

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Christopher L. Macey	:	
	:	
v.	:	C-2019-3012705
	:	
West Penn Power Company	:	

INITIAL DECISION

Before
Conrad A. Johnson
Administrative Law Judge

INTRODUCTION

This decision dismisses an Amended Complaint requesting that the Commission issue an order 1) assessing fines against the utility; 2) requiring the utility to reprimand its employees; 3) awarding monetary damages to the utility customer for his installation of a new meter pole at the service address; and 4) directing removal of the smart meter from the service address and replacement with an analog meter. The Amended Complaint is dismissed because 1) the Commission lacks authority to award monetary damages; 2) reprimand of a utility's employees is a management decision; and 3) the evidence fails to establish any violation by the utility of the Public Utility Code, a Commission regulation or a Commission order to thereby warrant the assessment of any fine or to direct removal of the smart meter.

HISTORY OF THE PROCEEDING

On September 6, 2019, Christopher L. Macey (Complainant or Mr. Macey) filed a Formal Complaint against West Penn Power Company (West Penn or Respondent). Complainant alleged West Penn had rendered poor service, breached a settlement agreement by

attaching a smart meter to his house¹ and had been unresponsive to his service requests. For relief, he wanted the smart meter removed from his house until installation of a new meter service pole was completed to accept a smart meter, fines assessed, daily damages, and employee reprimands.

West Penn filed an Answer and New Matter on September 26, 2019. West Penn admitted it entered into a settlement agreement with Complainant concerning his Complaint at Docket No. C-2017-2628021, which involved the installation of a customer-owned pole. West Penn admitted that on August 16, 2019, the smart meter was installed on Complainant's house and alleged Complainant failed to install the pole for the smart meter in a timely fashion. West Penn further averred the smart meter was removed from the house and installed on a customer-owned pole on August 26, 2019. West Penn asserted it was not in violation of the settlement agreement and had rendered reasonable customer service to Complainant at all relevant times. In New Matter, West Penn argued the Complaint was legally insufficient because the Commission lacked authority to award damages, and the Company's installation of a smart meter was in compliance with Act 129 of 2008 (Act 129) of the Public Utility Code (Code)² and the Company's Commission-approved smart meter plan (SMP).³

West Penn also filed Preliminary Objections on September 26, 2019. West Penn argued the Commission lacked jurisdiction to direct the reprimand of employees or to award monetary damages. Thus, West Penn asked that Complainant's request for relief be struck or in the alternative dismissal of the Complaint in its entirety.

¹ Complainant attached a January 8, 2019, letter to his Complaint regarding the installation of a new meter service pole on his property. The letter concerned his Complaint at Docket No. C-2017-2628021. This docket was closed on February 5, 2019.

² "66 Pa.C.S. § 2806.1, *et. seq.* Among other things, Act 129 specifically directed that electric distribution companies with at least 1000,000 customers file a smart meter technology procurement and installation plan with the Commission for approval." Answer at 2, n.1.

³ "West Penn's SMP was approved by the Commission at Docket No. M-2013-2341991 in its Order entered June 5, 2015." New Matter ¶14.

On October 4, 2019, Complainant filed a response to the Preliminary Objections. Complainant annotated West Penn's Preliminary Objections, admitting to most of the factual averments, but denying the legal claims on the basis that he did not have time to review the legal precedents and asserting he intended to amend his Complaint.

Initially, by notice dated October 9, 2019, the Preliminary Objections were assigned to Administrative Law Judge (ALJ) Emily DeVoe for ruling; however, later ALJ Mary Long received the assignment.

On October 15, 2019, Complainant filed a Reply to West Penn's Answer and New Matter, denying that installation of smart meters was mandatory under Act 129.

On October 25, 2019, ALJ Long issued a ruling on West Penn's Preliminary Objections. ALJ Long explained that the Commission, as a creature of the legislature, possessed only the authority that the General Assembly had specifically granted to it in the Code. In other words, the Commission only has the powers expressly conferred or necessarily implied by its enabling statute.⁴ Although it has general jurisdiction over the rates and services of public utilities operating in Pennsylvania, the Code does not grant the Commission the authority to award monetary damages.⁵ Thus, ALJ Long dismissed Complainant's claim for monetary damages.

ALJ Long further reasoned the Commission has broad powers to supervise and regulate all public utilities doing business within the Commonwealth and is empowered to determine whether a public utility is providing safe, adequate and reasonable service.⁶ While

⁴ *Feingold v. Bell of Pa.*, 383 A.2d 791 (Pa. 1977); *Allegheny County Port Authority v. Pa. Pub. Util. Comm'n.*, 237 A.2d 602 (Pa. 1967). See also *Department of Environmental Resources v. Butler County Mushroom Farm*, 454 A.2d 1, 4 (Pa. 1982), and *Pequea Township v. Department of Environmental Protection*, 716 A.2d 678, 686 (Pa.Cmwlth. 1998).

⁵ *Terminato v. Pa. National Insurance Co.*, 645 A.2d 1287 (Pa. 1994); *Elkin v. Bell Tel. Co. of Pa.*, 420 A.2d 371 (Pa. 1980); *Feingold*, cited above; *Poorbaugh v. Pa. Pub. Util. Comm'n.*, 666 A.2d 744 (Pa. Cmwlth. 1995). See also *Pettko v. Pennsylvania American Water Company*, 39 A.3d 473 (Pa. Cmwlth. 2012).

⁶ 66 Pa.C.S. §§ 501, 1501.

Complainant's request for reprimands of West Penn's employees may not be within the Commission's purview, the request for relief was made in the context of Complainant's customer service claims.⁷ Therefore, ALJ Long ruled that claims related to West Penn's customer service were appropriate for hearing.

By Notice dated October 28, 2019, the Parties were notified that a telephone hearing on service/reliability issues in this case would be convened by ALJ DeVoe on January 28, 2020, at 10:00 a.m. On the same date, ALJ DeVoe issued a Prehearing Order, informing the Parties of the procedural rules for the hearing.

Also, on October 28, 2019, Mr. Macey's Amended Complaint, which had been verified on October 18, 2019, was docketed by the Commission's Secretary's Bureau. The Amended Complaint again alleged that West Penn rendered poor service, breached a settlement agreement by attaching a smart meter to his house and was unresponsive to Complainant's service requests. As relief, Complainant wanted the smart meter removed and replaced with an analog meter, fines assessed, damages awarded, and West Penn's employees reprimanded.

On November 18, 2019, West Penn filed an Amended Answer and New Matter, denying in part and admitting in part the material allegations of the Amended Complainant. West Penn specifically averred that at all relevant times the Company's actions were reasonable, in accordance with all applicable laws, its Commission approved tariff, and the settlement agreement signed by Mr. Macey. In its Amended New Matter, West Penn again asserted, in part, that the Commission lacked authority to award damages. Thus, West Penn requested dismissal of the Amended Complaint with prejudice.

By Notice dated December 23, 2019, the Commission notified the Parties that this case was reassigned from ALJ DeVoe to me for a telephone hearing on January 28, 2020, at 10:00 a.m. By letter dated January 7, 2020, Mr. Macey requested an in-person hearing. West

⁷ The Commonwealth Court has cautioned that the right of a tribunal to strike impertinent matter should be sparingly exercised and only when a party can affirmatively show prejudice. *Dep't of Env'tl. Res. v. Hartford Acc. & Indem. Co.*, 396 A.2d 885, 887-88 (Pa.Cmwth. 1979).

Penn did not object to the request. Accordingly, by notice dated January 7, 2020, the Parties were informed the telephone hearing was changed to an in-person hearing before me for January 28, 2020, at 10:00 a.m.

On January 27, 2020, Mr. Macey filed Complainant's Response to Amended Answers and New Matter to the Amended Complaint of Christopher L. Macey (Response). Essentially, the Response is an argument consisting of six questions concerning the settlement agreement and the smart meter and Mr. Macey's answers to the six questions.⁸

The hearing convened as scheduled in Pittsburgh on January 28, 2020. Mr. Macey appeared self-represented together with his wife, Elizabeth Vienna. West Penn was represented by Attorneys Lauren Lepkoski and Tori Giesler.

Mr. Macey testified on his own behalf and offered Exhibits A and B. Complainant's Exhibit A, the Amended Complaint, which included Attachments marked as Exhibits A through H and J through M, and Exhibit B, a set of emails, were admitted into the record. Mr. Macey did not call his wife to testify.

West Penn's counsel called two witnesses, John Ahr and Scott Curcio, to testify. Three Exhibits were sponsored on behalf of West Penn. Judicial notice was taken of Exhibit 1, Complainant's Petition for Emergency Relief at Docket P-2019-3012296. Exhibit 2, the Settlement Agreement, and Exhibit 3, West Penn's Tariff, were admitted into the record.

The hearing generated a 113-page transcript. Upon my receipt of the transcript, I closed the record by Interim Order issued on February 28, 2020. This case is procedurally ready for ruling.

⁸ Complainant's Response does not strictly comply with Section 5.1(a)(2) of the Commission's regulations, which provides for a reply to new matter. 52 Pa. Code § 5.1(a)(2). However, Complainant appeared self-represented. Thus, the Response is included here for completeness of the procedural history and pursuant to Section 1.2 (a) of the regulations, which provides for a liberal construction of the Commission's regulations in order to secure a just, speedy, and inexpensive determination.

FINDINGS OF FACT

1. Complainant is Christopher L. Macey, who resides with his wife, Elizabeth Vienna, at 201 S. Highland Avenue, Oakdale, PA 15071 (service address.) Tr. 5.
2. Respondent West Penn Power Company is a jurisdictional public utility providing electric service to Mr. Macey and to Pennsylvania customers.
3. On January 10, 2019, the Parties entered into a settlement agreement (agreement) in satisfaction of Mr. Macey's Complaint at Docket No. C-2017-2628021. Tr. 15, 26; Exhibit A, Attachment Exhibit A and Exhibit 1.
4. Under the agreement, to accommodate the attachment of a smart meter, Mr. Macey was required to install a new meter pole at the service address in a location specified by West Penn's designer. Tr. 15, 26; Exhibit A, Attachment Exhibit A and Exhibit 1.
5. Under the agreement, at his expense and by May 15, 2019, Mr. Macey was required to have his electrician install a new meter pole at the service address. Tr. 15, 26; Exhibit A, Attachment Exhibit A and Exhibit 1; Tr. 41.
6. In February 2018 during the litigation of Mr. Macey's Complaint at Docket No. C-2017-2628021, West Penn's counsel, Attorney Lepkoski, had given Mr. Macey the name and phone number of Supervisor Dan Oswald (Supervisor Oswald) as West Penn's point of contact concerning installation of a new meter pole. Tr. 16, 26; Exhibit A, Attachment Exhibit D.
7. At the direction of Supervisor Oswald, West Penn's designer and distribution technician, Scott Curcio (Witness Curcio), had conducted a site visit on February 16, 2018, and he had staked the service address for the location of a new meter pole. Tr. 16, 27, 81, 84, 85.

8. On February 16, 2018, Witness Curcio had given Mr. Macey his business card and specifications sheet for installation of a new meter pole at the service address. Tr. 84.

9. The specifications sheet that Witness Curcio had given to Mr. Macey on February 16, 2018, provided the requirements for a new meter pole and measurements for where the meter socket was to attach to the pole. Tr. 84.

10. On September 18, 2018, Mr. Macey had obtained a quotation from Valley Electric for the installation of a new meter pole at the service address. Tr. 28; Exhibit A, Attachment Exhibit F.

11. On January 10, 2019, Mr. Macey emailed West Penn's counsel, Attorney Lepkoski, and informed her he needed "to get another estimate from an electrical contractor and then select a contractor to do the installation of work" for the new meter pole. Tr. 15; Exhibit A, Attachment Exhibit B.

12. In his January 10, 2019 email, Mr. Macey requested that Attorney Lepkoski provide him with the contact information for West Penn's representative to meet with and agree upon the exact location of the new meter pole and specifications for the pole. Tr. 15; Exhibit A, Attachment Exhibit B.

13. On March 25, 2019, Mr. Macey again emailed Attorney Lepkoski and requested the contact information for a West Penn representative to come to his residence to specifically identify the location for the installation of the new meter pole that would be acceptable to West Penn. Tr. 15-16; Exhibit A, Attachment Exhibit C.

14. On April 5, 2019, Mr. Macey sent Attorney Lepkoski a third email stating he had unsuccessfully attempted to contact Supervisor Oswald concerning the equipment necessary for the installation of the new meter pole. Tr. 16; Exhibit A, Attachment Exhibit D.

15. On April 7, 2019, Mr. Macey sent a letter to Attorney Lepkoski stating he was unable to proceed with a contractor until a location for the meter pole at the service address was specified by West Penn's designer. Exhibit A, Attachment Exhibit E.

16. On April 10, 2019, Witness Curcio visited the service location a second time, met with Mr. Macey and discussed the same things they had discussed on his prior visit on February 16, 2018. Tr. 16, 30, 31, 85.

17. On April 10, 2019, Mr. Macey stated to Witness Curcio he was having difficulty in securing an electrical contractor for installation of the new meter pole. Tr. 85.

18. On April 10, 2019, Witness Curcio again staked the service address for the location of the new meter pole. Tr. 30

19. On April 10, 2019, in the process of placing a second stake at the service address, Witness Curcio noticed in the weeds the remnants of the first stake, six inches of the stake, in the same location where he placed the second stake. Tr. 86.

20. On or about April 10, 2019, Mr. Macey had all the information he needed to proceed to work with Valley Electric for the installation of the new meter pole at the service address. Tr. 30.

21. In April 2019 Valley Electric began work at the service address for the installation of the new meter pole. Tr. 29.

22. By letter dated May 10, 2019, Mr. Macey informed Attorney Lepkoski that his electrical contractor intended to install the pole and feeder line to his house by July 5, 2019. Tr. 67; Exhibit A, Attachment Exhibit G.

23. On July 12, 2019, Mr. Macey emailed Witness Curcio and stated, "Valley attempted to install the new meter pole today, but due to the recent rain, the ground was too soft

to complete the hole. I believe they will try again next week.” Tr. 69; Exhibit A, Attachment Exhibit H.

24. The new meter pole was installed at the service address on July 25, 2019, but additional work needed to be completed on the pole before the smart meter could be attached to the pole. Tr. 17, 46-47.

25. On August 16, 2019, Attorney Lepkoski emailed Mr. Macey informing him as follows: the agreement required relocation work to be completed by May 15; the Company had provided him an extension; it was now August; and the Company had not heard from him as to whether everything was in place for installation of the smart meter. Therefore, the Company would be installing a smart meter at his residence. Tr. 56, 69; Exhibit A, Attachment Exhibit H.

26. On August 16, 2019, at the direction of John Ahr, West Penn’s Advisor of Regulatory Compliance for Smart Meters, a crew installed a smart meter on Mr. Macey’s house. Tr. 50, 56.

27. By August 16, 2019, the meter pole was in place but not ready or prepared for installation of the smart meter on the pole. Tr. 46-47.

28. On August 16, 2019, after the smart meter was attached to the house, Mr. Macey’s wife called West Penn to request service termination. Tr. 15-16.

29. On August 16, 2019, while at the service address, West Penn’s troubleshooter did not shut off the electric service because of Mr. Macey’s volatile behavior. Tr. 31-32.

30. By August 26, 2019, installation of the new meter pole was complete at the service address; on the same date, West Penn relocated the smart meter from Mr. Macey’s house to the pole. Tr. 20, 57-58.

DISCUSSION

Complaints and Burden of Proof

Section 701 of the Code, provides that any person may complain, in writing, about any act or thing done or omitted to be done by a public utility in violation, or claimed violation, of any law which the Commission has the jurisdiction to administer, or of any regulation or order of the Commission.⁹

Under the Code, as the party bringing the Complaint in this proceeding alleging unreasonable service and requesting replacement of the smart meter with an analog meter, Complainant bears the burden of proof.¹⁰ Consequently, Complainant has the burden of proving the allegations he raised in his Complaint and that he is entitled to the relief requested.

The term “burden of proof” means a duty to establish a fact by a preponderance of the evidence.¹¹ The term “preponderance of the evidence” means one party must present evidence which is more convincing, by even the smallest amount, than the evidence presented by the other party.¹² Accordingly, one must review the record in this case to determine whether the Complainant has satisfied his burden of proof. If the review indicates the burden has been satisfied, one must then determine whether the Respondent has submitted evidence of co-equal value or weight to refute the Complainant’s evidence. If this has occurred, the burden of proof cannot be satisfied, unless the party bearing the burden of proof presents additional evidence.¹³

⁹ 66 Pa.C.S. § 701.

¹⁰ See 66 Pa.C.S. § 332(a).

¹¹ *Se-Ling Hosiery v. Margulies*, 364 Pa. 45, 70 A.2d 854 (1950); *Feinstein v. Philadelphia Suburban Water Company*, 50 Pa. PUC 300 (1976).

¹² *Id.*

¹³ *Morrissey v. Pa. Dept. of Highways*, 424 Pa. 87, 225 A.2d 895 (1967); *Burleson v. Pa. Pub. Util. Comm’n.*, 443 A.2d 1373 (Pa.Cmwlt. 1982).

Furthermore, substantial evidence in the record must support the decision of the Commission.¹⁴ The term “substantial evidence” means such relevant evidence that a reasonable mind may accept as adequate to support a conclusion. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established.¹⁵

Reasonable Service

Section 1501 of the Code mandates that a public utility must furnish and maintain adequate, efficient, safe, and reasonable service and facilities, and must make such repairs, changes, alterations, substitutions, and improvements in or to such service and facilities as shall be necessary or proper for the accommodation, convenience and safety of its patrons and the public.¹⁶ Upon finding that the service or facilities of a public utility are unreasonable, unsafe or inadequate, the Commission may prescribe, by regulation or order, the reasonable, safe and adequate service or facilities that a public utility must furnish or employ.¹⁷

The Commonwealth Court has cautioned that the Commission may not sustain a complaint pursuant to Section 1501 unless it finds that a utility has violated a duty to render reasonable and reliable service.¹⁸ Further, the Commission has stated that a utility is not mandated to furnish perfect service:

[Section 1501] does not mandate perfect service nor must a public utility provide the best possible service. Most certainly, a public utility is not a guarantor of either perfect service or the best possible service.^[19]

¹⁴ See, e.g., Section 704 of the Administrative Agency Law, 2 Pa.C.S. § 704; *Yellow Cab Company v. Pa. Pub. Util. Comm’n.*, 524 A.2d 1069 (Pa.Cmwlth. 1987).

¹⁵ *Norfolk & Western Ry. Co. v. Pa. Pub. Util. Comm’n.*, 489 Pa. 109, 413 A.2d 1037 (1980); *Erie Resistor Corp. v. Unemployment Comp. Bd. of Review*, 194 Pa.Super. 278, 166 A.2d 96 (1961); *Murphy v. Pa. Dept. of Public Welfare, White Haven Center*, 480 A.2d 382 (Pa.Cmwlth. 1984).

¹⁶ 66 Pa.C.S. § 1501.

¹⁷ 66 Pa.C.S. § 1505.

¹⁸ *West Penn Power Co. v. Pa. Pub. Util. Comm’n.*, 478 A.2d 947, 949 (Pa.Cmwlth. 1984).

¹⁹ *Re Metropolitan Edison Company*, 80 Pa. PUC 663, 672 (1993).

Thus, the test to determine the adequacy of a utility's service and facilities is that of reasonableness.²⁰ This is also the test to determine the adequacy of a utility's response to customer service complaints.²¹

Positions of the Parties

Complainant contends West Penn provided him unreasonable service in breaching their agreement concerning the installation of a new meter pole on his property and attachment of a smart meter to the pole. Tr. 13-16. Complainant asserts he made repeated requests to West Penn to provide him the Company's designer's contact information. Tr. 15-16. Complainant suggests he needed the information to proceed with the pole installation. Tr. 26-29, 112. Complainant claims West Penn failed to respond to his requests and attached a smart meter to his house with virtually no notice to him and in breach of their agreement. Tr. 18-21. After installing the smart meter, Complainant adds West Penn refused to turn his electricity off. Tr. 14. This refusal caused harm to his wife, who suffers from electromagnetic hypersensitivity, according to Complainant. Tr. 14, 21. Thus, Complainant seeks fines and monetary damages against West Penn and replacement of his smart meter with an analog meter. Tr. 23-24.

West Penn takes the position, that by law and in accordance with its tariff, the Company was required to install a smart meter at Mr. Macey's location. Tr. 61. Under the Parties' agreement, Mr. Macey was required to install the new meter pole by May 15, 2019. Tr. 54. He received a three-month extension; however, without any explanation from Mr. Macey, the installation of the pole was not complete by August 16, 2019. Tr. 42, 56. Thus, West Penn argues the Company's actions were reasonable. Tr. 107-110.

Each issue and the competing positions of the Parties are addressed below.

²⁰ *Thurby v. West Penn Power*, C-2011-2254048 (Order April 4, 2013); *Bertsch v. PPL Electric Utilities Corp.*, C-2011-2251784 (Final Order April 2, 2012); *Scherich v. Verizon Pennsylvania Inc.*, Docket No. C-2008-2061244 (Final Order January 28, 2010).

²¹ *Thurby*, cited above.

Monetary Damages

While Mr. Macey's request for monetary damages was dismissed upon Preliminary Objections to his Formal Complaint, he filed an Amended Complaint and again requested compensation. Procedurally, the amended filing effectively withdrew the original filing and took its place.²² Accordingly, Mr. Macey's damage claim is again addressed in this proceeding. Specifically, Mr. Macey seeks \$4,479.00 for the expense he incurred to install the meter pole on his property. Tr. 22. As explained to Mr. Macey during the hearing, the Commission has no authority to award damages. Tr. 23. The Pennsylvania Supreme Court explained this lack of authority as follows:

It is relevant to the case now before us that the statutory array of PUC remedial and enforcement powers does not include the power to award damages to a private litigant for breach of contract by a public utility. Nor can we find an express grant of power from which the power to award such damages can be fairly implied.^[23]

Accordingly, Mr. Macey's request for monetary damages must be denied.

Smart Meter

Included as redress for his Amended Complaint, Mr. Macey requests removal of the smart meter that was attached to his new meter pole on August 26, 2019, to be replaced with an analog meter. Tr. 24. Ordering West Penn to remove Mr. Macey's smart meter and to replace it with an analog meter would violate the Code for the following reasons.

On October 15, 2008, Act 129 was signed into law and codified as part of the Code.²⁴ Act 129 required electric distribution companies (EDCs) with at least 100,000 customers, such as West Penn, to file a smart meter technology procurement and installation plan

²² See *Vetenshtein v. City of Philadelphia*, 755 A.2d 62, 67 (Pa. Cmwlth. 2000).

²³ See *Feingold*, cited above, n.4 at 794.

²⁴ 66 Pa.C.S. § 101, *et seq.*

(SMP) with the Commission for approval.²⁵ Specifically, Section 2807(f)(2) of the Code directed EDCs to furnish smart meter technology as follows: 1) upon request from a customer that agrees to pay the cost of the smart meter at the time of the request; 2) in new building construction; and 3) in accordance with a depreciation schedule not to exceed fifteen years.²⁶ Further, this technology is defined as follows:

[T]he term “smart meter technology” means technology, including metering technology and network communications technology capable of bidirectional communication, that records electricity usage on at least an hourly basis, including related electric distribution system upgrades to enable the technology. . . .^[27]

West Penn’s SMP was approved by the Commission on June 4, 2015.²⁸ Thus, under the Code and in accordance with its Commission-approved SMP, West Penn was required to install a smart meter at the service address. Therefore, Mr. Macey’s request for removal of the smart meter and replacement with an analog meter must be denied.

Reasonable Service

Mr. Macey claims West Penn failed to provide him reasonable service for several reasons: 1) West Penn failed to respond to his requests for contact information about the Company’s designer; 2) West Penn agreed to attach the smart meter to a pole that he would install on his property, but instead attached the smart meter to his house; and 3) West Penn refused to turn off his electric when requested, thereby resulting in physical harm to his wife.

²⁵ 66 Pa.C.S. § 2807(f).

²⁶ 66 Pa.C.S. § 2807(f)(2).

²⁷ 66 Pa.C.S. § 2807(g); Smart meters are also known Radio Frequency (RF) meters or Advanced Metering Infrastructure (AMI) meters.

²⁸ See *Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company For Approval of Their Smart Meter Deployment Plan*, Docket Nos. M-2013-2341990, M-2013-2341991, M-2013-2341993, M-2013-2341994, Smart Meter Deployment Plan (Order entered June 5, 2014). Also see West Penn’s Amended New Matter ¶¶3-4.

Section 1501 of the Code, cited above, requires every public utility to provide reasonable service to its customers. Section 102 of the Code, defines “service” as follows:

Used in its broadest and most inclusive sense, includes *any and all acts done, rendered, or performed*, and any and all things furnished or supplied, and any and all facilities used, furnished, or supplied by public utilities....^[29]

(Emphasis added). A utility’s “service” is not merely confined to the distribution of utility service, but also includes “any and all acts” related to that function.³⁰

Here, Mr. Macey’s request for the Company’s designer’s contact information falls within the ambit of reasonable service. Mr. Macey claims that West Penn’s failure to provide him the designer’s contact information caused his delay in installing the new meter pole on his property to which West Penn would attach the smart meter. The agreed upon date for installation of the meter pole was May 15, 2019.

In retort to Mr. Macey’s claim that West Penn caused his delay, West Penn maintains the Company’s designer’s information was given to Mr. Macey as early as February 2018. Additionally, on February 16, 2018, Witness Curcio staked the service address for the location of the meter pole and provided Mr. Macey the measurements for the pole. Witness Curcio provided Mr. Macey the requisite information a second time on April 10, 2019, and he again staked the service address in the same place he had staked it during his February 16, 2018 site visit. Mr. Macey had effectively received an extension from May 15, 2019, the agreed upon date to complete installation of the new meter pole to August 16, 2019; however, by August 16, 2019, installation of the pole was not complete.

²⁹ 66 Pa.C.S. § 102.

³⁰ *West Penn Power Co. v. Pa. Pub. Util. Comm’n*, 578 A.2d 75 (Pa. Cmwlth. 1990).

West Penn's retort has merit. Although West Penn did not respond to Mr. Macey's service request between January 10 and April 12, 2019, the information he was seeking had been provided to him in February 2018. On January 10, 2019, Mr. Macey agreed to install the meter pole by May 15, 2019. Mr. Macey emailed West Penn on July 12, 2019, and he informed West Penn installation of the pole would be complete by the next week. The pole was installed at the service address on July 25, 2019. Tr. 17. However, Mr. Macey admits the pole was not ready for attachment of the smart meter on July 25, 2019; additional work was "needed to prep for acceptance of the new feeder line." Tr. 17, 46-47. On August 16, 2019, counsel for West Penn emailed Mr. Macey and informed him since there had been no further contact from him, West Penn would proceed with installation of the service meter at the service address. Exhibit A, Attachment Exhibit H. Mr. Macey offered no explanation for the delay in completing the prep work required for acceptance of the new feeder line on the pole between July 25, 2019 and August 16, 2019. Tr. 30-31.

Here, the evidence establishes West Penn provided Mr. Macey the information needed for installation of the new meter pole at the service address and afforded him ample time for the pole installation for attachment of the smart meter; however, he failed to timely install the pole. Under these circumstances, a finding that West Penn failed to provide Mr. Macey reasonable service either in responding to his requests or in attaching the smart meter to his house would be unwarranted.

Mr. Macey further claims that when West Penn attached the smart meter to his house on August 16, 2019, he directed his wife to call West Penn to have the electric turned off, but West Penn refused to turn the power off. Tr. 19-21. Mr. Macey admits that West Penn sent a service person, a troubleshooter, to his house on August 16, 2019, in "a snorkel truck." *Id.* West Penn counters that the service person left the service address because of Mr. Macey's volatile behavior. Tr. 31-32. Mr. Macey admits to being animated when the service person arrived but denies making any threats. Tr. 32-33. On this issue credibility favors West Penn.

The evidence establishes that West Penn sent a service person in response to a shut-off request at the service address. From the evidence a reasonable inference may be drawn

that the shut-off did not occur because of Mr. Macey's "animated behavior." Thus, Mr. Macey's claim that West Penn's failure to shut-off his service upon request constituted unreasonable service must be denied.

Mr. Macey also argues that West Penn provided unsafe service by attaching the smart meter to his house because his wife has a medical condition, that is, electromagnetic hypersensitivity. According to Mr. Macey, after West Penn attached the smart meter to his house, his wife, "took ill and was sleep deprived." Tr. 15. His wife, Ms. Vienna, was unable to sleep in the house because of the smart meter, Mr. Macey testified. Tr. 19. "In fact, she spent most nights sleeping in the car [she] had to go camping when she got tired of sleeping in the car," claims Mr. Macey. Tr. 19-20.

When a utility customer challenges the effects of a smart meter's installation, the Commission has stated "[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."³¹

In the present case, Mr. Macey did not present any medical evidence concerning his claim that his wife, Ms. Vienna, has electromagnetic hypersensitivity. Mr. Macey claims West Penn was aware of his concerns about his wife's health, but deliberately and maliciously installed the smart meter on his house. Tr. 14-15. Medical evidence would be needed to establish a causal connection between Ms. Vienna's health and any harmful effects caused by the smart meter. Otherwise, Mr. Macey's claim is just an unsubstantiated opinion. Assertions, personal opinions or perceptions do not constitute factual evidence.³²

³¹ *Kreider v. PECO Energy Co.*, Docket No. P-2015-2495064 at 23 (Order entered January 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).

³² *Pennsylvania Bureau of Corrections v. City of Pittsburgh*, 532 A.2d 12 (Pa. 1987).

Notably, Mr. Macey did not call Ms. Vienna, who was present throughout the hearing, to testify. Tr. 4, 5, 8, 24, 45. Ms. Vienna could have presented her medical records, to establish that installation of the smart meter was harmful to her health and caused sleepless nights. Mr. Macey’s failure to call Ms. Vienna as a witness draws an adverse inference.

The general rule in Pennsylvania is that “if a party fails to call a witness or other evidence within his or her control, the fact finder may be permitted to draw an adverse inference.”

...

Generally, when a potential witness is available to only one of the parties to a trial, and it appears this witness has special information material to the issue, and this person's testimony would not be merely cumulative, then if such party does not produce the testimony of this witness, the jury may draw an inference it would have been unfavorable.^[33]

Since Mr. Macey did not call his wife to testify, an inference may be drawn that her testimony would not have been favorable to his case.

Considering Mr. Macey’s lack of medical evidence concerning his wife’s health and the adverse inference drawn from his failure to call his wife to testify, Mr. Macey’s claim that West Penn provided unsafe service cannot stand and must be denied.

Employee Reprimands and Fines

Mr. Macey’s remaining requests for relief against West Penn are now addressed. Mr. Macey wants the Commission to reprimand West Penn’s employees — the manager, who wrote the order to install the smart meter, and the employee, who installed the smart meter on his house.³⁴ Reprimand of a utility’s employees is an internal management decision beyond the

³³ *Kovach v. Solomon*, 732 A.2d 1, 8-9, (Pa.Super. 1999).

³⁴ See Amended Complaint ¶IV (3) and (4).

Commission's authority.³⁵ Accordingly, Mr. Macey's request for employee reprimands must be denied.

Mr. Macy also wants the Commission to assess fines against West Penn for poor service and attachment of the smart meter to his house in violation of their agreement. The Commission has the authority impose a civil penalty upon the utility for violation of the Code, a Commission regulation or order.³⁶ However, as discussed above the evidence fails to establish any violation by West Penn. Therefore, Mr. Macey's request for the assessment of a fine against West Penn must be denied.

Ruling

Considering the above analysis and applying the law to the facts, I am compelled to conclude Mr. Macey failed to carry his burden of proof, and therefore, his Amended Complaint must be dismissed.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the parties and the subject matter in this proceeding. 66 Pa. C.S. § 701.

2. Complainant as the party filing the Complaint bears the burden of proving that he is entitled to relief from the Commission. 66 Pa. C.S. § 332(a).

3. Complainant must show that the utility company is responsible or accountable for the problem described in his Complaint. *Patterson v. Bell Telephone Company of Pennsylvania*, 72 Pa. PUC 196 (1990).

³⁵ See *Metropolitan Edison Company v. Pa. Pub. Util. Comm'n*, 62 Pa.Cmwlth. 460, 437 A.2d 76 (1981).

³⁶ See *Seidel v. Ralph G. Smith, Inc.*, 49 Pa. PUC 557, 1975 Pa. PUC LEXIS 7 (1975).

4. The Public Utility Code mandates that a public utility must furnish and maintain adequate, efficient, safe, and reasonable service and facilities, and must make such repairs, changes, alterations, substitutions, and improvements in or to such service and facilities as shall be necessary or proper for the accommodation, convenience and safety of its patrons and the public. 66 Pa.C.S. § 1501.

5. The Commission lacks authority to adjudicate a private dispute seeking a monetary award. *See In Re: Melograne*, 812 A. 2d 1164 (Pa. 2002); *Feingold v. Bell of Pennsylvania*, 477 Pa. 1, 383 A.2d 791 (1977).

6. Act 129 of the Public Utility Code requires electric distribution companies, such as Respondent, to install smart meters at the service address of its customers. 66 Pa.C.S. § 2807(f)(2).

7. Complainant failed to sustain his burden of proof that Respondent's installation of the smart meter at the service address constituted unsafe or unreasonable service in violation of the Code. 66 Pa.C.S. § 1501.

8. Complainant has not met his burden of proving Respondent violated the Public Utility Code, a Commission regulation or a Commission order. 66 Pa.C.S. § 332(a).

9. Complainant has not met his burden of proving he is entitled to receive the relief he requested from the Commission. 66 Pa.C.S. § 332(a).

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ORDER

THEREFORE,

IT IS ORDERED:

1. That the Complaint of Christopher L. Macey against West Penn Power Company at Docket No. C-2019-3012705 is dismissed.
2. That the Secretary's Bureau shall mark Docket No. C-2019-3012705 closed.

Date: May 6, 2020

_____/s/_____
Conrad A. Johnson
Administrative Law Judge