was held in this matter. The Complainants presented their case through their own testimony only. The Complainants presented no

documentary evidence. West Penn presented its case through the testimony of Mr. John Ahr. Additionally, the Company introduced Exhibits PD-1, PD-2, PD-3, PD-4, PD-5, JCA-1, JCA-2, and JCA-3 Private.

On July 23, 2019, an Interim Order Setting Briefing Schedule was issued requiring the parties to submit any briefs in this matter on or before September 30, 2019. West Penn hereby submits its Main Brief in accordance with the Interim Order Setting Briefing Schedule.

II. LEGAL STANDARDS

Under Section 332(a) of the Public Utility Code, the Complainants maintain the burden of proof in this proceeding.¹ The first step in carrying the burden of proof is establishing a *prima facie* case that West Penn violated the Public Utility Code, the Commission's regulations, or a Commission order. Only if the Complainants establish a *prima facie* case does it become the responsibility of the respondent to provide rebuttal evidence.² In order to establish a *prima facie* case, more is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established.³ Mere bald assertions, personal opinions or perceptions, when not substantiated by facts, do not constitute evidence.⁴

Although the factual burden may shift during the course of a proceeding, the Complainants always maintain the overarching burden of proof in the proceeding. It is clearly established that the Complainants' "burden of proof before administrative tribunals as well as before most civil proceedings is satisfied by establishing a preponderance of the evidence."⁵ A preponderance of

¹ 66 Pa.C.S. § 332(a); *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm'n*, 578 A.2d 600 (Pa. Commw. 1990), alloc. den., 602 A.2d 863 (Pa. 1992).

² *Waldron v. Phila. Elec. Co.*, 54 Pa. P.U.C. 98 (Order entered Mar. 14, 1980).

³ *Norfolk and Western Ry. v. Pa. Pub. Util. Comm'n*, 413 A.2d 1037 (Pa. 1980).

⁴ *Pa. Bureau of Corrections v. City of Pittsburgh*, 532 A.2d 12 (Pa. 1987).

⁵ *Lansberry*, 578 A.2d at 602.

evidence is demonstrated where the evidence presented is more convincing, even by the smallest degree, than the evidence presented by the opposing party.⁶

In order for the Commission to sustain a formal complaint, the Complainants must demonstrate that an “act or thing done or omitted to be done by any public utility [is] in violation, or claimed violation, of any law which the Commission has jurisdiction to administer, or of any regulation or order of the commission.”⁷ Section 1501 of the Public Utility Code states, in relevant part: “every public utility shall furnish and maintain adequate, efficient, safe and reasonable service and facilities....”⁸ As part of formal complaint proceedings, the Commission evaluates the reasonableness of public utility service and facilities pursuant to Section 1501. In complaint proceedings similar to the instant proceeding, the Commission has held that the relevant legal standard is whether the installation of a smart meter constitutes unsafe or unreasonable service in violation of Section 1501 of the Public Utility Code.⁹

III. SUMMARY OF ARGUMENT

The Complainants have wholly failed to meet their burden of proof to demonstrate that the installation of a smart meter at their Service Location would constitute unreasonable service in violation of Section 1501 of the Public Utility Code or would otherwise violate the Public Utility Code, a Commission regulation or order.

West Penn has an absolute obligation to install smart meters at all of its customers’ service locations under Act 129 of 2008 (“Act 129”).¹⁰ Neither Act 129 nor subsequent Commission

⁶ *Pa. Pub. Util. Comm’n v. HIKO Energy, LLC*, 2015 Pa. PUC LEXIS 364 (I.D. entered Aug. 21, 2015), *supra*.

⁷ 66 Pa.C.S. § 701.

⁸ 66 Pa.C.S. § 1501.

⁹ *Frompovich v. PECO Energy Co.*, Docket No. C-2015-2474602 (Opinion and Order entered May 3, 2018) (“Frompovich Order”); *Susan Kreider v. PECO Energy Co.*, Docket No. C-2015-2469655 (Order on Reconsideration entered January 28, 2016).

¹⁰ 66 Pa.C.S. § 2806.1, *et seq.*

orders related to smart meter installation and deployment permit customers to “opt-out” from smart meter installation.¹¹ Further, both Act 129 and the Commission’s Implementation Order require that electric distribution companies (“EDCs”) install wireless smart meters with specific functionality. West Penn’s smart meters adhere to all of the requirements of Act 129 and the Commission. The smart meter components and deployment of smart meters in the West Penn territory were identified in the Company’s Smart Meter Deployment Plan, which was ultimately approved by the Commission on June 5, 2014.¹² West Penn must install a smart meter at the Complainants’ Service Location in order to remain in compliance with Act 129, related Commission orders, and its Smart Meter Deployment Plan.

The Complainants acknowledge that Act 129 does not allow customers to opt out of the installation of a smart meter.¹³ But they argue that Act 129 should not apply to their situation because they should be granted an accommodation under the Americans with Disabilities Act.¹⁴ This argument is misplaced. The Commission has affirmed that “it is beyond the jurisdiction of [the] Commission to determine whether [a] Complainant has a disability or a cause of action under the Americans with Disabilities Act.”¹⁵

In addition, the Complainants have failed to establish that the installation of a smart meter constitutes unreasonable service. At hearing, the Complainants failed to present any evidence supporting their assertions about the safety of smart meters or the impact that a smart meter will have on their privacy. Indeed, the evidence presented by the Company at hearing demonstrates

¹¹ *Id.*; see *Smart Meter Procurement and Installation*, Docket No. M-2009-2092655 (Order entered June 24, 2009) (“Implementation Order”).

¹² *Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company For Approval of Their Smart Meter Deployment Plan*, Docket Nos. M-2013-2341990, M-2013-2341991, M-2013-2341993, and M-2013-2341994 (Opinion and Order dated June 5, 2014) (hereinafter, “Smart Meter Deployment Plan”); see Exhibit PD-4.

¹³ Tr. 101:14-19; 112:11-14.

¹⁴ Tr. 101:21-102:2.

¹⁵ Frompovich Order at 43.

that the smart meters being installed by West Penn are safe and that the Company has appropriate procedures in place, which have been approved by the Commission, to protect customers' information.

Moreover, the lay testimony offered by the Complainants should carry little weight. Although the Pennsylvania Rules of Evidence are not strictly adhered to at the Commission, the Pennsylvania Supreme Court has unequivocally stated that any relaxation of the rules of evidence in administrative settings cannot allow lay witnesses to testify to technical matters "without personal knowledge or specialized training."¹⁶ Lay witness testimony only carries evidentiary weight where the witness has actually perceived the situation, and the opinion is not based on scientific, technical or specialized knowledge.¹⁷ In this case, none of the testimony offered by the Complainants was based on their own experience or personal knowledge related to smart meters. In fact, because a smart meter has yet to be installed at their Service Location, the Complainants have no personal knowledge or experience of relevance here. As such, all lay testimony from the Complainants related to more specialized topics, including privacy and the health impact of smart meters, should be disregarded and given no evidentiary weight under the Pennsylvania Rules of Evidence.

In sum, the Complainants failed to establish by a preponderance of the evidence that West Penn violated a Commission statute, regulation, or order. Specifically, the Complainants have not met their burden of proof to establish that the installation of a smart meter constitutes unreasonable service by the Company. Accordingly, West Penn urges the Commission to dismiss the Complaint with prejudice.

¹⁶ *Gibson v. W.C.A.B.*, 861 A.2d 938, 947 (Pa. 2004) (holding Rules of Evidence 602, 701 and 702 generally applicable in agency proceedings).

¹⁷ Pa.R.E. 701.

IV. ARGUMENT

A. **The Complainants failed to meet their burden of proof that West Penn violated the Public Utility Code, a Commission Order, or a Commission regulation.**

1. **The Installation of Smart Meters is Required by Law.**

Under Act 129, West Penn has an absolute obligation to install smart meters at all of its customers' service locations. Neither Act 129 nor subsequent Commission orders related to smart meter installation and deployment permit customers to "opt-out" from smart meter installation. West Penn's Smart Meter Deployment Plan, approved by the Commission, explicitly states that no opt-out option is available.¹⁸ The Complainants acknowledged as much at hearing when they indicated that they understood that Act 129 does not allow customers to opt-out of smart meter installation.¹⁹

On October 15, 2008, Act 129 was signed into law and codified as part of the Public Utility Code ("Code").²⁰ Act 129 required EDCs with at least 100,000 customers, such as West Penn, to file a smart meter technology procurement and installation plan ("SMIP Plan") with the Commission for approval.²¹ Specifically, Section 2807(f)(2) of the Code directed EDCs to furnish smart meter technology as follows: 1) upon request from a customer that agrees to pay the cost of the smart meter at the time of the request; 2) in new building construction; and 3) in accordance with a depreciation schedule not to exceed fifteen years.²²

On December 31, 2012, West Penn, along with FirstEnergy Corp.'s other EDCs in Pennsylvania (collectively, the "Companies"), filed their Joint Petition for Approval of their Smart Meter Deployment Plan, in which they requested that the Commission: (1) find that their proposed

¹⁸ Exhibit JCA-1, p. 9.

¹⁹ Tr. 101:14-19; 112:11-14

²⁰ 66 Pa.C.S. § 101, *et seq.*

²¹ 66 Pa.C.S. § 2807(f); *see* Exhibit PD-1.

²² 66 Pa.C.S. § 2807(f)(2).

Deployment Plan satisfies the requirements of Act 129 and the Commission's Implementation Order;²³ (2) approve the Companies' proposed procurement and deployment of approximately 2.1 million smart meters, over 98% of which should be installed by the end of 2019; (3) authorize the Companies to continue to recover smart meter costs; and (4) authorize the Companies to create a regulatory asset for their investment in their existing meters to be replaced by smart meters.²⁴ On March 19, 2014, the Companies submitted their revised Smart Meter Deployment Plan, which *intra alia* accelerated the smart meter deployment schedule laid out in their original Deployment Plan and was ultimately approved by the Commission on June 5, 2014.²⁵

In this proceeding, the Complainants' primary legal argument is that they should be allowed to opt-out of having a smart meter installed as an accommodation under the Americans with Disabilities Act.²⁶ They acknowledge that Act 129 does not have an opt-out provision for customers, but argue that Act 129 (or West Penn by acting in accordance with Act 129) violates the Americans with Disabilities Act by not allowing customers with disabilities to opt-out of smart meter installation.²⁷ As the Commission has affirmed, however, "it is beyond the jurisdiction of [the] Commission to determine whether [a] Complainant has a disability or a cause of action under the Americans with Disabilities Act."²⁸ Accordingly, Complainants' argument is outside the scope of this proceeding and must be rejected.

²³ See Exhibit PD-2.

²⁴ *Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company For Approval of Their Smart Meter Deployment Plan*, Docket Nos. M-2013-2341990, M-2013-2341991, M-2013-2341993, M-2013-2341994, Smart Meter Deployment Plan, filed December 31, 2012.

²⁵ See Exhibits PD-4 and JCA-1.

²⁶ Tr. 101:21-102:2.

²⁷ See Tr. 44:21-25.

²⁸ Frompovich Order at 43.

The Complainants also argue that the Commission’s approval of the Company’s Smart Meter Deployment Plan violated their due process rights because they did not receive the required notice of the filing.²⁹ To begin, the Complainants provide no legal basis for this conclusion. As Mr. Ahr explained, there were public notices and opportunities for public comment related to smart meter deployment in Pennsylvania.³⁰ Prior to the Implementation Order being issued, public comments were permitted on the open docket in that proceeding.³¹ West Penn’s SMIP Plan filed in response to the Implementation Order was also published on the Company’s website and in the Pennsylvania Bulletin providing public notice.³² The Complainants’ assertion that they did not receive notice or have an opportunity to provide comment is unsupported and without merit.

Commission precedent is uniform that the Commission cannot grant exceptions to the statutory directive that smart meters be installed by allowing customers to “opt-out.”³³ Neither the Company’s Commission-approved Smart Meter Deployment Plan nor Act 129 permit such opt-outs to occur.³⁴ The Commission has recently reaffirmed this conclusion, holding in a similar complaint proceeding that (1) there is no provision in the Code, Commission regulations or Orders that allows a customer to “opt-out” of a smart meter installation; (2) there is Commission precedent that no opt-out provision exists in current Pennsylvania law; and (3) the EDC is legally required to install smart meters by Act 129 and Commission Orders.³⁵

Put simply, there is no dispute in this proceeding that Act 129 does not provide for customers to opt-out of smart meter installation. Further, there is no basis to conclude that West

²⁹ Tr. 12:24-13:8.

³⁰ Tr. 135:18-137:13.

³¹ Tr. 135:18-22.

³² Tr. 136:2-137:13.

³³ See, e.g., *Lutherschmidt v. Metro. Edison Co.*, Docket No. C-2010 2200353 (Final Order entered March 25, 2011); *Negley v. Metro. Edison Co.*, Docket No. C-2010-2205305 (Initial Decision dated January 3, 2011 became final without Commission action on March 3, 2011).

³⁴ JCA-1, pp. 9 and 47; 66 Pa.C.S. § 2807(f); see Exhibit PD-1.

³⁵ *Hoffman-Lorah v. PPL Elec. Util. Corp.*, Docket No. C-2018-2644957 (Order entered May 23, 2019).

Penn's refusal to allow the Complainants to opt-out of smart meter installation is in any way a violation of the Company's Smart Meter Deployment Plan or other Commission order. As such, Complainants' argument must fail.

2. The Installation of a Smart Meter Does Not Constitute Unreasonable or Inadequate Service.

Although the Complainants raised a few health and privacy concerns related to smart meters, they failed to provide any reliable evidence in support of their allegations. By contrast, West Penn offered extensive testimony to rebut the Complainants' unsubstantiated allegations. The Complainants failed to establish even a bare minimum of their burden of proof to show that the deployment of smart meters is unreasonable or constitutes inadequate utility service.

Pursuant to Section 1501 of the Code, public utilities have a duty to maintain safe, adequate and reasonable service and facilities and to make repairs, changes, and improvements that are necessary or proper for the accommodation, convenience, and safety of its patrons, employees, and the public. Section 1501 of the Code provides, in pertinent part:

§ 1501. Character of service and facilities

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.³⁶

The Complainants failed to demonstrate that the installation of a smart meter at their residence would constitute unreasonable or inadequate service under Section 1501.

³⁶ 66 Pa.C.S. § 1501.

At hearing, the Complainants presented little to no evidence supporting their general concerns that smart meters may have harmful health impacts.³⁷ While Ms. Milburn testified that she believed the information relied on to justify the smart meter program was out of date,³⁸ there is no record evidence supporting this claim. There is similarly no record evidence supporting her claim that public health standards have not been considered.

The Complainants also raised concerns related to a smart meter's ability to communicate with appliances and indicated that they considered that to be an invasion of privacy.³⁹ Company witness Ahr responded to the Complainant's concerns about privacy, testifying that the only information that is accessible to the Company through a smart meter is the customer's electricity use and how it increases or decreases over the course of a day.⁴⁰ He further noted that smart meters do not provide the Company with information about what appliances are being used or what is consuming electricity within the home, but only communicate total electric usage.⁴¹

The Company also presented its Commission-approved Privacy Policy.⁴² The Company's Privacy Policy explains the type of customer information that can be transmitted through smart meters and addresses the security protocols in place to protect against unauthorized access to a customer's usage information.⁴³ The Policy states that West Penn will not share sensitive customer information, including the customer's name, address, usage levels, Social Security number, driver's license number, employer identification number, date of birth, credit card number, passport number, or bank account number with third parties without the customer's consent.⁴⁴ The

³⁷ See Tr. 70:8-10.

³⁸ Tr. 30:21-22.

³⁹ Tr. 71:4-8.

⁴⁰ Tr. 145:5-16.

⁴¹ Tr. 141:6-9; 145:17-23.

⁴² Exhibit JCA-2.

⁴³ *Id.*

⁴⁴ See *id.* at 2-3; Tr. 146:9-149:1.

Privacy Policy explains the security protections in place when a customer's usage data is transmitted across the smart meter network. The smart meter network includes several security protections to prevent against the unauthorized access of a customer's usage data including encryption, firewalls, password protection and continuous security monitoring.⁴⁵

In sum, the Complainants have failed to meet their burden to demonstrate that the installation of a smart meter constitutes unreasonable or inadequate service. While the Complainants raised general concerns about the health and privacy impacts of smart meters, these claims were not supported by record evidence. As such, there is no record basis to conclude that West Penn's installation of smart meters is in violation of Section 1501 of the Code and the Complainants' claims must be dismissed accordingly.

3. All hearsay and lay health and safety testimony was properly objected to and excluded and may not be relied upon in this matter.

During the hearing, Ms. Milburn attempted to offer testimony related to health and privacy issues without any expert credentials on these issues.⁴⁶ As a lay witness, Ms. Milburn was not qualified to testify or offer exhibits related to any issues outside of her direct personal knowledge. Yet, Ms. Milburn attempted on numerous occasions to provide testimony regarding the information contained in reports and other sources.⁴⁷ Notably, none of these sources were presented by Complainants at hearing. Ms. Milburn's testimony on these items was objected to as appropriate and not admitted into the record.⁴⁸

⁴⁵ Tr. 148:8-16; Exhibit JCA-2 at 3-4.

⁴⁶ See Tr. 70:8-71:13.

⁴⁷ Tr. 71:14-95-14.

⁴⁸ See *id.*

According to Pennsylvania Rule of Evidence 701, a lay witness is limited to giving opinion testimony that is rationally based on the witness's own perceptions. Specifically, Rule 701 provides as follows:

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is: (a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.⁴⁹

Although the Pennsylvania Rules of Evidence are not strictly adhered to at the Commission, the Pennsylvania Supreme Court has unequivocally stated that any relaxation of the rules of evidence in administrative settings cannot allow lay witnesses to testify to technical matters “without personal knowledge or specialized training.”⁵⁰ Lay witness testimony only carries evidentiary weight where the witness has actually perceived the situation, and the opinion is not based on scientific, technical or specialized knowledge.⁵¹ In this case, the bulk of the Complainants’ testimony related to issues outside the scope of their personal knowledge and was based on hearsay.⁵² All such testimony was properly excluded upon objection. To the extent such testimony was not objected to, such testimony should carry insignificant weight that cannot support the Complainants’ burden of proof in this proceeding.

West Penn presented extensive expert testimony in support of its position that its smart meter deployment is safe, reasonable and adequate.⁵³ The Complainants, on the other hand, failed to present any credible or relevant evidence to support their allegations that smart meter

⁴⁹ Pa.R.E. 701.

⁵⁰ *Gibson v. W.C.A.B.*, 861 A.2d 938, 947 (Pa. 2004) (holding Rules of Evidence 602, 701 and 702 generally applicable in agency proceedings).

⁵¹ Pa.R.E. 701.

⁵² In fact, because a smart meter has yet to be installed at their Service Location, the Complainants have no personal knowledge or experience of relevance here.

⁵³ Tr. 122:7-161:4.

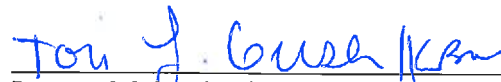
deployment is unsafe or violates Section 1501 of the Public Utility Code. In view of the Complainants' failure to support their position with record evidence, much less fulfill their burden of proof, the Complaint should be denied and dismissed with prejudice.

V. **CONCLUSION**

WHEREFORE, West Penn Power Company respectfully requests that Administrative Law Judge Jeffrey Watson recommend that the Pennsylvania Public Utility Commission dismiss the Formal Complaint of Jan and Jack Milburn with prejudice.

Respectfully submitted,

Dated: September 30, 2019



Lauren M. Lepkoski

Attorney No. 94800

Tori L. Giesler

Attorney No. 207742

FirstEnergy Service Company

2800 Pottsville Pike

P.O. Box 16001

Reading, Pennsylvania 19612-6001

(610) 921-6203

(610) 921-6658

llepkoski@firstenergycorp.com

tgiesler@firstenergycorp.com

Counsel for West Penn Power Company

APPENDIX A

PROPOSED FINDINGS OF FACT

1. Act 129 of 2008 required electric distribution companies with more than 100,000 customers to adopt smart meter technology procurement and installation plans.⁵⁴
2. Act 129 provides a list of required smart meter functionality.⁵⁵
3. West Penn's Smart Meter Technology Procurement and Installation Plan was approved by the Commission on June 30, 2011.⁵⁶
4. The Commission determined that West Penn's Smart Meter Deployment Plan was compliant with Act 129 and ultimately approved the smart meter deployment plan on June 5, 2014.⁵⁷
5. The Smart Meter Deployment Plan identifies Itron as West Penn's smart meter vendor and network provider.⁵⁸
6. The Smart Meter Deployment Plan explicitly states that there is "no opt-out for customers."⁵⁹
7. West Penn's smart meter deployment plan requires West Penn to deploy smart meters at 100% of its customer service locations. 98.5% of smart meters must be installed by mid-2019. The remaining 1.5% of smart meters, which are located in hard-to-access locations, such as remote hunting cabins, must be installed by 2022.⁶⁰

⁵⁴ Tr. 128:1-22.

⁵⁵ Tr. 128:6-16.

⁵⁶ Tr. 136:14-21; Exhibit PD-3.

⁵⁷ Exhibit PD-4.

⁵⁸ Tr. 140:11-17; Exhibit JCA-1.

⁵⁹ Exhibit JCA-1 at 9 and 47.

⁶⁰ Tr. 141:10-142:12.

8. To date, West Penn has not installed a smart meter at the Complainants' Service Location.⁶¹

9. The Complainants offered only lay witness testimony at the hearings in this matter and presented no documentary evidence.⁶²

10. West Penn offered testimony by Company employee, John Ahr.⁶³

11. West Penn's smart meter does not collect or communicate personally identifiable customer information.⁶⁴

12. West Penn's smart meters have no access to information regarding what devices are using electricity behind the meter. The smart meters communicate the total usage not what is causing the usage.⁶⁵

13. West Penn's smart meter network utilizes a number of cybersecurity protections to guard against unauthorized access to customer's usage data.⁶⁶

14. West Penn's Privacy Policy related to the confidentiality and cybersecurity protections applicable to smart meters was approved by the Commission on May 1, 2015.⁶⁷

15. On June 21, 2017, Ms. Milburn first contacted West Penn to refuse the installation of a smart meter at the Service Location.⁶⁸ This contact occurred before any smart meter deployment was going on in the portion of West Penn's service territory where the Service Location is located.⁶⁹

⁶¹ Tr. 127:22-25.

⁶² Tr. 71:14-95-14.

⁶³ Tr. 122:7-161:4.

⁶⁴ Tr. 145:5-16.

⁶⁵ Tr. 145:17-23.

⁶⁶ Tr. 148:8-16.

⁶⁷ Tr. 151:24-152:3; Exhibit PD-5.

⁶⁸ Tr. 153:2-7.

⁶⁹ Tr. 153:16-19.

16. On March 19, 2018, West Penn first attempted to contact the Complainants regarding the installation of a smart meter at the Service Location.⁷⁰

17. Subsequently on March 19, 2018, Ms. Milburn contacted the Company and indicated that she did not want a smart meter installed at the Service Location because of medical concerns.⁷¹

18. On March 21, 2018, West Penn mailed the Complainants a letter indicating that the installation of a smart meter at the Service Location was required and that continued refusal to allow installation of a smart meter could lead to disconnection of service.⁷²

19. On March 23, 2018, Mr. Milburn called the Company and indicated that he was refusing the installation of a smart meter at the Service Location because of medical concerns. He further stated that he wanted it noted that he did not want anyone from the Company on his property. Mr. Milburn was informed that continued refusal to allow installation of a smart meter could result in disconnection of electric service.⁷³

20. On May 15, 2018, West Penn mailed the Complainants another letter regarding the installation of a smart meter at the Service Location.⁷⁴

21. On May 21, 2018, Ms. Milburn called the Company and indicated that the Complainants desire was to continue to opt out of smart meter installation.⁷⁵

22. On May 25, 2018, the Complainants were sent a 10-day service termination letter.⁷⁶

⁷⁰ Tr. 153:23-154:1.

⁷¹ Tr. 154:3-10.

⁷² Tr. 156:21-157:5; JCA-3 at 4.

⁷³ Tr. 157:8-15; JCA-3 at 4.

⁷⁴ Tr. 157:24-25; JCA-3 at 3.

⁷⁵ Tr. 157:25-158:2; JCA-3 at 3.

⁷⁶ Tr. 158:6-9; JCA-3 at 3.

23. On June 14, 2018, Ms. Milburn again contacted the Company and indicated that she wanted to be put on a delay list for the installation of a smart meter.⁷⁷

24. On June 15, 2018, West Penn received notice of the filing of the complaint in the instant proceeding. West Penn did not terminate electric service to the Service Location because of the filing of this complaint.⁷⁸

⁷⁷ Tr. 158:10-12; JCA-3 at 2.

⁷⁸ Tr. 158:15-25.

APPENDIX B

PROPOSED CONCLUSIONS OF LAW

1. Under Section 332(a) of the Public Utility Code, the Complainants maintain the burden of proof in this proceeding.⁷⁹

2. The first step in carrying the burden of proof is establishing a prima facie case that West Penn violated the Public Utility Code, the Commission's regulations, or a Commission order. Only if the Complainants establish a prima facie case does it become the responsibility of the Company to provide rebuttal evidence.⁸⁰

3. In order to establish a prima facie case, more is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. Mere bald assertions, personal opinions or perceptions, when not substantiated by facts, do not constitute evidence.⁸¹

4. A party's burden of proof is met by establishing a preponderance of the evidence, which requires proof by a greater weight of the evidence.⁸²

5. A preponderance of evidence is demonstrated where the evidence presented is more convincing, even by the smallest degree, than the evidence presented by the opposing party.⁸³

6. In order for the Commission to sustain a formal complaint, the Complainants must demonstrate that an "act or thing done or omitted to be done by any public utility [is] in violation,

⁷⁹ 66 Pa.C.S. § 332(a); *Se-Ling Hosiery v. Margulies*, 70 A.2d 854 (Pa. 1950); *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm'n*, 578 A.2d 600 (Pa. Commw. 1990), alloc. den., 602 A.2d 863 (Pa. 1992).

⁸⁰ *Waldron v. Phila. Elec. Co.*, 54 Pa. P.U.C. 98 (Order entered Mar. 14, 1980); *Replogle v. Pa. Elec. Co.*, 54 Pa. PUC 528 (Order entered Oct. 9, 1980).

⁸¹ *Pa. Bureau of Corrections v. City of Pittsburgh*, 532 A.2d 12 (Pa. 1987); *Mid-Atlantic Power Supply Assoc. v. Pa. Public Utility Comm'n*, 746 A.2d 1196, 1200 (Pa. Commw. Ct. 2000).

⁸² *Lansberry*, 578 A.2d at 602.

⁸³ *Pa. Pub. Util. Comm'n v. HIKO Energy, LLC*, 2015 Pa. PUC LEXIS 364 (I.D. entered Aug. 21, 2015); see also *Se-Ling Hosiery*, *supra*.

or claimed violation, of any law which the Commission has jurisdiction to administer, or of any regulation or order of the commission.”⁸⁴

7. As part of formal complaint proceedings, the Commission evaluates the reasonableness of public utility service and facilities pursuant to Section 1501 of the Public Utility Code. Section 1501 states, in relevant part: “every public utility shall furnish and maintain adequate, efficient, safe and reasonable service and facilities....”⁸⁵

8. In similar complaint proceedings, the Commission has held that the relevant legal standard is whether the installation of a smart meter constitutes unsafe or unreasonable service in violation of Section 1501 of the Public Utility Code.⁸⁶

9. Neither Act 129 nor subsequent Commission orders related to smart meter installation and deployment permit customers to “opt-out” from smart meter installation.⁸⁷

10. It is beyond the jurisdiction of the Commission to determine whether Complainants have a disability or a cause of action under the Americans with Disabilities Act.”⁸⁸

11. The Complainants failed to establish that the Company’s installation of a smart meter at the Complainant’s Service Location would violate Act 129 or any related Commission orders.⁸⁹

12. A lay witness may only provide testimony related to his or her direct knowledge or experience.⁹⁰

⁸⁴ 66 Pa.C.S. § 701.

⁸⁵ 66 Pa.C.S. § 1501.

⁸⁶ Frompovich Order at 43; *Susan Kreider v. PECO Energy Co.*, Docket No. C-2015-2469655 (Order on Reconsideration entered January 28, 2016).

⁸⁷ 66 Pa.C.S. § 2806.1, *et seq.*; *see* Exhibit PD-2.

⁸⁸ Frompovich Order at 43.

⁸⁹ 66 Pa.C.S. § 2806.1, *et seq.*; *see* Exhibits PD-2 and PD-4.

⁹⁰ Pa.R.E. 701.

13. The Company owns, maintains, furnishes and installs its electric meters. It is within the Company's sole and exclusive discretion to install the meters and related equipment it deems reasonable and appropriate to provide service to customers.⁹¹

14. The Company has the absolute right to access a customer's premises to remove or exchange any or all Company equipment including a meter.⁹²

15. The Company is permitted to terminate a customer's electric service for denying access to the meter.⁹³

16. Any testimony of a lay witness related to technical or specialized knowledge should be excluded and given no evidentiary weight.⁹⁴

17. The hearsay evidence presented in this case was properly objected to and excluded and may not support any findings of fact.⁹⁵

18. The Complainants failed to sustain their burden of proof that the installation of a smart meter would constitute unsafe or unreasonable service by the Company.

⁹¹ Electric Pa. P.U.C. No. 40, Original Page 39, issued May 1, 2015; effective May 3, 2015.

⁹² Electric Pa. P.U.C. No. 40, Original Page 46, issued May 1, 2015; effective May 3, 2015.

⁹³ 66 Pa. C.S. § 1406; 52 Pa. Code § 56.81; Electric Pa. P.U.C. No. 40, Original Page 61, issued May 1, 2015; effective May 3, 2015.

⁹⁴ See *Gibson v. W.C.A.B.*, 861 A.2d 938, 947 (Pa. 2004).

⁹⁵ *Walker v. Unemployment Comp. Bd. of Review*, 367 A.2d 366, 370 (Pa Commw. Ct. 1976).

APPENDIX C

PROPOSED ORDERING PARAGRAPHS

1. The formal complaint of Jan and Jack Milburn filed against West Penn Power Company at the above-referenced docket is dismissed with prejudice.
2. This matter shall be marked as closed.

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

JAN AND JACK MILBURN

:

:

v.

:

Docket No. C-2018-3002756

:

WEST PENN POWER COMPANY

:

CERTIFICATE OF SERVICE

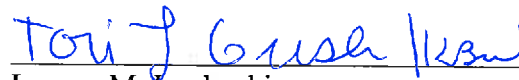
I hereby certify that I have this day served a true copy of the Main Brief of West Penn Power Company upon the individuals listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant).

Service by First Class Mail, postage prepaid, as follows:

Jan and Jack Milburn
114 Mountain Road
Ligonier, PA 15658

Administrative Law Judge Jeffrey A. Watson
Pennsylvania Public Utility Commission
Office of Administrative Law Judge
Piatt Place, Suite 220
301 5th Avenue
Pittsburgh, PA 15222

Dated: September 30, 2019



Lauren M. Lepkoski
Tori L. Giesler
FirstEnergy Service Company
2800 Pottsville Pike
P.O. Box 16001
Reading, Pennsylvania 19612-6001
(610) 921-6203
(610) 921-6658
llepkoski@firstenergycorp.com
tgiesler@firstenergycorp.com