

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

Public Meeting held May 9, 2024

Commissioners Present:

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

Kathleen Anthony

C-2018-3000490

v.

PPL Electric Utilities Corporation

OPINION AND ORDER

BY THE COMMISSION:

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition are the Exceptions filed by Kathleen Anthony (the Complainant or Ms. Anthony) on October 5, 2020, in response to the Initial Decision (Initial Decision or I.D.) of Administrative Law Judge (ALJ) Elizabeth H. Barnes, which was served on the Parties on September 16, 2020, in the above-captioned proceeding. Replies to Exceptions were filed by PPL Electric Utilities Corporation (PPL or the Company) on October 16, 2020. The Initial Decision denied and dismissed the Amended Formal Complaint (Complaint) filed by the Complainant on March 12, 2018 and amended on April 9, 2019. For the reasons discussed below, we shall deny the

Complainant's Exceptions, adopt the Initial Decision of ALJ Barnes, and dismiss the Complaint, consistent with this Opinion and Order.

I. Background

This case involves a Complaint concerning the safety of the advanced metering infrastructure (AMI), or smart meter, that PPL proposes to install at the Complainant's residence and use in the ordinary course of business to measure the Complainant's electricity consumption. The Complainant refuses to have a smart meter installed for health reasons. The Complainant also has health and safety concerns regarding the existing powerline carrier (PLC) meter currently present at the service address. In her Amended Complaint, Ms. Anthony requested: (1) that the Commission require PPL to comply with Section 1501 of the Public Utility Code; (2) that the Commission grant the Complainant an accommodation preventing PPL from installing a wireless metering device; (3) that the Commission allow the Complainant to purchase an analog meter for PPL to install; (4) that the accommodation apply to other locations if the Complainant should relocate or operate a business in the Commonwealth; and (5) that the Commission provide a permanent stay on PPL's attempts to terminate Complainant's electric service. Amended Complaint at 8-9.

PPL, an electric distribution company (EDC) subject to the jurisdiction of the Commission, furnishes, owns and maintains the meters in its distribution system. *See*, PPL's Tariff Electric Pa. P.U.C. No. 201, Rule 8 at 12.

The Complainant, Kathleen Anthony, is a PPL customer who has been notified of PPL's intent to install a smart meter at the service address. Answer to Amended Complaint at 2.

Act 129 of 2008 (Act 129 or Act), *inter alia*, amended Chapter 28 of the Public Utility Code (Code) and required EDCs with more than 100,000 customers to file smart meter technology procurement and installation plans for Commission approval and to furnish smart meter technology within its service territory in accordance with the provisions of the Act. Section 2807(f) of the Code provides as follows:

(f) *Smart Meter technology and time of use rates.*

(1) Within nine months after the effective date of this paragraph, electric distribution companies shall file a Smart Meter technology procurement and installation plan with the commission for approval. The plan shall describe the Smart Meter technologies the electric distribution company proposes to install in accordance with paragraph (2).

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

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

(ii) In new building construction.

(iii) In accordance with a depreciation schedule not to exceed 15 years.

66 Pa. C.S. § 2807(f). The General Assembly found that it was “in the public interest” to implement the measures set forth in Act 129 and that the universal installation of smart meters would enhance the “health, safety and prosperity” of Pennsylvania’s citizens through the “availability of adequate, reliable, affordable, efficient and environmentally sustainable electric service at the least cost.” *See*, H.B. 2200, 192d Gen. Assemb., Reg. Sess. (Pa. 2008).

By Order entered in 2009, the Commission directed all EDCs subject to Act 129’s smart meter requirements, including PPL, to universally deploy smart meter

technology within their respective service territories in the Commonwealth in accordance with a depreciation schedule not to exceed fifteen years and in accordance with other guidelines established therein. *See, Smart Meter Procurement and Installation*, Docket No. M-2009-2092655 (Implementation Order entered June 24, 2009) (*Smart Meter Installation Order*). PPL sought and obtained the Commission's approval to complete the installation of AMI meters for substantially all customers within its service territory by the end of 2019. *See, Petition of PPL Electric Utilities Corporation for Approval of its Smart Meter Procurement and Installation Plan*, Docket No. M-2014-2430781 (Opinion and Order entered September 3, 2015) (*PPL 2015 Smart Meter Order*); *see also, Petition of PPL Electric Utilities Corporation for Approval of its Smart Meter Procurement and Installation Plan*, Docket No. M-2009-2123945 (Opinion and Order entered June 24, 2010) (*PPL 2010 Smart Meter Order*).

II. History of the Proceeding

On March 12, 2018, Ms. Anthony filed a Formal Complaint with the Commission averring that she wishes to opt-out of a smart meter installation at the Service Address for health and safety reasons. I.D. at 1.

On April 4, 2018, PPL filed an Answer admitting that PPL provides electric service to the Complainant. The Answer contends that PPL is required to install AMI, or smart meters, for all automatic meter reading (AMR) customers and that it has the right to terminate service for failure of the customer to permit access to the meter. On April 9, 2019, the Complaint was Amended adding a claim that the current PLC meter was harming the Complainant's health. On April 23, 2019, PPL submitted an Answer to the amended Complaint. I.D. at 2.

After several continuances, an evidentiary hearing was held on June 25, 2020. At the hearing, the Complainant appeared *pro se* with ten exhibits,

premarked A-J. PPL appeared represented by Devin Ryan, Esquire and Curtis Renner, Esquire with fifteen exhibits and four witnesses: Mike Asbury (who adopted pre-served testimony and exhibits of Donald Vinciguerra), Kevin Durkin, Christopher Davis, Ph.D., and Mark Israel, M.D. An 89-page transcript of the hearing was filed on July 10, 2020, and the record closed on the same date. *Id.*

On September 16, 2020, the Commission served ALJ Barnes' Initial Decision in *Kathleen Anthony v. PPL Electric Utilities Corporation*, Docket No. C-2018-3000490.

As noted above, on October 5, 2020, the Complainant filed Exceptions to the Initial Decision. On October 16, 2020, PPL filed Replies to Exceptions.

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. Notice was provided on November 14, 2023, informing the Complainants of the lifting of the stay and their procedural rights and obligations under the Commission's regulations.

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 (Initial Decision issued May 11, 2015) (*Moore*). The burden of production goes to the legal sufficiency of a party's claim or affirmative defense. *See, Id.* It may shift between the parties during a hearing. A complainant may establish a *prima facie* case with circumstantial evidence. *See, Milkie v. Pa. PUC*, 768 A.2d 1217, 1220 (Pa. Cmwlth. 2001) (*Milkie*). If a complainant introduces sufficient evidence to establish legal sufficiency of the claim, also called a *prima facie* case, the burden of production shifts to the utility to rebut the complainant's evidence. *See, Moore*.

If the utility introduces evidence sufficient to balance the evidence introduced by the complainant, that is, evidence of co-equal value or weight, the complainant's burden of proof has not been satisfied and the burden of going forward with the evidence shifts back to the complainant, who must provide some additional evidence favorable to the complainant's claim. *See, Milkie*, 768 A.2d at 1220; *see also, Burleson v. Pa. PUC*, 443 A.2d 1373 (Pa. Cmwlth. 1982), *aff'd*, 501 Pa. 433, 461 A.2d 1234 (1983).

Having produced sufficient evidence to establish legal sufficiency of a claim, the party with the burden of proof must also carry the burden of persuasion to be entitled to a favorable ruling. *See, Moore*. While the burden of production may shift back and forth during a proceeding, the burden of persuasion never shifts; it always remains on a complainant as the party seeking affirmative relief from the Commission. *See, Milkie*, 768 A.2d at 1220; *see also, Riedel v. County of Allegheny*, 633 A.2d 1325, 1328, n.11 (Pa. Cmwlth. 1993); *see also, Burleson*, 443 A.2d at 1375. It is entirely possible for a party to carry the burden of production but not be entitled to a favorable ruling because the party did not carry the burden of persuasion. *See, Moore*. In

determining whether a complainant has met the burden of persuasion, the fact-finder¹ may engage in determinations of credibility, may accept or reject testimony of any witness in whole or in part, and may accept or reject inferences from the evidence. *See, Moore*, citing *Suber v. Pennsylvania Com'n on Crime and Delinquency*, 885 A. 2d 678, 682 (Pa. Cmwlth. 2005) (*Suber*).

2. Burden of Proof Applied to Section 1501² Complaint Challenging Smart Meter Installation

In *Povacz, et al. v. Pa. PUC*, 280 A.3d 975 (Pa. 2022) (*Povacz II*), which dealt with consolidated appeals involving the deployment of smart meters by PECO Energy Company, the Supreme Court of Pennsylvania (Supreme Court) reversed the Commonwealth Court's October 8, 2020 decision in *Povacz v. Pa. PUC* (241 A.3d 481) (*Povacz I*), and thereby affirmed the Commission's March 28, 2019 and May 9, 2019 Orders in *Maria Povacz v. PECO Energy Company*, C-2015-2475023 (*Povacz 2019 Order*); *Laura Sunstein Murphy v. PECO Energy Company*, C-2015-2475726 (*Laura Sunstein Murphy*); and *Cynthia Randall and Paul Albrecht v. PECO Energy Company*, C-2016-2537666 (*Cynthia Randall*). By *Povacz II*, the Supreme Court affirmatively established that there is no "opt-out" provision for installation of a smart meter pursuant

¹ 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)).

² The applicable Commission Regulation governing an EDC's provision of safe service is codified at 52 Pa. Code § 57.28(a)(1). Pursuant to Section 57.28(a)(1), an EDC must use reasonable efforts to properly warn and protect the public from danger and to exercise reasonable care to reduce the hazards to which customers may be subjected to by reason of the EDC's provision of electric utility service and its associated equipment and facilities. *See*, 52 Pa. Code § 57.28(a)(1). *See, Final Rulemaking Order, Rulemaking Re: Electric Safety Regulations, 52 Pa. Code Chapter 57*, Docket No. L-2015-2500632 (Order entered April 20, 2017) (*Electric Safety Final Rulemaking Order*).

to Act 129 and that to raise a viable challenge to smart meter installation, a customer must satisfy the preponderance of evidence standard for a violation of Section 1501 of the Code. *Povacz II*, 280 A. 3d at 983-984.

Pursuant to Section 1501 of the Code, all public utilities have a duty to maintain “adequate, efficient, safe, and reasonable service³ and facilities” and to make repairs, changes, and improvements that are necessary or proper for the accommodation, convenience, and safety of its patrons, employees, and the public. *See* 66 Pa. C.S. § 1501. Section 1501 of the Code, provides, in pertinent part, as follows:

Every public utility shall furnish and maintain adequate, efficient, safe, and reasonable service and facilities, and shall make all such repairs, changes, alterations, substitutions, extensions, and improvements in or to such service and facilities as shall be necessary or proper for the accommodation, convenience, and safety of its patrons, employees, and the public . . . Such service and facilities shall be in conformity with the regulations and orders of the commission.

66 Pa. C.S. § 1501.

As previously noted, in *Povacz II*, the Pennsylvania Supreme Court not only affirmed the Commission’s determination that there is no “opt-out” provision for smart meter installation in either Act 129, the Code, Commission Regulations, or Orders,

³ The term “service” is defined broadly under Section 102 of the Code to include any and all acts done or rendered or performed and any and all things furnished or supplied and any and all facilities, used, furnished or supplied by public utilities. *See*, 66 Pa. C.S. § 102. The statutory definition of “service” is also to be broadly construed by the Commission and the courts. *Country Place Waste Treatment Co., Inc. v. Pa. PUC*, 654 A.2d 72 (Pa. Cmwlth. 1995).

but also confirmed that challenges to smart meter installation, other than an “opt-out,” may arise under Section 1501⁴ of the Code. Therein, the Supreme Court stated:

[W]e conclude that Act 129 does mandate that EDCs furnish smart meters to all electric customers within an electric distribution service area and does not provide electric customers the ability to opt out of having a smart meter installed. An electric customer with concerns about smart meters may seek an accommodation from the PUC or EDC, but to obtain one the customer must establish by a preponderance of the evidence that installation of a smart meter violates Section 1501 [of the Code].

Povacz II, at 983-984; *See, Povacz 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 Co.*, Docket No. C-2015-2474602 (Opinion and Order entered May 3, 2018) (*Frompovich*).

In applying Section 1501 to a complaint challenging the installation of smart meter technology, the Supreme Court affirmed the Commission’s Opinion and Order in the *Povacz 2019 Order*, stating:

A customer seeking affirmative relief from the [Commission] must prove by a preponderance of the evidence that the named utility was responsible or accountable for the problem described in the complaint and that the offense was a violation of the Code, a [Commission] regulation or [o]rder, or a violation of a [Commission]-approved tariff. [See] 66

⁴ The Commission has also determined that if a customer’s formal complaint raises a claim under Section 1501, related to the safety of a utility’s installation and use of a smart meter at the customer’s residence, such a claim is legally sufficient to proceed to an evidentiary hearing before an ALJ. To satisfy the burden of proof a complainant may be required to present medical documentation and/or expert testimony demonstrating that the installation of a smart meter constitutes unsafe or unreasonable service. *Povacz II* at 1000, citing *Susan Kreider v. PECO Energy Company*, P-2015-2495064, 2016 WL 406549, at *14 (Pa. P.U.C. January 28, 2016) (*Kreider*).

Pa.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).⁵

In applying the standard of proof to scientific or expert medical evidence in support of alleged adverse health effects, the Commission ruled in the *Povacz 2019 Order*, and was subsequently affirmed by the Supreme Court in *Povacz II*, that in order to prevail in a Section 1501 claim against an EDC alleging that an AMI meter caused or will cause adverse health effects or harm to human health, the Complainant must demonstrate

⁵ With respect to the evidence necessary to support a challenge to smart meter installation under Section 1501, the Commonwealth Court has held that at the hearing, a complainant may prove his/her claim through the complainant's own personal testimony and/or "the testimony of others as well as other evidence that goes to that issue." *Romeo v. Pa. PUC*, 154 A.3d 422, 430 (Pa. Cmwlth. 2017) (*Romeo*).

by a preponderance of the evidence a “conclusive causal connection” between the harm to human health and the radio frequency fields (RFs)⁶ from the AMI meter⁷.

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

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

⁶ RF is an abbreviation for radio frequency and is also used here to denote RF fields or RF signals.

⁷ See, *Povacz 2019 Order* slip op., at 28-29 (citing *Letter of Notification of Philadelphia Electric Company Relative to the Reconstructing and Rebuilding of the Existing 138 kV Line to Operate as the Woodbourne-Heaton 230 kV Line in Montgomery and Bucks Counties*, 1993 WL 855896 (Pa. P.U.C. 1993), Docket No. A-110550F0055 (Final Order entered November 12, 1993) (*Woodbourne-Heaton Final Order*), slip op. at 11).

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

Finally, we note that any argument or Exception that we do not specifically delineate shall be deemed to have been duly considered and denied without further discussion. The Commission is not required to consider expressly or at length each contention or argument raised by the parties. *Consolidated Rail Corp. v. Pa. PUC*, 625 A.2d 741 (Pa. Cmwlth. 1993); *see also, generally, University of Pennsylvania v. Pa. PUC*, 485 A.2d 1217 (Pa. Cmwlth. 1984).

B. ALJ's Initial Decision

In the Initial Decision, ALJ Barnes made thirty-nine Findings of Fact (FOF) and reached eighteen Conclusions of Law (COL). *See, I.D.* at 2-7, 21-24. The Findings of Fact and Conclusions of Law are incorporated herein by reference and are adopted without comment unless they are either expressly or by necessary implication rejected or modified by this Opinion and Order.

In her disposition, ALJ Barnes addressed, *inter alia*, the following issues: (1) the Complainant's health and safety concerns; (2) the Complainant's request for an opt-out; and (3) the Complainant's concerns regarding data privacy. *I.D.* at 11-21.

1. Health and Safety Concerns

The ALJ noted that the Complainant contends that she has health issues that are disabilities covered by the Americans with Disabilities Act (ADA), and therefore PPL should grant her an accommodation. The Complainant argues that the use of an analog meter would not be an undue burden for PPL. The ALJ further noted that the Complainant offered several exhibits consisting of articles. PPL objected to these articles on the grounds that the articles were hearsay. I.D. at 11.

The ALJ stated that the Complainant's exhibits consist of statements made by third parties that were not available for cross examination at the hearing. Therefore, the ALJ reasoned that the articles contain hearsay evidence and could be excluded on that ground. The ALJ concluded that the Complainant's opinion that the AMI meter will cause her symptoms to become worsened based upon the exhibits submitted was successfully rebutted by the expert testimonies of Dr. Davis and Dr. Israel. I.D. at 12 (citing 66 Pa. C.S. § 332(c); *Answerphone, Inc. & Elite Answering Serv. V. The Bell Tele. Co. of Pa.*, 1993 Pa. PUC LEXIS 70, at *29-30 (Order entered April 1, 1993)).

The ALJ noted that PPL witness, Mr. Asbury, testified that the current PLC meter does not emit any radio frequency fields. Since the PLC meter does not emit RF, the ALJ was not persuaded to direct PPL to investigate the PLC system as the Complainant requested. I.D. at 12. Additionally, the ALJ provided that the Service Address is surrounded by five television UHF towers that emit RFs, exposing the Complainant to levels at least 197 times greater than she would receive standing within three meters from an AMI meter. *Id.* Thus, the ALJ reasoned, any exposure to radio frequency fields from the smart meter would be *de minimus* compared to the background radio frequency fields. I.D. at 12-13.

The ALJ noted that Dr. Israel testified that he has evaluated scientific research on RF fields and adverse health effects over the past several decades. Dr. Israel described several studies which he considered good examples of well-designed and well-conducted studies. Dr. Israel testified that none of these studies found adverse health effects on animals exposed to RF. I.D. at 13 (citing PPL St. 2). Dr. Israel stated that there is no reliable medical basis to conclude that RF fields from the AMI meters being used by PPL will cause or contribute to the development of illness or disease. I.D. at 14 (citing PPL St. 2). Similarly, Dr. Israel stated that there is no reliable medical basis to conclude that the RF fields from the AMI meter being used by PPL would cause, contribute to, or exacerbate any of the symptoms claimed by the Complainant, or any other adverse health effects. *Id.*

The ALJ provided that Dr. Davis conducted a substantial amount of research on RF fields of the type produced by the smart meter used by PPL. I.D. at 14 (citing PPL St. 1). Dr. Davis testified that these RF fields are part of the lower energy, non-ionizing portion of the electromagnetic spectrum which consists of lower frequency signals that do not have enough energy to break chemical bonds in cells or DNA. *Id.* The ALJ found Dr. Davis' testimony persuasive, concluding that the Complainant's articles hold less weight than the studies relied upon by Dr. Davis as the Complainant's articles were not published in scientific or medical journals. I.D. at 14.

The ALJ stated that the evidence is inconclusive that radio frequency fields from an AMI meter of the type used by PPL would cause or exacerbate health issues. The ALJ reasoned that the Complainant's testimony is based upon hearsay that is insufficient to refute the credible testimonies of Dr. Israel and Dr. Davis. I.D. at 13. The ALJ found in favor of PPL on this issue. I.D. at 15.

Regarding the Complainant's assertion that the Americans with Disabilities Act (ADA) applies here, the ALJ provided that the Commission is not a federal court and

therefore has no jurisdiction to find that the Complainant is disabled within the meaning of the ADA or to direct PPL to provide the Complainant with an ADA accommodation including an opt-out from a smart meter installation. I.D. at 15-16.

2. Opt-In versus Opt-Out Programs

The ALJ noted that the Complainant argued that over thirty states allow an opt-out of smart meter installation. The ALJ stated that the fact that other States have opt-out programs is noted but is non-binding. I.D. at 17. The ALJ found that PPL is required by statute and Commission Order to implement a Smart Meter Program and to install smart meters throughout its service territory. I.D. at 17-18. The ALJ explained that the Commission held that other EDCs would be in violation of law if they did not install a smart meter at properties like the Complainant's. I.D. at 18-19 (citing *Povacz 2013 Order; Frompovich* at 7-8).

3. Data Privacy

The ALJ noted that the Complainant contends that installation of a smart meter at the service address would invade her privacy and violate her Fourth Amendment Rights against unreasonable search and seizure. I.D. at 19 (citing Tr. at 75-80).

The ALJ provided that PPL filed a detailed AMI Customer Privacy Policy which sets forth the data PPL will collect using the smart meter, the steps PPL will take to protect the data and how PPL will use the data. I.D. at 19 (citing PPL Exh. DV-1). The ALJ explained that PPL uses firewalls to prevent unauthorized access to the AMI network, customer data is encrypted, and PPL's cybersecurity and data privacy policies are consistent with national policies. I.D. at 19 (citing PPL St. 4). The ALJ explained

further that the Complainant can decline to have the ZigBee radio⁸ activated if she is concerned about the AMI meter's connection with smart appliances at the service address. I.D. at 19-20 (citing *Lesniewski v. PPL Electric Utilities Corp.*, C-2018-3004594 (Final Order entered April 29, 2019, adopting Initial Decision issued March 25, 2019 at 24), wherein the Commission found in favor of PPL regarding the same data privacy issue).

The ALJ agreed with PPL, that it is not a state actor and opined that there is no evidence in the instant case that PPL is making its data easily accessible to law enforcement or other third parties. The ALJ cited to *Naperville*, noting that the Court found that smart meters used by the City of Naperville were constitutionally permissible and consistent with the Fourth Amendment. I.D. at 20.

Based on all the above, the ALJ dismissed the complaint for failure to prove by a preponderance of evidence that the installation of the smart meter constitutes unsafe or unreasonable service under 66 Pa. C.S. § 1501 or otherwise violates the Public Utility Code, a Commission order or regulation or a commission-approved tariff of the company. I.D. at 21.

C. Exceptions, Replies, and Disposition

The Complainants Exceptions⁹ generally pertain to the following: (1) due process; (2) burden of proof; (3) Act 129 and an opt-out request; (4) Constitutional claims; and (5) claims related to the ADA.

⁸ The smart meter proposed for use at the service address has a radio component to communicate with PPL and a Zigbee radio component to communicate with the customer's smart appliances if activated by the customer. PPL St. 4 at 11.

⁹ The Complainant's Exceptions are numbered and cite to relevant pages of the I.D. and COLS and FOFs, but in some cases repeat arguments or overlap. Where appropriate, we have grouped the Exceptions by topic in our Dispositions.

To the extent the Complainant's Exceptions include commentary alleging bias without foundation, such commentary is deemed to be immaterial, impertinent, and otherwise irrelevant to the disposition of this matter. Therefore, pursuant to 52 Pa. Code § 1.4(e), we shall strike such statements from our consideration of the Complainant's Exceptions.

To the extent the Complainant used extra-record materials in her Exceptions, such materials will be disregarded. It is well-established that parties cannot introduce new evidence following the close of the record. *Application of Apollo Gas Co.*, 1994 Pa. PUC Lexis, at *8-14 (Order entered February 10, 1994) (*Apollo Gas*). Accordingly, any extra-record information Ms. Anthony used in her Exceptions will not be considered. *Apollo Gas*.

1. Complainant's Arguments Regarding Due Process

a. Exception Nos. 1 and 2

In her Exception No. 1, the Complainant argues that the ALJ denied her due process by not providing a briefing schedule. In Exception No. 2, the Complainant contends that the ALJ did not allow the Complainant enough time to obtain expert witnesses to support her case. Exc. at 2.

b. Replies

PPL contends that the lack of briefs being submitted by the parties did not deny the Complainant due process. PPL notes that the Commission, as an administrative body, is bound by the due process provision of constitutional law and by the principles of common fairness. PPL explains that "[a]mong the requirements of due process are notice and an opportunity to be heard on the issues, to be apprised of the evidence submitted, to

cross-examine witness, to inspect documents, and to offer evidence in explanation or rebuttal. R. Exc. at 2 (citing *Hess v. Pa. PUC*, 107 A.3d 246, 266 (Pa. Cmwlth. 2014)(citations omitted)).

PPL avers that the Complainant had a full and fair opportunity to present her case and make her arguments at the evidentiary hearing. PPL asserts that the fact that no briefs were submitted is irrelevant as the Complainant had the opportunity to present all of her legal arguments orally at the evidentiary hearing. R. Exc. at 2.

PPL explains that the ALJ's decision not to issue a briefing schedule was within her discretion as the Commission's regulations explicitly state that the presiding officer has the authority to "regulate the course of the proceeding." R. Exc. at 3 (citing 52 Pa. Code § 5.483 (a)). PPL explains further that the Commission rejected a similar argument in *Lucey v. Metropolitan Edison Co.*, Docket No, C-2018-3003679 (Order entered October 8, 2020) (*Lucey*). R. Exc. at 3.

Regarding the Complainant's argument that the ALJ did not allow the Complainant enough time to secure expert witnesses, PPL explains that the hearing in this case was continued multiple times. R. Exc. at 4. PPL provides that the Complaint was served on PPL on March 15, 2018. PPL clarifies that from that point until the August 30, 2019 deadline for the Complainant's written expert testimony, the Complainant had approximately 530 days to secure expert witnesses and have them prepare their written expert testimony. R. Exc. at 5 (citing PPL September 6, 2019 Letter at 2; PPL October 15, 2019 Letter at 2). PPL submits that the ALJ provided the Complainant with more than sufficient time to secure her expert witnesses. R. Exc. at 5.

c. Disposition

The Complainant argues that she was denied “legal process” because the ALJ did not issue a briefing schedule. Exc. at 2. We note that the same argument was made in *Lucey*, where the Commission found that the Complainant was afforded due process when the ALJ decided not to issue a briefing schedule. In *Lucey*, the Commission provided:

As an administrative agency of the Commonwealth, the Commission is required to provide due process to the parties appearing before it. *Schneider v. Pa. PUC*, 479 A.2d 10, 15 (Pa. Cmwlth. 1984) (*Schneider*), citing *Fusaro v. Pa. PUC*, 382 A.2d 794 (Pa. Cmwlth. 1978). Due process is satisfied when the parties are afforded notice and the opportunity to appear and be heard. *Schneider*, 479 A.2d at 15 (Pa. Cmwlth. 1984), citing *Township of Middleton v. The Institute District of the County of Delaware*, 293 A.2d 885 (Pa. Cmwlth. 1972), aff’d 450 Pa. 282, 299 A.2d 599 (Pa. Cmwlth. 1973). The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. *Montefiore Hospital Ass’n of Western Pennsylvania v. Pa. PUC*, 421 A.2d 481, 484 (Pa. Cmwlth. 1980).

Lucey at 17.

Ms. Anthony participated in the hearing. Tr. at 7. During the hearing, Ms. Anthony explained why she filed the Complaint and what relief she was seeking. Tr. at 7-8. The Complainant was offered the opportunity to cross-examine PPL’s witnesses. Tr. at 51, 61, 74. Ms. Anthony presented a closing argument. Tr. at 75-81. Additionally, we note that the Hearing Notice provided instructions to the Parties for relying upon and introducing exhibits at the hearing.

Based upon review of the transcript and the Initial Decision, we conclude that the Complainant had ample opportunity to present her evidence and legal arguments at the hearing. The ALJ was acting within her discretion to regulate the course of the proceeding, including the decision not to issue a briefing schedule. See 52 Pa. Code § 5.483(a).

Regarding the Complainant's argument that the ALJ prevented her from securing expert witnesses, we disagree. The Complainant filed her Complaint on March 12, 2018. The hearing was continued several times. On August 30, 2019, the deadline to submit written testimony, the Complainant submitted a request to continue the October 31, 2019 hearing, so that she could be seen by a doctor in January 2020 whom she planned to secure as an expert witness. R. Exc. at 4 (Order Denying a Fourth Continuance, p. 1). The ALJ denied that request on September 11, 2019. R. Exc. at 4 (citing Order Denying a Fourth Continuance at 2).

The Complainant contends that the ALJ should have extended the August 30, 2019 deadline for written testimony because her witnesses would not be available until January or February 2020. We note that March 12, 2018 to August 30, 2019 is over 530 days which allowed the Complainant ample time to secure expert testimony. The Complainant filed two previous requests for continuance on August 16, 2018 and January 29, 2019, which were granted. PPL requested a third continuance after the Complainant filed an Amended Formal Complaint. The ALJ stated in the Order Granting Third Continuance that: "no further requests for continuances will be granted absent exigent circumstances." Order Granting Third Continuance at 2. The ALJ found that the Complainant's reasons for a fourth continuance were not "exigent." We agree with the ALJ that a year and a half was sufficient for the Complainant to prepare for the October 2019 hearing. The ALJ did not err in denying the Complainant's request for an additional continuance. Accordingly, we find that the Complainant's

arguments that she was not afforded due process are without merit. Therefore, the Complainant's Exceptions Nos. 1 and 2 are denied.

2. Complainant's Arguments Regarding the Burden of Proof

a. Exception Nos. 3, 5, 6 and 7

In her Exception No. 3, the Complainant contends that the ALJ erred by not giving the proper weight to her testimony regarding smart meters and the current PLC meter. The Complainant reiterates her argument from the Amended Complaint that the existing PLC meter at the service residence has caused her harm over the last seventeen years that it has been in place. The Complainant also objects to the Company's right to terminate service if Complainant does not allow installation of the AMI meter. Exc. at 2-3.

In her Exception No. 5, the Complainant argues that the ALJ erred by giving the testimony of Dr. Davis and Dr. Israel more weight than the Complainant's testimony. The Complainant contends that the ALJ should not have accepted Dr. Davis as an expert in Biophysics and the ALJ erred in accepting Dr. Israel's testimony. The Complainant argues that Dr. Davis and Dr. Israel are paid for their testimony which she considers "narrow, unyielding, and in many ways, appears to obfuscate the truth in regard to smart meters." Exc. at 10-11.

In Exception No. 6, the Complainant avers that the ALJ erred when she stated that the Commission decides cases on an individual basis and on the specific allegations presented. Exc. at 11.

In Exception No. 7, the Complainant submits that the ALJ erred in requiring the Complainant to prove causation. The Complainant avers that she "has met

her burden under Section 1501 by proving by a preponderance of evidence that the proposal to subject her to RF exposure from a smart meter is unsafe and unreasonable.” Exc. at 12.

b. Replies

Regarding the current PLC meter in use at the Complainant’s residence, PPL maintains that the Complainant’s allegations that it may cause or contribute to adverse health effects are without merit. PPL explains that the PLC meters, often referred to by customers as “analog meters,” utilize the power lines as a means of communication. PPL argues that the PLC meters do not contain radio transmitters and the Complainant’s allegations about the PLC meters are unfounded. R. Exc. at 12-13 (citing I.D. at 12; PPL St. 4 at 5). In addition, PPL provides that the Complainant’s allegations about the PLC meters are completely barred or substantially limited by the three-year statute of limitations set forth in 66 Pa. C.S. § 3314(a), given that the PLC meter was installed in 2002. R. Exc. at 14 (citing Tr. at 83-84).

The Company maintains that it has the legal right to terminate the Complainant’s electric service if it is denied reasonable access to its meter. R. Exc. at 14 (citing 66 Pa. C.S. § 1406(a)(4); 52 Pa. Code 56.81(3); PPL Exhs. KD-4 and KD-5). PPL notes that the Commission has stated that “[i]t is well-settled that where a customer refuses a utility access to its meter, the utility may terminate service after required notice is provided.” R. Exc. at 14 (citing *Frompovich*).

PPL provides that the Complainant’s characterizations of the expert opinions and qualifications of Dr. Davis and Dr. Israel are meritless. PPL contends that both of these experts have extensive professional qualifications, they are highly regarded in their respective fields, and they have been recognized as experts in federal and state court proceedings. R. Exc. at 6 (citing PPL St. 1 at 1-5; PPL St. 2 at 1-7) (additional

citations omitted). PPL argues that the opinions of these experts are reliable and demonstrate that there is no reliable medical or scientific basis to conclude that the Company's new AMI meters cause, contribute to, or exacerbate adverse health effects. R. Exc. at 6. PPL notes that the Complainant did not object to Dr. Davis or Dr. Israel being certified as experts in their respective fields. R. Exc. at 7 (citing Tr. at 55, 67). Therefore, PPL concludes, the Complainant has waived any objection to those witnesses being considered as experts and she cannot raise that objection for the first time in the Exceptions. R. Exc. at 7. PPL opines that the ALJ properly relied on the expert opinions offered by Dr. Davis and Dr. Israel. *Id.*

In addition, PPL avers that the ALJ properly held that there is no reliable medical or scientific basis to conclude that the new AMI meter will cause, contribute to, or exacerbate any adverse health effects. R. Exc. at 7 (citing I.D. at 10-16). PPL explains that the ALJ relied on PPL's credible and reliable expert testimony that refuted the Complainant's bald assertions that the AMI could cause or contribute to adverse health effects. R. Exc. at 7 (citing PPL St. 1 at 5-17; PPL Exhs. CD-1 through CD-5; PPL St. 5 at 7-19; PPL Exhs. MI-1 through MI-3).

PPL provides that Dr. Davis testified that the Federal Communications Commission (FCC) has determined safe public exposure levels for RF fields from devices that transmit RF signals. R. Exc. at 7-8 (citing PPL St. 1 at 9). PPL notes that Dr. Davis calculated the levels of RF fields from the AMI meters as 98,000 times lower than the RF exposure safety limits set by the FCC. R. Exc. at 8 (citing PPL St. 1 at 13; PPL Exh. CD-2). Additionally, PPL explains, the RF signals from the AMI meter are of very short duration and will occur for only a total of 84 seconds over a 24-hour period. R. Exc. at 8 (citing PPL St. 1 at 7).

PPL further notes that Dr. Davis also testified that the RF fields from using cell phones can be over 260,000 times higher than the RF fields from the AMI meter. R.

Exc. at 9 (citing PPL St. 1 at 15). In addition, the RF fields at three meters from the AMI meter being used by PPL are 197 times smaller than the background levels of RF from five television broadcast towers within a 50-mile radius of the Complainant's residence. R. Exc. at 9 (citing PPL St. 1 at 15; PPL Exh. CD-5). PPL submits that considering the AMI meter's RF fields are substantially lower than the FCC standard and many everyday sources, there is no reliable scientific basis to conclude that the very low levels of RF fields from the AMI meters being deployed by the Company can or will cause any adverse thermal or non-thermal biological effects in people. R. Exc. at 9 (citing I.D. at 14-15; PPL St. 1 at 1-17). PPL states that Dr. Davis' expert testimony was not contradicted by any other expert testimony. R. Exc. at 9.

PPL avers that Dr. Israel – the only medical expert to present testimony in this case – evaluated the scientific research on RF fields and adverse health effects. R. Exc. at 9 (citing PPL St. 2 at 8-19). Dr. Israel testified that he has been systematically examining the research over the past several decades and that many hundreds of studies have been published. R. Exc. at 9 (citing PPL St. 2 at 6). Dr. Israel described a number of studies that he considered good examples of well-designed and well-conducted studies which found no adverse effects on genetics, fertility, reproduction, growth, or development in animals exposed to RF fields. Additionally, Dr. Israel provided examples of well-conducted studies that did not find any increase in incidence of cancer in RF exposed animals. R. Exc. at 9-10 (citing PPL St. 2 at 9-10).

PPL contends that it presented overwhelming evidence through its scientific and medical expert witnesses, that supports the ALJ's finding that there is no reliable basis to conclude that the new AMI meter will cause or contribute to any adverse health effects. According to PPL, the Complainant relies on hearsay materials to allege that the proposed AMI meter will cause her or members of her household to experience adverse health effects. R. Exc. at 12 (citing Exc. at 2-3). PPL opines that bald assertions,

and personal opinions or perceptions do not constitute evidence. R. Exc. at 12 (citing *Mid-Atlantic Power Supply Ass'n v. Pa. PUC*, 746 A.2d 1196, 1200 (Pa. Cmwlth. 2000)).

In response to the Complainant's argument that the Commission fails to decide cases on an individual basis, PPL provides that the Complainant's only support is that the Commission has not granted "an accommodation from the deployment of a smart meter" in other cases. R. Exc. at 23 (citing Exc. at 11). PPL maintains that "[n]othing in the record or in any Commission orders demonstrates that the Commission fails to thoroughly review the records of every case before it and render its decisions accordingly." PPL contends that no opt-out has been granted by the Commission because it does not have the authority to grant an "opt-out" of an AMI meter under Pennsylvania law and the allegations that the new AMI meters cause, contribute to or exacerbate adverse health effects are unfounded. R. Exc. at 23.

Regarding the Complainant's argument that the ALJ erred by requiring proof of causation, PPL states that the ALJ properly relied on the Commission's precedent to find that the Complainant had the burden to "demonstrate by a preponderance of the evidence" that the exposure to RF fields "actually causes adverse health effects." R. Exc. at 24 (citing I.D. at 8).

c. Disposition

The Complainant argued in her Amended Formal Complaint that she was caused harm by the existing PLC meter at the service address. PPL testified that the PLC meter does not have a radio transmitter and does not emit RF fields. The PLC meter was installed on October 21, 2002. (PPL St. 4 at 5). We note that the three-year statute of limitations for bringing a complaint regarding the PLC meter has passed. *See*, 66 Pa. C.S. § 3314(a). Considering that the PLC meter does not have a radio transmitter, we agree with the ALJ's decision not to direct PPL to investigate its PLC system further.

I.D. at 12. The Complainant’s opinion regarding the PLC meter and the use of extra-record materials in her Exceptions does not constitute evidence that the PLC meter has caused the Complainant adverse health effects. Where a question involves scientific or medical expertise, in weighing the evidence presented, it is within the ALJ’s discretion to afford more weight to the testimony of an expert witness than that of a lay witness. Ms. Anthony is not an expert in PLC meter technology or physics or electromagnetics. Her testimony does not carry the same weight as the witnesses that are experts in physics or electromagnetics. Therefore, we find the ALJ’s reasoning in weighing the evidence presented to be sound and justified. Accordingly, the Complainant’s Exception No. 3 regarding the PLC meter, is denied.

We disagree with the Complainant’s argument that the Company cannot lawfully terminate her electric service for failure to provide access to the meter. The Commission has stated that “[i]t is well-settled that where a customer refuses a utility access to its meter, the utility may terminate service after required notice is provided.” *Frompovich*. Accordingly, the Complainant’s Exception No. 3 regarding termination of service where the customer prevents access for installation of the meter is denied.

As noted *supra*, in affirming the Commission’s *2019 Povacz Order*, the Pennsylvania Supreme Court held in *Povacz II* that, in order to prevail in a Section 1501 claim involving the safety of smart meters, and specially, 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 RFs from the AMI meter. *See, Povacz II* at 1006. In that context, the lay opinion of the Complainant does not provide a conclusive, causal connection between the harm to human health and the RFs from the AMI meter. *Id.*

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

The Supreme Court further instructed that the burden of proof is two-fold for Section 1501 claims involving the safety of smart meters and RF emissions. First, a customer must present expert opinion rendered to a reasonable degree of scientific certainty that radio frequency emissions from smart meters cause adverse health effects. Next, a customer must present expert opinion rendered to a reasonable degree of medical certainty that RF emissions from the smart meters, either alone or cumulative to other sources of RF emissions, caused them harm. The utility may then refute the customer’s evidence by providing scientific and/or medical expert testimony that, within a reasonable degree of certainty, the RF emissions from smart meters did not cause the alleged harm. *Id.* Once the parties have presented their evidence, the onus then falls on the fact finder to weigh the evidence and determine whether it is more likely than not that the smart meter caused the customer harm. *Id.* at 1006.

In the present case, the ALJ’s analysis and disposition turned on the relative weight of the evidence presented by the Complainant to establish that installation of a smart meter would constitute a violation of the Code, a Commission Regulation or Order or a violation of a Commission-approved tariff, versus the weight of the evidence presented by the Company in opposition to the Complaint. The ALJ concluded that the evidence presented by the Company outweighed the evidence presented by the Complainant on all issues. We concur. Upon review, we agree with the ALJ’s well-

reasoned analysis in the Initial Decision and the ALJ's conclusion that the Complainant failed to prove by a preponderance of the evidence that the installation of the smart meter constitutes unsafe or unreasonable service under 66 Pa. C.S. § 1501 or otherwise violates the Public Utility Code, a Commission order or regulation or a Commission-approved tariff of the company. I.D. at 21.

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 RFs from the AMI meter. *See, 2019 Povacz Order*. Here the ALJ properly concluded that the Complainant has failed to sustain her burden of proof that PPL violated 66 Pa.C.S. § 1501. I.D. at 22.

Specifically, we affirm the ALJ's finding in COL No. 18, that the Complainant has failed to demonstrate that the new AMI meter causes, contributes to, or exacerbates any adverse health effect. I.D. at 24. We find nothing in the Complainant's Exceptions to refute the ALJ's conclusion that the installation of the new AMI meter would violate the Public Utility Code or any Commission regulation or order. I.D. at 23, COL 13 (citing 66 Pa. C.S. §§ 332(a), 701).

Therefore, upon review of the record, and based on the foregoing discussion, we find that the ALJ properly weighed the evidence presented to conclude that the Complainant failed to establish by a preponderance of the evidence that the Company's installation of a smart meter would constitute unreasonable or unsafe provision of service under Section 1501 of the Code. Therefore, we shall deny the Complainant's Exception Nos. 3, 5, and 7 challenging the ALJ's dismissal of the Complaint for failure to satisfy the burden of proof.

While the Complainant avers that the ALJ erred when she stated that the Commission decides cases on an individual basis and on the specific allegations presented, we find no support for this argument. Exception No. 6 is citing to COL No. 10 which is a cite from *Kreider*. The Complainant has provided no evidence that the ALJ has not fully reviewed this case based on the record in this case. Accordingly, the Complainant's Exception No. 6 is denied.

3. Complainant's Arguments Regarding Act 129 and an Opt-out

a. Exception No. 4

In her Exception No. 4, the Complainant argues that the Commission has interpreted Act 129 incorrectly. The Complainant avers that “there is no basis on which the PUC can justify its mandate or universal forced deployment of smart meters in their Implementation Orders. Consequently, the EDCs, including PPL, have no legal basis on which to force smart meters on all of their customers.” Exc. at 10.

b. Replies

According to PPL, the ALJ properly held that the installation of the new AMI meter is required by law. R. Exc. at 18 (citing I.D. at 16-19). PPL offers that Section 2807(f) of the Public Utility Code prescribes that EDCs, like PPL, must file smart meter plans and “shall furnish smart meter technology” in any of the following situations: (1) “[u]pon request from a customer that agrees to pay the cost of the smart meter at the time of the request”; (2) “[i]n new building construction”; and (3) “[i]n accordance with a depreciation schedule not to exceed 15 years.” R. Exc. at 18 (citing 66 Pa. C.S. § 2807(f)(1)-(2)). PPL explains that the Commission 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.” R. Exc. at 18 (citing

Smart Meter Installation Order). PPL concludes that it must install the new smart meters for every customer in its service territory, including the Complainant. R. Exc. at 18.

PPL explains further that it must comply with the relevant Commission orders directing the Company to deploy the new AMI meters. PPL notes that the Commission determined that the existing PLC meters were not compliant with Act 129 and the *Smart Meter Installation Order*. R. Exc. at 19 (citing *PPL 2010 Smart Meter Order*). The Company must replace all the PLC meters with the new AMI meters which the Commission has found to be compliant with the requirements of Act 129. R. Exc. at 19 (citing *PPL 2015 Smart Meter Order*). PPL avers that it cannot install any other type of meter under its Smart Meter Plan and cannot leave the existing, non-compliant PLC meter in place. R. Exc. at 19-20 (citing PPL St. 4 at 6).

c. Disposition

In her Exception No. 4, the Complainant disagrees with the Commission's interpretation of Act 129 and argues that she should be able to opt out of a smart meter installation at the service address.

In *Povacz II*, the Pennsylvania Supreme Court expressly concluded that the complainant's assertion of the right to "opt-out" of Act 129 was unfounded. The Supreme Court further found that a customer may seek an accommodation to smart meter installation, provided the customer first established a violation under Section 1501 of the Code. Therein, the Supreme Court stated:

[W]e conclude that Act 129 does mandate that EDCs furnish smart meters to all electric customers within an electric distribution service area and does not provide electric customers the ability to opt out of having a smart meter installed. An electric customer with concerns about smart meters may seek an accommodation from the PUC or EDC,

but to obtain one the customer must establish by a preponderance of the evidence that installation of a smart meter violates Section 1501 [of the Code].

Povacz II, at 983-984. Therefore, by establishing that there is no “opt-out” permitting a customer to refuse smart meter installation, the Supreme Court’s holding in *Povacz II* is controlling on the question. In the present case, the Complainant’s Exceptions fail to establish any violation by the utility under Section 1501 of the Code, as a prerequisite to seeking an accommodation. Accordingly, to the extent the Complainant asserts a right to opt out of Act 129 to refuse smart meter installation, we shall deny the Complainant’s Exception No. 4 without further discussion.

4. Complainant’s Arguments Regarding Constitutional Claims

a. Exceptions (pp. 2, 3)

The Complainant argues that the installation of a smart meter would be a violation of the Fourteenth Amendment. Exc. at 2. The Complainant argues further that the installation of a smart meter would be a violation of the Pennsylvania Constitution and the Constitution of the United States. Exc. at 3.

b. Replies

PPL provides that 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;” and (2) “the party charged with the deprivation must be a person who may fairly be said to be a state actor.” R. Exc. at 21-22 (citing *Commonwealth v. Corley*, 491 A.2d 829, 832 (Pa. 1985) (additional citations omitted)). PPL contends that it is not a state actor. R. Exc. at 22.

c. Disposition

To the extent the Complainant's Exceptions assert that the ALJ erred by not finding that the installation of a smart meter constitutes a violation of the Complainant's constitutional rights, we shall deny the Exceptions. *See*, Exc. at 2,3.

As a general matter, we agree with PPL's argument that the Company is not a state actor, and therefore, the Complainant fails to assert a constitutional claim. *Commonwealth v. Corley*, 491 A.2d 829, 832 (Pa. 1985) (additional citations omitted). Further, in *Povacz II*, the Pennsylvania Supreme Court noted the Commonwealth Court's conclusion that the assertion of a constitutional right to refuse installation of a smart meter was unfounded. *See, Povacz II* at 985, fn. 8. As previously noted, *supra*, the Commonwealth Court's decision is binding on the question. Accordingly, to the extent the Complainant asserts a constitutional right to refuse smart meter installation, we shall deny the Complainant's Exceptions without further discussion.

5. Complainant's Argument Regarding the Americans with Disabilities Act

a. Exceptions (pp. 2, 3, 15)

The Complainant argues that the installation of a smart meter by PPL would be a violation of the Complainant's rights under the ADA. Exc. at 2, 3, 15.

b. Replies

PPL provides that the ALJ properly rejected the Complainant's arguments based on the ADA because the Commission lacks jurisdiction to interpret and enforce federal law. R. Exc. at 24 (citing I.D. at 15-16). PPL notes that nothing in the

Pennsylvania Public Utility Code grants the Commission the ability to interpret and enforce the ADA. According to PPL, it is well-established that the Commission lacks subject matter jurisdiction to interpret and enforce federal law. R. Exc. at 24 (citing *Frompovich*).

c. Disposition

We agree with the ALJ that the Commission lacks jurisdiction to hear claims brought under the ADA. I.D. at 15-16. We note that in *White v. PPL Electric Utilities Corp.*, Docket No. C-2018-3003468 (Opinion and Order entered May 21, 2020) at 19, the Commission held that it lacked jurisdiction to enforce the federal Fair Housing Act and federal Americans with Disabilities Act regarding a similar complaint. See also *Frompovich* at 43. Accordingly, we shall deny the Complainant's Exceptions with regard to the ADA and the Complainant's request for an accommodation in accordance with the ADA (Exc. at 2-3; 15).

IV. Conclusion

In light of the above discussion, we shall: (1) deny the Complainant's Exceptions; (2) adopt the ALJ's Initial Decision; and (3) dismiss the Complaint, consistent with this Opinion and Order; **THEREFORE,**

IT IS ORDERED:

1. That the Exceptions filed by Kathleen Anthony on October 5, 2020, to the Initial Decision of Administrative Law Judge Elizabeth H. Barnes issued on September 16, 2020, at Docket No. C-2018-3000490, are denied, consistent with this Opinion and Order.

2. That the Initial Decision of Administrative Law Judge Elizabeth H. Barnes, issued on September 16, 2020, at Docket No. C-2018-3000490, is adopted, consistent with this Opinion and Order.

3. That the Formal Complaint filed by Kathleen Anthony, on March 12, 2018 and amended on April 9, 2019, at Docket No. C-2018-3000490, is dismissed.

4. That this proceeding be marked closed.

BY THE COMMISSION,



Rosemary Chiavetta
Secretary

(SEAL)

ORDER ADOPTED: May 9, 2024

ORDER ENTERED: May 9, 2024