



2800 Pottsville Pike
PO Box 16001
Reading, PA 19612-6001

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

January 12, 2024

VIA ELECTRONIC FILING

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

Re: Andrew Sabatini and Theresa Sabatini v. West Penn Power Company
Docket No. C-2018-3005177

Dear Secretary Chiavetta:

Enclosed please find the Main Brief of West Penn Power Company 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,

Tori L. Giesler

mlr
Enclosures

c: As Per Certificate of Service

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

**ANDREW SABATINI AND THERESA
SABATINI**

v.

WEST PENN POWER COMPANY

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Docket No. C-2018-3005177

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



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: January 12, 2024

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I. PROCEDURAL HISTORY

On October 7, 2018, Andrew and Theresa Sabatini (“Complainants”) filed the above-captioned Formal Complaint against West Penn Power Company (“West Penn” or the “Company”) with the Pennsylvania Public Utility Commission (“Commission”) regarding the Company’s planned installation of a smart meter at 120 Fawn Lane, Acme, Pennsylvania 15610 (“Service Location”). In sum, the Complainants requested that they be permitted to retain their analog electric meter, as they did not want an electric smart meter installed by West Penn at the Service Location.

On October 29, 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.

On November 6, 2018, the Complainants filed a Reply to the Company’s Preliminary Objections.

On November 18, 2018, the Complainant filed a reply to the Company’s Answer and New Matter.

On November 26, 2018, a Motion Judge Assignment Notice was issued where the parties were informed that the Administrative Law Judge (“ALJ”) Jeffrey A. Watson had been assigned to rule on the Company’s Preliminary Objections.

On December 19, 2018, ALJ Watson issued an Interim Order which denied the Company’s Preliminary Objections.

Also on December 19, 2018, ALJ Watson issued an Interim Order establishing a litigation schedule. ALJ Watson directed the parties to exchange fact and expert witness information with each other by February 14, 2019, conclude discovery by April 15, 2019, and file a status report by

May 2, 2019. The Interim Order also provided information about the procedural rules of the Commission.

On January 15, 2019, in accordance with 52 Pa. Code § 5.341, the Company forwarded to the Complainant interrogatories and requests for production of documents (“Discovery Requests”) via first class mail.

On February 4, 2019, ALJ Watson received a letter from the Complainants dated January 29, 2019, requesting an extension of 90 days to respond to the discovery requests propounded by West Penn.

In response to that request, on February 12, 2019, ALJ Watson directed the Complainants to serve objections to specific discovery requests and file a certificate of service with the Commission by March 7, 2019. ALJ Watson further directed the Complainants to provide full and complete responses to all of West Penn’s discovery requests and file a certificate of service with the Commission by March 14, 2019.

On April 23, 2019, West Penn filed a Motion to Compel Responses to Interrogatories and Document Requests.

On May 1, 2019, ALJ Watson issued an Interim Order denying the Complainants’ objections to West Penn’s discovery requests, granting the Motion to Compel, and directing the Complainants to file full and complete responses to all of the discovery requests by May 17, 2019.

On May 2, 2019, the Complainants filed a response to the Company’s Motion to Compel.

Also on May 2, 2019, West Penn filed a status report advising that the Complainants had failed to provide witness identification information to West Penn and recommending that a prehearing conference be scheduled.

On May 13, 2019, ALJ Watson issued an Interim Order reconsidering the Company’s Motion to Compel in light of the Complainants’ response filed on May 2, 2019. In that Interim

Order, ALJ Watson again granted West Penn's Motion to Compel and directed the Complainants to serve full and complete responses to West Penn's discovery requests by May 29, 2019.

On May 29, 2019, ALJ Watson issued another Interim Order again reconsidering the Motion to Compel. ALJ Watson again granted the Motion to Compel and directed the Complainants to serve full and complete responses to the discovery requests by June 13, 2019.

Further, on June 3, 2019, a Prehearing Conference was scheduled for June 26, 2019, by an Interim Order dated June 3, 2019, and a Notice dated June 4, 2019.

On June 6, 2019, the Complainants served responses to West Penn's outstanding discovery requests.

On June 20, 2019, the Complainants filed an Amended Formal Complaint, alleging, among other things, that West Penn's proposal to install a smart meter at their Service Location violates the regulations of the Federal Communications Commission or, in the alternative, requesting that the Commission allow the Complainants to keep their analog meter "until the final days of [the] alleged 15 year 'smart meter' deployment mandate, in 2023, to grant [them] time required for legislative correction of Act 129's implementation according to its original purpose and intent."¹

On June 26, 2019, a Prehearing Conference was held. There, the parties addressed the litigations schedule, among other things.

On July 1, 2019, ALJ Watson served an Interim Order directing the parties to file a status report, either jointly or separately, by report by July 10, 2019, to indicate their agreed upon stipulations, if any, and provide dates for an evidentiary hearing, should one be necessary.

On July 10, 2019, West Penn filed an Answer and New Matter to the Amended Complaint.

Also on July 10, 2019, the Complainants filed a status report stating that they were in need of an extension of the previously established litigation schedule. West Penn filed a separate status

¹ Amended Complaint ¶ II.

report that same day, indicating that the Complainants had not submitted their witness notification(s) as directed.

On July 12, 2019, West Penn filed another status report.

On August 22, 2019, ALJ Watson issued another Interim Order extending the deadlines for the Complainants to exchange witness information and conduct discovery. Pursuant to that Interim Order, the parties were directed to exchange fact and expert witness information by September 20, 2019, and conclude discovery by October 10, 2019.

On October 22, 2019, West Penn filed another status report advising ALJ Watson that the Complainants still had not provided witness information, among other things.

On October 24, 2019, ALJ Watson issued an Interim Order scheduling an in person evidentiary hearing for December 11, 2019.

On November 25, 2019, West Penn served its proposed Hearing Exhibits.

On December 3, 2019, the Complainants requested a continuance of the December 11, 2019 Evidentiary Hearing and an extension of the litigation schedule.

On December 4, 2019, ALJ Watson issued an Interim Order, which held that the Complainants established good cause to continue the Evidentiary Hearing, but failed to establish good cause for another extension of the litigation schedule. As such, ALJ Watson denied the Complainants' request to further extend the litigation schedule, continued the Evidentiary Hearing, and directed the parties to meet and confer regarding a new hearing date, with a Status Report due by December 16, 2019.

On December 5, 2019, the Commission issued a Hearing Cancellation Notice, formally cancelling the December 11, 2019 Evidentiary Hearing.

On December 16, 2019, West Penn filed a status report.

Also on December 16, 2019, ALJ Watson received correspondence from the Complainants requesting reconsideration of their request for an extension of the litigation schedule.

On December 26, 2019, ALJ Watson issued an Interim Order denying the Complainants' request.

On January 13, 2020, the Complainants filed a request directed to the Commission's Secretary's Bureau to extend the litigation schedule in order to secure legal representation.

On January 22, 2020, the Commission issued a Hearing Notice, scheduling an in-person Evidentiary Hearing for February 20, 2020.

On January 24, 2020, ALJ Watson issued an Interim Order, denying the Complainants' request to further delay the evidentiary hearing.

On January 30, 2020, the Complainants filed a second request to delay the evidentiary hearing in order to secure legal representation. ALJ Watson did not issue an Interim Order on Complainants second request.

On February 20, 2020, the Evidentiary Hearing convened as scheduled. At the conclusion of the Evidentiary Hearing, ALJ Watson set a briefing schedule wherein the parties' respective Main Briefs were due on May 18, 2020.

On April 7, 2020, ALJ Watson issued an Interim Order, revising the deadline for briefs and directing parties to file briefs, if any, by May 29, 2020.

On May 22, 2020, Complainants filed a request to extend the briefing schedule due to their inability to access the transcript due to the closure of the Commission's offices as a result of the Covid-19 pandemic.

On June 29, 2020, the transcript for the February 20, 2020 Evidentiary Hearing was filed with the Commission.

On July 2, 2020, the Complainants filed a request to further extend the deadline for the filing of briefs, again due to their inability to access the transcript.

On July 8, 2020, ALJ Watson issued an Interim Order, further extending the deadline to file briefs to September 1, 2020.

On August 25, 2020, the Complainants again submitted a request to further extend the deadline to file briefs.

On October 20, 2020, ALJ Watson issued an Interim Order, further extending the deadline to file briefs to December 18, 2020.

On November 4, 2020, the Commission issued an Order at Docket No. M-2009-3092655, staying all smart meter related Formal Complaint proceedings, like the instant Complaint. This proceeding was stayed pending the Pennsylvania Supreme Court's disposition of the appeals concerning the Commonwealth Court's decision in *Povacz v. Pa. PUC*, 241 A.3d 481 (Pa. Cmwlth. 2020).

On August 16, 2022, the Pennsylvania Supreme Court issued its Opinion affirming in part and reversing in part the Commonwealth Court's decision.² Specifically, in *Povacz*, the Court held that: (1) Act 129 of 2008 ("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 electric distribution company ("EDC") cannot be required to provide an accommodation to a customer absent a Section 1501 violation; and (4) even if a smart meter complainant meets their burden of proof, the complainant is only "entitled to an accommodation to the extent allowed by Act 129 and a utility's tariff."³

² See *Povacz v. Pa. PUC*, 280 A.3d 975 (Pa. 2022) ("*Povacz*").

³ See *id.*, at 1014.

On November 9, 2023, the Commission issued an Order at Docket No. M-2009-3092655, lifting the stay in certain smart meter related Formal Complaint proceedings, like the instant Complaint.

On November 27, 2023, the Commission issued a Judge change Notice reassigning the instant matter to ALJ Emily I. DeVoe.

On December 5, 2023, ALJ DeVoe issued an Interim Order Extending the Deadline to File Main Briefs and Setting Deadline to File any Appropriate Motions to January 12, 2024, and also directing that no Reply Briefs will be accepted in this proceeding. West Penn submits this Main Brief pursuant to the December 5, 2023, Interim Order.

II. LEGAL STANDARDS

Under Section 332(a) of the Public Utility Code, the Complainants maintain the burden of proof in this proceeding.⁴ 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 Complainants establish a *prima facie* case does it become the responsibility of the respondent to provide rebuttal evidence.⁵ 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.⁶ Mere bald assertions, personal opinions or perceptions, when not substantiated by facts, do not constitute evidence.⁷

Although the factual burden may shift during a proceeding, the Complainants always maintain the overarching burden of proof. It is clearly established that the Complainants' "burden of proof before administrative tribunals as well as before most civil proceedings is satisfied by

⁴ 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).

⁵ *Waldron v. Phila. Elec. Co.*, 54 Pa. P.U.C. 98 (Order entered Mar. 14, 1980).

⁶ *Norfolk and Western Ry. v. Pa. Pub. Util. Comm'n*, 413 A.2d 1037 (Pa. 1980).

⁷ *Pa. Bureau of Corrections v. City of Pittsburgh*, 532 A.2d 12 (Pa. 1987).

establishing a preponderance of the evidence.”⁸ 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.⁹

In order for the Commission to sustain a formal complaint, the Complainants 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.”¹⁰ 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.”¹¹ 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 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.¹² Relatedly, the Court in *Povacz* made clear that Act 129 does not provide customers with the right to opt-out of smart meter installation at their residence, and that complainants seeking smart meter related relief must carry a two-fold burden of proof for Section 1501 claims involving the safety of smart meters and radio-frequency (“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,

⁸ *Lansberry*, 578 A.2d at 602.

⁹ *Pa. Pub. Util. Comm’n v. HIKO Energy, LLC*, 2015 Pa. PUC LEXIS 364 (I.D. entered Aug. 21, 2015), *supra*.

¹⁰ 66 Pa.C.S. § 701.

¹¹ 66 Pa.C.S. § 1501.

¹² *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).

caused them harm. The utility may then refute the customer's evidence by providing scientific and/or medical expert testimony that, within a reasonable degree of certainty, the RF emissions from smart meters did not cause the alleged harm.¹³ Once the parties have presented their evidence, the onus then falls on the ALJ to weigh the evidence and determine whether it is more likely than not that the smart meter caused the customer harm.¹⁴ The Supreme Court concluded that neither fear nor inconclusive scientific research was sufficient to prove that smart meter technology constitutes unsafe service under Section 1501.¹⁵ Further, the 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 may be entitled to an accommodation to the extent allowed by Act 129 and a utility's tariff.¹⁶

III. SUMMARY OF ARGUMENT

The Complainants wholly failed to meet their burden of proof that the installation of a smart meter at the 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").¹⁷ Neither Act 129 nor subsequent Commission orders related to smart meter installation and deployment permit customers to "opt-out" from smart meter installation.¹⁸ Further, both Act 129 and the Commission's Implementation Order require that EDCs install wireless smart meters with specific functionality. West Penn's smart meters adhere to the requirements of Act 129 and the Commission. The smart meter components and

¹³ *Povacz*, at 1008.

¹⁴ *Povacz*, at 1006.

¹⁵ *Povacz*, at 1005.

¹⁶ *Povacz*, at 1015.

¹⁷ 66 Pa.C.S. § 2806.1, *et seq.*

¹⁸ *Id.*; see *Smart Meter Procurement and Installation*, Docket No. M-2009-2092655 (Order entered June 24, 2009) ("Implementation Order").

deployment of smart meters in West Penn's territory were identified in West Penn's Smart Meter Deployment Plan, which was ultimately approved by the Commission on June 20, 2014.¹⁹ West Penn will install a smart meter at the Complainants' Service Location in order to remain in compliance with Act 129, related Commission orders, and its Smart Meter Deployment Plan. Despite the Complainants' arguments otherwise, West Penn must install a smart meter at the Service Location, as it is required by Act 129, the Company's SMDP, and the Court's holding in *Povacz*.

In addition, the Complainants failed to establish that the installation of a smart meter constitutes unreasonable service. The Complainants' statements related to health and safety concerns should be rejected as unsupported allegations. The Complainants offered no credible or convincing evidence to support their allegations. Moreover, the Complainants' concerns regarding health and safety are based exclusively upon their own personal beliefs regarding smart meters. The Complainants were not qualified to offer expert testimony and did not present the testimony of an expert on their behalf. Furthermore, at the February 20, 2020 Evidentiary Hearing, the Complainants explicitly elected not to address health and safety concerns related to West Penn's planned installation of a smart meter at the Service Address in any depth. Instead, as explained by the Complainants:

[t]he reasons that [the Complainants] gave in [their] Formal Complaint were not these legal reasons that we presented today. The reasons that [the Complainants] have in [their] original Formal Complaint were matters of safety, matters of health, matters of constitutional infringement, matters of [...] [h]ealth, safety, constitutional rights, oh and privacy. Privacy. As [the Complainants] didn't address those today in this hearing because what [the Complainants] discovered very recently [...] was all of this stuff, underlying things about the law. And [the Complainants] decided that was more important to present. And so that is what has created this hearing the way it has gone.²⁰

¹⁹ *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").

²⁰ Tr. at 211.

Instead, the entirety of the Complainants' substantive record in this proceeding focused on the legislative intent behind, and the language of, Act 129. To the extent that the Complainants argue that Act 129 does not mandate the installation of smart meters at the Service Location, such a reading of Act 129 was flatly rejected by the Court in *Povacz*.²¹

Furthermore, because West Penn is not a state actor, it cannot violate the Complainants' alleged constitutional rights.²² Thus, any constitutional claims related to the mandated installation of a smart meter at the Service Address directed at West Penn are as inappropriate for this proceeding as they are meritless.

Additionally, the Complainants' claim that the installation of a smart meter at the Service Location would violate the regulations of the Federal Communications Commission ("FCC") is meritless and should be denied. Indeed, the Complainants failed to offer any testimony or exhibits on this contention – raised for the first time in their June 20, 2019, Amended Complaint – whatsoever at the Evidentiary Hearing, thus, the record is devoid of any substance to support the Complainants' allegations related to the FCC and its unidentified, extra-record regulations.

The evidence of record and the applicable law weighs heavily against the Complainants' allegations and assertions. Indeed, the lay testimony offered by the Complainants should carry little, if any, weight. Furthermore, the thrust of the Complainants' argument(s) – the extent any were presented – focused on the legal directive(s) of Act 129,²³ and the Complainants' attempts to question West Penn's Counsel and ALJ Watson on their respective understandings of the law and ethical duties.²⁴ Although the Pennsylvania Rules of Evidence are not strictly adhered to at

²¹ *Povacz*, at 992 (“Our comprehensive reading of Act 129 leads us to conclude that the statute is not ambiguous and that Section 2807(f)(2) imposes a mandate on EDCs to furnish smart meter technology to all electric customers within an electric distribution service area, regardless of a customer's preference.”)

²² *Povacz v. Pa. PUC*, 241 A.3d 481, 486 n.9 (Pa. Cmwlth. 2020).

²³ Tr. 124-126, 138-139, 182.

²⁴ Tr. 122-123, 149-150, 152, 154.

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.”²⁵ 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.²⁶ As such, all lay testimony from the Complainants 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. Moreover, the overwhelming majority of the Complainants’ on-record presentation was expressly rebuffed by the Court in *Povacz*.²⁷

In sum, the Complainants failed to establish by a preponderance of the evidence that West Penn violated a Commission statute, regulation, or order. Specifically, the Complainants have not met their burden of proof that the installation of a smart meter constitutes unreasonable service by the Company. Accordingly, West Penn respectfully urges the Commission to dismiss the Complaint with prejudice.

IV. ARGUMENT

A. THE SUPREME COURT’S *POVACZ* DECISION RENDERS THE COMPLAINT MOOT AND, EVEN IF NOT MOOT, DISPOSES OF THE SUBSTANTIVE ISSUES IN THIS COMPLAINT PROCEEDING.

West Penn respectfully submits that the Complaint should be dismissed because the Supreme Court’s decision in *Povacz* renders this complaint proceeding moot and, even if not moot, disposes of the substantive issues in this proceeding.

In *Povacz*, the Pennsylvania Supreme Court held that: (1) Act 129 mandates the systemwide installation of smart meters; (2) the PUC applied the correct burden of proof standard

²⁵ *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).

²⁶ Pa.R.E. 701.

²⁷ See fn. 20, *supra*.

in the smart meter complaint cases arising under Section 1501 of the Public Utility Code; (3) an EDC cannot be required to provide an accommodation to a customer absent a Section 1501 violation; and (4) even if a smart meter complainant meets their burden of proof, the complainant is only “entitled to an accommodation to the extent allowed by Act 129 and a utility’s tariff.”²⁸

As explained in the following sections, the instant Complaint is now moot and, even if it were not moot, the *Povacz* decision disposes of the substantive issues before the Commission.

1. The Instant Complaint Is Moot.

The Supreme Court’s *Povacz* decision has rendered the instant complaint moot. Consistent with the Court’s ruling in *Povacz*, 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. *See* 66 Pa.C.S. § 1501. Moreover, under *Povacz*, smart meter related accommodations available to a West Penn customer must be consistent with West Penn’s Commission-approved tariff.

It is well-established that dismissal on mootness grounds is appropriate “unless an actual case or controversy exists at all stages of the judicial or administrative process.”²⁹ “Where ‘intervening changes in the factual matrix of a pending case’ occur which eliminate an actual controversy and make it impossible for the court to grant the requested relief, the case will be dismissed as moot.”³⁰ Moreover, “[a]n issue before the court is moot if, in ruling upon the issue, the court cannot enter an order that has any legal force or effect.”³¹ The only “limited exceptions” to the mootness doctrine are when: (1) “the conduct complained of is capable of repetition yet

²⁸ *See Povacz*, at *74-79.

²⁹ *Burns v. Dep’t of Human Servs.*, 190 A.3d 758, 762 (Pa. Cmwlth. 2018) (citing *Luzerne Cnty. Children & Youth Servs. v. Dep’t of Pub. Welfare*, 826 A.2d 84, 86 (Pa. Cmwlth. 2003)).

³⁰ *Pagnotta v. Pa. Interscholastic Ath. Ass’n*, 681 A.2d 235, 237 (Pa. Cmwlth. 1996) (emphasis added) (quoting *Zemprelli v. Thornburgh*, 466 A.2d 1123, 1124 (Pa. Cmwlth. 1983)).

³¹ *Burns*, 190 A.3d at 762 (citation omitted).

evading review”; (2) the case “involves questions important to the public interest”; or (3) “one party” will “suffer some detriment without the Court’s decision.”³²

Here, the Complaint is moot because it is impossible for the Commission to grant the Complainants’ request for an opt-out of the smart meter. The Supreme Court held that Act 129 mandates the installation of smart meters and that even if a complainant establishes that the smart meter’s installation would violate Section 1501 of the Public Utility Code, the Complainants are only “entitled to an accommodation to the extent allowed by Act 129 and a utility’s tariff.”³³ The only accommodation permitted under West Penn’s PUC-approved tariff is installing the smart meter at a different location at the customer’s expense.³⁴ This option has been available to the Complainants throughout this proceeding.

However, the Complainants request that they be granted an opt-out of the smart meter’s installation entirely, which the Supreme Court held in *Povacz* is not permissible. Moreover, nothing in Act 129 or the Company’s PUC-approved tariff provides an opt-out of the smart meter’s installation as an available accommodation. Therefore, the Complaint is moot because it is impossible for the Commission to grant the Complainants’ requested relief.

Further, none of the three exceptions to the mootness doctrine apply here. First, the conduct complained of is not capable of repetition yet evading review. In fact, both the Commonwealth Court and the Supreme Court already reviewed the legal issues raised by EDCs installing smart meters in the *Povacz* proceeding.

³² *Driscoll v. Zoning Bd. of Adjustment*, 201 A.3d 265, 269 (Pa. Cmwlth. 2018) (quoting *Clinkscale v. Dep’t of Pub. Welfare*, 101 A.3d 137, 139 (Pa. Cmwlth. 2014)).

³³ *Povacz*, 1014.

³⁴ West Penn Tariff Rule 4, Electric Pa. P.U.C. No. 40, Original Page 36. (“A Customer desiring the removal, relocation or change of Company facilities or interruption shall submit a request to the Company. The Company may accept or reject said request in its sole and exclusive discretion. If the Company accepts said request, the Customer shall pay in advance the Company’s total estimated cost for any Customer requested temporary interruption in the Customer’s service due to construction, maintenance or other activities.”)

Second, the instant complaint does not involve questions important to the public interest. Indeed, the only issue raised by this Complaint that arguably rises to the level of public importance, *i.e.*, whether Act 129 mandates the installation of smart meters, was resolved by the Pennsylvania Supreme Court in *Povacz*.

Third, the Complainants will not suffer a detriment without the Commission's decision on the merits of the Complaint. Indeed, the Complainants have had a full and fair opportunity to fully litigate the claims related to their Complaint prior to the Court's decision in *Povacz*. Indeed, as explained at further length in Section IV.B.(1)-(2), *infra*, the Complainants utterly failed to establish that the smart meter's installation and retention would cause them any harm. Also, under the Supreme Court's ruling in *Povacz*, Act 129 requires the Company to install smart meters for all of its customers, including the Complainants. The only accommodation that West Penn can offer the Complainants, even if they prevail in this Complaint, is the accommodation set forth in the Company's PUC-approved tariff, *i.e.*, relocating the meter's location at the customer's expense. As noted previously, that accommodation has been and remains available to the Complainants regardless of whether they prevail in this complaint proceeding. Thus, with or without the Commission sustaining or dismissing the Complaint, the Complainants will be in the same situation.

For these reasons, West Penn respectfully submits that the Commission should dismiss the Complainants' Complaint as moot.

2. Even if the Instant Complaint Were Not Moot, the *Povacz* Decision Disposes of the Substantive Issues before the Commission.

Even if the Complaint was not moot, the *Povacz* decision resolved the substantive issues in this proceeding.

First, the *Povacz* decision resolved the issue of whether West Penn is required by Act 129 to install smart meters for all of its customers, including the Complainant. In *Povacz*, the Supreme

Court “conclude[d] that Act 129 does mandate that EDCs,” like West Penn, “furnish smart meters to all electric customers within an electric distribution service area and does not provide electric customers the ability to opt out of having a smart meter installed.”³⁵ Moreover, even “[i]f the 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.”³⁶ Nothing in the Company’s tariff permits an opt-out of the smart meter’s installation. The only accommodation set forth in the Company’s tariff is for the meter to be relocated to a different location and for the customer to pay for the estimated relocation costs.³⁷ As a result, West Penn must install smart meters for all of its customers, including the Complainants, under Act 129.

Second, the Supreme Court’s decision resolved any issue about the Commission’s burden of proof standard in smart meter complaint cases, which requires complainants to prove, by a preponderance of the evidence, that there was a “conclusive causal connection” between the smart meters’ RF emissions and adverse health effects. As noted by the Supreme Court, the Commission has been using the “conclusive causal connection” standard in RF emission cases “for almost three decades.”³⁸ In these types of cases “where scientific evidence is required to establish the safety of a service or facility, use of the evidentiary standard of ‘conclusive causal connection’ to assess the evidence is correct.”³⁹

Third, the *Povac* decision resolved the Complainants’ claim that West Penn would violate their constitutional rights by installing the smart meter.⁴⁰ The Commonwealth Court previously

³⁵ *Povac*, 1014.

³⁶ *Id.*

³⁷ See note 34, *supra*.

³⁸ *Povac*, at 1004.

³⁹ *Id.*, 1007.

⁴⁰ West Penn notes that the Complainants included this allegation in their original Complaint, however, did not allege that the installation of a smart meter at the Service Address would violate their constitutional rights on-the-record at the February 20, 2020 Evidentiary Hearing.

found that “[c]onstitutional protections apply against state actors,” and “PECO is not a state actor in relation to its installation of smart meters and provision of electricity to its customers.”⁴¹ This finding was not disturbed by the Supreme Court’s *Povacz* decision. Therefore, because PECO and West Penn are similarly-situated EDCs, West Penn is not a state actor that can violate the Complainants’ constitutional rights.

For these reasons, the Supreme Court’s *Povacz* decision renders this complaint moot and, at the very least, disposes of the substantive issues in this matter.

B. EDCs MUST INSTALL SMART METERS FOR ALL CUSTOMERS.

In *Povacz*, the Supreme Court held that EDCs, such as West Penn, must install smart meters for all of their customers and that customers cannot opt out of the installations. Section 2807(f) of the Public Utility Code prescribes that EDCs, like West Penn, must file smart plans and “**shall** furnish smart meter technology” in any of the three situations outlined in Section 2807(f)(2).⁴² In interpreting the smart meter provisions of Act 129, the Commission correctly declared that EDCs must “deploy smart meters system-wide” because of the requirement in Section 2807(f)(2)(iii) that smart meters be deployed “in accordance with a depreciation schedule not to exceed 15 years.”⁴³ In other words, Section 2807(f)(2)(iii) directs EDCs to install new smart meters for all customers and to depreciate those meters over a 15-year period. The Commission also “recognize[d] that deployment of smart meters on a piecemeal or individual basis could involve greater costs than a systematic system-wide deployment.”⁴⁴ Relatedly, the Supreme Court explained in *Povacz* that “[i]f the General Assembly had intended to provide electric customers the ability to opt-out of

⁴¹ *Povacz v. Pa. PUC*, 241 A.3d 481, 486 n.9 (Pa. Cmwlth. 2020).

⁴² 66 Pa.C.S. § 2807(f)(1)-(2) (emphasis added).

⁴³ *Smart Meter Implementation Order*, p. 14.

⁴⁴ *Id.*, pp. 9, 14; see also *Springirth v. Nat’l Fuel Gas Distrib. Corp.*, 1991 Pa. PUC LEXIS 44, at *1-3, 6, 16-17 (Order entered Apr. 12, 1991) (dismissing complaint of customer seeking to make installation of automated meter reading devices optional, noting that the PUC previously found in another case that “[t]he customer should not be given the option of refusing installation of equipment” because “[t]o permit customer discretion in this area would be inefficient and uneconomical”) (quoting *Stenker v. The York Water Co.*, Docket No. C-871318 (Order entered July 27, 1987)).

smart meter installation, it would have used the same customer-choice language it used for the optional time-of-use rates and real-time price programs”⁴⁵

By way of additional background, on October 15, 2008, Act 129 was signed into law and codified as part of the Public Utility Code (“Code”).⁴⁶ 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.⁴⁷ 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.⁴⁸

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 and/or appellate court decisions related to smart meter installation and deployment permit customers to “opt-out” from smart meter installation. Consistent with this mandate, West Penn’s Commission-approved SMDP explicitly states that no opt-out option is available.⁴⁹ The Commission-approved SMDP mandates 100% of its meters to be replaced with smart meters. Therefore, the Complainants’ request for an opt out should be rejected.

Pursuant to Section 2807(f) of the Public Utility Code, West Penn jointly filed its Petition for Approval of Smart Meter Technology Procurement and Installation Plan with Metropolitan Edison Company, Pennsylvania Power Company and Pennsylvania Electric Company (together with West Penn collectively referred to hereafter as “the Companies”) on August 14, 2009 (“2009

⁴⁵ *Povacz*, at 999.

⁴⁶ 66 Pa.C.S. § 101, *et seq.*

⁴⁷ 66 Pa.C.S. § 2807(f); *see also* West Penn Exh. PD-2 .

⁴⁸ 66 Pa.C.S. § 2807(f)(2).

⁴⁹ *Smart Meter Deployment Plan*, at 9; *see also* West Penn Exh. PD-3.

SMP Plan”).⁵⁰ The Commission issued an Order on June 9, 2010, approving the 2009 SMP Plan with certain modifications.⁵¹ 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.⁵² On June 16, 2014, the Companies submitted their revised Smart Meter Deployment Plan, which *intra alia* accelerated the smart meter deployment schedule laid out in their original Deployment Plan.⁵³ Under the Revised Deployment Plan, the Companies proposed to deploy 170,000 smart meters by the end of 2015.⁵⁴ In its June 25, 2014 Opinion and Order, the Commission recognized the benefits of early deployment of smart meters and approved the revised Smart Meter Deployment Plan, stating:

[T]his Commission has already observed the benefits of early deployment. We find that the use of Penn Power as a case study may help the Companies identify other more cost-effective meter deployment strategies that can then be leveraged by FirstEnergy’s other operating companies. If deployment and operational savings prove very positive, FirstEnergy may also be able to further accelerate smart

⁵⁰ *Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company Approval of Smart Meter Technology Procurement and Installation Plan*, Docket No. M-2009-2123950 (Petition dated Aug. 10, 2009).

⁵¹ *Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company Approval of Smart Meter Technology Procurement and Installation Plan*, Docket No. M-2009-2123950 (Order entered June 9, 2010).

⁵² *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).

⁵³ *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).

⁵⁴ *Id.*

meter deployment, thus enabling an option to enhance customer savings even more.⁵⁵

In this proceeding, the Complainants have argued that a smart meter should not be installed at their Service Location.⁵⁶ This argument was based upon the Complainants' personal beliefs, including (a) that smart meters present health and safety issues,⁵⁷ and (b) that the installation of a smart meter at the Service Location is not required by Act 129 but, rather, is optional.⁵⁸

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.⁵⁹ 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.⁶⁰

The Complainants failed to present any credible evidence to support their allegations that West Penn's smart meter deployment is unsafe or violates Section 1501 of the Public Utility Code. Indeed, the crux of their argument was that Act 129 does not mandate smart meters at all.⁶¹ The Complainants did not substantiate any of their health and safety concerns on the record in this proceeding. In view of the Complainants' failure to fulfill their burden of proof, the Complaint should be denied and dismissed with prejudice.

⁵⁵ *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).

⁵⁶ *See, e.g.*, Formal Complaint ¶¶ 4-5; Amended Complaint ¶¶ II; Tr. 162.

⁵⁷ Tr. 210-211

⁵⁸ Tr. 123-126, 138-139, 182.

⁵⁹ *See Gorash v. West Penn Power Co.*, Docket No. C-2018-3006149 (Initial Decision issued Sept. 1, 2020), made final without further Commission action (Order entered Oct. 1, 2020)

⁶⁰ 66 Pa.C.S. § 2807(f)(2)(i).

⁶¹ Tr. 123-124.

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

Through the Complaint, the Complainants alleged various vague health and safety concerns related to smart meters, but failed to provide any reliable evidence – or any evidence whatsoever – in support of these allegations at the Evidentiary Hearing. As such, the Complainants failed to establish their 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 interruptions or delay. Such service and facilities shall be in conformity with the regulations and orders of the commission.⁶²

The Complainants presented no expert testimony to corroborate their health and safety allegations contained in the Complaint. In addition, the Complainants presented no evidence that they are qualified to offer expert testimony as an engineer, doctor or other medical professional. To the extent the Complainants relied upon hearsay or other inadmissible evidence to attempt to support their claims, this evidence was properly objected to upon hearsay and relevance grounds

⁶² 66 Pa.C.S. § 1501.

and cannot support a finding of fact. *See* Section IV.B.2. *infra*. Therefore, the Complainants' health and safety allegations are unfounded and should be rejected.

As such, the Complainants wholly failed to demonstrate that the installation of a smart meter at the Service Location would constitute unreasonable or inadequate service under Section 1501 of the Public Utility Code.

2. All Hearsay and Lay Health and Safety Testimony was Properly Objected to and Excluded and May Not be Relied Upon in this Matter.

At the Evidentiary Hearing, the Complainants attempted to offer testimony related to health and safety issues without possessing the necessary qualifications to testify on these issues. The record is devoid of any evidence to indicate whether either of the Complainants are medical doctors or engineers and, therefore, the Complainants do not otherwise possess the requisite expertise to provide expert testimony regarding health or safety issues related to radio frequencies or smart meters. As lay witnesses, the Complainants were not qualified to testify or offer exhibits related to any issues outside of their direct personal knowledge. Therefore, the Complainants' 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 701,⁶³ 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.

⁶³ Pa.R.E. 701.

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.”⁶⁴ 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.⁶⁵ In this case, the bulk of the Complainants’ testimony and exhibits related to issues outside the scope of their 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 Complainants’ burden of proof in this proceeding.

The record is clear that the Complainants failed to present any credible evidence to support their allegations that smart meter deployment is unsafe or violates Section 1501 of the Public Utility Code, or that installation of a smart meter at the Service Address is not required by law. In view of the Complainants’ fulsome failure to fulfill their burden of proof, the Complaint should be denied and dismissed with prejudice.

⁶⁴ *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).

⁶⁵ Pa.R.E. 701.

V. CONCLUSION

WHEREFORE, West Penn Power Company respectfully requests that Administrative Law Emily I. DeVoe recommend that the Pennsylvania Public Utility Commission dismiss the Formal Complaint of Andrew and Theresa Sabatini with prejudice.

Respectfully submitted,

Dated: January 12, 2024



Tori L. Giesler
Attorney No. 207742
Lauren M. Lepkoski
Attorney No. 94800
FirstEnergy Service Company
2800 Pottsville Pike
P.O. Box 16001
Reading, Pennsylvania 19612-6001
(610) 921-6203
(610) 921-6658
tgiesler@firstenergycorp.com
llepkoski@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.⁶⁶
2. Act 129 provides a list of required smart meter functionality, which was supplemented by Commission order.⁶⁷
3. West Penn's Smart Meter Technology Procurement and Installation Plan was filed on August 10, 2009.⁶⁸
4. The Commission ultimately approved the smart meter deployment plan, with modifications, on June 9, 2010.⁶⁹
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.⁷⁰

⁶⁶ West Penn Exh. PD-1.

⁶⁷ West Penn Exh. PD-2.

⁶⁸ *Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company Approval of Smart Meter Technology Procurement and Installation Plan*, Docket No. M-2009-2123950 (Petition dated Aug. 10, 2009).

⁶⁹ *Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company Approval of Smart Meter Technology Procurement and Installation Plan*, Docket No. M-2009-2123950 (Order entered June 9, 2010).

⁷⁰ *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, which *intra alia* accelerated the smart meter deployment schedule laid out in their original Deployment Plan.⁷¹
7. The Complainants did not offer substantive testimony on any issues relating to the health, safety, or reasonableness of the Company's smart meters or the deployment thereof.
8. The Complainants did not offer expert testimony on any of the issues raised in the Complaint or Amended Complaint.
7. The Company has not violated any Commission order, statute or regulation.

⁷¹ *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).

APPENDIX B

PROPOSED CONCLUSIONS OF LAW

1. Under Section 332(a) of the Public Utility Code, the Complainants maintain the burden of proof in this proceeding.⁷²
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 Complainants establish a prima facie case does it become the responsibility of the Company to provide rebuttal evidence.⁷³
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.⁷⁴
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.⁷⁵
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.⁷⁶
6. In order for the Commission to sustain a formal complaint, the Complainants must demonstrate that an "act or thing done or omitted to be done by any public utility [is] in violation, or claimed

⁷² 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).

⁷³ *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).

⁷⁴ *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).

⁷⁵ *Lansberry*, 578 A.2d at 602.

⁷⁶ *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, of any law which the Commission has jurisdiction to administer, or of any regulation or order of the commission.”⁷⁷

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....”⁷⁸
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.⁷⁹
9. Neither Act 129 nor subsequent Commission orders related to smart meter installation and deployment permit customers to “opt-out” from smart meter installation.⁸⁰
10. The Pennsylvania Supreme Court’s decision in *Povacz* requires the installation of smart meters.⁸¹
11. The *Povacz* Court held that customers may not “opt-out” of smart meter installation.⁸²
12. If the Complainants are able to prove a violation of Section 1501 of the Public Utility Code, he is entitled to an accommodation to the extent allowed by Act 129 and a West Penn’s tariff.⁸³

⁷⁷ 66 Pa.C.S. § 701.

⁷⁸ 66 Pa.C.S. § 1501.

⁷⁹ *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).

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

⁸¹ *Povacz*, at 983.

⁸² *Id.*

⁸³ *Id.*, at 1014.

13. If the Complainants prove that the installation of a smart meter as their Service Address violates Section 1501 of the Public Utility Code, the only relief available to them is for the smart meter to be relocated at their expense.⁸⁴
14. The Complainants failed to establish that the Company's installation of a smart meter at the Complainants' service location would violate Act 129 or any related Commission orders.⁸⁵
15. The Company has the absolute right to access a customer's premises to remove or exchange any or all Company equipment including a meter.⁸⁶
16. The Company is permitted to terminate a customer's electric service for denying access to the meter.⁸⁷
17. A lay witness may only provide testimony related to his or her direct knowledge or experience.⁸⁸
18. Any testimony of a lay witness related to technical or specialized knowledge should be excluded and given no evidentiary weight.⁸⁹
19. The hearsay evidence presented in this case was properly objected to and excluded and may not support any findings of fact.⁹⁰
20. 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";

⁸⁴ West Penn Tariff Rule 4, Electric Pa. P.U.C. No. 40, Original Page 36.

⁸⁵ See *id.*; see also *Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and 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).

⁸⁶ *Id.*

⁸⁷ 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.

⁸⁸ Pa.R.E. 701.

⁸⁹ See *Gibson v. W.C.A.B.*, 861 A.2d 938, 947 (Pa. 2004).

⁹⁰ *Walker v. Unemployment Comp. Bd. of Review*, 367 A.2d 366, 370 (Pa Commw. Ct. 1976).

and (2) “the party charged with the deprivation must be a person who may fairly said to be a state actor.”⁹¹

21. West Penn is not a state actor.

22. The Complainants failed to sustain their burden of proof that the installation of a smart meter would constitute unsafe or unreasonable service by the Company.

⁹¹ *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 Andrew and Theresa Sabatini 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**

**ANDREW SABATINI AND THERESA
SABATINI**

v.

WEST PENN POWER COMPANY

:
:
:
:
:

Docket No. C-2018-3005177

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 and First Class Mail, postage prepaid, as follows:

Andrew and Theresa Sabatini
120 Fawn Lane
Acme, PA 15610

Administrative Law Judge Emily I. DeVoe
edevoe@pa.gov

Dated: January 12, 2024



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