

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Geoff Day	:	
	:	
v.	:	C-2018-3003960
	:	
Duquesne Light Company	:	

INITIAL DECISION

Before
Jeffrey Watson
Administrative Law Judge

INTRODUCTION

This Initial Decision dismisses the Amended Formal Complaint filed by Geoff Day objecting to the installation of a smart meter at his properties for his failure to meet his burden of proof.

PROCEDURAL HISTORY

On August 10, 2018, Geoff Day (Complainant) filed a Formal Complaint (Complaint) with the Pennsylvania Public Utility Commission (Commission) against Duquesne Light Company (Respondent or Company) averring that Respondent was threatening to shut off his service. Complaint identified utility service at 1699 Suburban Avenue, Pittsburgh, Pennsylvania (1699 Suburban Avenue or Original Service Address). Complainant averred that the Company installed a smart meter on his property at 1699 Suburban Avenue without his consent. As relief, Complainant requested that the Commission order the removal of the smart meter and for Respondent to refrain from forcing the installation of the smart meter at the service

location and to discontinue their “harassment and bullying tactics” and threats to disconnect electric service at the service location.¹

On September 4, 2018, Respondent filed an Answer and New Matter to the Complaint. Respondent essentially denied the material allegations set forth in the Complaint. Respondent averred that it is required by Act 129 of 2008² (Act 129), to install a smart meter at the Service Address. Respondent further averred that the subject property, as identified by Complainant as 1699 Suburban Avenue, is a two-family dwelling and that a smart meter was installed at one side of the property designated as Unit 1 but not at Unit 2.

On September 4, 2018, Respondent also filed Preliminary Objections to the Complaint. Respondent averred that the request for relief for an exemption or to opt-out from the installation of a smart meter is not legally recoverable. Respondent further averred that Complainant failed to allege that Respondent violated any Commission statute, regulation, order or tariff provision with regard to the installation of the smart meters at the service location, rendering the Complaint legally insufficient.

On October 1, 2018, Complainant filed a response to the Preliminary Objections.

A Motion Judge Assignment Notice, which was issued on October 15, 2018 and received by the undersigned Presiding Officer on October 18, 2018, assigned the undersigned Presiding Officer to this proceeding.

On October 25, 2018, Respondent served interrogatories and requests for production of documents (Discovery Requests) upon Complainant. Complainant’s responses to the Discovery Requests were due on November 14, 2018. On November 20, 2018, Respondent filed a Motion to Compel Responses to Interrogatories and Document Requests (Motion to Compel Discovery). On December 14, 2018, an Interim Order was entered granting the Motion

¹ Formal Complaint ¶ 5.

² 66 Pa.C.S. § 2806.1 *et seq.*

to Compel Discovery Responses filed by Respondent. In addition, Complainant's objections to the Discovery Requests dated November 13, 2018, were overruled. Complainant was directed to serve upon counsel for Respondent full and complete responses to all of the Interrogatories and Request for Production of Documents served upon Complainant by Respondent not later than January 4, 2019.

On December 14, 2018, an Interim Order was entered denying the Preliminary Objections filed by Duquesne Light Company.

Also, on December 14, 2018, an Interim Order was entered directing that the Parties participate by telephone at a prehearing conference on Friday, February 1, 2019, at 10:00 a.m. The prehearing conference was convened as scheduled. Jeremy V. Farrell, Esquire, appeared for Respondent and Complainant also appeared and participated. At the prehearing conference, a discussion was held whereby the subject property was described as a duplex with a mailing address of 1699 and 1699½ Suburban Avenue, Pittsburgh, Pennsylvania. It was represented by the Parties that a smart meter was installed at 1699½ Suburban Avenue but not at 1699 Suburban Avenue. It was further represented that the Company was not being provided access to the meter at 1699 Suburban Avenue.

The Parties agreed that Complainant would file an Amended Complaint to specifically identify the properties that are the subject of the Complaint, the claims that Complainant was asserting, and the relief requested for each claim and property. On February 1, 2019, an Interim Order was entered directing this filing on or before February 21, 2019. Respondent was directed to file any responsive pleading to the Amended Complaint pursuant to the Public Utility Code and regulations.

On February 21, 2019, Complainant filed an Amended Formal Complaint (Amended Complaint) averring that Respondent was threatening to shut off his electric service and requested that Respondent remove the smart meter installed at 1699½ Suburban Avenue and cease its efforts to install a smart meter at 1699 Suburban Avenue.

On March 14, 2019, Respondent filed an Answer and New Matter to the Amended Complaint. Respondent averred that a smart meter was installed at 1699½ Suburban Avenue, but that Complainant refused access for Respondent to install a smart meter at 1699 Suburban Avenue. Respondent denied the remaining material averments set forth in the Amended Formal Complaint.

On March 25, 2019, Respondent filed a second Motion to Compel Discovery Responses. Respondent averred that subsequent to the issuance of the Interim Order granting Respondent's Motion to Compel Discovery on December 14, 2018, Complainant served responses to the Discovery Requests, but failed to provide full and complete responses to Discovery Requests 9, 10, 11, 12, 13, 14, 15, 17, 18 and 19.

On April 3, 2019, an Interim Order was entered granting the Second Motion to Compel Discovery Responses filed by Respondent on March 25, 2019. In addition, Complainant's objections and Response to Discovery Requests 9, 10, 11, 12, 13, 14, 15, 17, 18 and 19, were overruled. Complainant was directed to serve upon counsel for Respondent full and complete responses to all of the Interrogatories and Requests for Production of Documents served upon Complainant by Respondent, including Discovery Requests 9, 10, 11, 12, 13, 14, 15, 17, 18 and 19, not later than April 12, 2019. In the alternative, the Parties were advised that if Complainant determined that he would not provide testimony related to the outstanding Discovery Requests, at the evidentiary hearing, that they may file a stipulation, executed by all Parties, prior to April 12, 2019, in lieu of full and complete responses to Discovery Requests 9, 10, 11, 12, 13, 14, 15, 17, 18 and 19. The order also provided that the failure to comply with the terms of the order may result in sanctions being imposed upon Complainant, including the possibility of dismissal of Complainant's Amended Complaint.

On April 15, 2019, the undersigned Presiding Officer received a Status Report from Respondent addressing various issues and concerns that would be appropriately addressed at a prehearing conference. The Status Report stated that Complainant had not provided Respondent with his witness list and had not provided full and complete responses to the

Discovery Requests propounded by Respondent, despite the entry of an order to compel entered on April 3, 2019, despite the entry of an order to compel entered on April 3, 2019.

On April 16, 2019, Respondent filed a Motion to Preclude Complainant from Testifying at the Evidentiary Hearing. Respondent averred that Complainant failed to comply with the second order to compel Complainant to respond to the outstanding Discovery Requests and failed to execute the stipulation proposed by Respondent.

On April 18, 2019, Complainant filed a response to the Interim Order granting Respondent's Second Motion to Compel.

On April 18, 2019, Complainant filed a request for a revised litigation schedule. No specific reason for the request was provided by Complainant. On April 30, 2019, Respondent filed an Answer to the request for a revised litigation schedule, objecting to the request and requesting that an evidentiary hearing be scheduled.

On April 29, 2019, an Interim Order was entered requiring that the Parties attend and fully participate in a second prehearing conference on May 14, 2019, at 9:00 a.m.

On May 14, 2019, a second prehearing conference was held with Complainant and counsel for Respondent in attendance. Complainant advised that he was prosecuting his original and amended formal complaints filed in this proceeding. Under the circumstances, Respondent stressed the need to obtain responses for the outstanding Discovery Requests propounded to Complainant. At the prehearing conference, Complainant was advised that the deadline to comply with the order compelling Complainant to respond to the outstanding Discovery Requests would be extended until May 30, 2019, and that the failure to provide full and complete answers to all of the subject outstanding Discovery Requests may result in sanctions, including the dismissal of the case filed by Complainant.

On May 23, 2019, an Interim Order was entered advising the Parties that it was anticipated that the hearing would be scheduled in August of 2019 and would be held on two

consecutive days. The Parties were directed to contact all of their respective witnesses to identify all dates on which the witnesses would be available to provide testimony in this proceeding during the time periods from August 12-15 or August 19-22, 2019. The Parties were further directed to confer and determine if they wished for the hearing to be scheduled as an in-person hearing in Pittsburgh or a telephonic hearing. The Parties were directed to jointly file a Status Report or separate Status Reports on or before June 6, 2019, to include all dates in which the Parties and their witnesses would be available for a hearing.

On May 23, 2019, an Interim Order was entered denying, without prejudice, Respondent's Motion to Preclude Complainant from Testifying at the Evidentiary Hearing, as premature pending a determination as to whether Complainant provided full and complete answers to all of the subject outstanding Discovery Requests to Respondent on or before May 30, 2019. The Interim Order provided, in the event Complainant failed to fully and timely comply with the order requiring service of the Discovery Responses from Complainant, Respondent may renew its motion as well as any motion to dismiss or any other appropriate motion.

On June 10, 2019, Respondent filed a Status Report indicating witness availability and its preference for a telephonic hearing, although witnesses would be available for an in-person hearing if necessary.

On June 11, 2019, Complainant filed a pleading and cover letter with the Commission's Secretary dated June 6, 2019. The cover letter provided, "Enclosed please find Geoff Day's response to NEW MATTER". The cover letter indicated that a copy was provided to "Tucker Arensberg Attorneys." The undersigned Presiding Officer was not identified as having been provided with a copy of the cover letter or pleading and no certificate of service was attached. The pleading was entitled "STATUS REPORT AND REQUEST FOR IN-PERSON HEARING".

On June 13, 2019, a Call-In Telephone Hearing Notice was issued scheduling the telephonic hearing in this proceeding for Wednesday August 21, 2019 and Thursday August 22, 2019.

On August 12, 2019, an Interim Order was entered converting the initial call-in telephonic hearing scheduled for August 21, 2019 and August 22, 2019 to an in-person hearing, at the request of Complainant. Complainant and counsel for Respondent were directed to attend and fully participate at the in-person hearing. In addition, it was ordered that the expert and fact witnesses, as previously identified pursuant to the litigation schedule established in this proceeding, were permitted to appear at the hearing by telephone. The Parties were also directed to bring five copies of each proposed exhibit to the in-person hearing, and to deliver one copy of each pre-marked exhibit to the opposing Party and the undersigned Presiding Officer not later than August 19, 2019.

On August 13, 2019, a Hearing Type Change Notice was issued confirming that the hearing would take place as an in-person hearing in Pittsburgh, Pennsylvania.

On August 14, 2019, Complainant filed a one-page cover letter dated August 12, 2019, along with a one-page pleading entitled “Withdraw Of Formal Complaint”. Complainant stated he was withdrawing his Formal Complaint because his request for an in-person hearing was ignored, as was every valid concern raised by Complainant throughout this process. Complainant stated that it “appears that the level of corruption within the Public Utility Commission makes any good faith attempt for relief absolutely pointless, and a gross waste of time.” Complainant further stated that the “withdraw” of his Complaint is not an agreement or consent to the installation of a smart meter or any other smart grid components at or near his private property, or in conjunction with his electric service. Complainant further provided that the pleading was “WITHOUT PREJUDICE, i.e. All Natural Unalienable Rights Reserved.”

No certificate of service was attached to the pleading from Complainant, and the cover letter indicated that a copy of the documentation was provided to “Tucker Arensberg Attorneys”. The undersigned Presiding Officer discovered the document on the docket on August 16, 2019, when reviewing the docket while preparing for the in-person evidentiary hearing. Similar to the filing of the request for an in-person hearing filed by Complainant on June 11, 2019, the undersigned Presiding Officer was not identified as having been provided

with a copy of the cover letter or pleading and did not receive a copy of the pleading filed by Complainant on August 14, 2019.

On August 16, 2019, an Interim Order was entered advising the Parties that the request to withdraw the Complaint filed by Complainant would be considered after convening the hearing on August 21, 2019, at 10:00 a.m., and after providing each Party an opportunity to address the request. Accordingly, the Parties were directed to attend the evidentiary hearing in person on August 21, 2019, at 10:00 a.m.

The evidentiary hearing convened in this proceeding as scheduled on August 21, 2019. Complainant elected to proceed with the hearing. Upon conclusion of the hearing, the Parties were advised that an order would be entered addressing a briefing schedule.

Based upon the written stipulation agreed upon by the Parties at the evidentiary hearing, the Parties agreed to the filing of briefs. See ALJ Exhibit 1. On August 28, 2019, an Interim Order was entered requiring that any briefs be filed on or before December 2, 2019.

Complainant submitted a brief dated November 26, 2019. Respondent filed its brief on December 2, 2019.

An Interim Order was entered on December 19, 2019, closing the hearing record in this proceeding.

FINDINGS OF FACT

1. Complainant is Geoff Day.
2. Respondent is Duquesne Light Company.

3. Complainant is the owner of the properties located at 1699 Suburban Avenue (1699 Suburban Avenue) and 1699½ Suburban Avenue (1699½ Suburban Avenue) Pittsburgh, Pennsylvania. Stipulation at ¶ 1.

4. Duquesne Light is an electric distribution company with more than 100,000 customers. Stipulation at ¶ 4.

5. Duquesne Light provides electric distribution services to 1699 Suburban Avenue where it has not installed a smart meter and 1699 ½ Suburban Avenue where it has installed a smart meter. Stipulation at ¶ 2-3.

6. Complainant filed a Formal Complaint against Duquesne Light challenging the installation of a smart meter at 1699½ Suburban Avenue and the proposed installation of a smart meter at 1699 Suburban Avenue by Respondent. Stipulation at ¶ 7.

7. At the in-person evidentiary hearing scheduled for August 21-22, 2019, Complainant appeared to testify on his own behalf as his sole witness. Stipulation at ¶ 7.

8. Duquesne Light also appeared for the hearing on August 21, 2019, and planned to call eight witnesses to testify, Michael Belanger; Steven Wright; Dr. Benjamin Cotts; Dr. Gabor Mezei; Michael Secchiutti; Ron Dornin; Michael Tallent; and Roxanne Morris. Stipulation at ¶ 6.

9. Prior to taking testimony at the hearing on August 21, 2019, Complainant voluntarily withdrew all allegations and concerns raised in Amended Complaint filed at Docket No. C-2018-3003960, with the exception of the question of law as to whether Duquesne Light has the lawful right to install a smart meter at 1699 Suburban Avenue and 1699½ Suburban Avenue by Act 129 of 2008 and the Pennsylvania Public Utility Commission's Implementation Order, even though he does not consent to the installation of the smart meter. Stipulation at ¶ 7.

10. The Parties agreed to forego taking testimony at the hearing in this matter and agreed to brief the sole question of law, whether Respondent has the lawful right to install a smart meter at 1699 and 1699½ Suburban Avenue, by Act 129 of 2008 and the Commissions Implementation Order, even though Complainant does not consent to the installation of smart meters. Stipulation at ¶ 7-8.

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).³

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.”)

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

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.”

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

66 Pa.C.S. § 701. Therefore, a complainant must generally demonstrate that the public utility violated the Public Utility Code or a Commission regulation or order.

Section 1501 of the Public Utility Code states, in pertinent part, that:

Every public utility shall furnish and maintain adequate, efficient, safe, and reasonable service and facilities, and shall make all such repairs, changes, alterations, substitutions, extensions, and improvements in or to such service and facilities as shall be necessary or proper for the accommodation, convenience, and safety of its patrons, employees, and the public. Such service also shall be reasonably continuous and without unreasonable interruptions or delay. Such service and facilities shall be in conformity with the regulations and orders of the commission. Subject to the provisions of this part and the regulations or orders of the commission, every public utility may have reasonable rules and regulations governing the conditions under which it shall be required to render service....

66 Pa.C.S. § 1501.

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).

Smart Meter Mandate

At the hearing on August 21, 2019, Complainant voluntarily withdrew all allegations and concerns raised in his Complaint and Amended Complaint, with the exception of the question of law as to whether Duquesne Light has the lawful right to install a smart meter at 1699 Suburban Avenue and 1699½ Suburban Avenue by Act 129 of 2008 and the Commission's Implementation Order, even though Complainant does not consent to the installation of the smart meter.

Act 129 states, in part, that “[e]lectric distribution companies shall furnish smart meter technology in accordance with a depreciation schedule not to exceed 15

years." 66 Pa. C.S.A. § 2807(f)(2). The Commission has ruled that the use of the word "shall" in Act 129 indicates the General Assembly's direction that all customers receive a smart meter. *Evans v. PECO Energy Co.*, Docket No. C-2013-2368477 (Final Order entered February 6, 2014). Further, the Commission has repeatedly held that no provision in the Public Utility Code or the Commission's regulations or orders allows a customer to "opt out" of receiving a smart meter. *Hoffman-Lorah v. PPL Elec. Util. Corp.*, Docket No. C-2018-2644957 (Opinion and Order entered May 23, 2019); *Paul v. PECO Energy Co.*, Docket No. C-2015-2475355 (Opinion and Order entered June 14, 2018); *Frompovich; Povacz v. PECO Energy Co.*, Docket No. C-2012-2317176 (Opinion and Order entered Jan. 24, 2013) (*Povacz*).

If a customer wants to opt-out of receiving a smart meter, he or she must lobby the General Assembly to change the law rather than seeking relief from the Commission. *Myers v. PPL Elec. Utilities Corp.*, Docket No. C-2017-2620710 (Opinion and Order entered Aug. 29, 2019). Simply stated, without additional legislation from the General Assembly, the Commission cannot prohibit a utility from installing a smart meter where a customer does not want one. *Schmukler v. PPL Elec. Utilities Corp.*, C-2017-2621285 (Opinion and Order entered July 23, 2019).

Several Commission decisions since Act 129's enactment establish that a customer simply cannot opt-out of receiving a smart meter, as Complainant seeks to do here. In the *Povacz* case, *supra*, the complainant did not consent to receiving a smart meter and requested to opt-out of receiving one from her electric distribution company. The presiding administrative law judge sustained the company's preliminary objections and dismissed the formal complaint, holding that Act 129 does not allow customers to opt-out of receiving a smart meter. On exceptions, the Commission ruled "there is no provision in the Code, the Commission's Regulations or Orders that allows a customer to "opt out" of smart meter installation, as the Complainant desires to do." *Id.* at 10.

Subsequently, the Commission reached the same conclusion in the *Frompovich* case. In that case, the complainant requested to opt-out of receiving a smart

meter because she believed that Act 129 did not require the universal deployment of smart meters. After a hearing, the presiding administrative law judge dismissed her formal complaint. On exceptions, the Commission ruled that the utility is mandated under applicable law to replace all automatic meter reading (AMR) meters owned by it within its service territory with advanced metering infrastructure (AMI) meters, or smart meters. *Id.* The Commission thus denied the complainant's request to opt-out of receiving a smart meter and dismissed her complaint. *Id.*

The Commission made the same ruling again in *Hoffman-Lorah*. The complainant there contended that Act 129 only required her to receive a smart meter upon request. *Hoffman-Lorah*. The presiding administrative law judge rejected this argument, holding that no provision in the Code, the Commission regulations, or orders allows a customer to opt-out of receiving a smart meter. On exceptions, the Commission held that "we do not have the authority, absent directive in the form of legislation, to prohibit the Company from installing a smart meter where a customer does not want one." *Id.* at 43.

Commission precedent supports the conclusion that customers cannot opt-out of receiving a smart meter. For example, in *Hanley v. Pa. Power Co.*, Docket No. C-2016-2557487, 2018 WL 5994765 (Pa. P.U.C. Oct. 24, 2018), two customers filed a formal complaint to prevent an electric distribution company (EDC) from replacing their existing electric meter with a smart meter. *Id.* at *1. At the hearing, the complainants asserted they can receive a smart meter only if they requested one. *Id.* at *12. Like Duquesne Light here, the EDC claimed that Act 129 required it to install a smart meter at all customer service locations. *Id.* at *13. The Presiding ALJ dismissed the complaint, holding that the complainants failed to prove that Act 129 does not mandate the universal deployment of smart meters. *Id.* at *17.

In *Tellefsen v. Metropolitan Edison Co.*, Docket No. C-2018-3005250, 2019 WL 5865110 (Pa. P.U.C. Nov. 1, 2019), complainants filed a formal complaint seeking to prevent the utility from replacing the existing electric meter at their residence with a smart meter. *Id.* at *1. As in the instant case, the parties in *Tellefsen* agreed to forego a

hearing and brief the sole issue of whether smart meter installation is mandated by Act 129. *Id.* at *2. After considering both parties' briefs, the Commission concluded that the utility was required by Act 129 to install smart meters at its customers' service locations and thus dismissed the formal complaint. *Id.* at *9.

The rule of *stare decisis* states, "[f]or the sake of certainty, a conclusion reached in one case should be applied to those which follow, if the facts are substantially the same, even though the parties may be different." *Freed v. Geisinger Med. Ctr.*, 971 A.2d 1202, 1212 (Pa. 2009). *Stare decisis* is the preferred legal course because "it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Id.* The Commission has applied *stare decisis* to its prior holding that Act 129 requires the universal deployment of smart meters. *See Bervinchak v. PPL Elec. Utilities Corp.*, Docket No. C-2016-2577527 and Docket No. C-2016-2572824, 2018 WL 4185438, at *15 (Pa. P.U.C. Aug. 16, 2018). *Stare decisis* precedent at the Commission level requires a finding that Act 129 contains no opt-out.

Complainant, in his brief, argues that Act 129 of 2008 is an "opt-in bill" that is not compulsory for the American people, and that an opt-out is not necessary for those who choose simply not to opt-in. Complainant also argues that smart meters collect data from inside the home that reflects private activities. Complainant's Brief at pp. 1-2.

Here, like in many of the cases cited above, Complainant is attempting to opt-out of receiving a smart meter because he believes Duquesne Light can only install one upon his request or with his consent. But as the Commission held in the cases cited above, Complainant's interpretation of Act 129 is inconsistent with the Commission precedent concluding that electric distribution companies with more than 100,000 customers "shall furnish smart meter technology in accordance with a depreciation schedule not to exceed 15 years." 66 Pa.C.S.A. § 2807(f)(2).

Act 129 requires that all EDCs with more than 100,000 customers submit smart meter technology and procurement plans to the Commission for approval. If the General Assembly intended for EDCs to deploy smart meters only upon customer request, it would make little sense to require EDCs to submit detailed smart meter plans without describing the circumstances under which customers would be permitted to opt-out.

The Fourth Amendment to the United States Constitution Claim

Complainant also argues that Respondent's attempt to install a smart meter at his service addresses violates his rights under the Fourth Amendment to the United States Constitution, which states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend. IV.

Complainant argues that the right of the people to be secure in their own homes is violated where privacy is dismissed by enhanced surveillance and sophisticated communication systems such as smart meters. Complainant's Brief at pp. 12-13. Complainant also stresses that smart meter data is intimate and sensitive information regarding the interior of a home, which Americans reasonably expect to remain private. Complainant's Brief at pp. 18, 25.

The United States Constitution, however, only applies to "state action." It does not apply to conduct by a private company like Duquesne Light, even if the company is regulated by the state. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 349-350 (1974); *Schutz v. PPL Elec. Utilities Corp.*, No. C-2018-3005659, 2019 WL 2744430, at *12 (Pa. P.U.C. June 11, 2019).

In *Jackson*, a customer sued a privately owned and operated utility company, alleging that it violated her due process rights under the Fourteenth Amendment to the United States Constitution by terminating her electric service. 419 U.S. at 348-49. The U.S. District Court for the Middle District of Pennsylvania dismissed her complaint. *Id.* at 349. The United States Court of Appeals for the Third Circuit affirmed. *Id.* The Supreme Court of the United States granted certiorari and again affirmed. The Supreme Court ruled that although the utility company was heavily regulated by the Commonwealth of Pennsylvania, this state regulation did not convert the utility's decision to terminate the complainant's electric service into "state action." *Id.* at 358-59.

The Commission reached the same conclusion recently in the *Schutz* case. In that case, a residential customer filed a complaint seeking to prevent a utility company from installing a smart meter at her residence. 2019 WL at *1. She argued that the installation of a smart meter violated her right against unreasonable searches and seizures under the Fourth and Fourteenth Amendments to the United States Constitution. *Id.* at *12. In response, the utility asserted that it was not a state actor and thus not subject to the Fourth and Fourteenth Amendments. *Id.* The Commission concluded that the utility was not a "state actor"; rather, "it is a private, regulated utility company not constrained by the Fourth Amendment." *Id.* Although Duquesne Light is regulated by the Commission, it is a private company, not a "state actor." Accordingly, the United States Constitution does not apply in this matter.

Here, there is no dispute that Act 129 does not provide for customers to opt-out of smart meter installation. In addition, no evidence was presented to support the conclusion that Respondent's refusal to allow the Complainant to opt-out of smart meter installation violates any law, regulation or Commission order. Accordingly, Complainant's claims are not supported by the evidence; therefore, the claims must be dismissed.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the parties in this proceeding. 66 Pa.C.S. §§ 102, 701, 1501.
2. The Commission is a creature of statute and may exercise only those powers that are expressly conferred upon it by the legislature. *Feingold v. Bell of Pa.*, 383 A.2d 791, 794 (Pa. 1978).
3. The Commission must act within its jurisdiction. *City of Pittsburgh v. Pa. Pub. Util. Comm'n.*, 43 A.2d 348, 348 (Pa. Super. 1945).
4. Subject matter jurisdiction is a prerequisite to the exercise of power to decide a controversy. *Hughes v. Pa. State Police*, 619 A.2d 390, 393 (Pa. Cmwlth. 1992).
5. The Commission is only authorized to hear complaints regarding the Code, Commission Regulations, or a Commission order. 66 Pa.C.S. § 701; *Haleema B. Alkhatib v. PECO Energy Co.*, C-2011-2242125, 2012 WL 641672, at *5 (Pa. P.U.C. Jan. 12, 2012).
6. The Commission does not have jurisdiction over claims arising under the United States Constitution, and Duquesne Light is not a "state actor" subject to the United States Constitution. *Schutz v. PPL Elec. Utilities Corp.*, No. C-2018-3005659, 2019 WL 2744430, at *12 (Pa. P.U.C. June 11, 2019); *White v. PPL Elec. Utilities Corp.*, Docket No. C-20183003468, 2019 WL 2250756 (Pa. P.U.C. May 6, 2019) (Barnes, ALJ); *Alice Ann Belmonte-Gates v. PECO Energy Co.*, F-2012-2332583, 2013 WL 596066, at *7 (Pa. P.U.C. Jan. 24, 2013) (Cheskis, ALJ); *James Coppedge v. PECO Energy Co.*, F-2009-2135893, 2010 WL 3183815, at *5-6 (Pa. P.U.C. July 29, 2010); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 349-350 (1974).

7. 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).

8. The preponderance of evidence standard requires proof by a greater weight of the evidence. *Commonwealth v. Williams*, 732 A.2d 1167 (Pa. 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).

9. 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, 2015 WL 5256653, at *11 (Pa. P.U.C. Sept. 3, 2015).

10. When presented with a challenge to an AMI meter installation, the Commission has pronounced that "[t]he ALJ's role ... will be to determine based on the record in [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).

11. To satisfy his 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 Co.*, Docket No. F-8966524, 1990 WL 10702674 (Pa. P.U.C. Feb. 8, 1990).

12. 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 must then provide some additional evidence to rebut the evidence of Respondent. *Burleson v. Pa. Pub. Util. Comm'n*, 443 A.2d 1373 (Pa.Cmwlth. 1982), *aff'd*, 461 A.2d 1234 (Pa. 1983).

13. 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).

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

15. There is no specific provision in the Code, the Commission's regulations or orders that provides that an electric distribution customer may opt-out of smart meter installation. *Hoffman-Lorah v. PPL Elec. Util. Corp.*, Docket No. C-2018-2644957, 2019 WL 2325713, at *28 (Pa. P.U.C. May 23, 2019); *Paul v. PECO Energy Co.*, Docket No. C-20152475355, 2018 WL 3093596, at *4-5 (Pa. P.U.C. June 14, 2018); *Frompovich v. PECO Energy Co.*, Docket No. C-2015-2474602, 2018 WL 2149249, at *4 (Pa. P.U.C. May 3, 2018); *Povacz v. PECO Energy Co.*, Docket No. C-2012-2317176, 2013 WL 392699, at *6 (Pa. P.U.C. Jan. 24, 2013).

16. Complainant failed to carry his burden of proof establishing that Duquesne Light violated the Public Utility Code or a regulation or order of the Commission in requiring installation of a smart meter at his service addresses. 66 Pa.C.S. § 332.

17. Complainant failed to sustain his burden of proof that Duquesne Light's proposed 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. That Complainant's Amended Formal Complaint, as additionally orally amended at the evidentiary hearing on August 21, 2019, filed against Duquesne Light Company at Docket No. C-2018-3003960, is dismissed with prejudice.

2. That Docket No. C-2018-3003960 be marked closed.

Date: March 23, 2020

_____/s/
Jeffrey A. Watson
Administrative Law Judge