

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

John and Janet Holder	:	
	:	
v.	:	
	:	F-2019-3008809
PPL Electric Utilities Corporation	:	
June Maculesky	:	
	:	
v.	:	F-2019-3008832
	:	
PPL Electric Utilities Corporation	:	

INITIAL DECISION

Before
Elizabeth H. Barnes
Administrative Law Judge

INTRODUCTION

Residential customers filed complaints against an electric distribution company seeking to prevent the installation of new Advanced Metering Infrastructure (AMI) meters at their service addresses. The consolidated complaints will be dismissed for failure to prove by a preponderance of evidence that the installation of a smart meter constitutes unsafe or unreasonable service under 66 Pa. C.S. § 1501 or otherwise violates the Public Utility Code, a Commission order or regulation or a Commission-approved tariff of the company.

HISTORY OF THE PROCEEDING

On March 18, 2019, John and Janet Holder filed a formal complaint against PPL Electric Utilities Corporation (PPL) with the Pennsylvania Public Utility Commission

(Commission) at docket no. F-2019-3008809 seeking to prevent the installation of a smart meter at their residence due to alleged health, safety, and privacy concerns. Also on March 18, 2019, Janet Holder, as power of attorney, filed on behalf of her mother, June Maculesky, a formal complaint against PPL at docket no. F-2019-3008832, in which she also sought the prevention of a smart meter being installed at her residence, averring the same allegations.¹ The Holders and Ms. Maculesky sought to opt-out of smart meter installation.

On March 27, 2019, PPL was served with the above-captioned formal complaints. On April 23, 2019, PPL filed a Motion to Consolidate both formal complaints pursuant to 52 Pa. Code § 5.81, averring, *inter alia*, that Janet Holder is the daughter of June Maculesky and that she has power of attorney for her mother. In that capacity, Ms. Holder filed the formal complaint at F-2019-3008832 on her mother's behalf. There was no objection to the consolidation.

By Order dated May 14, 2019, the proceedings were consolidated pursuant to 52 Pa. Code § 5.81, as both complaints involve common questions of law and fact and in the interests of administrative and judicial resources. The complaints are similar and involve the same witnesses. Also, the service properties are less than a mile away from each other. Accordingly, a hearing was scheduled to be held on October 22, 2019.

On September 4, 2019, the Holders and Ms. Maculesky (Complainants) together filed an amended complaint raising the same issues in the prior formal complaints and attaching to it 389 pages of "exhibits" to support their amended complaint.

By Hearing Notice issued on October 3, 2019, the October 22, 2019 hearing was continued at the request of PPL and rescheduled for April 9, 2020.

After granting an extension to Respondent to file an answer to the amended complaint, which totaled over 400 pages, Respondent timely filed an answer to the amended

¹ Both formal complaints are timely appeals from decisions of the Bureau of Consumer Services (BCS) which denied both informal complaints by decisions dated January 1, 2019. The Holders appeal from the decision at BCS No. 3667431 and Ms. Maculesky's appeals from the decision at BCS No. 3667472.

complaint on January 21, 2020. The answer admitted that the Respondent provides electric service to the Complainants at the addresses shown on the respective consolidated Complaints. The answer contends that the Respondent is required to install AMI, or smart meters, for all automatic meter reading (AMR) customers and that it has the right to terminate service for failure of the customer to permit access to the meter.

On February 28, 2020, PPL filed a Motion in Limine and Motion for Sanctions requesting Complainants be precluded from submitting hearsay evidence regarding health issues as they indicated they would not be calling any expert witnesses and refused to answer interrogatories regarding their health issues. PPL requested a ruling that the ALJ find Complainants would not suffer any deleterious health effects from the AMI meter to be installed at their respective residences. On March 17, 2020, a Notice was issued cancelling the April 9, 2020 hearing due to the closure of the Commission's offices in response to the COVID-19 pandemic.²

On or about April 21, 2020, Complainants filed their response to the Motion in Limine. Complainants argued that just because they do not have any present health conditions, they should not be precluded from submitting evidence and arguing that AMI wireless smart meter devices potentially could or would cause, contribute to, or exacerbate future biological or adverse health effects.

On May 26, 2020, an Order granting PPL's Motion in Limine and for Sanctions was issued. Because Complainants failed to produce any information and documents responsive to PPL to Complainant Set I, No. 4 during the course of this proceeding, and they indicated that they did not intend to do so, I found that Complainants have not and will not experience any medical conditions or issues from the installation of PPL Electric's AMI meter as a sanction. Therefore, Complainants' health allegations will not be addressed in the body of this decision.

² The Commission's offices were closed beginning on March 16, 2020, pursuant to an Executive Order issued by the Pennsylvania Deputy Secretary for Human Resources and Management due to the COVID-19 pandemic. However, the Commission has continued working remotely.

The hearing was held on August 6, 2020, after granting further continuances for various procedural reasons.

At the hearing, Complainants Janet and John Holder appeared *pro se* with several exhibits. No exhibits were submitted for admission into the record. Respondent appeared represented by Devin Ryan, Esquire and Curtis Renner, Esquire with 15 exhibits and four witnesses: Mike Asbury, Kevin Durkin, Christopher Davis, Ph.D., and Mark Israel, M.D. Only the statements and exhibits of Mike Asbury and Kevin Durkin were offered and admitted into the record at the hearing. A 58-page transcript of the hearing was filed on August 20, 2020, and the record closed the same date. This case is ripe for a decision.

FINDINGS OF FACT

1. The Complainants in this proceeding are John and Janet Holder, who reside at 2424 Lafayette Avenue and June Maculesky, who resides at 1823 Butztown Road, Bethlehem, Lehigh County, Pennsylvania. Tr. 10.
2. June Maculesky was not present at the hearing.
3. Complainants request smart meters not be installed at the service addresses. Tr. 10-12.
4. The Respondent in this proceeding is PPL Electric Utilities Corporation, an electric distribution company (EDC). Tr. 12.
5. On June 30, 2014, PPL filed its new Smart Meter Plan intended to comply with all the requirements of Act 129 and the Commission's Smart Meter Implementation Order. PPL Electric Exhibit No. 3.
6. PPL selected Radio Frequency (RF) Mesh meters and metering system because the Company determined that the RF Mesh system would support the 15 capabilities

required by Act 129 and the Smart Meter Implementation Order. PPL Electric Exhibit No. 3 at 5-6.

7. Under the Smart Meter Plan, the RF Mesh meters are to be deployed between 2017 and 2019 for all of PPL’s 1.4 million customers. PPL Electric Exhibit No. 3.

8. PPL had deployed over 1,000,000 RF Mesh meters as of the July 27, 2020 hearing. PPL Electric Exhibit No. 3.

9. The RF Mesh meter to be installed for the Complainant’s residential account is the Landis + Gyr Focus AXR-SD meter. PPL Electric Statement No. 4.

10. Complainant John Holder has a Bachelor of Arts degree in philosophy. Tr. 25.

11. Complainant John Holder does not have a degree in engineering or medicine. Tr. 26.

12. The Landis + Gyr Focus AXR-SD meter is certified by the Underwriters Laboratories at UL 2735. PPL Electric Statement No. 4.

13. The Landis + Gyr Focus AXR-SD meter is compliant with the American National Standards Institute (ANSI). PPL Electric Statement No. 4.

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 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).³

In addition, a person does not sustain his or her burden of proof in an electric and magnetic field exposure case when the record evidence, “taken as a whole, leads to the ultimate finding and conclusion that the scientific studies at present are inconclusive.” *Letter of Notification of Phila. Elec. Co. Relative to the Reconstructing and Rebuilding of the Existing 138 kV Line to Operate as the Woodbourne-Heaton 230 kV Line in Montgomery and Bucks Counties*,

³ 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).

1992 Pa. PUC Lexis 160, at *210-11 (June 29, 1992) (Initial Decision) (*Woodbourne-Heaton*). Rather, the person must demonstrate by a preponderance of the evidence that such exposure actually causes adverse health effects. *Id.* at *211. Specifically, in AMI 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)(*Romeo*) (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”).

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.

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). 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. When presented with a challenge to an AMI 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 the 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 (Opinion and Order entered January 28, 2016) (citing *Woodbourne-Heaton*, 1992 Pa. PUC Lexis 160, at *12-13). *Frompovich v. PECO Energy Co.*, Docket No. C-2015-2474602 at 10 (Opinion and Order entered May 3, 2018) (*Frompovich*).

A public utility’s Commission-approved tariff is *prima facie* reasonable, has the full force of law and is binding on the utility and the customer. 66 Pa.C.S. § 316, *Kossmann v. Pa. Pub. Util. Comm’n*, 694 A.2d 1147 (Pa. Cmwlth. 1997) (*Kossmann*); *Stiteler v. Bell Telephone Co. of Pennsylvania*, A.2d 339 (Pa. Cmwlth. 1977).

Pennsylvania Courts have held that a power of attorney cannot be used by a lay person as a license to practice law. *Kohlman v. Western Pa. Hospital*, 652 A.2d 849 (Pa. Super. 1994) (*Kohlman*); *Nottingham Twsp. v. Gatios*, 2010 Pa. Dist. & Cnty. Dec. LEXIS 602 (July 13, 2010), 693 A.2d 996 (Pa. Cmwlth. 1997), *appeal den.*, 717 A.2d 536 (Pa. 1998).

The courts and this Commission have stated that the in-court representation of another amounts to the “practice of law” in the Commonwealth. *Ricks v. PECO Energy Co.*, Docket No. C-2012-23212440 (Opinion and Order entered March 6, 2014) (*Ricks*), citing *Kohlman, supra*.

It is well-settled in Commission practice that participation in a formal adversarial proceeding before this Commission constitutes the practice of law. *See, e.g., Lesley A. Scheaffer for Leslie W. Scheaffer v. Pa. Pub. Util. Comm’n*, Docket No. F-2016-2577647 (Opinion and Order entered April 3, 2018) (*Scheaffer*). As such, that participation is limited to those who either file as individuals and represent themselves or to attorneys who are representing others. 52 Pa. Code § 5.21. Just as an attorney cannot empower an individual to engage in the

unauthorized practice of law, no agency can confer the power to engage in conduct that is prohibited by Section 2524 of the Judicial Code, 42 Pa. C.S. § 2524. *See Kohlman, supra.* and *Westmoreland Cty v. Rodgers*, 693 A.2d 996 (Pa. Cmwlth. 1997), *alloc. den.*, 717 A.2d 536 (Pa. 1998).

It is important to note that the absence of an attorney, where one is required, actually deprives the forum of jurisdiction to adjudicate the matter. *See, McCain v. Curione*, 527 A.2d 591 (Pa. Cmwlth. 1987) (Commonwealth Court was without jurisdiction to consider arguments and motions made on behalf of a parolee in a civil action that was filed by another person who was not licensed to practice law); and *Spirit of the Avenger Ministries v. Commonwealth*, 767 A.2d 1130 (Pa. Cmwlth. 2001) (appeal quashed because the Court was without jurisdiction to consider the claims raised by a person not licensed to practice law in Pennsylvania, and the Court has the obligation to raise the issue of its jurisdiction *sua sponte*). A non-lawyer who has power of attorney may not engage in the practice of law based on the power of attorney. *See, Ricks*.

Although Mrs. Holder appeared at the hearing, she did not testify. Only Mr. Holder, Ms. Maculesky's son-in-law, testified and offered a closing argument in this proceeding. Mr. Holder is not authorized to represent Mrs. Maculesky and he is not her attorney. The Commission's Regulations permit individuals to represent themselves, but if they choose to be represented by another in an adversarial proceeding such as this, the representative must be an attorney or certified legal intern. 52 Pa. Code §§ 1.21 and 1.22. Ms. Holder is not a licensed attorney and cannot properly act as her mother's attorney in an adversarial proceeding. *See Angle v. Metropolitan Edison Co.*, F-2018-3006055 (Opinion & Order entered December 19, 2019).

Opt-In versus Opt-Out Program

Complainant John Holder argues that over 30 other States have an opt-in program and that the Commission misconstrued Section 2807 of Act 129 of 2008, 66 Pa. C.S. §§ 2806.1-2807. He contends there is nothing in the statute requiring the EDC to deploy smart meters to all

service locations. Rather, he argues that only those individuals requesting the meters and locations that involve new construction should receive them.

Conversely, PPL contends its installation of an AMI Meter is required by Pennsylvania law and that it would not constitute unreasonable or unsafe service to install an AMI Meter on Complainants' properties.

Disposition

The Commission has ruled that there is no provision in the Code, the Commission's Regulations or Orders that allows an electric distribution company's customer to "opt-out" of smart meter installation. 66 Pa.C.S. § 2807(f); *See Bervinchak v. PPL Electric Utilities Corp.*, C-2016-2572824 and C-2016-2577527 (Final Order October 2, 2018, Initial Decision dated August 16, 2018); *Povacz v. PECO Energy Co.*, Docket No. C-2012-2317176 at 10 (Order and Opinion entered January 24, 2013); *Povacz v. PECO Energy Co.*, Docket No. C-2015-2475023 (Initial Decision dated January 26, 2018). Moreover, the Commonwealth Court has held that federal law does not preempt the Commission's interpretation. *See Romeo*. The Commonwealth Court did not expressly address whether Mr. Romeo could opt-out of a smart meter installation. The Court held that Mr. Romeo's claim that smart meters cause safety and fire hazards and have a negative health impact, is not legally insufficient pursuant to 66 Pa. C.S. § 1501, which requires utilities to maintain adequate, efficient, safe, and reasonable service and facilities for their customers. *Id.*

I infer from the *Romeo* decision, that it is legally sufficient to plead the injunctive relief requested in the instant case and claim that smart meters are generally unsafe and unhealthy, and the installation of them is unreasonable service in violation of 66 Pa. C.S. § 1501. However, the Commonwealth Court did not expressly address the opt-in versus opt-out argument. Although Complainants similarly situated to Mr. Romeo are entitled to an evidentiary hearing, there is Commission precedent that there is no opt-out provision in the current law in Pennsylvania.

The fact that other States have opt-out provisions in their law is noted but is non-binding. The Commission is formulating binding policy through adjudications which constitute binding precedent regarding this issue. *See Crawford v. National Fuel Gas Distribution Corp.*, C-20066348 (Opinion and Order entered December 6, 2007), *citing Pacific Gas & Electric Co. v. FPC*, 164 U.S. App. D.C. 371, 506 F.2d 33 (D.C. Cir. 1974). The Commission has consistently held there is no opt-out provision for similarly situated Complainants. The instant case is more similar than distinguishable from prior decisions wherein the Commission has dismissed similar complaints. *Pa. Trout v. Dept. of Env'tl. Prot.*, 863 A.2d 93 (Pa. Cmwlth. 2004).

On October 15, 2008, Governor Edward G. Rendell signed Act 129 of 2008 into law, which directed EDCs with at least 100,000 customers to file, with the Commission, a smart meter deployment and installation plan. Thus, there is a statute requiring smart meter deployment by large electric distribution companies operating within the Commonwealth. 66 Pa. C.S. § 2807(f).

The implementation of the Respondent's Smart Meter Deployment Plan and the approval of the costs associated with its implementation have been found by the Commission to be in accordance with Act 129 of 2008, 66 Pa. C.S. § 2807(f). The Respondent is required by statute and Commission Order to implement a Smart Meter Program, to install smart meters throughout its service territory, and to charge a Smart Meter Technology Surcharge to all of its metered customers.

As the Commission stated in its April 21, 2016 Opinion and Order in the case of *Frompovich*:

In past cases involving smart meter installation, we have evaluated on an individual case-by-case basis the specific allegations presented in each complaint and reached a conclusion based on those particular circumstances. While PECO is correct that as adopted Act 129 does not provide a general opt out provision, where a complainant's objection to installation of a smart meter was not based upon a general objection to smart meters *per se*, but rather upon facts specific to the individual

complainant, we have denied preliminary relief and allowed the complaint to proceed to hearing. *See Kreider v. PECO Energy Company*, Docket No. P-2015-2495064 (Order on Material Question entered September 3, 2015; Order on Reconsideration entered January 28, 2016) (*Kreider*); *Paul v. PECO Energy Company*, Docket No. C-2015-2475355 (Order entered March 17, 2016). As we stated previously, “the law does not prohibit us from considering or holding a hearing on issues related to the safety of smart meters, consistent with our statutory authority in Section 1501 of the Code, when a legally sufficient claim is presented.” *Kreider*, Order on Material Question at 17.

As in *Kreider* and *Paul*, Ms. Frompovich has alleged factual averments specific to her that, *if proven*, could implicate, under her particular circumstances, a violation of Section 1501 of the Code, a statute the Commission has jurisdiction to administer.

Frompovich, supra at 11-12 (Opinion and Order entered April 21, 2016) (emphasis added).

To the extent that Complainants desire the ability to opt-out of the smart meter installation, they can continue advocating for such ability before the General Assembly, which is currently considering amending Section 2807(f) in some pending bills. These bills are not yet law. The Commission has held that it does not have the authority, absent a directive in the form of legislation, to prohibit the Respondent from installing a smart meter where a customer does not want one. *See Povacz v. PECO Energy Co.*, Docket No. C-2012-2317176 (Opinion and Order entered January 24, 2013). The Commission held that similarly situated respondents would be in violation of law if they did not install a smart meter at properties similarly situated to Complainant’s residence. *Id., Frompovich* at 7-8. Thus, I find in favor of PPL on this issue.

Data Privacy

Complainants contend that the new AMI meter will invade their privacy and that mandatory installation of a smart meter violates their Fourth Amendment Right against unreasonable searches and seizures. They argue PPL is a “state actor.” Tr. 13, 15.

Conversely, PPL argues that any claim that the installation of the meter would violate the Fourth Amendment is incorrect.

Disposition

As a part of its Smart Meter Plan proceeding, PPL filed a detailed AMI Customer Privacy Policy, which sets forth the data PPL will collect through the new smart meter, the steps the Company will take to protect the data, and the ways in which PPL will use the data. PPL Electric Exhibit No. MA-1. PPL uses firewalls to prevent anyone from obtaining unauthorized access to the AMI network. PPL Statement No. 4. Customer data is encrypted to make the data readable to only PPL personnel who can decode the encryption. PPL Statement No. 4. PPL's cybersecurity and data privacy policies are consistent with the national standards for the industry. PPL Statement No. 4. Additionally, if Complainants are concerned about the AMI meter's connection to smart appliances in their home, they can decline to have the ZigBee radio activated. *See Lesniewski v. PPL Electric Util. Corp.*, C-2018-3004594 (Final Order entered April 29, 2019, *adopting* Initial Decision issued March 25, 2019), wherein the Commission found in favor of PPL regarding the same data privacy issue. Specifically, the Commission held that Ms. Lesniewski had an option to decline activation of the ZigBee radio device located within the AMI meter.

Regarding Complainants' argument that a mandatory smart meter would violate their Fourth Amendment right of freedom from unreasonable searches and seizures, I agree with PPL that it is not a "state actor" in that it is not a sovereign governmental entity also responsible for law enforcement. Rather, it is a private, regulated utility company not constrained by the Fourth Amendment. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974)(*Jackson*). Further, there is no evidence in the instant case that PPL is making its data easily accessible to law enforcement or other third parties.

In *Naperville*, the Seventh Circuit found the City of Naperville owned and operated a public utility that provides electricity to its residents. Naperville began replacing its residential customers' analog energy meters with digital smart meters. *Naperville Smart Meter Awareness v. City of Naperville*, 900 F.3d 521, 524 (7th Cir. 2018) (*Naperville*). Naperville's Electric Utility collects residents' energy-consumption data at fifteen-minute intervals, storing it for up to three years. The Seventh Circuit concluded that the use of smart meters intruded upon

reasonable expectations of privacy, thus constituting a search subject to Fourth Amendment constraints, but that such searches were “reasonable,” and thus constitutionally permissible and consistent with the Fourth Amendment. In finding that the Naperville Electric Utility’s use of the smart meters constituted a search, the court relied heavily on *Kyllo v. United States*, 533 U.S. 27, 31–32 (2001). The Court referenced the administrative search doctrine to find that the presumption had been overcome. *Naperville*, 900 F.3d at 528-29 (citing *Camara v. Municipal Court*, 387 U.S. 523 (1967)). In particular, City of Naperville had “no prosecutorial intent;” “public utility [e]mployees—not law enforcement officials—collect and review the data.” *Id.* Thus, the Electric Utility’s intrusion was more innocuous than that found to violate the Fourth Amendment in *Camara*.

For these reasons, I find in favor of Respondent on this data privacy issue.

CONCLUSION

For all of these aforementioned reasons, the complaint will be dismissed for failure to prove by a preponderance of evidence that the installation of this smart meter constitutes unsafe or unreasonable service under 66 Pa. C.S. § 1501 or otherwise violates the Public Utility Code, a Commission order or regulation or a Commission-approved tariff of the company. Although the Complainants are genuine in their concerns, the Commission’s decisions cited above are controlling.

CONCLUSIONS OF LAW

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

2. Participation in a formal adversarial proceeding before this Commission constitutes the practice of law. *Lesley A. Scheaffer for Leslie W. Scheaffer v. Pa. Pub. Util. Comm’n*, Docket No. F-2016-2577647 (Opinion and Order entered April 3, 2018) (*Scheaffer*).

3. A power of attorney cannot be used by a lay person as a license to practice law. *Kohlman v. Western Pa. Hospital*, 652 A.2d 849 (Pa. Super. 1994)

4. The Commission's Regulations permit individuals to represent themselves, but if they choose to be represented by another in an adversarial proceeding, the representative must be an attorney or certified legal intern. 52 Pa. Code §§ 1.21 and 1.22.

5. PPL Electric Utilities Corporation's smart meter procurement and installation plan, which was approved by Commission Order in the case of *Petition of PPL Electric Utilities Corp. for Approval of Its Smart Meter Technology Procurement and Installation Plan*, Docket No. M-2014-2430781, p. 24 (Order Entered Sept. 3, 2015) does not contain a provision for customers to opt-out of smart meter installation.

6. 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).

7. 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).

8. A person does not sustain his or her burden of proof in an electric and magnetic field exposure case when the record evidence, "taken as a whole, leads to the ultimate finding and conclusion that the scientific studies at present are inconclusive" rather, the person must demonstrate by a preponderance of the evidence that such exposure actually causes adverse health effects. *Letter of Notification of Phila. Elec. Co. Relative to the Reconstructing and*

Rebuilding of the Existing 138 kV Line to Operate as the Woodbourne-Heaton 230 kV Line in Montgomery and Bucks Counties, 1992 Pa. PUC Lexis 160, at *210-11 (June 29, 1992) (Initial Decision).

9. In AMI 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).

10. 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.

11. Complainants have failed to sustain their burden of proof that Respondent violated Section 1501 of the Public Utility Code. 66 Pa. C.S. § 1501.

12. 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).

13. When presented with a challenge to an AMI 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 the 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) (citing *Woodbourne-Heaton*, 1992 Pa. PUC Lexis 160, at *12-13).

14. Complainants have failed to sustain their burden of proof that installing the new AMI meter would violate the Public Utility Code or any Commission regulation or order. *See* 66 Pa. C.S. §§ 332(a), 701.

15. PPL is legally required to install the RF Mesh meter on the Complainant's property by Act 129 and Commission orders. *See* 66 Pa. C.S. § 2807(f); *Smart Meter Procurement and Installation*, Docket No. M-2009-2092655, pp. 9, 14 (Order entered June 24, 2009).

16. Nothing in Act 129 permits a customer to "opt-out" of a smart meter installation. *See, e.g., Starr v. PECO Energy Co.*, Docket No. C-2015-2516061, p. 11 (Order Entered Sept. 1, 2016).

17. The Commission previously determined that the Company's existing PLC meters are not compliant with Act 129 and the Commission's Smart Meter Implementation Order. *See Petition of PPL Electric Utilities Corporation for Approval of Smart Meter Technology Procurement and Installation Plan*, Docket No. M-2009-2123945, p. 24 (Order entered June 24, 2010).

18. Under the Company's Commission-approved Smart Meter Plan, PPL must replace all of the PLC meters with the RF Mesh meters, which the Commission declared as meeting all of the requirements of Act 129 and the Commission's Smart Meter Implementation Order. *See Petition of PPL Electric Utilities Corp. for Approval of Its Smart Meter Technology Procurement and Installation Plan*, Docket No. M-2014-2430781, p. 24 (Order Entered Sept. 3, 2015).

ORDER

THEREFORE,

IT IS ORDERED:

1. That the Amended Formal Complaint filed by John and Janet Holder and June Maculesky against PPL Electric Utilities Corporation at Docket Nos. F-2019-3008809 and F-2019-3008832 is denied and dismissed.
2. That the dockets in this proceeding be marked closed.

Date: September 22, 2020

_____/s/_____

Elizabeth H. Barnes
Administrative Law Judge