

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Andrew and Theresa Sabatini	:	
	:	
v.	:	C-2018-3005177
	:	
West Penn Power Company	:	

**INITIAL DECISION**

Before  
Emily I. DeVoe  
Administrative Law Judge

**INTRODUCTION**

Complainants filed a Formal Complaint against Respondent objecting to the installation of a smart meter at their residence. This decision dismisses the Amended Formal Complaint due to Complainants’ failure to meet their burden of proof.

**HISTORY OF THE PROCEEDING**

**Initial Filings by the Parties**

Andrew Sabatini and Theresa Sabatini (Complainants) filed a Formal Complaint (Complaint) with the Pennsylvania Public Utility Commission (Commission) against West Penn Power Company (Respondent or Company) dated October 7, 2018, averring that Respondent is threatening to shut off their electric service and objecting to the installation of a smart meter at their property. Complainants raised health, safety, privacy and reliability concerns and alleged a violation of Section 1501 of the Public Utility Code. Complainants also averred that their constitutional rights have been violated. As relief, Complainants stated that they want to keep their analog electric meter and do not want a smart meter installed on their property.

On October 29, 2018, Respondent filed an Answer and New Matter to the Complaint. Respondent admitted that it provides residential retail electric service to Andrew Sabatini and that Theresa Sabatini is an authorized contact person on the account. Respondent averred that Complainants have refused to allow the Company access to the Company's meter in order to install a smart meter, which constitutes legal grounds to terminate service to the service location. Respondent denied the remaining material allegations set forth in the Complaint. Respondent further avers it is required by Act 129 of 2008<sup>1</sup> (Act 129), to install a smart meter.

On October 29, 2018, Respondent also filed Preliminary Objections to the Complaint. Respondent averred that the request for relief for an exemption from the installation of a smart meter is not legally recoverable in the cause of action and that Complainants have failed to allege that Respondent violated any Commission statute, regulation, order or tariff provision with regard to the proposed installation of the smart meter at the residential account. Respondent further averred it is required by Act 129 to install a smart meter at the service location. Finally, Respondent argued that the Formal Complaint is legally insufficient because it fails to state a claim upon which the Commission can grant relief, that a hearing is not in the public interest, and that the Complaint does not meet the standards set forth in recent Commission decisions in order to survive preliminary objections.

On November 6, 2018, Complainants filed a Reply to Preliminary Objections.

On November 18, 2018, Complainants filed a Reply to Answer and New Matter.

A Motion Judge Assignment Notice was issued on November 26, 2018, assigning this matter to Administrative Law Judge Jeffrey Watson (ALJ Watson).

On December 19, 2018, ALJ Watson entered an Interim Order denying the Preliminary Objections.

---

<sup>1</sup> 66 Pa.C.S. §§ 2806.1–2807.

On December 19, 2018, ALJ Watson issued an Interim Order establishing a litigation schedule. ALJ Watson directed the parties to exchange fact and expert witness information with each other by February 14, 2019, conclude discovery by April 15, 2019, and file a status report by May 2, 2019. The Order also provided information about the procedural rules of the Commission.

On January 15, 2019, WPP filed a certificate of service showing it had propounded Interrogatories and Requests for Production of Documents (discovery requests) upon Complainants.

On February 4, 2019, ALJ Watson received a letter from Complainants dated January 28, 2019, requesting an extension of 90 days to respond to the discovery requests propounded by Respondent.

On February 12, 2019, ALJ Watson issued an Interim Order granting in part and denying in part Complainants' request for an extension of time. ALJ Watson directed Complainants to serve objections to specific discovery requests and file a certificate of service with the Commission by March 7, 2019. ALJ Watson further directed Complainants to provide full and complete responses to all of Respondent's discovery requests and file a certificate of service with the Commission by March 14, 2019.

On April 23, 2019, Respondent filed a Motion to Compel Responses to Interrogatories and Document Requests (Motion to Compel). A full copy of the Company's Discovery Requests was attached as Exhibit A to the Motion to Compel. In the Motion to Compel, Respondent avers that Complainants did not file any objections to the Discovery Requests and has provided incomplete responses to the requested documents on March 14, 2019 regarding questions 2, 8-12, 24, 25, 27, 31; 4a, 7, 14, 15, 20-23, 26, 28-30, 32, 36-37; and 27 and 33.

On May 1, 2019, ALJ Watson issued an Interim Order denying Complainants' objections to the discovery requests, granting the Motion to Compel, and directing Complainants to file full and complete responses to all of the discovery requests by May 17, 2019.

On May 2, 2019, Complainants filed a response to the Motion to Compel, arguing that they had answered the discovery requests as completely as they could, providing links to various documents, and explaining it would be burdensome for them to print out further responses. They also reiterated their objections to some requests based on relevance. They advised they will provide information as it becomes available and are diligently and sincerely trying to comply.

On May 2, 2019, WPP filed a status report advising Complainants had failed to provide witness identification information to WPP and recommending that a prehearing conference be scheduled.

On May 13, 2019, ALJ Watson issued an Interim Order reconsidering the Motion to Compel in light of Complainants' response filed on May 2, 2019. ALJ Watson again granted the Motion to Compel and directed Complainants to serve full and complete responses to all of the discovery requests as well as a certificate of service no later than May 29, 2019.

On May 29, 2019, ALJ Watson issued another Interim Order again reconsidering the Motion to Compel. ALJ Watson again granted the Motion to Compel and directed Complainants to serve full and complete responses to the discovery requests and a certificate of service by June 13, 2019.

Further, on June 3, 2019, a Prehearing Conference was scheduled for June 26, 2019, by an Interim Order dated June 3, 2019, and a Notice dated June 4, 2019.

On June 6, 2019, Complainants filed a certificate of service indicating they served responses to the discovery requests upon Respondent.

On June 20, 2019, Complainants filed an Amended Formal Complaint. They alleged WPP's proposal to install a smart meter at the location of their current meter violates regulations of the Federal Communications Commission. Additionally, they amended their requested relief to include a request to keep their analog meter or, in the alternative, allow them to keep their analog meter "until the final days of [the] alleged 15 year 'smart meter' deployment mandate, in 2023, to grant [them] time required for legislative correction of Act 129's implementation according to its original purpose and intent."

On June 26, 2019, Complainants filed a letter with the Commission's Secretary's Bureau to register a complaint against ALJ Watson. Complainants alleged, *inter alia*, ALJ Watson was not being "equitable" in his decisions and communications with them.

On June 26, 2019, a prehearing conference was held as previously scheduled. Complainant Mr. Sabatini participated in the conference. Tori Giesler, Esq. and Lauren Lepkoski, Esq., appeared for Respondent. The Parties addressed the litigation schedule in this matter and other outstanding issues in this case. In addition, Complainant Andrew Sabatini and Respondent discussed the possibility of entering into a stipulation and submitting this case on briefs without the need for an evidentiary hearing.

On July 1, 2019,<sup>2</sup> ALJ Watson served an Interim Order directing the Parties to file a status report, either jointly or separately, by July 10, 2019, to indicate their agreed upon stipulations, if any, and provide dates for an evidentiary hearing, should one be necessary.

On July 10, 2019, WPP filed an Answer and New Matter to the Amended Complaint. The Answer and New Matter to the Amended Complaint included a Notice to Plead, directing Complainants to file a response to the New Matter within twenty days of service.

In its Answer, WPP averred, *inter alia*, its actions have been reasonable and performed in accordance with all applicable laws, as well as the Company's Commission-approved tariffs, the Pennsylvania Public Utility Code, and Commission regulations and orders.

---

<sup>2</sup> The Interim Order was dated June 27, 2019, but was served July 1, 2019.

In its New Matter, WPP argued there is no opt-out provision in Act 129, and smart meter installation is mandatory.

On July 10, 2019, Complainants filed a status report and indicated that they were in need of an extension of the litigation schedule as set forth in prior orders.

On July 10, 2019, Respondent also filed a status report. Respondent indicated that Complainants have not submitted their witness notification.

On July 12, 2019, Respondent filed an updated status report.

Based upon the representations of Complainants that they did not have an adequate understanding and knowledge of how to handle the process of their Formal Complaint and prepare for a hearing, ALJ Watson issued an Interim Order dated August 22, 2019, extending the deadlines for Complainants to exchange witness information and conduct discovery. Parties were directed to exchange fact and expert witness information by September 20, 2019, and conclude discovery by October 10, 2019. ALJ Watson again provided information regarding the Commission's procedural rules.

On October 22, 2019, WPP filed a status report advising it had still not received witness information from Complainants and provided its availability for an evidentiary hearing.

On October 24, 2019, ALJ Watson issued an Interim Order scheduling an in-person evidentiary hearing for December 11, 2019, and explaining the hearing procedures. ALJ Watson provided instructions regarding calling witnesses and offering documents into evidence.

On October 25, 2019, the Commission issued a Hearing Notice, scheduling the hearing for December 11, 2019.

On November 25, 2019, ALJ Watson received Respondent's proposed exhibits and other enumerated documents. No such documents were received from Complainants.

On December 3, 2019, the ALJ Watson received a document entitled "Request for Extension/Continuance." Complainants requested a continuance of the hearing scheduled for December 11, 2019, and an extension of the litigation schedule.

On December 4, 2019, ALJ Watson issued an Interim Order regarding Complainant's requests. ALJ Watson found Complainants established good cause to continue the evidentiary hearing but failed to establish good cause for another extension of the litigation schedule. Consequently, ALJ Watson denied Complainants' request to further extend the litigation schedule, continued the evidentiary hearing, directed the parties to meet and confer regarding a new hearing date, and submit a status report by December 16, 2019.

On December 5, 2019, the Commission issued a Cancellation Notice cancelling the December 11, 2019, evidentiary hearing.

On December 16, 2019, WPP filed a status report providing information regarding the Company's availability for an evidentiary hearing and its attempts to meet and confer with Complainants.

On December 16, 2019, ALJ Watson received correspondence from Complainants requesting reconsideration of their request for an extension of the litigation schedule in this proceeding.

On December 26, 2019, ALJ Watson issued an Interim Order denying Complainants' request.

On January 13, 2020, Complainants filed a request directed to the Commission's Secretary's Bureau to extend the litigation schedule in order to secure legal representation.

On January 22, 2020, the Commission issued a Notice, scheduling an in-person hearing for February 20, 2020.

On January 24, 2020, ALJ Watson issued an Interim Order, denying Complainant's request to further delay the evidentiary hearing to allow Complainants to secure legal representation. ALJ Watson explained, "Complainants were previously advised, early in the proceeding of their right to obtain legal counsel and chose to represent themselves. Under the circumstances in this case, Complainants have not established good cause to grant an additional extension in this proceeding."

On January 30, 2020, Complainants filed a second request to delay the evidentiary hearing in order to secure legal representation. ALJ Watson did not issue an Interim Order on Complainants' second request.

### Evidentiary Hearing

The evidentiary hearing convened as scheduled on February 20, 2020. Complainants were present and represented themselves. Ms. Giesler and Ms. Lepkowski again appeared on behalf of the Company. Mr. Sabatini testified on behalf of Complainants and offered exhibits into the record. Complainant's Exhibits PD-A, PD-B, PD-C, and JCA-1<sup>3</sup> were admitted into the record. Respondent offered no witness testimony but did offer exhibits. West Penn's Exhibits PD-1, PD-2, PD-3, and PD-4 were admitted into the record.

At the conclusion of the hearing, ALJ Watson set a briefing schedule. ALJ Watson advised the parties that main briefs were due on May 18, 2020.

On April 7, 2020, ALJ Watson issued an Interim Order, revising the deadline for briefs and directing parties to file briefs, if any, by May 29, 2020.

---

<sup>3</sup> Although initially pre-served as a potential exhibit by the Company, the JCA-1 was admitted as an exhibit for Complainants.

On May 22, 2020, Complainants filed a request to extend the briefing schedule due to their inability to access the transcript due to the closure of the Commission's offices as a result of the Covid-19 pandemic.

On May 28, 2020, ALJ Watson issued an Interim Order, extending the deadline to file briefs to July 10, 2020.

The transcript for the hearing was filed June 29, 2020.<sup>4</sup>

On July 2, 2020, Complainants filed a request to further extend the deadline for the filing of briefs, again due to their inability to access the transcript.

On July 8, 2020, ALJ Watson issued an Interim Order, further extending the deadline to file briefs to September 1, 2020.

On August 25, 2020, Complainants again submitted a request to further extend the deadline to file briefs.

On October 20, 2020, ALJ Watson issued an Interim Order, further extending the deadline to file briefs to December 18, 2020.

#### *Povacz I, Povacz II, and the Commission's Stay Order*

The Commission's handling of complaints challenging the installation of smart meters on consumer's residences has been the subject of recent appellate litigation. On October 8, 2020, the Commonwealth Court of Pennsylvania (Commonwealth Court) issued an Opinion in *Povacz v. Pennsylvania Public Utility Commission*, 241 A.3d 481 (Pa. Cmwlth. 2020) (*Povacz I*), the first of several appeals involving PECO Energy Company's (PECO) deployment of smart meter technology pursuant to Act 129, codified at 66 Pa.C.S. § 2807(f). In the *Povacz I*

---

<sup>4</sup> It is unclear from the online Docket why there was such a delay between the evidentiary hearing and the filing of the transcript.

consolidated opinion, the Commonwealth Court partially affirmed, and partially reversed and remanded, the Commission's March 28, 2019, and May 9, 2019, Orders. *Povacz I* at 495. Specifically, the Commonwealth Court, in *Povacz I*, held that Act 129 does not mandate the installation of smart meters, and that the Commission had the authority to grant customers accommodations based on their health concerns. *Id.* at 490. However, the Commonwealth Court affirmed: (1) the Commission's application of the preponderance of evidence standard; (2) the Commission's finding that the customers failed to sustain their burden of proof; and (3) that the Commission's findings of fact were supported by substantial evidence. *Id.* at 490, 491, 493-495. The Commonwealth Court also declined to find that the deployment of smart meters violated the customers' Fourteenth Amendment liberty interests in bodily integrity. *Id.* at 487-488.

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

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

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

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

The Supreme Court noted that while Act 129 does not provide customers with the right to opt-out of smart meter installation at their residence, they may file a complaint with the Commission raising a claim that installation of a smart meter violates Section 1501 of the Code, 66 Pa.C.S. § 1501.

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

#### Proceeding Post-*Povacz II* in the Instant Case

On November 27, 2023, the Commission issued a Judge Change Notice reassigning this matter to me.<sup>5</sup>

Upon review of the extensive procedural history in this case, I determined it was appropriate to set a deadline for the filing of briefs and the filing of any appropriate motions.

---

<sup>5</sup> The reassignment was part of an initiative within the Commission's Office of Administrative Law Judge (OALJ) to more evenly distribute the workload associated with the previously-stayed smart meter cases in order to more efficiently adjudicate the accumulation of smart meter cases that resulted from the Commission's *November 4, 2020 Stay Order*.

On December 5, 2023, I issued an Interim Order directing the parties to file main briefs by January 12, 2024, and any appropriate motion by January 12, 2024, and responses to any motions by January 26, 2024.

On January 9, 2024, three days prior to the January 12, 2024 deadline, Complainants served me with a request to extend the deadline for the filing of their brief, requesting a six month extension of the deadline to file their brief.

On January 10, 2024, I issued an Interim Order denying Complainants' request to extend the deadline for filing briefs. I noted, *inter alia*, although this matter was stayed until November 9, 2023, Complainants were served with notice the stay was lifted on November 14, 2023. At no point after August 9, 2020 (when Commission offices reopened), or after November 14, 2023 (when Complainants received notice the stay was lifted), or after December 5, 2023, (when I issued my Order setting the deadline of January 12, 2024), did Complainants make arrangements to come to the OALJ's Pittsburgh office to review the transcript.

I further explained that I had reviewed the transcript and admitted exhibits and found the record was complete. I advised the parties I would be able to render an initial decision without the aid of briefs from the parties. I reiterated that the filing of briefs was optional, and whether a party chose to file a brief would not affect my ultimate decision.

On January 12, 2024, Respondent filed its main brief.

On January 25, 2024, Complainants filed correspondence again requesting an extension of the briefing deadline. They again proposed they be permitted an additional six months to prepare their brief.

Also on January 25, 2024, Complainants filed a Motion to Strike Respondent's brief, alleging that the brief was untimely filed. I reviewed the Commission's records in this matter, and determined that Respondent's brief was e-filed with the Commission's Secretary's Bureau at 3:25:16 pm on January 12, 2024. The records show the brief was subsequently

processed and posted to the online docket by the Secretary's Bureau staff at 1:45:02 pm on January 16, 2024, and published to the Commission's website and made public at 2:00:37 pm on January 16, 2024.

On January 26, 2024, I issued an Interim Order explaining my review of the Commission's records, and explaining that the delay between January 12, 2024, and January 16, 2024, was due to internal administrative processes in the Commission's Secretary's Bureau and does not affect the date Respondent's brief was filed, which was January 12, 2024. Therefore, I denied Complainants' Motion to Strike the Respondent's brief.

On March 8, 2024, I issued an Interim Order closing the evidentiary record.

This matter is ripe for adjudication.

#### FINDINGS OF FACT

1. Complainants are Andrew and Theresa Sabatini, who reside at 120 Fawn Lane, Acme, PA. Tr. 121.

2. Respondent is West Penn Power Company, an electrical distribution company (EDC) that provides residential electrical service to Complainants at the service address.

3. Act 129 of 2008 required EDCs with at least 100,000 customers to adopt smart meter technology procurement and installation plans (SMTPIPs) to the Commission. West Penn Ex. PD-1.

4. Act 129 also defined some of the specific characteristics the meters need to have, including bi-directional communication with the utility and the ability to report consumption data in at least hourly intervals. West Penn Ex. PD-1.

5. WPP is an EDC with at least 100,000 customers. West Penn Ex. PD-4.
6. On June 24, 2009, the Commission issued an Implementation Order, providing general direction to EDCs regarding their adoption of smart meter programs and requiring EDCs to submit SMTPIPs to the Commission. West Penn Ex. PD-2.
7. On August 14, 2009, WPP submitted its SMTPIP to the Commission. West Penn Ex. PD-4.
8. WPP subsequently filed a revised SMTPIP. West Penn Ex. PD-4.
9. On June 30, 2011, the Commission entered an Order approving Respondent's revised SMTPIP. West Penn Exs. PD-3, PD-4.
10. On December 31, 2012, Respondent filed its initial smart meter deployment plan (SMDP) with the Commission. West Penn Ex. PD-4.
11. On March 19, 2014, WPP revised its SMDP. Compl. Ex. JCA-1.
12. By Order entered June 5, 2014, the Commission approved Respondent's final SMDP. West Penn Ex. PD-4.
13. The SMDP does not provide an opt-out for customers. West Penn Ex. PD-4; Compl. Ex JCA-1.

## DISCUSSION

### General Burden of Proof for Consumer Complaints

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 Co. of New York v. Nat’l Labor Rel. Bd.*, 305 U.S. 197, 229 (1938). More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk & W. Ry. Co. v. Pa. Pub. Util. Comm’n*, 413 A.2d 1037 (Pa. 1980).

### Burden of Proof Applied to Section 1501 Complaints Challenging Smart Meter Installation

Pursuant to Section 1501 of the Code, all public utilities have a duty to maintain “adequate, efficient, safe, 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. 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 discussed below, the Supreme Court held that while Act 129 does not provide customers with the right to opt-out of smart meter installation at their residence, they may file a complaint with the Commission raising a claim that installation of a smart meter violates Section 1501 of the Code, 66 Pa.C.S. § 1501.

### Complainants’ Case-in-Chief

At the hearing, Mr. Sabatini testified that the Pennsylvania legislature wrote and intended Act 129 to be “opt-in,” meaning that customers would have the choice whether to have

a smart meter installed. Tr. 123. As evidence of his position, he referenced the legislative record for Act 129. Tr. 124-126, 138-139. He testified the Commission altered the language of Act 129 by interpreting Act 129 to mandate smart meter installation, thus violating the Pennsylvania Constitution. Tr. 123.

Further, Mr. Sabatini requested ALJ Watson take official notice of Act 129, which was pre-marked and submitted by the Company as PD-1. ALJ Watson also took official notice of three sections of the Legislative Journal: a portion of the Legislative Journal dated February 11, 2008 (PD-A), a portion of the Legislative Journal dated February 12, 2008 (PD-B), and a portion of the Legislative Journal dated October 8, 2008 (PD-C). Tr. 232-34.

The Company did not present any testimony but did offer some documents, and requested ALJ Watson take official notice of them: an Implementation Order issued by the Commission on June 18, 2009, at Docket number M-2009-2092655 (PD-2); an Order issued by the Commission on June 30, 2011, at Docket number M-2009-2123951, adopting WPP's SMTPIP (PD-3); and an Opinion and Order issued by the Commission on June 5, 2014, at Docket number M-2013-2341990, approving WPP's Revised Smart Meter Deployment Plan (PD-4). Complainants did not object, and ALJ Watson took official notice of those documents. Tr. 237. Further, the parties stipulated to the admission of Company's exhibit JCA-1. Tr. 239.

#### Whether Complainants Met Their Burden of Proof

While Complainants alleged health, safety and privacy, reliability concerns in their initial complaint, and alleged safety concerns in their Amended Complaint, they presented no evidence or argument at the hearing to support these claims. Unless a party admits a fact in an answer, filed under oath, to a numbered allegation in a pleading, a pleading or any part thereof, may not be considered evidence of a fact other than that of filing thereof, unless offered and received into evidence. 52 Pa. Code § 5.405. Therefore, Complainants' allegations in their complaint are simply that, *allegations*. It is Complainants' burden to present substantial evidence to support those claims at an evidentiary hearing.

Notably, ALJ Watson thoroughly explained the hearing process to both Complainants at the start of the evidentiary hearing. ALJ Watson explained, “But I just want to make it clear that the only thing that I can consider in this case by way of facts, would be evidence that is presented at the hearing.” Tr. 92. He further explained,

Typically, we received evidence from the witness stand. And when there is testimony presented, then that testimony is offered. There could be an objection. I will make a ruling on the objection. And if I receive the evidence into the record that is evidence that I can consider in making my decision.

If for some reason there is an objection that is sustained and the evidence is not received into the record, then obviously, I wouldn't be able to consider it. If there are documents that are offered and admitted into evidence and received into evidence today at the hearing, then I can consider that at the hearing. So I just want to be clear, and I know I was clear on June 26th at the Prehearing Conference, but I want to be clear again because I think this is important.

The only thing that I can consider in making my decision is evidence that is received at the hearing in this case ... So it has to be offered by way of testimony, or exhibits or otherwise. And it has to be received into evidence. If it's properly presented and received into evidence, then I can and will consider it in making my decision and give it the appropriate weight, if any, that is warranted under the circumstances.

So the reason I tell you that is these cases sometimes go on a long time. Sometimes a really long time. This case was filed in 2018. Today is February 20th of 2020. I know the parties submit information and exchange information between the parties. I know sometimes the parties will send me documents. They may send the Commission Secretary documents, they may exchange documents or send things to the Commission throughout the course of the proceeding.

What you have to understand is, if you send the Company -. Mr. Sabatini, if you send the Company something during the course of this whole process, or if the Company sends you something, I don't have it; it's not in the hearing record. So, it's something that I can't consider. I can only consider evidence that is properly received into evidence at this hearing today

So I just want to be clear. I just don't want somebody to walk out of here today and say wow, okay, the Judge was super fair, the hearing process is so fair and everything went so well. And I think that that evidence that I submitted six months ago will go a long way to having me win my case. Not realizing, I can't consider anything that you sent six months ago or - or six weeks ago or exchanged with the parties. I can only consider evidence that is received at this hearing today and it is properly presented and received.

Tr. 92-94.

After listening to ALJ Watson's explanation of the hearing procedures, Complainants decided to present their case based solely on the premise that Act 129 does not mandate smart meter installation. They did not address or present evidence or testimony on any other claim or argument.

The Supreme Court wrote in *Povacz II*, “[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.” *Povacz II* at 984-985.

Complainants' sole argument presented at the hearing was that Act 129 allowed customers to “opt-in” to smart meter installation, and if not, the law allowed them to “opt-out” of smart meter installation. This argument was squarely addressed and is undoubtedly rendered moot by the Supreme Court's decision in *Povacz II*. At the hearing, Complainants made no claim that they were seeking nor did they present any evidence to support an accommodation under Section 1501.

Accordingly, Complainants' claims must be dismissed. In view of Complainants' failure to meet their burden of proof, the Amended Complaint must be denied and dismissed with prejudice.

## CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the subject matter of this Complaint. 66 Pa.C.S. § 701.
2. As the proponent of a rule or order, the Complainant bears the burden of proof pursuant to Section 332(a) of the Pennsylvania Public Utility Code (Code). 66 Pa.C.S. § 332(a).
3. Act 129 mandates the systemwide installation of smart meters. *Povacz v. Pa. Pub. Util. Comm'n*, 280 A.3d 975 (Pa. 2022).
4. While Act 129 does not provide customers with the right to opt-out of smart meter installation at their residence, they may file a complaint with the Commission raising a claim that installation of a smart meter violates 66 Pa.C.S. § 1501; *Povacz v. Pa. Pub. Util. Comm'n*, 280 A.3d 975 (Pa. 2022).
5. Unless a party admits a fact in an answer, filed under oath, to a numbered allegation in a pleading, a pleading or any part of thereof, may not be considered evidence of a fact other than that of filing thereof, unless offered and received into evidence. 52 Pa. Code § 5.405.
6. Complainants failed to meet their burden of proof. 66 Pa.C.S. § 332(a).

ORDER

THEREFORE,

IT IS ORDERED;

1. That the Formal Complaint of Andrew and Theresa Sabatini filed against West Penn Power Company at Docket No. C-2018-3005177 is denied.
2. That Docket No. C-2018-3005177 be marked as closed.

Date: June 4, 2024

\_\_\_\_\_/s/\_\_\_\_\_  
Emily I. DeVoe  
Administrative Law Judge