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January 10, 2024

**VIA ELECTRONIC FILING**

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

**Re: Gregory and Donna Kollmar v. West Penn Power Company**  
**Docket No. C-2019-3014650**

Dear Secretary Chiavetta:

Enclosed please find the Motion of West Penn Power Company for Summary Judgement with regard to the above-captioned matter. This document has been served on the Complainants as shown in the Certificate of Service.

Please contact me if you have any questions regarding this matter.

Very truly yours,



Daniel A. Garcia

DAG/vlr

Enclosures

c: As Per Certificate of Service



**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

<b>GREGORY AND DONNA KOLLMAR</b>	:	
	:	
v.	:	<b>Docket No. C-2019-3014650</b>
	:	
<b>WEST PENN POWER COMPANY</b>	:	

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**MOTION OF  
WEST PENN POWER COMPANY  
FOR SUMMARY JUDGMENT**

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**TO DEPUTY CHIEF ADMINISTRATIVE LAW JUDGE EMILY I. DEVOE:**

AND NOW, comes West Penn Power Company (“West Penn” or the “Company”) and files this Motion for Summary Judgment pursuant to Sections 5.102 and 5.103 of the Pennsylvania Public Utility Commission’s (“Commission”) regulations, and 52 Pa. Code §§ 5.102- 5.103, and respectfully requests that the above-captioned Formal Complaint be summarily dismissed in its entirety and with prejudice.

As explained herein, Gregory and Donna Kollmar (“Complainants”) have the burden of proof in this proceeding to demonstrate that the installation of West Penn’s smart meter would violate the Public Utility Code or a Commission regulation or order. However, the Complainants never provided notification of their expert and factual witnesses and any written direct testimony in support of their allegations as required by the Scheduling Order dated November 28, 2023. Therefore, the Complainants have failed to present any evidence as part of their direct case. As a result, the Complainants are not expected to present any expert evidence in support of their direct case which could meet their burden of proof under the law.

For these reasons, and as explained in more detail below, West Penn respectfully requests that Administrative Law Judge Emily I. DeVoe (“ALJ DeVoe”) grant this Motion for Summary Judgment and summarily dismiss the instant Complaint in its entirety and with prejudice.

In support thereof, West Penn states as follows:

**I. BACKGROUND AND PROCEDURAL HISTORY**

1. On November 26, 2019, West Penn was served with the Formal Complaint filed by the Complainants, which challenged the Company’s planned installation of a smart meter at the Complainants’ property, 1749 Freeport Road, Arnold, Pennsylvania 15068 (“Service Location”).

2. Per the Formal Complaint, the Complainants raised concerns, as follows:

**The power has threatened to shut off my electric service on 11/25/19  
The smart meter is a direct energy weapon that can burn down our homes  
Unsafe conditions 66PA.C.S.ss.1501 of PUC code  
It can be used to be used a tracking device  
In Act 129 of 2008 shall furnish smart meter technology as follows: Upon request from a customer that agrees to pay the cost of the smart meter at the time of the request. “we have not requested the smart to be installed in our home”  
Negotiate and file new contract with West Penn Power with other terms to accept smart meter if they pay me \$50.000 a week.<sup>1</sup>**

3. On December 16, 2019, West Penn filed an Answer, New Matter, and Preliminary Objections to the Complaint.

4. The Complainants did not file a response to either the New Matter or the Preliminary Objection.

5. On January 22, 2020, this matter was assigned to Administrative Law Judge Mark Hoyer (“ALJ Hoyer”).

6. On January 31, 2020, ALJ Hoyer issued an Interim Order denying West Penn’s Preliminary Objection.

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<sup>1</sup> Formal Complaint ¶ 5

7. On May 20, 2020, the Commission issued a Notice, reassigning this matter to ALJ DeVoe and scheduling a prehearing conference for July 31, 2020.

8. On May 21, 2020, ALJ DeVoe issued an Interim Order, scheduling the prehearing conference and detailing the Commission's procedural rules regarding service, representation, and discovery.

9. On July 30, 2020, Ms. Kollmar contacted ALJ DeVoe's office requesting the prehearing conference be cancelled because she was sick.

10. On July 30, 2020, the prehearing conference was cancelled via a Cancellation Notice and Interim Order.

11. On October 8, 2020, the Commonwealth Court of Pennsylvania ("Court") issued an Opinion in the first of several appeals before it that involve an electric distribution company's ("EDC") deployment of smart meter technology pursuant to Act 129 of 2008 ("Act 129"), codified at 66 Pa.C.S. § 2807(f). In this consolidated opinion, the Court partially affirmed, and partially reversed and remanded, the Commission's March 28, 2019 and May 9, 2019 Orders in *Maria Povacz v. PECO Energy Co.*, C-2015-2475023; *Laura Sunstein Murphy v. PECO Energy Co.*, C-2015-2475726, and *Cynthia Randall and Paul Albrecht v. PECO Energy Co.*, C-2016-2537666.<sup>2</sup>

12. On October 16, 2020, West Penn filed its status report as directed by the July 30, 2020, Interim Order. West Penn advised, inter alia, that Complainants failed to provide their witness information as directed.

13. On November 4, 2020, the Commission entered an Order and Notice on November 4, 2020 at Docket No. M-2009-2092655, pursuant to 66 Pa.C.S. § 501, instituting a stay of certain formal complaint proceedings then-pending before the Commission involving challenges to EDC

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<sup>2</sup> *Povacz v. Pa. PUC*, 241 A.3d 481, 495 (Pa. Cmwlth. 2020) ("*Povacz I*").

deployment of smart meter technology as being in violation of Section 1501 of the Code (“November 4, 2020 Stay Order”). The November 4, 2020 Stay Order also directed that the stay would apply to any new formal complaints filed with the Commission claiming that EDC deployment of smart meter technology was a violation of Section 1501, and that the stay would remain in place until it was lifted by further Commission action. The November 4, 2020 Stay Order applied to and was docketed at the instant case.

14. The Commission, as well as all other parties in *Povacz I*, subsequently sought and were granted review of the Commonwealth Court’s *Povacz I* decision by the Supreme Court of Pennsylvania (“PA Supreme Court” or “Supreme Court”). Previously, the Commonwealth Court stayed the proceedings in several other unconsolidated appeals that raised the same, or similar, smart meter issues pending its disposition of *Povacz I*. Upon application by the Commission, the Commonwealth Court continued the stay of these appeals pending the Supreme Court’s disposition of *Povacz II*.

15. On August 16, 2022, the PA Supreme Court issued an Opinion and Order.<sup>3</sup> Since the Supreme Court’s issuance of its *Povacz II* decision, the Commonwealth Court has lifted the stays on the remaining unconsolidated smart meter appeals and directed the parties to submit briefs, supplemental briefs, and other appropriate filings as warranted. The Commonwealth Court has ultimately affirmed the Commission in several unpublished and published opinions.<sup>4</sup>

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<sup>3</sup> *Povacz, et al. v. Pa. Public Utility Commission*, 280 A.3d 975 (Pa. 2022) (“*Povacz II*”).

<sup>4</sup> See *Hoffman-Lorah v. Pa. Pub. Util. Comm’n*, 2023 Pa. Cmwlth. Unpub. LEXIS 325, 2023, WL 4144399; *Branagh v. Pa. Pub. Util. Comm’n*, 2023 Pa. Cmwlth. Unpub. LEXIS 352, 2023, WL 4363414; *Hess v. Pa. Pub. Util. Comm’n*, 2023 Pa. Cmwlth. Unpub. LEXIS 371, 2023, WL 4540460; *Mary Paul v. Pa. Pub. Util. Comm’n*, No. 460 C.D. 2019, 2023 Pa. Cmwlth. LEXIS 113; *Schmukler v. Pa. Pub. Util. Comm’n*, No. 1102 C.D. 2019, 2023 Pa. Commw. LEXIS 136. The following smart meter appeals were dismissed by the Commonwealth Court on procedural grounds: *Sunstein v. Pa. Pub. Util. Comm’n*, No. 1581 C.D. 2019; *Ulmer v. Pa. Pub. Util. Comm’n*, No. 967 C.D. 2020; and *Lucey v. Pa. Pub. Util. Comm’n*, No. 1212 C.D. 2020.

16. Given the Supreme Court's decision in *Povacz II*, the Commission lifted the stay implemented by the November 4, 2020, Stay Order on November 9, 2023. The Commission entered an Order at Docket No. M-2009-2092655, explaining that cases pending before the Office of Administrative Law Judge, such as the instant case, would proceed as directed by the assigned presiding officer.

17. On November 23, 2023, an Assignment Notice was issued informing the parties that the Presiding Officer in this instant proceeding has been changed from ALJ Watson to ALJ DeVoe.

18. On November 28, 2023, ALJ DeVoe issued an Interim Order compelling the Complainants to provide their expert witness information by December 22, 2023.

19. The Complainants failed to provide their witness information as directed.

20. West Penn herein files this Motion for Summary Judgment and respectfully requests that the Formal Complaint be dismissed in its entirety and with prejudice because the Complainants failed to indicate they will be providing any expert testimony in support of their claims and, therefore, will be unable to sustain their burden of proof at the evidentiary hearing.

## **II. LEGAL STANDARDS**

### **A. BURDEN OF PROOF**

21. On August 16, 2022, the Pennsylvania Supreme Court issued its Opinion affirming in part and reversing in part the Commonwealth Court's decision in *Povacz I*.<sup>5</sup>

22. Specifically, the Supreme Court in *Povacz II* held that: (1) Act 129 mandates the systemwide installation of smart meters; (2) the PUC applied the correct burden of proof standard in the smart meter complaint cases arising under Section 1501 of the Public Utility Code; (3) an

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<sup>5</sup> See *Povacz II*.

electric distribution company cannot be required to provide an accommodation to a customer absent a Section 1501 violation; and (4) even if a smart meter Complainants meets their burden of proof, the Complainants are only “entitled to an accommodation to the extent allowed by Act 129 and a utility’s tariff.”<sup>6</sup>

23. The Supreme Court noted that while Act 129 does not provide customers with the right to opt-out of smart meter installation at their residence, they may file a complaint with the Commission raising a claim that installation of a smart meter violates Section 1501 of the Code, 66 Pa.C.S. § 1501. The Supreme Court reiterated that Complainants seeking relief from the Commission must satisfy their burden of proof by a preponderance of the evidence. The Supreme Court explained that inconclusive evidence – evidence that does not lead to a conclusion of a definite result one way or the other – does not meet even the minimal requirements of the preponderance of the evidence standard.<sup>7</sup> The Supreme Court opined that while a customer’s evidence does not need to prove their assertion beyond any doubt, evidence of a mere possibility that harm could result is insufficient to satisfy the preponderance of the evidence standard.<sup>8</sup>

24. The PA Supreme Court opined in *Povacz II* that the burden of proof is two-fold for Section 1501 claims involving the safety of smart meters and radiofrequency (“RF”) emissions. First, a customer must present expert opinion rendered to a reasonable degree of scientific certainty that radio frequency emissions from smart meters cause adverse health effects. Next, a customer must present expert opinion rendered to a reasonable degree of medical certainty that RF emissions from the smart meters, either alone or cumulative to other sources of RF emissions, caused them harm. The PA Supreme Court concluded that neither fear nor inconclusive scientific research was

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<sup>6</sup> *Id.* at 1012-1014.

<sup>7</sup> *Id.* at 1005.

<sup>8</sup> *Id.* at 1008.

sufficient to prove that smart meter technology constitutes unsafe service under Section 1501.<sup>9</sup> The PA Supreme Court held that if a customer establishes by a preponderance of the evidence, based on the totality of the circumstances, that smart meter service violates Section 1501, they are entitled to an accommodation to the extent allowed by Act 129 and a utility's tariff. However, given that Act 129 mandates smart meter deployment, the PA Supreme Court clarified that such accommodation may not rise to the level of an opt-out from smart meter installation.<sup>10</sup>

## **B. STANDARD FOR SUMMARY JUDGMENT**

25. Section 5.102 of the Commission's regulations provides the Commission's standard of review for a request for summary judgment:

(1) Standard for grant or denial on all counts. The presiding officer will grant or deny a motion for judgment on the pleadings or a motion for summary judgment, as appropriate. The judgment sought will be rendered if the applicable pleadings, depositions, answers to interrogatories and admissions, together with affidavits, if any, show that there is no genuine issue as to a material fact and that the moving party is entitled to a judgment as a matter of law.

(2) Standard for grant or denial in part. The presiding officer may grant a partial summary judgment if the pleadings, depositions, answers to interrogatories and admissions, together with affidavits, if any, show that there is no genuine issue as to a material fact and that the moving party is entitled to a judgment as a matter of law on one or more but not all outstanding issues.

52 Pa. Code § 5.102(d)(1)-(2).

26. The Commission is granted discretion to dismiss any complaint without a hearing if, in its opinion, a hearing is not necessary in the public interest.<sup>11</sup> A hearing is necessary only to

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<sup>9</sup> *Id.* at 1005.

<sup>10</sup> *Id.* at 1015.

<sup>11</sup> 66 Pa.C.S. § 703(b); 52 Pa. Code § 5.21(d).

resolve disputed questions of fact, and when the question presented is one of law, the Commission need not hold a hearing.<sup>12</sup>

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<sup>12</sup> *Lehigh Valley Power Comm. v. Pa. Pub. Util. Comm'n*, 563 A.2d 548 (Pa. Cmwlth. 1989); *Edan Transp. Corp. v. Pa. Pub. Util. Comm'n*, 623 A.2d 6 (Pa. Cmwlth. 1993).

### **III. ARGUMENT**

#### **A. THE FORMAL COMPLAINT SHOULD BE DISMISSED BECAUSE THE COMPLAINANTS FAILED TO CARRY THEIR BURDEN OF PROOF**

27. West Penn incorporates by reference Paragraphs 1 through 28 as if fully set forth herein.

28. West Penn respectfully requests that the Formal Complaint be dismissed in its entirety and with prejudice due to the Complainants' inability to carry their burden of proof in support of their claims.

29. In its ruling in *Povacz II*, the PA Supreme Court held that Act 129 mandates the systemwide installation of smart meters.<sup>13</sup> The PA Supreme Court noted in *Povacz II* that while Act 129 does not provide customers with the right to opt-out of smart meter installation at their residence, they may file a complaint with the Commission raising a claim that installation of a smart meter violates 66 Pa.C.S. § 1501.

30. The PA Supreme Court opined in *Povacz II* that the burden of proof is two-fold for Section 1501 claims involving the safety of smart meters and RF emissions. First, a customer must present expert opinion rendered to a reasonable degree of scientific certainty that radio frequency emissions from smart meters cause adverse health effects. Next, a customer must present expert opinion rendered to a reasonable degree of medical certainty that RF emissions from the smart meters, either alone or cumulative to other sources of RF emissions, caused them harm.

31. *Povacz II* further affirmed that a Complainant's burden of proof is satisfied by establishing a preponderance of evidence which is substantial and legally credible.<sup>14</sup> The PA Supreme Court in *Povacz II* opined that while a customer's evidence does not need to prove their

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<sup>13</sup> See *Povacz II* at 1012-1014.

<sup>14</sup> *Povacz II* at 1012-14.

assertion beyond any doubt, evidence of a mere possibility that harm could result is insufficient to satisfy the preponderance of the evidence standard.<sup>15</sup>

32. Here, the Complainants raised concerns regarding the safety of smart meters and expressed their concerns that smart meter installation could affect their current medical conditions.<sup>16</sup>

33. As a matter of law, the Company is required to install a smart meter at the Service Location.

34. However, the Complainants have refused access to permit the installation of a smart meter at the Service Location and do not currently have a smart meter installed.<sup>17</sup>

35. Moreover, the Complainants have failed to indicate they plan to provide any expert testimony evidencing, to a reasonable degree of scientific certainty, that smart meters emit a radio frequency and that such an emission would be a violation of 66 Pa.C.S. § 1501.

36. Rather, the Complainants are expected simply proffer lay opinions and beliefs, or perceptions as to the effects RFs may have to their health, which do not constitute evidence.<sup>18</sup>

37. As a result, the Complainants' layperson claims that they would be adversely affected by a smart meter cannot demonstrate that West Penn would violate the Public Utility Code or a regulation or order of the Commission by installing a smart meter at the service location and that West Penn, by virtue of installing a smart meter at the service location, would provide unsafe or unreasonable service in violation of 66 Pa.C.S. § 1501.

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<sup>15</sup> *Id.* at 1008.

<sup>16</sup> *See* Formal Complaint of Complainants (Nov. 26, 2019).

<sup>17</sup> *See* Answer and New Matter to the Complaint of the Respondent (Dec. 16, 2019).

<sup>18</sup> *Pa. Bureau of Corr. v. City of Pittsburgh*, 532 A.2d 12 (Pa. 1987).

38. As the party with the burden of proof,<sup>19</sup> the Complainants are required to establish a *prima facie* case that the Company's installation of a smart meter violates 66 Pa.C.S. § 1501. As such, the Complainants' requested relief in the instant matter, i.e., keeping the "analog" meter currently installed at the Service Location, is inconsistent with the Public Utility Code, the Commission's orders and regulations, West Penn's Smart Meter Deployment Plan, and West Penn's Commission-approved tariff and, therefore, cannot be granted by the Commission – particularly without the submission of credible and compelling expert testimony.

39. This request for an accommodation is essentially a request to opt out of smart meter installation, which is simply not possible. Consistent with the Court's ruling in *Povacz II*, West Penn customers, such as the Complainants, may only receive a smart meter related accommodation ordered by the Commission if they are able to establish a violation of Section 1501 of the Public Utility Code.

40. None of the arguments of the Complainants can advance as laypeople at hearing will demonstrate, by preponderance of the evidence, that installation of a smart meter at the Service Location would become an unsafe or unreasonable service in violation of 66 Pa.C.S. §1501.

41. Under Section 5.102(d)(1) of the Commission's regulations, summary judgment will be granted if there is no genuine issue as to a material fact and that the moving party is entitled to a judgment as a matter of law.<sup>20</sup>

42. Due to the Complainants' failure to present any expert evidence in support of their claims, there are no material facts in dispute.

43. Here, the Complainants have the burden of proof to demonstrate that the installation of West Penn's smart meter would violate the Public Utility Code or a Commission regulation or

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<sup>19</sup> See Section II.A., *supra*.

<sup>20</sup> 52 Pa. Code § 5.102(d)(1).

order. However, the Complainants failed to provide notification of their expert and factual witnesses as required. Therefore, the Complainants will be unable to effectively advance their direct case and meet their burden of proof.

44. In sum, the Complainants were able to and should have served notice of their planned factual and expert testimony. By failing to do so, the Complainants have demonstrated that they will fail to carry their burden of proof at hearing, and their Formal Complaint should be dismissed accordingly.

45. For these reasons, there are no material facts in dispute, and West Penn is entitled to judgment as a matter of law. Thus, the Company respectfully requests that ALJ DeVoe grant the instant Motion for Summary Judgment and summarily dismiss the Formal Complaint in its entirety and with prejudice.

**IV. CONCLUSION**

WHEREFORE, West Penn Power Company respectfully requests that Administrative Law Judge Emily DeVoe enter an Order granting the Motion for Summary Judgment and dismissing the Formal Complaint with prejudice, as explained above.

Respectfully submitted,



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Date: January 10, 2024

Attorneys for West Penn Power Company

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

**GREGORY AND DONNA KOLLMAR** :  
 :  
 v. : **Docket No. C-2019-3014650**  
 :  
**WEST PENN POWER COMPANY** :

**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served a true copy of the Motion of West Penn Power Company for Summary Judgement upon the individuals listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant).

Service by First Class Mail, postage prepaid, as follows:

Gregory and Donna Kollmar  
1749 Freeport Road  
Arnold, PA 15068

Dated: January 10, 2024



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