

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Kim Betchy	:	
	:	
v.	:	C-2018-3000257
	:	
West Penn Power Company	:	

INITIAL DECISION

Before
Jeffrey A. Watson
Administrative Law Judge

INTRODUCTION

A residential customer filed a Formal Complaint seeking to prevent a public utility from replacing her existing electric meter with a smart meter at her residence. The complaint will be dismissed for failure to prove by a preponderance of evidence that the smart meter installation violates a Commission order, rule or regulation or constitutes unsafe or unreasonable service under 66 Pa.C.S. § 1501.

HISTORY OF THE PROCEEDING

On February 20, 2018, Kim Betchy (Complainant) filed a Formal Complaint (Complaint or Original Complaint) with the Pennsylvania Public Utility Commission (Commission) against West Penn Power Company (West Penn, Respondent or Company) alleging, the existence of reliability, safety or quality problems with her electric service and health problems caused by the installation of a smart meter at her residence. Complainant also averred that representatives of the Company damaged her “no-trespassing” sign near her meter. Finally, Complainant alleged the existence of unacceptable radiation levels in her home since the

smart meter was installed and that her bills significantly increased since the smart meter was installed. As relief, Complainant requested that her smart meter at her residence of 140 Inwood Avenue (Service Location 1) be replaced with an analog meter and that the home next door at 150 Inwood Avenue (Service Location 2) be permitted to keep its analog meter and that the power be restored (Service Location 1 and Service Location 2 are collectively referred to as Service Locations).¹

On March 26, 2018, Respondent filed an Answer and New Matter to the Complaint, denying the material allegations set forth in the Original Complaint. Respondent further averred that it was required by Act 129 of 2008 to install a smart meter.

On March 26, 2018, Respondent also filed preliminary objections to the Original Complaint.

Complainant filed a response to the preliminary objections on April 9, 2018, essentially reiterating various averments set forth in her Original Complaint.

A Motion Judge Assignment Notice was issued on April 27, 2018 and assigned the undersigned presiding officer to this proceeding.

On May 4, 2018, an Interim Order was entered granting in part and denying in part the preliminary objections filed by West Penn. The preliminary objection seeking a dismissal of the claim regarding a request for relief to allow Service Location 2 to keep its analog meter and to have the power turned on at Service Location 2 for lack of standing by Complainant was granted. The preliminary objections filed by West Penn Power Company were denied in all other respects. In addition, the Original Complaint was referred to the Commission's Mediation Unit for mediation review. Ultimately, the case could not be resolved.

On May 18, 2018, a Notice was issued which scheduled a telephonic evidentiary hearing for June 27, 2018.

¹ Complainant did not aver that she was an owner, occupant or customer of Service Location 2.

On May 21, 2018, an Interim Order was entered converting the telephonic evidentiary hearing to a prehearing conference. The prehearing conference was held as scheduled. Complainant and counsel for Respondent attended and participated at the prehearing conference.

On July 18, 2018, an Interim Order was entered directing Complainant to submit written direct testimony and Respondent to submit written rebuttal testimony.

On October 15, 2018, Complainant filed her written testimony dated September 24, 2018. The written testimony was signed by Complainant and included Complainant's proposed Exhibits O, P, Q and S.

On February 26, 2019, an Evidentiary Hearing Notice was issued scheduling a telephonic hearing for March 14, 2019.

The hearing convened as scheduled on March 14, 2019 and was concluded on that date. Complainant represented herself and testified on her own behalf. Complainant Exhibits A, B, C, D, E, J and O were admitted into evidence. Tori Giesler, Esquire, and Lauren Lepkoski, Esquire, represented Respondent; John Ahr, Dr. Christopher Davis and Mark Israel, M.D., appeared and provided testimony on behalf of the Company. Respondent Exhibits 1R, 2R and 3R were admitted into evidence. Complainant's proposed Exhibits F, G, H, I and M were not admitted into the record.²

At the hearing, Complainant requested permission to amend her Original Complaint to include averments from an unfiled and undated complaint (Second Complaint) regarding Service Location 2. Complainant stated that she wanted the issues raised in both complaints addressed at the hearing. The Second Complaint contained a verification signed by Complainant. The Second Complaint was marked as ALJ Exhibit 1. Respondent did not object to the request. Accordingly, Complainant's request to amend the Original Complaint to include

² Tr. 158-166.

the averments set forth in the Second Complaint was granted.³ In addition, the parties agreed that the Respondent's responsive pleading to the Original Complaint would be amended to apply to the averments set forth in the Amended Complaint.⁴

At the hearing, the parties stipulated to the admission of Respondent Exhibits 1R, 2R and 3R into evidence in lieu of oral testimony from Respondent, and Complainant advised that she waived cross-examination of Respondent witnesses, John Ahr, Dr. Christopher Davis and Mark Israel, M.D.⁵

During the hearing, the parties stipulated to the admission of the written testimony of Complainant, with the attached exhibits, dated August 28, 2018, September 24, 2018 and December 14, 2018, in lieu of oral testimony from Complainant.⁶

On April 8, 2019 a transcript of the evidentiary hearing, consisting of 173 pages, was filed with the Commission Secretary.

In addition, ALJ Exhibit 1 was admitted into evidence, consisting of an undated formal complaint form regarding property identified as 150 Inwood Avenue, Carmichaels, Pennsylvania.

Upon conclusion of the hearing, the parties were advised that an order would be entered addressing a briefing schedule. On March 18, 2019, an Interim Order was entered permitting the parties to file main briefs in this proceeding on or before June 10, 2019. On June 10, 2019, Respondent filed a brief. Complainant did not file a brief.

³ Tr. 76-80.

⁴ Tr. 81-84.

⁵ Tr. 73-75

⁶ Tr. 139-141.

The record closed by Interim Order entered on July 1, 2019. This case is ripe for a decision.

FINDINGS OF FACT

1. Complainant, Kim Betchy, resides at 140 Inwood Avenue, Carmichaels, Pennsylvania (Service Location 1). Tr. 77.

2. Complainant also owns property adjacent to her residence at 150 Inwood Avenue (Service Location 2).

3. Respondent is West Penn Power Company, an Electric Distribution Company (EDC) providing electric service to over 100,000 Pennsylvania customers. Respondent Ex 3.

4. Complainant provided Respondent with a Notice Of No Consent To Trespass And Surveillance – Notice of Liability (Notice) dated July 20, 2017, regarding Service Location 2. Complainant Ex. A.

5. The Notice advised Respondent that she did not consent to the installation of any smart meter or any activity monitoring device at Service Location 2; requested that both smart meters be removed from her property and stated that Complainant's rights were being violated. Complainant Ex. A.

6. Complainant offered lay witness testimony at the hearing in this matter; she did not offer any expert testimony.

7. Respondent installed smart meters at Complainant's Service Locations. West Penn Power Ex. 1R at 13-16

8. Act 129 of 2008 (Act 129)⁷ was signed into law on October 15, 2008. West Penn Ex. 1R at 4, Ex. JCA 1 at 4-7.

9. Act 129 requires all EDCs with at least 100,000 customers to install smart meters throughout their service territories and to submit smart meter deployment plans to the Commission for approval. West Penn Ex. 1R at 4-5, 7.

10. Act 129 provides a list of required smart meter functionality, which was supplemented by Commission order. West Penn Ex. 1R at 4-5, 7.

11. West Penn's smart meter procurement and installation plan was filed with the Commission on August 14, 2009 (2009 SMP Plan). *Petition of West Penn Power Company d/b/a Allegheny Power for Expedited Approval of its Smart Meter Technology Procurement and Installation Plan*, Docket No. M-2009-2123951 (Petition dated August 14, 2009).

12. The Commission issued an Order on June 20, 2011 approving an unopposed Amended Joint Petition for Settlement of All Issues regarding the 2009 SMP Plan. *Petition of West Penn Power Company d/b/a Allegheny Power for Expedited Approval of its Smart Meter Technology Procurement and Installation Plan*, Docket No. M-2009-2123951 (Order dated June 30, 2011).

13. Subsequent to the Commission's approval of the 2009 SMP Plan, West Penn became affiliated with First Energy Corporations (First Energy's), Pennsylvania EDCs, (Metropolitan Edison Company, Pennsylvania Electric Company and Pennsylvania Power Companies (collectively, Companies). See West Penn Exhibit JCA-1; West Penn Statement No. 1R, pp. 7-9.

14. On December 31, 2012, the Companies filed their Joint Petition for Approval of their Smart Meter Deployment Plan (Joint Petition). *Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West*

⁷ 66 Pa.C.S. § 101, *et seq.*

Penn Power Company for Approval of their Smart Meter Deployment Plan, Docket No. M-2013-2341990, M-2013-2341991, M-2013-2341993, M-2013-2341994 (Petition filed December 31, 2012).

15. In their Joint Petition, the Companies requested that the Commission: (1) find that their proposed deployment plan satisfies the requirements of Act 129 and the Commission's Implementation Order; (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.⁸

16. On June 16, 2014, the Companies submitted their revised smart meter deployment plan, which, *inter alia*, accelerated the smart meter deployment scheduled set forth in their original deployment plan. *See* West Penn Exhibit JCA-1.

17. As part of the revised deployment plan, the Companies proposed to deploy 170,000 smart meters by the end of 2015. West Penn Ex. JCA-1 at 13.

18. The Commission determined the Companies' smart meter deployment plan was compliant with Act 129 and ultimately approved the revised smart meter deployment plan (2014 SMDP or SMDP) on June 25, 2014. West Penn Power Ex. 1R at 9.

19. The Company presented West Penn St. 1R, the testimony of John C. Ahr. Mr. Ahr is employed by FirstEnergy Service Company with the title, Advisor, Regulatory Compliance – Smart Meters. Mr. Ahr's testimony explained the Company's smart meter deployment plan, smart meter safety, and Complainant's efforts to refuse a smart meter.

⁸ *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 (Petition filed December 31, 2012).

20. The Company presented West Penn St. 2R, the testimony of Dr. Christopher C. Davis. Dr. Davis is professor of electrical and computer engineering at the University of Maryland. Dr. Davis provided testimony on radio frequency fields and the safety of the Company's smart meter implementation.

21. The Company presented West Penn St. 3R, the testimony of Dr. Mark A. Israel. Dr. Israel, a medical doctor and professor at Dartmouth Medical School, testified that there was no reliable medical basis to support Complainant's medical claims.

22. West Penn provided Dr. Davis with the specifications for its Itron smart meters at issue in this proceeding, and he used those specifications to calculate the radio frequency field levels of or emitting from the meters. West Penn St. 2R at 12.

23. Itron meters have two radios, a LAN radio and a ZigBee radio. West Penn Power Ex. JCA-1 at 12.

24. The total daily time of radio frequency signaling from each Itron meter is 190.2 seconds over the course of 24 hour, with individual signal durations of less than 150 milliseconds. West Penn Power Ex. JCA-1 at 8.

25. The radio frequency field levels of or emitting from the Itron meters comply with the Federal Communications Commission (FCC) safety standards for the radios in the meter. The FCC safety standards are based on the average exposure over 30 minutes. The 30-minute average for the LAN radio is 62,000 times smaller than the FCC's safety standards and the 30-minute average for the ZigBee radio is 527,000 smaller than the FCC's safety standards. West Penn Power Ex. JCA-1 at 13.

26. Radio frequency field of or emitting from Itron meters are the same types of radio frequency fields used for radio communications by many common everyday devices, such as radio, cellphones, garage door openers, baby monitors, Wi-Fi and other wireless communications devices. West Penn Power Ex. JCA-1 at 13.

27. The only customer 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. West Penn St. 1R at 11-13.

28. Respondents' smart meters do not provide the Company with information about which appliances are being used or how electricity is being consumed within the home, but only communicate total electric usage. West Penn St. 1R at 11-13.

29. 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. *See* West Penn Ex. JCA-2.

30. West Penn does not share sensitive customer information, including the customers' 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 customers' consent. *See* West Penn Ex. JCA-2.

31. 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. *See* West Penn Ex. JCA-2.

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 Dist. of Columbia's Appeal*, 21 A.2d 883 (Pa. 1941); *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).⁹

In smart 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”).

⁹ 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).

When presented with a challenge to a smart meter installation, the Commission has pronounced that “[t]he ALJ’s role . . . will be to determine based on the record in [each] 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 [the] case.” *Kreider v. PECO Energy Co.*, Docket No. P-2015-2495064 at 23 (Order entered Jan. 28, 2016) (citing *Woodbourne-Heaton*, 1992 Pa. PUC LEXIS 160, at *12-13), *see also Frompovich v. PECO Energy Co.*, Docket No. C-2015-2474602, (Opinion and Order entered May 3, 2018 at 10).

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 (Code) or a Commission regulation or order.

Section 1501 of the 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.

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 of Pa.*, 420 A.2d 371, 374 (Pa. 1980) (citations omitted).

Complainant Failed to Meet Her 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.

On October 15, 2008, Act 129 was signed into law and codified as part of the Code (Code).¹⁰ Act 129 requires EDCs with at least 100,000 customers, such as West Penn, to file a smart meter technology procurement and installation plan with the Commission for approval.¹¹ Specifically, Section 2807(f)(2) of the Code directs EDCs to deploy smart meter technology as follows: 1) upon request from a customer who 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.¹²

Under Act 129, West Penn has an obligation to install smart meters at 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 Commission approved SMDP, explicitly states that no opt-out option is available.¹³ As explained by Company witness Mr. Ahr, West Penn’s SMDP calls for 98.5% of the Company’s smart meter installation to be completed by 2019, with the remaining 1.5% of meters being installed by the end of 2022.¹⁴

¹⁰ 66 Pa.C.S. § 101, *et seq.*

¹¹ 66 Pa.C.S. § 2807(f); *see also* West Penn Ex. JCA 1 at 4-7.

¹² 66 Pa.C.S. § 2807(f)(2).

¹³ *Smart Meter Deployment Plan*, at 9.

¹⁴ West Penn St. No. 1R at 10-11.

Pursuant to Section 2807(f) of the Public Utility Code, West Penn filed their Petition for Approval of Smart Meter Technology Procurement and Installation Plan on August 14, 2009.¹⁵ The Commission issued an Order on June 30, 2011 approving an unopposed Amended Joint Petition for Settlement of All Issues regarding the 2009 SMP Plan.¹⁶ Subsequent to the Commission's approval of the 2009 SMP Plan, West Penn became affiliated with FirstEnergy Pennsylvania. On December 31, 2012, 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 deployment plan satisfies the requirements of Act 129 and the Commission's Implementation Order; (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.¹⁷ On June 16, 2014, the Companies submitted their revised smart meter deployment plan,¹⁸ which *inter alia* accelerated the smart meter deployment schedule laid out in their original deployment plan. Under the revised deployment plan, the FirstEnergy Companies proposed to deploy 170,000 smart meters by the end of 2015.¹⁹ In its June 25, 2014 Opinion and Order, the Commission recognized the benefits of early deployment of smart meters and approved the revised SMDP, stating:

[T]his Commission has already observed the benefits of early deployment. We find that the use of Penn Power as a case study may help the Companies identify other more cost-effective meter deployment strategies that can then be leveraged by FirstEnergy's other operating companies. If

¹⁵ *Petition of West Penn Power Company d/b/a Allegheny Power for Expedited Approval of its Smart Meter Technology Procurement and Installation Plan*, Docket No. M-2009-2123951 (Petition dated Aug. 14, 2009)

¹⁶ *Petition of West Penn Power Company d/b/a Allegheny Power for Expedited Approval of its Smart Meter Technology Procurement and Installation Plan*, Docket No. M-2009-2123951 (Order dated June 30, 2011).

¹⁷ *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 (Petition filed December 31, 2012).

¹⁸ See West Penn Ex. JCA-1.

¹⁹ West Penn Ex. JCA-1 at 13.

deployment and operational savings prove very positive, FirstEnergy may also be able to further accelerate smart meter deployment, thus enabling an option to enhance customer savings even more.²⁰

In this proceeding, Complainant averred that she provided Respondent with a notice that she did not consent to the installation of smart meters at the Service Locations. The notice advised Respondent that she did not consent to the installation of any smart meter or any activity monitoring device at Service Location 2; requested that both smart meters be removed from her property; and stated that her rights were being violated.

Complainant expressed concerns to Respondent that the proposed smart meters invade the privacy of individuals; can aid in criminal activity against occupants where they are installed; violate various laws, including wiretap laws; and are unsafe and present health and safety issues. Complainant further expressed concerns that smart meters do not save consumers money; are not U.L. Certified; cause fires; and were not mandated by the legislature. Complainant offered her lay testimony but no expert testimony at the hearing in this matter.

Complainant further argued that the law permits a smart meter to be deployed at the Service Locations only upon her express request and consent.²¹ In her written testimony dated September 24, 2018, Complainant analyzes Act 129 and concludes, that a smart meter may only be installed “[u]pon request from a customer that agrees to pay the cost of the smart meter at the time of the request. **I did not agree nor did I make a request at any time.**”²² Complainant further argues “that the smart meters were never MANDATORY [*sic*],” ...this is

²⁰ *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 (Opinion and Order entered June 25, 2014 at 16).

²¹ Complainant’s Ex. O, J, and A.

²² Complainant Ex. O (Emphasis added).

not necessary since the smart meters were never MANDATED, “and” nothing is more important than the fact that the smart meters were never MANDATED.”²³

Complainant points to Section 2807(f)(2)(i) of the Code for the proposition that the deployment of smart meters for individual customers should occur only upon request of the individual customer.²⁴ By extension, Complainant appears to contend that Act 129 allows an overall “opt-out” for customers to reject installation of a smart meter.

Contrary to Complainant’s arguments, 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.” Neither the Company’s Commission-approved SMDP nor Act 129 permit such opt-outs to occur.²⁵

As discussed below, the Complainant’s interpretation of Section 2807(f) of the Code is incorrect.

Respondent witness Jon Ahr testified that the Company’s SMDP, as approved by the Commission, provides for smart meter deployment to be completed on or before December 31, 2022.²⁶ This deployment is broken into two parts. The majority of customers (98.5%) will receive smart meters by mid-2019, with the remaining 1.5% of customers to receive installation by December 31, 2022.²⁷ The FirstEnergy Companies’ Commission-approved SMDP provides, in pertinent part:

²³ Complainant Ex. J.

²⁴ See Complainant Ex. O; see also Complainant Ex. J at 7.

²⁵ West Penn Ex. JCA-1 at 9, 48; see, e.g., *Lutherschmidt v. Metropolitan Edison Company*, Docket No. C-2010-2200353 (Final Order entered March 25, 2011); *Negley v. Metropolitan Edison Company*, Docket No. C-2010-2205305 (Initial Decision dated January 3, 2011 became final without Commission action on March 3, 2011).

²⁶ *Id.*

²⁷ *Id.*

The Full-Scale Deployment Stage will commence upon resolution of all problems encountered during the Solution Validation Stage and will continue until all meters are installed on or before December 31, 2022. During this stage, the remainder of the smart meter infrastructure will be concurrently built in each of the Companies' respective service territories, starting with the most populated areas first. All remaining smart meters will be installed during this Stage at an anticipated meter installation rate of 1,900 meters per day, five days per week, and potentially ramping up to 3,000 meters per day if circumstances and conditions warrant. At this pace, the Companies expect to install approximately 98.5% of all meters by mid-2019, with the remaining 1.5% of the meters being installed thereafter through December 31, 2022. The 1.5 % of the installations represent those installations that may require alternative communication solutions or difficult to reach locations such as remote hunting cabins. Any similar situations discovered in Penn Power's service territory are included in the 1.5% estimate and will be addressed in the time frame discussed above.²⁸

Therefore, Section 2807(f)(i) is just one way a customer may receive a smart meter. Complainant's arguments do not account for the legislative mandate under Section 2807(f)(iii) or the requirements of the SMDP ultimately approved by the Commission.

West Penn installed smart meters at Complainant's Service Locations.²⁹ With respect to the Company's deployment timeframe, Mr. Ahr explained that the Company cannot manually read the Complainant's meters because the Company will deploy smart meters for all its customers in the Complainant's area served by West Penn. Mr. Ahr further testified that, from a practical perspective, West Penn must have a uniform means of reading all customers' meters.³⁰

²⁸ West Penn Ex. JCA-1, pp. 47-48.

²⁹ The Complainant's initial Formal Complaint was received by the Company on March 6, 2018. The initial Formal Complaint addressed account number 100094136684, at 140 Inwood Avenue, Carmichaels, Pennsylvania, the Complainant's primary residence. *See* Tr. 77. A second, undated complaint was submitted by the Complainant regarding the meter installed at 150 Inwood Avenue, Carmichaels, Pennsylvania. At hearing on March 14, 2019, the March 6, 2018 Formal Complaint was amended to contain the averments raised by the Complainant in her undated second complaint. Tr. at 80. As explained in Mr. Ahr's testimony, the Company installed a smart meter at 140 Inwood Avenue on April 6, 2016 due to the meter being damaged. *Id.* at 13. The Company installed a smart meter at 150 Inwood Avenue on April 10, 2018, however there had been no service at that location since December 7, 2017. *Id.* at 16.

³⁰ *Id.* at 11.

Complainant raised opposition to the legal validity of Act 129. She referred to dialogue in the General Assembly’s legislative history of Act 129 for her proposition that smart meter deployment is invalid.³¹ In particular, Complainant pointed to the Pennsylvania Legislative Journal of the Senate of Wednesday, October 8, 2008, in which Senators discussed House Bill 2200, which would eventually become the smart meter statute at 66 Pa.C.S. § 2806.1, *et seq.* Complainant points to a statement of Senator Vincent Fumo concerning smart meter legislation.³² Regardless of what individual legislators may have stated during the legislative debate process the final version of Act 129 that was passed by the Pennsylvania legislature does not contain an “opt-out” provision.

2. The Installation of the Smart Meter Did Not Constitute Unreasonable or Inadequate Service.

Although Complainant alleged multiple health and safety concerns related to smart meters, she failed to provide any reliable evidence in support of her allegations. By contrast, West Penn offered extensive expert testimony to rebut Complainant’s allegations. Complainant failed to establish her burden of proof to show that the deployment of smart meters at the Service Locations 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

³¹ Complainant Ex. O.

³² Complainant Ex. O; Complainant Ex. J.

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.³³

Complainant failed to demonstrate that the installation of a smart meter at her residence or the service locations would constitute unreasonable or inadequate service under Section 1501. Complainant makes multiple assertions in her Amended Complaint. For example, Complainant testified that, “There is an EMERGENCY SITUATION involving an IMMEDIATE THREAT to PUBLIC HEALTH or SAFETY. The smart meter is a threat to my health and safety.”³⁴ Complainant further asserts that, “Electromagnetic and Radio Frequency energy contamination from smart meters exceeds allowable safe and healthful limits for domestic environments as determined by the EPA and other scientific programs.”³⁵ Complainant also alleged that there are “research studies that were conducted by the internet Harvard Medical Doctors”, “independent studies”, and “Professors.”³⁶ In response to Company witness Dr. Israel’s testimony concerning Complainant’s health claims, Complainant testified, “[H]e is giving his opinion based off of the other reports with in [sic] this circle. He claims that he did not find any studies in regard to symptoms of ones, health issues from a smart meter, there are over 2,000, scientific researched studies and findings on this subject.”³⁷

Complainant attempted to introduce a number of exhibits, to support her claims, but which were objected to and excluded as hearsay. Further, Complainant attempted to offer testimony related to health and safety issues without any expert credentials on these issues. As a lay witness, Complainant was not qualified to testify or offer exhibits related to any issues

³³ 66 Pa.C.S. § 1501.

³⁴ Complainant Ex. O.

³⁵ Complainant Ex. O (page 3 of 3).

³⁶ Complainant Ex. J.

³⁷ Complainant Ex. A.

outside of her direct personal knowledge. All of the foregoing testimony and exhibits were properly excluded.

According to Pennsylvania Rule of Evidence 701,³⁸ 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.

Although the Pennsylvania Rules of Evidence are not strictly adhered to in Commission proceedings, 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.”³⁹ 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.⁴⁰ In this case, the bulk of the Complainant’s testimony and exhibits were related to issues outside the scope of her personal knowledge and were based on hearsay. All such testimony and exhibits, where objected to, were properly excluded. To the extent such testimony was not objected to, such testimony carries no weight and cannot support Complainant’s 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. Complainant, on the other hand, failed to present any credible or relevant evidence to support her allegations that smart meter

³⁸ Pa.R.E. 701.

³⁹ *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).

⁴⁰ Pa.R.E. 701.

deployment is unsafe or violates Section 1501 of the Public Utility Code. In view of Complainant's failure to support her position, much less fulfill her burden of proof, the Complaint must be dismissed with prejudice.

In response to the Complainant's concerns about smart meter emissions, West Penn presented the testimony of Dr. Christopher C. Davis, a Professor of Engineering and Electrical and Computer Engineering at the University of Maryland, where he teaches Physics and Electrical Engineering, including Electromagnetics (which includes radio frequency (RF) electromagnetics) and Bioelectromagnetics.⁴¹ Dr. Davis has served on the Institute of Electrical and Electronics Engineers (IEEE) Committee on Man and Radiation and as Chair of its Subcommittee on Radio Frequency Fields, which consists of experts who examine the scientific research on RF fields and evaluate the IEEE exposure guidelines.⁴²

Dr. Davis' testimony provides an explanation of RF fields that result from West Penn's smart meters.⁴³ Dr. Davis testified that West Penn provided him the specifications for its Itron smart meters at issue in this proceeding, and he used those specifications to calculate the RF field levels produced by the meters. The Itron meters have two radios, a LAN radio and a ZigBee radio.⁴⁴

The total daily time of radio frequency signaling from those meters is 190.2 seconds over the course of 24 hours, with individual signal durations of less than 150 milliseconds.⁴⁵ As Dr. Davis explained, the RF field levels produced by the Itron meters are well within with the FCC safety standards for the radios in the meter. The FCC safety standards are based on the average exposure over 30 minutes. The 30-minute average for the LAN radio is

⁴¹ West Penn St. 2R.

⁴² *Id.* at 3.

⁴³ West Penn St. 2R at 7-12.

⁴⁴ *Id.* at 12.

⁴⁵ *Id.* at 8.

62,000 times smaller than the FCC's safety standards, and the 30-minute average for the ZigBee radio is 527,000 smaller than the FCC's safety standards.⁴⁶

As Dr. Davis explained, RF fields from the Itron meters are the same types of RF fields used for radio communications by many common everyday devices, such as radios, cellphones, garage door openers, baby monitors, Wi-Fi and other wireless communications devices.⁴⁷

Dr. Davis concluded his analysis of West Penn's smart meters as follows⁴⁸:

Q. Have you formed any overall expert opinions about the radio frequency fields from West Penn's Itron meters?

A. Yes, based on my education, training and experience in physics, biophysics, chemistry, electrical engineering, electromagnetics, bioelectromagnetics, and radio frequency bioelectromagnetics and dosimetry, my review of the scientific research on radio frequency fields, and my calculations of radio frequency field levels, I have formed the following opinions:

The levels of radio frequency fields from West Penn's Itron meters are extremely low and many times lower than the radio frequency fields people commonly encounter from everyday sources.

There is no reliable scientific basis in physics, biophysics, bioelectromagnetics, or radio frequency bioelectromagnetics to conclude that the very low levels of radio frequency fields from West Penn's Itron meters can or will cause any adverse thermal or non-thermal biological effects in people.

To address the specific medical harms claimed by the Complainant in this proceeding, West Penn presented Dr. Mark A. Israel, M.D. Dr. Israel is the Executive Director of the Israel Cancer Research Fund, an international charitable fund supporting medical and

⁴⁶ *Id.* at 13.

⁴⁷ *Id.* at 13.

⁴⁸ *Id.* at 14-15.

scientific research, and a Professor at Dartmouth Medical School.⁴⁹ Dr. Israel reviewed the Complainant's Amended Complaint, exhibits, discovery answers, and testimony to assess the medical claims being made.⁵⁰

Dr. Israel evaluated Complainant's claims of blurred vision based on well-established research studies. After completing his review of Complainant's claim, he concluded as follows⁵¹:

There are two well done studies of radio frequency fields and human vision: Schmid 2005 and Irlenbusch 2007. Those studies should have detected blurred vision if it occurred, but both found no effect of radio frequency fields on human vision. Moreover, I did not find a collection of studies that are overall consistent in showing that radio frequency fields affect human vision. Therefore, I do not agree with the statement by the Complainant's ophthalmologist that there are "practical problems with 'smart meters'" and do not agree that there is any basis to remove or not install West Penn's smart meter at the Complainant's house. It is my expert medical opinion that there is no reliable medical basis to conclude that radio frequency fields from West Penn's smart meters affect human vision.

Dr. Israel further reviewed all of Complainant's medical claims and found there to be no medical basis to conclude that West Penn's smart meters were the cause of any such issues.⁵² Upon fully reviewing the medical claims of Complainant, Dr. Israel concluded⁵³:

Q. Have you formed an expert opinion about whether the radio frequency fields from a West Penn smart meter at the Complainant's house caused, contributed to, or exacerbated, or will cause, contribute to or exacerbate any of the medical conditions identified

⁴⁹ West Penn St. 3R at 1.

⁵⁰ *Id.*

⁵¹ *Id.* at 8.

⁵² West Penn St. 3R at 8-17.

⁵³ *Id.* at 17-18 (emphasis added).

in the Complainant's Formal Complaint, exhibits, discovery answers, and direct testimony and exhibits?

A. Yes, I have.

Q. What is that opinion?

A. Based on my medical education, training, and experience, and my evaluation of the scientific studies, **in my expert opinion there is no reliable medical basis to conclude that radio frequency fields from West Penn's smart meters at the Complainant's house caused, contributed to, or exacerbated or will cause, contribute to or exacerbate, any of the medical conditions identified in by Ms. Betchy** in her Formal Complaint, exhibits, discovery answers, or direct testimony and exhibits. (Emphasis added.)

Under the circumstances Complainant's allegations regarding the health impacts of smart meters must but rejected.

Complainant also raised concerns related to privacy. Company witness Mr. Ahr responded to 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.⁵⁴ He further noted that smart meters do not provide the Company with information about which appliances are being used or how electricity is being consumed within the home, but only communicate total electric usage.⁵⁵

The Company also presented its Commission-approved Privacy Policy.⁵⁶ 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. 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,

⁵⁴ West Penn St. 1R at 11-13.

⁵⁵ *Id.*

⁵⁶ West Penn Ex. JCA-2.

credit card number, passport number or bank account number with third parties without the customer's consent.⁵⁷ The 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.⁵⁸

Finally, Complainant raised concerns related to the fire risk of smart meters.⁵⁹ Complainant failed to produce any reliable or credible evidence regarding this claim. Having failed to present any competent evidence into the record that West Penn's installed smart meters cause fires or otherwise present a fire hazard, Complainant's claim must be rejected.⁶⁰

Despite Complainant failing to support her allegations with any reliable evidence, the Company still rebutted each of the Complainant's allegations related to the Company's smart meters as they relate to this proceeding.

Conclusion

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.⁶¹ Complainant's uncorroborated, unsubstantiated testimony is insufficient to support a finding that Respondents installation of the smart meters is not mandated by the Code, or that the smart technology utilized by Respondent

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *See* Complainant Ex. J (where Complainant alleges, "[S]everal independent studies that smart meters do catch on fire and that they do burn homes down.")

⁶⁰ *See, e.g., Frompovich v. PECO Energy Co.*, 2018 Pa. PUC LEXIS 160, 90.

⁶¹ *In re: Fink's Estate*, 343 Pa. 65, 74, 21 A.2d 883, 888-889 (1941); *Rodgers v. United States*, 66 F. Supp. 663, 667 (E.D. Pa. 1946) (relying, in relevant part, on *Roseberry v. Home Life Insurance Company*, 120 Pa. Super. 450, 454, 183 A. 121 (1936), also available at, 95 A.L.R. 749.

creates privacy, health or safety concerns in violation of the Code or its Commission-approved SMDP. In addition, Complainant has not made a *prima facie* case that the alleged actions and proposed actions by Respondent constitute unsafe or unreasonable service under 66 Pa.C.S. § 1501.

For all of the aforementioned reasons, the Complaint will be dismissed for failure to prove by a preponderance of evidence the claims asserted by Complainant, as set forth herein.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the parties and the subject matter in this proceeding. 52 Pa.C.S. § 331; 66 Pa.C.S. §§ 102, 107, 1501, 701.

2. 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).

3. 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).

4. 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).

5. 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.

6. 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 of Pa.*, 420 A.2d 371, 374 (Pa. 1980) (citations omitted).

7. 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 [each] particular case, whether there is sufficient evidence to support a finding that 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 [the particular] case.” *Kreider v. PECO Energy Co.*, Docket No. P-2015-2495064, p. 23 (Order entered Jan. 28, 2016) (citation omitted).

8. To satisfy her burden of proof, Complainant must demonstrate that the utility violated the Public Utility Code or a regulation or order of the Commission. 66 Pa.C.S. § 701. This must be shown by a preponderance of the evidence. *Patterson v. Bell Telephone Company of Pennsylvania*, 72 Pa. PUC 196 (1990).

9. Upon the presentation by Complainant of evidence sufficient to initially satisfy the burden of proof, the burden of going forward with the evidence, sometimes called the burden of persuasion, to rebut the evidence of Complainant shifts to Respondent. If the evidence presented by Respondent is of co-equal weight, Complainant has not satisfied the burden of proof. Complainant now has to provide some additional evidence to rebut the evidence of Respondent. *Burleson v. Pa. Pub. Util. Comm’n*, 443 A.2d 1373 (Pa.Cmwlt. 1982), *aff’d*, 501 Pa. 433, 461 A.2d 1234 (1983).

10. While the burden of persuasion may shift back and forth during a proceeding, the burden of proof never shifts. The burden of proof always remains on the party seeking affirmative relief from the Commission. *Milkie v. Pa. Pub. Util. Comm'n*, 768 A.2d 1217 (Pa.Cmwlth. 2001).

11. Assertions, personal opinions or perceptions do not constitute evidence. *Pennsylvania Bureau of Corrections v. City of Pittsburgh*, 532 A.2d 12 (Pa. 1987).

12. A public utility is required to provide adequate, efficient, safe and reasonable service. 66 Pa.C.S. §§ 102 and 1501.

13. There is no provision in the Code, the Commission's regulations or orders that provides that an electric distribution customer may "opt out" of smart installation. *Povacz v. PECO Energy Company*, Docket No. C-2012-2317176 (Opinion and Order entered January 24, 2013).

14. Act 129 of 2008, 66 Pa.C.S. § 2806.1 *et seq.*, required electric distribution companies to file smart meter technology procurement and installation plans with the Commission for approval. 66 Pa.C.S. § 2807(f).

15. A utility may issue written notice of termination to a customer if a customer does not permit access to meters, service connections or other property of the public utility for the purpose of replacement, maintenance, repair or meter reading, including the installation of an AMI meter. 66 Pa.C.S. § 1406(a)(4); 52 Pa.Code § 56.81(3).

16. Any testimony of a lay witness related to technical or specialized knowledge should be excluded and given no evidentiary weight. *See Gibson v. W.C.A.B.*, 861 A.2d 938, 947 (Pa. 2004).

17. The hearsay evidence presented in this case was properly objected to and excluded and may not support any findings of fact. *Walker v. Unemployment Comp. Bd. of Review*, 367 A.2d 366, 370 (Pa.Cmwlth. Ct. 1976).

18. Complainant has failed to carry her burden of proof establishing that Penelec violated the Public Utility Code or a regulation or order of the Commission in requiring installation of a smart meter at Complainant's properties. 66 Pa.C.S. § 332.

19. Complainant failed to sustain her burden of proof that West Penn's installation of a smart meter constitutes unsafe or unreasonable service by the Company, in violation of 66 Pa.C.S. § 1501.

ORDER

THEREFORE,

IT IS ORDERED:

1. The Formal Complaint of Kim Betchy filed against West Penn Power Company at Docket No. C-2018-3000257 is dismissed with prejudice.

2. This matter shall be marked as closed.

Date: September 30, 2019

/s/
Jeffrey A. Watson
Administrative Law Judge