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April 11, 2024

VIA ELECTRONIC FILING

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

Re: Gilbert Martinez v. Metropolitan Edison Company
Docket No. C-2019-3013798

Dear Secretary Chiavetta:

Enclosed please find the Main Brief of FirstEnergy Pennsylvania Electric Company (Met-Ed 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

mlr
Enclosures

c: As Per Certificate of Service

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Gilbert Martinez

v.

Metropolitan Edison Company

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DOCKET NO. C-2019-3013798

MAIN BRIEF

**ON BEHALF OF FIRSTENERGY PENNSYLVANIA ELECTRIC COMPANY
ON BEHALF OF ITS MET-ED RATE DISTRICT**



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Dated: April 11, 2024

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I. PROCEDURAL HISTORY

On October 25, 2019, Gilbert Martinez (“Complainant”) filed a Formal Complaint with the Pennsylvania Public Utility Commission (“Commission”) in which the Complainant, *inter alia*, challenged the installation of a smart meter at his home located at 1706 Cotton Street, Reading, PA 19606 (“Service Location”).

On November 14, 2019, FirstEnergy Pennsylvania Electric Company,¹ on behalf of its Met-Ed Rate District (the “Company”) filed its Answer and New Matter denying the material allegations of the Complaint, as well as Preliminary Objections.

On November 23, 2019, the Complainant filed a reply to the Company’s Preliminary Objections.

On December 2, 2019, the Commission issued a Call-In Telephone Pre-Hearing Conference Notice, scheduling a telephonic Pre-Hearing Conference on January 22, 2020.

On December 26, 2020, Administrative Law Judge Andrew M. Calvelli issued an Order Denying the Company’s Preliminary Objections.

On January 16, 2020, the Company filed a Motion to Compel.

On January 22, 2020, the Commission issued a Call-In Telephone Hearing Notice, scheduling a telephonic hearing for February 20, 2020, at 10:00 a.m.

On February 3, 2020, Administrative Law Judge Calvelli issued a Prehearing Order.

On February 19, 2020, the Commission issued a Hearing Cancellation Notice, cancelling the February 20, 2020 Evidentiary Hearing.

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 Metropolitan Edison Company have their own separate and distinct rate district under FirstEnergy Pennsylvania Electric Company’s tariff.

On March 12, 2020, the Commission issued a Judge Change Notice, reassigning this proceeding to Administrative Law Judge Elizabeth H. Barnes.

On May 26, 2020, Judge Barnes issued an Order granting the Company's Motion to Compel.

On August 13, 2020, the Commission issued a Call-In Telephone Hearing Notice, scheduling the Evidentiary Hearing for September 17, 2020.

On October 16, 2020, the Company filed a Motion to Stay the Proceeding.

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 June 13, 2022, the Commission issued a Judge Change Notice, reassigning this proceeding to Administrative Law Judge Gail M. Chiodo (the "ALJ").

On August 16, 2022, the Pennsylvania Supreme Court issued its Opinion affirming in part and reversing in part the Commonwealth Court's decision.² 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."³

² See *Povacz v. Pa. PUC*, 280 A.3d 975 (Pa. 2022) ("*Povacz II*").

³ *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 13, 2023, the ALJ issued an Order Post Evidentiary Hearing Conference.

On December 15, 2023, the Commission issued a Post-Hearing Conference Notice, scheduling a Post-Hearing Conference for February 27, 2024.

On February 27, 2024, the Post-Hearing Conference was held as scheduled.

Also on February 27, 2024, the ALJ issued a Briefing Order, allowing parties to file Main Briefs on or before April 11, 2024, and Reply Briefs on or before April 25, 2024.

The Company submits this Main Brief pursuant to the February 27, 2024 Briefing Order.

II. LEGAL STANDARDS

Under Section 332(a) of the Public Utility Code, the Complainant maintains the burden of proof in this proceeding.⁴ 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 Complainant establishes a *prima facie* case does it become the responsibility of the respondent to provide rebuttal evidence.⁵ 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.⁶ Mere bald assertions, personal opinions or perceptions, when not substantiated by facts, do not constitute evidence.⁷

Although the factual burden may shift during a proceeding, the Complainant always maintains the overarching burden of proof. It is clearly established that the Complainant's "burden

⁴ 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).

⁵ *Waldron v. Phila. Elec. Co.*, 54 Pa. P.U.C. 98 (Order entered Mar. 14, 1980).

⁶ *Norfolk and Western Ry. v. Pa. Pub. Util. Comm'n*, 413 A.2d 1037 (Pa. 1980).

⁷ *Pa. Bureau of Corrections v. City of Pittsburgh*, 532 A.2d 12 (Pa. 1987).

of proof before administrative tribunals as well as before most civil proceedings is satisfied by establishing a preponderance of the evidence.”⁸ 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.⁹

In order for the Commission to sustain a formal complaint, the Complainant 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.”¹⁰ 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.”¹¹ 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.¹² 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

⁸ *Lansberry*, 578 A.2d at 602.

⁹ *Pa. Pub. Util. Comm’n v. HIKO Energy, LLC*, 2015 Pa. PUC LEXIS 364 (Initial Decision issued Aug. 21, 2015), *supra*.

¹⁰ 66 Pa.C.S. § 701.

¹¹ 66 Pa.C.S. § 1501.

¹² *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).

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.¹³ 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.¹⁴ The Supreme Court concluded that neither fear nor inconclusive scientific research was sufficient to prove that smart meter technology constitutes unsafe service under Section 1501.¹⁵ 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.¹⁶

III. SUMMARY OF ARGUMENT

The Complainant wholly failed to meet his burden of proof that the installation of a smart meter at the Service Location constitutes 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").¹⁷ Neither Act 129 nor subsequent Commission orders related to smart meter installation and deployment permit customers to "opt-

¹³ *Povacz II*, at 1008.

¹⁴ *Povacz II*, at 1006.

¹⁵ *Povacz II*, at 1005.

¹⁶ *Povacz II*, at 1015.

¹⁷ 66 Pa.C.S. § 2806.1, *et seq.*

out” from smart meter installation.¹⁸ Further, both Act 129 and the Commission’s Implementation 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, 2014.¹⁹ The Company must install and retain a smart meter at the Complainant’s Service Location in order to remain in compliance with Act 129, related Commission orders, and its Smart Meter Deployment Plan. Despite the Complainant’s arguments otherwise, the Company must install and retain 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 Complainant failed to establish that the installation of a smart meter constitutes unreasonable service. The Complainant’s statements related to health and safety concerns should be rejected as unsupported allegations. The Complainant offered no credible or convincing evidence to support his allegations. Moreover, the Complainant’s concerns regarding health and safety are based exclusively upon his own personal beliefs regarding smart meters. The Complainant was not qualified to offer expert testimony and did not present the testimony of an expert on their behalf.²⁰ Moreover, and importantly, to the extent that the Complainant argues that

¹⁸ *Id.*; see *Smart Meter Procurement and Installation*, Docket No. M-2009-2092655 (Order entered June 24, 2009) (“Implementation Order”).

¹⁹ *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”).

²⁰ See Tr. 51.

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

Furthermore, because the Company is not a state actor, it cannot violate the Complainant's alleged constitutional rights.²² Thus, any constitutional claims related to the mandated installation of a smart meter at the Service Address 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 Complainant's allegations and assertions. Indeed, the lay testimony offered by the Complainant should carry little, if any, weight. Furthermore, the thrust of the Complainant's argument(s) focused on the legal directive(s) of Act 129 and the constitutionality of Act 129, as well as health and safety concerns surrounding the installation of smart meters. 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 Complainant related to more specialized topics, including health, safety, and radio frequency, should be disregarded and given no evidentiary

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.").

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.

weight under the Pennsylvania Rules of Evidence. Moreover, the overwhelming majority of the Complainant's on-record presentation was expressly rebuffed by the Court in *Povacz II*.²⁵

In sum, the Complainant failed to establish by a preponderance of the evidence that the Company violated a Commission statute, regulation, or order. Specifically, the Complainant has not met his burden of proof that the installation of a smart meter constitutes unreasonable service by the Company. Accordingly, the Company respectfully urges the Commission to dismiss the Complaint with prejudice.

IV. 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.

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

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

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.

²⁵ See fn. 2, *supra*.

²⁶ See *Povacz*, at *74-79.

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*, the Company's customers, 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*, 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.”²⁷ “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.”²⁸ 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.”²⁹ 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.”³⁰

Here, the Complaint is moot because it is impossible for the Commission to grant the Complainant's 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 complainant is only

²⁷ *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)).

²⁸ *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)).

²⁹ *Burns*, 190 A.3d at 762 (citation omitted).

³⁰ *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)).

“entitled to an accommodation to the extent allowed by Act 129 and a utility’s tariff.”³¹ 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.³² This option has been available to the Complainant throughout this proceeding.

However, the Complainant requests that they be granted an opt-out of the smart meter’s installation entirely, which the Supreme Court held in *Povacz* is not permissible. 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 Complainant’s 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* 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, *i.e.*, whether Act 129 mandates the installation of smart meters, was resolved by the Pennsylvania Supreme Court in *Povacz II*.

Third, the Complainant will not suffer a detriment without the Commission’s decision on the merits of the Complaint. Indeed, the Complainant has had a full and fair opportunity to fully litigate the claims related to his Complaint prior to the Court’s decision in *Povacz II*. Indeed, as

³¹ *Povacz II*, 1014.

³² 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.”)

explained at further length in Section IV.B(1)-(2), *infra*, the Complainant utterly failed to establish that the smart meter’s installation and retention would cause him 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 Complainant. The only accommodation that the Company can offer the Complainant, even if he prevails 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 Complainant regardless of whether he prevails in this complaint proceeding. Thus, with or without the Commission sustaining or dismissing the Complaint, the Complainant 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.”³³ 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

³³ *Povacz II*, 1014.

accommodation to the extent allowed by Act 129 and a utility's tariff."³⁴ 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.³⁵ As a result, the Company must install and retain smart meters for all of its customers, including the Complainant, 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."³⁶ 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."³⁷

Third, the *Povacz II* decision resolved the Complainant's claim that the Company would violate their constitutional rights by installing the smart meter. The Commonwealth Court previously found that "[c]onstitutional protections apply against state actors," and "PECO is not a state actor in relation to its installation of smart meters and provision of electricity to its customers."³⁸ This finding was not disturbed by the Supreme Court's *Povacz* decision. Therefore, because PECO and the Company are similarly-situated EDCs, the Company is not a state actor that can violate the Complainant's constitutional rights.

³⁴ *Id.*

³⁵ See note 32, *supra*.

³⁶ *Povacz II*, at 1004.

³⁷ *Id.*, 1007.

³⁸ *Povacz v. Pa. PUC*, 241 A.3d 481, 486 n.9 (Pa. Cmwlth. 2020).

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).³⁹ 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.”⁴⁰ 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.”⁴¹ Relatedly, the Supreme Court explained in *Povacz II* that “[i]f the General Assembly had intended to provide electric customers 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”⁴²

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”).⁴³ Act 129 required EDCs with at least

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

⁴⁰ *Smart Meter Implementation Order*, p. 14.

⁴¹ *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)).

⁴² *Povacz II*, at 999.

⁴³ 66 Pa.C.S. § 101, *et seq.*

100,000 customers, such as the Company, to file a smart meter technology procurement and installation plan (“SMP Plan”) with the Commission for approval.⁴⁴ 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.⁴⁵

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.⁴⁶ The Commission-approved SMDP mandates 100% of its meters to be replaced with smart meters. Therefore, the Complainant’s 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 West Penn Power Company (together with the Met-Ed Rate District collectively referred to hereafter as “the Companies”)⁴⁷ on August 14, 2009 (“2009 SMP Plan”).⁴⁸ The Commission issued an Order on June 9, 2010,

⁴⁴ 66 Pa.C.S. § 2807(f).

⁴⁵ 66 Pa.C.S. § 2807(f)(2).

⁴⁶ *Smart Meter Deployment Plan*, at 9.

⁴⁷ *See* n. 1, *supra*.

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).

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. 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

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.*

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).

In this proceeding, the Complainant has argued that a smart meter should not be installed at his Service Location and/or should be removed from the Service Location.⁵⁴ This argument was based upon the Complainant's 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.⁵⁵ 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.⁵⁶

The Complainant failed to present any credible evidence to support his allegations that the Company's smart meter deployment is unsafe or violates Section 1501 of the Public Utility Code. The Complainant did not substantiate any of his health, safety, or privacy concerns on the record in this proceeding. In view of the Complainant's failure to fulfill his burden of proof, the Complaint should be denied and dismissed with prejudice.

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

Through the Complaint, the Complainant alleges various vague health, safety, and privacy concerns related to smart meters, but failed to provide any reliable evidence in support of these

⁵⁴ See, e.g., Formal Complaint ¶¶ 4-5; Tr. 9, 14; See Section IV(A)(1), *supra*.

⁵⁵ 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).

⁵⁶ 66 Pa.C.S. § 2807(f)(2)(i).

allegations at the Evidentiary Hearing. As such, the Complainant failed to establish his 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 Complainant presented no expert testimony to corroborate his health, safety, or privacy allegations contained in the Complaint. In addition, the Complainant presented no evidence that he is qualified to offer expert testimony as an engineer, doctor or other medical professional.

As such, the Complainant 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.

⁵⁷ 66 Pa.C.S. § 1501.

2. All Hearsay and Lay Health and Safety Testimony was Properly Objected to and Excluded and May Not be Relied Upon in this Matter.

At the Evidentiary Hearing, the Complainant attempted to offer testimony related to health and safety issues without possessing the necessary qualifications to testify on these issues. The record is devoid of any evidence to indicate whether the Complainant is a medical doctor or engineer and, therefore, the Complainant does not otherwise possess the requisite expertise to provide expert testimony regarding health or safety issues related to radio frequencies or smart meters. As a lay witness, the Complainant was not qualified to testify or offer exhibits related to any issues outside of his direct personal knowledge. Therefore, the Complainant's testimony regarding health, medical or scientific opinions carry no evidentiary weight and, where applicable, were properly objected to.

According to Pennsylvania Rule of Evidence 701,⁵⁸ a lay witness is limited to giving opinion testimony that is rationally based on the witness's own perceptions. Specifically, Rule 701 provides as follows:

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is: (a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of R 702.

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.”⁵⁹

⁵⁸ Pa.R.E. 701.

⁵⁹ *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).

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.⁶⁰ In this case, the bulk of the Complainant's testimony related to issues outside the scope of his personal knowledge and were based on hearsay. To the extent such testimony was not objected to or excluded, such testimony should carry insignificant weight that cannot support the Complainant's burden of proof in this proceeding.

The record is clear that the Complainant failed to present any credible evidence to support his allegations that smart meter deployment is unsafe or violates Section 1501 of the Public Utility Code, or that installation of a smart meter at the Service Address is not required by law. In view of the Complainant's fulsome failure to fulfill their burden of proof, the Complaint should be denied and dismissed with prejudice.

⁶⁰ Pa.R.E. 701.

V. **CONCLUSION**

WHEREFORE, FirstEnergy Pennsylvania Company on behalf of its Met-Ed Rate District respectfully requests that Administrative Law Judge Gail M. Chiodo recommend that the Pennsylvania Public Utility Commission dismiss the Formal Complaint of Gilbert Martinez with prejudice.

Respectfully submitted,

Dated: April 11, 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.⁶¹
2. Act 129 provides a list of required smart meter functionality, which was supplemented by Commission order.⁶²
3. The Company's Smart Meter Technology Procurement and Installation Plan was filed on August 10, 2009.⁶³
4. The Commission ultimately approved the smart meter deployment plan, with modifications, on June 9, 2010.⁶⁴
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.⁶⁵

⁶¹ Met-Ed Exh. JCA-2.

⁶² Met-Ed Exh. JCA-2.

⁶³ *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).

⁶⁴ *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).

⁶⁵ *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.⁶⁶
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, Regulatory Compliance – Smart Meters.⁶⁷
8. Mr. Ahr’s testimony fully explained the Company’s smart meter deployment plan⁶⁸ and smart meter safety.⁶⁹
9. Customers are not permitted to opt-out of the installation of smart meters under Act 129.⁷⁰
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.⁷¹
11. The Company’s smart meters are Underwriters Laboratories (“UL”) certified, which means the meters were tested for Compliant UL standard 2735.⁷²
12. The Complainant did not offer expert testimony on any of the issues raised in the Complaint.
13. The Company has not violated any Commission order, statute or regulation.⁷³

⁶⁶ *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).

⁶⁷ Tr. 53.

⁶⁸ Tr. 59-60.

⁶⁹ *Id.*

⁷⁰ Tr. 82-83.

⁷¹ 69.

⁷² *Id.*

⁷³ Tr. 76.

APPENDIX B

PROPOSED CONCLUSIONS OF LAW

1. Under Section 332(a) of the Public Utility Code, the Complainants maintain the burden of proof in this proceeding.⁷⁴
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.⁷⁵
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.⁷⁶
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.⁷⁷
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.⁷⁸
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

⁷⁴ 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).

⁷⁵ *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).

⁷⁶ *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).

⁷⁷ *Lansberry*, 578 A.2d at 602.

⁷⁸ *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.”⁷⁹

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....”⁸⁰
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.⁸¹
9. Neither Act 129 nor subsequent Commission orders related to smart meter installation and deployment permit customers to “opt-out” from smart meter installation.⁸²
10. The Pennsylvania Supreme Court’s decision in *Povacz II* requires the installation of smart meters.⁸³
11. The *Povacz II* Court held that customers may not “opt-out” of smart meter installation.⁸⁴
12. If the Complainants are able to prove a violation of Section 1501 of the Public Utility Code, he is entitled to an accommodation to the extent allowed by Act 129 and the Company’s tariff.⁸⁵

⁷⁹ 66 Pa.C.S. § 701.

⁸⁰ 66 Pa.C.S. § 1501.

⁸¹ *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).

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

⁸³ *Povacz II*, at 983.

⁸⁴ *Id.*

⁸⁵ *Id.*, at 1014.

13. If the Complainant is able prove that the installation of a smart meter at the Service Location violates Section 1501 of the Public Utility Code, the only relief available to him is for the smart meter to be relocated at their expense.⁸⁶
14. The Complainant failed to establish that the Company's installation of a smart meter at the Complainant's Service Location violated Act 129 or any related Commission orders.⁸⁷
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.⁸⁸
16. The Company is permitted to terminate a customer's electric service for denying access to the meter.⁸⁹
17. A lay witness may only provide testimony related to his or her direct knowledge or experience.⁹⁰
18. Any testimony of a lay witness related to technical or specialized knowledge should be excluded and given no evidentiary weight.⁹¹
19. The hearsay evidence presented in this case was properly objected to and excluded and may not support any findings of fact.⁹²
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";

⁸⁶ FirstEnergy Pennsylvania Electric Company Tariff Rule 4, Electric Pa. P.U.C. No. 1, Original Page 40.

⁸⁷ 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).

⁸⁸ *Id.*

⁸⁹ 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.

⁹⁰ Pa.R.E. 701.

⁹¹ See *Gibson v. W.C.A.B.*, 861 A.2d 938, 947 (Pa. 2004).

⁹² *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.”⁹³

21. The Company is not a state actor.

22. The Complainant failed to sustain his burden of proof that the installation of a smart meter constitutes unsafe or unreasonable service by the Company.

⁹³ *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).

APPENDIX C

PROPOSED ORDERING PARAGRAPHS

1. The formal complaint of Gilbert Martinez filed against FirstEnergy Pennsylvania Electric Company (Met-Ed Rate District) at the above-referenced docket is dismissed with prejudice.
2. This matter shall be marked as closed.

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Gilbert Martinez

v.

Metropolitan Edison Company

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:
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:
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DOCKET NO. C-2019-3013798

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the Main Brief of FirstEnergy Pennsylvania Electric Company (Met-Ed Rate District) upon the individuals listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant).

Service by electronic mail only as follows:

Gilbert Martinez
Gilmarcus09@gmail.com

Administrative Law Judge Gail M. Chiodo
gchiodo@pa.gov

Dated: April 11, 2024



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