Diana Sabatine
Non-domestic
c/o 315 Possum Hollow Road
Latrobe, Pennsylvania [15650]
(724) 689-9771

January 16, 2020

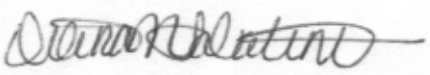
Via E-Service
Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
P.O. Box 3265
Harrisburg, Pennsylvania 17105-3265

Re: Diana Sabatine v. WEST PENN POWER COMPANY
Docket No. C-2018-3002804

Dear Secretary Chiavetta,

Please file the attached *Brief* in the above-referenced docket number. This document has also been served on the Respondent and Judge Jeffrey Watson as shown in the Certificate of Service.

Thank you,



Diana Sabatine

Enclosure(s)

E-Service, Email and Certificate of Service:

Tori L. Gielser, Esquire, First Energy Service Company/First EnergyCorp./West Penn Power
Judge Jeffrey Watson, Administrative Law Judge, Pennsylvania Public Utility Commission

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Diana Sabatine	:	
	:	
v.	:	**Docket No. C-2018-3002804**
	:	
WEST PENN POWER COMPANY	:	
Respondent	:	

BRIEF

AND NOW comes Diana Sabatine (Complainant), a woman, as herself, a living, breathing, human being; one of the people and not a fictitious entity. Also, Complainant is not an attorney. It is critical that the Pennsylvania Public Utility Commission (PUC) understand this plain English claim of divinely given rights ascribed to each of the people, such as the Complainant, as described in the Bible, the Magna Carta, the Declaration of Independence, Articles of Confederation, Pennsylvania Constitutions, and The Constitution for these united states of America, as lawfully amended, so as to refrain from violating the People's rights. While the Complainant does not make light of any of the violations of her rights and duties, she particularly points out potential damage to rights of privacy and pursuit of happiness.

Under choice of law clause, Complainant chooses an Article III Court of Record as offered by the Constitution of these united states of America. It is the duty of the PUC by virtue of their oath of office and as an agent of the people to protect We the People.

All Rights Reserved,

Dated: January 16, 2020

Diana Sabatine
c/o 315 Possum Hollow Road
Latrobe, Pennsylvania [15650]
djsabatine@hotmail.com
(724) 689-9771

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SUMMARY

For reasons of health, privacy, fire safety, and security of the electric grid Complainant does not want her home electric to be metered by a meter that communicates electrically or electromagnetically (such as radio waves) or that is powered by a switched mode power supply. **Because the statutes that allow such meters and fund the grants for such meters and the law in question are very clear on their face** that such a meter must not be forced upon her and because those reasons above have been very clearly proven in other cases that have been before the Pennsylvania Public Utility Commission (PUC) Administrative Law Judges (ALJ), Complainant chooses not to argue the above deficiencies, but **argues only the error of the PUC and the Respondent by changing the statutes from the meaning intended by the legislatures**.

It is the duty of this Court to adhere to the mandate of the PUC (created by the Pennsylvania Legislative Act of March 31, 1937 and the Public Utility Law of May 28, 1937 which abolished the Public Service Commission, http://www.puc.state.pa.us/about_puc.aspx) to interpret the statutes, not to change or amend in any degree. The statutes are to be interpreted in the plain language of the average/normal People on Pennsylvania, not in any foreign language or language of art such as legalese. It will aid this Court to review the legislative history and the early discussions held even in the PUC itself to fully comprehend the intent of the legislature, as included herein, but the final arbiter of the language must be the People such as this present Complainant. It is a maxim of law that no law can be enforceable upon the people if it is in anyway incomprehensible or misleading to the people.

Over and above the duty of the PUC to adhere to the statutes and law, it is the duty of the Electric Distribution Companies (EDCs) that are under the authority of the PUC to adhere to the statutes and law. This duty is over and above the duty to comply with any orders of the PUC, even if it means less income for stock holders, such as income from sales of any data that might be collected by advanced metering (smart meters). Even the Respondent's witness John C. Ahr stipulated as much in his verbal testimony on behalf of Respondent during the PUC telephonic hearing October 30, 2019.

Further, because of the complicity of the PUC in this matter, this matter becomes a test of the adequacy of the PUC Administrative Law process to justly decide when the matter before the ALJ may involve acts contrary to the Organic Law and / or against the people on Pennsylvania by PUC employees. In other words, it seems the PUC and employees are complicit in what can be thought of as a Wheel Conspiracy or Chain Conspiracy, Bolden v. State, 44 Md. App. 643 (Md. Ct. Spec. App. 1980).

ARGUMENT

The issue at hand:

When Complainant notified First Energy Corp., a.k.a. West Penn (Respondent) that she did not request an advanced meter (smart meter) to be installed/deployed on her home, various employees notified her by phone, letter, and by visit by First Energy Corp. employees, that they would end electric service to her home, in direct violation of Pennsylvania Act 129 of 2008 (Act 129) and other statutes and law. From Act 129 in relevant part:

"(2) Electric distribution companies shall furnish smart meter technology as follows:

(i) **Upon request** from a customer **that agrees to pay the cost** of the smart meter at the time **of the request**.

(ii) In new building construction.

(iii) **In accordance with a depreciation schedule not to exceed 15 years**." Emphasis added.

Respondent's response was and is that Complainant does not have a choice – that the "smart meter" deployment / installation is mandatory – **not** "**upon request from a customer"** as plainly stated in Act 129. Further, some employees of the PUC and some employees of the Respondent claim there was a time, unspecified by Act 129, when the smart meter was voluntary, but this unverified time or date has somehow passed, and now "**Upon request from a customer that agrees to pay the cost** of the smart meter at the time **of the request"** no longer applies. Respondent claims that this was mandated by the PUC, and this PUC mandate has been memorialized in "Smart Meter Procurement and Installation Implementation Order" of June 2009, which can be found at PUC web address http://www.puc.state.pa.us/filing_resources/issues_laws_regulations/act_129_information/smart_meter_technology_procurement_and_installation.aspx .

More precise is the wording is in the **Smart Meter Q&A, Fact Sheet,** Smart Meter Q&A found on the PUC web site:

http://www.puc.state.pa.us/General/consumer_ed/pdf/13_Smart%20Meters.pdf

Please take judicial notice of the above and: And in relevant part: "State law does not allow a customer to "opt out" of their EDC's smart meter program or surcharge. Installation of a smart meter is a condition of service."

Respondent maintains that the language allowing electric distribution companies (EDCs) to depreciate the cost of meters over 15 years contradicts AND is superior to the self-explanatory language of "**upon request from a customer**". Respondent further asserts the same results for US P. L. 109-58 known as the Energy Policy Act of 2005 which has **NO depreciation schedule**.

Complainant maintains the language of all relevant Acts and law is plain for the everyday people of Pennsylvania to comprehend. Otherwise there would be no way for Pennsylvanians to stand under any Act or law.

The ALJ is **required** to make findings which are supported by substantial competent evidence. "Substantial evidence has been defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion". Republic Steel Corp. v. W.C.A.B. Shinsky), 492 Pa. 1, 421 A.2d 1060 (1980). The ALJ in this Complaint has been presented with conflicting testimony. The Complainant relies upon the Act passed by the Pennsylvania legislature known as Act 129 of 2008 and the related Federal law known as the Energy Policy Act of 2005, both of which use plain language that the common man comprehends and does not need interpretation. The PUC, a part of the Executive branch of government, on the other hand, has not only interpreted the Act incorrectly, but has amended the Act completely without going through the

Pennsylvania legislature, which is the branch of government with the duty to make changes to existing law, thereby usurping the authority of another branch of the government.

Rosemary Chiavetta, Secretary of the PUC, stated in her letter dated November 20, 2019, to the Pennsylvania Smart Meter Work Group (PASMWG) "Finally, any concerns raised by the group regarding the law implementing the deployment (sic) of smart meters in Pennsylvania must be raised with the Pennsylvania General Assembly. The Commission **does not have the authority to amend** Act 129 mandating the implementation of smart meters in Pennsylvania." However, Complainant argues the PUC did amend/change the Act without the necessary authority. Emphasis added.

In short, the Complainant's argument is the PUC certainly amended Act 129. Based on this, Complainant further argues Secretary Chiavetta's own letter admits the PUC does not have the authority to act outside Act 129. However, it is clear the PUC amended Act 129. the PUC acted outside its Constitutional and legislated boundaries. We do not know who in the PUC took it upon themselves to amend Act 129, nevertheless, **Act 129 has been amended / changed**.

The point is very well summarized by Wes Zimmerman, **special agent for the IRS Criminal Investigation Division**: "Taken *in toto*, Act 129 § 2807(f)(2)(iii), as per the IRS tax code and Treasury Regulations, and as seen in the PA Public Utilities Code, sets a cap on the service period of smart meters, dictating their replacement at most every 15 years. It says nothing about replacing electromechanical analog meters and nothing about universal forced deployment of smart meters. No such inferences as these can be made from the statutory language of Act 129, from the "intent" as recorded in the House and Senate Journals in the legislative history of HB 2200 that became Act 129, nor in the changes to the bill through each Printer's Number.

Thus, I have found no basis on which the PUC can justify their mandate of universal forced deployment of smart meters in their Implementation Order of 2009. Consequently, the EDCs, including West Penn Power, have no legal basis on which to force smart meters on their customers".[1]

Development in the Legislature

The actual legislative record and development of what we now know as Act 129 of 2008 pertaining to smart meters is documented under "House Bill 2200 History" (https://www.legis.state.pa.us/cfdocs/billinfo/bill_history.cfm?syear=2007&sind=0&body=H&type=B&bn=2200)is as follows:

Please take Judicial Notice of the wording in Bill # PN 3218 on February 11, 2008:

> (ii) Electric distribution companies shall furnish smart meter technology to:
>
> (A) Customers responsible for 40% of the distribution company's annual peak demand within four years after the effective date of this paragraph.
>
> (B) Customers responsible for 75% of the distribution company's annual peak demand within six years after the effective date of this paragraph.
>
> (C) One hundred percent of its customers within ten years after the effective date of this paragraph.

Please take Judicial Notice of remarks relevant to smart meters made about Bill # PN3218 as recorded in the House Journal, February 11, 2008, pages 386-403:

- It is undisputed that in response to Bill #3218 legislators asserted that customers should be able to choose a smart meter and not have it mandated.

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[1] 1: Before the Pennsylvania Public Utility Commission: Testimony of Wes Zimmerman, Special Agent, IRS Criminal Investigation Division, 3 W. Broad Street, Suite 8 Bethlehem, PA 18018, 1 January 2020. Page 8

- It is undisputed that in response to Bill #3218 there were no legislators who spoke up, according to the record, to support that smart meter installation should be mandatory.
- It is undisputed that Bill #3218 was not favored and was not passed by the House.

Please take Judicial Notice the relevant wording of Bill # PN 3233 on February 12, 2008:

> (ii) Electric distribution companies shall furnish smart meter technology to:
>
> (A) Customers responsible for 40% of the distribution company's annual peak demand within four years after the effective date of this paragraph.
>
> (B) Customers responsible for 75% of the distribution company's annual peak demand within six years after the effective date of this paragraph.
>
> (C) One hundred percent of its customers within ten years after the effective date of this paragraph.

Please take Judicial Notice of the remarks relevant to smart meters that were made about Bill # PN3233 as recorded in the House Journal, February 12, 2008, pages 430-432**:**

- It is undisputed that in response to Bill # PN 3233 there **continued to be legislative opposition** that Pennsylvania customers **should not be forced** to pay for smart meters and their higher costs and that smart meters **should not be mandated**.
- It is undisputed **that the language of PNs 3218/3233 with regard to smart meters *was not passed into law.***

Please take Judicial Notice of the language of Bill # PN 4429 in the Senate as of September 23, 2008:

"(2) ELECTRIC DISTRIBUTION COMPANIES SHALL FURNISH SMART METER TECHNOLOGY AS FOLLOWS:

(I) UPON REQUEST TO A CUSTOMER THAT AGREES TO PAY THE COST OF THE SMART METER.

(II) IN THE CONSTRUCTION OF A NEW RESIDENCE OR NEW BUILDING TO BE USED BY A COMMERCIAL CUSTOMER.

(III) **IN ACCORDANCE WITH A SCHEDULE OF REPLACEMENT OF FULL DEPRECIATION OF EXISTING METERS."**

- It is undisputed that PN 4429 **which required replacing all existing meters** according to their full depreciation schedule **was not passed.**

Please take Judicial Notice of the language of Bill # PN 4429 in the Senate as of September 23, 2008:

(2) ELECTRIC DISTRIBUTION COMPANIES SHALL FURNISH SMART METER TECHNOLOGY AS FOLLOWS:

(I) UPON REQUEST TO A CUSTOMER THAT AGREES TO PAY THE COST OF THE SMART METER.

(II) IN THE CONSTRUCTION OF A NEW RESIDENCE OR NEW BUILDING TO BE USED BY A COMMERCIAL CUSTOMER.

(III) IN ACCORDANCE WITH A SCHEDULE OF REPLACEMENT OF FULL DEPRECIATION OF EXISTING METERS.

- Side note: While there are no Senate Journal comments about the explicit language of PN 4429, it **was not passed by the Senate**.

- It is undisputed that PN 4429 which required replacing all existing meters according to their full depreciation schedule was not passed.

Please take Judicial Notice of the language of Bill # PN 4526 in the Senate as of October 7, 2008:

> (2) ELECTRIC DISTRIBUTION COMPANIES SHALL FURNISH SMART METER TECHNOLOGY AS FOLLOWS:
>
> (I) UPON REQUEST FROM A CUSTOMER THAT AGREES TO PAY THE COST OF THE SMART METER AT THE TIME OF THE REQUEST.
>
> (II) IN NEW BUILDING CONSTRUCTION.
>
> (III) IN ACCORDANCE WITH A DEPRECIATION SCHEDULE NOT TO EXCEED 15 YEARS.

- It is undisputed that **within the context that smart meters are a new offering** to Pennsylvania customers that the language of PN 4526 differs from that of PN 4429 regarding the wording of clause (III).
- It is undisputed that PN 4526 no longer mentions existing meters in its context.
- It is undisputed that in comparing PN 4526 to PN 3218 and PN 3233 that clause (III) language is completely different and that "ONE HUNDRED PERCENT OF ITS CUSTOMERS WITHIN TEN YEARS AFTER THE EFFECTIVE DATE OF THIS PARAGRAPH" and "IN ACCORDANCE WITH A DEPRECIATION SCHEDULE NOT TO EXCEED 15 YEARS" do not mean the same thing, regardless of the specified number of years.

- It is undisputed that in PN 4526 that the subject of discussion is smart meters and that therefore the depreciation schedule referred to in clause (III) can only be in reference to smart meters.

Please take Judicial Notice of discussion of PN 4526 in the Senate is recorded in the Senate Journal on October 8, 2008, pages 2626-2631 from which the following comments pertinent to smart meters and concerns about customers are taken:

- It is undisputed that three Senators (Tomlinson, Boscola and Fumo) stated that smart meters were not mandated in this bill.
- It is undisputed that no other senators spoke up to contradict or correct the statements of Senators Tomlinson, Boscola and Fumo with regard to the non-mandatory intent of PN 4526.
- It is undisputed that there were on-going concerns about future high costs of electricity to the consumer that PN 4526 was not addressing.
- It is undisputed that, as mentioned by Senator Ferlo, the power companies are purchasing power from the PJM marketplace which is what really sets the rates, independent of the type of meter on homes.

Please take Judicial Notice of Bill 4526, passed by the Senate, and then went back to the House. The Legislative Journal, pp. 2323-2327 documents further concerns about PN 4526 prior to voting as follows:
(https://www.legis.state.pa.us/WU01/LI/HJ/2008/0/20081008.pdf#page=65)

- It is undisputed that PN 4526 was passed in the House with ongoing reservations and concerns about the costs to customers.
- It is undisputed that **Rep. Turzai emphasized he supported a non-mandated approach** that allowed customers to make their own energy conservation decisions for themselves.

- It is undisputed that since Rep. Turzai voted in favor of PN 4526 that he did so in part because he believed it was a "non-mandated approach". (In other words, Rep. Turzai's comment about supporting a non-mandated approach strongly suggests **there was no mandate**.)
- It is undisputed that, according to the legislative record, opposition such as to that expressed about **mandatory language was absent** of the previous bill versions (PNs 3218, 3233) in the consideration of PN 4526.
- It is undisputed that, according to the legislative record, **no legislators found issue with the non-mandatory language** of PN 4526 as opposed to the mandatory language of the previous bill versions (PNs 3218, 3233).
- It is undisputed that HB2200 PN4526 was passed in part because both the houses of Legislators were satisfied with the non-mandatory nature of the language with regard to "furnishing" smart meters.

Please take Judicial Notice that HB 2200 was signed into law as Act 129 by Governor Edward G. Rendell with the section pertaining to the "furnishing" of smart meters was recorded in relevant part as follows:

> "§ 2807. Duties of electric distribution companies."
>
> "(f) Smart meter technology and time of use rates —
>
> (1) Within nine months after the effective date of this paragraph, electric distribution companies shall file a smart meter technology procurement and installation plan with the commission for approval. The plan shall describe the smart meter technologies the electric distribution company proposes to install in accordance with paragraph (2).
>
> (2) Electric distribution companies shall furnish smart

meter technology as follows:

(i) Upon request from a customer that agrees to pay the cost of the smart meter at the time of the request.

(ii) In new building construction.

(iii) In accordance with a depreciation schedule not to exceed 15 years."

"APPROVED--The 15th day of October, A. D. 2008. EDWARD G. RENDELL"

- It is undisputed that the language of Act 129 § 2807 is the same as what was written in PN 4526.
- It is undisputed that Act 129 § 2807 is believed to be non-mandatory as per the documented legislative and senate records.
- It is undisputed that Act 129 § 2807 f(2)(i) requires that customers who wish to have a smart meter **must request it and agree to pay** for the cost of it at the time of the request, which is not mandatory and requires full disclosure and an informed decision.
- It is undisputed that Act 129 § 2807 f(2)(ii) **does not say** "in all new building construction" and therefore, based on language and the non-mandatory intent with which the law was passed, makes smart meters an option **but not a requirement** for new construction.
- It is undisputed that Act 129 § 2807 f(2)(iii) **does not mention existing analog meters** and, in accord with the language of that section, **can only be self-referential to smart meters**.
- It is undisputed that smart meters are to be furnished "In accordance with a depreciation schedule not to exceed 15 years" is a financial accounting measure of relevance to smart

meters since there is no mention of the existing analog meters whose depreciation schedules have already been assigned, and **"depreciation" is an accounting term only**.

- It is undisputed that stating smart meters are to be furnished "In accordance with a depreciation schedule not to exceed 15 years" is not the same as saying "…furnished to … One hundred percent of its customers within ten years after the effective date of this paragraph" **as was the language of PN 3218 which went unpassed.**
- It is undisputed that stating smart meters are to be furnished "IN ACCORDANCE WITH A DEPRECIATION SCHEDULE NOT TO EXCEED 15 YEARS" **is not the same as saying** "IN ACCORDANCE WITH A SCHEDULE OF REPLACEMENT OF FULL DEPRECIATION OF EXISTING METERS" as was the language of PN 4429.
- It is undisputed that since earlier versions of the bill which mandated universal deployment of smart meters in their versions of clause (iii) were criticized for being mandatory and were not passed, whereas the belief and intent as clearly expressed by both houses immediately prior to the passage of Act 129 was that the new language was clearly non-mandatory, that Act 129 § 2807 f(2)(iii**) cannot reasonably be interpreted by the common man as meaning "mandatory universal deployment"** of smart meters.

Please take Judicial Notice of the first evidence we have found in the PUC public records that amends the wording and intent of Act 129 § 2807 (f) (2) was found in a March 5, 2009 power point presentation made by PUC employees to MADRI Steering Committee in relevant part (http://madrionline.org/wp-content/uploads/2009/04/Act_129_Presentation.pdf):

Act 129 of 2008
Overview and Implementation

MADRI Steering Committee Meeting
March 5, 2009

Kim Pizzingrilli, Commissioner
kpizzin@state.pa.us
717.772.0692

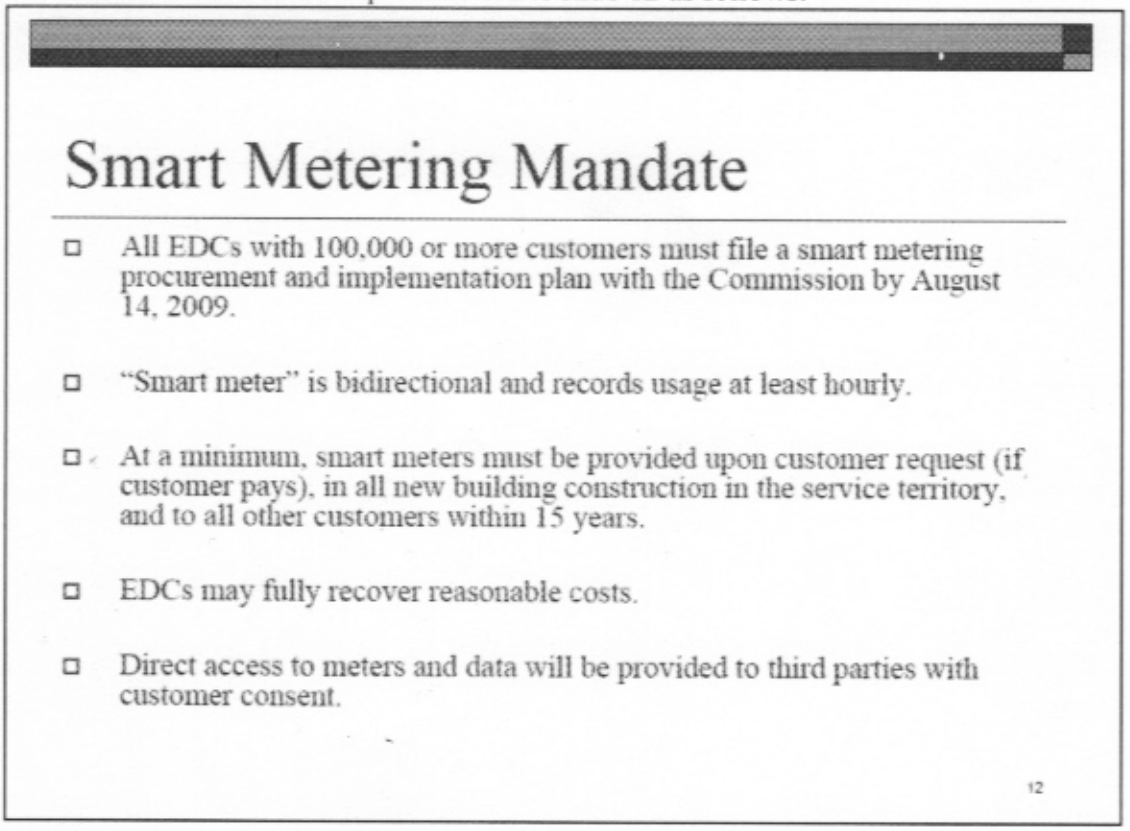
Shane Rooney, Counsel
srooney@state.pa.us
717.787.2871

Pennsylvania Public Utility Commission
Harrisburg, PA 17105-3265
www.puc.state.pa.us

Act 129

- Legislative History
- Implementation Schedule
- Energy Consumption Reduction Objective
- Peak Demand Reduction Objective
- Standards for Implementation
- Penalties
- Smart Metering Mandate
- Time Based Rate Mandate

The relevant slide in this 15-slide presentation is slide 12 as follows:



Smart Metering Mandate

- All EDCs with 100,000 or more customers must file a smart metering procurement and implementation plan with the Commission by August 14, 2009.
- "Smart meter" is bidirectional and records usage at least hourly.
- At a minimum, smart meters must be provided upon customer request (if customer pays), in all new building construction in the service territory, and to all other customers within 15 years.
- EDCs may fully recover reasonable costs.
- Direct access to meters and data will be provided to third parties with customer consent.

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- It is undisputed that to be compliant with Act 129 Slide 12 above would retain the language use in the first two bullet points.
- It is undisputed that to be compliant with Act 129 Slide 12 above in the third bullet point would NOT say "at minimum".
- It is undisputed that to be compliant with Act 129 Slide 12 above in the fourth bullet point would remain as is, possibly adding "over 15 years".
- It is undisputed that to be compliant with Act 129 Slide 12 above the fifth bullet point would not exist, or if the concept was covered it must be something along the lines that made it clear that **access to meters and data to third parties would be offered only to**

"electric generation suppliers and providers of conservation and load management services." PA Title 66 §2807(f)(3).

- It is undisputed that Commissioner Kim Pizzingrilli and PUC Counsel Shane Rooney **significantly amended Act 129 § 2807 (f) (2) and §2807 (f) (3)** in language and intent in their March 5, 2009 "Act 129 of 2008 Overview and Implementation" presentation.
- It is undisputed that "shall furnish" in Act 129 § 2807 (f) (2) does not carry the same meaning as "must be provided" used in the PUC's March 5, 2008 presentation.
- It is undisputed that "in all new building construction in the service territory" cited in the PUC's March 5, 2008 presentation does not state mandatory "in new building construction".
- It is undisputed that "and to all other customers within 15 years" of the PUC's March 5, 2008 presentation is identical in intent to PN 3218/3233's third clause that smart meters are to be "…furnished to …One hundred percent of its customers within ten years after the effective date of this paragraph" and that PNs 3218/3233 **were criticized in the legislative history for being mandatory** and ***were not passed into law*** at least in part because they seemed to mandate universal deployment of smart meters.
- It is undisputed that "and to all other customers within 15 years" in the PUC's March 5, 2008 presentation is not the same in scope, meaning or intent of "IN ACCORDANCE WITH A DEPRECIATION SCHEDULE NOT TO EXCEED 15 YEARS" of Act 129 § 2807 (f) (2)(iii).
- It is undisputed that the primary clause of Act 129 § 2807 (f) (2)(i) stating that smart meters shall be furnished "UPON REQUEST FROM A CUSTOMER THAT AGREES

TO PAY THE COST OF THE SMART METER AT THE TIME OF THE REQUEST" is preserved in the PUC's March 5, 2008 presentation.

- It is undisputed that the clauses stating smart meters be provided "in all new building construction in the service territory" and "to all other customers within 15 years" render null and void the non-mandatory clause (i): "upon customer request (if customer pays)".
- It is undisputed that there is no point citing a provision in a law for a non-mandatory ("upon request from a customer (if customer pays)") if the remaining clauses invalidate it.

Please take Judicial Notice of the PUC's "Smart Meter Procurement and Installation Implementation Order" of June 2009 (hereinafter Order):

- It is undisputed that the Order mirrors the intent as presented in their March 5, 2008, presentation as shown above rather than carefully adhering to Act 129 as legislated.

  Excerpts below that are relevant are from this Order.

  (Link to the June 2009 Order: http://www.puc.pa.gov/pcdocs/1046123.doc)
- Section B "Smart Meter Deployment" (p. 6) cites Act 129 verbatim:

  "Act 129 requires EDCs to furnish smart meter technology (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 15 years. 66 Pa.C.S. § 2807(f)(2). "

The rest of the Order focuses on when and how to deploy smart meters to customers who request them, with a caveat on the latter as follows (Section 3: New Construction, p. 12):

"As with all equipment, meters have a useful life. EDCs determine how much to invest in meter equipment based on its useful life and have an opportunity to depreciate that investment over the useful life of the meter. In addition, EDCs have an opportunity to recover the cost of the meter from ratepayers. Therefore, if a meter is replaced prior to the end of its useful life, the EDC will not be able to take advantage of the full depreciation of that meter or the ratepayers will pay an increased rate to cover the cost of both meters. The Commission believes that the intent of the Act's provision for installing smart meters in new construction was to avoid this waste and added expense."

The above belief is the PUC's way to change the *option* of getting smart meters in new construction to *mandating it in all new construction* while making it look like they are complying with the law and the intent with which it was passed. The difficulty with this statement is that it presumes that all analog meters will eventually have to be replaced with smart meters, **which is not what Act 129 clearly stated. It does not preserve the non-mandatory, customer friendly, nature with which Act 129 was written**, intended and passed.

In the third clause of Act 129 § 2807(f)(2), which the Order states as follows (Section 4: System-Wide Deployment, p. 14):

"The Commission believes that it was the intent of the General Assembly to require all covered EDCs to deploy smart meters system-wide when it included a requirement for smart meter deployment "in accordance with a depreciation schedule not to exceed 15 years." It is this system-wide deployment that will provide the foundation for the EDCs' smart meter installation plans."

Please take Judicial Notice that the following refers to the PUC's Order and the observations about it cited above:

- It is undisputed that the Act 129 § 2807 (f) (2) (ii) provision "in new construction" legally and logically does **not mean** the same thing as "in all new construction".
- It is undisputed that the Act 129 § 2807 (f) (2) (ii) provision "in new construction" is lacking the word "all" in it.
- It is undisputed that Act 129 § 2807 (f) (2) (ii) **was amended by the PUC** from being a non-mandatory, customer centric option "upon request of a customer" for new construction as per how it is written to be required in all new construction by the PUC's Implementation Order.
- It is undisputed that Act 129 § 2807 (f) (2) (iii) was amended from a clear accounting provision to a mandatory edict for system-wide deployment by the PUC's Order.
- It is undisputed that the PUC's belief "that it was the intent of the General Assembly to require all covered EDCs to deploy smart meters system-wide when it included a requirement for smart meter deployment 'in accordance with a depreciation schedule not to exceed 15 years'" **is inconsistent with the legislative history** and development of Act 129 with regard to smart meters.
- It is undisputed that "upon request from a customer" of Act 129 § 2807 (f) (2) (i) was rendered null and void by the PUC's Implementation Order through the alteration of clauses (ii) and (iii), changing (ii) to mean effectively "in <u>all</u> new construction", and changing (iii) from an accounting term to mean "required system-wide deployment".
- It is undisputed intent of the Order parallels the explicit wording of the PUC's March 5, 2009 "Act 129 of 2008 Overview and Implementation" with regard to furnishing (or providing) smart meters.

- It is undisputed that, given all of the above history and documentation, that Act 129 § 2807 (f) (2) has been altered in the PUC's Implementation Order of June 2009 from what was written, intended and passed by legislators.
- It is undisputed that a law (Act 129) whose first and foremost clause § 2807 (f) (2) (i) is for a non-mandatory opt-in smart meter provision would intentionally negate this provision with its next two clauses §2807 (f) (2)(ii) and (iii).
- It is undisputed that if the PUC has the authority to interpret the law, it additionally has a parallel duty to ensure the interpretation is consistent with and obedient to the law, but never to amend the law.
- It is undisputed that the Respondent is following the PUC Implementation Order and is not following Act 129 as written, intended and passed. In short, the **Respondent is NOT FOLLOWING THE LAW**.
- It is undisputed **by their own testimony that the Respondent has the duty to follow the law.**
- **It is undisputed the Respondent must oppose the PUC when the PUC contradicts the law and to exhaust all remedies in pursuit thereof.**

Please take Judicial Notice of US P. L. 109-58 known as the Energy Policy Act of 2005:

- **It is undisputed** FirstEnergy agreed to accept a grant of $57,470,137 from the Federal Government Energy Act of 2005 documentation taken from the government website https://www.energy.gov, **RECOVERY ACT SELECTIONS FOR SMART GRID INVESTMENT GRANT AWARDS - BY CATEGORY:**

https://www.energy.gov/sites/prod/files/edg/media/SGIGSelections_Category.pdf

FirstEnergy Service Company	$57,470,137	$114,940,273	Akron, OH with addtl. benefits in PA	Modernize the electrical grid and reduce peak energy demand by leveraging the crosscutting nature of different smart grid technologies, including significant communication and information management systems, deploying a smart meter network and automating the distribution system.	http://www.energy.gov/recovery/smartgrid_maps/FirstEnergy.JPG

- It is undisputed that the taking of said grant from the Federal Government as stipulated in the Energy Act of 2005 obligates FirstEnergy Corp to adhere to the requirements of that act, which in part stipulates that the smart meters be deployed **at the customer request**.
- It is undisputed FirstEnergy Corp. announces agreement with the US Department of Energy agreement for Smart Grid grants, again obligating FirstEnergy Corp. to the stipulations of the Energy Act of 2005, in part that smart meters be deployed **at the customer request**.

CONCLUSION

Complainant argues that the **contract** between the people herein referred to as Complainant, a.k.a. Rate Payer, and the person herein known as Respondent was violated, the **Organic Law** was violated, **Pennsylvania Act 129 of 2008** was violated, and the **Federal Energy Act of 2005** which provided grant money was violated. This violation was directly perpetrated by the Respondent, but at the direction of the PUC. Violation occurred by universal mandatory deployment of meters without a valid contract, full disclosure, conscious consent, and agreement to pay in advance of deployment/installation on the home of Complainant (or the homes of the people in general).

It is interesting that it seems that **no** language in the actual PUC implementation order says it is mandatory for every customer, but only a goal; however the two page public relations "**Smart Meter Q&A, Fact Sheet,** Smart Meter Q&A" found on the PUC web site alone was found to be specific to mandatory for every customer as a condition of service. The Respondent's action is contrary to statutory authority, and outside the bounds of reason.

During the telephonic hearing with the PUC on this matter October 30, 2019, the Respondent's own witness, John C. Ahr, testified that the Respondent must follow the law.

All Rights Reserved,

Dated: January 16, 2020

Diana Sabatine
c/o 315 Possum Hollow Road
Latrobe, Pennsylvania [15650]
diana.sabatine@gmail.com
(724) 689-9771

EXHIBITS

EXHIBIT A Act of Oct. 15, 2008, P. L. 1592, NO. 129 – Page 1 and Page 17

EXHIBIT B PUBLIC LAW 109 – 58 – AUG. 8, 2005 – 119 STAT 963-967

EXHIBIT C Republic Steel Corp. v. W.C.A.B. Shinsky), 492 Pa. 1, 421 A.2d 1060 (1980)

EXHIBIT D Bolden v. State, 44 Md. App. 643 (Md. Ct. Spec. App. 1980)

EXHIBIT E Testimony of Wes Zimmerman, Special Agent, IRS Criminal Investigation Division, 3 W. Broad Street, Suite 8 Bethlehem, PA 18018, Before the Pennsylvania Public Utility Commission,1 January 2020

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Diana Sabatine	:	
	:	
v.	:	**Docket No. C-2018-3002804**
	:	
WEST PENN POWER COMPANY	:	

ORDER

THEREFORE,

IT IS ORDERED:

Whereas the plain language of Pennsylvania Act 129 of 2008 was violated by the implementation of the same, it is Ordered any electricity distributor under the authority of the Pennsylvania Public Utility Commission, contractors, etc. maintain electric service to Complainant using meter/s of the same technology currently installed on Complainant's home. Should Complainant move to another home or open another electric account under said authority the meter used by the subsequent electricity distributor shall be the same technology now on Complainant's home or new account.

Further, Respondent shall refund all charges to Complainant related to changing / replacing the meter with interest.

Finally, Respondent shall refund all monies granted and received by US P. L. 109-58 known as the Energy Policy Act of 2005 as the result of violating the plain language meaning of said Act.

Date: _____

_____
Jeffrey A. Watson
Administrative Law Judge

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Diana Sabatine	:	
	:	
v.	:	**Docket No. C-2018-3002804**
	:	
WEST PENN POWER COMPANY	:	

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the *Brief* in the above captioned docket number upon the individual(s) listed below.

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

Judge Jeffrey Watson
Pennsylvania Public Utility Commission
Office of Administrative Law Judge
Piatt Place, Suite 220
301 Fifth Avenue
Pittsburgh, Pa 15222

Tori L. Giesler, Esquire
First Energy Service Company
2800 Pottsville Pike
P.O. Box 16001
Reading, Pennsylvania 19612

Dated: January 16, 2020

Diana Sabatine
c/o 315 Possum Hollow Road
Latrobe, Pennsylvania [15650]

PUBLIC UTILITY CODE (66 PA.C.S.) - OMNIBUS AMENDMENTS
Act of Oct. 15, 2008, P.L. 1592, No. 129 **Cl. 66**
Session of 2008
No. 2008-129

HB 2200

AN ACT

Amending Title 66 (Public Utilities) of the Pennsylvania Consolidated Statutes, further providing for director of operations, secretary, employees and consultants; repealing provisions relating to office of trial staff; further providing for bureaus and offices; providing for other bureaus, offices and positions; further providing for electric utility definitions; providing for energy efficiency and conservation program and for energy efficiency and conservation; further providing for duties of electric distribution companies and for market power remediation; and providing for procurement, for additional alternative energy sources and for carbon dioxide sequestration network.

The General Assembly recognizes the following public policy findings and declares that the following objectives of the Commonwealth are served by this act:

(1) The health, safety and prosperity of all citizens of this Commonwealth are inherently dependent upon the availability of adequate, reliable, affordable, efficient and environmentally sustainable electric service at the least cost, taking into account any benefits of price stability over time and the impact on the environment.

(2) It is in the public interest to adopt energy efficiency and conservation measures and to implement energy procurement requirements designed to ensure that electricity obtained reduces the possibility of electric price instability, promotes economic growth and ensures affordable and available electric service to all residents.

(3) It is in the public interest to expand the use of alternative energy and to explore the feasibility of new sources of alternative energy to provide electric generation in this Commonwealth.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. Section 305(a) of Title 66 of the Pennsylvania Consolidated Statutes is amended to read:

§ 305. Director of operations, secretary, employees and consultants.

(a) Director of operations.--The commission may appoint a director of operations who shall serve at the pleasure of the commission and shall be responsible for the day-to-day administration and operation of the bureaus and offices of the commission, except that the director of operations shall have responsibility for the [Office of Trial Staff] **prosecutorial function** only with regard to administrative matters.

EXHIBIT A: Act of Oct. 15, 2008, P. L. 1592, NO. 129 – Page 1 and Page 17

disapprove the proposed amendments within nine months of the date that the amendments are filed. If the commission fails to issue a final order within nine months, the amendments shall be deemed to be approved and the default service provider may implement the amendments as filed.

(7) The default service provider shall offer residential and small business customers a generation supply service rate that shall change no more frequently than on a quarterly basis. All default service rates shall be reviewed by the commission to ensure that the costs of providing service to each customer class are not subsidized by any other class.

(f) Smart meter technology and time of use rates.--

(1) Within nine months after the effective date of this paragraph, electric distribution companies shall file a smart meter technology procurement and installation plan with the commission for approval. The plan shall describe the smart meter technologies the electric distribution company proposes to install in accordance with paragraph (2).

(2) Electric distribution companies shall furnish smart meter technology as follows:

(i) Upon request from a customer that agrees to pay the cost of the smart meter at the time of the request.

(ii) In new building construction.

(iii) In accordance with a depreciation schedule not to exceed 15 years.

(3) Electric distribution companies shall, with customer consent, make available direct meter access and electronic access to customer meter data to third parties, including electric generation suppliers and providers of conservation and load management services.

(4) In no event shall lost or decreased revenues by an electric distribution company due to reduced electricity consumption or shifting energy demand be considered any of the following:

(i) A cost of smart meter technology recoverable under a reconcilable automatic adjustment clause under section 1307(b), except that decreased revenues and reduced energy consumption may be reflected in the revenue and sales data used to calculate rates in a distribution rate base rate proceeding filed under section 1308 (relating to voluntary changes in rates).

(ii) A recoverable cost.

(5) By January 1, 2010, or at the end of the applicable generation rate cap period, whichever is later, a default service provider shall submit to the commission one or more proposed time-of-use rates and real-time price plans. The commission shall approve or modify the time-of-use rates and real-time price plan within six months of submittal. The default service provider shall offer the time-of-use rates and real-time price plan to all customers that have been provided with smart meter technology under paragraph (2)(iii). Residential or commercial customers may elect to participate in time-of-use rates or real-time pricing. The default service provider shall submit an annual report to the price programs and the efficacy of the programs in affecting energy demand and consumption and the effect on wholesale market prices.

EXHIBIT A: Act of Oct. 15, 2008, P. L. 1592, NO. 129 – Page 1 and Page 17

EXHIBIT B: PUBLIC LAW 109 – 58 – AUG. 8, 2005 – 119 STAT 963-967

(b) COMPLIANCE.—

(1) TIME LIMITATIONS.—Section 112(b) of the Public Utility Regulatory Policies Act of 1978 (16 U.S.C. 2622(b)) is amended by adding at the end the following: Deadlines.

"(3)(A) Not later than 2 years after the enactment of this paragraph, each State regulatory authority (with respect to each electric utility for which it has ratemaking authority) and each nonregulated electric utility shall commence the consideration referred to in section 111, or set a hearing date for such consideration, with respect to each standard established by paragraphs (11) through (13) of section 111(d).

"(B) Not later than 3 years after the date of the enactment of this paragraph, each State regulatory authority (with respect to each electric utility for which it has ratemaking authority), and each nonregulated electric utility, shall complete the consideration, and shall make the determination, referred to in section 111 with respect to each standard established by paragraphs (11) through (13) of section 111(d).".

(2) FAILURE TO COMPLY.—Section 112(c) of the Public Utility Regulatory Policies Act of 1978 (16 U.S.C. 2622(c)) is amended by adding at the end the following: "In the case of each standard established by paragraphs (11) through (13) of section 111(d), the reference contained in this subsection to the date of enactment of this Act shall be deemed to be a reference to the date of enactment of such paragraphs (11) through (13).".

(3) PRIOR STATE ACTIONS.—

(A) IN GENERAL.—Section 112 of the Public Utility Regulatory Policies Act of 1978 (16 U.S.C. 2622) is amended by adding at the end the following:

"(d) PRIOR STATE ACTIONS.—Subsections (b) and (c) of this section shall not apply to the standards established by paragraphs (11) through (13) of section 111(d) in the case of any electric utility in a State if, before the enactment of this subsection—

"(1) the State has implemented for such utility the standard concerned (or a comparable standard);

"(2) the State regulatory authority for such State or relevant nonregulated electric utility has conducted a proceeding to consider implementation of the standard concerned (or a comparable standard) for such utility; or

"(3) the State legislature has voted on the implementation of such standard (or a comparable standard) for such utility.".

(B) CROSS REFERENCE.—Section 124 of such Act (16 U.S.C. 2634) is amended by adding the following at the end thereof: "In the case of each standard established by paragraphs (11) through (13) of section 111(d), the reference contained in this subsection to the date of enactment of this Act shall be deemed to be a reference to the date of enactment of such paragraphs (11) through (13).".

SEC. 1252. SMART METERING.

(a) IN GENERAL.—Section 111(d) of the Public Utility Regulatory Policies Act of 1978 (16 U.S.C. 2621(d)) is amended by adding at the end the following:

"(14) TIME-BASED METERING AND COMMUNICATIONS.—(A) Not later than 18 months after the date of enactment of this paragraph, each electric utility shall offer each of its customer Deadline.

EXHIBIT B: PUBLIC LAW 109 – 58 – AUG. 8, 2005 – 119 STAT 963-967

classes, and provide individual customers upon customer request, a time-based rate schedule under which the rate charged by the electric utility varies during different time periods and reflects the variance, if any, in the utility's costs of generating and purchasing electricity at the wholesale level. The time-based rate schedule shall enable the electric consumer to manage energy use and cost through advanced metering and communications technology.

"(B) The types of time-based rate schedules that may be offered under the schedule referred to in subparagraph (A) include, among others—

"(i) time-of-use pricing whereby electricity prices are set for a specific time period on an advance or forward basis, typically not changing more often than twice a year, based on the utility's cost of generating and/or purchasing such electricity at the wholesale level for the benefit of the consumer. Prices paid for energy consumed during these periods shall be pre-established and known to consumers in advance of such consumption, allowing them to vary their demand and usage in response to such prices and manage their energy costs by shifting usage to a lower cost period or reducing their consumption overall;

"(ii) critical peak pricing whereby time-of-use prices are in effect except for certain peak days, when prices may reflect the costs of generating and/or purchasing electricity at the wholesale level and when consumers may receive additional discounts for reducing peak period energy consumption;

"(iii) real-time pricing whereby electricity prices are set for a specific time period on an advanced or forward basis, reflecting the utility's cost of generating and/or purchasing electricity at the wholesale level, and may change as often as hourly; and

"(iv) credits for consumers with large loads who enter into pre-established peak load reduction agreements that reduce a utility's planned capacity obligations.

"(C) Each electric utility subject to subparagraph (A) shall provide each customer requesting a time-based rate with a time-based meter capable of enabling the utility and customer to offer and receive such rate, respectively.

"(D) For purposes of implementing this paragraph, any reference contained in this section to the date of enactment of the Public Utility Regulatory Policies Act of 1978 shall be deemed to be a reference to the date of enactment of this paragraph.

"(E) In a State that permits third-party marketers to sell electric energy to retail electric consumers, such consumers shall be entitled to receive the same time-based metering and communications device and service as a retail electric consumer of the electric utility.

Deadline.

"(F) Notwithstanding subsections (b) and (c) of section 112, each State regulatory authority shall, not later than 18 months after the date of enactment of this paragraph conduct an investigation in accordance with section 115(i) and issue a decision whether it is appropriate to implement the standards set out in subparagraphs (A) and (C).".

EXHIBIT B: PUBLIC LAW 109 – 58 – AUG. 8, 2005 – 119 STAT 963-967

(b) STATE INVESTIGATION OF DEMAND RESPONSE AND TIME-BASED METERING.—Section 115 of the Public Utility Regulatory Policies Act of 1978 (16 U.S.C. 2625) is amended as follows:

(1) By inserting in subsection (b) after the phrase "the standard for time-of-day rates established by section 111(d)(3)" the following: "and the standard for time-based metering and communications established by section 111(d)(14)".

(2) By inserting in subsection (b) after the phrase "are likely to exceed the metering" the following: "and communications".

(3) By adding at the end the following:

"(i) TIME-BASED METERING AND COMMUNICATIONS.—In making a determination with respect to the standard established by section 111(d)(14), the investigation requirement of section 111(d)(14)(F) shall be as follows: Each State regulatory authority shall conduct an investigation and issue a decision whether or not it is appropriate for electric utilities to provide and install time-based meters and communications devices for each of their customers which enable such customers to participate in time-based pricing rate schedules and other demand response programs.".

(c) FEDERAL ASSISTANCE ON DEMAND RESPONSE.—Section 132(a) of the Public Utility Regulatory Policies Act of 1978 (16 U.S.C. 2642(a)) is amended by striking "and" at the end of paragraph (3), striking the period at the end of paragraph (4) and inserting "; and", and by adding the following at the end thereof:

"(5) technologies, techniques, and rate-making methods related to advanced metering and communications and the use of these technologies, techniques and methods in demand response programs.".

(d) FEDERAL GUIDANCE.—Section 132 of the Public Utility Regulatory Policies Act of 1978 (16 U.S.C. 2642) is amended by adding the following at the end thereof:

"(d) DEMAND RESPONSE.—The Secretary shall be responsible for—

"(1) educating consumers on the availability, advantages, and benefits of advanced metering and communications technologies, including the funding of demonstration or pilot projects;

"(2) working with States, utilities, other energy providers and advanced metering and communications experts to identify and address barriers to the adoption of demand response programs; and

"(3) not later than 180 days after the date of enactment of the Energy Policy Act of 2005, providing Congress with a report that identifies and quantifies the national benefits of demand response and makes a recommendation on achieving specific levels of such benefits by January 1, 2007.". Deadline. Reports.

(e) DEMAND RESPONSE AND REGIONAL COORDINATION.— 16 USC 2642 note.

(1) IN GENERAL.—It is the policy of the United States to encourage States to coordinate, on a regional basis, State energy policies to provide reliable and affordable demand response services to the public.

(2) TECHNICAL ASSISTANCE.—The Secretary shall provide technical assistance to States and regional organizations formed by two or more States to assist them in—

(A) identifying the areas with the greatest demand response potential;

EXHIBIT B: PUBLIC LAW 109 – 58 – AUG. 8, 2005 – 119 STAT 963-967

(B) identifying and resolving problems in transmission and distribution networks, including through the use of demand response;

(C) developing plans and programs to use demand response to respond to peak demand or emergency needs; and

(D) identifying specific measures consumers can take to participate in these demand response programs.

(3) REPORT.—Not later than 1 year after the date of enactment of the Energy Policy Act of 2005, the Commission shall prepare and publish an annual report, by appropriate region, that assesses demand response resources, including those available from all consumer classes, and which identifies and reviews—

(A) saturation and penetration rate of advanced meters and communications technologies, devices and systems;

(B) existing demand response programs and time-based rate programs;

(C) the annual resource contribution of demand resources;

(D) the potential for demand response as a quantifiable, reliable resource for regional planning purposes;

(E) steps taken to ensure that, in regional transmission planning and operations, demand resources are provided equitable treatment as a quantifiable, reliable resource relative to the resource obligations of any load-serving entity, transmission provider, or transmitting party; and

(F) regulatory barriers to improve customer participation in demand response, peak reduction and critical period pricing programs.

(f) FEDERAL ENCOURAGEMENT OF DEMAND RESPONSE DEVICES.—It is the policy of the United States that time-based pricing and other forms of demand response, whereby electricity customers are provided with electricity price signals and the ability to benefit by responding to them, shall be encouraged, the deployment of such technology and devices that enable electricity customers to participate in such pricing and demand response systems shall be facilitated, and unnecessary barriers to demand response participation in energy, capacity and ancillary service markets shall be eliminated. It is further the policy of the United States that the benefits of such demand response that accrue to those not deploying such technology and devices, but who are part of the same regional electricity entity, shall be recognized.

Deadlines.

(g) TIME LIMITATIONS.—Section 112(b) of the Public Utility Regulatory Policies Act of 1978 (16 U.S.C. 2622(b)) is amended by adding at the end the following:

"(4)(A) Not later than 1 year after the enactment of this paragraph, each State regulatory authority (with respect to each electric utility for which it has ratemaking authority) and each nonregulated electric utility shall commence the consideration referred to in section 111, or set a hearing date for such consideration, with respect to the standard established by paragraph (14) of section 111(d).

"(B) Not later than 2 years after the date of the enactment of this paragraph, each State regulatory authority (with respect to each electric utility for which it has ratemaking authority),

EXHIBIT B: PUBLIC LAW 109 – 58 – AUG. 8, 2005 – 119 STAT 963-967

and each nonregulated electric utility, shall complete the consideration, and shall make the determination, referred to in section 111 with respect to the standard established by paragraph (14) of section 111(d).".

(h) FAILURE TO COMPLY.—Section 112(c) of the Public Utility Regulatory Policies Act of 1978 (16 U.S.C. 2622(c)) is amended by adding at the end the following:

"In the case of the standard established by paragraph (14) of section 111(d), the reference contained in this subsection to the date of enactment of this Act shall be deemed to be a reference to the date of enactment of such paragraph (14).".

(i) PRIOR STATE ACTIONS REGARDING SMART METERING STANDARDS.—

(1) IN GENERAL.—Section 112 of the Public Utility Regulatory Policies Act of 1978 (16 U.S.C. 2622) is amended by adding at the end the following:

"(e) PRIOR STATE ACTIONS.—Subsections (b) and (c) of this section shall not apply to the standard established by paragraph (14) of section 111(d) in the case of any electric utility in a State if, before the enactment of this subsection—

"(1) the State has implemented for such utility the standard concerned (or a comparable standard);

"(2) the State regulatory authority for such State or relevant nonregulated electric utility has conducted a proceeding to consider implementation of the standard concerned (or a comparable standard) for such utility within the previous 3 years; or

"(3) the State legislature has voted on the implementation of such standard (or a comparable standard) for such utility within the previous 3 years.".

(2) CROSS REFERENCE.—Section 124 of such Act (16 U.S.C. 2634) is amended by adding the following at the end thereof: "In the case of the standard established by paragraph (14) of section 111(d), the reference contained in this subsection to the date of enactment of this Act shall be deemed to be a reference to the date of enactment of such paragraph (14).".

SEC. 1253. COGENERATION AND SMALL POWER PRODUCTION PURCHASE AND SALE REQUIREMENTS.

(a) TERMINATION OF MANDATORY PURCHASE AND SALE REQUIREMENTS.—Section 210 of the Public Utility Regulatory Policies Act of 1978 (16 U.S.C. 824a–3) is amended by adding at the end the following:

"(m) TERMINATION OF MANDATORY PURCHASE AND SALE REQUIREMENTS.—

"(1) OBLIGATION TO PURCHASE.—After the date of enactment of this subsection, no electric utility shall be required to enter into a new contract or obligation to purchase electric energy from a qualifying cogeneration facility or a qualifying small power production facility under this section if the Commission finds that the qualifying cogeneration facility or qualifying small power production facility has nondiscriminatory access to—

"(A)(i) independently administered, auction-based day ahead and real time wholesale markets for the sale of electric energy; and (ii) wholesale markets for long-term sales of capacity and electric energy; or

EXHIBIT C

Supreme Court of Pennsylvania

Republic Steel Corp. v. W.C.A.B

492 Pa. 1 (Pa. 1980) · 421 A.2d 1060
Decided Oct 31, 1980

Argued September 29, 1980.

Decided October 31, 1980.

Appeal from the Commonwealth Court, No. 1538 C. D. 1978, 48 Pa. Commw. 131, 408 A.2d 1200, Crumlish, Jr., J. *2

Benjamin L. Costello, Pittsburgh, Kenneth J. Yablonski, Washington, for appellant. *3

Scott E. Becker, Linton L. Moyer, Thomson, Rhodes Grigsby, William Jones, Pittsburgh, for appellee.

Before O'BRIEN, C. J., and ROBERTS, NIX, LARSEN, FLAHERTY and KAUFFMAN, JJ.

OPINION OF THE COURT

FLAHERTY, Justice.

This is an appeal from an order of the Commonwealth Court[1], which reversed a decision of the Workmen's Compensation Appeal Board (hereinafter Board). The Board had affirmed a referee's decision awarding benefits to the appellant, Alex Shinsky, on the basis that he had been totally disabled by coal miner's pneumoconiosis.

[1] *Republic Steel Corporation v. Workmen's Compensation Appeal Board et al.*, 48 Pa. Commw. 131, 408 A.2d 1200 (1979).

Appellant worked as a coal miner for more than twenty-five years and was employed by the appellee, Republic Steel Corporation (hereinafter Republic), from 1971 until January 7, 1975, when respiratory difficulties precipitated his retirement. Appellant Shinsky notified Republic of disability caused by occupational disease on December 1, 1975, and filed his claim petition on December 11, 1975.

Republic raised before the Workmen's Compensation referee the issue of whether notice of such occupational disease was timely given, in view of the fact that Shinsky received medical treatment, in connection with a breathing problem, from Dr. A. G. Saloom from 1971 until mid 1975. Republic contends that Shinsky knew he suffered from pneumoconiosis at the *latest* in mid 1975, alleging that he had been so informed by Dr. Saloom. This was more than 120 days before notice was given to Republic. Hence, it was argued before the Workmen's Compensation referee that there had been a failure to comply with the 120 day notice requirement of Section 311 of the Pennsylvania Workmen's Compensation Act, which provides: *4

> Unless the employer shall have knowledge of the occurrence of the injury, or unless the employe or someone in his behalf, or some of the dependents or someone in their behalf, shall give notice thereof to the employer within twenty-one days after the injury, no compensation shall be due until such notice is given, and, unless such notice be given within one hundred and twenty days after the occurrence of the injury, no compensation shall be allowed. However, in cases of injury resulting from ionizing radiation or any other cause in which the nature of the injury or its relationship to the employment is not known to the employe, the time for giving notice shall not begin to run until the employe knows, or by the exercise of reasonable diligence should know, of the existence of the injury and its possible relationship to his employment. The term "injury" in this section means, in cases of occupational disease, disability resulting from occupational disease.

Act of June 2, 1915, P.L. 736, *as amended*, 77 P. S. § 631 (1980 supp.). The referee resolved the factual issue of notice as follows:

> "Although claimant had filed on three separate occasions for federal black lung benefits and had been doctoring with Dr. A. G. Saloom from 1971 and further that Dr. Saloom feels that he must have told the claimant on July 3, 1975, that he was totally disabled from coal workers pneumoconiosis, this referee is of the opinion that the first time that the claimant was fully aware of the seriousness of his condition and that he was totally disabled from coal workers pneumoconiosis was when he had been examined by another independent physician, Dr. Thomas Connely, on October 31, 1975, and had been told the results of said examination, '. . . he is totally and permanently disabled from coal workers pneumoconiosis as a result of his cumulative exposure to coal dust while employed as an active miner by letter dated November 11, 1975, to his union attorney; and that upon learning the results of his examination, he
> 5 notified his last employer through his *5 attorney by certified mail #917210 dated December 1, 1975, and received on December 3, 1975, which was within 30 days of his awareness.' "

Appellant maintains that Commonwealth Court, in reversing the decision of the Board, usurped the fact finding authority of the Board, thereby exceeding the proper scope of review by an appellate court with respect to the findings of an administrative agency.

The standard of review of agency proceedings by appellate courts in this Commonwealth is the determination of whether there is substantial evidence to support the findings of the agency. *Keystone Water Company v. Pennsylvania Public Utility Commission*, 477 Pa. 594, 385 A.2d 946 (1978). *Shenandoah Suburban Bus Lines*, 355 Pa. 521, 50 A.2d 301 (1947). Substantial evidence has been defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Shenandoah Suburban Bus Lines, supra.* Hence, appellate review must focus on whether there is rational support in the record, when reviewed as a whole, for the agency action. These principles have repeatedly been stated in another fashion: Review of the findings of fact is limited to the question of whether the lower court's findings are adequately supported by the evidence as a whole; credibility is solely an issue for the finder of fact; and findings of fact will be overturned only if they are arbitrary and capricious. See *Kay v. Kay*, 460 Pa. 680, 334 A.2d 585 (1975). *Hatalowich v. Redevelopment Authority of City of Monessen*, 454 Pa. 481, 312 A.2d 22 (1973). In applying this standard of review to the findings of an administrative agency, it has been held by the Commonwealth Court itself that an appellate court, in order to reverse, must conclude that the findings of the agency are *totally* without support in the record. *Owens v. Workmen's Compensation Appeal Board*, 39 Pa. Commw. 510, 395 A.2d 1032 (1979).

Upon review of the whole record in the present case, we find substantial evidence supporting the Board's finding of fact and, hence, the referee's and Board's findings cannot *6 be described as arbitrary or capricious. It is undisputed that appellant Shinsky received medical care from 1971 to 1975, and there is evidence in the record to support the conclusion that he had a breathing problem during that period, but there is also testimony that he did not understand or realize that the breathing problem was pneumoconiosis until October 31, 1975. There is also testimony by Dr. Saloom, which is not unequivocal, that Shinsky did receive notice prior to October, 1975 that he was suffering from pneumoconiosis. However, the statement of this treating physician was not unqualified. When asked if he had informed Shinsky that he was totally disabled and suffering from pneumoconiosis, Dr. Saloom replied:

> "Let's put it this way, *I must have informed him.* Yes, I'm sure. *I think it was something*, you know, I don't have a record on here, but I think there were telephone calls that he would — Mr. Shinsky wasn't a man — he was one of those who said well you know, god's will or something like that at times, and he wasn't — I mean he wasn't one to come and sit in a doctor's office." (Emphasis added.)

Thus, there are at least three possibilities or supportable inferences which could have supported the referee and Board's findings of fact. First, Dr. Saloom did not appear to have first-hand recollection of telling Shinsky the nature of his illness, and the doctor's records do not state that he did. The referee could simply have resolved the disputed issue of fact in favor of the claimant; the Board may have concluded that in fact Shinsky was not informed that he had pneumoconiosis more than 120 days before the notice was filed, thereby resolving a credibility issue in favor of Shinsky. There is no question that the issue is disputed, but it is the function of the finder of fact to resolve disputed issues of fact, and it is clear that the issue was resolved in favor of the claimant, and that there is evidence to support it. Second, the referee may justifiably have concluded that, while notice was given to Shinsky by Dr. Saloom in the first part of 1975, Shinsky did not understand what he was being told, nor, as a reasonable man, what he should have understood. *7 This position is more difficult to justify, but, since it involves an inference from the facts, since all inferences most favorable to Shinsky must be drawn, and since there is direct testimony which fairly can be characterized as indicating he did not understand from Dr. Saloom the nature of his illness, there is support for this inference in the record. The third possibility is that Shinsky understood that he had pneumoconiosis, but did not understand that he was totally disabled by it. Thus, there is substantial evidence on the whole record for the position of the Board.

Order of the Commonwealth Court reversed.

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