

**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.

Diana Sabatine

C-2018-3002804

v.

West Penn Power Company

**OPINION AND ORDER**

**BY THE COMMISSION:**

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition are the Exceptions filed by Diana Sabatine (Complainant) on July 10, 2020, in response to the Initial Decision of Administrative Law Judge (ALJ) Jeffrey A. Watson (Initial Decision or I.D.), which was served on the Parties on April 21, 2020, in the above-captioned proceeding. Replies to Exceptions were filed by West Penn Power Company (West Penn or the Company) on July 21, 2020. The Initial Decision denied and dismissed the Formal Amended Complaint (Amended Complaint) filed by the Complainant on July 30, 2018. For the reasons discussed below, we shall

deny the Complainant's Exceptions, adopt the Initial Decision of ALJ Watson, and dismiss the Complaint, with prejudice, 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 West Penn proposes to install at the Complainant's residence and use in the ordinary course of business to measure the Complainant's electricity consumption. The Complainant is seeking a directive that an electric distribution company (EDC) be prevented from installing a smart meter at her residence for health reasons. Amended Complaint at 3. The Complainant also alleges that the EDC has threatened to shut off her service. Amended Complaint at 2.

West Penn, an electric distribution company (EDC) subject to the jurisdiction of the Commission, furnishes, owns and maintains the meters in its distribution system. *See*, FirstEnergy Pennsylvania Electric Company Tariff Electric Pa. P.U.C. No. 1, Rule 8 at 44.

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:

(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 West Penn, 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*). West Penn sought and obtained the Commission’s approval to complete the installation of AMI meters for substantially all customers within its service territory by mid-2019. Met-Ed sought and obtained the Commission’s approval to complete the installation of AMI meters for substantially all customers within its service territory by mid-2019. *See, 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 No. M-2013-2341990 (Opinion and Order entered March 6, 2014) (2014 Smart Meter Order).*

On December 15, 2017, the Complainant contacted the Company to refuse installation of the smart meter. The Company representative explained that there is no opt-out option available and provided dispute rights information to the Complainant. On December 26, 2017, the Complainant contacted the Company and stated that she refused the smart meter installation. Amended Answer at 2.

On March 15, 2018, the Company attempted to contact the Complainant to discuss her concerns. The Complainant answered the phone but stated she was unable to talk at the time. Amended Answer at 2-3.

On March 16, 2018 and May 10, 2018, the Company sent correspondence to the Complainant in an effort to schedule installation of a smart meter at the service location. On May 21, 2018, the Company sent the Complainant a pre-disconnect warning letter pursuant to 66 Pa. C.S. § 1406, 52 Pa. Code § 56.81 and the Company's commission-approved tariff. Amended Answer at 3.

On May 24, 2018, the Complainant contacted the Company and indicated she was in contact with the Company CEO and stated that all correspondence should be sent to her via certified mail. The call was transferred to the Company's smart meter department at Complainant's request. She provided that the smart meter was not required by federal or state law and she does not want one. She provided further that "no trespassing" signs were posted on her property and any trespassers would be subject to a fine. She indicated that she was dissatisfied with the results of the call and stated that she sent a notice of liability to the Commission. The Company representative explained to

the Complainant that the Company owns the meter and can disconnect service if she continues to refuse installation of the smart meter. Amended Answer at 3.

On May 31, 2018 a service termination notice was sent to the Complainant. Answer at 3. On June 4, 2018, the Complainant's husband, John Sabatine, contacted the Company regarding the service termination notice. Mr. Sabatine stated that the Complainant had been diagnosed with an illness in 2014 and that they had been advised that the smart meter would adversely affect the Complainant's health. Mr. Sabatine asked for information that would convince the Complainant that the smart meter would not harm her health and he asked for additional time. The Company representative stated that they could not offer any additional delays for the installation of the smart meter as the Company is required to install the smart meter in accordance with the schedule approved by the Commission. Mr. Sabatine was advised of his right to file a complaint with the Commission. Amended Answer at 3-4.

On June 11 and June 12, 2018, the Company attempted to contact the Complainant regarding the service termination notice and smart meter refusal. On June 18, 2018, the Company was served the Formal Complaint and termination efforts ceased. Amended Answer at 4.

The Complainant and West Penn eventually litigated this matter in an evidentiary hearing before ALJ Watson. After the hearing concluded, ALJ Watson's written Initial Decision concluded that the Complainant failed to satisfy her burden of proof with respect to the claims contained in the Complaint. The Complainant filed Exceptions to the Initial Decision, and West Penn filed Replies thereto. This Opinion and Order addresses the Complainant's Exceptions.

## II. History of the Proceeding

On June 18, 2018, Diana Sabatine filed a Formal Complaint (Complaint) against West Penn, indicating that the Company was threatening to terminate service. As requested relief she stated that she has “medical condition(s) that will worsen from the installation of a ‘smart meter’.” Complaint at 3.

On July 9, 2018, the Company filed its Answer denying the material allegations within the Complaint and submitted Preliminary Objections. I.D. at 1.

On July 30, 2018, the Complainant filed an Amended Formal Complaint (Amended Complaint), averring she objected to the installation of a smart meter at the service location due to health, safety, privacy, and constitutional concerns. The Complainant also averred that Act 129 of 2008 (Act 129) provides that smart meters are voluntary and only those customers who “opt-in” should receive one. As relief, the Complainant requested that she be allowed to keep her analog meter. I.D. at 2.

The Amended Formal Complaint was served upon West Penn on July 30, 2018. On August 22, 2018, West Penn filed an Amended Answer and New Matter. *Id.*

On August 22, 2018, West Penn filed an Amended Answer and New Matter to the Amended Complaint, as well as Amended Preliminary Objections to the Amended Complaint. West Penn denied the material allegations within the Amended Complaint. *Id.*

On October 12, 2018, the Complainant filed a “Notice and Petition for Judicial Determination Of Jurisdiction” (Notice and Petition). *Id.*

On October 15, 2018, an Interim Order was entered denying the Company's Amended Preliminary Objections to the Amended Complaint. *Id.*

On October 17, 2018, an Interim Order was entered establishing a procedural schedule in this proceeding. *Id.*

On October 25, 2018, the Complainant filed a document styled as a "Petition for Interim Review of Law by Pennsylvania Commonwealth Court to Determine Jurisdiction" (Petition for Review).<sup>1</sup> *Id.*

On November 29, 2018, the Complainant filed a Motion to Stay these proceedings to allow the Complainant an opportunity to "pursue moving [her] civil Complaint to an Article III Court of Record...." I.D. at 3.

On December 27, 2018, three Interim Orders were issued, one denying the Complainant's Notice and Petition, one denying the Complainant's Petition for Review, and one denying the Complainant's Motion to Stay. *Id.*

On January 10, 2019, the Complainant filed a "First Amended Notice and Petition for Judicial Determination of Jurisdiction" (First Amended Notice and Petition), "Second Amended Notice and Petition for Judicial Determination of Jurisdiction" (Second Amended Notice and Petition), and a "Third Amended Notice and Petition for Judicial Determination of Jurisdiction" (Third Amended Notice and Petition). *Id.*

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<sup>1</sup> On October 25, 2018, the Complainant also filed a document titled "Settlement Offer." As settlement offers are generally not admissible as evidence, *see*, Pa.R.E. 408, this document and its contents were not considered by the ALJ in drafting the Initial Decision. I.D. at 2, n. 1.

On January 29, 2019, three Interim Orders were issued, one denying the Complainant's First Amended Notice and Petition, one denying the Complainant's Second Amended Notice and Petition, and one denying the Complainant's Third Amended Notice and Petition. *Id.*

On January 30, 2019, an Interim Order was entered revising the procedural schedule in this proceeding. *Id.*

On February 5, 2019, the Complainant filed a "Fourth Amended Notice and Petition to Challenge Jurisdiction" (Fourth Amended Notice and Petition). *Id.*

On April 12, 2019, the Complainant filed correspondence addressed to the Chairman of the Commission. *Id.*

On April 30, 2019, an Interim Order was entered, denying the Complainant's Fourth Amended Notice and Petition. *Id.*

On June 4, 2019, a prehearing conference was held. The Complainant appeared pro se, and West Penn was represented by counsel. On June 5, 2019, an Interim Order was entered, revising the procedural schedule. I.D. at 4.

On June 21, 2019, West Penn filed a Motion to Dismiss Complaint of Diana Sabatine for Failure to Comply with Order (Motion to Dismiss). The Complainant filed a response to the Motion on June 25, 2019. *Id.*

On September 3, 2019, an Interim Order was entered, denying West Penn's Motion to Dismiss, scheduling an evidentiary hearing for October 30-31, 2019, and revising the procedural schedule. *Id.*

On October 24, 2019, the Complainant filed a “Motion To Strike – No. 1” and “Motion To Strike – No. 2.” These motions were denied by two Interim Orders entered on October 28, 2019. *Id.*

On October 30, 2019, an evidentiary hearing was held. The Complainant presented her case through her own testimony. West Penn presented its case through the testimony of Mr. John Ahr and West Penn Exhibit JCA-1. In addition, official notice was taken of the Complainant’s Exhibits A and B, as well as West Penn’s Exhibits PD-1, PD-2, PD-3, and PD-4. *Id.*

On October 30, 2019, an Interim Order Setting Briefing Schedule was issued requiring the parties to submit any briefs on or before January 3, 2020. *Id.*

On November 27, 2019, a 112-page transcript was filed.

On December 30, 2019, the Complainant submitted a request to extend the deadline to file her brief. On January 3, 2020, an Interim Order was issued, extending the deadline for the parties to file their briefs to January 16, 2020. *Id.*

On January 16, 2020, the Complainant and West Penn each filed a Main Brief, and the hearing record closed.<sup>2</sup> I.D. at 5.

On April 20, 2020, the Commission served ALJ Watson’s Initial Decision in *Diana Sabatine v. West Penn Power Company*, Docket No. C-2018-3002804.

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<sup>2</sup> The ALJ notes that the Complainant’s Main Brief refers to extra-record materials and information to support her arguments. The ALJ provided that the extra-record material and information contained in the Complainant’s Main Brief were not considered by the ALJ in preparing the Initial Decision. I.D. at 5, n. 2.

As noted above, on July 10, 2020, the Complainant filed Exceptions to the Initial Decision. On July 21, 2020, West Penn filed Replies to Exceptions.<sup>3</sup>

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.

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<sup>3</sup> By Secretarial Letter dated May 13, 2020, the Commission granted the Complainant a sixty-day extension to file Exceptions in accordance with 52 Pa. Code § 1.15. Exceptions were due July 10, 2020 and Reply Exceptions were due July 20, 2020. The Reply Exceptions were dated July 21, 2010 and received by the Commission on that date. Due to the circumstances at the time, namely the pandemic emergency, we will accept the Reply Exceptions as timely filed in accordance with 52 Pa. Code § 1.2(a). The additional day to file Reply Exceptions does not affect the substantive rights of the parties.

### 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<sup>4</sup> 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*).

## **2. Burden of Proof Applied to Section 1501<sup>5</sup> 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

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<sup>4</sup> 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)).

<sup>5</sup> 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*).

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<sup>6</sup> 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. *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,

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<sup>6</sup> 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 the Commission and the courts. *Country Place Waste Treatment Co., Inc. v. Pa. PUC*, 654 A.2d 72 (Pa. Cmwlth. 1995).

but also confirmed that challenges to smart meter installation, other than an “opt-out”, may arise under Section 1501<sup>7</sup> 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 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.*

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<sup>7</sup> 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*).

*Pa. Pub. Util. Comm'n*, . . . 134 Pa. Commw. 218, 578 A.2d 600 ([Pa. Cmwlth.] 1990)[.] . . .

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.

. . . .

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)<sup>8</sup>

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

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<sup>8</sup> 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*).

by a preponderance of the evidence a “conclusive causal connection” between the harm to human health and the radio frequency fields (RFs)<sup>9</sup> from the AMI meter<sup>10</sup>.

### 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 a constitutional claim for exemption from smart meter installation, predicated on a violation of “bodily integrity,” was unfounded in the circumstances. 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. Ill. 2014) (“*Naperville I*”). 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 allocation as to any constitutional claims, the Commonwealth Court’s holding stands.

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<sup>9</sup> RF is an abbreviation for radio frequency and is also used here to denote RF fields or RF signals.

<sup>10</sup> 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).

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 Watson made seventeen Findings of Fact (FOF) and reached fifteen Conclusions of Law (COL). *See, I.D.* at 5-7, 12-15. 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 his disposition, ALJ Watson addressed the smart meter mandate, unreasonable or inadequate service, and the record evidence. *I.D.* at 10-12.

## **1. Smart Meter Mandate**

The ALJ noted the Complainant's argument that the installation of a smart meter is voluntary and the Company's mandate to install the meter is contrary to Act 129. I.D. at 10. The ALJ provided that Commission precedent supports West Penn's conclusion that there is no "opt-out" available to customers. The ALJ explained that the EDC is legally required to install smart meters by Act 129 and Commission Orders. I.D. at 10 (citing *Hoffman-Lorah v. PPL Elec. Util. Corp.*, Docket No. C-2018-2644957 (Opinion and Order entered May 23, 2019); 66 Pa.C.S. § 2807(f); Exhibit JCA-1 at 9 and 47-48; Exhibit PD-1). Additional citations omitted.

The ALJ noted that the Complainant's testimony and exhibits focused on her assertion that the smart meter installation is voluntary under Act 129. The ALJ reasoned that this issue has been well-settled. The ALJ concluded that the Complainant failed to meet her burden to prove that West Penn's refusal to allow her to opt-out of smart meter installation is a violation of any statute, regulation, or Commission order. The ALJ stated that the Complainant's claims are not supported by the evidence and must be dismissed. I.D. at 11.

## **2. Unreasonable or Inadequate Service**

The ALJ noted that the Complainant raised several health, safety and privacy concerns related to smart meters in her Amended Complaint but did not provide any evidence related to these allegations at the evidentiary hearing. The ALJ concluded that there is no record evidence to support that West Penn's installation of a smart meter constitutes a violation of Section 1501 of the Code and the Complainant's claims regarding health, safety and privacy must be dismissed. I.D. at 11-12.

### 3. Record Evidence

The ALJ noted that the Complainant's testimony and exhibits pertained to her legal arguments that smart meter installation is not mandatory in accordance with Act 129. The ALJ stated that official notice was taken of Exhibits A and B.

The ALJ provided that John Ahr, Manager of Regulatory Compliance for Smart Meters, testified regarding the mandate in Act 129 and West Penn's Smart Meter Deployment Plan. West Penn Exhibit JCA-1 was admitted into evidence and official notice was taken of PD-1, PD-3, and PD-4. I.D. at 12.

The ALJ concluded that the Complainant failed to meet her burden of proof and denied and dismissed the Amended Complaint with prejudice. *Id.*

### C. Exceptions, Replies and Disposition

The Complainant's Exceptions<sup>11</sup> generally pertain to the following: (1) that the Complainant should have been provided a copy of the hearing transcript at no cost; and (2) that she should have been allowed to record the evidentiary hearing.

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<sup>11</sup> We acknowledge that the format of the Complainant's 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 Complainant is 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), to secure a just, speedy, and inexpensive determination.

**1. Complainant's Arguments Regarding (1) Recording the Hearing and (2) Obtaining the Hearing Transcript at No Cost to Complainant**

**a. Exceptions at 4-6, 9-10**

The Complainant's Exceptions consist of a series of declarations and demands regarding her argument that she should have been permitted to record the telephonic hearing and should have received a copy of the hearing transcript at no cost. The Exceptions do not relate to the ALJ's finding that the Complainant did not "carry her burden of proof establishing that West Penn violated the Public Utility Code or a regulation or order of the Commission in requiring installation of a smart meter at her property." I.D. at 15 (citing 66 Pa.C.S. § 332).

**b. Replies**

West Penn provides that the Complainant did not dispute any of the ALJ's relevant findings in the Initial Decision, including that the Complainant failed to sustain her burden of proof that the installation of a smart meter would violate the Public Utility Code, a Commission regulation, or a Commission order. R. Exc. at 2 (citing I.D. at 11-15; Exc. at 1-11). West Penn notes that the Complainant was not permitted to audio record the hearing. West Penn explains that Section 5.251(a) of the Commission's regulations states that "hearings will be stenographically reported by the Commission's official reporter." R. Exc. at 2 (citing 52 Pa. Code § 5.251(a)). West Penn explains further that "the hearing transcript will be a part of the record and the sole official transcript of the proceeding." R. Exc. at 2 (citing Pa. Code § 5.251(b)). According to West Penn, only the court reporter can make an electronic recording of the hearing, no one else is permitted to do so. R. Exc. at 2 (citing §§ 5.251-5.252). West Penn contends that the ALJ was consistent with these regulations when he explained at the hearing that

“the only recording in this matter is performed by the official court reporter” and that “[n]o one else is permitted to record this proceeding.” R. Exc. at 3 (citing Tr. at 17).

West Penn explains that the Complainant was properly barred from recording the hearing. According to West Penn, the Complainant cites to *Wilson v. Blake*, 381 A.2d (Pa. 1977) (*Wilson*) as support for her position that she should have been allowed to record the hearing. West Penn provides that *Wilson* is a criminal case and while the Supreme Court of Pennsylvania held that Rule 141 of the Pennsylvania Rules of Criminal Procedure enable the defendants in *Wilson* to make a tape recording at the preliminary hearing, Rule 141 does not apply here. R. Exc. at 2-3.

West Penn argues that the Complainant is not entitled to a free copy of the hearing transcript. According to the Commission’s regulation at 52 Pa. Code § 5.245(a), “[a] party or other person desiring copies of the transcript may obtain copies from the official report upon payment of the fees fixed therefore.” West Penn notes that if the Complainant did not want to pay for the transcript, she could, as explained by the ALJ, “read the transcript and view the transcript at the Commission office.” R. Exc. at 3 citing Tr. at 119-120). West Penn argues that the Complainant could also have taken notes during the hearing, as parties often do. R. Exc. at 3, n. 3.

### **c. Disposition**

We note that the Complainant did not except to the ALJ’s finding that she did not meet her burden of proof. The Complainant’s Exceptions contend that she should have been allowed to record the evidentiary hearing and should have received a copy of the hearing transcript at no cost.

At the beginning of the evidentiary hearing, the ALJ explained “This is an evidentiary hearing. So everything that’s said is being taken down and recorded by the

court reporter. If anyone is interested in obtaining a transcript, simply call my office in Pittsburgh and my office will provide you with the information on how to obtain a transcript of this proceeding. This is the only recording that is permitted, as it is the official recording of the Commission by the court reporting service.” Tr. at 7. The ALJ stated shortly thereafter, at the telephonic hearing, that “the only recording in this matter is performed by the official court reporter. No one else is permitted to record this proceeding. I assume everyone understands that and will abide by that.” Tr. at 17.

It was made clear to the Complainant that the only recording of the hearing permitted was that done by the court reporter. The Complainant did not ask the ALJ directly if she could record the hearing. Section 5.251 states that “the hearing transcript will be a part of the record and the sole official transcript of the proceeding.” 52 Pa. Code § 5.251(b). The ALJ has the responsibility to “conduct a fair and impartial hearing and maintain order.” 52 Pa. Code § 5.484(a). The ALJ explained to the Complainant that he was “charged with the duty to conduct a hearing in this case” and “to conduct an orderly hearing.” Tr. at 5.

The ALJ asked the parties on the telephonic hearing call to acknowledge their presence and provide their names in accordance with 52 Pa. Code § 5.241(a). There was some confusion as to whether all parties on the call acknowledged their presence. The Complainant refused to answer whether there were additional persons on the line with her. Tr. at 5-6. When West Penn’s attorney signed onto the call, there was an indication that nine people were on the call, but only five acknowledged their presence when the ALJ asked. Tr. at 16. We note that recording the hearing without the knowledge or consent of all persons on the call would have violated the Pennsylvania Wiretap Act (18 Pa. Cons. Stat. Ann. §§ 5703, 5704(4)) which requires that all parties would have had to consent to the recording. The Complainant did not ask to record the call, the other parties did not consent to being recorded by the Complainant and the ALJ stated that the only recording permitted was by the court reporter. There is no error here

by the ALJ. The ALJ exercised his duty to conduct a fair and impartial hearing and to conduct an orderly hearing. The Complainant's Exceptions as they pertain to the recording of the hearing are denied.

The ALJ explained the availability of the transcript to the Complainant. She is not entitled to a free copy of the transcript. The Complainant is required by Commission regulation at 52 Pa. Code § 5.254 to pay for a transcript if she wants a personal copy. The Complainant was not required to pay for a personal copy of the transcript. As the ALJ explained, the Complainant could have viewed the transcript at the Commission's office. Tr. at 119-120. When the ALJ asked the Complainant at the hearing if she would like to purchase the transcript, she stated "I would like to think about it." Tr. at 119. The transcript was filed with the Commission on November 27, 2019 and was available for viewing at the Commission offices by the Complainant.

Therefore, we shall deny the Complainant's Exceptions regarding her argument that she was entitled to a copy of the transcript at no charge and that her due process rights were somehow violated by not receiving a free copy of the hearing transcript.

#### **IV. Conclusion**

In light of the above discussion, we shall: (1) deny the Complainant's 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 Diana Sabatine on July 10, 2020, to the Initial Decision of Administrative Law Judge Jeffrey A. Watson issued on April 21, 2020, at Docket No. C-2018-3002804, are denied, consistent with this Opinion and Order.

2. That the Initial Decision of Administrative Law Judge Jeffrey A. Watson, issued on April 21, 2020, at Docket No. C-2018-3002804, is adopted, consistent with this Opinion and Order.

3. That the Formal Complaint filed by Diana Sabatine, on June 18, 2018, and Amended on July 30, 2018, at Docket No. C-2018-3002804, is dismissed with prejudice, barring the Complainant from filing another formal complaint with the Public Utility Commission raising the same issues or claims as raised in the Formal Complaint filed on June 18, 2018 and the Amended Formal Complaint filed on July 30, 2018, at Docket No. C-2018-3002804.

4. That this proceeding is marked closed.

**BY THE COMMISSION,**

A handwritten signature in black ink, appearing to read "Rosemary Chiavetta". The signature is written in a cursive, flowing style.

Rosemary Chiavetta  
Secretary

(SEAL)

ORDER ADOPTED: February 22, 2024

ORDER ENTERED: February 22, 2024