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June 5, 2020

**VIA ELECTRONIC FILING**

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

**Re: Jon Allen Hribal v. West Penn Power Company  
Docket No. C-2019-3008050**

Dear Secretary Chiavetta:

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

Please contact me if you have any questions.

Very truly yours,



Tori L. Giesler

krak  
Enclosures

c: As Per Certificate of Service

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

**JON ALLEN HRIBAL**

**v.**

**WEST PENN POWER COMPANY**

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**DOCKET NO. C-2019-3008050**

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

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Dated: June 5, 2020

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## **I. PROCEDURAL HISTORY**

On February 19, 2019, Jon Allen Hribal (the “Complainant”) filed the above-captioned Formal Complaint against West Penn Power Company (“West Penn” or the “Company”) with the Pennsylvania Public Utility Commission (“Commission”) regarding 114 Lake Forest Boulevard, Scottdale, Pennsylvania 15683 (“Service Location”), which was electronically served on the Company on February 25, 2019.

On March 18, 2019, the Company filed its Answer and New Matter denying the material allegations of the Formal Complaint. On the same day, the Company also filed Preliminary Objections to the Formal Complaint.

On March 29, 2019, the Complainant filed a response to the Company’s Answer and New Matter and Preliminary Objections.

On April 15, 2019, a Motion Judge Assignment Notice was issued where the parties were informed that the Administrative Law Judge (“ALJ”) Jeffrey A. Watson had been assigned to rule on the Company’s Preliminary Objections.

On May 3, 2019, ALJ Watson issued an Interim Order which denied the Company’s Preliminary Objections.

On May 16, 2019, in accordance with 52 Pa. Code § 5.341, the Company forwarded to the Complainant interrogatories and document requests (“Discovery Requests”) via first class mail.

The Complainant did not file any objection to the Discovery Requests and did not timely respond to the Discovery Requests. As such, the Company filed a Motion to Compel full and complete responses to the Discovery Requests on July 29, 2019.

On August 9, 2019, the Complainant filed a letter seeking additional time to respond to the Discovery Requests.

On August 13, 2019, the Company filed a letter indicating that it did not oppose the requested extension and that it was willing to voluntarily extend the response deadline to August 30, 2019.

On August 22, 2019, ALJ Watson issued an Interim Order Granting Request By Complainant For Additional Time To Respond To Discovery Requests. The Complainant was granted until September 6, 2019, to serve his responses to the Discovery Requests.

On September 4, 2019, ALJ Watson issued an Interim Order Establishing Initial Litigation Schedule.

On September 6, 2019, the Company was served with the Complainant's responses to the Discovery Requests. As such, it filed a letter on September 11, 2019, indicating that it was withdrawing its Motion to Compel.

On October 8, 2019, ALJ Watson issued an Interim Order Requiring Filing of Status Reports.

On November 6, 2019, West Penn filed its Status Report.

On December 20, 2019, the Commission issued a Hearing Notice, scheduling an Initial Call-Out Telephonic Hearing for February 13, 2020.

On January 10, 2020, the Commission issued a Hearing Change Notice, which converted the February 13, 2020 hearing from a Call-Out Telephonic Hearing to an In-Person Hearing.

On February 13, 2020, the In-Person Hearing was held as scheduled.

On April 7, 2020, an Interim Order Establishing Briefing Schedule was issued. West Penn submits this Main Brief pursuant to the Briefing Order.

## II. LEGAL STANDARDS

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

Although the factual burden may shift during a proceeding, the Complainant always maintains the overarching burden of proof. It is clearly established that the Complainant's "burden of proof before administrative tribunals as well as before most civil proceedings is satisfied by establishing a preponderance of the evidence."<sup>5</sup> A preponderance of evidence is demonstrated where the evidence presented is more convincing, even by the smallest degree, than the evidence presented by the opposing party.<sup>6</sup>

In order for the Commission to sustain a formal complaint, the Complainant must demonstrate that an "act or thing done or omitted to be done by any public utility [is] in violation, or claimed violation, of any law which the Commission has jurisdiction to administer, or of any regulation or order of the commission."<sup>7</sup> Section 1501 of the Public Utility Code

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

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

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

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

<sup>5</sup> *Lansberry*, 578 A.2d at 602.

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

<sup>7</sup> 66 Pa.C.S. § 701.

states, in relevant part: “every public utility shall furnish and maintain adequate, efficient, safe and reasonable service and facilities.”<sup>8</sup> As part of formal complaint proceedings, the Commission evaluates the reasonableness of public utility service and facilities pursuant to Section 1501. In complaint proceedings similar to the instant proceeding, the Commission has held that the relevant legal standard is whether the installation of a smart meter constitutes unsafe or unreasonable service in violation of Section 1501 of the Public Utility Code.<sup>9</sup>

### **III. SUMMARY OF ARGUMENT**

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

West Penn has an absolute obligation to install smart meters at all of its customers’ service locations under Act 129 of 2008 (“Act 129”).<sup>10</sup> Neither Act 129 nor subsequent Commission orders related to smart meter installation and deployment permit customers to “opt-out” from smart meter installation.<sup>11</sup> Further, both Act 129 and the Commission’s Implementation Order require that electric distribution companies (“EDCs”) install wireless smart meters with specific functionality.<sup>12</sup> West Penn’s smart meters adhere to the requirements of Act 129 and the Commission. The smart meter components and deployment of smart meters in the West Penn’s territory were identified in West Penn’s Smart Meter Deployment Plan,

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<sup>8</sup> 66 Pa.C.S. § 1501.

<sup>9</sup> *Frompovich v. PECO Energy Co.*, 2018 Pa. PUC LEXIS 160 (Opinion and Order entered May 3, 2018); *Susan Kreider v. PECO Energy Co.*, Docket No. C-2015-2469655 (Order on Reconsideration entered January 28, 2016).

<sup>10</sup> 66 Pa.C.S. § 2806.1, *et seq.*

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

<sup>12</sup> Tr. 107-108.

which was ultimately approved by the Commission on June 20, 2014.<sup>13</sup> West Penn will install a smart meter at the Complainant's Service Location in order to remain in compliance with Act 129, related Commission orders, and its Smart Meter Deployment Plan.

Furthermore, the Complainant's claim that the installation of a smart meter at his Service Location would violate his rights under the Pennsylvania and/or United States Constitution should be denied. West Penn is not a state actor and, therefore, cannot deprive the Complainant of any constitutional rights. Moreover, the Complainant has failed to demonstrate any such violation will occur.

In addition, the Complainant failed to establish that the installation of a smart meter constitutes unreasonable service. The Complainant's statements related to health, safety and privacy concerns should be rejected as unsupported allegations. The Complainant offered no credible or convincing evidence to support his allegations. Moreover, the Complainant's concerns regarding, health, safety and privacy are based exclusively upon his own personal beliefs regarding smart meters. The Complainant was not qualified to offer expert testimony and did not present the testimony of an expert on his behalf.

By contrast, the substantial evidence of record presented by the Company addresses the issues raised in this proceeding and completely rebuts any evidence presented by the Complainant. West Penn witness, Mr. John C. Ahr, presented testimony on the Company's behalf in this proceeding. Mr. Ahr is employed by FirstEnergy Service Company with the title Advisor, Regulatory Compliance – Smart Meters. Mr. Ahr's testimony fully explained the Company's smart meter deployment plan, smart meter safety, and the steps the Company has

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<sup>13</sup> *Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company For Approval of Their Smart Meter Deployment Plan*, Docket Nos. M-2013-2341990, M-2013-2341991, M-2013-2341993, and M-2013-2341994 (Sec. Letter dated June 20, 2014) (hereinafter, "Smart Meter Deployment Plan" or "SMDP").

taken under its smart meter privacy policy to protect sensitive customer information. Mr. Ahr also explained that, all else being equal, the installation of a smart meter would increase the speed at which a customer could be reconnected to the grid, that West Penn's smart meters are compatible with systems that read the customer usage information that is transmitted, and that the Company will maintain meter technicians to service and read meters as needed.

The evidence of record weighs heavily against the Complainant's allegations and assertions. In comparison to the Company's expert testimony, the lay testimony and largely inadmissible exhibits offered by the Complainant should carry little, if any, weight. Although the Pennsylvania Rules of Evidence are not strictly adhered to at the Commission, the Pennsylvania Supreme Court has unequivocally stated that any relaxation of the rules of evidence in administrative settings cannot allow lay witnesses to testify to technical matters "without personal knowledge or specialized training."<sup>14</sup> Lay witness testimony only carries evidentiary weight where the witness has actually perceived the situation, and the opinion is not based on scientific, technical or specialized knowledge.<sup>15</sup> As such, all lay testimony from the Complainant related to more specialized topics, including health, safety, radio frequency and privacy, should be disregarded and given no evidentiary weight under the Pennsylvania Rules of Evidence.

In sum, the Complainant failed to establish by a preponderance of the evidence that West Penn violated a Commission statute, regulation, or order. Specifically, the Complainant has not met his burden of proof that the installation of a smart meter constitutes unreasonable service by

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<sup>14</sup> *Gibson v. W.C.A.B.*, 861 A.2d 938, 947 (Pa. 2004) (holding Rules of Evidence 602, 701 and 702 generally applicable in agency proceedings).

<sup>15</sup> Pa.R.E. 701.

the Company. Accordingly, West Penn urges the Commission to dismiss the Complaint with prejudice.

#### **IV. ARGUMENT**

##### **A. The Complainant Failed to Meet His Burden of Proof that West Penn Violated the Public Utility Code, a Commission Order, or a Commission Regulation.**

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

On October 15, 2008, Act 129 was signed into law and codified as part of the Public Utility Code (“Code”).<sup>16</sup> Act 129 required EDCs with at least 100,000 customers, such as West Penn, to file a smart meter technology procurement and installation plan (“SMP Plan”) with the Commission for approval.<sup>17</sup> 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.<sup>18</sup>

Under Act 129, West Penn has an absolute obligation to install smart meters at all of its customers’ service locations. Neither Act 129 nor subsequent Commission orders related to smart meter installation and deployment permit customers to “opt-out” from smart meter installation. As explained by Company witness John C. Ahr, Act 129 required EDCs with more than 100,000 customers to install smart meters across their service territory.<sup>19</sup> Consistent with this mandate, West Penn’s Commission-approved SMDP explicitly states that no opt-out option

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<sup>16</sup> 66 Pa.C.S. § 101, *et seq.*

<sup>17</sup> 66 Pa.C.S. § 2807(f); *see also* Met-Ed Exh. JCA 1 at 4-7.

<sup>18</sup> 66 Pa.C.S. § 2807(f)(2).

<sup>19</sup> Tr. 104.

is available.<sup>20</sup> The Commission-approved SMDP mandates 100% of its meters to be replaced with smart meters. Therefore, the Complainant's request for an opt out should be rejected.

Pursuant to Section 2807(f) of the Public Utility Code, West Penn jointly filed its Petition for Approval of Smart Meter Technology Procurement and Installation Plan with Metropolitan Edison Company, Pennsylvania Power Company and Pennsylvania Electric Company (together with West Penn collectively referred to hereafter as "the Companies") on August 14, 2009 ("2009 SMP Plan").<sup>21</sup> The Commission issued an Order on June 9, 2010, approving the 2009 SMP Plan with certain modifications.<sup>22</sup> On December 31, 2012, the Companies filed their Joint Petition for Approval of their Smart Meter Deployment Plan, in which they requested that the Commission: (1) find that their proposed Deployment Plan satisfies the requirements of Act 129 and the Commission's Implementation Order; (2) approve the Companies' proposed procurement and deployment of approximately 2.1 million smart meters, over 98% of which should be installed by the end of 2019; (3) authorize the Companies to continue to recover smart meter costs; and (4) authorize the Companies to create a regulatory asset for their investment in their existing meters to be replaced by smart meters.<sup>23</sup> On June 16, 2014, the Companies submitted their revised Smart Meter Deployment Plan,<sup>24</sup> which *intra alia* accelerated the smart

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<sup>20</sup> *Smart Meter Deployment Plan*, at 9.

<sup>21</sup> *Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company Approval of Smart Meter Technology Procurement and Installation Plan*, Docket No. M-2009-2123950 (Petition dated Aug. 10, 2009).

<sup>22</sup> *Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company Approval of Smart Meter Technology Procurement and Installation Plan*, Docket No. M-2009-2123950 (Order entered June 9, 2010).

<sup>23</sup> *Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company For Approval of Their Smart Meter Deployment Plan*, Docket Nos. M-2013-2341990, M-2013-2341991, M-2013-2341993, M-2013-2341994 (Petition filed December 31, 2012).

<sup>24</sup> *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 (Revised Plan filed June 16, 2014).

meter deployment schedule laid out in their original Deployment Plan.<sup>25</sup> Under the Revised Deployment Plan, the Companies proposed to deploy 170,000 smart meters by the end of 2015.<sup>26</sup> In its June 25, 2014 Opinion and Order, the Commission recognized the benefits of early deployment of smart meters and approved the revised Smart Meter Deployment Plan, stating:

[T]his Commission has already observed the benefits of early deployment. We find that the use of Penn Power as a case study may help the Companies identify other more cost-effective meter deployment strategies that can then be leveraged by FirstEnergy's other operating companies. If deployment and operational savings prove very positive, FirstEnergy may also be able to further accelerate smart meter deployment, thus enabling an option to enhance customer savings even more.<sup>27</sup>

In this proceeding, the Complainant has argued that a smart meter should not be installed at his Service Location.<sup>28</sup> This argument was based upon the Complainant's personal beliefs,<sup>29</sup> including (a) that smart meters present health, safety and privacy issues, and (b) that Act 129 is unconstitutional.<sup>30</sup>

At the outset, West Penn notes that Commission precedent is uniform that the Commission cannot grant exceptions to the statutory directive that smart meters be installed by allowing customers to "opt-out." Neither the Company's Commission-approved SMDP nor Act 129 permit such opt-outs to occur.<sup>31</sup> Furthermore, Section 2807(f)(2)(i) provides:

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<sup>25</sup> See Tr. 136.

<sup>26</sup> *Id.* at 13.

<sup>27</sup> *Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company For Approval of Their Smart Meter Deployment Plan*, Docket Nos. M-2013-2341990, M-2013-2341991, M-2013-2341993, M-2013-2341994 (Opinion and Order entered June 25, 2014 at 16).

<sup>28</sup> See, e.g., Formal Complaint ¶¶ 4-5; Tr. 90 (Complainant testifying that he is requesting a ruling that abolishes Act 129 and does away with the smart meter that would be installed at his Service Location).

<sup>29</sup> See, e.g., Tr. 50-51.

<sup>30</sup> See, e.g., Tr. 13.

<sup>31</sup> See, e.g., *Lutherschmidt v. Metropolitan Edison Company*, Docket No. C-2010 2200353 (Final Order entered March 25, 2011); *Negley v. Metropolitan Edison Company*, Docket No. C-2010-2205305 (Initial Decision dated January 3, 2011 became final without Commission action on March 3, 2011).

(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.<sup>32</sup>

On cross-examination, the Complainant admitted that the current state of law in Pennsylvania does not permit him to opt-out of having smart meter installed.<sup>33</sup> Moreover, Complainant admitted that he did not believe that West Penn had violated Act 129, or any other law, as they are written and in effect today.<sup>34</sup>

Furthermore, the Complainant's assertion that Act 129 violates either the United States Constitution or the Constitution of the Commonwealth of Pennsylvania is also without merit. Specifically, the Complainant asserted that Act 129 is unconstitutional at the state level, citing Article 1, Paragraph 2 of the Constitution of the Commonwealth of Pennsylvania.<sup>35</sup> The Complainant did not identify specific portions of the United States Constitution under which he has challenged Act 129. However, the Company notes that the Complainant raised privacy concerns regarding the Company's smart meters.<sup>36</sup> To the extent that the Complainant raises any additional constitutional claims in his Main Brief, the Company reserves its rights to respond to those specific claims in its Reply Brief.

As an initial matter, the Company notes that for there to be a deprivation of constitutional rights, two elements must be met: (1) "the deprivation must be caused by the exercise of some

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<sup>32</sup> 66 Pa.C.S. § 2807(f)(2)(i).

<sup>33</sup> Tr. 96-97.

<sup>34</sup> Tr. 97.

<sup>35</sup> See Formal Complaint ¶ 4 (incorporating attached document); PA. CONST. art I, § 2.

<sup>36</sup> See Formal Complaint ¶ 4 (incorporating attached document); Tr. 29.

right or privilege created by the state”; and (2) “the party charged with the deprivation must be a person who may fairly said to be a state actor.”<sup>37</sup>

Here, West Penn is not a state actor. In *Jackson v. Metropolitan Edison Co.*, the U.S. Supreme Court found that a fellow Pennsylvania electric utility, *i.e.*, Metropolitan Edison Company, was not a state actor, even though it arguably had “monopoly power” and “provided an essential public service required to be supplied on a reasonably continuous basis.”<sup>38</sup> Therefore, in keeping with the U.S. Supreme Court’s holding in *Jackson*, West Penn similarly is not a state actor. Moreover, even if the Company were a state actor, the Seventh Circuit Court of Appeals found that the collection of smart meter data by a city-owned public utility was a reasonable warrantless search.<sup>39</sup> Thus, West Penn cannot violate the Complainant’s constitutional rights by installing the new AMI meter.

Complainant’s specific assertion that Act 129 is unconstitutional pursuant to PA. CONST. art I, § 2 should be rejected. This section of the Pennsylvania Constitution states:

§ 2. Political powers.

All power is inherent in the people, and all free governments are founded on their authority and instituted for their peace, safety and happiness. For the advancement of these ends they have at all times an inalienable and indefeasible right to alter, reform or abolish their government in such manner as they may think proper.<sup>40</sup>

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<sup>37</sup> *Commonwealth v. Corley*, 491 A.2d 829, 832 (Pa. 1985) (emphasis added) (quoting *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 937 (1982)); see *Commonwealth v. Demor*, 942 A.2d 898, 899-900 (Pa. Super. 2008) (applying principles outlined in *Corley* to Fourth Amendment analysis); *W. Pa. Socialist Workers 1982 Campaign v. Conn. General Life Ins. Co.*, 485 A.2d 1, 5-6 (Pa. Super. 1984) (“[T]he search and seizure provisions of Article 1, section 8, have been held inapplicable to the conduct of private parties.”) (citations omitted).

<sup>38</sup> *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351-53 (1974).

<sup>39</sup> See *Naperville Smart Meter Awareness v. City of Naperville*, 900 F.3d 521, 527-29 (7th Cir. 2018).

<sup>40</sup> PA. CONST. art I, § 2.

This proceeding concerns whether the installation of a smart meter by West Penn constitutes unsafe or unreasonable service in violation of Section 1501 of the Public Utility Code. Article 1, Section 2 has nothing to do with the instant case.

For these reasons, the Complainant has failed to sustain his burden to demonstrate that West Penn can legally be required not to install a smart meter at his Service Location under Act 129.

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

Although Mr. Hribal alleged various health, safety and privacy concerns related to radio frequency fields and smart meters, he failed to provide any reliable evidence in support of his allegations. Mr. Hribal further failed to demonstrate that West Penn's smart meters might be incompatible with the systems that read them, and that the installation of smart meters would adversely affect the Company's ability to restart service where it had been terminated. By contrast, West Penn rebutted the Complainant's allegations. As such, the Complainant failed to establish his burden of proof to show that the deployment of smart meters is unreasonable or constitutes inadequate utility service.

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

§ 1501. Character of service and facilities  
Every public utility shall furnish and maintain adequate, efficient, safe, and reasonable service and facilities, and shall make all such repairs, changes, alterations, substitutions, extensions, and improvements in or to such service and facilities as shall be necessary or proper for the accommodation, convenience, and safety of its patrons, employees, and the public. Such service also shall be

reasonably continuous and without unreasonable interruptions or delay. Such service and facilities shall be in conformity with the regulations and orders of the commission.<sup>41</sup>

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

The Complainant presented no expert testimony to corroborate his health and safety allegations. In addition, the Complainant himself is not an engineer, doctor or other medical professional, and does not otherwise possess the requisite expertise to provide expert testimony himself. To the extent the Complainant relied upon hearsay or other inadmissible evidence to attempt to support his claims, this evidence was properly objected to upon hearsay and relevance grounds and cannot support a finding of fact. *See* Section IV.A.3. *infra*. Therefore, the Complainant's health and safety allegations are unfounded and should be rejected.

With respect to the Complainant's claims that West Penn's smart meters are unsafe or constitute a fire hazard, these claims are unsubstantiated. Mr. Ahr testified that the Company's smart meters comply with all applicable requirements and standards for smart meters adopted by the Federal Communications Commission and the American National Standards Institute Tests.<sup>42</sup> In addition, Mr. Ahr testified that the Company's smart meters are Underwriters Laboratories ("UL") certified, which means the meters were tested for Compliant UL standard 2735.<sup>43</sup> As such, West Penn clearly demonstrated that its smart meters are compliant with all applicable safety standards.

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<sup>41</sup> 66 Pa.C.S. § 1501.

<sup>42</sup> Tr. 113-114.

<sup>43</sup> Tr. 113-114.

Similarly, the Complainant's privacy concerns are unsubstantiated. West Penn developed, and the Commission approved, a smart meter privacy policy.<sup>44</sup> The privacy policy is binding upon West Penn, and describes in detail how the Company protects private customer information related to the use of smart meters.<sup>45</sup> Mr. Ahr specifically explained:

The policy states that the company's smart meter communication network is a high security environment that uses multiple layers of protection from unwanted access. This includes the use of passwords, firewalls, continuous security monitoring and other security controls. It also states that the usage data that is transmitted across the network is encrypted.<sup>46</sup>

Mr. Ahr also explained that no personally identifiable customer information is transmitted over West Penn's smart meters.<sup>47</sup> Moreover, the Company does not sell or share customer information to third parties without prior consent.<sup>48</sup> As such, the Complainant failed to substantiate his privacy concerns.

Company witness Mr. Ahr also explained that the Complainant's assertions regarding service restoration delays due to smart meters is incorrect.<sup>49</sup> Mr. Ahr credibly testified that the Company is able to turn off and turn on service to a customer without physically visiting the service site when a smart meter is installed.<sup>50</sup> As such, the Company can restore service much quicker with a smart meter installed. Moreover, Mr. Ahr confirmed that the Company maintains employees to read physically read and inspect meters, if necessary, and that these employees would be qualified to conduct the same functions as meter technicians have traditionally.<sup>51</sup>

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<sup>44</sup> Tr. 111-112.

<sup>45</sup> Tr. 112; *see also* West Penn Exh. 6.

<sup>46</sup> Tr. 113.

<sup>47</sup> Tr. 112.

<sup>48</sup> Tr. 112-113.

<sup>49</sup> Tr. 34-35.

<sup>50</sup> Tr. 114.

<sup>51</sup> Tr. 115-116.

Finally, Mr. Ahr rebutted the Complainant's claims that, if a customer were to change energy providers, the new provider's system would not be compatible with or able to read the information transmitted by West Penn's smart meters.<sup>52</sup> Specifically, Mr. Ahr testified that regardless of whether a meter is an analog meter or smart meter, it reads a customer's energy consumption and an energy provider can read this data.<sup>53</sup>

Despite failing to support his allegations with any reliable evidence, the Company still rebutted each of the Complainant's allegations related to the Company's smart meters. The Complainant wholly failed to demonstrate that the installation of a smart meter at his service location would constitute unreasonable or inadequate service under Section 1501 of the Public Utility Code.

**3. All Hearsay and Lay Health and Safety Testimony was Properly Objected to and Excluded and May Not be Relied Upon in this Matter.**

Mr. Hribal introduced a number of exhibits, which were properly objected to as hearsay. Further, the Complainant attempted to offer testimony related to health and safety issues without possessing the necessary qualifications to testify on these issues. Mr. Hribal is not a medical doctor or an engineer, and does not otherwise possess the requisite expertise to provide expert testimony regarding health or safety issues related to radio frequencies or smart meters. Moreover, on cross examination, Mr. Hribal admitted that he has had no experience managing or developing electric utility tariffs.<sup>54</sup> As a lay witness, Mr. Hribal was not qualified to testify or offer exhibits related to any issues outside of his direct personal knowledge. Therefore, the

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<sup>52</sup> Tr. 31.

<sup>53</sup> Tr. 116.

<sup>54</sup> Tr. 96.

Complainant's testimony and exhibits regarding health, medical or scientific opinions carry no evidentiary weight and, where applicable, were properly objected to.

According to Pennsylvania Rule of Evidence 701,<sup>55</sup> a lay witness is limited to giving opinion testimony that is rationally based on the witness's own perceptions. Specifically, Rule 701 provides as follows:

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is: (a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of R 702.

Although the Pennsylvania Rules of Evidence are not strictly adhered to at the Commission, the Pennsylvania Supreme Court has unequivocally stated that any relaxation of the rules of evidence in administrative settings cannot allow lay witnesses to testify to technical matters “without personal knowledge or specialized training.”<sup>56</sup> Lay witness testimony only carries evidentiary weight where the witness has actually perceived the situation, and the opinion is not based on scientific, technical or specialized knowledge.<sup>57</sup> In this case, the bulk of the Complainant's testimony and exhibits related to issues outside the scope of his personal knowledge and were based on hearsay. All such testimony and exhibits, where objected to, were properly excluded upon objection. To the extent such testimony was not objected to, such testimony should carry insignificant weight that cannot support the Complainant's burden of proof in this proceeding.

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<sup>55</sup> Pa.R.E. 701.

<sup>56</sup> *Gibson v. W.C.A.B.*, 861 A.2d 938, 947 (Pa. 2004) (holding Rules of Evidence 602, 701 and 702 generally applicable in agency proceedings).

<sup>57</sup> Pa.R.E. 701.

West Penn presented extensive expert testimony in support of its position that its smart meter deployment is safe, reasonable and adequate. The Complainant, on the other hand, failed to present any credible evidence to support his allegations that smart meter deployment is unsafe or violates Section 1501 of the Public Utility Code. In view of the Complainant's failure to fulfill his burden of proof, the Complaint should be denied and dismissed with prejudice.

V. **CONCLUSION**

WHEREFORE, West Penn Power Company respectfully requests that the Administrative Law Jeffrey A. Watson recommend that the Pennsylvania Public Utility Commission dismiss the Formal Complaint of Jon Allen Hribal with prejudice.

Respectfully submitted,

Dated: June 5, 2020



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## APPENDIX A

### PROPOSED FINDINGS OF FACT

1. Act 129 of 2008 required electric distribution companies with more than 100,000 customers to adopt smart meter deployment plans.<sup>58</sup>
2. Act 129 provides a list of required smart meter functionality, which was supplemented by Commission order.<sup>59</sup>
3. West Penn's Smart Meter Technology Procurement and Installation Plan was filed on August 10, 2009.<sup>60</sup>
4. The Commission ultimately approved the smart meter deployment plan, with modifications, on June 9, 2010.<sup>61</sup>
5. On December 31, 2012, the Companies filed their Joint Petition for Approval of their Smart Meter Deployment Plan, in which they requested that the Commission: (1) find that their proposed Deployment Plan satisfies the requirements of Act 129 and the Commission's Implementation Order; (2) approve the Companies' proposed procurement and deployment of approximately 2.1 million smart meters, over 98% of which should be installed by the end of 2019; (3) authorize the Companies to continue to recover smart meter costs; and (4) authorize the

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<sup>58</sup> Tr. 72-73, 75.

<sup>59</sup> Tr. 75-76.

<sup>60</sup> *Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company Approval of Smart Meter Technology Procurement and Installation Plan*, Docket No. M-2009-2123950 (Petition dated Aug. 10, 2009).

<sup>61</sup> *Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company Approval of Smart Meter Technology Procurement and Installation Plan*, Docket No. M-2009-2123950 (Order entered June 9, 2010).

Companies to create a regulatory asset for their investment in their existing meters to be replaced by smart meters.<sup>62</sup>

6. On June 16, 2014, the Companies submitted their revised Smart Meter Deployment Plan,<sup>63</sup> which *intra alia* accelerated the smart meter deployment schedule laid out in their original Deployment Plan.

7. The Company presented one witness in this proceeding, John C. Ahr. Mr. Ahr is employed by FirstEnergy Service Company with the title Advisor, Regulatory Compliance – Smart Meters.

8. Mr. Ahr’s testimony fully explained the Company’s smart meter deployment plan<sup>64</sup> smart meter safety.<sup>65</sup>

9. Customers are not permitted to opt-out of the installation of smart meters under Act 129.<sup>66</sup>

10. West Penn developed, and the Commission approved, a smart meter privacy policy.<sup>67</sup>

11. The privacy policy is binding upon West Penn, and describes in detail how the Company protects private customer information related to the use of smart meters.<sup>68</sup>

12. No personally identifiable customer information is transmitted over West Penn’s smart meters.<sup>69</sup>

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<sup>62</sup> *Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company For Approval of Their Smart Meter Deployment Plan*, Docket Nos. M-2013-2341990, M-2013-2341991, M-2013-2341993, M-2013-2341994 (Petition filed December 31, 2012).

<sup>63</sup> *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 (Revised Plan filed June 16, 2014).

<sup>64</sup> Tr. 104-110.

<sup>65</sup> Tr. 113-114.

<sup>66</sup> See Tr. 104.

<sup>67</sup> Tr. 111-112.

<sup>68</sup> Tr. 112; see also West Penn Exh. 6.

13. The Company does not sell or share customer information to third parties, without prior consent.<sup>70</sup>

14. The Company's smart meters comply with all applicable requirements and standards for smart meters adopted by the Federal Communications Commission and the American National Standards Institute Tests.<sup>71</sup>

15. The Company's smart meters are Underwriters Laboratories ("UL") certified, which means the meters were tested for Compliant UL standard 2735.<sup>72</sup>

16. The Company is able to turn off and turn on service to a customer without physically visiting the service site when a smart meter is installed.<sup>73</sup>

17. The Company maintains employees to read physically read and inspect meters, if necessary, and these employees would be qualified to conduct the same functions as meter technicians have traditionally.<sup>74</sup>

18. Regardless of whether a meter is an analog meter or smart meter, it reads a customer's energy consumption and an energy provider can read this data.<sup>75</sup>

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<sup>69</sup> Tr. 112.

<sup>70</sup> Tr. 112-113.

<sup>71</sup> Tr. 114.

<sup>72</sup> Tr. 114.

<sup>73</sup> Tr. 114.

<sup>74</sup> Tr. 115-116.

<sup>75</sup> Tr. 116.

## APPENDIX B

### PROPOSED CONCLUSIONS OF LAW

1. Under Section 332(a) of the Public Utility Code, the Complainant maintains the burden of proof in this proceeding.<sup>76</sup>

2. The first step in carrying the burden of proof is establishing a prima facie case that West Penn violated the Public Utility Code, the Commission's regulations, or a Commission order. Only if the Complainant establishes a prima facie case does it become the responsibility of the Company to provide rebuttal evidence.<sup>77</sup>

3. In order to establish a prima facie case, more is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. Mere bald assertions, personal opinions or perceptions, when not substantiated by facts, do not constitute evidence.<sup>78</sup>

4. A party's burden of proof is met by establishing a preponderance of the evidence, which requires proof by a greater weight of the evidence.<sup>79</sup>

5. A preponderance of evidence is demonstrated where the evidence presented is more convincing, even by the smallest degree, than the evidence presented by the opposing party.<sup>80</sup>

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

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<sup>76</sup> 66 Pa.C.S. § 332(a); *Se-Ling Hosiery v. Margulies*, 70 A.2d 854 (Pa. 1950); *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm'n*, 578 A.2d 600 (Pa. Commw. 1990), alloc. den., 602 A.2d 863 (Pa. 1992).

<sup>77</sup> *Waldron v. Phila. Elec. Co.*, 54 Pa. P.U.C. 98 (Order entered Mar. 14, 1980); *Replogle v. Pa. Elec. Co.*, 54 Pa. PUC 528 (Order entered Oct. 9, 1980).

<sup>78</sup> *Pa. Bureau of Corrections v. City of Pittsburgh*, 532 A.2d 12 (Pa. 1987); *Mid-Atlantic Power Supply Assoc. v. Pa. Public Utility Comm'n*, 746 A.2d 1196, 1200 (Pa. Commw. Ct. 2000).

<sup>79</sup> *Lansberry*, 578 A.2d at 602.

<sup>80</sup> *Pa. Pub. Util. Comm'n v. HIKO Energy, LLC*, 2015 Pa. PUC LEXIS 364 (I.D. entered Aug. 21, 2015); *see also Se-Ling Hosiery, supra*.

violation, or claimed violation, of any law which the Commission has jurisdiction to administer, or of any regulation or order of the commission.”<sup>81</sup>

7. As part of formal complaint proceedings, the Commission evaluates the reasonableness of public utility service and facilities pursuant to Section 1501 of the Public Utility Code. Section 1501 states, in relevant part: “every public utility shall furnish and maintain adequate, efficient, safe and reasonable service and facilities....”<sup>82</sup>

8. In similar complaint proceedings, the Commission has held that the relevant legal standard is whether the installation of a smart meter constitutes unsafe or unreasonable service in violation of Section 1501 of the Public Utility Code.<sup>83</sup>

9. Neither Act 129 nor subsequent Commission orders related to smart meter installation and deployment permit customers to “opt-out” from smart meter installation.<sup>84</sup>

10. The Complainant failed to establish that the Company’s installation of a smart meter at the Complainant’s service location would violate Act 129 or any related Commission orders.<sup>85</sup>

11. The Company owns, maintains, furnishes and installs its electric meters. It is within the Company’s sole and exclusive discretion to install the meters and related equipment it deems reasonable and appropriate to provide service to customers.<sup>86</sup>

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<sup>81</sup> 66 Pa.C.S. § 701.

<sup>82</sup> 66 Pa.C.S. § 1501.

<sup>83</sup> *Frompovich v. PECO Energy Co.*, Docket No. C-2015-2474602 (Opinion and Order entered May 3, 2018; *Susan Kreider v. PECO Energy Co.*, Docket No. C-2015-2469655 (Order on Reconsideration entered January 28, 2016).

<sup>84</sup> 66 Pa.C.S. § 2806.1, *et seq.*; *see Smart Meter Procurement and Installation*, Docket No. M-2009-2092655 (Order entered June 24, 2009).

<sup>85</sup> *See id.*; *see also Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West West Penn Company For Approval of Their Smart Meter Deployment Plan*, Docket Nos. M-2013-2341990, M-2013-2341991, M-2013-2341993, and M-2013-2341994 (Sec. Letter dated June 20, 2014).

<sup>86</sup> Electric Pa. P.U.C. No. 81, Original Pages 37-38, issued February 20, 2020; effective March 1, 2020.

12. The Company has the absolute right to access a customer's premises to remove or exchange any or all Company equipment including a meter.<sup>87</sup>

13. The Company is permitted to terminate a customer's electric service for denying access to the meter.<sup>88</sup>

14. A lay witness may only provide testimony related to his or her direct knowledge or experience.<sup>89</sup>

15. Any testimony of a lay witness related to technical or specialized knowledge should be excluded and given no evidentiary weight.<sup>90</sup>

16. The hearsay evidence presented in this case was properly objected to and excluded and may not support any findings of fact.<sup>91</sup>

17. In order for there to be a deprivation of constitutional rights, two elements must be met: (1) "the deprivation must be caused by the exercise of some right or privilege created by the state"; and (2) "the party charged with the deprivation must be a person who may fairly said to be a state actor."<sup>92</sup>

18. West Penn is not a state actor.

19. The Complainant failed to sustain his burden of proof that the installation of a smart meter would constitute unsafe or unreasonable service by the Company.

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<sup>87</sup> *Id.*

<sup>88</sup> 66 Pa.C.S. § 1406; 52 Pa. Code § 56.81; Electric Pa. P.U.C. No. 81, Original Page 60, issued February 20, 2020; effective March 1, 2020.

<sup>89</sup> Pa.R.E. 701.

<sup>90</sup> See *Gibson v. W.C.A.B.*, 861 A.2d 938, 947 (Pa. 2004).

<sup>91</sup> *Walker v. Unemployment Comp. Bd. of Review*, 367 A.2d 366, 370 (Pa. Commw. Ct. 1976).

<sup>92</sup> *Commonwealth v. Corley*, 491 A.2d 829, 832 (Pa. 1985) (emphasis added) (quoting *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 937 (1982)); see *Commonwealth v. Demor*, 942 A.2d 898, 899-900 (Pa. Super. 2008) (applying principles outlined in *Corley* to Fourth Amendment analysis); *W. Pa. Socialist Workers 1982 Campaign v. Conn. General Life Ins. Co.*, 485 A.2d 1, 5-6 (Pa. Super. 1984) ("[T]he search and seizure provisions of Article 1, section 8, have been held inapplicable to the conduct of private parties.") (citations omitted).

APPENDIX C

PROPOSED ORDERING PARAGRAPHS

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

BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

**JON ALLEN HRIBAL**

v.

**WEST PENN POWER COMPANY**

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**DOCKET NO. C-2019-3008050**

CERTIFICATE OF SERVICE

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

Service by electronic mail, postage prepaid, as follows:

Jon Allen Hribal  
jonhribal@yahoo.com

Administrative Law Judge Jeffrey A. Watson  
jeffwatson@pa.gov

Dated: June 5, 2020



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