

June 24, 2024

*VIA ELECTRONIC FILING*

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

RE: **Docket No. C-2018-3005177**

Secretary Chiavetta:

Enclosed for filing are the Complainants' *Exceptions to the Initial Decision of ALJ Emily DeVoe* in the above-referenced proceeding.

Respectfully submitted this 24th day of June 2024,

\_\_\_\_\_/s/

Andrew Sabatini

\_\_\_\_\_/s/

Theresa Sabatini

**BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION**

**ANDREW AND THERESA SABATINI** :  
 :  
 v : **Docket No. C-2018-3005177**  
 :  
**WEST PENN POWER COMPANY** :

**CERTIFICATE OF SERVICE**

We hereby certify that we have this day served a true copy of these *Exceptions to the Initial Decision of ALJ Emily DeVoe* upon the individuals listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant).

Service via Electronic Mail as follows:

Lauren M Lepkoski Esquire  
Tori L Giesler Esquire  
Firstenergy Services Co  
2800 Pottsville Pikepo Box 16001  
Reading Pa 19612  
610.921.6203  
Accepts E-Service  
[llepkoski@firstenergycorp.com](mailto:llepkoski@firstenergycorp.com)  
[tgiesler@firstenergycorp.com](mailto:tgiesler@firstenergycorp.com)

Administrative Law Judge Emily Devoe  
Pennsylvania Public Utility Commission  
Piatt Place, Suite 220  
301 5<sup>th</sup> Avenue  
Pittsburgh, PA15222  
[edevoe@pa.gov](mailto:edevoe@pa.gov)

Commission's Office of Special Assistants  
[ra-OSA@pa.gov](mailto:ra-OSA@pa.gov)

Dated: June 24, 2024

## TABLE OF CONTENTS

Page

<b>I. PREAMBLE .....</b>	<b>1</b>
<b>II. EXCEPTIONS .....</b>	<b>6</b>
<b>EXCEPTION NO. 1 .....</b>	<b>6</b>
<b>EXCEPTION NO. 2 .....</b>	<b>8</b>
<b>III. SUMMARY .....</b>	<b>24</b>
<b>IV. CONCLUSION .....</b>	<b>28</b>

**ATTACHMENT I: STATE ACTION DOCTRINE**

**BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION**

<b>ANDREW AND THERESA SABATINI</b>	:	
	:	
v	:	<b>Docket No. C-2018-3005177</b>
	:	
<b>WEST PENN POWER COMPANY</b>	:	

**EXCEPTIONS OF COMPLAINANTS ANDREW AND THERESA SABATINI TO THE INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE EMILY DEVOE**

\* \* \*

As pro se, Complainants wish to invoke leniency in this Honorable Court as per *Erickson v Pardus*, 551 U.S. 89, 94 (2007), “A document filed pro se is to be liberally construed, and a pro se complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers . . .” and *Haines v. Kerner*, 404 U.S. 520 (1971), “The US Supreme Court has ruled that people as themselves (that are pro se, as we are) are not same as professional attorneys, and should not be treated and judged as such.”

\* \* \*

Preamble:

When we filed our formal complaint with the PUC in 2018, we had the naive view that the PUC would be a fair and impartial advocate for us. We had no idea that we would be bullied and harassed not only by the First Energy/West Penn Power attorneys, but also by the PUC’s own ALJs and the entire Formal Complaint process and procedure.

When we tried to make our concerns heard regarding the health consequences of the “Smart” meters, we were badgered about turning over our medical records to unaccountable, adversarial attorneys that were fighting against our complaint. Our private, confidential medical records do not belong in the hands of a corporate/state actor bent on doing anything to deny our rights and subvert the law and the adjudication process at the PUC.

We didn’t understand the interrogatory process, so we never got questions to West Penn Power. We didn’t understand any of the legal procedures, and we did our best to gather information and evidence to present at our hearing.

At that hearing, every piece of evidence we presented was objected to and dismissed as hearsay, and we didn’t have the legal savvy to fight back and get our documents admitted into the record.

Now we have found the following information on Evidentiary Standards and Criteria:

### **EVIDENTIARY STANDARDS AND CRITERIA**

Evidence is relevant if it tends to establish facts in issue. *LeRoi v. Pa. State Civil Service Commission*, 382 A.2d 1260 (Pa. Cmwlth. 1978).

**“Commonwealth agencies shall not be bound by technical rules of evidence at agency hearings, and all relevant evidence of reasonably probative value may be received.”** 2 Pa. C.S. § 505.

The Pennsylvania Public Utility Commission, a Commonwealth agency, is not bound by technical rules of evidence at agency hearings and therefore may receive all relevant evidence of reasonably probative value.

If the evidence is relevant to the issues before the agency and of reasonable probative value, the agency may receive it. 2 Pa. C.S. § 505.

**Hearsay evidence may generally be received and considered during an administrative proceeding.** See *A.Y. v. Commonwealth, Dep't of Pub. Welfare, Allegheny County Children & Youth Serv.*, 537 Pa. 116, 641 A.2d 1148, 1150 (1994).

Under the relaxed evidentiary standards applicable to administrative proceedings, as provided under 2 Pa. C.S. § 505, **it is well-settled that simple hearsay evidence**, which otherwise would be inadmissible at a trial, **generally may be received into evidence and considered during an administrative proceeding.** *D'Alessandro v. Pennsylvania State Police*, 937 A.2d 404, 411, 594 Pa. 500, 512 (2007).

**Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.** *Borough of E. McKeesport v. Special/Temporary Civil Serv. Comm'n*, 942 A.2d 274, 281 n.9 (Pa. Cmwlth. 2008)

Substantial evidence must be “more than a scintilla and must do more than create a suspicion of the existence of the fact to be established.” *Kyu Son Yi v. State Bd. of Veterinary Med.*, 960 A.2d 864, 874 (Pa. Cmwlth. 2008).

In order for evidence relied upon in an administrative proceeding to be considered “substantial evidence,” the “. . . information admitted into evidence must have sufficient indicia of reliability . . .” *Gibson v. W.C.A.B.*, 861 A.2d 938, 944, 580 Pa. 470, 480 (Pa. 2004).

To satisfy the requirement of authenticating or identifying an item of evidence ... “the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.” Pa. R.E., Rule 901.

Evidence which is corroborated by any competent evidence in the record must be given its “natural probative” effect.

The Complainants brought forth highly relevant, credible and reliable evidence of definite probative value that met the above criteria and which would constitute a preponderance of evidence, acceptable to any reasonable mind, that forced, chronic, long-term exposure, even at very low levels, to the radiofrequency radiation and RF fields produced by wireless “Smart” meters poses a substantive, increased risk to health and safety.

Although the Complainants are not experts in the fields of medicine or radiation biophysics, they are sufficiently educated and have expertise enough to understand the public documents and the conclusions published in peer-reviewed scientific studies that are written in plain English such that any reasonably well-educated school student could understand.

However, despite the evidentiary standards and criteria listed here, in the course of the proceedings of the instant case, ALJ Watson utterly failed to apply careful judicial scrutiny to the Complainants' evidentiary exhibits in light of those standards and criteria and despite the fact that much of the evidence was published in **public documents**. Nonetheless, all of the Complainants' evidentiary exhibits concerning RF safety were denied admission into the record.

So here we are, six years into this process, and on June 4, 2024 ALJ DeVoe has just ruled against us with prejudice.

We object!

This decision comes after having been denied an extension to file our brief. On December 5, 2023, ALJ DeVoe entered a briefing schedule giving us just over one month, until January 12, 2024, to file our brief. Item number 5 in her order read: “That no extension to any of the deadlines set forth in this order shall be granted **absent good cause.**”

On January 9th, 2024, we filed a Motion to Extend the Briefing Schedule and supplied the “good cause” of Theresa’s mother’s final illness, death, and funeral, which was occurring HERE IN OUR HOUSEHOLD during the ENTIRE time of our briefing schedule period from (December 5th, 2023 to January 12, 2024). That’s not to mention the other reasonable issues of Christmas and New Year’s holidays and our inability to afford our own copy of the transcript and our need to come to PUC offices in Pittsburgh to view our transcript: all reasonable and constituting “good cause”.

One day later, on January 10, 2024, ALJ DeVoe entered an Interim Order entirely denying our Motion for Extension of Briefing Schedule even in the light of the ALJ’s previous Interim Order of December 5, 2023, stating that “no extension ... shall be granted **absent good cause.**” Our “good cause” was the death of Theresa’s mother, who we cared for here in our home for the preceding 6 years. She died on December 28th, 2023, in the middle of our briefing period. The funeral was January 5th, 2024, and there was much to handle regarding arrangements, finances, etc before, during and after this period. The callous disregard and denial of our legal rights by ALJ DeVoe is unacceptable and inhumane. Our complaint to Chief ALJ Rainey about this utter lack of decency and legal misconduct fell on deaf ears, and he never even deigned to respond to our complaint and request for his intervention.

We object!

Our legal rights have not been recognized or upheld in this process. That legal brief was necessary due to the changes in the legal landscape regarding Act 129 during the intervening six years since we filed our initial case. Not only that, but the science; the facts and data regarding “Smart” meter energy savings, or lack thereof; the safety and efficacy of “Smart” meter technology; the health affects of “Smart” meters; and the appalling lack of privacy and security safeguards - all of those have radically changed in the past four years since our hearing, and without our brief, none of that is entered into our record. ALJ Devoe’s ruling against us “with prejudice” means we have no further opportunity to address these many and various issues that have come to light since our hearing in February of 2020.

## **COMPLAINANTS EXCEPTIONS TO ALJ DEVOE’S CONCLUSIONS OF LAW**

### ***Page 19 of ALJ DeVoe’s Initial Decision***

1) “The commission has jurisdiction over the subject matter of this complaint. 66 Pa.C.S. 701”

When this complaint was filed in 2018, we believed that the commission did have jurisdiction over the subject matter of our complaint. Our complaint was originally predicated on the scientific data widely available and now growing exponentially that RF signals do, in fact, pose dangers and potential harm to biological beings over and above the thermal damage which long ago was seen as its sole danger.

In the proceeding 6 years since our original complaint was filed, this data has become incontrovertible.

However, when we recently accessed our transcript, we were surprised to find that there was no mention of the fact that we did present evidence at our hearing regarding the safety and privacy concerns that we had regarding “Smart” meter technology, and that evidence was ALL thrown out as hearsay. As pro-se complainants we were not savvy enough to know how to legally get our evidence into the record.

As for what was actually accepted into our hearing record and the discussion of what the “subject matter” of our complaint was at our hearing, we do not believe that the PUC has jurisdiction over the issues at hand, which have to do with the legislative intent of Act 129, which was not fully addressed in the PA Supreme Court decision in *Povacz II*. So this is NOT a matter for the PUC, it is a matter for the Supreme Court of Pennsylvania, the General Assembly of the State of Pennsylvania, and/or the Federal Court systems.

The PUC and the PA Supreme Court have undermined the General Assembly, subverting both the meaning and intention of Act 129. From the fact of its having appealed the Commonwealth Court's detailed and very well-reasoned decision in *Povacz* to the PA Supreme Court, it has become even more obvious that the PUC's primary interest regarding these matters certainly has NOT been in the public interest. Rather, the Commission's primary concern has continued to be the protection of other interests by its having acted with extraordinary insistence and tenacity to preserve, at all costs, its misguided smart meter policy, which was based upon the Commission's own manifestly flawed interpretation of the legislative intent of the Pennsylvania General Assembly as such had been set forth and expressed in the language of Act 129, the history of the legislative printer number versions, and the clearly expressed comments of legislators themselves as recorded in the legislative record, which was accepted for judicial notice at our hearing of February 2020.

As demonstrated by an abundance of facts and deeds, the Pennsylvania Public Utility Commission has proven itself to exemplify the very definition of a 'captured agency'.

***Page 19 of ALJ DeVoe's Initial Decision***

3) “Act 129 mandates the systemwide installation of smart meters. *Povacv v. Pa. Pub. Util. Comm'n*, A.3d975 (Pa. 2022).”

In the Supreme Court Decision, *Povacv v. Pa. Pub. Util. Comm'n* (Pa. 2022):

Page 28 “Customer’s opt out argument erroneously focuses on (f)(2)(i), which references customers who request a smart meter and agree to pay for it on request (“early technology adopters”), thereby divorcing that clause from the preceding requirement to develop and file a Procurement and Installation Plan. (PECO 21) Customers’ preferred reading, that only those customers who agree to pay for a smart meter would receive a smart meter, flies in the face of the development and filing of a plan for procurement and installation. It ignores the magnitude of the infrastructure required for the utilization of smart meter technology and requires an EDC to have a crystal ball to conjure up the number of customers desiring a smart meter.”

So in this interpretation and decision of the PA Supreme Court, THEY ignore the plain language reading of ACT 129, AND they imply that the General Assembly of the State of Pennsylvania mandated a particular technology that requires a particular type of infrastructure that would necessitate the foreknowledge of the number of opt in “Smart” meter customers.

However, the only specific requirements for “Smart” meter technology are mentioned here:

Act 129, 2807 (g) “Definition. - - As used in this section, the term ‘smart meter technology’ means technology, including metering technology and network communications technology capable of bidirectional communication, that records electricity usage on at least an hourly basis, including related electric distribution system upgrades to enable the technology.”

Here we see the Act 129 requirements say that the meters must 1) be bidirectional and 2) record electricity usage on at least an hourly basis. They don’t say anything about communicating to

other meters. They don't say anything about creating a mesh network which requires private, household electricity usage data to travel, not from meter to Company and back, bidirectionally, but from meter to meter, to be collected at a "hub" meter, and then finally transmitted to the Company. This is the mesh network the PUC and EDCs are mandating, and it introduces many vulnerabilities in privacy and data security, creating a target-rich environment for data and privacy breaches such as we see almost daily in the best run databases of banks and government operations. This is what requires the costly infrastructure that Judge Crompton (Povacz, 241 A.3d at 497) mentions in his support of the Supreme Court's concurrence that the PUC implementation order is correct: that the expenditures of the EDCs from the time the PUC implementation order was propagated in 2009 amounts to a verification of the PUC's interpretation of Act 129, irrationally upholding an invalid and obviously contradictory interpretation of the plain language reading of the Act and the clearly stated intention of legislators in the Legislative Record.

The Supreme Court decision continues:

Page 29: "PECO's tariff explains the operation of (f)(1) as follows: Once all necessary infrastructure is complete, but not later than October of 2012, a customer may request that PECO install a smart meter ahead of the planned schedule for their property. However the customer must pay the incremental cost of installing the meter outside of the normal installation schedule."

The Supreme Court opts to use the erroneous interpretation of the PECO tariff, which in part stems from the erroneous PUC Implementation Order, rather than the plain language reading of the Act itself, using the parenthetical quoted term "early technology adopters" which is nowhere found in the Act itself. This terminology is coming from the PECO Procurement and Installation Plan where PECO explains ... "a customer may request that PECO install a smart meter ahead of the planned schedule for their property."

The Supreme Court conjures up a crystal ball in their argument in favor of PECO's interpretation of the Act, but one has to wonder if they themselves have a crystal ball to see the legislative intent of the Act better than the legislators themselves who, as clearly and definitively recorded in the Legislative Record, state that the Act 129 amendment to Title 66 is NOT a mandate. The PA Supreme Court seems to know better than the legislators what their intent was. By ignoring the legislative history and the legislative record and cleaving to the interpretation of an EDC and an implementation order of the industry-captured PUC, the PA Supreme Court, either in ignorance or collusion, contradicts and thwarts the General Assembly, a co-equal branch of our state government.

So while the PA Supreme Court does address legislative intent, they do so in a roundabout way, finding intent and legislative meaning in what the General Assembly has not done (ie "changed the language of Act 129 to include an opt-out provision"), rather than simply looking at the legislative historical record.

When considering PA Code, Title 1, Chapter 19. Rules of Construction we see the following:

**PA Code, Title 1, Chapter 19. Rules of Construction:**

**§ 1921. Legislative intent controls.**

**(a) Object and scope of construction of statutes.**--The object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly. Every statute shall be construed, if possible, to give effect to all its provisions.

**(b) Unambiguous words control construction.**--When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit.

**(c) Matters considered in ascertaining intent.**--When the words of a statute are not explicit, the intention of the General Assembly may be ascertained by considering, among other matters:

- (1) The occasion and necessity for the statute.
- (2) The circumstances under which it was enacted.
- (3) The mischief to be remedied.
- (4) The object to be attained.
- (5) The former law, if any, including other statutes upon the same or similar subjects.
- (6) The consequences of a particular interpretation.
- (7) The contemporaneous legislative history.
- (8) Legislative and administrative interpretations of such statute.

**§ 1922. Presumptions in ascertaining legislative intent.**

In ascertaining the intention of the General Assembly in the enactment of a statute the following presumptions, among others, may be used:

- (1) That the General Assembly does not intend a result that is absurd, impossible of execution or unreasonable.
- (2) That the General Assembly intends the entire statute to be effective and certain.
- (3) That the General Assembly does not intend to violate the Constitution of the United States or of this Commonwealth.
- (4) That when a court of last resort has construed the language used in a statute, the General Assembly in subsequent statutes on the same subject matter intends the same construction to be placed upon such language.
- (5) That the General Assembly intends to favor the public interest as against any private interest.

Everything in §§ 1921 and 1922 refer back to legislative intent and how to ascertain that intent. The heart and soul of the interpretation and implementation of any law or act coming from the PA General Assembly has fundamentally to find and cleave to the legislative intent. Why then did neither the PUC nor the PA Supreme Court take into consideration the plain language of the Act, and the Legislative Record to guide their actions and decisions regarding the implementation of Act 129?

When we examine the legislative record, we find clarity. By reviewing the third clauses of § 2807(f)(2) of the Printer's Numbers (PNs) of versions of House Bill 2200 that were NOT passed into law, we see what language was excluded from the final version which was passed into law.

PNs 3218 and 3233 (February 11 and 12, respectively, 2008) both stated, "Electric distribution companies shall furnish smart meter technology to: ... (C) One hundred percent of its customers within ten years after the effective date of this paragraph."

The *House Journal* records numerous dissenting comments about the mandatory nature of these PNs.

- House Journal, February 11, 2008, pages 386-403 [p. 390 Mr. Hutchinson; 390-391 Mr. Godshall; p. 392 Mr. McCall; p. 393 Rep. Smith and Mr. Saylor; p. 395 Mr. Benninghoff; p. 397 Mr. Gabig]
- House Journal, February 12, 2008, pages 430-432 [p. 431: Mr. Hutchinson]

PN 4429 (September 23, 2008) stated, "ELECTRIC DISTRIBUTION COMPANIES SHALL FURNISH SMART METER TECHNOLOGY AS FOLLOWS: ... (III) IN ACCORDANCE WITH A SCHEDULE OF REPLACEMENT OF FULL DEPRECIATION OF EXISTING METERS."

Note here, that PNs 3218 and 3233 which mandated smart meters for all customers, and PN 4429 which made reference to retiring from service and replacing existing (mostly analog) meters were NOT PASSED INTO LAW. Also noteworthy is that PN 4429, again – which was NOT passed into law - would have required covered EDCs to replace fully depreciated existing (presumably analog/mechanical) meters that had exceeded their useful life with smart meters. However, this language in PN 4429 was changed and is in sharp contrast to the language that was passed into law.

Any interpretation of §2807(f)(2)(iii) of the Act, such as the PUC and EDCs espouse, that it mandates smart meters for all customers or that it makes any reference at all to existing analog meters is erroneous, because those interpretations are based on language that the PA legislature purposefully modified and are based on language that was NOT PASSED INTO LAW. The prior PNs of the Act that were NOT passed into law should not have formed the basis for the PUC's Implementation Order of June 2009, which the Supreme Court used, in part, to make its mistaken determination in Povazc II.

In addition to the clear plain English understanding of Act 129 §2807(f)(2)(iii)'s reference to a 15-year depreciation schedule are the Senate Journal records of PN 4526, the version that WAS signed into law.

Discussion of PN 4526 in the Senate is recorded in the Senate Journal on October 8, 2008, pages 2626-2631, from which the following comments pertinent to smart meters and concerns about customers are taken. Here is a link: (<https://www.legis.state.pa.us/WU01/LI/SJ/2008/0/Sj20081008.pdf#page=13>)

p 2626

Senator TOMLINSON.

It also contains language in there that we will have smart meters. **It is not mandated**, but it allows for the deployment of smart meters through a depreciation process, through new home construction process, and through the depreciation of 15 years, and **for anyone who wants to purchase a smart meter which they feel will help them manage their electric load better.**

p. 2627

Senator BOSCOLA.

**We also made sure that smart meters would not be mandated for every single ratepayer.**

Not only is that a smarter approach to smart meter deployment, but it will also save electric

customers hundreds of millions of dollars paying for something that will not provide a real benefit in their own households.

p. 2629

Senator FUMO

In addition, **we did not mandate smart meters, but we made them optional.** We did say in new construction, where they really are practical, they will be put in.

So the Legislative Record and the history of the PN versions makes the clear and strong case that the legislative intent for Act 129 was that it was NOT a mandate. The Supreme Court based their decision of the intent of the General Assembly on supposition that after “decades” (2008 until the decision in 2022 is NOT decades), the legislators have not changed the wording of the Act, that their “silence” proves that their original intent is being implemented.

In addition to the Legislative Record, the Formal Complaint Hearing Record of Sherry Yewcic, solidifies the fact that there was no mandate intended by the General Assembly. Mr. Thomas Yewcic, former Member of the Pennsylvania House of Representatives, husband of Mrs. Sherry Yewcic, testified at the remote, telephonic PUC hearing before Judge Jeffrey A. Watson on July 22, 2020 (PUC Docket number C-2018-3001276).

The following is a portion of the cross examination of Mr. Yewcic by Ms. Tori Giesler, in which Mr. Yewcic makes clear that there was no mandate for “Smart” meters written or intended in Act 129 by the General Assembly:

(Yewcic TR, Page 47)

15

19

\* \* \*

20 BY MS. GIESLER:

21 Ms. Giesler: Thank you for your testimony, Mr. Yewcic. (22) I just want to clarify a  
couple things for (23) our purposes for the record. Is it your understanding (24) that the law in  
Pennsylvania as it stands today (25) requires you to receive a smart meter or do you [Yewcic TR,  
Page 48] (1) believe you have the option of a smart meter under (2) the law?

3 Mr. Yewcic: Are you referring to Act 129?

4 Ms. Giesler: Yes.

5 Mr. Yewcic: When I retired from the legislature in (6) 2008 it went through my  
committee, Act 129. I have (7) no recollect - - I don't recall anyone at any time (8) stating that  
smart meters were a mandate, and they (9) weren't. As I recall, there was language that (10)  
talked about a customer, ratepayer or consumer may (11) opt in. There was no other language.  
When I left (12) the legislature, what happened in the courts, (13) whatever the decisions were, I  
don't know. I did (14) look at your testimony. I reviewed it. But the (15) courts weren't in the  
legislature, I was. There was (16) no mention of a mandate. If there was a mandate in (17) 2008  
I doubt seriously it would have made it out of (18) committee. It just wasn't the case. I assume  
it (19) had to go to the court down the road, at which I already (20) left the legislature and wasn't  
paying attention to (21) the process then. As far as am I mandated to put (22) something on my  
house? I made no agreement to (23) change the meter on my house, but our objection is (24) the  
ill health it causes my wife. If the law states (25) that we have to something that's harmful to  
[Yewcic TR, Page 49] (1) somebody, then there is a problem with the law. I (2) think common  
sense should prevail.

3 Ms Giesler: Are you aware of the fact that there have (4) been numerous efforts to implement an opt out under (5) the law that have not passed?

6 Mr. Yewcic: Well, yeah. I've been in the process. (7) Those things aren't going to happen unless there is (8) an agreement between the house and government, the (9) governor and probably the industry. I know how the (10) process works. That's one of the reasons why I (11) opted to retire early. Those efforts failed. Just (12) because a state rep introduces language doesn't mean (13) it's going to go anywhere unless there is an (14) agreement to make it happen. I've been there. (15) That's just not a good example of how things get (16) done or not get done in the legislature as far as (17) legislation is concerned. We have talked to the (18) prime sponsor of that legislation and the new (19) chairman of the committee last year when Godshaw (20) retired is unable to get -- just doesn't seem to be (21) any support to do it. I have my reasons why I (22) believe that.

23 Ms Giesler: So that's a yes; is that correct? I need (24) a yes or no. It's a yes or no question.

25 Mr. Yewcic: State the question again.

[Yewcic TR, Page 50]

1 Ms. Giesler: Are you aware that there have (2) been numerous unsuccessful attempts to implement an (3) opt out revision to Act 129 as it exists today?

4 Mr. Yewcic: Yes, I am aware legislation has been (5) introduced and it has not passed.

6 Ms. Giesler: It's correct that you voted for Act 129 as (7) it's currently written today in support of it, (8) correct?

9 Mr. Yewcic: I voted for Act 129 in 2008 because, as I (10) stated, there were no mandates. There was no (11) suggestion of a mandate. Those didn't come until (12) later.

**The relevant part of Ms. Giesler's cross examination of Mr. Yewcic continues on line 24 of Page 50 of the Yewcic Transcript:**

24 Ms. Giesler: So wouldn't a bunch of lawyer have looked (25) over it for interpretation errors or any issues that [Yewcic TR, Page 51] (1) might be presented if passed with that language?

2 Mr. Yewcic: I do not recall any communication of any (3) lawyer in a reference bureau regarding the house (4) bill before it passed. Nobody stated there was a (5) mandate to implement smart meters. The house record (6) and senate record are available and I'm pretty (7) certain somebody, I think in the senate, maybe Fumo, (8) former senator or somebody stated there was no (9) mandate in the bill, and it was an opt in bill, not (10) a mandate. That's my recollection.

11 Ms. Giesler: Doesn't it stand to reason that if a bunch (12) of the state legislators today will not agree to put (13) in an opt out provision into the law, that it's (14) possible that some of you just misunderstood what (15) you were voting for?

16 Mr. Yewcic: **No. That's nonsense.** (Emphasis mine) Every legislative (17) session is different. There are a lot of external (18) reasons why people support and don't support (19) legislation having to do with fundraising, perhaps (20) jobs for children, family members. Who

knows? (21) There are a lot of reasons why things happen and (22) don't happen in legislature and I don't think we are (23) going to solve that problem here.

Mr. Yewcic's testimony solidifies the evidence in the Legislative History of the PNs and the Legislative Record comments of Tomlinson, Boscola, and Fuma quoted above: there was NO "Smart" meter mandate intended or implied in Act 129. Period.

The policy of mandatory installation of AMI smart meters that has been adopted by the Pennsylvania Public Utility Commission and implemented by the electric utility companies is the product of a complete misinterpretation and misconstruction of the prevailing legislative intent of the Pennsylvania General Assembly as such was set forth and enacted into law under Act 129.

Accordingly, insofar as the enforcement of § 2807(f)(2) **and § 2807(f)(7)** under Act 129 were to have remained in keeping with the expressed, prevailing legislative intent of the General Assembly, West Penn Power Electric Utility and the state's other regulated electric utility companies have **no basis in law**, pursuant to Act 129 **as written**, to terminate electric service to customers who do not give consent to the installation of "Smart" meters on their homes or properties.

Furthermore, in the absence of a compelling governmental interest, the State is **prohibited** from **making or enforcing any law** such as Act 129 which would have the effect of depriving citizens of their fundamental rights protected under the Constitution of the United States. Even if the state were to have a compelling interest in having enacted Act 129, the law must be narrowly drawn such that the **least restrictive means possible** are used to achieve its objectives.

Despite the prevailing legislative intent of Act 129 which did not mandate smart meters, the

fact that the language set forth in § 2807(f)(2) does not state that customers can opt out of having these meters installed is due to the fact that it does explicitly say that a customer must request the “Smart” meter.

The Commission revealed its decision to introduce and impose its own meaning and intent into the law:

"The Commission believes that it was the intent of the General Assembly to require all covered [Electric Distribution Companies] to deploy smart meters system-wide when it included a requirement for smart meter deployment 'in accordance with a depreciation schedule not to exceed 15 years.'" (Commission's *Smart Meter Implementation Order*; also referenced in ¶ 2, *supra*.)

The Pennsylvania Public Utility Commission's policy mandating smart meters constitutes *administrative overreach*. The Commission is charged with implementing and enforcing the law **as written and pursuant to its actual, legislated intent**, not with second-guessing the expressed will of the Legislature to make new law.

The commission, by divorcing the meaning of § 2807(f)(2) **from § 2807(f)(7)**, misses the intended meaning of the Act. Therefore, because the Commission's policy mandating smart meters pursuant to Act 129: **(1)** is predicated entirely upon § 2807(f)(2) in conjunction with § 2807(f)(1) **and NOT in conjunction with § 2807(f)(7)**, **(2)** is excessively restrictive and harmful in its effect upon citizens' fundamental rights protected under the Fourth, Fifth, Eighth, Ninth and Fourteenth Amendments to the Constitution of the United States, and **(3)** as previously asserted, *denies* a select faction of citizens the *equal protection of the laws*, the Commission's enforcement of this policy is, in and of itself, unconstitutional.

First Energy/West Penn Power Electric Utilities and the state's other electric utility companies therefore have no basis in law, pursuant to the Commission's policy mandating smart meters,

to terminate electric service to customers who do not give consent to the installation of “Smart” meters on their homes or properties.

It is the Commission's inherently unconstitutional policy of mandating smart meters that has opened the door to the wrongful and unlawful acts committed by West Penn Power Electric Utilities and other state-regulated electric utility companies, enabling them as '**State actors**', or agents of the State (See **Attachment I, 'State Action Doctrine'**), to carry out their smart meter programs **by means of harassment, threats, intimidation and coercion—all under color of law.**

These violations therefore give rise to actionable cause under the Fourth, Fifth, Eighth, Ninth and Fourteenth Amendments to the Constitution of the United States. (Were the Complainants to seek relief and redress of their grievances in the courts, protection of their rights under these amendments to the Constitution could be further secured and pursued under USC 18 Section 241, USC 42 Section 1983, USC 42 Section 1985(3), and USC 42 Section 1986.).

#### **A. THE CONSTITUTION OF THE UNITED STATES, THE FOURTH, FIFTH, EIGHTH, NINTH, AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES**

##### **Article VI, Clause 3 of the United States Constitution states:**

*This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and **the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.***

The [Supremacy Clause](#) of Article VI of the U.S. Constitution mandates that states must provide hospitable forums for federal claims and the vindication of federal rights (*Felder v. Casey*, 487 U.S. 131, 108 S. Ct. 2302, 101 L. Ed. 2d 123 (1988)).

The Supremacy Clause establishes that the federal constitution, and federal law generally, take precedence over state laws, and even state constitutions.

In *Edgar v. MITE Corp.*, 457 U.S. 624 (1982), the Supreme Court ruled: "**A state statute is void to the extent that it actually conflicts with a valid Federal statute**".

**The Fourth Amendment to the United States Constitution** guarantees that:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated ... ."

**The Fifth Amendment** provides that:

"No person shall ... be deprived of life, liberty, or property, without due process of law;  
nor shall private property be taken for public use, without just compensation."

**The Eighth Amendment** provides that:

Excessive bail shall not be required, nor excessive fines imposed, **nor cruel and unusual punishments inflicted.**

**The Ninth Amendment to the Constitution of the United States** provides that:

"The enumeration in the Constitution, of certain rights, shall not be construed to deny  
or disparage others retained by the people."

**The Fourteenth Amendment** provides in part:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

**B. 50 U.S.C. 36, Subchapter I, §§ 1801(f), 1809(a), 1810, and 1812**

**Section 1801. "ELECTRONIC SURVEILLANCE" Definition—**

...

(3) the intentional acquisition by an electronic, mechanical, or other surveillance device of the contents of any radio communication, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes, and if both the sender and all intended recipients are located within the United States;

(4) the installation or use of an electronic, mechanical, or other surveillance device in the United States for monitoring to acquire information, other than from a wire or radio communication, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes.

**Section 1809. Criminal Sanctions**

(a) Prohibited activities A person is guilty of an offense if he intentionally

(1) engages in electronic surveillance under color of law except as authorized by this chapter, chapter 119, 121, or 206 of title 18, or any express statutory authorization that is an additional exclusive means for conducting electronic surveillance under section 1812 of this title;

(2) discloses or uses information obtained under color of law by electronic surveillance, knowing or having reason to know that the information was obtained through electronic surveillance not authorized by this chapter, chapter 119, 121, or 206 of title 18, or

any express statutory authorization that is an additional exclusive means for conducting electronic surveillance under section 1812 of this title.

### **Section 1810. Civil Liability**

An aggrieved person, other than a foreign power or an agent of a foreign power, as defined in section 1801(a) or (b)(1)(A) of this title, respectively, who has been subjected to an electronic surveillance or about whom information obtained by electronic surveillance of such person has been disclosed or used in violation of section 1809 of this title shall have a cause of action against any person who committed such violation and shall be entitled to recover—

- (a) actual damages, but not less than liquidated damages of \$1,000 or \$100 per day for each day of violation, whichever is greater;
- (b) punitive damages; and
- (c) reasonable attorney's fees and other investigation and litigation costs reasonably incurred.

**Section 1812.** Statement of exclusive means by which electronic surveillance and interception of certain communications may be conducted

- (a) Except as provided in subsection (b), the procedures of chapters 119, 121, and 206 of title 18 and this chapter shall be the exclusive means by which electronic surveillance and the interception of domestic wire, oral, or electronic communications may be conducted.
- (b) Only an express statutory authorization for electronic surveillance or the interception of domestic wire, oral, or electronic communications, other than as an amendment to this chapter or chapters 119, 121, or 206 of title 18 shall constitute an additional exclusive means for the purpose of subsection (a).

**SUMMARY**

**The right to protect oneself from harm, *possible* harm, and/or risk of harm is the most fundamental of individual liberties without which health, happiness and the enjoyment of life would be unduly burdened and unjustifiably made difficult or impossible.**

The picture emergent from the pattern established by these proceedings vividly illustrates why **no government, and no persons, regardless of what they may be persuaded to believe, should have the authority or wield power so profound as to have determination and control over matters of health and well-being of others so as to decide even the conditions under which they must live in their own homes. For if those with such power are wrong in their belief, they shall have been party to the commission of a terrible injustice and moral crime against their fellow human beings in the misguided exercise of that power.**

The Complainants assert the following:

1. In accordance with Title 66 of the PA Consolidated Statutes § 2807(f)(2)(iii) **and § 2807(f)(7)**, the phrase, 'depreciation schedule not to exceed 15 years', referenced in Provision (iii) of Paragraph 2, applies specifically to **new smart meter technology** as specified under § 2807(f)(7), and the Commission's policy mandating smart meters is thus founded upon a misconstruction of the legislative intent and direction given by the PA General Assembly in its enactment of Act 129 into law.
2. Act 129 neither compels nor permits the PA Public Utility Commission to adopt an interpretation of Title 66 § 2807(f)(2) and § 2807(f)(7) under the Act as a mandate that would require public electric utilities in the state to install wireless smart meters on the homes and properties of customers who do not want or do not consent to them. **One would have to read text into the statute that is not already there to reach the Commission's conclusion that smart meters are mandatory.**
3. The PA Public Utility Commission exceeded its statutory authority by making the installation of wireless smart meters mandatory for all customers the state's public electric utilities with 100,000 or more customers.

4. Title 52 of the Pa. Consolidated Statutes § 56.81(3) and Title 66 § 1406(a)(4) apply to meters, only to meters, and to nothing but meters, that is, to devices with the functional capability of doing nothing more or other than to measure electric power usage such that electric utility companies are able to bill according to the actual amount of electricity used. These statutes do NOT apply to powerful, RF radiation-emitting and RF signal-transmitting antennas or to whatever multiplicity of devices the State and/or electric utilities may decide to package together and conveniently call a 'meter'.

5. Pursuant to Title 52 of the Pa. Consolidated Statutes § 56.81(3) and Title 66 § 1406(a)(4), West Penn Power has threatened to terminate the Complainants' access to electric service solely on the basis of our not giving consent to the Company's installation of wireless smart meters on our homes.

Under these statutes, a termination of service is authorized for a customer's "[f]ailure to permit access to meters, service connections or other property of the public utility for the purpose of replacement, maintenance, repair or meter reading."

6. The Complainants have *never* denied West Penn Power Electric Utilities access to the company's meter for any purpose **that is properly and conclusively proven to be safe and which would not deprive or be in violation of the Complainants' fundamental rights**. This includes allowing West Penn Power access for the purpose of meter replacement of like kind.

7. The Complainants simply have denied the company permission to install a powerful, FCC-regulated, RF radiation-emitting and RF signal-transmitting device which is far more than merely a meter and for which **there is no reliable medical or scientific evidence upon which to conclude that chronic, long-term exposure to the radiofrequency radiation and RF fields produced as a result of the installation of such metering devices could not, cannot, would not and will not cause, exacerbate or contribute to biological or adverse health effects.**

8. In its actions to compel the Complainants' consent by means of threats and coercion, while also acting pursuant to the Commission's policy mandating wireless smart meters, West Penn Power has acted under color of law as an agent of the State and is, according to the U.S. Supreme Court's State Action Doctrine, a 'State actor'.

9. West Penn Power's **actions pursuant to the Commission's policy of mandating the installation of smart meters would force the Complainants' properties to be used by West Penn Power for purposes other than the collection of the Complainants' electricity usage data. That is, the Commission's policy would allow West Penn Power to forcibly use its wireless smart meters on the Complainants' homes as "relay points to transmit data" that**

**does not originate from the Complainants' properties.** West Penn Power, **acting with the imprimatur either of the Commission or of the State itself**, thus would be given usage of the Complainants' properties without such usage having been granted either by the existing easement or by the Complainants' informed consent. West Penn Power's actions and the Commission's policy pursuant to Act 129 therefore violate the Complainants' property rights protected under the Fifth and Fourteenth Amendments to the Constitution of the United States.

**10.** West Penn Power Electric Utilities does **not** have the statutory authority or right to site powerful, radiofrequency radiation-producing, RF-transmitting, data communications devices on the Complainants' properties and to thereby physically affect or cause physical alteration to the **interior** environments of the Complainants' homes by means of the production of RF electromagnetic fields, and/or conducted emissions ('high-frequency voltage transients') and/or frequent transmissions of modulated radiofrequency radiation which would add to the already-existing RF radiation burden from other outside sources including area cell phone towers and nearby meters and facilities in the utility company's mesh network.

**11.** Without the Complainants' consent, West Penn Power Electric Utilities does **not** have the statutory authority or right, pursuant to Act 129 and/or 52 Pa.C.S. §56.81(3) and/or 66 Pa.C.S. § 1406(a)(4), to **use** the Complainants' homes, and **by and through such direct use of the Complainants' own premises**, physically alter their living environments in any way which possibly could **increase** their **risk** of sustaining biological or adverse health effects.

**12.** Without the Complainants' consent, PPL Electric Utilities does **not** have the statutory authority or right, pursuant to Act 129 and/or 52 Pa.C.S. §56.81(3) and/or 66 Pa.C.S. § 1406(a) (4), to **use** the Complainants' homes, and **from their own premises**, irradiate them in perpetuity **as a condition of their continuing to have access to electric service.**

**13.** The findings by the WHO / IARC (International Agency for Research on Cancer), on the basis of sufficient scientific evidence that RF radiation is a Group 2B, possible human carcinogen, coupled with the findings reported in the highly peer-reviewed, **final** report of the U.S. National Toxicology Program (NTP) of "**clear evidence**" of cancer causation in animal test subjects as a result of their exposure to RF radiation, establishes RF radiation as an agent that is capable, through mechanisms **other than** the thermal heating of tissues, of adversely affecting biological systems at non-thermal levels, that is, at levels **below** the FCC safety guidelines.

**14.** To forcibly subject persons to chronic, long-term exposure to a definitely possible human carcinogen, is to forcibly subject them to chronic, long-term exposure very possibly to a definite human carcinogen.

15. Without the Complainants' consent, West Penn Power Electric Utilities does ***not*** have the statutory authority or right, pursuant to Act 129 and/or 52 Pa.C.S. §56.81(3) and/or 66 Pa.C.S. § 1406(a)(4), to **use** Complainants' homes in such a way as to irradiate them in perpetuity ***from their own premises*** with what has been found by IARC, on the basis of sufficient scientific evidence, to be ***a Group 2B possible human carcinogen***.

16. Without the Complainants' consent, West Penn Power Electric Utilities, acting pursuant to Act 129 and/or 52 Pa.C.S. §56.81(3) and/or 66 Pa.C.S. § 1406(a)(4), has no statutory authority or right, by the company's use of Complainants' homes or properties, to increase the Complainants' risk—***no matter how small***—of biological or adverse health effects as a condition of their having access to electric service.

17. Without the Complainants' consent, the Pennsylvania Public Utility Commission, acting pursuant to Act 129 and/or 52 Pa.C.S. §56.81(3) and/or 66 Pa.C.S. § 1406(a)(4), has no statutory authority or right, through West Penn Power Electric Utilities' use of the Complainants' homes or properties, to increase the Complainants' risk—no matter how small—of biological or adverse health effects as a condition of their having access to electric service.

18. West Penn Power's use of RF-emitting, wireless smart meter devices, in forcibly subjecting the Complainants in perpetuity to the hazards and risks that much scientific research has found to be associated with RF radiation and RF fields, would deprive the Complainants of their most fundamental and basic human right to act to protect themselves from harm, possible harm, and/or risk of harm and so would violate this right which is protected under the Ninth and Fourteenth Amendments to the Constitution of the United States.

19. As clearly enunciated by the U.S. Supreme Court, electricity is a necessity of modern life, and West Penn Power's action to terminate the Complainants' access to electric service, solely on the basis of the Complainants not consenting to the installation of wireless smart meter devices on their homes or properties, would constitute a **cruel and unusual punishment** and would violate the Complainants' rights protected under the Eighth and Fourteenth Amendments to the Constitution of the United States.

20. West Penn Power's collection, at intervals of 15 minutes and through the use of smart meter technology, of aggregate quantities of more of the Complainants' usage data than is customary and minimally necessary for generating a monthly bill **constitutes a search under the Fourth Amendment**. West Penn Power's 24/7 collection of the Complainants' data, which is mandated to occur at intervals of 15 minutes or less **with no lower limit**, and such that, without the

Complainants' consent, **their data may be shared by West Penn Power with third parties** who may de-anonymize and disaggregate that data, constitutes an abridgement and deprivation of the Complainants' Fourth Amendment right to a reasonable expectation of privacy.

---

From the fact of its having appealed the Commonwealth Court's detailed and very well-reasoned decision in *Povacz* to the PA Supreme Court, it has become even more obvious that the PUC's primary interest regarding these matters certainly has NOT been the protection of public health and safety. Rather, the Commission's primary concern has continued to be the protection of other interests by its having acted with extraordinary insistence and tenacity to preserve, at all costs, its misguided smart meter policy, which was based upon the Commission's own manifestly flawed interpretation of the legislative intent of the Pennsylvania General Assembly as such had been set forth and expressed in the language of Act 129.

As demonstrated by an abundance of facts and deeds, the Pennsylvania Public Utility Commission heretofore has thus shown itself to exemplify the very definition of 'captured agency.'

## V. CONCLUSION

For the reasons set forth above, the Complainants respectfully request that the Commission grant these Exceptions and issue a Final Order that rejects the ALJ's *Initial Decision* of June 4, 2024 and orders West Penn Power Electric Utilities to grant Complainants an accommodation which is reasonable and consistent with not only the guidance set forth by the Pennsylvania Commonwealth Court in *Povacz*, but also the actual and true legislative intent of the Pennsylvania General Assembly as set forth in Act 129 and clearly articulated in both the Legislative Record and Mr. Yewcic's testimony presented above, such that the Complainants are permitted to simply retain the wired electric meter that is presently installed on their home.

Respectfully submitted this 24th day of June 2024,

\_\_\_\_\_/s/

Andrew Sabatini

\_\_\_\_\_/s/

Theresa Sabatini

## ATTACHMENT I

### STATE ACTION DOCTRINE

In *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974), "a customer sued a privately owned utility under the Civil Rights Act of 1871 for improperly shutting off her service without providing her notice or a hearing. The Supreme Court asked whether there was a close enough nexus between the state and the utility for the acts of the latter to be treated as those of the former. Although the utility was heavily regulated by the state, it was held not to be a state actor. The Court reasoned that the provision of utility service is not generally an 'exclusive prerogative of the State.' Also absent was the symbiotic relationship between the utility and the state found in previous cases." (Congressional Research Service, CRS Report for Congress, Document R42338, February 3, 2012.)

"Though its holding [in *Jackson*] was broad **the Court did not foreclose the possibility that a privately owned utility could be a state actor under different circumstances.**" (CRS Report for Congress, Document R42338, *supra.*) (Emphasis added.)

"Faithful adherence to the 'state action' requirement of the Fourteenth Amendment requires careful attention to the gravamen of the plaintiff's complaint." *Blum v. Yaretsky*, 457 U.S. 991, 1003 (1982).

"[T]he inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." *Jackson v. Metropolitan Edison Co.*, [419 U.S. 345](#), 351.

"Our cases have accordingly insisted that the conduct allegedly causing the deprivation of a federal right be fairly attributable to the State. These cases reflect a two-part approach to this question of 'fair attribution.' First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible. ... Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State." *Lugar v. Edmondson Oil*, 457 U.S. 922 (1982).

In *Lugar v. Edmondson Oil*, 457 U.S. 922, 942 (1982), the Court stated:

"[W]e have consistently held that a private party's joint participation with state officials in the seizure of disputed property is sufficient to characterize that party as a 'state actor' for purposes of the Fourteenth Amendment. The rule in these cases is the same as that

articulated in *Adickes v. S. H. Kress & Co.*, supra, at 152, in the context of an equal protection deprivation:

"Private persons, jointly engaged with state officials in the prohibited action, are acting "under color" of law for purposes of the statute. To act "under color" of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents," quoting *United States v. Price*, 383 U.S., at 794."

"[I]f the government coerces, influences, or encourages the performance of the act, it is state action." [https://en.wikipedia.org/wiki/State\\_actor](https://en.wikipedia.org/wiki/State_actor) (See e.g., *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982).)

"Relying on *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149 (1978); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972); and *Adickes v. S. H. Kress Co.*, 398 U.S. 144 (1970), the Court held that, 'a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State.'" *Rendell-Baker v. Kohn*, 457 U.S. 830, 839 (1982).

A state can be held liable for exercising coercive power or significantly encouraging, either overtly or covertly, a private party. *Blum v. Yaretsky*, 457 U.S. 991 at 1002-03 (1982).

"Not even the fact that the actions of the state agents are illegal under state law makes the action unattributable to the state for purposes of the [Fourteenth Amendment](#)."

<https://www.law.cornell.edu/constitution-conan/amendment-14/section-1/state-action#fn1344amd14>

"Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law." *United States v. Classic*, [313 U.S. 299](#), 326 (1941).

"Actions of the state that are considered in any analysis should include passive as well as active state involvement. The essential ingredient in this respect is knowledge. If the state is cognizant of the challenged activity and chooses not to prevent it, then for all purposes encouragement of the activity is taking place." *The State Action Doctrine in State and Federal Courts*, Hala Ayoub, Florida State University Law Review, Vol. 11, 1984.

In a letter, dated January 16, 2018, and addressed to us, Sheila Ketterer, PPL Director of Advanced Metering & Data Operations, responding directly on behalf of Gregory Dudkin, President and Director of PPL Electric Utilities Corporation, stated: "**Pennsylvania Act 129**, passed into law in 2008, **requires electric utilities** with more than 100,000 customers **to provide those customers with advanced meters** that have specific capabilities. **PPL Electric Utilities ... is subject to this requirement. The specific language, found in Section 3 of the law, says utilities 'shall furnish' these meters. Act 129 does not include language allowing either customers or utilities to opt out of advanced meter installation.** As a result, we cannot honor customers' requests not to replace their meters." (Emphasis added.)

Ms. Ketterer, on behalf of Mr. Dudkin, thus has asserted that the actions of PPL in this matter are, and have been, **compelled** by the State.

As has been shown under Section II of this Complaint, "The Commission's Misconstruction of the Prevailing Legislative Intent of the Pennsylvania General Assembly," it is *not* the enactment of Pennsylvania's Act 129 by the state legislature which is responsible for the mandating of state-wide installation of wireless smart meters. Rather, it is the Pennsylvania Public Utility Commission which bears that responsibility with its no-opt-out implementation policy based entirely on its misconstruction of the explicitly-expressed legislative intent of the Pennsylvania General Assembly. (That explicitly-expressed legislative intent, which is on public record, was that smart meters were not mandated and would not be mandated.) By this means, the Commission has directly insinuated its own interests and intent into the actions of the state's electric utility companies with regard to the mandatory installation of wireless smart meter devices and technology, which never have been studied or tested specifically for biological or adverse health effects and which the Commission and PPL Electric Utilities have forced upon customers and the public at large without their informed consent.

By virtue of PPL Electric's actions directly pursuant to the Pennsylvania Public Utility Commission policy and implementation **order mandating system-wide** installation of smart meters, the Company's "conduct has sufficiently received the imprimatur of the State so as to make it 'state' action for purposes of the Fourteenth Amendment." *Blum v. Yaretsky*, supra. See also *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978); *Jackson v. Metropolitan Edison Co.*, supra; *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972); *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970).

In a dissenting opinion on the divergence of the Court's analysis of 'state action' in *Jackson v. Metropolitan Edison* from that in *Burton v. Wilmington Parking Authority*, 365 U.S. 715, (1961), Justice Douglas wrote:

[Justice Douglas dissent - Begin quote]

... May a utility have complete immunity under federal law when the State allows its regulatory agency to become the prisoner of the utility or, by a listless attitude of no concern, to permit the utility to use its monopoly power in a lawless way?

...

In *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), we said: "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." *Id.*, at 722. A particularized inquiry into the circumstances of each case is necessary in order to determine whether a given factual situation falls within "the variety of individual-state relationships which the [Fourteenth] Amendment was designed to embrace." *Ibid.* As our subsequent discussion in *Burton* made clear, the dispositive question in any state-action case is not whether any single fact or relationship presents a sufficient degree of state involvement, but rather whether the aggregate of all relevant factors compels a finding of state responsibility. 2 *Id.*, at 722-726. See generally *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972).

...

It is not enough to examine seriatim each of the factors upon which a claimant relies and to dismiss each individually as being insufficient to support a finding of state action. It is the aggregate that is controlling.

...

... In the present case, however, respondent is not just one person among many; it is the only public utility furnishing electric power to the city. When power is denied a householder, the home, under modern conditions, is likely to become unlivable.

Respondent's procedures for termination of service may never have been subjected to the same degree of state scrutiny and approval, whether explicit or implicit, that was present in *Public Utilities Comm'n v. Pollak*, 343 U.S. 451 (1952). Yet in the present case the State is heavily involved in respondent's termination procedures, getting into the approved tariff a requirement of "reasonable notice." Pennsylvania has undertaken to regulate numerous aspects of respondent's operations in some detail, 5 and a "hands-off" attitude of permissiveness or neutrality toward the operations in this case is at war with the state agency's functions of supervision over respondent's conduct in the area of servicing householders, particularly where (as here) the State would presumably lend its

weight and authority to facilitate the enforcement of respondent's published procedures. Cf. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970); *Reitman v. Mulkey*, 387 U.S. 369 (1967); *Railway Employees' Dept. v. Hanson*, 351 U.S. 225 (1956); *Shelley v. Kraemer*, 334 U.S. 1 (1948).

In the aggregate, these factors depict a monopolist providing essential public services as a licensee of the State and within a framework of extensive state supervision and control. The particular regulations at issue, promulgated by the monopolist, were authorized by state law and were made enforceable by the weight and authority of the State. Moreover, the State retains the power of oversight to review and amend the regulations if the public interest so requires. Respondent's actions are sufficiently intertwined with those of the State, and its termination-of-service provisions are sufficiently buttressed by state law to warrant a holding that respondent's actions in terminating this householder's service were "state action" for the purpose of giving federal jurisdiction over respondent under 42 U.S.C. 1983. ...

...

Section 1983 was designed to give citizens a federal forum [6](#) for civil rights complaints wherever, by direct or indirect actions, a State, acting "in cahoots" with a private group or through neglect or listless oversight, allows a private group to perpetrate an injury. The theory is that in those cozy situations, local politics and the pressure of economic overlords on subservient state agencies make recovery in state courts unlikely. ...

Section 1983 addresses itself to grievances inflicted "under color of any statute, ordinance, [or] regulation . . . of any State . . . ." The regulatory regime imposed by Pennsylvania on respondent utility seems to fit this statute like a glove. Electrical service, being a necessity of life under the circumstances of this case, is an entitlement which under our decisions may not be taken without the requirements of procedural due process. *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972); *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Palmer v. Columbia Gas of Ohio, Inc.*, 479 F.2d 153 (CA6 1973).

...

[2](#) The court below in *Burton* had relied heavily on a number of facts indicating minimal state involvement, but we regarded that court's analysis as unduly restricted in its scope: "While these factual considerations are indeed validly accountable aspects of the enterprise upon which the State has embarked, we cannot say that they lead inescapably to the conclusion that state action is not present. Their persuasiveness is diminished when evaluated in the context of other factors which must be acknowledged." 365 U.S., at 723. After discussing those additional factors in greater detail, we concluded: "Addition of all

these activities, obligations and responsibilities of the Authority, the benefits mutually conferred, together with the obvious fact that the restaurant is operated as an integral part of a public building devoted to a public parking service, indicates that degree of state participation and involvement in discriminatory action which it was the design of the Fourteenth Amendment to condemn." *Id.*, at 724.

...

5 The Public Utility Commission is given extensive control over utility rates, Pa. Stat. Ann., Tit. 66, 1141 et seq. (1959 and Supp. 1974-1975), and over the character and quality of utility services and facilities, 1171, 1182-1183; it is given broad power to receive and investigate complaints, 1391, 1398, and to regulate and supervise the activities, rules, and contractual undertakings of utilities, 1171, 1341-1343, 1360.

6 There is no requirement for an exhaustion of state remedies before suing under 1983 (see *Wilwording v. Swenson*, 404 U.S. 249 (1971)), though suggestions for statutory changes in that regard have been made. Judd, *The Expanding Jurisdiction of the Federal Courts*, 60 A. B. A. J. 938, 941 (1974)."

[Justice Douglas dissent - End quote] (*Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974).)

In *Braden v. University of Pittsburgh*, 552 F.2d 948, 956-58 (1977), the U.S. Court of Appeals for the Third Circuit held:

[Third Circuit opinion - Begin quote]

## II. STATE ACTION.

... It is incumbent upon this Court to determine which, if either, of these cases *Burton* or *Jackson* may control the present situation and, in so doing, whether *Jackson* has superseded *Burton* as the preeminent declaration on state action with respect to circumstances such as we have here.

In *Burton*, the Court held that a private restaurant owner who refused service to a customer because of his race, violated the Fourteenth Amendment where the restaurant was located in a building owned by a state-created parking authority and leased from that authority. After a thorough review of the relationship between the restaurant and the authority, the Supreme Court concluded that the state had "so far insinuated itself into a position of interdependence with (the restaurant) that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so 'purely private' as to fall without the scope of the Fourteenth

Amendment."<sup>40</sup> It is thus apparent that the dispositive factor in *Burton*, with respect to the state action issue, was the extent and nature of the overall relationship between the state agency and the private enterprise.

Decided thirteen years after *Burton*, *Jackson* concerned a different type of nongovernmental entity, namely, a privately owned and operated utility corporation. The utility was, however, subject to extensive state regulation in many particulars of its business. When the utility company terminated the electric service of a customer without notice, without a hearing, or without an opportunity to pay any amounts due, the customer charged that she had been denied due process. The Supreme Court rejected the due process claim on the ground that, since state action was not present, the utility was exempt from constitutional commands. It held that the Commonwealth of Pennsylvania was not sufficiently connected with the challenged termination to make the conduct of the private utility corporation attributable to the state for purposes of the Fourteenth Amendment.

Important to the inquiry here is the analytical formula set forth in *Jackson* respecting state action. For the Supreme Court stated there that, when considering the vexing state action issue, the "inquiry must be whether there is a sufficiently close nexus between the state and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself."<sup>41</sup>

Appellants maintain that this "close nexus" test, rather than the "relationship" approach of *Burton*, should be applied in the case at bar. They contend that, for state action to exist, the Commonwealth must be closely involved with the challenged employment practices of the University. In so arguing, appellants imply that the vitality of *Burton* has been severely undermined by *Jackson*, and that the existence of a pervasive relationship between the Commonwealth and the University is not, standing alone, sufficient to undergird a ruling of state action.<sup>42</sup> While *Jackson* may invite some concern as to the present status of *Burton*, we do not find appellants' reading of these cases to be convincing. To the contrary, in our view, *Burton* retains viability, and so its teachings may well bear on the present inquiry.

Based on a review of the Supreme Court's opinion in *Jackson*, we believe that that decision would not preclude application of the precepts of *Burton* here, should the appropriate state-private relationship exist. Instead of overruling *Burton*, the *Jackson* Court merely distinguished the earlier opinion, finding "absent in (*Jackson*) the symbiotic

relationship presented in *Burton* . . . ."43 The implication arising from such efforts at differentiation is not that *Burton* was supplanted by *Jackson*, but rather that *Burton* remained as a powerful precedent with which the Court had to contend. Moreover, the *Jackson* opinion repeatedly cites *Burton* with apparent approval,44 hardly sounding the death knell for *Burton* that the appellants would have us perceive.

It may be that only in the absence of an inextricably-linked relationship between the state and a private entity does the "close nexus" test of *Jackson* come into play. Where a private enterprise stands, in its operations, as a veritable partner with the state, then it seems proper to hold such enterprise subject to the same constitutional requirements to which the state is accountable. ... [A]s we understand it, *Burton* and *Jackson* stand as two models of state-action analysis that have been designed by the Supreme Court to date, with the applicability of either approach resting on the type of setting which may be present.46

... Indeed, the Supreme Court declared in *Burton* that "only by sifting facts and weighing circumstances . . ." can matters turning on state action be resolved.47 And such emphasis on the factual elements was echoed in *Jackson* as well.48

...

Not only does it appear that the state in this situation, as in *Burton*, has "insinuated itself into a position of interdependence" with *Pitt*, but it seems to be a "joint participant" ... as well.

...

It should be observed that *Jackson* was decided immediately after the opinion in *Isaacs* was rendered. Since *Isaacs* so heavily relies, quite properly, on *Burton*, the analysis presented by Judge Higginbotham remains valid only so long as *Jackson* is not construed to overrule or devitalize *Burton*. As we fail to so read *Jackson*, the principles espoused in *Isaacs* remain supportive of the conclusion reached by the trial judge that state action cannot be ruled out summarily in the case at bar.

...

Having concluded that *Burton* retains vitality, we must examine the available materials concerning the nature and extent of the connection ... . Indeed, the Supreme Court declared in *Burton* that "only by sifting facts and weighing circumstances . . ." can matters turning on state action be resolved.47 And such emphasis on the factual elements was echoed in *Jackson* as well.48

...

[40](#) 365 U.S. at 725, 81 S. Ct. at 862

[41](#) 419 U.S. at 351, 95 S. Ct. at 453

[42](#) See Brief for Appellants at 20-25

[43](#) 419 U.S. at 357, 95 S. Ct. at 457

[44](#) See, e. g., *id.* at 350, 351, 95 S. Ct. 449

This Court has, on a number of previous occasions, indicated that *Burton* is very much a viable precedent. See, e. g., *Broderick v. Associated Hospital Service of Philadelphia*, 536 F.2d 1, 4 (3d Cir. 1976); *Magill v. Avonworth Baseball Conference*, 516 F.2d 1328, 1332 (3d Cir. 1975).

[46](#) *Moose Lodge No. 107 v. Irvis*, [407 U.S. 163](#), 92 S. Ct. 1965, 32 L. Ed. 2d 627 (1972), though decided before *Jackson*, indicates that a bipartite approach to state action is the proper one. In declining to find state action in *Moose Lodge*, the Court seemingly invoked both the "close nexus" and "overall relationship" formulas:

However detailed this type of (private club) regulation may be in some particulars, it cannot be said to in any way foster or encourage (the) discrimination. Nor can it be said to make the State in any realistic sense a partner or even a joint venturer in the club's enterprise."

*Id.* at 176-77, 92 S. Ct. at 1973.

The Supreme Court has, of course, fashioned other analytical frameworks to deal with state action problems of a different complexion. See, e. g., *Hudgens v. N.L.R.B.*, [424 U.S. 507](#), 96 S. Ct. 1029, 47 L. Ed. 2d 196 (1976); *Evans v. Newton*, [382 U.S. 296](#), 86 S. Ct. 486, 15 L. Ed. 2d 373 (1966); *Marsh v. Alabama*, [326 U.S. 501](#), 66 S. Ct. 276, 90 L. Ed. 265 (1946).

[47](#) 365 U.S. at 722, 81 S. Ct. at 860

[48](#) 419 U.S. at 351, 95 S. Ct. 449

[Third Circuit opinion - End quote]

"Utility service is a necessity of modern life; indeed, the discontinuance of water or heating for even short periods of time may threaten health and safety." (*Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1 (1978).)

In its analysis following upon that in *Burton v. Wilmington*, the U.S. Court of Appeals for the Sixth Circuit, in *Palmer v. Columbia Gas of Ohio*, 479 F.2d 153 (1973), held:

[Sixth Circuit opinion - Begin quote]

STATE ACTION

...

... When a privately owned company enjoying a monopoly is in the business of providing a necessity of life it cannot, for purposes of evaluating its relationship to its customers

and to the state in which and under whose control it operates, be considered as an independent, free market, common law competitor.

...

The parties are not upon equal ground. ... The consumer, once taken on to the system, becomes dependent on that system for a prime necessity of business, comfort, health, and even life.

...

Virtually every aspect of this company's operations are subject to the dictates of state statute or to the regulation<sup>15</sup> of the Public Utilities Commission ... .

...

The important factor is not the number of statutes and regulations which pertain to the operation of a utility company, but the extent to which the state has reserved power to control the operations of a public utility, and the amount of power given to the utility which is usually reserved to the state.

...

[T]he state has granted to utilities powers not usually possessed by private corporations. ...

In addition, we must consider the fact that the furnishing of natural gas to the citizens ... is a legitimate public function which itself has been held to satisfy the state action requirement; when a public function is performed by a private firm whose freedom of decision making has been restricted by governmental regulation and whose freedom of action has been severely circumscribed, the actions of the otherwise private firm become subject to the constitutional limitations placed upon state action. ... When private individuals or groups are endowed by the state with functions or powers which are of a governmental nature, they become instrumentalities of the state and thus are subject to its constitutional limitations. *Evans v. Newton*, [382 U.S. 296](#), 299, 86 S.Ct. 486, 15 L.Ed.2d 373 (1966).

In summary, inasmuch as the operations of the appellant company are fully circumscribed by an all-encompassing system of state statutes ... and the supervision of the state regulatory authority, and inasmuch as the state ... is significantly involved in virtually every one of the company's activities, including the specific activity complained of, the conclusion that the regulatory activities of the state have insinuated it into a position of interdependence with the company so that it must be recognized as a joint participant with the company is inescapable. *Burton*, *supra*, 365 U.S. at 725, 81 S.Ct. 856.

[Sixth Circuit opinion - End quote]

Regardless of which line of analysis is followed pursuant to the *State Action Doctrine*, either that deriving from *Burton*, or that applied in *Jackson*, it is clear that the Commission's policy of mandatory installation of AMI wireless smart meters is such that, in addition to willful acquiescence, there absolutely does exist sufficient involvement, influence, knowledge, and sanctioning by the Commission in the conduct engaged in by PPL Electric Utilities against the Complainants and the citizens of this Commonwealth to establish that the PPL Electric has acted and is acting, along with the Commission, under color of law as an agent of the State and is thereby a 'state actor'.

**(END ATTACHMENT I)**