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July 12, 2024

VIA ELECTRONIC FILING

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

**Re: James R. Dummett & William A. Dummett, Sr., v. Pennsylvania Electric
Company
Docket No. C-2023-3042086**

Dear Secretary Chiavetta:

Enclosed please find the Motion of FirstEnergy Pennsylvania Electric Company, on behalf of its Penelec Rate District for Summary Judgement with regard to the above-captioned matter. This document has been served on the Complainants as shown in the Certificate of Service.

Please contact me if you have any questions regarding this matter.

Very truly yours,

A handwritten signature in blue ink, appearing to read "DAG", with a horizontal line extending to the right.

Daniel A. Garcia

DAG/vlr

Enclosures

c: As Per Certificate of Service

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

James Robert Dummett & William	:	
Arthur Dummett, Sr.,	:	
	:	
	:	
Complainants,	:	Docket No. C-2023-3042086
	:	
v.	:	
	:	
Pennsylvania Electric Company,	:	
	:	
Respondent.	:	

NOTICE TO PLEAD

YOU ARE HEREBY ADVISED THAT, PURSUANT TO 52 PA. CODE § 5.102(b), YOU MAY FILE AN ANSWER TO THE ENCLOSED MOTION WITHIN TWENTY (20) DAYS AFTER THE DATE OF SERVICE. YOUR ANSWER SHOULD BE FILED WITH THE SECRETARY OF THE PENNSYLVANIA PUBLIC UTILITY COMMISSION, P.O. BOX 3265, HARRISBURG, PA 17105-3265. A COPY SHOULD ALSO BE SERVED ON THE UNDERSIGNED COUNSEL.



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Date: July 12, 2024

Counsel for FirstEnergy Pennsylvania Electric
Company (Penelec Rate District)

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

James Robert Dummett & William	:	
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	:	
v.	:	
	:	
Pennsylvania Electric Company,	:	
	:	
Respondent.	:	

**MOTION OF
FIRSTENERGY PENNSYLVANIA ELECTRIC COMPANY
FOR SUMMARY JUDGMENT**

TO DEPUTY CHIEF ADMINISTRATIVE LAW JUDGE EMILY I. DEVOE:

AND NOW, comes FirstEnergy Pennsylvania Electric Company (“Company”) on behalf of its Penelec Rate District¹ and files this Motion for Summary Judgment pursuant to Sections 5.102 and 5.103 of the Pennsylvania Public Utility Commission’s (“Commission”) regulations, and 52 Pa. Code §§ 5.102- 5.103, and respectfully requests that the above-captioned Formal Complaint be summarily dismissed in its entirety and with prejudice.

As explained herein, James Robert Dummett and William Arthur Dummett, Sr. (“Complainants”) have the burden of proof in this proceeding to demonstrate that the installation of the Company’s smart meter would violate the Public Utility Code or a Commission regulation or order. However, the Complainants never provided notification of their expert and factual witnesses and any written direct testimony in support of their allegations as required by the

¹ On January 1, 2024, FirstEnergy Corp.'s Pennsylvania operating companies (i.e., Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company, and West Penn Power Company) merged into FirstEnergy Pennsylvania Electric Company. Due to the merger transaction, the affected operating companies' tariffs were consolidated into a single tariff, with each former operating company's rates becoming its own rate district. As such, the customers of the former Penelec have their own separate and distinct rate district under FirstEnergy Pennsylvania Electric Company's tariff.

Scheduling Order dated February 14, 2024. Therefore, the Complainants have failed to present any evidence as part of their direct case. As a result, no opportunity exists for the Complainants to present any evidence in support of their direct case. Thus, there are no disputed issues of material fact in this proceeding, and the Company is entitled to judgment as a matter of law.

For these reasons, and as explained in more detail below, Company respectfully requests that Administrative Law Judge Emily I. DeVoe (“ALJ DeVoe”) grant this Motion for Summary Judgment and summarily dismiss the instant Complaint in its entirety and with prejudice.

In support thereof, Company states as follows:

I. BACKGROUND AND PROCEDURAL HISTORY

1. On August 7, 2023, Penelec was served with the Formal Complaint filed by the Complainants, which challenged the Company’s planned installation of a smart meter at the Complainants’ property, 3360 Cedar Avenue, Oil City, Pennsylvania (“Service Location”).

2. Per the Formal Complaint, the Complainants raised concerns, as follows:

My Father, William Arthur Dummett is the account holder for the utility service provided by Penelec he is aware of this issue and is actively a part in finding the solution this issue as we as myself, James Robert Dummett. I, James Robert Dummett, am the tenant listed at the service address and I have been suffering from EMF exposure from the smart meter installed on my house. This issue has been occurring for the last 5 years that I have lived at this address. I have had to spends thousands of dollars addressing this issue over the 5 years on top of the pain and suffering the smart has caused me. I have had numerous medical tests done to confirm my issue are not from any other disease or underlying condition or illness. I have routine documented the EMF levels and the effects it has had in my home’s electrical wiring. I am writing this letter to be opted out of the smart meter program as it negatively is impacting my health and to have an analog meter placed on my home.

3. On August 25, 2023, Company filed an Answer, New Matter, and Preliminary Objections to the Complaint.

4. The Preliminary Objections included a Notice to Plead, directing the Complainants to file a response within ten days of service.

5. The Complainants did not file a response to either the New Matter or the Preliminary Objection.

6. On November 28, 2023, ALJ DeVoe issued an Interim Order, requiring the parties to submit a status report by January 17, 2024, submit dispositive motions by January 24, 2024, and responses to dispositive motions within twenty days of service of the motion. This Interim Order was not served on the parties and ALJ DeVoe was not made aware of this until February 14, 2024.

7. On February 14, 2024, ALJ DeVoe issued an Interim Order denying Company's Preliminary Objections and setting the litigation schedule. This Order required the parties to exchange the names and testimony summaries of all fact and expert witnesses by March 1, 2024, conclude discovery by April 12, 2024, and file a status report by April 24, 2024, and any dispositive motions filed by April 24, 2024.

8. On March 1, 2024, the Company had made its witness identification as required by ALJ DeVoe's February 14, 2024, Interim Order.

9. On April 24, 2024, the Company filed a status report, advising the Complainants have not yet provided notification of their expert and factual witnesses.

10. On June 10, 2024, a Pre-Hearing Conference was held. ALJ DeVoe ordered all dispositive motions must be filed by July 12, 2024. The Complainants did not attend the hearing.

11. The Complainants never served the names of their fact and expert witnesses and/or written testimony summaries in support of their allegations as required.

12. Company herein files this Motion for Summary Judgment and respectfully requests that the Formal Complaint be dismissed in its entirety and with prejudice because the Complainants failed to serve any direct testimony in support of their claims and, therefore, will be unable to sustain their burden of proof at the evidentiary hearing.

II. LEGAL STANDARDS

A. BURDEN OF PROOF

13. On August 16, 2022, the Pennsylvania Supreme Court issued its Opinion affirming in part and reversing in part the Commonwealth Court’s decision in *Povacz I*.²

14. Specifically, the Supreme Court in *Povacz II* held that: (1) Act 129 mandates the systemwide installation of smart meters; (2) the PUC applied the correct burden of proof standard in the smart meter complaint cases arising under Section 1501 of the Public Utility Code; (3) an electric distribution company cannot be required to provide an accommodation to a customer absent a Section 1501 violation; and (4) even if a smart meter complainant meets their burden of proof, the complainant is only “entitled to an accommodation to the extent allowed by Act 129 and a utility’s tariff.”⁴³

15. 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. The Supreme Court reiterated that complainants seeking relief from the Commission must satisfy their burden of proof by a preponderance of the evidence. The Supreme Court explained that inconclusive evidence – evidence that does not lead to a conclusion of a definite result one way or the other – does not meet even the minimal requirements of the

² See *Povacz II*.

³ *Id.* at 1012-1014.

preponderance of the evidence standard.^{5F4} The Supreme Court opined that while a customer's evidence does not need to prove their assertion beyond any doubt, evidence of a mere possibility that harm could result is insufficient to satisfy the preponderance of the evidence standard.^{6F5}

16. The PA Supreme Court opined in *Povacz II* that the burden of proof is two-fold for Section 1501 claims involving the safety of smart meters and radiofrequency (“RF”) emissions. First, a customer must present expert opinion rendered to a reasonable degree of scientific certainty that radio frequency emissions from smart meters cause adverse health effects. Next, a customer must present expert opinion rendered to a reasonable degree of medical certainty that RF emissions from the smart meters, either alone or cumulative to other sources of RF emissions, caused them harm. The PA Supreme Court concluded that neither fear nor inconclusive scientific research was sufficient to prove that smart meter technology constitutes unsafe service under Section 1501.^{7F6} The PA Supreme Court held that if a customer establishes by a preponderance of the evidence, based on the totality of the circumstances, that smart meter service violates Section 1501, they are entitled to an accommodation to the extent allowed by Act 129 and a utility's tariff. However, given that Act 129 mandates smart meter deployment, the PA Supreme Court clarified that such accommodation may not rise to the level of an opt-out from smart meter installation.^{8F7}

B. STANDARD FOR SUMMARY JUDGMENT

17. Section 5.102 of the Commission's regulations provides the Commission's standard of review for a request for summary judgment:

(1) Standard for grant or denial on all counts. The presiding officer will grant or deny a motion for judgment on the pleadings or a motion for summary judgment, as appropriate. The judgment sought will be rendered if the applicable pleadings, depositions, answers to interrogatories and admissions, together with affidavits, if any, show that there is no genuine issue as to a material fact and that the moving party is entitled to a judgment as a matter of law.

⁴ *Id.* at 1005.

⁵ *Id.* at 1008.

⁶ *Id.* at 1005.

⁷ *Id.* at 1015.

(2) Standard for grant or denial in part. The presiding officer may grant a partial summary judgment if the pleadings, depositions, answers to interrogatories and admissions, together with affidavits, if any, show that there is no genuine issue as to a material fact and that the moving party is entitled to a judgment as a matter of law on one or more but not all outstanding issues.

52 Pa. Code § 5.102(d)(1)-(2).

18. The Commission is granted discretion to dismiss any complaint without a hearing if, in its opinion, a hearing is not necessary in the public interest.^{9F} A hearing is necessary only to resolve disputed questions of fact, and when the question presented is one of law, the Commission need not hold a hearing.^{10F}

III. ARGUMENT

A. THE FORMAL COMPLAINT SHOULD BE DISMISSED BECAUSE THE COMPLAINANTS FAILED TO CARRY THEIR BURDEN OF PROOF

19. Company incorporates by reference Paragraphs 1 through 18 as if fully set forth herein.

20. Company respectfully requests that the Formal Complaint be dismissed in its entirety and with prejudice due to the Complainants' failure to carry their burden of proof in support of their claims.

21. In its ruling in *Povacz II*, the Court held that Act 129 mandates the systemwide installation of smart meters.^{11F} The PA Supreme Court noted in *Povacz II* 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 66 Pa.C.S. § 1501.

⁸ 66 Pa.C.S. § 703(b); 52 Pa. Code § 5.21(d).

⁹ *Lehigh Valley Power Comm. v. Pa. Pub. Util. Comm'n*, 563 A.2d 548 (Pa. Cmwlth. 1989); *Edan Transp. Corp. v. Pa. Pub. Util. Comm'n*, 623 A.2d 6 (Pa. Cmwlth. 1993).

¹⁰ See *Povacz II* at 1012-1014.

22. The PA Supreme Court opined in *Povacz II* that the burden of proof is two-fold for Section 1501 claims involving the safety of smart meters and RF emissions. First, a customer must present expert opinion rendered to a reasonable degree of scientific certainty that radio frequency emissions from smart meters cause adverse health effects. Next, a customer must present expert opinion rendered to a reasonable degree of medical certainty that RF emissions from the smart meters, either alone or cumulative to other sources of RF emissions, caused them harm.

23. *Povacz II* further affirmed that a complainant's burden of proof is satisfied by establishing a preponderance of evidence which is substantial and legally credible.^{12F¹¹} The PA Supreme Court in *Povacz II* opined that while a customer's evidence does not need to prove their assertion beyond any doubt, evidence of a mere possibility that harm could result is insufficient to satisfy the preponderance of the evidence standard.^{13F¹²}

24. Here, the Complainants raised concerns regarding the safety of smart meters and expressed their concerns that smart meter installation could affect their current medical conditions.^{14F¹³}

25. As a matter of law, the Company is required to install a smart meter at the Service Location.

26. Moreover, the Complainants have failed to include in the record any documentation or expert testimony evidencing, to a reasonable degree of scientific certainty, that smart meters emit a radio frequency and that such an emission would be a violation of 66 Pa.C.S. § 1501.

27. Rather, the Complainants simply proffer lay opinions and beliefs, or perceptions as to the effects RFs may have to their health, which do not constitute evidence.^{16F¹⁴}

¹¹ *Povacz II* at 1012-14.

¹² *Id.* at 1008.

¹³ See Formal Complaint of Complainants (August 7, 2023).

¹⁴ *Pa. Bureau of Corr. v. City of Pittsburgh*, 532 A.2d 12 (Pa. 1987).

28. The Complainants' claim that they would be adversely affected by a smart meter fails to demonstrate that Company would violate the Public Utility Code or a regulation or order of the Commission by installing a smart meter at the service location; and that Company, by virtue of installing a smart meter at the service location, would provide unsafe or unreasonable service in violation of 66 Pa.C.S. § 1501.

29. As the party with the burden of proof,^{17F}¹⁵ the Complainants were required to establish a *prima facie* case that the Company's installation of a smart meter violates 66 Pa.C.S. § 1501. As such, the Complainants' requested relief in the instant matter, i.e., removing the smart meter and replacing it with the "analog" meter, is inconsistent with the Public Utility Code, the Commission's orders and regulations, Company's Smart Meter Deployment Plan, and Company's Commission-approved tariff and, therefore, cannot be granted by the Commission.

30. This request for an accommodation is essentially a request to opt-out of smart meter installation, which is simply not possible. Consistent with the Court's ruling in *Povacz II*, Company customers, such as the Complainants, may only receive a smart meter related accommodation ordered by the Commission if they are able to establish a violation of Section 1501 of the Public Utility Code.

31. None of the arguments of the Complainants demonstrate, by preponderance of the evidence, that installation of a smart meter at the Service Location would become an unsafe or unreasonable service in violation of 66 Pa.C.S. §1501.

32. Under Section 5.102(d)(1) of the Commission's regulations, summary judgment will be granted if there is no genuine issue as to a material fact and that the moving party is entitled to a judgment as a matter of law.^{18F}¹⁶

¹⁵ See Section II.A., *supra*.

¹⁶ 52 Pa. Code § 5.102(d)(1).

33. Due to the Complainants' failure to present any evidence in support of their claims, there are no material facts in dispute.

34. Here, the Complainants have the burden of proof to demonstrate that the installation of Company's smart meter would violate the Public Utility Code or a Commission regulation or order. However, the Complainants failed to provide notification of their expert and factual witnesses and did not serve any written direct testimony in support of their allegations as required. Therefore, the Complainants have failed to present any evidence as part of their direct case and no such opportunity exists for the Complainants to present any evidence in support of their direct case.

35. In sum, the Complainants were able to and should have served their factual and expert written direct testimony. By failing to do so, the Complainants failed to carry their burden of proof, and their Formal Complaint should be dismissed accordingly.

36. For these reasons, there are no material facts in dispute, and Company is entitled to judgment as a matter of law. Thus, the Company respectfully requests that ALJ DeVoe grant the instant Motion for Summary Judgment and summarily dismiss the Formal Complaint in its entirety and with prejudice.

IV. CONCLUSION

WHEREFORE, FirstEnergy Pennsylvania Electric Company, on behalf of its Penelec Rate District respectfully requests that Administrative Law Judge Emily DeVoe enter an Order granting the Motion for Summary Judgment and dismissing the Formal Complaint with prejudice, as explained above.

Respectfully submitted,



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Date: July 12, 2024

Counsel for FirstEnergy Pennsylvania Electric
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	:	
Respondent,	:	

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the Motion of FirstEnergy Pennsylvania Electric Company, on behalf of its Penelec Rate District for Summary Judgement upon the individuals listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant).

Service by electronic mail, as follows:

James Robert Dummett
William A. Dummett, Sr.
Godsvengence@icloud.com

Administrative Law Judge Emily I. DeVoe
edevoe@pa.gov

Dated: July 12, 2024



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