

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Jon Allen Hribal	:	
	:	
v.	:	C-2019-3008050
	:	
West Penn Power Company	:	

INITIAL DECISION

Before
Jeffrey A. Watson
Administrative Law Judge

INTRODUCTION

Complainant filed a Formal Complaint against Respondent objecting to the installation of a smart meter at his residence. This decision dismisses the Formal Complaint due to Complainant’s failure to meet his burden of proof.

HISTORY OF THE PROCEEDING

Jon A. Hribal (Complainant) filed a Formal Complaint (Complaint) with the Pennsylvania Public Utility Commission (Commission) against West Penn Power Company (Respondent, West Penn, or Company) on February 19, 2019, objecting to the installation of a smart meter at his residence located at 114 Lake Forest Boulevard, Scottdale, PA (service location or service address) due to health, safety, and privacy concerns. As relief, Complainant requested he be allowed to keep his analog meter.

On March 18, 2019, Respondent filed an Answer and New Matter denying the material allegations in the Complaint.

On March 18, 2019, Respondent also filed Preliminary Objections to the Complaint.

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

On April 15, 2019, a Motion Judge Assignment Notice was issued assigning this proceeding to the undersigned presiding officer.

On May 3, 2019, an Interim Order was issued denying Respondent's Preliminary Objections.

On September 4, 2019, an Interim Order was entered establishing a litigation schedule.

On December 19, 2019, the Commission issued a Call-Out Telephone Hearing Notice, scheduling an evidentiary hearing for February 13, 2020.

On January 10, 2020, Complainant submitted correspondence requesting that the hearing be held in person. That same day, the Commission issued a Hearing Change Notice changing the hearing to an in-person hearing.

On February 13, 2020, an evidentiary hearing was held. Complainant presented his case through his own testimony and Exhibit D which was admitted into the record. Respondent presented its case through the testimony of Company employee, Mr. John Ahr, and Exhibits 1 through 7 which were admitted into the record.

On April 7, 2020, an Interim Order Setting Briefing Schedule was issued requiring the parties to submit any briefs on or before May 22, 2020.

On May 27, 2020, an Interim Order Extending Briefing Schedule was entered requiring the parties to file any briefs on or before June 5, 2020.

On June 5, 2020, both parties filed briefs.

On July 6, 2020, an Interim Order was issued closing the evidentiary record.

FINDINGS OF FACT

1. Complainant is Jon Allen Hribal, who resides at 114 Lake Forest Boulevard, Scottsdale, Pennsylvania.
2. Respondent is West Penn Power Company, an electrical distribution company (EDC) that provides residential electrical service to Complainant at the service address.
3. Complainant offered his own lay witness testimony at the hearing.¹
4. Respondent offered the testimony of Company employee, John Ahr.²
5. On October 15, 2008, Act 129 of 2008 (Act 129) was signed into law, requiring all EDC's with at least 100,000 customers to file a smart meter technology procurement and installation plan (SMTPIP) with the Commission for approval.³
6. West Penn is an EDC with at least 100,000 customers.⁴

¹ Tr. 25:21-99:6.

² Tr. 100:16-137:3.

³ Tr. 102:25-3; Exhibit 1.

⁴ Tr. 104:15-8.

7. On June 24, 2009, the Commission issued an implementation order providing general directions to EDCs regarding their adoption of smart meter programs and requiring Respondent to submit its initial SMTPIP.⁵

8. On August 14, 2009, Respondent submitted its SMTPIP to the Commission for approval.⁶

9. West Penn's SMTPIP was subsequently consolidated with the SMTPIPs of other First Energy Companies as a result of a merger.⁷

10. On June 30, 2011, the Commission approved an amended joint petition of settlement regarding Respondent's SMTPIP.⁸

11. On December 31, 2012, Respondent filed its initial smart meter deployment plan (SMDP) with the Commission.⁹

12. By Order dated June 25, 2014, the Commission approved the Company's final SMDP.¹⁰

13. The final SMDP identifies the development of the deployment plan, the financial analysis that went into the deployment plan, the smart meter technology that is being used by West Penn, how the meters communicate within the system, and cost and benefit analyses associated with the plan.¹¹

⁵ Tr. 104:22-105:16; Exhibit 2.

⁶ Tr. 105:19-21.

⁷ Tr. 105:22-106:10.

⁸ Tr. 106:6-10; Exhibit 3.

⁹ Tr. 107:4-5.

¹⁰ Tr.107:20-24; Exhibits 4 and 5.

¹¹ Tr. 109:8-13; Exhibit 4.

14. West Penn is installing Itron OpenWay Centron smart meters.¹²

15. Respondent's SMDP does not allow customers to opt out of smart meter installation.¹³

16. The smart meter relays to the Company only information regarding a consumer's electricity consumption and does not relay information regarding what is causing the consumption.¹⁴

17. Respondent has a Commission-approved privacy policy it must follow.¹⁵

18. Respondent's privacy policy provides that the Company will not share sensitive customer information, including the customer's name, address, usage levels, Social Security number, driver's license number, employee identification number, date of birth, credit card number, passport number, or bank account number with third parties without the customer's informed consent.¹⁶

19. The privacy policy provides that customer names, addresses, Social Security numbers, and similar sensitive account numbers are not transmitted through the smart meter network and cannot be shared without the customer's prior approval.¹⁷

¹² Tr. 109:21-110:2.

¹³ Exhibit 4.

¹⁴ Tr. 110:7-16.

¹⁵ Tr. 110:22-111:15; Exhibits 6 and 7.

¹⁶ Tr. 112:12-20; Exhibit 6.

¹⁷ Tr. 112:22-113:12.

20. The smart meter network includes a number of security protections to prevent against the unauthorized access of a customer's usage data, including encryption, firewalls, password protection, and continuous security monitoring.¹⁸

21. Respondent's smart meters are compliant with the standards set by the Federal Communications Commission (FCC) and the American National Standards Institute (ANSI) and are Underwriter Laboratory (UL) certified.¹⁹

DISCUSSION

Legal Standards

Under Section 332(a) of the Public Utility Code, 66 Pa.C.S. § 332(a), "the proponent of a rule or order has the burden of proof." It is well-established that "[a] litigant's burden of proof before administrative tribunals as well as before most civil proceedings is satisfied by establishing a preponderance of evidence which is substantial and legally credible." *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm'n*, 578 A.2d 600, 602 (Pa.Cmwlth. 1990). The preponderance of evidence standard requires proof by a greater weight of the evidence. *Commonwealth v. Williams*, 557 Pa. 207, 732 A.2d 1167 (1999). This standard is satisfied by presenting evidence more convincing, by even the smallest amount, than that presented by another party. *Brown v. Commonwealth*, 940 A.2d 610, 614 n.14 (Pa.Cmwlth. 2008).

If the party seeking a rule or order from the Commission sets forth a *prima facie* case, then the burden shifts to the opponent. *MacDonald v. Pa. R.R. Co.*, 348 Pa. 558, 36 A.2d 492 (1944). Establishing a *prima facie* case requires either evidence sufficient to make a finding of fact permissible or evidence to create a presumption against an opponent which, if not met, results in an obligatory decision for the proponent. Once a *prima facie* case has been established, if contrary evidence is not presented, there is no requirement that the party seeking a rule or

¹⁸ Tr. 113:16-22.

¹⁹ Tr. 114:4-8.

order from the Commission must produce additional evidence to sustain its burden of proof. *See Replogle v. Pa. Elec. Co.*, 54 Pa. PUC 528, 1980 Pa. PUC LEXIS 20 (Order entered Oct. 9, 1980); *see also, Dist. of Columbia's Appeal*, 21 A.2d 883 (Pa. 1941); *Application of Pennsylvania-American Water Co. for Approval of the Right To Offer, Render, Furnish or Supply Water Serv. to the Pub. in Additional Portions Of Mahoning Twp., Lawrence County, Pa.*, Docket No. A-212285F0148, 2008 Pa. PUC LEXIS 874 (Order entered Oct. 29, 2008).²⁰

In smart meter related matters, the Commission has held that “[t]he Complainant will have the burden of proof during the proceeding to demonstrate, by a preponderance of the evidence, that [the utility] is responsible or accountable for the problem described in the Complaint.” *Kreider v. PECO Energy Co.*, Docket No. P-2015-2495064, p. 18 (Order entered Sept. 3, 2015); *see also, Romeo v. Pa. Pub. Util. Comm’n*, 154 A.3d 422, 429 (Pa.Cmwlth. 2017) (finding that the smart meter complainant should have an opportunity at a hearing to try to prove his claim through “the testimony of others as well as other evidence that goes to that issue.”)

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

²⁰ In addition, any finding of fact necessary to support an adjudication of the Commission must be based upon substantial evidence. *Met-Ed Indus. Users Grp. v. Pa. Pub. Util. Comm’n*, 960 A.2d 189, 193 n.2 (Pa.Cmwlth. 2008) (citing 2 Pa.C.S. § 704). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Borough of E. McKeesport v. Special/Temporary Civil Serv. Comm’n*, 942 A.2d 274, 281 n.9 (Pa.Cmwlth. 2008) (citation omitted). Although substantial evidence must be “more than a scintilla and must do more than create a suspicion of the existence of the fact to be established,” *Kyu Son Yi v. State Bd. of Veterinary Med.*, 960 A.2d 864, 874 (Pa.Cmwlth. 2008) (citation omitted), the “presence of conflicting evidence in the record does not mean that substantial evidence is lacking.” *Allied Mech. and Elec., Inc. v. Pa. Prevailing Wage Appeals Bd.*, 923 A.2d 1220, 1228 (Pa.Cmwlth. 2007) (citation omitted).

Section 701 of the Public Utility Code provides that “any person . . . having an interest in the subject matter . . . may complain in writing, setting forth any act or thing done or omitted to be done by any public utility in violation, or claimed violation, of any law which the commission has jurisdiction to administer, or of any regulation or order of the commission.” 66 Pa.C.S. § 701. Therefore, a complainant must generally demonstrate that the public utility violated the Public Utility Code or a Commission regulation or order.

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

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

66 Pa.C.S. § 1501.

The Commission has exclusive jurisdiction to adjudicate “issues involving the reasonableness, adequacy, and sufficiency” of a public utility’s facilities and services. *See Elkin v. Bell of Pa.*, 420 A.2d 371, 374 (Pa. 1980) (citations omitted).

Smart Meter Mandate

On October 15, 2008, Act 129 was signed into law and codified as part of the Public Utility Code (Code).²¹ The Commission recently held in a similar complaint proceeding: (1) that there is no provision in the Code or Commission regulations or orders that allows a

²¹ 66 Pa.C.S. § 101, *et seq.*

customer to opt-out of a smart meter installation; (2) that there is Commission precedent that no opt-out provision exists in current Pennsylvania law; and (3) that the EDC is legally required to install smart meters by Act 129 and Commission orders.²²

Here, there is no dispute that Act 129 does not allow for customers to opt-out of smart meter installation. Complainant testified that he believes that Act 129 requires West Penn to install a smart meter at the service location.²³ Complainant testified that he does not believe West Penn has violated any law.²⁴

Rather, Complainant argues that Act 129 is unconstitutional on both the state and federal level and should be repealed.²⁵ As discussed above, Section 701 of the Public Utility Code provides that individuals may file formal complaints with the Commission alleging that a utility violated “any law which the commission has jurisdiction to administer, or of any regulation or order of the commission.”²⁶ The Commission, as an administrative agency, has only the authority and jurisdiction conferred upon it by statute.²⁷ The Commission does not have the authority to determine the constitutionality of state legislation, such as Act 129. Therefore, Complainant’s claim must be dismissed.

Unreasonable or Inadequate Service

Complainant testified about the reasons why he does not want a smart meter and addressed his concerns related to health, safety, and privacy.

²² *Hoffman-Lorah v. PPL Elec. Util. Corp.*, Docket No. C-2018-2644957 (Order entered May 23, 2019). See also, e.g., *Lutherschmidt v. Metro. Edison Co.*, Docket No. C-2010 2200353 (Final Order entered March 25, 2011); *Negley v. Metro. Edison Co.*, Docket No. C-2010-2205305 (Initial Decision dated January 3, 2011 became final without Commission action on March 3, 2011).

²³ Tr. 98:24-97:3.

²⁴ Tr. 97:18-20.

²⁵ Tr. 15:13-17, 29:21-24.

²⁶ 66 Pa.C.S. § 701.

²⁷ *City of Pittsburgh v. Pa. Pub. Util. Comm’n*, 43 A.2d 348 (Pa.Super. 1945).

As stated above, 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.

At the hearing, Complainant testified that smart meters are about “demand and control” and allow utilities to get a “demand charge” which is a burden for residential customers because they cannot recoup this charge for tax purposes.²⁸

Complainant further testified that he believes smart meters are a fire hazard²⁹ and emit radiofrequency and electromagnetic frequency that could cause negative health and safety effects for consumers³⁰. He testified he is concerned that the utility has not assumed any liability for any damages the smart meters may cause.³¹ Complainant also testified he believes that the smart meters may not be compatible with other utility companies should a customer choose to switch providers,³² and he has not found any evidence that smart meters save customers any money.³³

Complainant testified he believes the smart meters are susceptible to hackers and that the utility could sell the customers’ information or provide it to the government.³⁴ He also testified that the smart meters make it easier for the utility companies to terminate a customer’s service and that a utility could terminate a customer’s service in error.³⁵ Complainant testified he

²⁸ Tr. 27:2-18.

²⁹ Tr. 27:19-20.

³⁰ Tr. 70:24-71:1, 79:8-11.

³¹ Tr. 30:14-19.

³² Tr. 31: 9-11.

³³ Tr. 31:12-13.

³⁴ Tr. 33:12-16.

³⁵ Tr. 33:18-25.

believes that the smart meters will make meter readers unnecessary, and without meter readers, the billing will not be as reliable.³⁶

He testified that he believes that the passage of Act 129 has to do with “Earth Summit Agenda 21”³⁷, the “Federal Reserve Cartel”³⁸, and a global conspiracy³⁹.

Company witness Ahr testified he had no reason to believe that Respondent’s smart meters are unsafe.⁴⁰ He testified that the smart meters are compliant with the standards set by the FCC and ANSI and are UL certified.⁴¹ He testified that the smart meters enable a customer’s service to be connected/reconnected quickly due to the remote functionality of smart meters.⁴² He explained that the company still has employees who are able to go out to a service location to respond to meter issues.⁴³ Mr. Ahr explained that the smart meters are capable of recording a customer’s electric energy usage regardless of what provider they may select.⁴⁴

Complainant’s evidence consists solely of his unsubstantiated personal feelings, opinions, and beliefs. Assertions, personal opinions, or perceptions do not constitute evidence.⁴⁵ Complainant failed to meet his burden to demonstrate that the Company’s installation of a smart meter at his residence constitutes unreasonable or inadequate service. Accordingly, Complainant’s claims must be dismissed.

³⁶ Tr. 38:15-19.

³⁷ Tr. 80:16-23.

³⁸ Tr. 81:19-23.

³⁹ Tr. 80:16-23, 82:2-7, 82:22-25.

⁴⁰ Tr. 114:4-8.

⁴¹ *Id.*

⁴² Tr. 114:19-24.

⁴³ Tr. 116:24-117:6.

⁴⁴ Tr. 126:13-15.

⁴⁵ *Pa. Bureau of Corrections v. City of Pittsburgh*, 532 A.2d 12 (Pa. 1987).

CONCLUSIONS OF LAW

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

2. Under Section 332(a) of the Pennsylvania Public Utility Code, the proponent of a rule or order has the burden of proof. 66 Pa.C.S. § 332(a). It is well established that “[a] litigant’s burden of proof before administrative tribunals as well as before most civil proceedings is satisfied by establishing a preponderance of evidence which is substantial and legally credible.” *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm’n*, 578 A.2d 600, 602 (Pa.Cmwlth. 1990).

3. The preponderance of evidence standard requires proof by a greater weight of the evidence. *Commonwealth v. Williams*, 557 Pa. 207, 732 A.2d 1167 (1999). This standard is satisfied by presenting evidence that makes the existence of a contested fact more likely than its nonexistence. *Brown v. Commonwealth*, 940 A.2d 610, 614 n.14 (Pa.Cmwlth. 2008) (citation omitted).

4. In smart meter-related matters, the Commission has held that “[t]he Complainant will have the burden of proof during the proceeding to demonstrate, by a preponderance of the evidence, that [the utility] is responsible or accountable for the problem described in the Complaint.” *Kreider v. PECO Energy Co.*, Docket No. P-2015-2495064, p. 18 (Order entered Sept. 3, 2015).

5. Section 701 of the Public Utility Code provides that “any person . . . having an interest in the subject matter . . . may complain in writing, setting forth any act or thing done or omitted to be done by any public utility in violation, or claimed violation, of any law which the commission has jurisdiction to administer, or of any regulation or order of the commission.” 66 Pa.C.S. § 701.

6. The Commission has exclusive jurisdiction to adjudicate “issues involving the reasonableness, adequacy, and sufficiency” of a public utility’s facilities and services. *See Elkin v. Bell of Pa.*, 420 A.2d 371, 374 (Pa. 1980) (citations omitted).

7. When presented with a challenge to a smart meter installation, the Commission has pronounced that “[t]he ALJ’s role . . . will be to determine based on the record in this particular case, whether there is sufficient evidence to support a finding that Complainant was adversely affected by the smart meter or whether [the utility’s] use of a smart meter will constitute unsafe or unreasonable service in violation of Section 1501 under the circumstances in this case.” *Kreider v. PECO Energy Co.*, Docket No. P-2015-2495064, p. 23 (Order entered Jan. 28, 2016) (citation omitted).

8. To satisfy his or her burden of proof, a complainant must demonstrate that the utility violated the Public Utility Code or a regulation or order of the Commission. 66 Pa.C.S. § 701. This must be shown by a preponderance of the evidence. *Patterson v. Bell Telephone Co. of Pa.*, 72 Pa. PUC 196 (1990).

9. Upon the presentation by a complainant of evidence sufficient to initially satisfy the burden of proof, the burden of going forward with the evidence, sometimes called the burden of persuasion, to rebut the evidence of the complainant shifts to the respondent. If the evidence presented by the respondent is of co-equal weight, the complainant has not satisfied the burden of proof. The complainant now has to provide some additional evidence to rebut the evidence of the respondent. *Burleson v. Pa. Pub. Util. Comm’n*, 443 A.2d 1373 (Pa.Cmwlth. 1982), *aff’d*, 501 Pa. 433, 461 A.2d 1234 (1983).

10. While the burden of persuasion may shift back and forth during a proceeding, the burden of proof never shifts. The burden of proof always remains on the party seeking affirmative relief from the Commission. *Milkie v. Pa. Pub. Util. Comm’n*, 768 A.2d 1217 (Pa.Cmwlth. 2001).

11. Assertions, personal opinions, or perceptions do not constitute evidence. *Pa. Bureau of Corrections v. City of Pittsburgh*, 532 A.2d 12 (Pa. 1987).

12. A public utility is required to provide adequate, efficient, safe, and reasonable service. 66 Pa.C.S. §§ 102 and 1501.

13. There is no specific provision in the Code or the Commission's regulations or orders that provides that an electric distribution customer may opt-out of smart meter installation. *Povacz v. PECO Energy Co.*, Docket No. C-2012-2317176 (Opinion and Order entered January 24, 2013).

14. Act 129 of 2008, 66 Pa.C.S. § 2806.1 *et seq.*, requires electric distribution companies to file smart meter technology procurement and installation plans with the Commission for approval. 66 Pa.C.S. § 2807(f).

15. A utility may issue written notice of termination to a customer if a customer does not permit access to meters, service connections, or other property of the public utility for the purpose of replacement, maintenance, repair, or meter reading, including the installation of a smart meter. 66 Pa.C.S. § 1406(a)(4); 52 Pa.Code § 56.81(3).

16. Complainant failed to carry his burden of proof establishing that West Penn Power Company violated the Public Utility Code or a regulation or order of the Commission in installing a smart meter at Complainant's property. 66 Pa.C.S. § 332.

17. Complainant failed to carry his burden of proof establishing that West Penn Power Company provided unsafe or unreasonable service in violation of 66 Pa.C.S. § 1501.

