

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Eugene Bazan and Tania Slawecki	:	
	:	
v.	:	C-2017-2640338
	:	
West Penn Power Company	:	

**SECOND INTERIM ORDER
RESCHEDULING TELEPHONIC HEARING AND REQUIRING
SERVICE OF PROPOSED EXHIBITS AND DOCUMENTS**

An evidentiary hearing was held on March 10, 2020. On March 16, 2020, the Commission’s offices were closed as a result of the COVID-19 Pandemic. Accordingly, the second hearing day scheduled for April 1, 2020, was cancelled.

The further evidentiary hearing in this proceeding was subsequently scheduled for October 29, 2020.

On October 16, 2020, Respondent, West Penn Power Company filed a Motion to Stay the Proceeding based upon the recent Commonwealth Court decision in *Povacz et. al. v. Pa. Pub. Util. Comm’n*, No. 492 C.D. 2019 (Cmlth. Pa. filed October 8, 2020). Complainant, Eugene Bazan, did not object to the Motion to Stay.

On October 28, 2020, Administrative Law Judge Jeffrey A. Watson issued an Interim Order Cancelling Evidentiary Hearing Scheduled for October 29, 2020.

The Commission’s handling of complaints challenging the installation of smart meters on consumer’s residences has been the subject of recent appellate litigation. On October 8, 2020, the Commonwealth Court of Pennsylvania (Commonwealth Court) issued an Opinion in *Povacz, et al. v. Pa. Public Utility Commission*, 241 A.3d 481 (Pa. Cmwltth. 2020)

(*Povacz I*), the first of several appeals involving PECO Energy Company's (PECO) deployment of smart meter technology pursuant to Act 129, codified at 66 Pa. C.S. § 2807(f). In the *Povacz I* consolidated opinion, the Commonwealth Court partially affirmed, and partially reversed and remanded, the Commission's March 28, 2019, and May 9, 2019, Orders in Maria Povacz, Laura Sunstein Murphy, and Cynthia Randall. *Povacz I* at 495. Specifically, the Commonwealth Court, in *Povacz I*, held that Act 129 does not mandate the installation of smart meters, and that the Commission had the authority to grant customers accommodations based on their health concerns. *Id.* at 490. However, the Commonwealth Court affirmed: (1) the Commission's application of the preponderance of evidence standard; (2) the Commission's finding that the customers in Maria Povacz, Laura Sunstein Murphy, and Cynthia Randall failed to sustain their burden of proof; and (3) that the Commission's findings of fact were supported by substantial evidence. *Id.* at 490, 491, 493-495. The Commonwealth Court also declined to find that the deployment of smart meters violated the customers' Fourteenth Amendment liberty interests in bodily integrity. *Id.* at 487- 488.

In light of the Commonwealth Court's decision in *Povacz I*, the Commission entered an Order and Notice, at Docket No. M-2009-2092655, on November 4, 2020, pursuant to 66 Pa. C.S. § 501, instituting a stay of certain formal complaint proceedings then-pending before the Commission involving challenges to electric distribution company (EDC) deployment of smart meter technology as being in violation of Section 1501 of the Public Utility Code, 66 Pa.C.S. § 1501 (*November 4, 2020, Stay Order*). The *November 4, 2020, Stay Order* also directed that the stay would apply to any new formal complaints filed with the Commission claiming that EDC deployment of smart meter technology was a violation of Section 1501, and that the stay would remain in place until it was lifted by further Commission action. The *November 4, 2020, Stay Order* applied to and was docketed at the instant case.

The Commission, as well as all other parties in *Povacz I*, subsequently sought and were granted review of the Commonwealth Court's *Povacz I* decision by the Supreme Court of Pennsylvania.

Previously, the Commonwealth Court stayed the proceedings in several other unconsolidated appeals that raised the same, or similar, smart meter issues pending its disposition of *Povacz I*. Upon application by the Commission, the Commonwealth Court continued the stay of these appeals pending the Supreme Court's disposition of *Povacz II*.

On August 16, 2022, the Supreme Court issued an Opinion and Order, *Povacz, et al. v. Pa. Public Utility Commission*, 280 A.3d 975 (Pa. 2022) (*Povacz II*). In its Opinion in *Povacz II*, the Supreme Court affirmed the Commission's determinations in all respects. The Supreme Court reversed the Commonwealth Court's determination that Act 129 does not mandate smart meter installation and that Court's remand to the Commission for consideration as to whether the installation of a smart meter was unreasonable service under Section 1501 of the Code, 66 Pa.C.S. § 1501.

The Supreme Court did, however, affirm the Commonwealth Court's conclusion that the "Customers failed to meet their burden of proving, by a preponderance of the evidence, a conclusive causal connection between [radio frequency] emissions from smart meters and adverse human health effects. *Id.* at 1014. The Supreme Court concluded that Act 129 mandates smart meter deployment and requires the system-wide installation of smart meter technology by EDCs. *Id.* at 992. The Supreme Court found that Section 2807(f)(1), when read in conjunction with Section 2807(f)(2), provides instructions for furnishing smart meters to all customers. In short, the Supreme Court found that under Act 129, customers may choose what to do with smart meter technology but have no right to refuse smart meter installation. *Id.* at 997. Accordingly, the Supreme Court reversed the Commonwealth Court, and affirmed the Commission's interpretation in *Maria Povacz, Laura Sunstein Murphy, and Cynthia Randall* that Act 129 mandates universal smart meter installation. *Id.*

The Supreme Court noted that while Act 129 does not provide customers with the right to opt-out of smart meter installation at their residence, they may file a complaint with the Commission raising a claim that installation of a smart meter violates Section 1501 of the Code, 66 Pa.C.S. § 1501. The Supreme Court reiterated that complainants seeking relief from the Commission must satisfy their burden of proof by a preponderance of the evidence. The

Supreme Court explained that inconclusive evidence – evidence that does not lead to a conclusion of a definite result one way or the other – does not meet even the minimal requirements of the preponderance of the evidence standard. *Id.* at 1005. The Supreme Court opined that while a customer’s evidence does not need to prove their assertion beyond any doubt, evidence of a mere possibility that harm could result is insufficient to satisfy the preponderance of the evidence standard. *Id.* at 1008.

The Supreme Court noted that the burden of proof is two-fold for Section 1501 claims involving the safety of smart meters and radio frequency (RF) emissions. First, a customer must present expert opinion rendered to a reasonable degree of scientific certainty that radio frequency emissions from smart meters cause adverse health effects. Next, a customer must present expert opinion rendered to a reasonable degree of medical certainty that RF emissions from the smart meters, either alone or cumulative to other sources of RF emissions, caused them harm. The utility may then refute the customer’s evidence by providing scientific and/or medical expert testimony that, within a reasonable degree of certainty, the RF emissions from smart meters did not cause the alleged harm. *Id.* Once the parties have presented their evidence, the onus then falls on the fact finder to weigh the evidence and determine whether it is more likely than not that the smart meter caused the customer harm. *Id.* at 1006. 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. *Id.* at 1005. 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 are entitled to an accommodation to the extent allowed by Act 129 and a utility’s tariff. However, given that Act 129 mandates smart meter deployment, the Supreme Court clarified that such accommodation may not rise to the level of an opt-out from smart meter installation. *Id.* at 1015.

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

On January 17, 2024, A Judge Change Notice was issued reassigning this proceeding to me.

A second hearing day is rescheduled for April 25, 2024, at 10:00 a.m. by telephone.

The Parties are reminded of the requirement that they call into the hearing on the scheduled day and time. Failure to do so may result in the dismissal of the case. The Parties will not be called by the Administrative Law Judge.

THEREFORE,

IT IS ORDERED:

1. That the telephonic hearing in this proceeding shall take place on **April 25, 2024, at 10:00 a.m.**

To participate in the hearing, you must dial the toll-free number listed below. You will be prompted to enter a PIN number, which is also listed below. You will be asked to speak your name, press the # key, and then the telephone system will connect you to the hearing. If you have any witnesses you want to have present during the hearing who are participating from a separate phone, you must provide them with the telephone number and PIN Number.

Toll-free Bridge Number: 866.566.0651

PIN Number: 59956427

2. In addition to and notwithstanding the terms set forth in prior orders or hearing notices entered in this proceeding, if you intend to present any documents or exhibits for my consideration at the hearing, or if you intend to have a witness refer to or rely upon any

material of any kind, document or proposed exhibit, you must serve a copy of each such proposed exhibit and document to me and to the opposing party in this case **by email**. Your documents or exhibits must be received by me at mhoyer@pa.gov and every other party **on or before April 18, 2024**. In addition, be sure that you serve me with a copy of any document that you file in this proceeding at the time of its filing **by email, as set forth in this order**. If you send me any correspondence or document, you must also send a copy of that correspondence or document to every other party. For your convenience, a copy of the Commission's current service list of all parties to this proceeding is enclosed with this Order. Any communication as well as documents and proposed exhibits provided to me, shall be emailed to every other party, on or before April 18, 2024.

3. The Parties shall provide me and the opposing Party with a copy of ANY document you file in this case, by email, in addition to filing the document with the Commission's Secretary.

4. The Party intending to offer or utilize any such material or document, or proposed exhibit shall also have at least one copy for his or her use at the hearing.

5. That all proposed exhibits, documents, and materials shall be properly pre-marked for identification prior to the evidentiary hearing and prior to serving such materials upon the opposing Party and the undersigned Presiding Officer.

6. That it shall be the responsibility of the Party offering their proposed evidence to make appropriate arrangements to properly present their evidence at the hearing in this proceeding. The Parties are encouraged to confer and to cooperate in an effort to resolve any procedural matters prior to the hearing. The failure to make such appropriate arrangements as set forth above may result in the refusal of any request to use such materials at the hearings or to introduce any such materials or proposed evidence at the hearings in this proceeding.

7. Pursuant to 52 Pa. Code §§ 1.21 - 1.22, you may represent yourself, if you are an individual, or you may have an attorney licensed to practice law in the Commonwealth of

Pennsylvania, or admitted *Pro Hac Vice*, represent you. However, if you are a partnership, limited liability company, corporation, trust, association, or governmental agency or subdivision, you must have an attorney licensed to practice law in the Commonwealth of Pennsylvania, or admitted *Pro Hac Vice*, represent you in this proceeding. Unless you are an attorney, you may not represent someone else. Attorneys shall insure that their appearance is entered in accordance with the provisions of 52 Pa. Code § 1.24(b).

8. The Complainants bear the burden of proof in this proceeding and must show by a preponderance of the evidence that the Respondent has violated the Public Utility Code or a regulation or an Order of this Commission so that the Complainant is entitled to the relief requested in the complaint. 66 Pa.C.S. § 332(a).

9. **YOU MAY LOSE THIS CASE IF YOU DO NOT TAKE PART IN THIS HEARING AND PRESENT EVIDENCE ON THE ISSUES RAISED. 52 Pa. Code § 5.245.**

10. Although the hearing is being conducted telephonically for the convenience of the Parties, it is still a formal legal proceeding and will be conducted in accordance with the Commission's Rules of Practice and Procedure. 52 Pa. Code §§ 1.1, *et seq.*

11. If you, or anyone you plan to call as a witness on your behalf, have a limited ability to speak or understand English or are deaf or hearing-impaired, a qualified interpreter can be provided upon your request. If you want an interpreter, please contact the Scheduling Office at least ten (10) days before the scheduled Prehearing Conference or Hearing to make your request.

Scheduling Office: (717) 787-1399
AT&T Relay Service number for persons who are deaf or hearing-impaired:
1-800-654-5988.

12. This order shall not be construed as a ruling on the admission or admissibility of any evidence or documentation into evidence and is not intended to modify or expand the scope of any ruling previously made in this proceeding.

Date: April 3, 2024

_____/s/
Mark A. Hoyer
Deputy Chief Administrative Law Judge

**C-2017-2640338 - EUGENE BAZAN AND TANIA SLAWECKI v. WEST
PENN POWER COMPANY**

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