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August 7, 2020

VIA ELECTRONIC FILING

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

Re: Jessica Janosek v. West Penn Power Company
Docket No. C-2019-3010124

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 Complainant 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**

JESSICA JANOSEK	:	
	:	
v.	:	DOCKET NO. C-2019-3010124
	:	
WEST PENN POWER COMPANY	:	

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

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Dated: August 7, 2020

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I. PROCEDURAL HISTORY

On May 23, 2019, Jessica Janosek (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 937 Keisterville Road, Keisterville, PA 15449 (“Service Location”), which was electronically served on the Company on May 24, 2019.

On June 13, 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. The Complainant did not file an Answer to the Company’s Preliminary Objections, but did file a Reply to the Company’s Answer and New Matter on July 8, 2019.

On July 8, 2019, a Call-In Telephone Hearing Notice was issued where the parties were informed that the Administrative Law Judge Mary D. Long would preside at a prehearing conference scheduled for August 9, 2019.

On July 11, 2019, a Prehearing Conference/Judge Change Notice was issued. The Administrative Law Judge Emily I. DeVoe was assigned to preside over this matter.

On July 12, 2019, West Penn served its first set of Interrogatories and Requests for Production of Documents (“Set I Discovery”).

On July 17, 2019, the Administrative Law Judge Emily I. DeVoe issued an Interim Order Establishing Initial Litigation Schedule. On the same day, an Interim Order Scheduling Prehearing Conference was issued.

On October 7, 2019, the Complainant sent written correspondence to the Administrative Law Judge Emily I. DeVoe requesting a second prehearing conference.

On October 15, 2019, a Call-In Telephone Pre-Hearing Conference Notice was issued by the Commission and scheduled a telephonic prehearing conference for November 4, 2019.

On October 16, 2019, an Interim Order Scheduling Second Prehearing Conference was issued. A second prehearing conference was scheduled for November 4, 2019.

On November 4, 2019, an Interim Order Confirming Requirements for Evidentiary Hearing was issued by the Administrative Law Judge Jeffrey A. Watson (the “ALJ”) on behalf of the Administrative Law Judge Emily I. DeVoe.

On November 6, 2019, a Call-In Telephone Hearing Notice was issued and scheduled an evidentiary hearing for February 6, 2020.

On January 24, 2020, a Hearing Judge Change notice was issued, and the Administrative Law Judge Mark A. Hoyer was assigned to this proceeding. A second Hearing Judge Change Notice was issued on the same day, and assigned the ALJ to this proceeding.

On January 27, 2020, West Penn served the exhibits it intended to offer into evidence at the evidentiary hearing on the ALJ and the Complainant.

The evidentiary hearing was held on February 6, 2020.

On July 1, 2020, the ALJ issued an Interim Order Establishing Briefing Schedule. 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.¹ 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

¹ 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).

responsibility of the respondent to provide rebuttal evidence.² 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.³ Mere bald assertions, personal opinions or perceptions, when not substantiated by facts, do not constitute evidence.⁴

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."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.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 violation, or claimed violation, of any law which the Commission has jurisdiction to administer, or of any regulation or order of the commission."⁷ Section 1501 of the Public Utility Code states, in relevant part: "every public utility shall furnish and maintain adequate, efficient, safe and reasonable service and facilities."⁸ 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

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

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

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

⁵ *Lansberry*, 578 A.2d at 602.

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

⁷ 66 Pa.C.S. § 701.

⁸ 66 Pa.C.S. § 1501.

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.⁹

III. SUMMARY OF ARGUMENT

The Complainant wholly failed to meet her burden of proof that the installation of a smart meter at her 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").¹⁰ Neither Act 129 nor subsequent Commission orders related to smart meter installation and deployment permit customers to "opt-out" from smart meter installation.¹¹ Further, both Act 129 and the Commission's Implementation Order require that electric distribution companies ("EDCs") install wireless smart meters with specific functionality.¹² 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, which was ultimately approved by the Commission on June 20, 2014.¹³ 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.

⁹ *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).

¹⁰ 66 Pa.C.S. § 2806.1, *et seq.*

¹¹ *Id.*; see *Smart Meter Procurement and Installation*, Docket No. M-2009-2092655 (Order entered June 24, 2009) ("Implementation Order").

¹² Tr. 107-108.

¹³ *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").

Furthermore, the Complainant's claim that the installation of a smart meter at her Service Location would violate her rights under the Fourth Amendment to 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 and safety concerns should be rejected as unsupported allegations. The Complainant offered no credible or convincing evidence to support her allegations. Moreover, the Complainant's concerns regarding health and safety are based exclusively upon her own personal beliefs regarding smart meters. Although the Complainant offered evidence regarding symptoms she, and her family, were reported to have at various visits to the doctor, none of this evidence demonstrates that the symptoms were caused or exacerbated by West Penn's smart meters. Importantly, the Complainant was not qualified to offer expert testimony and did not present the testimony of an expert on her behalf, regarding her alleged symptoms or the cause of those symptoms.

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 and smart meter safety. In addition, Mr. Ahr detailed the Company's contacts with the Complainant prior to the filing of the Formal Complaint and demonstrated that the Company provided the Complainant with reasonable service. Mr. Ahr also

explained that the Company is permitted under Rule 9 and 20 of its Commission-approved tariff to terminate service if the Complainant refuses to permit the Company to access the meter.

The evidence of record weighs heavily against the Complainant's allegations and assertions. In comparison to the Company's expert testimony, the lay testimony 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."¹⁴ 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.¹⁵ As such, all lay testimony from the Complainant related to more specialized topics, including health, safety, and radio frequency, 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 her burden of proof that the installation of a smart meter constitutes unreasonable service by the Company. Accordingly, West Penn urges the Commission to dismiss the Complaint with prejudice.

¹⁴ *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).

¹⁵ Pa.R.E. 701.

IV. ARGUMENT

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

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

On October 15, 2008, Act 129 was signed into law and codified as part of the Public Utility Code (“Code”).¹⁶ 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.¹⁷ 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.¹⁸

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.¹⁹ Consistent with this mandate, West Penn’s Commission-approved SMDP explicitly states that no opt-out option is available.²⁰ 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 filed its Petition for Approval of Smart Meter Technology Procurement and Installation Plan on August 14, 2009

¹⁶ 66 Pa.C.S. § 101, *et seq.*

¹⁷ 66 Pa.C.S. § 2807(f).

¹⁸ 66 Pa.C.S. § 2807(f)(2).

¹⁹ Tr. 163-164.

²⁰ *Smart Meter Deployment Plan*, at 9; *see also* West Penn Exh. JCA-5 at 9.

("2009 SMP Plan").²¹ However, during the pendency of the proceeding, FirstEnergy and West Penn's corporate parent announce their intent to merge and the 2009 SMP Plan was reassessed. The Commission issued an Order on June 30, 2011, approving the 2009 SMP Plan with certain modifications.²² On December 31, 2012, West Penn jointly filed with Metropolitan Edison Company, Pennsylvania Power Company and Pennsylvania Electric Company (collectively "the Companies") 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.²³ On June 16, 2014, the Companies submitted their revised Smart Meter Deployment Plan, which *intra alia* accelerated the smart meter deployment schedule laid out in their original Deployment Plan.²⁴ Under the Revised Deployment Plan, the Companies proposed to deploy 170,000 smart meters by the end of 2015.²⁵ In its June 25, 2014 Opinion and Order, the Commission recognized the

²¹ *Petition of West Penn Power Company for Approval of Smart Meter Technology Procurement and Installation Plan*, Docket No. M-2009-2123951 (Petition dated Aug. 14, 2009).

²² *Petition of West Penn Power Company for Approval of Smart Meter Technology Procurement and Installation Plan*, Docket No. M-2009-2123951 (Order entered June 9, 2010).

²³ *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).

²⁴ *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); *see also* West Penn Exhibit JCA-5.

²⁵ *Id.*

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.²⁶

In this proceeding, the Complainant has argued that a smart meter should not be installed at her Service Location.²⁷ This argument was based upon the Complainant's personal beliefs, including (a) that smart meters present health and safety issues,²⁸ (b) that the installation of a smart meter at her Service Location would violate her Fourth Amendment rights,²⁹ and (c) that she is entitled to an accommodation, i.e., to opt-out of the installation of a smart meter at the Service Location, under the Americans With Disabilities Act ("ADA").³⁰

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.³¹ Furthermore, Section 2807(f)(2)(i) provides:

²⁶ *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).; *see also* West Penn Exhibit JCA-4.

²⁷ *See, e.g.*, Formal Complaint ¶¶ 4-5; Tr. 14.

²⁸ *See* Tr. 59.

²⁹ *See, e.g.*, Tr. 132

³⁰ *See, e.g.*, Tr. 112, 143-144.

³¹ *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.
- (ii) In new building construction.
- (iii) In accordance with a depreciation schedule not to exceed 15 years.³²

On cross-examination, the Complainant admitted that the current state of law in Pennsylvania does not permit her to opt-out of having smart meter installed.³³ Moreover, the Complainant's attempted reliance any opt-out provisions applicable in other states should be rejected.³⁴ The Commission and Pennsylvania courts have made clear the practices and policies of other jurisdictions have little if any relevance for Pennsylvania.³⁵

Furthermore, the Complainant's assertion that the installation of a smart meter violates her Fourth Amendment rights under the United States Constitution is without merit.³⁶ In order for there to be a deprivation of constitutional rights, two elements must be met: (1) "the

³² 66 Pa.C.S. § 2807(f)(2)(i).

³³ Tr. 34-35.

³⁴ Tr. 24-25.

³⁵ See, e.g., *Petition of Columbia Gas of Pennsylvania, Inc. for Approval of its Long-Term Infrastructure Improvement Plant; Petition of Columbia Gas of Pennsylvania, Inc. for Approval of a Distribution System Improvement Charge*, Docket No. P-2012-2338282, 2014 Pa. PUC LEXIS 93, at *34-35 (Recommended Decision Feb. 25, 2014) ("Although the OCA points to the practice of utilities in other states to support its argument to include ADIT in the DSIC, the jurisdictions that the OCA has identified in this proceeding have mechanisms that are dissimilar from the Pennsylvania mechanism. In the instant case, even if a review of the practices of other states in interpreting the Pennsylvania statute was appropriate, the mechanisms in the other states vary significantly from the Pennsylvania DSIC such that that they provide no relevant guidance in judging the reasonableness of the proposed ADIT adjustment."), *adopted*, Docket Nos. P-2012-2338282, et al. (Order entered May 22, 2014); *Performance Metrics & Remedies (PMO III F0013) 2008 Guidelines Updates*, 2008 Pa. PUC LEXIS 1105, at *19-20 (Order entered July 22, 2008) ("[W]hether the NY PSC has adopted a particular change for use in NY (or whether other states in the footprint have adopted a particular change) does not control Pennsylvania's decision to adopt or reject a particular change for use in Pennsylvania. . . . We shall not, however, adopt changes or refrain from adopting changes for use in Pennsylvania based solely on what happens in NY or any other jurisdiction."); *Petition for Declaratory Order Regarding Ownership of Alt. Energy Credits, Associated with Non-Utility Generating Facilities Under Contract to Pa. Elec. Co. and Metro. Edison Co.*, 2007 Pa. PUC LEXIS 7, at *26-27 (Order entered Feb. 12, 2007) (stating that neither the ALJ nor the Commission grounded their decisions on the analysis of the decisions of foreign jurisdictions); see also *Elder v. Orlucky*, 515 A.2d 517, 522 (Pa. 1986) (noting that it was not appropriate to consider another jurisdiction's statute where there was no indication that the General Assembly based Pennsylvania legislation on legislation adopted in other jurisdictions).

³⁶ Tr. 29.

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.”³⁷

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.”³⁸ 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.³⁹ Thus, West Penn cannot violate the Complainant’s constitutional rights by installing the new AMI meter.

Finally, the Complainant’s assertion that West Penn has violated the ADA is irrelevant and outside the jurisdiction of the Commission. Importantly, the Commission has clearly recognized that it no jurisdiction to act under the ADA.⁴⁰ As the Commission held in *Frompovich*:

[I]t is beyond the jurisdiction of Commission to determine whether the Complainant has a disability or a cause of action under the American with Disabilities Act. See I.D. at 18. If Ms. Frompovich believes that she has a valid ADA claim against PECO, she must work through the federal courts or one of the federal enforcement

³⁷ *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).

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

³⁹ *See Naperville Smart Meter Awareness v. City of Naperville*, 900 F.3d 521, 527-29 (7th Cir. 2018). Importantly, the Complainant attempted to rely upon this decision at hearing. Tr. 132.

⁴⁰ *See Frompovich v. PECO Energy Co.*, 2018 Pa. PUC LEXIS 160, at *69 (Order entered May 3, 2018).

agencies, which include the Department of Labor, the Equal Employment Opportunity Commission, the Department of Transportation, the Federal Communications Commission or the Department of Justice, but not this Commission.⁴¹

Moreover, the Complainant admitted at hearing that she has not filed a claim against the Company under the ADA, and the ALJ explained that the Commission did not have jurisdiction to act under the ADA.⁴² As such, the Complainant's claims under the ADA cannot serve as the basis for finding that the Company has violated the Public Utility Code, the Commission's regulations or a Commission order.

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

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

Although Ms. Janosek alleged various health and safety concerns related to radio frequency fields and smart meters, she failed to provide any reliable evidence in support of her allegations. By contrast, West Penn rebutted the Complainant's allegations. As such, the Complainant failed to establish her 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:

⁴¹ *Frompovich*, 2018 Pa. PUC LEXIS at *69.

⁴² Tr. 112-114.

§ 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.⁴³

The Complainant presented no expert testimony to corroborate her health and safety allegations. In addition, the Complainant presented no evidence that she is qualified to offer expert testimony as an engineer, doctor or other medical professional. To the extent the Complainant relied upon hearsay or other inadmissible evidence to attempt to support her 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.

West Penn witness Mr. Ahr further rebutted any of the Complainant's health and safety concerns. Mr. Ahr testified that West Penn's smart meters comply with all safety requirements and standards that were established by agencies such as the Federal Communications Commission.⁴⁴ He also explained that the meter manufacturer only permits certified personnel to perform required American National Standards Institute testing on smart meter products.⁴⁵ Mr. Ahr also explained that the Company's smart meters are Underwriters Laboratory certified and comply with UL-2735.⁴⁶

⁴³ 66 Pa.C.S. § 1501.

⁴⁴ Tr. 167.

⁴⁵ Tr. 167.

⁴⁶ Tr. 168.

In addition, Mr. Ahr explain why, as a practical matter, the Company could not allow the Complainant to keep her analog meter and provide meter readings to the Company. Specifically, Mr. Ahr explained that the Company needs a consistent method of gathering meter information and that meter readings conducted by a customer does not allow for this.⁴⁷ Moreover, Mr. Ahr testified that Act 129 does not permit a customer to provide their own meter readings,⁴⁸ and that it would be discriminatory to permit the Complainant to keep her smart meter while requiring other customers to have a smart meter installed.⁴⁹

The Complainant further testified regarding the contacts she had with the Company prior to the initiation of the Complaint⁵⁰ and alleged that West Penn threatened to terminate her service.⁵¹ Mr. Ahr fully explained the Company's contacts with the Complainant, including the notices it sent her regarding the installation of the smart meter, the Company's attempts to reach out to the Complainant after receiving a letter indicating she did not want a smart meter installed, and the pre-complaint, pre-disconnection letters the Company sent the Complainant.⁵² Importantly, although the Company is permitted to terminate service where a customer denies it access to its smart meters,⁵³ the Company ceased termination procedures once the Formal Complaint was filed, and has not installed the meter at the Service Location⁵⁴ As such, the Company has not violated any provision of the Public Utility Code, the Commission's regulations or any applicable Commission order.

⁴⁷ Tr. 165-167.

⁴⁸ Tr. 166.

⁴⁹ Tr. 166.

⁵⁰ See Tr. 48-49.

⁵¹ Compl. ¶ 4; Tr. 49.

⁵² See Tr. 168-174.

⁵³ Tr. 174 (“...refusal to allow the company access to its meter and placed[sic] it with a smart meter constitutes grounds for termination of service, as it’s a violation of Rules 9 and 20 of the Company’s commission group tariff.”).

⁵⁴ Tr. 173-174.

Despite failing to support her allegations with any reliable evidence, the Company still rebutted 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 her 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.

Ms. Janosek attempted to introduce a number of exhibits and attempted to offer testimony related to health and safety issues, without possessing the necessary qualifications to testify on these issues. Ms. Janosek 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. As a lay witness, Ms. Janosek was not qualified to testify or offer exhibits related to any issues outside of her direct personal knowledge. Therefore, the 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 701,⁵⁵ 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

⁵⁵ Pa.R.E. 701.

evidence in administrative settings cannot allow lay witnesses to testify to technical matters “without personal knowledge or specialized training.”⁵⁶ 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.⁵⁷ In this case, the bulk of the Complainant’s testimony and exhibits related to issues outside the scope of her personal knowledge and were based on hearsay. All such testimony, where objected to, were properly excluded upon objection. To the extent such testimony was not objected to or excluded, such testimony should carry insignificant weight that cannot support the Complainant’s burden of proof in this proceeding. Moreover, to the extent any such testimony or exhibits were admitted for a limited purpose, the purpose for which such evidence was admitted was not related to proving a medical diagnosis or that the Company’s smart meter caused the Complainant to suffer any adverse health effects.⁵⁸

West Penn presented 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 her 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 her burden of proof, the Complaint should be denied and dismissed with prejudice.

⁵⁶ *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).

⁵⁷ Pa.R.E. 701.

⁵⁸ *See, e.g.*, Tr. 86-87 (admitting Compl. Exhibits F-2 and F-3 for the limited purpose to show Complainant went to MedExpress on February 16, 2019 to receive treatment for a headache as well as complaints related to tinnitus bilateral); *see also* Tr. 87-88 (similarly admitting Compl. Exhibits F-4 and F-5 for limited purposes), and 96 (admitting Comp. Exhibit G for limited purposes).

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 Jessica Janosek with prejudice.

Respectfully submitted,

Dated: August 7, 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.⁵⁹
2. Act 129 provides a list of required smart meter functionality, which was supplemented by Commission order.⁶⁰
3. West Penn's Smart Meter Technology Procurement and Installation Plan was filed on August 14, 2009.⁶¹
4. The Commission ultimately approved the smart meter deployment plan, with modifications, on June 30, 2011.⁶²
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 Companies to create a regulatory asset for their investment in their existing meters to be replaced by smart meters.⁶³

⁵⁹ Tr. 155-156.

⁶⁰ Tr. 155-156.

⁶¹ Tr. 158; *Petition of West Penn Power Company for Approval of Smart Meter Technology Procurement and Installation Plan*, Docket No. M-2009-2123951 (Petition dated Aug. 14, 2009).

⁶² Tr. 158-159; *Petition of West Penn Power Company for Approval of Smart Meter Technology Procurement and Installation Plan*, Docket No. M-2009-2123951 (Order entered June 9, 2010).

⁶³ Tr. 159-160; *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).

6. On June 16, 2014, the Companies submitted their revised Smart Meter Deployment Plan,⁶⁴ 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 plan⁶⁵ and smart meter safety.⁶⁶

9. Customers are not permitted to opt-out of the installation of smart meters under Act 129.⁶⁷

10. 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.⁶⁸

11. The Company’s smart meters are Underwriters Laboratories (“UL”) certified, which means the meters were tested for Compliant UL standard 2735.⁶⁹

12. Mr. Ahr fully explained the Company’s contacts with the Complainant, including the notices it sent him regarding the installation of the smart meter, the Company’s attempts to

⁶⁴ Tr. 161; *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).

⁶⁵ Tr. 161-165.

⁶⁶ Tr. 165-168.

⁶⁷ Tr. 163.

⁶⁸ Tr. 167.

⁶⁹ Tr. 166.

reach out to the Complainant after receiving a letter indicating she did not want a smart meter installed, and the pre-complaint, pre-disconnection letters the Company sent the Complainant.⁷⁰

13. Although the Company is permitted to terminate service where a customer denies it access to its smart meters,⁷¹ the Company ceased termination procedures once the Formal Complaint was filed.⁷²

14. The Company has not violated any Commission order, statute or regulation.⁷³

⁷⁰ See Tr. 168-174.

⁷¹ Tr. 174 (“...refusal to allow the company access to its meter and placed[sic] it with a smart meter constitutes grounds for termination of service, as it’s a violation of Rules 9 and 20 of the Company’s commission group tariff.”).

⁷² Tr. 173-174.

⁷³ Tr. 144-145, 174.

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.⁷⁴

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.⁷⁵

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.⁷⁶

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.⁷⁷

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.⁷⁸

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

⁷⁴ 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).

⁷⁵ *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).

⁷⁶ *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).

⁷⁷ *Lansberry*, 578 A.2d at 602.

⁷⁸ *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.”⁷⁹

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....”⁸⁰

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.⁸¹

9. Neither Act 129 nor subsequent Commission orders related to smart meter installation and deployment permit customers to “opt-out” from smart meter installation.⁸²

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.⁸³

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.⁸⁴

⁷⁹ 66 Pa.C.S. § 701.

⁸⁰ 66 Pa.C.S. § 1501.

⁸¹ *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).

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

⁸³ *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).

⁸⁴ Electric Pa. P.U.C. No. 81, Original Pages 42-44, issued March 20, 2020; effective April 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.⁸⁵

13. The Company is permitted to terminate a customer’s electric service for denying access to the meter.⁸⁶

14. A lay witness may only provide testimony related to his or her direct knowledge or experience.⁸⁷

15. Any testimony of a lay witness related to technical or specialized knowledge should be excluded and given no evidentiary weight.⁸⁸

16. The hearsay evidence presented in this case was properly objected to and excluded and may not support any findings of fact.⁸⁹

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.”⁹⁰

18. West Penn is not a state actor.

19. The Commission has no jurisdiction to act under the ADA.⁹¹

⁸⁵ *Id.*

⁸⁶ 66 Pa.C.S. § 1406; 52 Pa. Code § 56.81; Electric Pa. P.U.C. No. 81, Original Page 45, issued March 20, 2020; effective April 1, 2020.

⁸⁷ Pa.R.E. 701.

⁸⁸ See *Gibson v. W.C.A.B.*, 861 A.2d 938, 947 (Pa. 2004).

⁸⁹ *Walker v. Unemployment Comp. Bd. of Review*, 367 A.2d 366, 370 (Pa Commw. Ct. 1976).

⁹⁰ *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).

⁹¹ See *Frompovich v. PECO Energy Co.*, 2018 Pa. PUC LEXIS 160, at *69 (Order entered May 3, 2018).

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

APPENDIX C

PROPOSED ORDERING PARAGRAPHS

1. The formal complaint of Jessica Janosek 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**

JESSICA JANOSEK

v.

WEST PENN POWER COMPANY

:
:
:
:
:

DOCKET NO. C-2019-3010124

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the Main Brief of West Penn Power 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 as follows:

Jessica Janosek
vampbloodlust@hotmail.com

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

Dated: August 7, 2020



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