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March 7, 2024

VIA ELECTRONIC FILING

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

Re: Jeannette and Craig Pavlick v. West Penn Power Company
Docket No. C-2018-3002723

Dear Secretary Chiavetta:

Enclosed please find the Reply Brief of FirstEnergy Pennsylvania Electric Company (West Penn Rate District) regarding the above-referenced matter. This document has been served as shown in the Certificate of Service.

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

Very truly yours,



Tori L. Giesler

vlr
Enclosures

c: As Per Certificate of Service

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Jeannette and Craig Pavlick,

v.

West Penn Power Company

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DOCKET NO. C-2018-3002723

REPLY BRIEF
ON BEHALF OF FIRSTENERGY PENNSYLVANIA ELECTRIC COMPANY
ON BEHALF OF ITS WEST PENN RATE DISTRICT



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Dated: March 7, 2024

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I. PROCEDURAL HISTORY

On June 13, 2018, Jeannette and Craig Pavlick (“Complainants”) filed a Formal Complaint (“Complaint”) with the Pennsylvania Public Utility Commission (“Commission”) against FirstEnergy Pennsylvania Electric Company, on behalf of its West Penn Rate District¹ (“Company”), alleging that the Company was threatening to shut off their electric service, or had done so already. The Complaint also contested the Company’s planned installation of a smart meter at the Complainants’ home at 4200 Colonial Drive, Murrysville, PA 15668 (“Service Location”).

On July 5, 2018, the Company filed an Answer and New Matter to the Complaint, admitting and denying the various allegations contained in the Complaint.

Also on July 5, 2018, the Company filed Preliminary Objections to the Complaint.

On July 25, 2018, the Complainants filed a Reply to the Company’s Preliminary Objections.

On August 13, 2018, the Commission issued a Motion Judge Assignment Notice, assigning this proceeding to Administrative Law Judge (“ALJ”) Jeffrey A. Watson.

On August 29, 2018, ALJ Watson issued an Interim Order Denying the Company’s Preliminary Objections.

On September 14, 2018, the Company served Interrogatories and Requests for Production of Documents (Set I) on the Complainants.

On October 2, 2018, the Company filed a Motion to Compel.

¹ On January 1, 2024, FirstEnergy Corp.'s Pennsylvania operating companies (i.e., Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company, and West Penn Power Company) merged into FirstEnergy Pennsylvania Electric Company. Due to the merger transaction, the affected operating companies' tariffs were consolidated into a single tariff, with each former operating company's rates becoming its own rate district. As such, the customers of the former West Penn Power Company have their own separate and distinct rate district under FirstEnergy Pennsylvania Electric Company’s tariff.

On October 15, 2018, ALJ Watson issued an Interim Order Establishing Initial Litigation Schedule.

On November 28, 2018, ALJ Watson issued an Interim Order Granting Motion of West Penn Power Company to Compel Responses to Interrogatories and Document Requests.

On April 19, 2018, the Company submitted a Status Report.

On April 29, 2019, the Complainants filed a “Motion to Find in Favor of Complainants, Additional Comments Regarding Clarification Request and response to West Penn Power Company Letter Dated April 19, 2019.”

On May 2, 2019, ALJ Watson issued an Interim Order Scheduling Prehearing Conference.

On May 29, 2019, ALJ Watson issued an Interim Order Rescheduling Prehearing Conference and Directing the Parties to Confer Regarding Outstanding Discovery Issues.

On June 25, 2019, the Prehearing Conference was held.

Also on June 25, 2019, the ALJ issued an Interim Order Denying Complainants’ Motion to Find in Favor of Complainants.

On June 28, 2019, the Company filed another Motion to Compel.

On October 1, 2019, ALJ Watson issued an Interim Order Granting Motion of West Penn Power Company to Compel Responses to Interrogatories and Document Requests.

On October 17, 2019, the Company filed a Petition for Protective Order.

On October 24, 2019, ALJ Watson issued a Protective Order.

On December 20, 2019, ALJ Watson issued an Interim Order Requiring Status Report From the Parties.

On December 31, 2019, the Company filed a Status Report.

On January 8, 2020, the Commission issued a Telephonic Hearing Notice.

On January 15, 2020, the Company filed a Motion to Dismiss.

On February 3, 2020, ALJ Watson issued an Interim Order Holding Motion to Dismiss in Abeyance and Requiring Complainants to Comply with Interim Order Entered on October 1, 2019.

On March 6, 2020, ALJ Watson issued an Interim Order Confirming Requirements for Evidentiary Hearing.

On March 16, 2020, the Complainants made a request to ALJ Watson to continue the March 24, 2020 Evidentiary Hearing.

That same day, ALJ Watson issued an Interim Order Granting the Complainants' Request for Continuance of Hearing.²

On April 15, 2020, the Company submitted a Status Report.

On April 28, 2020, the Commission issued a Telephonic Hearing Cancellation/Reschedule Notice.

On May 1, 2020, ALJ Watson issued a Prehearing Order.

On July 21, 2020, the Company served its proposed Hearing Exhibits.

On July 28, 2020, the Commission issued a Telephonic Hearing Cancellation/Reschedule Notice.

On September 16, 2020, the Complainants requested another continuance of the Evidentiary Hearing.

On September 21, 2020, ALJ Watson issued an Interim Order Denying the Complainants' Request for Continuance.

That same day, the Company served its proposed Hearing Exhibits.

² The Company notes that the March 16, 2020 Interim Order mistakenly referenced "Respondent's" request for a continuance, while it was the Complainants who made the request.

On September 22, 2020, the Complainants provided ALJ Watson with a letter objecting to the Interim Order denying their continuance request.

On September 24, 2020, ALJ Watson issued another Interim Order Denying Complainants' Request for Reconsideration of Denial of Continuance Request.

On September 29, 2020, the Evidentiary Hearing was held as scheduled.

On October 5, 2020, the Complainants filed a Motion to File a Brief.

On October 20, 2020, ALJ Watson issued an Interim Order Denying the Complainants' Motion to File Briefs.

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

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

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

⁴ *Id.* at 1014.

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

On December 6, 2023, ALJ Mary D. Long (hereinafter, “the ALJ”) issued an Interim Order on Further Proceedings, permitting the Complainants to file a Main Brief on or before February 7, 2024, and the Company to file a Reply Brief on or before March 7, 2024.

On February 7, 2024, the Complainants filed their Main Brief.

The Company submits this Reply Brief pursuant to the December 6, 2023 Interim Order.

II. LEGAL STANDARDS

Under Section 332(a) of the Public Utility Code, the Complainants maintain the burden of proof in this proceeding.⁵ The first step in carrying the burden of proof is establishing a *prima facie* case that the Company violated the Public Utility Code, the Commission’s regulations, or a Commission order. Only if the Complainants establish a *prima facie* case does it become the responsibility of the respondent to provide rebuttal evidence.⁶ In order to establish a *prima facie* case, more is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established.⁷ Mere bald assertions, personal opinions or perceptions, when not substantiated by facts, do not constitute evidence.⁸

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

⁵ 66 Pa.C.S. § 332(a); *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm’n*, 578 A.2d 600 (Pa. Commw. 1990), alloc. den., 602 A.2d 863 (Pa. 1992).

⁶ *Waldron v. Phila. Elec. Co.*, 54 Pa. P.U.C. 98 (Order entered Mar. 14, 1980).

⁷ *Norfolk and Western Ry. v. Pa. Pub. Util. Comm’n*, 413 A.2d 1037 (Pa. 1980).

⁸ *Pa. Bureau of Corrections v. City of Pittsburgh*, 532 A.2d 12 (Pa. 1987).

establishing a preponderance of the evidence.”⁹ A preponderance of evidence is demonstrated where the evidence presented is more convincing, even by the smallest degree, than the evidence presented by the opposing party.¹⁰

In order for the Commission to sustain a formal complaint, the Complainants must demonstrate that an “act or thing done or omitted to be done by any public utility [is] in violation, or claimed violation, of any law which the Commission has jurisdiction to administer, or of any regulation or order of the commission.”¹¹ Section 1501 of the Public Utility Code states, in relevant part: “every public utility shall furnish and maintain adequate, efficient, safe and reasonable service and facilities.”¹² As part of formal complaint proceedings, the Commission evaluates the reasonableness of public utility service and facilities pursuant to Section 1501. In complaint proceedings similar to the instant proceeding, the Commission has held that the relevant legal standard is whether the installation of a smart meter constitutes unsafe or unreasonable service in violation of Section 1501 of the Public Utility Code.¹³ Relatedly, the Court in *Povacz II* made clear that Act 129 does not provide customers with the right to opt-out of smart meter installation at their residence, and that Complainants seeking smart meter related relief must carry a two-fold burden of proof for Section 1501 claims involving the safety of smart meters and radio-frequency (“RF”) emissions.

First, a customer must present expert opinion rendered to a reasonable degree of scientific certainty that radio frequency emissions from smart meters cause adverse health effects. Next, a customer must present expert opinion rendered to a reasonable degree of medical certainty that RF

⁹ *Lansberry*, 578 A.2d at 602.

¹⁰ *Pa. Pub. Util. Comm’n v. HIKO Energy, LLC*, 2015 Pa. PUC LEXIS 364 (Initial Decision issued Aug. 21, 2015), *supra*.

¹¹ 66 Pa.C.S. § 701.

¹² 66 Pa.C.S. § 1501.

¹³ *Frompovich v. PECO Energy Co.*, 2018 Pa. PUC LEXIS 160 (Opinion and Order entered May 3, 2018); *Susan Kreider v. PECO Energy Co.*, Docket No. C-2015-2469655 (Order on Reconsideration entered January 28, 2016).

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.¹⁴ Once the parties have presented their evidence, the onus then falls on the ALJ to weigh the evidence and determine whether it is more likely than not that the smart meter caused the customer harm.¹⁵ The Supreme Court concluded that neither fear nor inconclusive scientific research was sufficient to prove that smart meter technology constitutes unsafe service under Section 1501.¹⁶ Further, the Supreme Court held that if a customer establishes by a preponderance of the evidence, based on the totality of the circumstances, that smart meter service violates Section 1501, they may be entitled to an accommodation to the extent allowed by Act 129 and a utility's tariff.¹⁷

III. SUMMARY OF REPLY ARGUMENT

The Complainants wholly failed to meet their burden of proof that the installation of a smart meter at the Service Location would constitute unreasonable service in violation of Section 1501 of the Public Utility Code or would otherwise violate the Public Utility Code, a Commission regulation or order.

The Company has an absolute obligation to install smart meters at all of its customers' service locations under Act 129 of 2008 ("Act 129").¹⁸ Neither Act 129 nor subsequent Commission orders related to smart meter installation and deployment permit customers to "opt-out" from smart meter installation.¹⁹ Further, both Act 129 and the Commission's Implementation

¹⁴ *Povacz II*, at 1008.

¹⁵ *Povacz II*, at 1006.

¹⁶ *Povacz II*, at 1005.

¹⁷ *Povacz II*, at 1015.

¹⁸ 66 Pa.C.S. § 2806.1, *et seq.*

¹⁹ *Id.*; see *Smart Meter Procurement and Installation*, Docket No. M-2009-2092655 (Order entered June 24, 2009) ("Implementation Order").

Order require that EDCs install wireless smart meters with specific functionality. The Company's smart meters adhere to the requirements of Act 129 and the Commission. The smart meter components and deployment of smart meters in the Company's territory were identified in the Company's Smart Meter Deployment Plan, which was ultimately approved by the Commission on June 20, 2014.²⁰ The Company will install a smart meter at the Complainants' Service Location in order to remain in compliance with Act 129, related Commission orders, and its Smart Meter Deployment Plan. Despite the Complainants' arguments otherwise, the Company must install a smart meter at the Service Location, as it is required by Act 129, the Company's SMDP, and the Court's holding in *Povacz II*.

In addition, the Complainants failed to establish that the installation of a smart meter constitutes unreasonable service. The Complainants' statements related to health and safety concerns should be rejected as unsupported allegations. The Complainants offered no credible or convincing evidence to support their allegations. Moreover, the Complainants' concerns regarding health and safety are based exclusively upon their own personal beliefs regarding smart meters. The Complainants were not qualified to offer expert testimony and did not present the testimony of an expert on their behalf. Moreover, and importantly, while the Complainants argue that Act 129 does not mandate the installation of smart meters at the Service Location, such a reading of Act 129 was flatly rejected by the Court in *Povacz II*.²¹

²⁰ *Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company For Approval of Their Smart Meter Deployment Plan*, Docket Nos. M-2013-2341990, M-2013-2341991, M-2013-2341993, and M-2013-2341994 (Sec. Letter dated June 20, 2014) (hereinafter, "*Smart Meter Deployment Plan*" or "SMDP").

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

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

The evidence of record and the applicable law weighs heavily against the Complainants' allegations and assertions. Indeed, the lay testimony offered by the Complainants should carry little, if any, weight. Although the Pennsylvania Rules of Evidence are not strictly adhered to at the Commission, the Pennsylvania Supreme Court has unequivocally stated that any relaxation of the rules of evidence in administrative settings cannot allow lay witnesses to testify to technical matters "without personal knowledge or specialized training."²³ Lay witness testimony only carries evidentiary weight where the witness has actually perceived the situation, and the opinion is not based on scientific, technical or specialized knowledge.²⁴ As such, all lay testimony from the Complainants related to more specialized topics, including health, safety, and radio frequency, should be disregarded and given no evidentiary weight under the Pennsylvania Rules of Evidence. Moreover, the overwhelming majority of the Complainants' on-record presentation was expressly rebuffed by the Court in *Povacz II*.²⁵

In sum, the Complainants failed to establish by a preponderance of the evidence that the Company violated a Commission statute, regulation, or order. Specifically, the Complainants have not met their burden of proof that the installation of a smart meter constitutes unreasonable service by the Company. Moreover, the Complainants' Main Brief is merely an attempt to relitigate what

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

²³ *Gibson v. W.C.A.B.*, 861 A.2d 938, 947 (Pa. 2004) (holding Rules of Evidence 602, 701 and 702 generally applicable in agency proceedings).

²⁴ Pa.R.E. 701.

²⁵ See fn. 2, *supra*.

was already fully litigated in *Povacz II*. Accordingly, the Company respectfully urges the Commission to dismiss the Complaint with prejudice.

IV. REPLY ARGUMENT

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

Despite the Complainants' reading of the Court's decision in *Povacz II*, the Company submits that the Complaint should be dismissed because the Supreme Court's decision in *Povacz II* renders this complaint proceeding moot and, even if not moot, disposes of the substantive issues in this proceeding.

The Complainants' Main Brief pains to walk through the text and legislative history of Act 129. However, the Complainants' understanding of Act 129 – and the legislative history behind it, and the Commission's interpretation of the same – is obviated and wholly rebuffed by the Court's unequivocal holding in *Povacz II*. (*See* Complainants MB, pp. 15-20.)

In *Povacz II*, the Pennsylvania Supreme Court held that: (1) Act 129 mandates the systemwide installation of smart meters; (2) the PUC applied the correct burden of proof standard in the smart meter complaint cases arising under Section 1501 of the Public Utility Code; (3) an EDC cannot be required to provide an accommodation to a customer absent a Section 1501 violation; and (4) even if a smart meter complainant meets their burden of proof, the complainant is only “entitled to an accommodation to the extent allowed by Act 129 and a utility’s tariff.”²⁶

²⁶ *See Povacz II*, at 1014.

As explained in the following sections, the instant Complaint is now moot and, even if it were not moot, the *Povacz II* decision disposes of the substantive issues before the Commission, in contravention to the Complainants' arguments otherwise.²⁷

1. The Instant Complaint Is Moot.

The Supreme Court's *Povacz II* decision has rendered the instant complaint moot. Consistent with the Court's ruling in *Povacz II*, customers of the Company, such as the Complainant, may only receive a smart meter related accommodation ordered by the Commission if they are able to establish a violation of Section 1501 of the Public Utility Code. *See* 66 Pa.C.S. § 1501. Moreover, under *Povacz II*, smart meter related accommodations available to a customer of the Company must be consistent with the Company's Commission-approved tariff.

It is well-established that dismissal on mootness grounds is appropriate “unless an actual case or controversy exists at all stages of the judicial or administrative process.”²⁸ “Where ‘intervening changes in the factual matrix of a pending case’ occur which eliminate an actual controversy and make it impossible for the court to grant the requested relief, the case will be dismissed as moot.”²⁹ Moreover, “[a]n issue before the court is moot if, in ruling upon the issue, the court cannot enter an order that has any legal force or effect.”³⁰ The only “limited exceptions” to the mootness doctrine are when: (1) “the conduct complained of is capable of repetition yet evading review”; (2) the case “involves questions important to the public interest”; or (3) “one party” will “suffer some detriment without the Court’s decision.”³¹

²⁷ The Company notes that the Complainants appear to be aware of the mandate in *Povacz II*, writing “the PUC, and now the PA Supreme Court, state that this is a universal mandate.” (Complainants MB, p. 31.)

²⁸ *Burns v. Dep’t of Human Servs.*, 190 A.3d 758, 762 (Pa. Cmwlth. 2018) (citing *Luzerne Cnty. Children & Youth Servs. v. Dep’t of Pub. Welfare*, 826 A.2d 84, 86 (Pa. Cmwlth. 2003)).

²⁹ *Pagnotta v. Pa. Interscholastic Ath. Ass’n*, 681 A.2d 235, 237 (Pa. Cmwlth. 1996) (emphasis added) (quoting *Zemprelli v. Thornburgh*, 466 A.2d 1123, 1124 (Pa. Cmwlth. 1983)).

³⁰ *Burns*, 190 A.3d at 762 (citation omitted).

³¹ *Driscoll v. Zoning Bd. of Adjustment*, 201 A.3d 265, 269 (Pa. Cmwlth. 2018) (quoting *Clinkscale v. Dep’t of Pub. Welfare*, 101 A.3d 137, 139 (Pa. Cmwlth. 2014)).

Here, the Complaint is moot because it is impossible for the Commission to grant the Complainants' request for an opt-out of the smart meter. The Supreme Court held that Act 129 mandates the installation of smart meters and that even if a complainant establishes that the smart meter's installation would violate Section 1501 of the Public Utility Code, the Complainants are only "entitled to an accommodation to the extent allowed by Act 129 and a utility's tariff."³² The only accommodation permitted under the Company's Commission-approved tariff is installing the smart meter at a different location at the customer's expense.³³ This option has been available to the Complainants throughout this proceeding.

However, the Complainants request that they be granted an opt-out of the smart meter's installation entirely, which the Supreme Court held in *Povacz II* is not permissible. (*See* Complainants MB, pp. 13, 19-20, 31.) Moreover, nothing in Act 129 or the Company's PUC-approved tariff provides an opt-out of the smart meter's installation as an available accommodation. Therefore, the Complaint is moot because it is impossible for the Commission to grant the Complainants' requested relief.

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

Second, the instant Complaint does not involve questions important to the public interest. Indeed, the only issue raised by this Complaint that arguably rises to the level of public importance,

³² *Povacz II*, 1014.

³³ FirstEnergy Pennsylvania Electric Company Tariff Rule 4, Electric Pa. P.U.C. No. 1, Original Page 40 ("A Customer desiring the removal, relocation or change of Company facilities or interruption shall submit a request to the Company. The Company may accept or reject said request in its sole and exclusive discretion. If the Company accepts said request, the Customer shall pay in advance the Company's total estimated cost for any Customer requested temporary interruption in the Customer's service due to construction, maintenance or other activities.").

i.e., whether Act 129 mandates the installation of smart meters, was resolved by the Pennsylvania Supreme Court in *Povacz II*.

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

For these reasons, the Company respectfully submits that the Commission should dismiss the Complaint as moot.

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

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

First, the Court's *Povacz II* decision resolved the issue of whether the Company is required by Act 129 to install smart meters for all of its customers, including the Complainant. In *Povacz II*, the Supreme Court "conclude[d] that Act 129 does mandate that EDCs," like the Company,

“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.”³⁴ Moreover, even “[i]f the customer establishes by a preponderance of the evidence based on the totality of the circumstances that smart meter service violates Section 1501, they are entitled to an accommodation to the extent allowed by Act 129 and a utility’s tariff.”³⁵ Nothing in the Company’s tariff permits an opt-out of the smart meter’s installation. The only accommodation set forth in the Company’s tariff is for the meter to be relocated to a different location and for the customer to pay for the estimated relocation costs.³⁶ As a result, the Company must install smart meters for all of its customers, including the Complainants, under Act 129.

Second, the Supreme Court’s decision resolved any issue about the Commission’s burden of proof standard in smart meter complaint cases, which requires Complainants to prove, by a preponderance of the evidence, that there was a “conclusive causal connection” between the smart meters’ RF emissions and adverse health effects. As noted by the Supreme Court, the Commission has been using the “conclusive causal connection” standard in RF emission cases “for almost three decades.”³⁷ In these types of cases “where scientific evidence is required to establish the safety of a service or facility, use of the evidentiary standard of ‘conclusive causal connection’ to assess the evidence is correct.”³⁸

Third, the *Povacz II* decision resolved the Complainants’ claim that the Company would violate their constitutional rights by installing the smart meter at the Service Location. The Commonwealth Court previously found that “[c]onstitutional protections apply against state

³⁴ *Povacz II*, 1014.

³⁵ *Id.*

³⁶ See note 33, *supra*.

³⁷ *Povacz II*, at 1004.

³⁸ *Id.*, 1007.

actors,” and “PECO is not a state actor in relation to its installation of smart meters and provision of electricity to its customers.”³⁹ This finding was not disturbed by the Supreme Court’s *Povacz II* decision. Therefore, because PECO and the Company are similarly-situated EDCs, the Company is not a state actor that can violate the Complainants’ constitutional rights.

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

B. EDCs MUST INSTALL SMART METERS FOR ALL CUSTOMERS.

In *Povacz II*, the Supreme Court held that EDCs, such as the Company, must install smart meters for all of their customers and that customers cannot opt out of the installations. Section 2807(f) of the Public Utility Code prescribes that EDCs, like the Company, must file smart plans and “**shall** furnish smart meter technology” in any of the three situations outlined in Section 2807(f)(2).⁴⁰ In interpreting the smart meter provisions of Act 129, the Commission correctly declared that EDCs must “deploy smart meters system-wide” because of the requirement in Section 2807(f)(2)(iii) that smart meters be deployed “in accordance with a depreciation schedule not to exceed 15 years.”⁴¹ In other words, Section 2807(f)(2)(iii) directs EDCs to install new smart meters for all customers and to depreciate those meters over a 15-year period. The Commission also “recognize[d] that deployment of smart meters on a piecemeal or individual basis could involve greater costs than a systematic system-wide deployment.”⁴² Relatedly, the Supreme Court explained in *Povacz II* that “[i]f the General Assembly had intended to provide electric customers

³⁹ *Povacz v. Pa. PUC*, 241 A.3d 481, 486 n.9 (Pa. Cmwlth. 2020).

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

⁴¹ *Smart Meter Implementation Order*, p. 14.

⁴² *Id.*, pp. 9, 14; see also *Springirth v. Nat’l Fuel Gas Distrib. Corp.*, 1991 Pa. PUC LEXIS 44, at *1-3, 6, 16-17 (Order entered Apr. 12, 1991) (dismissing complaint of customer seeking to make installation of automated meter reading devices optional, noting that the PUC previously found in another case that “[t]he customer should not be given the option of refusing installation of equipment” because “[t]o permit customer discretion in this area would be inefficient and uneconomical”) (quoting *Stenker v. The York Water Co.*, Docket No. C-871318 (Order entered July 27, 1987)).

the ability to opt-out of smart meter installation, it would have used the same customer-choice language it used for the optional time-of-use rates and real-time price programs”⁴³

By way of additional background, on October 15, 2008, Act 129 was signed into law and codified as part of the Public Utility Code (“Code”).⁴⁴ Act 129 required EDCs with at least 100,000 customers, such as the Company, to file a smart meter technology procurement and installation plan (“SMP Plan”) with the Commission for approval.⁴⁵ Specifically, Section 2807(f)(2) of the Code directed EDCs to furnish smart meter technology as follows: 1) upon request from a customer that agrees to pay the cost of the smart meter at the time of the request; 2) in new building construction; and 3) in accordance with a depreciation schedule not to exceed fifteen years.⁴⁶

Under Act 129, the Company has an absolute obligation to install smart meters at all of its customers’ service locations. Neither Act 129 nor subsequent Commission orders and/or appellate court decisions related to smart meter installation and deployment permit customers to “opt-out” from smart meter installation. Consistent with this mandate, the Company’s Commission-approved SMDP explicitly states that no opt-out option is available.⁴⁷ The Commission-approved SMDP mandates 100% of its meters to be replaced with smart meters. Therefore, the Complainants’ request for an opt-out should be rejected.

Pursuant to Section 2807(f) of the Public Utility Code, the Company jointly filed its Petition for Approval of Smart Meter Technology Procurement and Installation Plan with Pennsylvania Electric Company, Pennsylvania Power Company and Metropolitan Edison

⁴³ *Povacz II*, at 999.

⁴⁴ 66 Pa.C.S. § 101, *et seq.*

⁴⁵ 66 Pa.C.S. § 2807(f).

⁴⁶ 66 Pa.C.S. § 2807(f)(2).

⁴⁷ *Smart Meter Deployment Plan*, at 9.

Company (together with West Penn, collectively referred to hereafter as “the Companies”) on August 14, 2009 (“2009 SMP Plan”).⁴⁸ The Commission issued an Order on June 9, 2010, approving the 2009 SMP Plan with certain modifications.⁴⁹ On December 31, 2012, the Companies filed their Joint Petition for Approval of their Smart Meter Deployment Plan, in which they requested that the Commission: (1) find that their proposed Deployment Plan satisfies the requirements of Act 129 and the Commission’s Implementation Order; (2) approve the Companies’ proposed procurement and deployment of approximately 2.1 million smart meters, over 98% of which should be installed by the end of 2019; (3) authorize the Companies to continue to recover smart meter costs; and (4) authorize the Companies to create a regulatory asset for their investment in their existing meters to be replaced by smart meters.⁵⁰ On June 16, 2014, the Companies submitted their revised Smart Meter Deployment Plan, which *intra alia* accelerated the smart meter deployment schedule laid out in their original Deployment Plan.⁵¹ Under the Revised Deployment Plan, the Companies proposed to deploy 170,000 smart meters by the end of 2015.⁵² In its June 25, 2014 Opinion and Order, the Commission recognized the benefits of early deployment of smart meters and approved the revised Smart Meter Deployment Plan, stating:

[T]his Commission has already observed the benefits of early deployment. We find that the use of Penn Power as a case study may help the Companies identify other more cost-effective meter deployment strategies that can then be leveraged by FirstEnergy’s other operating companies.

⁴⁸ *Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company Approval of Smart Meter Technology Procurement and Installation Plan*, Docket No. M-2009-2123950 (Petition dated Aug. 10, 2009).

⁴⁹ *Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company Approval of Smart Meter Technology Procurement and Installation Plan*, Docket No. M-2009-2123950 (Order entered June 9, 2010).

⁵⁰ *Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company For Approval of Their Smart Meter Deployment Plan*, Docket Nos. M-2013-2341990, M-2013-2341991, M-2013-2341993, M-2013-2341994 (Petition filed December 31, 2012).

⁵¹ *Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company For Approval of Their Smart Meter Deployment Plan*, Docket Nos. M-2013-2341990, M-2013-2341991, M-2013-2341993, M-2013-2341994 (Revised Plan filed June 16, 2014).

⁵² *Id.*

If deployment and operational savings prove very positive, FirstEnergy may also be able to further accelerate smart meter deployment, thus enabling an option to enhance customer savings even more.⁵³

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

At the outset, the Company notes that Commission precedent is uniform that the Commission cannot grant exceptions to the statutory directive that smart meters be installed by allowing customers to "opt-out." Neither the Company's Commission-approved SMDP nor Act 129 permit such opt-outs to occur.⁵⁴ Furthermore, Section 2807(f)(2)(i) provides:

(2) Electric distribution companies shall furnish Smart Meter technology as follows:

(i) Upon request from a customer that agrees to pay the cost of the Smart Meter at the time of the request.⁵⁵

The Complainants failed to present any credible evidence to support their allegations that the Company's smart meter deployment is unsafe or violates Section 1501 of the Public Utility Code. Indeed, the crux of the Complainants' argument(s) was that Act 129 does not mandate smart meters at all.⁵⁶ The Complainants did not substantiate any of their health and safety concerns on the record in this proceeding. In view of the Complainants' failure to fulfill their burden of proof, the Complaint should be denied and dismissed with prejudice.

⁵³ *Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company For Approval of Their Smart Meter Deployment Plan*, Docket Nos. M-2013-2341990, M-2013-2341991, M-2013-2341993, M-2013-2341994 (Opinion and Order entered June 25, 2014 at 16).

⁵⁴ *See Gorash v. West Penn Power Co.*, Docket No. C-2018-3006149 (Initial Decision issued Sept. 1, 2020), made final without further Commission action (Order entered Oct. 1, 2020).

⁵⁵ 66 Pa.C.S. § 2807(f)(2)(i).

⁵⁶ Tr. 123-124.

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

Throughout the Complaint – and through the Evidentiary Hearing and in their Main Brief - the Complainants allege various vague health and safety concerns related to smart meters, but failed to provide any reliable evidence in support of these allegations at the Evidentiary Hearing. As such, the Complainants failed to establish their burden of proof to show that the deployment of smart meters is unreasonable or constitutes inadequate utility service.

Pursuant to Section 1501 of the Code, public utilities have a duty to maintain safe, adequate and reasonable service and facilities and to make repairs, changes, and improvements that are necessary or proper for the accommodation, convenience, and safety of its patrons, employees, and the public. Section 1501 of the Code provides, in pertinent part:

§ 1501. Character of service and facilities

Every public utility shall furnish and maintain adequate, efficient, safe, and reasonable service and facilities, and shall make all such repairs, changes, alterations, substitutions, extensions, and improvements in or to such service and facilities as shall be necessary or proper for the accommodation, convenience, and safety of its patrons, employees, and the public. Such service also shall be reasonably continuous and without unreasonable interruptions or delay. Such service and facilities shall be in conformity with the regulations and orders of the commission.⁵⁷

The Complainants presented no expert testimony to corroborate their health, safety, or privacy allegations contained in the Complaint. In addition, the Complainants presented no evidence that they are qualified to offer expert testimony as engineers, doctors or other medical professionals.

⁵⁷ 66 Pa.C.S. § 1501.

As such, the Complainants wholly failed to demonstrate that the installation of a smart meter at the Service Location would constitute unreasonable or inadequate service under Section 1501 of the Public Utility Code. In view of the Complainants' fulsome failure to fulfill their burden of proof, the Complaint should be denied and dismissed with prejudice.

2. The Installation of a Smart Meter at the Service Location Does Not Constitute Discriminatory Service.

The Complainants' allegations that the mandated installation of smart meters for all of the Company's customers is discriminatory and in violation of Section 1502 of the Public Utility Code is meritless. (*See* Complainants MB, p. 21-22.) Indeed, as explained by the Court in *Povacz II*, “[c]onsidering the overall goal of Act 129 to promote energy efficiency and conservation in Pennsylvania, the plain language of Section 2807(f)(2) mandates the system-wide installation of smart meter technology, including smart meters, with no opt-out provision.”⁵⁸ Here, to grant the Complainants an opt-out of the smart meter's installation would be discriminatory, rather than the Complainants' argued inverse. Indeed, because the Company is required to install smart meters for all of its customers, permitting a limited opt-out for the Complainants may raise Section 1502 concerns; applying the Court's holding in *Povacz II*, and the Company's Commission-approved Tariff, does not.

3. The Complainants' Assertion That the Company has Failed to Comply With 52 Pa. Code § 57.259 and Federal Trade Commission Regulations is Unsupported and Meritless.

In their Main Brief, the Complainants argue, for the first time, that the Company did not comply with the requirements of certain Federal Trade Commission (“FTC”) regulations. (*See* Complainants MB, pp. 22-24.) First, the Complainants' did not raise these allegations until their Main Brief. Indeed, at no point during the lengthy procedural history of this proceeding did the

⁵⁸ *Povacz II*, at 998.

Complainants' contend that the Company did not comply with FTC regulations. The Complainants' attempt to advance these allegations for the first time in their Main Brief (*i.e.*, after the record has closed) is improper and would deprive the Company of an opportunity to present evidence in response to the same.⁵⁹

Furthermore, the record is devoid of any evidence to support the Complainants' new allegations on this point. Indeed, the vague reference to "scant promotional literature" – as characterized by the Complainants – was not entered into evidence in this proceeding. Furthermore, while the Complainants now present arguments regarding the alleged "short life expectancy" of smart meters and their "greater likelihood of catching on fire," such allegations are completely unsupported by the record evidence in this proceeding and should be entirely disregarded. Indeed, this appears to be an attempt by the Complainants to throw things at the wall in the hopes that something sticks. While the efficacy of such an approach is questionable in the best of circumstances, it is entirely inappropriate for this proceeding, which has been ongoing for more than 5-years and was subject to an Evidentiary Hearing where the Complainants were at liberty to make a variety of claims and arguments related to their Complaint. As such, these arguments – raised for the first time in the Complainants' Main Brief - should be disregarded, and the Complaint should be dismissed with prejudice.

Additionally, the Complainants allegations related to the purported violation of 52 Pa. Code § 57.259 is without support. Indeed, the Complainants take issue with the Company's compliance on this point because they "have had to conduct [Complainants'] own investigation to

⁵⁹ *Petition of Duquesne Light Co. for approval of smart meter procurement and installation plan*, 2010 Pa. PUC LEXIS 154, *63-64, Docket No. M-2009-2123948 (Initial Decision issued Jan. 28, 2010) ("[DEP's] position in this proceeding was set forth for the first time in its Main Brief. This deprived all parties from testing the reasonableness of its position during the hearing or of addressing it in their respective Main Briefs.") *adopted as modified* (Order Entered Apr. 15, 2010).

learn about the many pitfalls.”⁶⁰ The Complainants also argue that the educational materials did not provide “honest, unbiased, truthful education information about smart meters.”⁶¹ This argument is similarly unsupported. Indeed, the Complainants did not – and could not - reference why they believe the purported materials provided by the Company were dishonest, biased, or untruthful. The record is devoid of any substance on this point and, therefore, this argument should be wholly rejected.

⁶⁰ Tr. 166-167.

⁶¹ Tr. 167.

V. **CONCLUSION**

WHEREFORE, FirstEnergy Pennsylvania Company on behalf of its West Penn Rate District respectfully requests that Administrative Law Judge Mary D. Long recommend that the Pennsylvania Public Utility Commission dismiss the Formal Complaint of Jeanette and Craig Pavlick with prejudice.

Respectfully submitted,

Dated: March 7, 2024



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APPENDIX A

PROPOSED FINDINGS OF FACT

1. Act 129 of 2008 required electric distribution companies with more than 100,000 customers to adopt smart meter deployment plans.⁶²
2. Act 129 provides a list of required smart meter functionality, which was supplemented by Commission order.⁶³
3. The Company's Smart Meter Technology Procurement and Installation Plan was filed on August 14, 2009.⁶⁴
4. The Commission ultimately approved the smart meter deployment plan, with modifications, on June 30, 2011.⁶⁵
5. On December 31, 2012, the Companies filed their Joint Petition for Approval of their Smart Meter Deployment Plan, in which they requested that the Commission: (1) find that their proposed Deployment Plan satisfies the requirements of Act 129 and the Commission's Implementation Order; (2) approve the Companies' proposed procurement and deployment of approximately 2.1 million smart meters, over 98% of which should be installed by the end of 2019; (3) authorize the Companies to continue to recover smart meter costs; and (4) authorize the Companies to create a regulatory asset for their investment in their existing meters to be replaced by smart meters.⁶⁶

⁶² Tr. 199.

⁶³ Tr. 199.

⁶⁴ Tr. 201; *Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company Approval of Smart Meter Technology Procurement and Installation Plan*, Docket No. M-2009-2123950 (Petition dated Aug. 10, 2009).

⁶⁵ Tr. 201-202; *Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company Approval of Smart Meter Technology Procurement and Installation Plan*, Docket No. M-2009-2123950 (Order entered June 9, 2010).

⁶⁶ Tr. 212; *Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company For Approval of Their Smart Meter Deployment Plan*, Docket Nos. M-2013-2341990, M-2013-2341991, M-2013-2341993, M-2013-2341994 (Petition filed December 31, 2012).

6. On June 16, 2014, the Companies submitted their revised Smart Meter Deployment Plan, which *intra alia* accelerated the smart meter deployment schedule laid out in their original Deployment Plan.⁶⁷
7. The Company presented one witness in this proceeding, Mr. John C. Ahr. Mr. Ahr was employed by FirstEnergy Service Company with the title Advisor, Inventory Compliance – Smart Meters.⁶⁸
8. Mr. Ahr’s testimony fully explained the Company’s smart meter deployment plan⁶⁹ and smart meter safety.⁷⁰
9. Customers are not permitted to opt-out of the installation of smart meters under Act 129.⁷¹
10. The Company’s smart meters comply with all applicable requirements and standards for smart meters adopted by the Federal Communications Commission and the American National Standards Institute Tests.⁷²
11. The Company’s smart meters are Underwriters Laboratories (“UL”) certified, which means the meters were tested for Compliant UL standard 2735.⁷³
12. The Complainants did not offer substantive testimony on any issues relating to the health, safety, or reasonableness of the Company’s smart meters or the deployment thereof.
13. The Complainants did not offer expert testimony on any of the issues raised in the Complaint.

⁶⁷ *Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company For Approval of Their Smart Meter Deployment Plan*, Docket Nos. M-2013-2341990, M-2013-2341991, M-2013-2341993, M-2013-2341994 (Revised Plan filed June 16, 2014).

⁶⁸ Tr. 192.

⁶⁹ Tr. 206-207.

⁷⁰ Tr. 218.

⁷¹ Tr. 211-212.

⁷² Tr. 218.

⁷³ Tr. 218-219.

14. Although the Company is permitted to terminate service where a customer denies it access to its smart meters,⁷⁴ the Company did not terminate service at the Service Location.⁷⁵
15. The Company has not violated any Commission order, statute or regulation.⁷⁶

⁷⁴ Tr. 228.

⁷⁵ Tr. 226.

⁷⁶ Tr. 231.

APPENDIX B

PROPOSED CONCLUSIONS OF LAW

1. Under Section 332(a) of the Public Utility Code, the Complainant maintains the burden of proof in this proceeding.⁷⁷
2. The first step in carrying the burden of proof is establishing a *prima facie* case that the Company violated the Public Utility Code, the Commission's regulations, or a Commission order. Only if the Complainants establish a *prima facie* case does it become the responsibility of the Company to provide rebuttal evidence.⁷⁸
3. In order to establish a *prima facie* case, more is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. Mere bald assertions, personal opinions or perceptions, when not substantiated by facts, do not constitute evidence.⁷⁹
4. A party's burden of proof is met by establishing a preponderance of the evidence, which requires proof by a greater weight of the evidence.⁸⁰
5. A preponderance of evidence is demonstrated where the evidence presented is more convincing, even by the smallest degree, than the evidence presented by the opposing party.⁸¹
6. In order for the Commission to sustain a formal complaint, the Complainants must demonstrate that an "act or thing done or omitted to be done by any public utility [is] in violation, or claimed

⁷⁷ 66 Pa.C.S. § 332(a); *Se-Ling Hosiery v. Margulies*, 70 A.2d 854 (Pa. 1950); *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm'n*, 578 A.2d 600 (Pa. Commw. 1990), alloc. den., 602 A.2d 863 (Pa. 1992).

⁷⁸ *Waldron v. Phila. Elec. Co.*, 54 Pa. P.U.C. 98 (Order entered Mar. 14, 1980); *Replogle v. Pa. Elec. Co.*, 54 Pa. PUC 528 (Order entered Oct. 9, 1980).

⁷⁹ *Pa. Bureau of Corrections v. City of Pittsburgh*, 532 A.2d 12 (Pa. 1987); *Mid-Atlantic Power Supply Assoc. v. Pa. Public Utility Comm'n*, 746 A.2d 1196, 1200 (Pa. Commw. Ct. 2000).

⁸⁰ *Lansberry*, 578 A.2d at 602.

⁸¹ *Pa. Pub. Util. Comm'n v. HIKO Energy, LLC*, 2015 Pa. PUC LEXIS 364 (Initial Decision issued Aug. 21, 2015); see also *Se-Ling Hosiery*, *supra*.

violation, of any law which the Commission has jurisdiction to administer, or of any regulation or order of the commission.”⁸²

7. As part of formal complaint proceedings, the Commission evaluates the reasonableness of public utility service and facilities pursuant to Section 1501 of the Public Utility Code. Section 1501 states, in relevant part: “every public utility shall furnish and maintain adequate, efficient, safe and reasonable service and facilities....”⁸³
8. In similar complaint proceedings, the Commission has held that the relevant legal standard is whether the installation of a smart meter constitutes unsafe or unreasonable service in violation of Section 1501 of the Public Utility Code.⁸⁴
9. Neither Act 129 nor subsequent Commission orders related to smart meter installation and deployment permit customers to “opt-out” from smart meter installation.⁸⁵
10. The Pennsylvania Supreme Court’s decision in *Povacz II* requires the installation of smart meters.⁸⁶
11. The *Povacz II* Court held that customers may not “opt-out” of smart meter installation.⁸⁷
12. If the Complainants are able to prove a violation of Section 1501 of the Public Utility Code, they are entitled to an accommodation to the extent allowed by Act 129 and the Company’s tariff.⁸⁸

⁸² 66 Pa.C.S. § 701.

⁸³ 66 Pa.C.S. § 1501.

⁸⁴ *Frompovich v. PECO Energy Co.*, Docket No. C-2015-2474602 (Opinion and Order entered May 3, 2018); *Susan Kreider v. PECO Energy Co.*, Docket No. C-2015-2469655 (Order on Reconsideration entered January 28, 2016).

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

⁸⁶ *Povacz II*, at 983.

⁸⁷ *Id.*

⁸⁸ *Id.*, at 1014.

13. If the Complainants are able to prove that the installation of a smart meter as the Service Location violates Section 1501 of the Public Utility Code, the only relief available to them is for the smart meter to be relocated at their expense.⁸⁹
14. The Complainants failed to establish that the Company's installation of a smart meter at the Complainants' Service Location would violate Act 129 or any related Commission orders.⁹⁰
15. The Company has the absolute right to access a customer's premises to remove or exchange any or all Company equipment including a meter.⁹¹
16. The Company is permitted to terminate a customer's electric service for denying access to the meter.⁹²
17. A lay witness may only provide testimony related to his or her direct knowledge or experience.⁹³
18. Any testimony of a lay witness related to technical or specialized knowledge should be excluded and given no evidentiary weight.⁹⁴
19. The hearsay evidence presented in this case was properly objected to and excluded and may not support any findings of fact.⁹⁵
20. In order for there to be a deprivation of constitutional rights, two elements must be met: (1) "the deprivation must be caused by the exercise of some right or privilege created by the state";

⁸⁹ Exhibit No. JCA-9; FirstEnergy Pennsylvania Electric Company Tariff Rule 4, Electric Pa. P.U.C. No. 1, Original Page 40.

⁹⁰ See *id.*; see also *Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Company For Approval of Their Smart Meter Deployment Plan*, Docket Nos. M-2013-2341990, M-2013-2341991, M-2013-2341993, and M-2013-2341994 (Sec. Letter dated June 20, 2014).

⁹¹ *Id.*; See also Tr. 231.

⁹² 66 Pa.C.S. § 1406; 52 Pa. Code § 56.81; Electric Pa. P.U.C. No. 81, Original Page 45, issued March 20, 2020; effective April 1, 2020

⁹³ Pa.R.E. 701.

⁹⁴ See *Gibson v. W.C.A.B.*, 861 A.2d 938, 947 (Pa. 2004).

⁹⁵ *Walker v. Unemployment Comp. Bd. of Review*, 367 A.2d 366, 370 (Pa Commw. Ct. 1976).

and (2) “the party charged with the deprivation must be a person who may fairly said to be a state actor.”⁹⁶

21. The Company is not a state actor.⁹⁷

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

⁹⁶ *Commonwealth v. Corley*, 491 A.2d 829, 832 (Pa. 1985) (emphasis added) (quoting *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 937 (1982)); see *Commonwealth v. Demor*, 942 A.2d 898, 899-900 (Pa. Super. 2008) (applying principles outlined in *Corley* to Fourth Amendment analysis); *W. Pa. Socialist Workers 1982 Campaign v. Conn. General Life Ins. Co.*, 485 A.2d 1, 5-6 (Pa. Super. 1984) (“[T]he search and seizure provisions of Article 1, section 8, have been held inapplicable to the conduct of private parties.”) (citations omitted).

⁹⁷ *Povacz v. Pa. PUC*, 241 A.3d 481, 486 n.9 (Pa. Cmwlt. 2020).

APPENDIX C

PROPOSED ORDERING PARAGRAPHS

1. The formal complaint of Jeannette and Craig Pavlick filed against FirstEnergy Pennsylvania Electric Company (West-Penn Rate District) at the above-referenced docket is dismissed with prejudice.
2. This matter shall be marked as closed.

