

**PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17120**

Public Meeting held April 4, 2024

Commissioners Present:

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

Geoff Day

C-2018-3003960

v.

Duquesne Light Company

OPINION AND ORDER

BY THE COMMISSION:

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition are the Exceptions of Mr. Geoff Day (Complainant or Mr. Day) filed on May 1, 2020, to the Initial Decision (I.D. or Initial Decision) of Administrative Law Judge (ALJ) Jeffrey Watson, which was served on the Parties on April 13, 2020, and denied the Amended Formal Complaint (Amended Complaint) filed

by the Complainant on February 21, 2019, in the above-captioned proceeding.¹ On May 11, 2020, Duquesne Light Company (Duquesne or the Company) filed Replies to Exceptions. For the reasons discussed below, we shall deny the Complainant’s Exceptions; adopt the Initial Decision of ALJ Watson; and dismiss the Amended Complaint, consistent with this Opinion and Order.

I. Background

This case involves a Formal Complaint (Complaint), as amended, concerning the safety of the advanced metering infrastructure (AMI), or smart meter, which Duquesne uses in the ordinary course of business to measure electricity consumption. Duquesne, an electric distribution company (EDC) subject to the jurisdiction of the Commission, furnishes, owns, and maintains the meters in its distribution system. The Complainant is a Duquesne customer and is the owner of a duplex home with two resident properties – one property which does not have a smart meter installed (Unit 1), and one property where a smart meter was installed by Duquesne (Unit 2).² Duquesne proposes to install a smart meter at Unit 1. The Complainant is seeking a directive that Duquesne: (1) be prevented from installing a smart meter at Unit 1; and (2) remove the smart meter from Unit 2 and replace it with an analog meter. Amended Complaint at 3.

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

¹ We note that the Complainant is identified as both “Geoff Day” and “Geoffrey Day” in the Amended Complaint and elsewhere in the record. *See*, Amended Complaint at *passim*. According to the Customer (Complainant) Information section of the Amended Complaint, the Complainant’s name is “Geoff Day.” Amended Complaint at 1, ¶ 1. Therefore, we shall refer to the Complainant as Geoff Day or Mr. Day.

² In the interest of privacy, we will not be stating the mailing address locations for the two residences in this case.

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 Duquesne, 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 Implementation Order*). Duquesne sought and obtained the Commission's approval to complete the installation of AMI meters with substantially all customers to receive an AMI meter by late 2018. *See, Petition of Duquesne Light Company for Approval of Its Final Smart Meter Procurement and Installation Plan*, Docket No. M-2009-2123948 (Opinion and Order entered May 6, 2013) (*2013 Smart Meter Order*); *See also, Petition of Duquesne Light Company for Approval to Modify its Smart Meter Procurement and Installation Plan*, Docket No. P-2015-2497267 (Opinion and Order entered April 7, 2017) (*2017 Smart Meter Order*).

II. History of the Proceeding

On August 10, 2018, the Complainant filed the instant Complaint.³ In the Complaint, Mr. Day alleged, *inter alia*, that the Company installed a smart meter on his property without his consent and ignored his requests to remove the smart meter. As relief, Mr. Day requested, *inter alia*, that the Commission order the Company to: (1) remove the smart meter from his property; (2) refrain from forcing the installation of the smart meter at his residence; and (3) stop threatening to disconnect his electric service. Complaint at 2-3; I.D. at 1-2.

On September 4, 2018, Duquesne filed an Answer and New Matter to the Complaint (Answer), essentially denying material allegations in the Complaint but contending that the Company is required by Act 129 to install smart meters at the service

³ Upon review of the Commission's case management system, although the Complaint was filed with the Commission on August 10, 2018, it was not served on the Respondent until August 13, 2018. Therefore, pursuant to 52 Pa. Code § 5.61(a), Duquesne was provided twenty (20) days to file an Answer to the Complaint. It is noted that Monday, September 3, 2018, was a holiday. Therefore, an Answer to the Complaint was due Tuesday, September 4, 2018.

address. Duquesne averred, *inter alia*, that the subject property identified by the Complainant is a two-family dwelling with a smart meter installed at one side of the home (*i.e.*, Unit 2) but not the other (*i.e.*, Unit 1). Duquesne further noted that on June 6, 2018, the Company's third-party contractor visited the Complainant's home to change the meter at Unit 1, but the meter was locked with no access. Answer at 1-4; I.D. at 2.

Also, on September 4, 2018, Duquesne filed Preliminary Objections in response to the Complaint (Preliminary Objections), averring that: (1) the Complainant's request for relief for an exemption or opt-out from the installation of a smart meter is not legally recoverable; and (2) the Complainant failed to allege that the Company violated any tariff provision or Commission statute, Regulation, or Order with regard to the installation of the smart meters at the service location, rendering the Complaint legally insufficient. Preliminary Objections at 5-6; I.D. at 2.

On October 3, 2018, the Complainant filed an Answer to Duquesne's Preliminary Objections (Answer to PO).⁴ In his Answer to PO, the Complainant argues, *inter alia*, that there is no provision in Act 129 stating that smart meters are mandatory. Answer to PO at 5-6; I.D. at 2.

⁴ By Secretarial Letter issued September 21, 2018, Mr. Day was informed that his Answer to PO was being returned to him and directed that he correct a deficiency in the Answer to the PO and return it to the address provided within ten days of the date on the letter. Pursuant to Sections 5.101(f)(1) and 1.56(b) of the Code, answers to preliminary objections were due on October 4, 2018 (*i.e.*, within ten days after the date of service; whenever a party is required to act within a prescribed period after service of a document upon the party and the document is served by first-class mail, the "mailbox rule" applies by adding three days to the prescribed period). *See*, 52 Pa. Code §§ 5.101(f)(1); 1.56(b). Further, we note that although the Commission's case management system indicates that the Answer to PO was received on October 3, 2018, and the Answer to PO is stamped "RECEIVED" by the Commission's Secretary's Bureau on October 3, 2018, the Initial Decision indicates that the Answer to PO was received by the Commission on October 1, 2018.

On November 20, 2018, Duquesne filed a Motion to Compel Responses to Interrogatories and Document Requests (Motion to Compel).⁵ On December 14, 2018, the ALJ issued the following three Interim Orders: (1) one granting the Motion to Compel, which, *inter alia*, directed the Complainant to serve upon counsel for Duquesne full and complete responses to the Discovery Requests no later than January 4, 2019; (2) one denying Duquesne's Preliminary Objections; and (3) one directing that the Parties participate in a prehearing conference on February 1, 2019. I.D. at 2-3.

On February 1, 2019, a prehearing conference was held as scheduled. The Company was represented by counsel and the Complainant appeared *pro se*. At the hearing, a discussion was held where the subject property was described as a duplex home with two different meters, and it was represented by the Parties that one meter is a smart meter and one is not.⁶ It was further represented that Duquesne was not being provided access to the meter at Unit 1. The Parties agreed that the Complainant would file an Amended Complaint to identify: (1) the properties that are the subject of the Complaint; (2) the claims that he is asserting; and (3) the relief requested for each claim and property. Feb. 1 Tr. at 19-23; I.D. at 3. Consequently, on February 1, 2019, the ALJ issued an Interim Order directing the Complainant to file an Amended Complaint on or before February 21, 2019. I.D. at 3.

⁵ On October 25, 2018, Duquesne served its First Set of Discovery Requests Directed to Complainant upon Mr. Day (Discovery Requests). Also, on October 25, 2018, Duquesne filed a Certificate of Service certifying that a true copy of the Discovery Requests was served on Mr. Day. According to Duquesne's Motion to Compel, the Complainant's one-page document titled "Response to discovery request" (Complainant Response) did not provide any substantive responses to the Company's Discovery Requests. Motion to Compel at 2. Copies of Duquesne's Discovery Requests and the Complainant Response are attached to the Motion to Compel. *See*, Motion to Compel at 7-17, 20.

⁶ We note that counsel for Duquesne stated that he did not know if the meter which Duquesne intends to replace with a smart meter (*i.e.*, the meter at Unit 1) is an automatic meter reading (AMR) meter or an analog meter. Feb. 1 Tr. at 22.

On February 21, 2019, the Complainant filed the Amended Complaint.⁷ In the Amended Complaint, Mr. Day alleged that Duquesne is threatening to, or already has, shut off his electric service. The Complainant also identified, by mailing address, the two properties that are the subject of his Amended Complaint. As relief, the Complainant requested that the Commission order the Company to: (1) remove the smart meter at Unit 2 and replace it with an analog meter; (2) stop attempting to install an additional smart meter at Unit 1; and (3) stop threatening to disconnect his electric service. Amended Complaint at 3; I.D. at 3.

On March 14, 2019, Duquesne filed an Answer and New Matter to the Amended Complaint (Answer to Amended Complaint), essentially denying all of the material allegations of the Amended Complaint but contending that it is required to install smart meters at each premises in its service territory, including the locations identified in the Amended Complaint. Answer to Amended Complaint at 1-2; I.D. at 4.

On March 25, 2019, Duquesne filed a second Motion to Compel Discovery Responses (Second Motion to Compel).⁸ On April 3, 2019, the ALJ issued an Interim Order granting the Second Motion to Compel, which, *inter alia*, directed the Complainant to serve upon counsel for Duquesne full and complete responses to all of the Company's Discovery Requests no later than April 12, 2019. I.D. at 4.

⁷ By Secretarial Letter dated February 22, 2019, Duquesne was provided a copy of the Amended Complaint and provided that if the Company wishes to respond to the Amended Complaint, such answer must be filed with the Commission within twenty (20) days of the date on the letter.

⁸ On January 7, 2019, Mr. Day filed his Responses to Duquesne's Discovery Requests (Responses to Discovery Requests). According to Duquesne's Second Motion to Compel, the Complainant failed to provide full and complete responses to the Discovery Requests. Second Motion to Compel at 2.

On April 16, 2019, Duquesne filed a Motion to Preclude the Complainant from Testifying at the Evidentiary Hearing (Motion to Preclude). On April 18, 2019, the Complainant filed a response to the Second Motion to Compel (Response to Second Motion to Compel).⁹ On May 1, 2019, Duquesne filed a Status Report (Status Report).¹⁰ The Status Report indicated, *inter alia*, that the Complainant had not provided the Company with a witness list and had not provided full and complete responses to the Discovery Responses. I.D. at 4-5.

On April 29, 2019, the ALJ issued an Interim Order directing that the Parties participate in a second prehearing conference on May 14, 2019. I.D. at 5.

On May 14, 2019, a second prehearing conference was held as scheduled. The Company was represented by counsel and the Complainant appeared *pro se*. At the hearing, the Complainant: (1) advised that he was prosecuting his Complaint and Amended Complaint in this proceeding; and (2) was advised that the deadline to respond to the outstanding Discovery Responses would be extended until May 30, 2019, and that failure to provide full and complete answers to all of the outstanding Discovery Responses may result in sanctions, including the dismissal of the Complainant's case. I.D. at 5.

⁹ By Secretarial Letter issued April 11, 2019, Mr. Day was informed that the Response to Second Motion to Compel was being returned to him and directed that he correct a deficiency in the Response to Second Motion to Compel and return it to the address provided within ten days of the date on the letter.

¹⁰ By Secretarial Letter issued April 24, 2019, Duquesne was informed that the Status Report was being returned to the Company and directed that the Company correct a deficiency in the Status Report and return it to the address provided within ten days of the date on the letter. Further, we note that although the Commission's case management system indicates that the Status Report was received on May 1, 2019, and the Status Report is stamped "RECEIVED" by the Commission's Secretary's Bureau on May 1, 2019, the Initial Decision indicates that the Status Report was received by the Commission on April 15, 2019.

On May 23, 2019, the ALJ issued two Interim Orders: (1) one requiring a status report to address hearing availability of the Parties and their witnesses from August 12-15 and August 19-22, 2019; and (2) one denying Duquesne's Motion to Preclude. On June 10, 2019, Duquesne filed a Status Report indicating witness availability and its preference for a telephonic hearing. I.D. at 5-6. On June 11, 2019, the Complainant filed a cover letter and document entitled "STATUS REPORT AND REQUEST FOR IN-PERSON HEARING."¹¹ I.D. at 6.

By Corrected Hearing Notice dated August 13, 2019 (Hearing Notice), an Initial In-Person Hearing was scheduled for August 21, 2019, and August 22, 2019, at 10:00 a.m. each day. The Hearing Notice included the date, location, and time of the hearing. I.D. at 7.

On August 14, 2019, the Complainant filed a cover letter along with a document entitled "WITHDRAWAL OF FORMAL COMPLAINT."¹² I.D. at 7. On August 16, 2019, the ALJ issued an Interim Order advising the Parties that the Complainant's request to withdraw the Complaint would be considered after convening the hearing on August 21, 2019. Accordingly, the Parties were directed to attend the evidentiary hearing in-person on August 21, 2019, at 10:00 a.m. I.D. at 8.

On August 21, 2019, the evidentiary hearing was held as scheduled (August 21 Hearing). The Company was represented by counsel, and the Complainant appeared *pro se* and agreed to proceed with the hearing. At the August 21 Hearing, the Parties agreed, by written stipulation, that the Complainant: (1) is the owner of two properties – one property which does not presently have a smart meter installed, and one property where a smart meter was installed by Duquesne; and (2) is withdrawing all

¹¹ No Certificate of Service was attached to the pleading. I.D. at 6.

¹² No Certificate of Service was attached to the pleading. I.D. at 7.

allegations and concerns raised in the Complaint and Amended Complaint, with the exception of the question of law as to whether Duquesne has the lawful right to install a smart meter at the Complainant's residence, even though Mr. Day does not consent to the installation of the smart meter. I.D. at 8 (citing ALJ Exh. 1); Aug. 21 Tr. at 51-53.

On August 28, 2019, the ALJ issued an Interim Order requiring that any briefs be filed on or before December 2, 2019. On November 26, 2019, the Complainant filed a brief (Complainant Brief). On December 2, 2019, Duquesne filed a brief (Duquesne Brief). I.D. at 8.

On December 19, 2019, the ALJ issued an Interim Order Closing the Hearing Record. I.D. at 8.

In the Initial Decision issued on April 13, 2020, the ALJ dismissed the Amended Complaint for failure to: (1) carry his burden of proof establishing that Duquesne violated the Code or a Commission Regulation or Order in requiring installation of a smart meter at his service address; and (2) sustain his burden of proof that Duquesne's proposed installation of a smart meter constitutes unsafe or unreasonable service, in violation of 66 Pa. C.S. § 1501. I.D. at 1, 20-21.

As previously noted, the Complainant timely filed Exceptions on May 1, 2020, and Duquesne timely filed Replies to Exceptions on May 11, 2020.

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 2020 Stay Order*). The *November 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 of pending smart meter complaints. Notice was provided on November 14, 2023, informing the Complainant of the lifting of the stay and their procedural rights and obligations under the Commission's regulations. Based upon the lifting of the stay, we shall now address the Complainant's Exceptions.

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 entered 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, Burlison 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, Burlison*, 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-finder¹³ 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. Pa. Comm'n on Crime and Delinquency*, 885 A.2d 678 (Pa. Cmwlth. 2005) (*Suber*).

2. Burden of Proof Applied to Section 1501¹⁴ 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

¹³ 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)).

¹⁴ 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* (Opinion and Order entered April 20, 2017) (*Electric Safety Final Rulemaking Order*).

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*, Docket No. C-2015-2475023 (Opinion and Order entered March 28, 2019) (*2019 Povacz Order*); *Laura Sunstein Murphy v. PECO Energy Company*, Docket No. C-2015-2475726 (Opinion and Order entered May 9, 2019) (*Laura Sunstein Murphy*); and *Cynthia Randall and Paul Albrecht v. PECO Energy Company*, Docket No. C-2016-2537666 (Opinion and Order entered May 9, 2019) (*Cynthia Randall*). By *Povacz II*, the Supreme Court affirmatively established that there is no “opt-out” provision for installation of a smart meter pursuant to Act 129 and that to raise a viable challenge to smart meter installation, a customer must satisfy the preponderance of evidence standard for a violation of Section 1501 of the Code. *Povacz II* at 280 A. 3d at 983-984.

Pursuant to Section 1501 of the Code, a public utility has a duty to maintain “adequate, efficient, safe, and reasonable service¹⁵ 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

¹⁵ 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).

be in conformity with the regulations and orders of the commission.

66 Pa. C.S. § 1501.

As previously noted, in *Povacz II*, the Pennsylvania Supreme Court not only affirmed the Commission’s determination that there is no “opt-out” provision for smart meter installation in either Act 129, the Code, Commission Regulations, or Orders, but also confirmed that challenges to smart meter installation, other than an “opt-out,” may arise under Section 1501 of the Code.¹⁶ 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 v. PECO Energy Company*, Docket No. C-2012-2317176 (Opinion and Order entered January 24, 2013) (*Povacz 2013 Order*); *see also, Frompovich v. PECO Energy Company*, Docket No. C-2015-2474602 (Opinion and Order entered May 3, 2018) (*Frompovich*).

¹⁶ 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*).

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 *2019 Povacz Order*, stating:

A customer seeking affirmative relief from the [Commission] must prove by a preponderance of the evidence that the named utility was responsible or accountable for the problem described in the complaint and that the offense was a violation of the Code, a [Commission] regulation or [o]rder, or a violation of a [Commission]-approved tariff. [See] 66 Pa.C.S. §§ 332(a), 701; *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm'n*, . . . 134 Pa. Commw. 218, 578 A.2d 600 ([Pa. Cmwlth.] 1990)[.] . . .

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).¹⁷

¹⁷ 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*).

In applying the standard of proof to scientific or expert medical evidence in support of alleged adverse health effects, the Commission ruled in the *2019 Povacz Order*, and was subsequently affirmed by the Supreme Court in *Povacz II*, that in order to prevail in a Section 1501 claim against an EDC alleging that an AMI meter caused or will cause adverse health effects or harm to human health, the Complainant must demonstrate by a preponderance of the evidence a “conclusive causal connection” between the harm to human health and the radio frequency fields (RFs)¹⁸ from the AMI meter.¹⁹

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 rejection of a constitutional claim for exemption from smart meter installation predicated on a violation of “bodily integrity.” 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

¹⁸ RF is an abbreviation for radio frequency and is also used here to denote RF fields or RF signals.

¹⁹ See, *2019 Povacz 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).

meters was arbitrary. *Id.* at 839 (internal quotations marks omitted).

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

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

B. ALJ’s Initial Decision

In the Initial Decision, ALJ Watson made ten Findings of Fact (FOF) and reached seventeen Conclusions of Law (COL). I.D. at 8-10, 18-21. The FOF and COL 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.

The ALJ first addressed the smart meter mandate.²⁰ I.D. at 12. The ALJ noted that the Commission has ruled that the word “shall” in Act 129 indicates the

²⁰ As previously noted, based upon the written stipulation agreed upon by the Parties at the August 21 Hearing, the Complainant: (1) is the owner of two properties – one property which does not, at present, have a smart meter installed, and one property where a smart meter was installed by Duquesne; and (2) voluntarily withdrew all allegations and concerns raised in his Amended Complaint and his Complaint, with one exception – the question of law as to whether the Company has the lawful right to install a smart meter at the two properties owned by Mr. Day by Act 129 and the Commission’s

General Assembly’s direction that all customers receive a smart meter. I.D. at 12-13 (citing *Evans v. PECO Energy Company*, Docket No. C-2013-2368477 (Final Order entered February 6, 2014); 66 Pa. C.S. § 2807(f)(2)). The ALJ further noted that the Commission has repeatedly held that no provision in the Code or the Commission’s Regulations or Orders allows a customer to “opt-out” of receiving a smart meter. I.D. at 13 (citing *Hoffman-Lorah v. PPL Electric Utilities Corporation*, Docket No. C-2018-2644957 (Opinion and Order entered May 23, 2019) (*Hoffman-Lorah*); *Paul v. PECO Energy Company*, Docket No. C-2015-2475355 (Opinion and Order entered June 14, 2018) (*Paul*); *Frompovich*; *Povacz 2013 Order*).

The ALJ also noted that a customer who wants to opt-out of receiving a smart meter must lobby the General Assembly to change the law, rather than seeking relief from the Commission. I.D. at 13 (citing *Myers v. PPL Electric Utilities Corporation*, Docket No. C-2017-2620710 (Opinion and Order entered August 29, 2019); *Schmukler v. PPL Electric Utilities Corporation*, Docket No. C-2017-2621285 (Opinion and Order entered July 23, 2019)). The ALJ also referred to the *Povacz 2013 Order*, *Frompovich*, and *Hoffman-Lorah* to note that several Commission decisions since the enactment of Act 129 establish that a customer cannot opt-out of receiving a smart meter. I.D. at 13-14 (citing *Povacz 2013 Order*; *Frompovich*; *Hoffman-Lorah*).

The ALJ noted that Commission precedent supports the conclusion that customers cannot opt-out of receiving a smart meter. I.D. at 14-15 (citing *Hanley v. Pennsylvania Power Company*, Docket No. C-2016-2557487 (Initial Decision issued November 2, 2018) (*Hanley*); *Tellefsen v. Metropolitan Edison Company*, Docket No. C-2018-3005250 (Final Order entered December 26, 2019) (*Tellefsen*). Further, the ALJ recognized that *stare decisis* precedent at the Commission level requires a finding that

Smart Meter Implementation Order, even though the Complainant does not consent to the installation. I.D. at 12; *See*, Aug. 21 Tr. at 52.

Act 129 contains no opt-out because “it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual perceived integrity of the judicial process.”²¹ I.D. at 15 (*Freed*). The ALJ continued that the Commission has applied *stare decisis* to its prior holding that Act 129 requires the universal deployment of smart meters. I.D. at 15 (citing *Bervinchak v. PPL Electric Utilities Corporation*, Docket Nos. C-2016-2572824 and C-2016-2577527 (Final Order entered October 2, 2018) (*Bervinchak*)).

The ALJ addressed the Complainant’s arguments that: (1) Act 129 is an “opt-in bill” that is not compulsory for the American people, and no opt-out is necessary for those who chose simply not to opt-in; and (2) smart meters collect data from inside the home that reflects private activities. I.D. at 15 (citing Complainant Brief at 1-2). The ALJ reasoned that the Complainant is attempting to opt-out of receiving a smart meter because, according to the Complainant, the Company can only install a smart meter upon his request or with his consent. The ALJ continued that the Complainant’s interpretation of Act 129 is inconsistent with Commission precedent concluding that EDCs with more than 100,000 customers “shall furnish smart meter technology in accordance with a depreciation schedule not to exceed 15 years.” I.D. at 15 (citing 66 Pa. C.S. § 2807(f)(2)). Further, the ALJ noted that Act 129 requires that all EDCs with more than 100,000 customers submit smart meter technology and procurement plans to the Commission for approval. The ALJ continued that if the General Assembly intended for EDCs to deploy smart meters only upon customer request, then requiring EDCs to submit detailed smart meter plans without describing the circumstances for permitting a customer opt-out would make little sense. I.D. at 15-16.

²¹ The rule of *stare decisis* states: “[f]or the sake of certainty, a conclusion reached in one case should be applied to those which follow, if the facts are substantially the same, even though the parties may be different. I.D. at 15 (citing *Freed v. Geisinger Medical Center*, 971 A.2d 1202, 1212 (Pa. 2009) (*Freed*)).

Finally, the ALJ also addressed the Complainant’s argument that the Company’s attempt to install a smart meter at his service addresses is a violation of his Fourth Amendment rights under the United States Constitution (U.S. Constitution). Specifically, the ALJ acknowledged the Complainant’s position that: (1) the right of the people to be secure in their homes is violated where privacy is dismissed by smart meters; and (2) smart meter information is sensitive regarding the interior of a home, which Americans reasonably expect to remain private. I.D. at 16 (citing Complainant Brief at 12-13, 18, 25). The ALJ found that the U.S. Constitution does not apply in the instant matter because the U.S. Constitution only applies to a “state action” and, although Duquesne is regulated by the Commission, it does not apply to the conduct of a private company, such as Duquesne. I.D. at 16-17 (citing *Jackson v. Metropolitan Edison Company*, 419 U.S. 345, 349-350 (1974); *Schutz v. PPL Electric Utilities Corporation*, Docket No. C-2018-3005659 (Opinion and Order entered May 21, 2020)).

Accordingly, the ALJ dismissed the Amended Complaint because: (1) there is no dispute that Act 129 does not provide for customers to opt-out of smart meter installation; and (2) no evidence was presented to support the conclusion that the Company’s refusal to allow the Complainant to opt-out of smart meter installation violates any law, Commission Regulation or Order. I.D. at 17.

C. Exceptions²²

In his Exceptions, the Complainant disagrees with the ALJ’s Initial Decision. The Complainant’s Exceptions assert that the ALJ’s rejection of the

²² 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 exceptions is taken, and cite to the relevant pages of the Initial Decision. Nevertheless, particularly because the Complainant is appearing *pro se*, we will accept

Complainant’s basis for refusing smart meter installation somehow constitutes a violation of a constitutionally-protected right. Mr. Day contends that the ALJ has a duty and obligation to support the United States Constitution and the law. The Complainant continues that the ALJ’s decision to dismiss the Complaint with prejudice “is a clear dereliction of his duties” and violates his “natural, unalienable, constitutionally protected [r]ights.” Exc. at 1. Further, Mr. Day appears to argue that the ALJ’s Initial Decision violated United States Code (U.S.C.) Title 42 § 1983 – Deprivation of Rights Under Color of Law, and U.S.C. Section 242 of Title 18. The Complainant concludes his Exceptions by “demand[ing]” that the ALJ “carry out his duties in good faith, and immediately grant [the] [C]omplainant all requested relief, or, resign forthwith from the [Commission].” *Id.*

D. Replies to Exceptions

In its Replies, Duquesne contends that the Commission should deny the Complainant’s Exceptions because they fail to identify any erroneous FOF or COL to which exception is taken, pursuant to 52 Pa. Code § 5.533(b). R. Exc. at 10. Further, Duquesne contends that the Complainant provides no supporting reasons for his Exceptions and merely states that the Initial Decision is “void and unacceptable.” R. Exc. at 10 (citing Exc. at 1). Moreover, the Company notes that the Complainant makes several unfounded claims against the ALJ. In short, Duquesne argues that although *pro se* complainants generally receive some latitude in legal proceedings, the Exceptions provide no basis for overturning the Initial Decision and, therefore, should be denied for this reason alone. R. Exc. at 10.

Duquesne agrees with the ALJ that based on Commission precedent, Act 129 does not permit the Complainant to opt-out of receiving a smart meter. R. Exc.

the Exceptions as filed, pursuant to Section 1.2(a) and (d) of our Regulations, 52 Pa. Code § 1.2(a) and (d), to secure a just, speedy, and inexpensive determination.

at 10-11. The Company notes that the Commission has repeatedly ruled that the use of “shall” in Act 129 indicates the General Assembly’s direction that all customers receive a smart meter. R. Exc. at 11 (citing Duquesne Brief at 6; *Evans v. PECO Energy Company*, Docket No. C-2013-2368477 (Final Order entered February 6, 2014); 66 Pa. C.S. § 2807(f)(2)). Further, Duquesne notes that the Commission has consistently held that no provision in the Code or the Commission’s Regulations or Orders allows a customer to opt-out of receiving a smart meter. R. Exc. at 11 (citing Duquesne Brief at 6; *Hoffman-Lorah; Paul; Povacz 2013 Order; Frompovich*). Moreover, the Company avers that rather than seeking relief from the Commission, a customer must lobby the General Assembly to change the law if that customer wants to opt-out of receiving a smart meter. R. Exc. at 11 (citing Duquesne Brief at 6-7; *Myers v. PPL Electric Utilities Corporation*, Docket No. C-2017-2620710 (Opinion and Order entered August 29, 2019); *Kline v. PPL Electric Utilities Corporation* (Docket No. C-2017-2621072) (Opinion and Order entered October 8, 2020)).

Duquesne refers to several Commission decisions to assert that a customer cannot opt-out of receiving a smart meter. R. Exc. at 12-13 (citing Duquesne Brief at 7-8; *Povacz 2013 Order; Frompovich; Paul; Hoffman-Lorah*). Further, the Company refers to decisions issued after *Hoffman-Lorah* to argue that the Commission has held that customers cannot opt-out of, or refuse, the installation of a smart meter, and the presiding ALJ in subsequent cases has consistently followed the Commission’s precedent. R. Exc. at 13-15 (citing Duquesne Brief at 8-9; *Larson v. PECO Energy Company*, Docket No. C-2017-2615206 (Opinion and Order entered September 19, 2019); *Gavin v. PECO Energy Company*, Docket No. C-2017-2616249 (Opinion and Order entered July 11, 2019); *Hanley; Lamagna v. Pennsylvania Electric Company*, Docket No. C-2017-2608014 (Final Order entered December 21, 2018); *Tellefsen*). Moreover, Duquesne argues that these prior decisions must be upheld by the rule of *stare decisis*, and the Commission has applied *stare decisis* to its prior holdings that Act 129 requires the universal deployment of smart meters. R. Exc. at 15 (citing Duquesne Brief at 9-10;

Freed; Bervinchak; Zimmerman v. PPL Electric Utilities Corporation, Docket No. C-2017-2615038 (Initial Decision issued August 16, 2018)). Furthermore, the Company asserts that in the instant case, the ALJ properly applied *stare decisis* by holding that the Complainant cannot opt-out of receiving a smart meter. Additionally, Duquesne again refers to *Povacz 2013 Order, Frompovich, Paul, Hoffman-Lorah, Hanley, Lamagna, and Tellefsen* to contend that although the parties are different, the instant case is substantially the same as those cases. R. Exc. at 15-16. Accordingly, Duquesne avers that the ALJ correctly ruled that the Company has the right to install a smart meter at the Complainant's residence, regardless of whether the Complainant gives consent. R. Exc. at 16 (66 Pa. C.S. § 2807(f)(2)).

Duquesne also agrees with the ALJ that the mandatory deployment of smart meters complies with Act 129 and, when read in conjunction with the statute's other provisions, is the most-plausible interpretation. Further, the Company argues that the Act 129 requirement that EDCs with more than 100,000 customers submit smart meter technology and procurement plans to the Commission for approval only makes sense if the General Assembly also intended that smart meters be universally deployed. R. Exc. at 16 (citing Duquesne Brief at 10-11; *Implementation Order* at 14). Accordingly, Duquesne avers that the ALJ correctly ruled that the Company has the right to install a smart meter at the Complainant's service addresses. R. Exc. at 16-17.

Duquesne also contends that its Commission-approved tariff requires the Company to install a smart meter at the Complainant's service addresses. Duquesne refers to several rules in the Company's tariff that authorize Company personnel to enter the Complainant's property to install a smart meter. R. Exc. at 17 (citing Duquesne Brief at 14; *Warren v. Duquesne Light Company*, Docket No. F-2014-2399085 (Final Order entered September 12, 2014)). Specifically, Duquesne refers to: (1) Rule 9B, which provides that pursuant to Act 129 and the Company's Commission-approved smart meter deployment plan (SMDP), smart meters conforming to the Company's standards must be

installed at each metered service premises; (2) Rule 22, which authorizes Company representatives to access the Company's equipment; and (3) Rule 33, which authorizes the Company to terminate service and remove its equipment from the customer's property if the Company is blocked access to its equipment. R. Exc. at 17-19 (citing Duquesne Brief at 14-15; *2013 Smart Meter Order*; *2017 Smart Meter Order*);). Accordingly, Duquesne asserts that the ALJ properly ruled that the Company has the right to install a smart meter at Mr. Day's residence. R. Exc. At 19.

Duquesne also avers that the ALJ correctly ruled that the Fourth Amendment does not prohibit the Company from installing a smart meter at Mr. Day's residence. R. Exc. at 19 (citing U.S. Const. Amend. IV). The Company argues that the U.S. Constitution only applies to "state action" and does not apply to a state-regulated private company, such as Duquesne. R. Exc. at 19-20 (citing Duquesne Brief at 11-12). Accordingly, Duquesne asserts that the ALJ correctly ruled that the U.S. Constitution does not apply here because the Company is not a "state actor." R. Exc. at 20.

Further, Duquesne refers to several cases to argue that the ALJ and the Commission lack jurisdiction to rule on any claims arising under the U.S. Constitution. Specifically, the Company avers that the Commission may exercise only those powers that are expressly conferred upon it by the legislature and must act within its jurisdiction. R. Exc. at 20-21 (citing Duquesne Brief at 12; *Feingold v. Bell of Pennsylvania*, 383 A.2d 791, 794 (Pa. 1978); *City of Pittsburgh v. Pa. PUC*, 43 A.2d 348, 348 (Pa. Super. 1945)). Further, Duquesne notes that subject matter jurisdiction is a prerequisite to the exercise of power to decide a controversy, and the Commission is only authorized to hear complaints regarding the Code, Commission Regulations or Orders. R. Exc. at 21 (Duquesne Brief at 12-13; *Hughes v. Pa. State Police*, 619 A.2d 390, 393 (Pa. Cmwlth. 1992); *Haleema B. Alkhatib v. PECO Energy Company*, Docket No. C-2011-2242125 (Opinion and Order entered January 12, 2012); 66 Pa. C.S. § 701). Moreover, the Company reiterates that the Commission does not have jurisdiction over

claims arising under the U.S. Constitution. R. Exc. at 21-22 (citing Duquesne Brief at 13; *White v. PPL Electric Utilities Corporation*, Docket No. C-2018-3003468 (Opinion and Order entered May 21, 2020); *Alice Ann Belmonte-Gates v. PECO Energy Company*, Docket No. F-2012-2332583 (Opinion and Order entered August 13, 2013); *James Coppedge v. PECO Energy Company*, Docket No. F-2009-2135893 (Opinion and Order entered August 3, 2010)). Accordingly, Duquesne contends that the ALJ correctly rejected the Complainant's claim that the Company violated any constitutional rights. R. Exc. at 22.

E. Disposition

We note that any argument or Exception that we do not specifically address 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).

As a general matter, in cases involving a challenge to smart meter installation, the standard burden of proof applicable in complaint proceedings applies. However, case law addressing the specific claims raised in challenges to smart meter installation has also developed. Claims challenging the installation of a smart meter can generally be categorized as claiming one or more of the following: (1) a right to opt out of the smart meter installation; (2) a Section 1501 violation of the provision of reasonable and safe service based on either alleged adverse health effect or unsafe technology; (3) a constitutional right to refuse the installation; and/or, (4) a right to choose which type of technology to install. *See, generally, Povacz II*.

In the present case, the Complainant's Exceptions, while premised upon alleged constitutional grounds, challenge the ALJ's denial of the right to opt out of smart meter installation, and the right to select an analog meter at one of the properties. Exc. at 1. The Complainant does not want a smart meter at Unit 1, and wants the smart meter already installed at Unit 2 to be replaced with an analog meter. Complainant Brief at 27; Amended Complaint at 3; Aug. 21 Tr. at 53; Feb. 1 Tr. at 18-21. The Complainant also argued that the Company's attempt to install a smart meter at his address is a violation of his rights under the Fourth Amendment to the U.S. Constitution. Complainant Brief at 12-13, 17; Amended Complaint at 3. The ALJ denied Mr. Day's request because, under the requirements of Act 129 and in accordance with the Company's Commission-approved SMDP, Duquesne is required to install a smart meter at the Complainant's service address. I.D. at 15-16 (citing 66 Pa. C.S. § 2807(f)). The ALJ also denied the Complainant's argument that Duquesne's attempt to install a smart meter is a violation of his Fourth Amendment rights because the U.S. Constitution does not apply to the conduct of a private company, such as Duquesne, and therefore does not apply in this matter. I.D. at 16-17.

To the extent the Complainant's Exceptions dispute the ALJ's denial of the right to opt out, the Exceptions appear to reiterate the legal right to opt out of smart meter installation on his property. Exc. at 1. However, based upon the holding of the Pennsylvania Supreme Court in *Povacz II*, the Complainant's Exceptions must be denied. As noted, *supra*, the Supreme Court expressly held that there is no opt out of Act 129 for customers who do not want a smart meter installed on their property.

In the present case, the ALJ correctly concluded that the Complainant has no right to an opt-out of smart meter installation. According to *Povacz II*, 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. Here, we agree with the ALJ that there is no specific provision in the Code or

the Commission's Regulations or Orders that provides for customers to opt-out of smart meter installation. I.D. at 20, COL No. 15. Further, we agree with the ALJ's analysis and conclusion that the Complainant is attempting to opt-out of receiving a smart meter based on the Complainant's interpretation of Act 129, which is inconsistent with Commission precedent. I.D. at 15.

Further, we agree with Duquesne that the Company's Commission-approved tariff: (1) requires that smart meters be installed at each customer-metered premises, including the Complainant's service addresses; (2) authorizes Company representatives to access the Company's equipment, including the Company's meters at the two service addresses; and (3) authorizes the Company to terminate service and remove its equipment from the customer's property if the Company is prevented from accessing its equipment. Moreover, we agree with Duquesne that it was required by its Commission-approved SMDP to install a smart meter at the Complainant's home. R. Exc. at 17-19 (citing *2013 Smart Meter Order*; *2017 Smart Meter Order*).

In addition to no opt-out from smart meter installation, the customer has no right to select the smart meter technology utilized by the Company. Therefore, the Complainant's request for installation of an analog meter rather than a smart meter (*i.e.*, "immediately grant [the] [C]omplainant all requested relief") must be rejected. Exc. at 1. Under *Povacz II*, it is the Company, not the customer, which has the authority to determine the type of smart meter to install. In *Povacz II*, the Supreme Court reasoned 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.* Accordingly, to the extent the Complainant's Exceptions assert a right to a certain type of meter, the Exceptions are denied.

Section 2807(f) of the Code prescribes that EDCs must file smart meter plans and “shall furnish smart meter technology” in any of the following situations: (i) “[u]pon request from a customer that agrees to pay the cost of the smart meter at the time of the request;” (ii) “[i]n new building construction;” and (iii) “[i]n accordance with a depreciation schedule not to exceed 15 years.” 66 Pa. C.S. § 2807(f)(1)-(2). We previously concluded that the use of the word “shall” in Section 2807(f) indicates the General Assembly’s direction that all customers will receive a smart meter. *Povacz 2013 Order* at 10; *Paula and Charles Hughes v. PPL Electric Utilities Corporation*, C-2019-3007631 (Opinion and Order entered July 16, 2020) at 27.

In contrast with the Complainant’s arguments, in our opinion, under a comprehensive reading of Section 2807(f)(2)(i) and (iii) together, subsection (i) directs an EDC to install a smart meter upon the request of a customer, in the event the customer desires a smart meter to be installed at the customer’s premises, in advance of the time the EDC will install a smart meter at the customer’s premises, in accordance with the EDC’s Commission-approved depreciation or deployment schedule. This interpretation is based on the language in subsection (i), requiring the customer to agree to pay the cost for the installation of the smart meter at the time of the request. In contrast, the depreciation schedule referenced in subsection (iii) addresses the length of time the EDCs will recover the depreciation expense in socialized utility rates associated with the capital investment in deploying smart meters system-wide.²³

Although the Complainant expresses that he wants an analog meter and does not want a smart meter installed on his property, we agree with the ALJ’s analysis and conclusion that, under the provisions of Act 129, Duquesne is required to deploy

²³ In the *Smart Meter Implementation Order*, we recognized that the EDCs needed time to select the technology, train personnel, and deploy the entire AMI network, including any associated hardware and software. *Smart Meter Implementation Order* at 6.

smart meters, consistent with 66 Pa. C.S. § 2807(f)(2). I.D. at 15-16. Further, we agree with the ALJ's conclusion that the Complainant has presented no evidence to support the conclusion that Duquesne, which is required to comply with Act 129 and 66 Pa. C.S. § 2807 by installing smart meters at the Complainant's residence, violated the Code, a Commission Regulation, or a Commission Order. I.D. at 17.

Indeed, we declared that EDCs must "deploy smart meters system-wide" because of the requirement that smart meters be deployed "in accordance with a depreciation schedule not to exceed 15 years." *Smart Meter Implementation Order* at 14. We also "recognize[d] that deployment of smart meters on a piecemeal or individual basis could involve greater costs than a systematic system-wide deployment." *Smart Meter Implementation Order* at 9, 14. Moreover, we agree with the ALJ that in accordance with Act 129, the Company is required to install smart meters for all of Duquesne's customers. I.D. at 15-16 (citing 66 Pa. C.S. § 2807(f)(2)). Therefore, we find no error in the ALJ's determination that the installation of the smart meter was mandatory, as set forth in the Initial Decision. We agree with the Company that the Complainant's request for an opt out of smart meter installation must be rejected.

We also agree with the Company that the Complainant's claims of a violation of a constitutionally protected right should be denied. Indeed, as discussed by the ALJ, although Duquesne is regulated by the Commission, it is not a "state actor," and therefore, the U.S. Constitution does not apply to the conduct by a private company. I.D. at 17. To the extent the Complainant raises the Fourth Amendment right of privacy as a bar to smart meter installation, we disagree. As noted by the Company and the ALJ, the Commission: (1) does not have jurisdiction to rule on any claims arising under the U.S. Constitution; (2) may exercise only those powers given by the legislature; and (3) is only authorized to hear complaints regarding the Code, Commission Regulations or a Commission Order. R. Exc. at 20-21; I.D. at 18, COL Nos. 5-6. Therefore, the Complainant's claim on this matter is denied.

Upon review of the record, and based on the foregoing discussion, we find the Complainant's claims fails to establish that the Company violated any provision of the Code, a Commission Regulation or Order, or a Commission-approved tariff. Therefore, for all the foregoing reasons, we shall deny the Complainant's Exceptions.

IV. Conclusion

Based upon our review of the record and the applicable law, we shall deny the Complainant's Exceptions and adopt the Initial Decision, consistent with this Opinion and Order; **THEREFORE,**

IT IS ORDERED:

1. That the Exceptions filed by Geoff Day on May 1, 2020, at Docket No. C-2018-3003960, are denied, consistent with this Opinion and Order.
2. That the Initial Decision of Administrative Law Judge Jeffrey Watson, issued on April 13, 2020, at Docket No. C-2018-3003960, is adopted, consistent with this Opinion and Order.
3. That the Formal Complaint filed on August 10, 2018, and the Amended Complaint filed on February 21, 2019, by Geoff Day against Duquesne Light Company, at Docket No. C-2018-3003960, are denied.

4. That this proceeding at Docket No. C-2018-3003960 be 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: April 4, 2024

ORDER ENTERED: April 4, 2024