PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17120

Public Meeting held February 22, 2024

Commissioners Present:

Stephen M. DeFrank, Chairman
Kimberly Barrow, Vice Chair
Ralph V. Yanora
Kathryn L. Zerfuss
John F. Coleman, Jr.

Lawrence and Debra Esposito C-2019-3007334

v.

PPL Electric Utilities Corporation

OPINION AND ORDER

BY THE COMMISSION:

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition are the Exceptions filed by Lawrence and Debra Esposito (Complainants) on January 14, 2020, in response to the Initial Decision (Initial Decision or I.D.) of Administrative Law Judge (ALJ) Elizabeth H. Barnes, which was served on the Parties on December 26, 2019, in the above-captioned proceeding. Replies to Exceptions were filed by PPL Electric Utilities Corporation (PPL or the Company) on January 27, 2020. The Initial Decision denied and dismissed the Formal Complaint (Complaint) filed by the Complainants on January 22, 2019. For the reasons discussed

below, we shall deny the Complainants' Exceptions, adopt the Initial Decision of ALJ Barnes, and dismiss the Complaint, consistent with this Opinion and Order.

I. Background

This case involves a Complaint concerning the safety of the advanced metering infrastructure (AMI), or smart meter, that PPL proposes to install at the Complainants' residence and use in the ordinary course of business to measure the Complainants' electricity consumption. The Complainants are seeking a directive that an electric distribution company (EDC) be prevented from installing a smart meter at their residence for health reasons. Complaint at 3. The Complainants also allege that the EDC has threatened to shut off their service. Complaint at 2.

PPL, an EDC subject to the jurisdiction of the Commission, furnishes, owns and maintains the meters in its distribution system. *See,* PPL's Tariff Electric Pa. P.U.C. No. 201, Rule 8 at 12.

Act 129 of 2008 (Act 129 or Act), *inter alia*, amended Chapter 28 of the Public Utility Code (Code) and required EDCs with more than 100,000 customers to file smart meter technology procurement and installation plans for Commission approval and to furnish smart meter technology within its service territory in accordance with the provisions of the Act. Section 2807(f) of the Code provides as follows:

> (f) *Smart Meter technology and time of use rates.*
>
> (1) Within nine months after the effective date of this paragraph, electric distribution companies shall file a Smart Meter technology procurement and installation plan with the commission for approval. The plan shall describe the Smart Meter technologies the electric distribution company proposes to install in accordance with paragraph (2).

> (2) Electric distribution companies shall furnish Smart Meter technology as follows:
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> (i) Upon request from a customer that agrees to pay the cost of the Smart Meter at the time of the request.
>
> (ii) In new building construction.
>
> (iii) In accordance with a depreciation schedule not to exceed 15 years.

66 Pa. C.S. § 2807(f). The General Assembly found that it was "in the public interest" to implement the measures set forth in Act 129 and that the universal installation of smart meters would enhance the "health, safety and prosperity" of Pennsylvania's citizens through the "availability of adequate, reliable, affordable, efficient and environmentally sustainable electric service at the least cost." *See,* H.B. 2200, 192d Gen. Assemb., Reg. Sess. (Pa. 2008).

By Order entered in 2009, the Commission directed all EDCs subject to Act 129's smart meter requirements, including PPL, to universally deploy smart meter technology within their respective service territories in the Commonwealth in accordance with a depreciation schedule not to exceed fifteen years and in accordance with other guidelines established therein. *See, Smart Meter Procurement and Installation*, Docket No. M-2009-2092655 (Implementation Order entered June 24, 2009) (*Smart Meter Installation Order*). PPL sought and obtained the Commission's approval to complete the installation of AMI meters for substantially all customers within its service territory by the end of 2019. *See, Petition of PPL Electric Utilities Corporation for Approval of its Smart Meter Procurement and Installation Plan,* Docket No. M-2014-2430781 (Opinion and Order entered September 3, 2015); *see also, Petition of PPL Electric Utilities Corporation for Approval of its Smart Meter Procurement and Installation Plan*, Docket No. M-2009-2123945 (Opinion and Order entered June 24, 2010).

On May 2, 2018, PPL, in carrying out its obligations under Act 129 and the relevant Commission's Orders implementing Act 129, sent the Complainants a letter notifying them that a smart meter would be installed at the service address in approximately six weeks. On May 21, 2018, PPL sent the Complainants a notice that the smart meter would be installed in three weeks. PPL Exh. KD-1 at 2. On August 10, 2018, the Complainants refused installation of the AMI meter. *Id.* On January 10, 2019, PPL sent the Complainants a notice of termination for refusal of the RF Mesh smart meter at the service property. PPL Exh. KD-1 at 1.

The Complainants and PPL eventually litigated this matter in an evidentiary hearing before ALJ Barnes. After the hearing concluded, ALJ Barnes' Initial Decision concluded that the Complainants failed to satisfy their burden of proof with respect to the claims contained in the Complaint. The Complainants filed Exceptions to the Initial Decision, and PPL filed Replies thereto. This Opinion and Order addresses the Complainants' Exceptions.

II. History of the Proceeding

On January 22, 2019, Lawrence and Debra Esposito (Complainants) filed the instant Complaint and on the same date, an Amended Complaint with the Commission against PPL. The Complainants indicated that they did not want a smart meter installed at the service address for health concerns. The Complainants requested a directive to prevent PPL from terminating Complainants' electric service and installing the smart meter. Complaint[1] at 3.

[1] The original Formal Complaint and the amended Formal Complaint were both received by the Commission on January 22, 2019. The Amended Complaint added the Complainants' health concerns regarding an AMI meter. We are terming the Amended Complaint as "Complaint" for ease of reference.

The Complaint was served upon PPL on January 22, 2019. On February 11, 2019, PPL filed an Answer. The Answer admitted that PPL provides electric service to the Complainants and proposed to install a smart meter at the service address. The Answer provided that PPL was required to install a smart meter, per the requirements of Act 129 and the Commission's orders. PPL denied that the AMI meter poses a health hazard. PPL averred that it is expressly permitted to terminate service if it is prevented from replacing the meter. As a result of the filing of the Formal Complaint, PPL ceased termination procedures initiated due to the refusal of installation of the smart meter. Answer at 1-4.

The Hearing was held as scheduled on November 12, 2019. At the hearing, Complainants appeared pro se with no exhibits. PPL appeared represented by Devin Ryan, Esquire and Curtis Renner, Esquire with fifteen exhibits and four witnesses: Kevin Durkin, Donald Vinciguerra, Christopher Davis, Ph.D., and Mark Israel, M.D. All statements and exhibits from PPL were admitted into the record. A transcript consisting of 100 pages was filed on December 6, 2019.

The record in this case closed on December 6, 2019.

On December 26, 2019, the Commission served ALJ Barnes' Initial Decision in *Lawrence and Debra Esposito v. PPL Electric Utilities Corporation*, Docket No. C-2019-3007334.

As noted above, on January 14, 2020, the Complainants filed Exceptions to the Initial Decision. On January 27, 2020, PPL filed Replies to Exceptions.[2]

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[2] The Complainants' Exceptions were due on January 15, 2020, i.e. 20 days after the Initial Decision was issued on December 26, 2019. PPL's Replies to Exceptions were timely filed because they were due ten days after the January 15, 2020 due date for the Complainants' Exceptions. R. Exc. at 1, n. 2.

On November 4, 2020, the Commission entered an Order and Notice, 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 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. By Order entered November 14, 2023, at Docket No. M-2009-2092655, the Commission lifted the stay. Notice was provided on November 14, 2023, informing the Complainants of the lifting of the stay and their procedural rights and obligations under the Commission's regulations.

III. Discussion

A. Legal Standards

1. General Burden of Proof for Complaint Proceeding

As the party seeking affirmative relief from the Commission, the complainant in a formal complaint proceeding has the burden of proof. 66 Pa. C.S. § 332(a). The evidence necessary to meet that burden must be substantial. 2 Pa. C.S. § 704. "Substantial evidence" is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion. *Consolidated Edison Company of New York v. National Labor Relations Board*, 305 U.S. 197, 229, 59 S.Ct. 206, 217. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk & Western Ry. Co. v. Pa. PUC*, 413 A.2d 1037 (Pa. 1980).

To establish a sufficient case and satisfy the burden of proof, the complainant must show that the respondent utility is responsible or accountable for the problem described in the Complaint. *Patterson v. The Bell Telephone Company of Pennsylvania*, 72 Pa. P.U.C. 196 (1990). The offense must be a violation of the Code, a Commission Regulation or Order or a violation of a Commission-approved tariff. 66 Pa. C.S. § 701. Such a showing must be by a "preponderance of the evidence." *Samuel J. Lansberry, Inc. v. Pa. PUC*, 578 A.2d 600 (Pa. Cmwlth. 1990), *alloc. denied*, 529 Pa. 654, 602 A.2d 863 (1992). That is, the Complainant's evidence must be more convincing, by even the smallest amount, than that presented by the respondent. *Se-Ling Hosiery, Inc. v. Margulies*, 364 Pa. 45, 70 A.2d 854 (1950).

The burden of proof is comprised of two distinct burdens: (1) the burden of production; and (2) the burden of persuasion. *Hurley v. Hurley*, 2000 Pa. Super. 178, 754 A.2d 1283 (2000). The burden of production, also called the burden of going forward with the evidence, determines which party must come forward with evidence to support a particular claim or defense. *Scott and Linda Moore v. National Fuel Gas Distribution*, Docket No. C-2014-2458555 (Final Order issued August 25, 2015) (*Moore*). The burden of production goes to the legal sufficiency of a party's claim or affirmative defense. *See, Id*. It may shift between the parties during a hearing. A complainant may establish a *prima facie* case with circumstantial evidence. *See, Milkie v. Pa. PUC*, 768 A.2d 1217, 1220 (Pa. Cmwlth. 2001) (*Milkie*). If a complainant introduces sufficient evidence to establish legal sufficiency of the claim, also called a *prima facie* case, the burden of production shifts to the utility to rebut the complainant's evidence. *See, Moore*.

If the utility introduces evidence sufficient to balance the evidence introduced by the complainant, that is, evidence of co-equal value or weight, the complainant's burden of proof has not been satisfied and the burden of going forward with the evidence shifts back to the complainant, who must provide some additional

evidence favorable to the complainant's claim. *See, Milkie*, 768 A.2d at 1220; *see also, Burleson v. Pa. PUC*, 443 A.2d 1373 (Pa. Cmwlth. 1982), *aff'd*, 501 Pa. 433, 461 A.2d 1234 (1983).

Having produced sufficient evidence to establish legal sufficiency of a claim, the party with the burden of proof must also carry the burden of persuasion to be entitled to a favorable ruling. *See, Moore*. While the burden of production may shift back and forth during a proceeding, the burden of persuasion never shifts; it always remains on a complainant as the party seeking affirmative relief from the Commission. *See, Milkie*, 768 A.2d at 1220; *see also, Riedel v. County of Allegheny*, 633 A.2d 1325, 1328, n.11 (Pa. Cmwlth. 1993); *see also*, *Burleson*, 443 A.2d at 1375. It is entirely possible for a party to carry the burden of production but not be entitled to a favorable ruling because the party did not carry the burden of persuasion. *See, Moore.* In determining whether a complainant has met the burden of persuasion, the fact-finder[3] may engage in determinations of credibility, may accept or reject testimony of any witness in whole or in part, and may accept or reject inferences from the evidence. *See, Moore*, citing *Suber v. Pennsylvania Com'n on Crime and Delinquency*, 885 A.2d 678, 682 (Pa. Cmwlth. 2005) (*Suber*).

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[3] In formal complaint proceedings, the Commission, not the ALJ, is the ultimate fact-finder; it weighs the evidence and resolves conflicts in testimony. When reviewing the initial decision of an ALJ, the Commission has all the powers that it would have had in making the initial decision except as to any limits that it may impose by notice or by rule. *Milkie*, 768 A.2d at 1220, n. 7 (citing, *inter alia*, 66 Pa. C.S. § 335(a)).

2. Burden of Proof Applied to Section 1501[4] Complaint Challenging Smart Meter Installation

In *Povacz, et al. v. Pa. PUC*, 280 A.3d 975 (Pa. 2022) (*Povacz II*), which dealt with consolidated appeals involving the deployment of smart meters by PECO Energy Company, the Supreme Court of Pennsylvania (Supreme Court) reversed the Commonwealth Court's October 8, 2020 decision in *Povacz v. Pa. PUC* (241 A.3d 481) (*Povacz I*), and thereby affirmed the Commission's March 28, 2019 and May 9, 2019 Orders in *Maria Povacz v. PECO Energy Company,* C-2015-2475023 (*Povacz 2019 Order*); *Laura Sunstein Murphy v. PECO Energy Company*, C-2015-2475726 (*Laura Sunstein Murphy*); and *Cynthia Randall and Paul Albrecht v. PECO Energy Company*, C-2016-2537666 (*Cynthia Randall*). By *Povacz II,* the Supreme Court affirmatively established that there is no "opt-out" provision for installation of a smart meter pursuant to Act 129 and that to raise a viable challenge to smart meter installation, a customer must satisfy the preponderance of evidence standard for a violation of Section 1501 of the Code. *Povacz II* at 280 A. 3d at 983-984.

Pursuant to Section 1501 of the Code, all public utilities have a duty to maintain "adequate, efficient, safe, and reasonable service[5] and facilities" and to make

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[4] The applicable Commission Regulation governing an EDC's provision of safe service is codified at 52 Pa. Code § 57.28(a)(1). Pursuant to Section 57.28(a)(1), an EDC must use reasonable efforts to properly warn and protect the public from danger and to exercise reasonable care to reduce the hazards to which customers may be subjected to by reason of the EDC's provision of electric utility service and its associated equipment and facilities. *See* 52 Pa. Code § 57.28(a)(1). *See Final Rulemaking Order, Rulemaking Re: Electric Safety Regulations, 52 Pa. Code Chapter 57*, Docket No. L-2015-2500632 (Order entered April 20, 2017) (*Electric Safety Final Rulemaking Order*).

[5] The term "service" is defined broadly under Section 102 of the Code to include any and all acts done or rendered or performed and any and all things furnished or supplied and any and all facilities, used, furnished or supplied by public utilities. *See*, 66 Pa. C.S. § 102. The statutory definition of "service" is also to be broadly construed by

repairs, changes, and improvements that are necessary or proper for the accommodation, convenience, and safety of its patrons, employees, and the public. *See* 66 Pa. C.S. § 1501. Section 1501 of the Code, provides, in pertinent part, as follows:

> 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 and facilities shall be in conformity with the regulations and orders of the commission.

66 Pa. C.S. § 1501.

As previously noted, in *Povacz II*, the Pennsylvania Supreme Court not only affirmed the Commission's determination that there is no "opt-out" provision for smart meter installation in either Act 129, the Code, Commission Regulations, or Orders, but also confirmed that challenges to smart meter installation, other than an "opt-out," may arise under Section 1501[6] of the Code. Therein, the Supreme Court stated:

> [W]e conclude that Act 129 does mandate that EDCs 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

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the Commission and the courts. *Country Place Waste Treatment Co., Inc. v. Pa. PUC*, 654 A.2d 72 (Pa. Cmwlth. 1995).

[6] The Commission has also determined that if a customer's formal complaint raises a claim under Section 1501, related to the safety of a utility's installation and use of a smart meter at the customer's residence, such a claim is legally sufficient to proceed to an evidentiary hearing before an ALJ. To satisfy the burden of proof a complainant may be required to present medical documentation and/or expert testimony demonstrating that the installation of a smart meter constitutes unsafe or unreasonable service. *Povacz II* at 1000, citing *Susan Kreider v. PECO Energy Company*, P-2015-2495064, 2016 WL 406549, at *14 (Pa. P.U.C. January 28, 2016) (*Kreider*).

> installed. An electric customer with concerns about smart meters may seek an accommodation from the PUC or EDC, but to obtain one the customer must establish by a preponderance of the evidence that installation of a smart meter violates Section 1501 [of the Code].

Povacz II, at 983-984; *See, Povacz 2013 Order*; *see also, Frompovich v. PECO Energy Co*., Docket No. C-2015-2474602 (Opinion and Order entered May 3, 2018) (*Frompovich*).

In applying Section 1501 to a complaint challenging the installation of smart meter technology, the Supreme Court affirmed the Commission's Opinion and Order in the *Povacz 2019 Order*, stating:

> A customer seeking affirmative relief from the [Commission] must prove by a preponderance of the evidence that the named utility was responsible or accountable for the problem described in the complaint and that the offense was a violation of the Code, a [Commission] regulation or [o]rder, or a violation of a [Commission]-approved tariff. [*See*] 66 Pa.C.S. §§ 332(a), 701; *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm'n*, . . . 134 Pa. Commw. 218, 578 A.2d 600 ([Pa. Cmwlth.] 1990)[.] . . .
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> Although Act 129 does not provide an electric customer [] with the right to opt-out of the installation of a smart meter at their residence, they [sic] may file a complaint raising a claim that installation of a smart meter violates Section 1501 of the Code.
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> . . . .
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> Pursuant to [S]ection [1501 of the Code], an EDC (as a public utility) must provide service that is, *inter alia*, both safe and reasonable. **To carry their burden of proof on a Section 1501** [**of the Code**] **claim, a smart meter challenger may be required to present medical documentation and/or expert testimony demonstrating that the furnishing of a smart meter constitutes unsafe or unreasonable service** in violation of Section 1501 [of the Code] under the circumstances presented. *Susan Kreider v.*

PECO Energy Co., P-2015-2495064, 2016 WL 406549, at *14 (Pa. P.U.C. Jan. 28, 2016).

Povacz II, 280 A. 3d at 999-1000 (emphasis added; footnote omitted)[7]

In applying the standard of proof to scientific or expert medical evidence in support of alleged adverse health effects, the Commission ruled in the *Povacz 2019 Order*, and was subsequently affirmed by the Supreme Court in *Povacz II*, that in order to prevail in a Section 1501 claim against an EDC alleging that an AMI meter caused or will cause adverse health effects or harm to human health, the Complainant must demonstrate by a preponderance of the evidence a "conclusive causal connection" between the harm to human health and the radio frequency fields (RFs)[8] from the AMI meter.[9]

3. Other Relevant Legal Standards

In addition to establishing that a complaint challenging the installation of a smart meter may arise under Section 1501, the Supreme Court's decision in *Povacz II* acknowledged the Commonwealth Court's conclusion that the assertion of a constitutional claim for exemption from smart meter installation, predicated on a

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[7] With respect to the evidence necessary to support a challenge to smart meter installation under Section 1501, the Commonwealth Court has held that at the hearing, a complainant may prove his/her claim through the complainant's own personal testimony and/or "the testimony of others as well as other evidence that goes to that issue." *Romeo v. Pa. PUC*, 154 A.3d 422, 430 (Pa. Cmwlth. 2017) (*Romeo*).

[8] RF is an abbreviation for radio frequency and is also used here to denote RF fields or RF signals.

[9] *See, Povacz 2019 Order* slip op., at 28-29 (citing *Letter of Notification of Philadelphia Electric Company 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*, 1993 WL 855896 (Pa. P.U.C. 1993), Docket No. A-110550F0055 (Final Order entered November 12, 1993) (*Woodbourne-Heaton Final Order*), slip op. at 11).

violation of "bodily integrity," was unfounded in the circumstances. Specifically, the Supreme Court noted the Commonwealth Court's denial of a claim under the Fourteenth Amendment stating:

> The Commonwealth Court rejected Customers' constitutional arguments, persuaded by the reasoning of *Naperville Smart Meter Awareness v. City of Naperville*, 69 F. Supp. 3d 830 (N.D. III 2014) ("*Naperville II*"). Therein, a federal district court rejected the customers' "*Fourteenth Amendment* bodily integrity argument because their complaint failed to identify an arbitrary deprivation of a recognized liberty or property interest" and to aver that the city's decision to employ smart meters was arbitrary. *Id*. at 839 (internal quotations marks omitted).

Povacz II at 985, fn. 8. As the Supreme Court denied allocator as to any constitutional claims, the Commonwealth Court's holding stands.

Further, the Supreme Court noted that a customer must be connected to the distribution system to receive electric service confirming that EDCs operate in a universal basis. *Povacz II* at 993. As such, the Court concluded that by obtaining service from their incumbent EDC, customers contractually accept the EDC's Commission-approved Tariff, including the installation of smart meter technology. *Id* at 994. Therefore, the Supreme Court found that "the authority to select and install a certain type of electric meter rests solely with the EDCs, […] not the customer." *Id*.

Finally, we note that any argument or Exception that we do not specifically delineate shall be deemed to have been duly considered and denied without further discussion. The Commission is not required to consider expressly or at length each contention or argument raised by the parties. *Consolidated Rail Corp. v. Pa. PUC*, 625 A.2d 741 (Pa. Cmwlth. 1993); *see also, generally, University of Pennsylvania v. Pa. PUC*, 485 A.2d 1217 (Pa. Cmwlth. 1984).

B. ALJ's Initial Decision

In the Initial Decision, ALJ Barnes made thirty-nine Findings of Fact (FOF) and reached seventeen Conclusions of Law (COL). *See*, I.D. at 3-8, 17-20. The Findings of Fact and Conclusions of Law are incorporated herein by reference and are adopted without comment unless they are either expressly or by necessary implication rejected or modified by this Opinion and Order.

In her disposition, ALJ Barnes addressed the Complainants' health and safety concerns and data privacy concerns. I.D. at 10-16.

1. Health and Safety Concerns

The ALJ noted that the Complainants would like to opt-out of a smart meter installation at the service address due to the possibility of long-term health effects from radiofrequency emissions from the smart meter. I.D. at 10-11 (citing Tr. at 11, 94-95).

The ALJ reasoned that although the Complainants offered testimony regarding health conditions that they or their family members may have or may be experiencing as of the date of the hearing, there is insufficient evidence to show any of these health conditions would be exacerbated by the installation an AMI meter. I.D. at 11. The ALJ reasoned that the Complainants are neither engineers nor medical professionals and found their lay opinions as to the probable health effects of the smart meter to be non-persuasive. *Id.*

The ALJ was persuaded by the credible testimony of Dr. Mark A. Israel, who testified that there is no reliable medical basis to conclude that RF fields from the smart meter used by PPL will cause or contribute to adverse health effects. I.D. at 13

(citing PPL St. 2 at 16, 18). The ALJ found credible the expert testimony of PPL witness, Dr. Christopher C. Davis that the smart meter used by PPL would not cause adverse health effects. I.D. at 13 (citing PPL St. 1 at 2,3).

2. Data Privacy

The ALJ provided that the Complainants contend it is a violation of their rights according to the Constitution of the United States and the State of Pennsylvania to require the installation of a smart meter at the service address. I.D. at 14 (citing Tr. at 11). The ALJ explained that PPL filed an AMI Customer Privacy Policy which details the data PPL will collect using the smart meter, how the data will be used, and how the data will be protected. I.D. at 15 (citing PPL Exh. DV-1). The ALJ explained further that PPL uses firewalls to prevent unauthorized access to the AMI network, and customer data is encrypted. I.D. at 15 (citing PPL St. 4 at 7-8).

Further, the ALJ noted that the Complainants can decline to have the Zigbee radio (the radio device portion of the AMI meter that would interact with the home's appliances) activated. I.D. at 15. As the ALJ explained, the Commission found in favor of PPL regarding the same data privacy issue in *Lesniewski*. I.D. at 15 -16 (citing *Malgorzata Lesniewski v. PPL Utilities Corporation*, Docket No. C-2018-3004594, (Order entered March 11, 2019) at 24; *Aguirre v. PPL Electric Utilities Corp*., C-2018-3005352 (Opinion and Order entered December 5, 2019) at 21 (*Aguirre*); PPL St. 4 at 7-8).

Similarly, the ALJ explained that in *Aguirre*, the Complainant also argued that a mandatory smart meter would violate his Fourth Amendment rights of freedom from unreasonable searches. In that case, the Commission agreed with PPL that it is not a state actor but rather a private regulated utility company not constrained by the Fourth Amendment. I.D. at 16 (citing *Aguirre* at 21; *Jackson v. Metropolitan Edison Company*,

419 U.S. 345 (1974)). The ALJ also cited to *Naperville Smart Meter Awareness v. City of Naperville*, 900 F.3d 521 (7th Cir. 2018), noting that the Seventh Circuit found the City of Naperville's use of smart meters "reasonable," constitutionally permissible, and consistent with the Fourth Amendment. I.D. at 16 (citing *Naperville*, 900 F.3d at 528-29, additional citations omitted). The ALJ found in favor of PPL on the data privacy issue. I.D. at 16.

Based on the above, the ALJ dismissed the Complaint for failure to prove by a preponderance of evidence that the installation of the 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. I.D. at 17.

C. Exceptions, Replies and Disposition

The Complainants' Exceptions[10] generally pertain to the following: (1) burden of proof; (2) an opt-out request; (3) Pennsylvania and/or federal Constitutional claims; and (4) concerns regarding data privacy.

The Complainants have used extra-record materials in their Exceptions. It is well-established that parties cannot introduce new evidence following the close of the record. *Application of Apollo Gas Co.*, 1994 Pa. PUC Lexis, at *8-14 (Order entered

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[10] We acknowledge that the format of the Complainants' Exceptions does not strictly comply with Section 5.533(b) of our Regulations, 52 Pa. Code § 5.533(b), which requires that exceptions be numbered, identify the finding of fact and conclusions of law to which exception is taken, and cite to the relevant pages of the Initial Decision. Nevertheless, particularly because the Complainants are appearing *pro se*, we will accept the Exceptions as filed pursuant to Section 1.2(a) of our Regulations, 52 Pa. Code § 1.2(a), in order to secure a just, speedy, and inexpensive determination. We note that the Complainants have not identified each Exception by number. We will number each bolded heading for a total of ten Exceptions.

February 10, 1994) (*Apollo Gas*). Any extra-record information the Complainants used in their Exceptions will not be considered. *Apollo Gas*.

Much of the text in the Exceptions is extra record material. The remainder includes: (1) repeated arguments that the PPL witnesses are biased and should not have been allowed to testify as the Complainants were not able to have an exhibit entered into the record; (2) issues with the FOFs; (3) a new argument that many things deemed safe are not; and (4) a new argument that many industries have experienced data breaches.

1. Complainants' Arguments Regarding the Burden of Proof

a. Exception Nos. 2-6, 8, and 9

In their Introduction to their Exceptions. The Complainants state: "We are being forced against our will to allow installation of an RF device for which research indicates the possibility of long term health effects and for which research is ongoing." Exc. at 3. In Exception Nos. 2, 3, 4, 6, 8 and 9 the Complainants except to FOF Nos. 13-15, 22-23, 25-29, and the dispositions in the I.D. in paragraphs 1 and 2 at page 12 and 13. The Complainants argue that while they do not disagree with the credentials of Dr. Israel and Dr. Davis, they cannot be called "objective" and "could be considered biased." The Complainants contend that Dr. Israel and Dr. Davis should not be allowed to testify as the Complainants were not allowed to submit into evidence the "Bioinitiative Report." Exc. at 4-7.

In their Exception No. 4, the Complainants object to FOFs No. 22-23 regarding background RF from television towers within fifty miles of the service address.

In Exception No. 5, the Complainants disagree with the ALJ's FOF No. 36 that states that Complainants are neither medical professionals nor engineers. Exc. at 5-6.

The Complainants contend that experts “are not infallible, are prone to error, and perfectly capable of lying.” Exc. at 6.

b. Replies

PPL provides that the ALJ properly held that there is no reliable medical or scientific basis to conclude that the new AMI meter will cause, contribute to, or exacerbate any adverse health effects. R. Exc. at 2 (citing I.D. at 11-12). PPL avers that the ALJ relied on PPL’s credible and reliable expert testimony refuting the Complainants’ assertions that the smart meter could cause adverse health effects. R. Exc. at 3 (citing PPL St. 1 at 5-16; PPL Exhs. CD-1 through CD-5; PPL St. 2 at 7-18; PPL Exhs. MI-1 through MI-3).

PPL notes that Dr. Davis testified that the Federal Communications Commission (FCC) has determined safe public exposure levels for RF fields from devices such as smart meters. R. Exc. at 3 (citing PPL St. 1 at 9). According to PPL, the FCC safe exposure limits are based on evaluations of the body of scientific research on RF fields and were adopted in consultation with other federal agencies including the Food and Drug Administration (FDA) and the Environmental Protection Agency (EPA). *Id.* PPL explains that the FCC continues to coordinate with the FDA and EPA to evaluate whether new research indicates any adverse health effects from RF fields. R. Exc. at 3 (citing PPL St. 1 at 9-11). PPL notes that, as stated in the I.D., the FCC recently reviewed its current RF exposure limits after a Notice of Inquiry issued by the FCC. R. Exc. at 3 (citing I.D. at 13-14). After review of the record submitted by over 564 commenters, the FCC concluded that there was “no appropriate basis and thus decline[d] to propose amendments to [its] existing limits at this time.” R. Exc. at 3 (citing *In the Matter of Proposed Changes in the Comm’n’s Rules Regarding Human Exposure to Radiofrequency Electromagnetic Fields*, 2019 FCC LEXIS 3622, at *2, 483 n.1 (F.C.C. Dec. 4, 2019)).

PPL explains that Dr. Davis calculated that the levels of RF fields from the AMI meters are 98,000 times lower than the FCC RF safety limits. R. Exc. at 3 (citing PPL St. 1 at 13; PPL Exh. CD-2). Further, the RF signals from the AMI meter are of very short duration and will occur for only a total of 84 seconds over a 24-hour period. R. Exc. at 3-4 (citing PPL St. 1 at 7).

PPL submits that the background levels of RF fields at the Complainants' residence are many times higher than the fields from the AMI meter. As Dr. Davis testified, the fields at three meters from the AMI meter are 10.9 times smaller than the background RF exposure from eight television broadcast towers within 50 miles of the Complainants' residence. R. Exc. at 4 (citing PPL St. 1 at 15). PPL argues that Dr. Davis' expert testimony was not contradicted by any other expert testimony. R. Exc. at 4.

PPL puts forward that Dr. Israel - the only medical expert to present testimony in this case – evaluated the scientific research on RF fields and adverse health effects. R. Exc. at 5 (citing PPL St. 2 at 8). Dr. Israel testified that he has been systematically examining this research over the past several decades and that many hundreds of studies have been published. Dr. Israel testified that these studies found no adverse effects on genetics, fertility, reproduction, growth, or development in animals exposed to RF fields and similarly, no increased incidence in cancer. R. Exc. at 5 (citing PPL St. 2 at 9-10).

PPL disagrees with the Complainants' argument that they do not need to be experts to testify on these issues and that any expert opinions are "prone to error." R. Exc. at 8 (citing Exc. at 5-6). According to PPL, the Complainants can testify to their own experiences but that does not qualify them to render expert opinions in medical or engineering fields. PPL provides that the ALJ properly concluded that the Complainants

are neither engineers nor medical professionals and that their lay opinions as to the health effects of a smart meter are not persuasive. R. Exc. at 8 (citing I.D. at 11).

Regarding the "Bioinitiative Report," that the Complainants contend the ALJ erred by excluding, PPL provides that the Complainants never attempted to present any exhibits during their direct testimony. R. Exc. at 8 (citing Tr. at 9-48). PPL opines that even if the BioInitiative Report were presented by the Complainants, it would not have affected the outcome of the I.D. PPL notes that Dr. Israel testified that the BioInitiative Report: (1) is not a scientific study published in a peer reviewed scientific journal; (2) entirely lacks "scientific objectivity," as many public health authorities and expert groups have found; and (3) "does not provide a reliable scientific basis for reaching conclusions about RF fields and health." R. Exc. at 9 (citing PPL St. 2 at 16; PPL Exh. MI-4).

PPL disagrees with the Complainants' assertions that the expert opinions of Dr. Davis and Dr. Israel are "biased." PPL maintains that the credentials and credibility of these experts are unassailable. PPL notes that nothing in the record indicates "bias" alleged by the Complainants. R. Exc. at 9.

Finally, PPL argues that the Commission should reject the Complainants' extra-record materials included in their Exceptions. PPL notes that parties cannot introduce new evidence and arguments at the exception stage. R. Exc. at 12 (citing *Apollo Gas*). In addition, PPL contends that consideration by the Commission of the extra-record materials put forward by the Complainants would violate PPL's due process rights. R. Exc. at 12. Additionally, PPL notes that Section 5.431 of the Commission's regulations prescribes that "[t]he record will be closed at the conclusion of the hearing unless otherwise directed by the presiding officer or the Commission." R. Exc. at 13 (citing 52 Pa. Code § 5.431(a)). PPL submits that the Complainants made no motion to keep the record open or to reopen the record to admit their extra-record evidence. PPL

contends that the Complainants, in their Exceptions, do not demonstrate good cause for introducing their extra-record evidence, nor do they show changes in fact or law that would warrant the reopening of the record to admit such evidence. *Id.*

c. Disposition

As noted *supra*, in affirming the Commission's *2019 Povacz Order*, the Pennsylvania Supreme Court held in *Povacz II* that, in order to prevail in a Section 1501 claim involving the safety of smart meters, and specially, against an EDC alleging that an AMI meter caused, or will cause, adverse health effects or harm to human health, the Complainant must demonstrate, by a preponderance of the evidence, a "conclusive causal connection" between the harm to human health and the RFs from the AMI meter. See, *Povacz II* at 1006. In that context, the lay opinion of the Complainant does not provide a conclusive, causal connection between the harm to human health and the RFs from the AMI meter. *Id.*

The Supreme Court reiterated that complainants seeking relief from the Commission must satisfy their burden of proof by a preponderance of the evidence. The 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. *Id.* at 1005. The Court further 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. *Id.* at 1008.

The Supreme Court further instructed 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. 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. *Id.* Once the parties have presented their evidence, the onus then falls on the fact finder to weigh the evidence and determine whether it is more likely than not that the smart meter caused the customer harm. *Id.* at 1006.

In the present case, the ALJ's analysis and disposition turned on the relative weight of the evidence presented by the Complainants to establish that installation of a smart meter would constitute a violation of the Code, a Commission Regulation or Order or a violation of a Commission-approved tariff, versus the weight of the evidence presented by the Company in opposition to the Complaint. The ALJ concluded that the evidence presented by the Company outweighed the evidence presented by the Complainants on all issues. We concur. Upon review, we agree with the ALJ's well-reasoned analysis in the Initial Decision and the ALJ's conclusion that the Complainants did not meet their burden of proof regarding their claim that the installation of the 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. I.D. at 17.

In order to prevail in a Section 1501 claim against an EDC alleging that an AMI meter caused, or will cause, adverse health effects or harm to human health, the Complainant must demonstrate, by a preponderance of the evidence, a "conclusive causal connection" between the harm to human health and the RFs from the AMI meter. See *2019 Povacz Order*. Here the ALJ properly concluded that the Complainants have failed to show any health concerns are likely to be caused, contributed to, or exacerbated by the AMI meter to be installed at their service address. I.D. at 11.

Specifically, we affirm the ALJ's finding in COL No. 11, that the Complainants failed to satisfy their burden of proof that installing the new AMI meter would violate the Public Utility Code or any Commission Regulation or Order. I.D. at 19 (citing 66 Pa. C.S. §§ 332(a), 701). We find nothing in the Complainants' Exceptions to refute the ALJ's conclusion that the Company's use of a smart meter to measure the electric usage at the Complainants' property will not constitute unsafe or unreasonable service, in violation of Section 1501.

The Company presented credible evidence through its expert witnesses, Dr. Israel and Dr. Davis, to support the ALJ's finding that the Complainants have failed to demonstrate that the new AMI meter will cause, or contribute to, or exacerbate any adverse health effect. I.D. at 20. Specifically, we concur in the ALJ's finding that the Complainants' arguments concerning the alleged effects of the electromagnetic frequencies on their health from smart meters are non-persuasive and were rejected based on the record developed in this case. I.D. at 10-14. Upon review of the record and the witness' testimony, we do not see "bias" by the PPL witnesses as the Complainants allege.

The Complainants state that the "research is ongoing" regarding RF fields. Exc. at 3. The burden of proof in this case is that the Complainants must demonstrate, by a preponderance of the evidence, a "conclusive causal connection" between the harm to human health and the RFs from the AMI meter. See, *2019 Povacz Order*. The Complainants have not met this burden of proof.

We find no error in FOFs Nos. 22 and 23 regarding background RF from television towers within fifty miles of the service address.

The Complainants can testify to their personal experiences, but they are not experts in the medical or engineering professions and do not qualify to testify as such.

The ALJ did not err in FOF No. 36 when she stated that the Complainants are not medical professionals or engineers.

Further, we reject the Complainants' assertion that they were precluded from presenting evidence of the BioInitiative Report. See Exc. at 4-7. The record reflects that the Complainants had the opportunity to offer evidence, including any report, but did not do so. The Complainants offered no exhibits at the hearing. I.D. at 2; Tr. at 6.

Therefore, upon review of the record, and based on the foregoing discussion, we find that the ALJ properly weighed the evidence presented to conclude that the Complainants failed to establish by a preponderance of the evidence that the Company's installation of a smart meter would constitute unreasonable or unsafe provision of service under Section 1501 of the Code. Therefore, we shall deny Complainants' Exceptions challenging the ALJ's dismissal of the Complaint for failure to satisfy the burden of proof.

We note that FOF No. 8 states that PPL has installed an AMI meter at the service address. This is incorrect. FOF No. 8 should read: The RF meter *to be* installed at the service property is the Landis + Gyr Focus 350 FOCUS AXR-SD meter. PPL Electric St. No. 4 at 5-6. We shall modify this FOF, however, this correction is immaterial to our finding that the Complainants have failed to show that installation of the proposed AMI meter would violate a Commission Order, Regulation or Commission-approved tariff.

2. Complainants’ Request to Opt-Out

a. Exceptions at page 8

In their Exceptions at page 8, the Complainants request that the Commission reject the I.D. and allow the Complainants to continue with their current meter. Exc. at 8.

b. Replies

PPL provides that the ALJ properly held that there is no provision to “opt-out” of a smart meter installation under Pennsylvania law. R. Exc. at 1. PPL states:

> PPL Electric observes that the Complainants failed to file Exceptions to this finding by the ALJ. Therefore, even assuming arguendo that the Complainants’ Exceptions are granted, the Complainants have waived the right to challenge the ALJ’s finding that the new AMI meter’s installation is required by law. It is well-established that parties waive any arguments that they fail to raise in their Exceptions before the PUC and properly preserve for appeal. *Springfield Twp. v. Pa. PUC*, 676 A.2d 304, 309 (Pa. Cmwlth. 1996) (citations omitted); *HIKO Energy, LLC v. Pa. PUC*, 163 A.3d 1079, 1094 (Pa. Cmwlth. 2017) (citations omitted), affirmed, 2019 Pa. LEXIS 3139 (Pa. 2019); *Merritt v. Duquesne Light Co*., 2011 Pa. PUC LEXIS 1197, at *9-10 (Order entered Mar. 31, 2011) (quoting Generic Investigation Regarding Transp. Assessments, Docket No. 1-2008-2022003 (Order entered Aug. 26, 2008)). Thus, the Complainants cannot be granted their requested relief, i.e., an opt-out of the new AMI meter’s installation, even if their Exceptions are granted.

R. Exc. at 1, n. 1.

c. Disposition

In their Exceptions at page 8, the Complainants request that the Commission reject the I.D. and allow them to retain their current meter at the service address. Because the Pennsylvania Supreme Court's holding in *Povacz II* expressly found that there is no "opt-out" provision under Act 129, we shall deny the request in the concluding paragraph of the Exceptions.

In *Povacz II*, the Pennsylvania Supreme Court expressly concluded that the complainant's assertion of the right to "opt-out" of Act 129 was unfounded. Therein, the Supreme Court stated:

> [W]e conclude that Act 129 does mandate that EDCs 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. An electric customer with concerns about smart meters may seek an accommodation from the PUC or EDC, but to obtain one the customer must establish by a preponderance of the evidence that installation of a smart meter violates Section 1501 [of the Code].

Povacz II, at 983-984. Therefore, by establishing that there is no "opt-out" permitting a customer to refuse smart meter installation, the Supreme Court's holding in *Povacz II* is controlling on the question. Accordingly, to the extent the Complainants assert a right to "opt-out" of Act 129 to refuse smart meter installation, we shall deny the Complainants' request in their Exceptions at 8 without further discussion.

In their Exceptions at page 8, the Complainants request that they be allowed to retain their current meter rather than have a smart meter installed. Exc. at 8.

In *Povacz II*, the Pennsylvania Supreme Court expressly concluded that the utility and not the customer has the right to determine what type of smart meter technology to install. *See, Povacz II* at 993. The Supreme Court noted that a customer must be connected to the distribution system to receive electric service confirming that EDCs operate in a universal basis. *Id.* As such, the Court concluded that by obtaining service from their incumbent EDC, customers contractually accept the EDC's Commission-approved Tariff, including the installation of smart meter technology. *Id* at 994. Therefore, the Supreme Court found that "the authority to select and install a certain type of electric meter rests solely with the EDCs, […] not the customer." *Id.*

Therefore, by establishing that the customer has no right to select which smart meter technology to install, the Supreme Court's holding in *Povacz II* is controlling on the question. Accordingly, while the Complaints want to keep an analog meter, to the extent that if the Complainants try or may try to assert the right to select a specific smart meter technology to install to comply with the law, we shall deny the Complainants' request at page 8 of their Exceptions without further discussion.

3. Complainants' Argument Regarding Constitutional Claims

a. Exceptions at 3

In their Exceptions at page 3, the Complainants contend that "[i]nstallation of this device is an invasion of our privacy and against our rights as citizens of the United State[s] and the Commonwealth of Pennsylvania." Exc. at 3.

b. Replies

PPL did not address this issue in its Replies.

c. Disposition

To the extent the Complainants' Exceptions assert that the ALJ erred by not finding that the installation of a smart meter constitutes a violation of the Complainants' constitutional rights, we shall deny the Exception. See, Exc. at 3.

For example, in *Povacz II*, the Pennsylvania Supreme Court acknowledged the Commonwealth Court's conclusion that the assertion of a constitutional right predicated upon a violation of bodily integrity as a basis to refuse installation of a smart meter was unfounded. *See, Povacz II* at 985, fn. 8. In the present case, the Complainants fail to assert *any basis* for a finding of a violation of a constitutional right. As noted below, we conclude that the installation of the smart meter in the circumstances does not violate the Complainants' privacy. Accordingly, to the extent the Complainants assert a constitutional right to refuse smart meter installation, we shall deny the Complainants' Exceptions regarding constitutional rights without further discussion.

4. Complainants' Concerns Regarding the Safety and Privacy of the AMI Meter Data

a. Exception Nos. 1, 2, 7 and 10

In their Exception No. 1, the Complainants disagree with FOF No. 9 and aver that the Underwriters Laboratories (UL) certification of the smart meter is not a guarantee of safety and refer to an extra-record attachment. Exc. at 4. In their Exception Nos. 2 and 7, the Complainants provide an extra-record list of industries that the Complainants consider unsafe. Exc. at 5, 6. In their Exception No. 10, the Complainants provide an extra-record list of industries that they believe have suffered cyber-security breaches. Exc. at 7-8.

b. Replies

In its Replies, PPL argues that the ALJ properly found that the Complainants failed to prove that the new AMI meter is a privacy risk. R. Exc. at 10 (citing I.D. at 15-16). PPL witness Donald Vinciguerra testified that the Company takes several steps to protect the data it receives from the new AMI meters, including the use of technologies such as firewalls, encryption, digital signatures, authentication, and access controls. R. Exc. at 10 (citing PPL St 4 at 7-8). PPL avers that their cybersecurity policies and practices are consistent with the national standard for the industry. R. Exc. at 10 (citing PPL St. 4 at 8).

c. Disposition

We shall deny the Complainants' Exceptions on this issue. We find no error in the ALJ's FOF No. 9 regarding the UL certification and will not consider the Complainants' extra-record information on the UL certification, or the lists of industries designated "unsafe" by the Complainants. We are not persuaded by the Complainants' Exceptions that they have demonstrated a privacy risk of the proposed AMI meter to be installed by PPL. Thus, the Complainants' Exception Nos. 1, 2, 7 and 10 are denied.

IV. Conclusion

In light of the above discussion, we shall: (1) deny the Complainants' Exceptions; (2) adopt the ALJ's Initial Decision; and (3) dismiss the Complaint, consistent with this Opinion and Order; **THEREFORE,**

IT IS ORDERED:

1. That the Exceptions filed by Lawrence and Debra Esposito on January 14, 2020, to the Initial Decision of Administrative Law Judge Elizabeth H. Barnes issued on December 26, 2019, at Docket No. C-2019-3007334, are denied, consistent with this Opinion and Order.

2. That FOF No. 8 shall be modified as follows: The RF meter *to be* installed at the service property is the Landis + Gyr Focus 350 FOCUS AXR-SD meter. PPL Electric St. No. 4 at 5-6.

3. That the Initial Decision of Administrative Law Judge Elizabeth H. Barnes, issued on December 26, 2019, at Docket No. C-2019-3007334, is adopted, consistent with this Opinion and Order.

4. That the Formal Complaint filed by Lawrence and Debra Esposito, on January 22, 2019, and Amended on January 22, 2019, at Docket No. C-2019-3007334, is dismissed.

5. That this proceeding is marked closed.

BY THE COMMISSION,

Rosemary Chiavetta
Secretary

(SEAL)

ORDER ADOPTED: February 22, 2024

ORDER ENTERED: February 22, 2024