

Tori L. Giesler, Esq.  
(610) 921-6658  
(330) 315-9263 (Fax)

September 4, 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: Jan Kiefer v. West Penn Power Company**  
**Docket No. C-2018-3006172**

Dear Secretary Chiavetta:

Attached please find the Main Brief on behalf of West Penn Power 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**

**JAN KIEFER**

**v.**

**WEST PENN POWER COMPANY**

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**DOCKET NO. C-2018-3006172**

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

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Tori L. Giesler, Attorney No. 207742  
Lauren M. Lepkoski, Attorney No. 94800  
2800 Pottsville Pike  
P.O. Box 16001  
Reading, Pennsylvania 19612-6001

Counsel for West Penn Power Company

Dated: September 4, 2020

**TABLE OF CONTENTS**

<b>I.</b>	<b>PROCEDURAL HISTORY</b> .....	<b>1</b>
<b>II.</b>	<b>LEGAL STANDARDS</b> .....	<b>4</b>
<b>III.</b>	<b>SUMMARY OF ARGUMENT</b> .....	<b>6</b>
<b>IV.</b>	<b>ARGUMENT</b> .....	<b>9</b>
	<b>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. ....</b>	<b>9</b>
	<b>1. The Installation of Smart Meters is Required by Law.....</b>	<b>9</b>
	<b>2. The Installation of a Smart Meter Does Not Constitute Unreasonable or Inadequate Service.....</b>	<b>14</b>
	<b>3. All Hearsay and Lay Health and Safety Testimony was Properly Objected to and Excluded and May Not be Relied Upon in This Matter. ....</b>	<b>21</b>
<b>V.</b>	<b>CONCLUSION</b> .....	<b>23</b>

**TABLE OF AUTHORITIES**

Cases

*Commonwealth v. Corley*, 491 A.2d 829, 832 (Pa. 1985)..... 13

*Commonwealth v. Demor*, 942 A.2d 898, 899-900 (Pa. Super. 2008)..... 13

*Frompovich v. PECO Energy Co.*, Docket No. C-2015-2474602 (Opinion and Order entered May 3, 2018) ..... 6

*Gibson v. W.C.A.B.*, 861 A.2d 938, 947 (Pa. 2004) ..... 8, 22

*Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351-53 (1974). ..... 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)..... 6, 10

*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) ..... 11

*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).....11

*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).....11

*Lutherschmidt v. Metropolitan Edison Company*, Docket No. C-2010 2200353 (Final Order entered March 25, 2011)..... 12

*Naperville Smart Meter Awareness v. City of Naperville*, 900 F.3d 521, 527-29 (7th Cir. 2018) ..... 14

*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)..... 12

*Norfolk and Western Ry. v. Pa. Pub. Util. Comm'n*, 413 A.2d 1037 (Pa. 1980)..... 5

*Pa. Bureau of Corrections v. City of Pittsburgh*, 532 A.2d 12 (Pa. 1987)..... 5

*Pa. Pub. Util. Comm'n v. HIKO Energy, LLC*, 2015 Pa. PUC LEXIS 364 (I.D. entered Aug. 21, 2015) ..... 5

*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)..... 10

*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) ..... 10

*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). ..... 4, 5

*Smart Meter Procurement and Installation*, Docket No. M-2009-2092655 (Order entered June 24, 2009) ..... 6

*Susan Kreider v. PECO Energy Co.*, Docket No. C-2015-2469655 (Order on Reconsideration entered January 28, 2016). ..... 6

<i>W. Pa. Socialist Workers 1982 Campaign v. Conn. General Life Ins. Co.</i> , 485 A.2d 1, 5-6 (Pa. Super. 1984).....	13
<i>Waldron v. Phila. Elec. Co.</i> , 54 Pa. P.U.C. 98 (Order entered Mar. 14, 1980).....	5

Statutes

66 Pa.C.S. § 101, <i>et seq.</i> .....	9
66 Pa.C.S. § 1501.....	5, 15
66 Pa.C.S. § 2806.1, <i>et seq.</i> .....	6
66 Pa.C.S. § 2807(f).....	9
66 Pa.C.S. § 2807(f)(2).....	9
66 Pa.C.S. § 2807(f)(2)(i).....	12
66 Pa.C.S. § 332(a).....	4
66 Pa.C.S. § 701.....	5

Rules

Pa.R.E. 701.....	9, 21, 22
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## **I. PROCEDURAL HISTORY**

On November 26, 2018, Jan Kiefer (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 later that same day.

On December 17, 2018, 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 filed an Answer to the Company’s Preliminary Objections on January 7, 2019, but did file a Reply to the Company’s Answer and New Matter.

The Commission issued a Motion Judge Assignment Notice on January 22, 2019. The Administrative Law Judge Jeffrey A. Watson (the “ALJ”) was assigned as the Presiding Officer in this proceeding.

On June 10, 2019, the ALJ issued an Interim Order Establishing Initial Litigation Schedule. Among other procedural deadlines, the Interim Order Establishing Initial Litigation Schedule required any party wishing to present expert testimony to “provide to the other Party in writing, the name and business address of that expert and a written summary of the expected testimony of that expert” on or before August 16, 2019. Interim Order Establishing Initial Litigation Schedule at 1.

On June 24, 2019, West Penn served its first set of Interrogatories and Requests for Production of Documents (“Set I Discovery”). Importantly, Question Nos. 24 and 25 of the Set I Discovery asked that the Complainant:

24. Please provide the following information for all witnesses you intend to call to testify at the hearing in this proceeding.

- a. Provide the full name of the witness.
- b. Provide the address and telephone number of the witness.
- c. Provide the title or position held by the witness.
- d. Provide the educational background of the witness.
- e. Provide the employment background of the witness.
- f. Provide the scope of testimony for the witness.

25. Would any witness identified in question 24 be offered as an expert?

- a. If yes, provide the curriculum vitae of the witness and a summary of the testimony the expert witness is expected to provide.

The Complainant did not object or respond to the Set I Discovery.

West Penn, therefore, filed a Motion to Compel responses to the Set I Discovery on July 23, 2019.

The Complainant did not respond to the Motion to Compel.

On August 5, 2019, the ALJ issued an Interim Order Granting Motion of West Penn Power Company To Compel Responses To Interrogatories And Document Requests.

On July 31, 2019, West Penn received responses to certain of the Set I Discovery. Therein, Complainant stated with respect to question number 24 “no other witness, maybe my wife DR. Gauri Kiefer UPMC Oncologists.” With respect to question number 25, Complainant responded “no experts but just as good in a non legal mannor[sic].”

On August 15, 2019, West Penn received additional responses to certain of the Set I Discovery.

On October 25, 2019, West Penn filed a letter status report with the Commission. Therein, West Penn advised the ALJ and the Commission that it believed discovery is complete. It further indicated that while the Complainant did not provide notification of any expert or factual witnesses in accordance with the Interim Order Establishing Initial Litigation Schedule, he indicated in e-mail correspondence to counsel for West Penn that he did not have any witnesses. However, in one of the August 15, 2019 responses to the Set I Discovery, Complainant indicated he “may” call his wife, Dr. Gauri Kiefer, as a witness.

On December 27, 2019, the ALJ issued an Interim Order Requiring Status Report And Permitting Respondent To Engage In Further Discovery. Therein, the ALJ ordered that “any expert reports or changes to expert reports or opinions of any experts related to Complainant’s witnesses, including Dr. Gauri Kiefer, shall be provided by Complainant to respondent on or before January 15, 2020.” Interim Order Requiring Status Report And Permitting Respondent To Engage In Further Discovery at 1 (emphasis added). The ALJ further granted West Penn until January 31, 2020, to engage in additional discovery regarding Complainant’s possible witness, Dr. Gauri Kiefer.

On January 7, 2020, the Complainant filed a letter with the Commission stating “Gauri is co owner of our home and is not going to submit any reports writings etc.”

On January 23, 2020, West Penn filed a status report.

On January 24, 2020, West Penn served its second set of Interrogatories and Requests for Production of Documents (“Set II Discovery”). Questions 3 through 5 of the Set II Discovery sought:

3. In the event Dr. Kiefer intends to provide any testimony at hearing about radio-frequency (RF) fields, advanced metering infrastructure (AMI) meters and any aspect of human or animal health, please identify each opinion she intends to offer and for

each describe in detail the scientific and/or medical basis for the opinion.

Complainant provided the following response to question 3 of the Set II Discovery “She is not offering any evidence.”

On January 30, 2020, a Telephone Hearing Notice was issued by the Commission.

On April 29, 2020, the ALJ issued an Interim Order Cancelling Hearing Schedule For April 14, 2020 And Requiring The Parties To Confer Regarding New Hearing Dates And Submit Status Report, due to the corona virus pandemic.

On May 5, 2020, West Penn filed a status report.

On May 7, 2020, the Commission issued a Telephonic Hearing Cancellation/Reschedule Notice, scheduling a telephonic hearing to occur on June 30, 2020. Also on May 7, 2020, the ALJ issued a Prehearing Order.

On Jun 19, 2020, West Penn submitted copies of the exhibits it intended to present at the hearing to the ALJ and the Complainant.

The Complainant did not provide any copies of any exhibits to the ALJ or West Penn prior to the hearing.

The telephonic evidentiary hearing was held on June 30, 2020.

On July 7, 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.<sup>1</sup> The first step in carrying the burden of proof is establishing a *prima*

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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).

*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 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

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<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.

<sup>8</sup> 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.<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 West Penn's territory were identified in West Penn's Smart Meter Deployment Plan ("SMDP"), 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 SMDP.

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<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*, Docket No. M-2009-2092655 (Order entered June 24, 2009) ("Implementation Order").

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

<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").

Furthermore, the Complainant's insinuation that the installation of a smart meter at his Service Location would violate his 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 his allegations. Moreover, the Complainant's concerns regarding health and safety are based exclusively upon her own personal beliefs regarding smart meters. Despite being afforded multiple opportunities to identify possible expert witnesses and provide West Penn the opportunity to conduct discovery regarding any experts or the opinions of any experts the Complainant planned to offer, the Complainant did not identify an expert witness in advance of the hearing. Although the Complainant attempted to present the testimony of his wife, Dr. Gauri Kiefer, in an expert capacity at the hearing, West Penn properly and repeatedly objected to such testimony and the ALJ properly and repeatedly excluded such testimony from the record. Indeed, due to the Complainant's failure to identify and summarize any expert testimony or opinions he planned to offer in response to the Company's discovery requests, or the ALJ's Interim Orders, Complainant was precluded from offering any expert testimony at the hearings in this matter.

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 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.

Furthermore, the Company offered the expert testimony of both Dr. Christopher Davis and Dr. Mark Israel. Dr. Davis is professor and scientific research in electrical engineering, electromagnetics and radio frequency bioelectromagnetics at the University of Maryland. He provided testimony about radio frequency (“RF”) fields and the safety of the Company’s smart meter implementation. Dr. Israel is a medical doctor, medical researcher and professor at Dartmouth Medical School. He testified based on the extensive research on RF fields and health, there is no reliable medical basis to support the Complainant’s medical claims.

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.”<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

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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).

specialized knowledge.<sup>15</sup> 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 his 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.

#### **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

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

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

<sup>17</sup> 66 Pa.C.S. § 2807(f).

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

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 is available.<sup>20</sup> The Commission-approved SMDP mandates 100% of its meters to be replaced with smart meters.<sup>21</sup> 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 (“2009 SMP Plan”).<sup>22</sup> However, during the pendency of the proceeding, FirstEnergy Corp. and West Penn’s then-corporate parent announced 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.<sup>23</sup> 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 SMDP, 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

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<sup>19</sup> Tr. 95-96.

<sup>20</sup> *Smart Meter Deployment Plan*, at 9; *see also* West Penn Exh. JCA-1 at 9.

<sup>21</sup> Tr. 107.

<sup>22</sup> *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).

<sup>23</sup> *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).

asset for their investment in their existing meters to be replaced by smart meters.<sup>24</sup> On June 16, 2014, the Companies submitted their Revised SMDP, which *intra alia* accelerated the smart meter deployment schedule laid out in their original SMDP.<sup>25</sup> Under the Revised SMDP, 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 SMDP, 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 or that he be given another year with his analog meter.<sup>28</sup> This argument was based upon the Complainant's personal beliefs, including (a) that smart meters present health and safety issues,<sup>29</sup> (b) that the installation of a smart meter at her Service Location would

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<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 (Petition filed December 31, 2012).

<sup>25</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); *see also* West Penn Exhibit JCA-5.

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

<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). *see also* West Penn Exhibit JCA-4.

<sup>28</sup> *See, e.g.*, Formal Complaint ¶¶ 4-5; Tr. 53, 55.

<sup>29</sup> *See* Tr. 55.

violate his constitutional rights,<sup>30</sup> and (c) that the Company had threatened to terminate service to the Service Location.<sup>31</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>32</sup> Furthermore, Section 2807(f)(2)(i) provides:

(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.<sup>33</sup>

On cross-examination, the Complainant admitted that he could not identify any Pennsylvania statute, any Commission regulation or any Commission order that West Penn would violated by installing a smart meter at the service location.<sup>34</sup> He further admitted that he was not, in fact, alleging a violation of a Pennsylvania statute, Commission regulation or Commission order and stated<sup>35</sup>:

Q. So if you don't know what the regulations or orders are, or what they require, would it be fair to say that you couldn't possibly allege that they have violated any of the above?

A. Want I'm -.

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<sup>30</sup> See Tr. 118 (attempting to cross-examine West Penn witness Mr. Ahr regarding the constitutionality of Act 129 and/or the installation of a smart meter).

<sup>31</sup> See, e.g., Tr. 54-55.

<sup>32</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).

<sup>33</sup> 66 Pa.C.S. § 2807(f)(2)(i).

<sup>34</sup> Tr. 58 (admitting he did not know of any violation of a Pennsylvania statute or Commission regulation), 58-59 (admitting he did not know any violation of a Commission order).

<sup>35</sup> Tr. 59 (emphasis added).

Q. That's a yes or no, Mr. Kiefer. The answer is a yes or no question - answer.

A. Okay. They - as far as - I don't know if they violated the regulations and the statutes, I think you used the word, because I don't know that.

Q. So you're not making that allegation then. Is that correct?

A. No. No. I'm not making - I'm not make that allegation.

Importantly, this testimony was corroborated by West Penn witness Mr. Ahr, who unequivocally also testified in response to the question “Q. And has the Company violated any Commission order, or regulations or statutes?” that “A. No. They have not.”<sup>36</sup>

Furthermore, the Complainant’s insinuation that the installation of a smart meter as required by Act 129 may violates his constitutional rights is without merit.<sup>37</sup> 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>38</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>39</sup> Therefore, in keeping with the U.S. Supreme Court’s holding in *Jackson*, West Penn similarly is

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<sup>36</sup> Tr. 116.

<sup>37</sup> See Tr. 118 (attempting to cross-examine West Penn witness Mr. Ahr regarding the constitutionality of Act 129 and/or the installation of a smart meter).

<sup>38</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>39</sup> *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351-53 (1974).

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>40</sup> Thus, West Penn cannot violate the Complainant's constitutional rights by installing the new AMI meter.

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 Mr. Kiefer alleged various health and safety concerns related to radio frequency fields and smart meters, he failed to provide any reliable evidence in support of his 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:

### § 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

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<sup>40</sup> See *Naperville Smart Meter Awareness v. City of Naperville*, 900 F.3d 521, 527-29 (7th Cir. 2018).

interruptions or delay. Such service and facilities shall be in conformity with the regulations and orders of the commission.<sup>41</sup>

The Complainant presented no expert testimony to corroborate his 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.

Although the Complainant attempted to offer the testimony of his wife, Dr. Gauri Kiefer, as a medical expert in this proceeding, the ALJ proposed excluded this evidence and prohibited Dr. Kiefer from providing expert testimony.<sup>42</sup> The ALJ summarized the crux of this ruling as follows<sup>43</sup>:

If there's nothing further with regard to the request by the Company, I am going to allow Mr. Kiefer to offer the testimony of Dr. Kiefer as a fact witness. Given the history in this case, and the lack of the discovery responses and other information that was requested and not provided, I do agree with Counsel that counsel would be prejudiced to permit expert testimony based on the circumstances. So I am going to preclude expert testimony from Dr. Kiefer; however, I am going to permit Mr. Kiefer to present Dr. Kiefer as a fact witness. If there are any specific objections to any specific questions, I will address those as they arise.

Indeed, as explained above, the Interim Order Establishing Initial Litigation Schedule required any party wishing to present expert testimony to “provide to the other Party in writing, the name and business address of that expert and a written summary of the expected testimony of that expert” on or before August 16, 2019.<sup>44</sup> In addition, as explained above, the Company repeatedly requested information from the Complainant regarding any expert witness he intended

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<sup>41</sup> 66 Pa.C.S. § 1501.

<sup>42</sup> Tr. 50.

<sup>43</sup> Tr. 50.

<sup>44</sup> *See also* Tr. 20-21.

to call.<sup>45</sup> The Complainant further affirmed in his discovery responses that (a) he would be presenting “no experts but just as good in a non legal mannor[sic]”<sup>46</sup> and (b) that his wife, Dr. Gauri Kiefer, “is not offering any evidence” regarding expert testimony or opinions.<sup>47</sup> For these reasons, the Complainant was precluded from offering any expert testimony and failed to corroborated his health and medical claims.

Finally, it is worth noting that the Complainant did not offer a single exhibit to support his Complaint. 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.<sup>48</sup> He also explained that the meter manufacturer only permits certified personnel to perform required American National Standards Institute testing on smart meter products.<sup>49</sup> Mr. Ahr also explained that the Company’s smart meters are Underwriters Laboratory certified and comply with UL-2735.<sup>50</sup>

The Complainant further alleged that West Penn threatened to terminate his service.<sup>51</sup> 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 reach out to the Complainant after receiving a letter indicating he did not want a smart meter installed, and the

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<sup>45</sup> See also Tr. 21-23.

<sup>46</sup> Tr. 22.

<sup>47</sup> Tr. 24-25.

<sup>48</sup> Tr. 108-109.

<sup>49</sup> Tr. 108.

<sup>50</sup> Tr. 108-109.

<sup>51</sup> Compl. ¶ 4; see also Tr. 54.

pre-complaint, pre-disconnection letters the Company sent the Complainant.<sup>52</sup> Importantly, although the Company is permitted to terminate service where a customer denies it access to its smart meters,<sup>53</sup> the Company ceased termination procedures once the Formal Complaint was filed, and has not installed the meter at the Service Location.<sup>54</sup> As such, the Company has not violated any provision of the Public Utility Code, the Commission's regulations or any applicable Commission order.

The Company also presented the expert testimony of Dr. Christopher Davis, is a professor at the University of Maryland, where he has decades of experience teaching in the fields of Physics, Electrical Engineering, and RF Electromagnetics, among others. Dr. Davis also has more than 40 years experience conducting research in these scientific fields. [WPP Ex CD-1] Dr. Davis has authored more than 260 scientific articles, including many studies on RF fields. [WPP Ex CD-1; Tr. 147] Dr. Davis also is a Fellow of the Institute of Electrical and Electronics Engineers ("IEEE") and past chair of the IEEE Subcommittee on Radiofrequency Fields Committee on Man and Radiation.<sup>55</sup> At the hearing, Dr. Davis was accepted without objection as an expert in the fields of Physics, Biophysics, Chemistry, Electrical Engineering, Electromagnetics, Bioelectromagnetics, Radiofrequency Bioelectromagnetics and Dosimerty {Tr 152-153.

Dr. Davis testified that the national safety standards for public exposures to RF fields adopted by the Federal Communication Commission ("FCC") provide a scientifically reliable basis for evaluating the safety of RF fields from the smart meters being used by the company.[Tr

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<sup>52</sup> See Tr. 109-114.

<sup>53</sup> Tr. 114 ("Refusal to allow West Penn access to its meter to replace it with a smart meter constitutes ground for termination of service, as it is a violation - in violation of Rules 9 and 20 of West Penn's Commission-approved tariff.").

<sup>54</sup> Tr. 113-114.

<sup>55</sup> Tr. 149; *see also* West Penn Exh. CD-1.

160] Dr. Davis calculated the RF levels from the two radios used in West Penn's smart meters (i.e., the LAN radio and the Zigbee radio) and compared them to the FCC National safety standards for public exposure to RF in the US. Dr. Davis testified that the RF from the LAN radio, which is the main radio in the smart meter, is 62,000 smaller than the safety standard set by the FCC.<sup>56</sup> In addition, Dr. Davis testified that the RF from the Zigbee radio is 527,000 less than the FCC standards.<sup>57</sup>

Dr. Davis also compared the very low levels of RF fields from the smart meter to Mr. Kiefer's voluntary exposure to RF fields from his cell phone. Based on Mr. Kiefer's testimony that he used his cellphone for approximately ten minutes a day,<sup>58</sup> Dr. Davis concluded that Mr. Kiefer would have to sit near a smart meter "for nearly nine years" to get a level of RF fields equivalent to each day's use of his cell phone:<sup>59</sup>

by being very conservative and assuming that Mr. Kiefer used his cellphone at arm's length, it would turn out he would have to sit about three meters in front of his smart meter for nearly nine years to get the same level of exposure as he's getting from his cellphone, used ten minutes per day.

Dr. Davis further explained that the "sticker" or "so-called protective device" that Mr. Kiefer testified to attaching to his cell phone does not work.<sup>60</sup>

Dr. Davis also calculated RF fields broadcast by UHF TV towers in the vicinity of the Kiefer residence. His calculations show that the prevailing background levels of RF fields at the Kiefer residence are about 22.50 times higher than the RF fields from the smart meter being used by the Company. [Tr 165]

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<sup>56</sup> Tr. 162.

<sup>57</sup> Tr. 162.

<sup>58</sup> Tr. 157.

<sup>59</sup> Tr. 157-158.

<sup>60</sup> Tr. 158.

Overall, Dr. Davis concluded that there was nothing unusual about the RF fields from smart meters [Tr 163] and that they are at such a low level that they cannot cause biological effects in humans. [Tr 163] Dr. Davis also concluded to a reasonable degree of scientific certainty that the RF fields from the smart meter will not cause any hazardous effects to humans.<sup>61</sup>

The Company also presented the expert testimony of Dr. Mark Israel, a medical doctor, Professor of Medicine, medical researcher and the Executive Director of an international charitable fund for research on cancer.<sup>62</sup> Dr. Israel has for 40 years provided care to medical patients, conducted medical research and taught medical students. In addition to his service at the National Institutes of Health and his Professorship at the University of California, Dr. Israel directed the Norris Cotton Cancer Center at Dartmouth, where he was responsible for the operations of a major medical center providing care to over 30,000 patients a year. [Tr 185-187]. In the course of his medical career, he has been the recipient of many honors from the medical community, including the distinguished Farber Award and the C. Everett Coop Courage Award for his contribution and leadership in medical research. [Tr 194-195]

At the hearing, Dr. Israel was accepted without objection as an expert in “medicine and medical research, including particularly radiofrequency fields and health.” [Tr. 197-198]

Dr. Israel testified that he had conducted a review of the scientific research on RF fields and health, including particularly cancer [Tr 199] and a condition described as “electromagnetic hypersensitivity.”<sup>63</sup> He conducted his review of the scientific research using the approaches he

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<sup>61</sup> Tr. 167.

<sup>62</sup> Tr. 184.

<sup>63</sup> Tr. 199.

used in his work as a physician and teacher. [Tr 200]. Dr. Israel testified that, based on his evaluation of the extensive scientific research on RF fields, there is no reliable basis to conclude that RF fields cause or contribute to any health effect or any medical condition. [Tr 203]

Dr. Israel also testified that while Mr. Kiefer claimed he was sensitive to RF fields, he had provided no medical documentation showing any diagnosis, testing or even a discussion about the Complainant or his wife having so-called “electromagnetic hypersensitivity.”<sup>64</sup> Dr. Israel further testified that the scientific studies on claimed electromagnetic hypersensitivity have not shown a connection between the alleged symptoms of the condition and actual exposure to RF fields. [Tr 207-208] He also noted that public health authorities have concluded that the symptoms allegedly associated with “electromagnetic hypersensitivity” or “idiopathic environmental intolerance” were not associated with RF exposure,<sup>65</sup> and testified it was not generally accepted in the medical community that exposure to RF fields caused “electromagnetic hypersensitivity” or “idiopathic environmental intolerance.”<sup>66</sup> Dr. Israel concluded to a reasonable degree of medical certainty that “there's not a reliable scientific basis to conclude that radiofrequency fields cause or contribute to the development of any adverse health conditions or exaggerate any ongoing health conditions.”<sup>67</sup>

Despite the Complainant having failed to support his allegations with any reliable evidence, the Company still fully 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 his service location would constitute unreasonable or inadequate service under Section 1501 of the Public Utility Code.

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<sup>64</sup> Tr. 199.

<sup>65</sup> Tr. 208.

<sup>66</sup> Tr. 208.

<sup>67</sup> Tr. 209.

**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. Kiefer attempted to testimony regarding his alleged health and medical concerns. Importantly, Mr. Kiefer 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. In addition, Mr. Kiefer failed to properly identify any expert witness in this proceeding and was, therefore, precluded from offering any expert testimony on his health and medical claims. As a lay witness, Mr. Kiefer and his wife were 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,<sup>68</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

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<sup>68</sup> Pa.R.E. 701.

“without personal knowledge or specialized training.”<sup>69</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>70</sup> 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.

West Penn presented highly credible and unrebutted scientific and medical 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.

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<sup>69</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>70</sup> Pa.R.E. 701.

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 Jan Kiefer with prejudice.

Respectfully submitted,

Dated: September 4, 2020



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Lauren M. Lepkoski  
Attorney No. 94800  
Tori L. Giesler  
Attorney No. 207742  
FirstEnergy Service Company  
2800 Pottsville Pike  
P.O. Box 16001  
Reading, Pennsylvania 19612-6001  
(610) 921-6203  
(610) 921-6658  
llepkoski@firstenergycorp.com  
tgiesler@firstenergycorp.com

Counsel for West Penn Power Company

## 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>71</sup>
2. Act 129 provides a list of required smart meter functionality, which was supplemented by Commission order.<sup>72</sup>
3. West Penn's Smart Meter Technology Procurement and Installation Plan was filed on August 14, 2009.<sup>73</sup>
4. The Commission ultimately approved the smart meter deployment plan, with modifications, on June 30, 2011.<sup>74</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 Companies to create a regulatory asset for their investment in their existing meters to be replaced by smart meters.<sup>75</sup>

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<sup>71</sup> Tr. 95-96.

<sup>72</sup> Tr. 96, 102.

<sup>73</sup> *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).

<sup>74</sup> *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).

<sup>75</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).

6. On June 16, 2014, the Companies submitted their revised Smart Meter Deployment Plan,<sup>76</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 and smart meter safety.

9. 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.<sup>77</sup>

10. He also explained that the meter manufacturer only permits certified personnel to perform required American National Standards Institute testing on smart meter products.<sup>78</sup>

11. Mr. Ahr also explained that the Company's smart meters are Underwriters Laboratory certified and comply with UL-2735.<sup>79</sup>

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 reach out to the Complainant after receiving a letter indicating he did not want a smart meter installed, and the pre-complaint, pre-disconnection letters the Company sent the Complainant.<sup>80</sup>

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<sup>76</sup> West Penn Exh. JCA-1; *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>77</sup> Tr. 108-109.

<sup>78</sup> Tr. 108.

<sup>79</sup> Tr. 108-109.

<sup>80</sup> *See* Tr. 109-114.

13. Importantly, although the Company is permitted to terminate service where a customer denies it access to its smart meters,<sup>81</sup> the Company ceased termination procedures once the Formal Complaint was filed, and has not installed the meter at the Service Location.<sup>82</sup>

14. Customers are not permitted to opt-out of the installation of smart meters under Act 129.<sup>83</sup>

15. 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 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.<sup>84</sup>

16. The Company has not violated any Commission order, statute or regulation.<sup>85</sup>

17. The Company also presented the expert testimony of Dr. Christopher Davis, a Fellow of the Institute of Electrical and Electronics Engineers and past chair of the IEEE Subcommittee on Radiofrequency Fields Committee on BAN and Radiation.<sup>86</sup>

18. Dr. Davis described the RF fields emitted by cell phones and smart meters and concluded that, generally speaking a cellphone puts out more power than a smart meter.<sup>87</sup>

19. Importantly, Dr. Davis heard Mr. Kiefer was using a cell phone to testify at the hearing and used his phone for approximately ten minutes a day.<sup>88</sup>

20. Dr. Davis was able to conclude that<sup>89</sup>:

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<sup>81</sup> Tr. 114 (“Refusal to allow West Penn access to its meter to replace it with a smart meter constitutes ground for termination of service, as it is a violation - in violation of Rules 9 and 20 of West Penn's Commission-approved tariff.”).

<sup>82</sup> Tr. 113-114.

<sup>83</sup> Tr. 106-107.

<sup>84</sup> See Tr. 168-174.

<sup>85</sup> Tr. 116.

<sup>86</sup> Tr. 149; *see also* West Penn Exh. CD-1.

<sup>87</sup> Tr. 156-157.

<sup>88</sup> Tr. 157.

by being very conservative and assuming that Mr. Kiefer used his cellphone at arm's length, it would turn out he would have to sit about three meters in front of his smart meter for nearly nine years to get the same level of exposure as he's getting from his cellphone, used ten minutes per day.

21. Dr. Davis further explained that the “sticker” or “so-called protective device” that Mr. Kiefer testified to attaching to his cell phone does not work.<sup>90</sup>

22. Furthermore, Dr. Davis the exposure levels of the two radios used in West Penn’s smart meters (i.e., the LAN radio and the Zigbee radio) to the Federal Communications Commission’s (“FCC”) safety standards. Dr. Davis testified that the RF exposure from the LAN radio, which is the main radio in the smart meter, is 62,000 smaller than the safety standards set by the FCC.<sup>91</sup> In addition, Dr. Davis testified that the RF exposure from the Zigbee radio is 527,000 less than the FCC standards.<sup>92</sup>

23. Dr. Davis testified to a reasonable degree of scientific certainty the emissions from the smart meters is so small that “there's no way at all that it could cause any hazardous effects to humans.”<sup>93</sup>

24. The Company presented the expert testimony of Dr. Mark Israel, a medical doctor, scientific researcher and the National Executive Director of the Israel Cancer Research Fund.<sup>94</sup>

25. Dr. Israel testified that the Complainant had presented no medical documentation containing any diagnosis, testing or a discussion of the Complainant or his wife having something called “electromagnetic hypersensitivity.”<sup>95</sup>

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<sup>89</sup> Tr. 157-158.

<sup>90</sup> Tr. 158.

<sup>91</sup> Tr. 162.

<sup>92</sup> Tr. 162.

<sup>93</sup> Tr. 167.

<sup>94</sup> Tr. 184.

26. However, Dr. Israel reviewed sufficient scientific research to conclude with a reasonable degree of scientific certainty that “there was no - no really reliable medical basis on which to conclude that radiofrequency fields cause or contributed to any health effect or any medical condition.”<sup>96</sup>

27. Dr. Israel further described a number of public health authorities that had concluded that the symptoms allegedly associated with “electromagnetic hypersensitivity” or “idiopathic environmental intolerance” were not associated with RF exposure,<sup>97</sup> and testified it was not generally accepted in the medical community that exposure to RF fields caused “electromagnetic hypersensitivity” or “idiopathic environmental intolerance.”<sup>98</sup>

28. Dr. Israel concluded to a reasonable degree of medical certainty that “there's not a reliable scientific basis to conclude that radiofrequency fields cause or contribute to the development of any adverse health conditions or exaggerate any ongoing health conditions.”<sup>99</sup>

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<sup>95</sup> Tr. 199.

<sup>96</sup> Tr. 202.

<sup>97</sup> Tr. 208.

<sup>98</sup> Tr. 208.

<sup>99</sup> Tr. 209.

## 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>100</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>101</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>102</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>103</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>104</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>100</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>101</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>102</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>103</sup> *Lansberry*, 578 A.2d at 602.

<sup>104</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>105</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>106</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>107</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>108</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>109</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>110</sup>

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<sup>105</sup> 66 Pa.C.S. § 701.

<sup>106</sup> 66 Pa.C.S. § 1501.

<sup>107</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>108</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>109</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>110</sup> 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.<sup>111</sup>

13. The Company is permitted to terminate a customer’s electric service for denying access to the meter.<sup>112</sup>

14. A lay witness may only provide testimony related to his or her direct knowledge or experience.<sup>113</sup>

15. Any testimony of a lay witness related to technical or specialized knowledge should be excluded and given no evidentiary weight.<sup>114</sup>

16. The hearsay evidence presented in this case was properly objected to and excluded and may not support any findings of fact.<sup>115</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>116</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>111</sup> *Id.*

<sup>112</sup> 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.

<sup>113</sup> Pa.R.E. 701.

<sup>114</sup> See *Gibson v. W.C.A.B.*, 861 A.2d 938, 947 (Pa. 2004).

<sup>115</sup> *Walker v. Unemployment Comp. Bd. of Review*, 367 A.2d 366, 370 (Pa Commw. Ct. 1976).

<sup>116</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 Jan Kiefer 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**

**JAN KIEFER**

v.

**WEST PENN POWER COMPANY**

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**DOCKET NO. C-2018-3006172**

**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:

Jan Kiefer  
gospillthebeans@gmail.com

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

Dated: September 4, 2020

  
\_\_\_\_\_  
Lauren M. Lepkoski  
Tori L. Giesler  
FirstEnergy Service Company  
2800 Pottsville Pike  
P.O. Box 16001  
Reading, Pennsylvania 19612-6001  
(610) 921-6203  
(610) 921-6658  
llepkoski@firstenergycorp.com  
tgiesler@firstenergycorp.com