

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Gilbert Martinez	:	
	:	
v.	:	C-2019-3013798
	:	
Metropolitan Edison Company	:	

**INITIAL DECISION**

Before  
Gail M. Chiodo  
Administrative Law Judge

**INTRODUCTION**

This decision denies and dismisses the Formal Complaint of an electric service customer who seeks to prevent the utility from installing a smart meter at his residence. This decision finds that the customer failed to establish a *prima facie* case evidencing any violation of a Commission statute, regulation, or order on the part of the utility, or that the customer is entitled to the relief requested.

**HISTORY OF THE PROCEEDING**

On October 25, 2019, Gilbert Martinez (Complainant) filed a Formal Complaint (Complaint) with the Pennsylvania Public Utility Commission (Commission) seeking to prevent Metropolitan Edison Company (Respondent, Met-Ed or Company) from replacing his analog meter with a smart meter at his residence. Mr. Martinez avers that Met-Ed threatened to shut off his service for denying Met-Ed access to his property to complete the installation. Mr. Martinez denies refusing Met-Ed access but avers he did tell the Company that he does not consent to a smart meter installation and threatened to sue the Company if it attempted to do so. Mr.

Martinez also avers that smart meters are unhealthy because they cause cancer, are unsafe because they cause fires due to their poor design, and are an unlawful and an illegal invasion of his privacy since they constitute “wiretapping” and an unreasonable search and seizure.

On November 14, 2019, the Company<sup>1</sup> filed an Answer and New Matter, as well as Preliminary Objections. In its Answer, the Company denied the material allegations and conclusions of law in the Complaint. In its New Matter and Preliminary Objections, the Respondent averred, *inter alia*, that the Complaint was legally insufficient because the Company was required to install smart meters under Act 129 of 2008 (Act 129) of the Public Utility Code (Code). 66 Pa.C.S. § 2806.1–2807. According to Respondent, since there is no “opt-out” provision to the installation of a smart meter, the Commission is not authorized to grant the relief requested in the Complaint.

On November 23, 2019, the Complainant filed a response to the Preliminary Objections in the form of a document entitled, “Preliminary Objection Response and Motion for Default Judgment” (Response). In this Response, Mr. Martinez detailed the claims he made in his Complaint, and argued that the Company is not mandated by Act 129 to install smart meters. The Complainant also took issue with certain representations made in the Company’s pleadings and certificate of service, alleging they were fraudulent. Mr. Martinez contended that he is entitled to a default judgment in his favor, or alternatively, a hearing on the merits.

On December 9, 2019, the Commission issued a Call-In Telephone Pre-Hearing Conference Notice, scheduling a prehearing conference on January 22, 2020. The Commission assigned Administrative Law Judge (ALJ) Andrew M. Calvelli to preside over this matter.

On December 26, 2020, ALJ Calvelli denied the Company’s Preliminary Objections. On January 16, 2020, the Company filed a Motion to Compel.

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<sup>1</sup> On January 1, 2024, FirstEnergy Corporation’s Pennsylvania operating companies, including Met-Ed, 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 Met-Ed have their own separate and distinct rate district under FirstEnergy Pennsylvania Electric Company’s tariff.

On January 22, 2020, a prehearing conference was held. Mr. Martinez represented himself and the Company was represented by Tori L. Giesler, Esquire and Lauren Marissa Lepkoski, Esquire. During this conference, the outstanding discovery issue was resolved and the Company withdrew its Motion to Compel. (Tr. at 9-10). Further, ALJ Calvelli ruled that Mr. Martinez could proceed at the hearing on the issues he identified in his Complaint “as well as his response to [Met-Ed’s] preliminary objections.” (Tr. at 11). The ALJ also denied the Complainant’s Motion for Default Judgment. (Tr. at 15, 25).

On February 2, 2020, the Commission issued a Call-In Telephone Hearing Notice, scheduling a telephonic hearing for February 20, 2020. On February 3, 2020, ALJ Calvelli’s Prehearing Order was issued concerning various procedures that would govern the hearing.

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

On March 12, 2020, the Commission issued a Judge Change Notice, reassigning this proceeding to ALJ Elizabeth H. Barnes.<sup>2</sup>

On August 13, 2020, a Call-in Telephone Hearing Notice was issued scheduling a hearing for September 17, 2020.

On September 17, 2020, an evidentiary hearing was held by telephone before ALJ Barnes. The Complainant represented himself and testified on his own behalf. Mr. Martinez offered several exhibits, none of which were admitted into the record. While it is somewhat unclear from the record precisely how many exhibits were offered by the Complainant and how they were labeled, the transcript reveals that the proposed exhibits included: (1) a video showing other individuals discussing the alleged effects of smart meters on one’s health, “the role of

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<sup>2</sup> On May 26, 2020, ALJ Barnes issued an Order granting the Company’s Motion to Compel. However, as indicated above, this Motion was orally withdrawn at the prehearing conference held on January 22, 2020, before ALJ Calvelli. (Tr. at 10-11).

smart meters . . . as surveillance,” and “the damage of smart meter burning” a home (Tr. at 25); (2) various articles about fires allegedly associated with smart meters; and (3) various audio recordings the Complainant made of “every single conversation I have [had] with them [the Company].” (Tr. at 41; *see also*, Tr. at 39-40, 43).<sup>3</sup> The Company objected to the admission of these proposed exhibits for several reasons.<sup>4</sup> ALJ Barnes denied the admission of these proposed exhibits on the basis of hearsay, explaining that the participants in the video and the authors of the articles were not available for cross-examination. (Tr. at 51).

The Complainant also offered as proposed exhibits a copy of the Company’s tariff and Section 2807 of the Code (relating to smart meter deployment). The Company did not object to the ALJ taking judicial notice of these, which the ALJ did. (Tr. at 45-46, 51;<sup>5</sup> *See also*, Met-Ed Exhibits JCA 1, 9).

At the hearing, the Company was represented by Attorneys Giesler and Lepkoski. The Company presented one witness, John C. Ahr, who sponsored nine exhibits, all admitted into the record. They are:

- Met-Ed Exhibit JCA 1 – Copy of 66 Pa.C.S. §§ 2801 - 2815
- Met-Ed Exhibit JCA 2 – Implementation Order, M-2009-2092655 (6/24/2009))
- Met-Ed Exhibit JCA 3 – Joint Petition, M-2009-2123950 (6/9/2010)
- Met-Ed Exhibit JCA 4 – Revised Smart Meter Deployment Plan (6/5/2014)

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<sup>3</sup> During the hearing, both counsel for the Company and ALJ Barnes indicated that they had difficulty reviewing the video and audio recordings since they were emailed to both via a Google link to a private drive, which they did not open for security reasons. (*See, e.g.*, Tr. at 28-29, 30, 32). Although the Complainant requested a continuance to provide the video and audio recordings at an in-person hearing, ALJ Barnes denied this request. (Tr. at 42).

<sup>4</sup> In addition to its objections on the basis of relevancy and hearsay, the Company also objected to the audio recordings on the basis that they were recorded without notice to, and the consent of, the Company. The Company argued that such recordings potentially constitute criminal liability on the Complainant’s part, citing 18 Pa.C.S. § 5703 (relating to interception, disclosure or use of wire, electronic or oral communications). (Tr. at 43, 44). As discussed above, the ALJ ruled these recordings inadmissible on the basis of hearsay, and this decision makes no comment on the legality of said recordings.

<sup>5</sup> ALJ Barnes also took judicial notice of “the BCS complaint report.” (Tr. at 51). While it is unclear what BCS report is being referred to, and none was admitted of record, I note that the instant Complaint is not a timely appeal from any determination of an informal complaint submitted to the BCS, since such appeals are as a matter of course designated with an F-docket number, not a C-docket number, as in the instant case. In any event, even if this Complaint were a timely BCS appeal, it would be subject to *de novo* review, which means based on the evidentiary record created at the hearing. *See*, 52 Pa. Code § 56.173(a).

Met-Ed Exhibit JCA 5 – Smart Meter Customer Privacy  
Met-Ed Exhibit JCA 6 – Final Approved Deployment Plan  
Met-Ed Exhibit JCA 7 – Smart Meter Privacy Policy (3/18/2015)  
Met-Ed Exhibit JCA 8 – Customer Contacts  
Met-Ed Exhibit JCA 9 – Met-Ed Tariff Rule 9

At the conclusion of the testimony, Mr. Martinez made a closing argument. (Tr. at 99-103). The Company waived closing argument, instead requesting to file a brief. In response, Mr. Martinez also wanted an opportunity to file a brief. As a result of this discussion, ALJ Barnes directed that main briefs could be filed by November 9, 2020, and reply briefs by November 23, 2020. (Tr. at 103-04).

On October 12, 2020, a 109-page hearing transcript was filed with the Commission.

On October 16, 2020, prior to the time for filing briefs, the Company filed a Motion to Stay the proceeding in light of the decision of the Commonwealth Court of Pennsylvania in *Povacz v. Pennsylvania Public Utility Commission*, 241 A.3d 481 (Pa. Cmwlth. 2020) (*Povacz I*), the first of several appeals involving the deployment of smart meter technology pursuant to Act 129. The Complainant did not file a response to this Motion.

On November 4, 2020, this matter was stayed pursuant to the Commission's Order, which instituted a stay of then-pending proceedings before the Commission challenging smart meter deployment as being in violation of Section 1501 of the Code, 66 Pa.C.S. § 1501. *See, Smart Meter Procurement and Installation*, No. M-2009-2092655 (Order entered Nov. 4, 2020) (*Stay Order*).

On June 13, 2022, this matter was reassigned to me by a Judge Change Notice.<sup>6</sup>

On November 14, 2023, the *Stay Order* was lifted by the Commission. *Smart Meter Procurement and Installation*, No. M-2009-2092655 (Order entered Nov. 14, 2023).

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<sup>6</sup> Both ALJs Calvelli and Barnes no longer serve as ALJs in the Office of Administrative Law Judge.

On December 13, 2023, the parties were issued my Post-evidentiary Hearing Conference Order, advising them that a post evidentiary hearing conference would be scheduled. This Order explained that the purpose of this conference was to give the parties an opportunity to address various procedural matters including whether the Complainant wanted an opportunity to reopen the evidentiary record to present expert testimony in light of the decision of the Supreme Court of Pennsylvania in *Povacz v. Pennsylvania Public Utility Commission*, 280 A.3d 975 (Pa. 2022) (*Povacz II*), and whether either party wished to file a brief. On December 15, 2023, the Commission issued a Post-Hearing Conference Notice, scheduling a Post-Hearing Conference for February 27, 2024.

On February 27, 2024, a post-hearing conference was held. Mr. Martinez represented himself and Attorney Giesler represented the Company. During this conference, Mr. Martinez stated that he did not want to reopen the evidentiary record to present any expert testimony, but that he wanted the opportunity to file main and reply briefs. (Tr. at 18, 122, 124). Mr. Martinez also asked about obtaining a copy of the hearing transcript at no cost to him. (Tr. at 125). I advised Mr. Martinez that he could obtain a personal copy of the transcript from the official court reporting agency upon payment of a fee, or if he did not want to pay the fee, he could view the transcript in the Commission's office. (*See*, Tr. at 125-26). Mr. Martinez was also provided the contact information of the private court reporting agency with which the Commission contracted to inquire about obtaining a personal copy for a fee, as well as how to contact the Secretary's Bureau to arrange for viewing the transcript at no fee in the Commission's office. (Tr. at 125-127).<sup>7</sup>

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<sup>7</sup> I also explained to Mr. Martinez that I had no authority to waive the applicable private court reporting agency's fee, even though he claimed he was unable to afford any fee. Rather, I explained that I am bound by the Commission regulation and precedent. (Tr. at 125-26; *See* 52 Pa. Code § 5.254 (relating to copies of transcripts; *Sabatine v. West Penn Power Co.*, Docket No. C-2018-3002804 (Opinion and Order entered Feb. 22, 2024); *McLean v. Phil. Gas Works*, Docket No. C-2016-2539492 (Opinion and Order entered Dec. 20, 2018); and *Bhattacharyya v. Pa.-Am. Water Co.*, Docket No. C-2009-2115020 (Opinion and Order entered Aug. 20, 2010). *But, cf. Sierra Club v. Pa. Pub. Util. Comm'n*, 702 A.2d 1131 (Pa. Cmwlth. 1997), *aff'd*, 731 A.2d 133 (Pa. 1999) (the Court rejected requests by intervenors in a base rate proceeding to direct the Commission to provide them copies of testimony transcripts at cost reproduction rates rather than at the rate that court reporting firm which the Commission had contracted, finding that the Commission procedure was reasonable under 52 Pa. Code § 5.254; however, the majority limited this holding to litigants who did not allege or make a showing of need for the transcript and financial inability to pay).

Also on February 27, 2024, my Briefing Order was issued, allowing parties to file main briefs on or before April 11, 2024, and reply briefs on or before April 25, 2024.

On April 11, 2024, the Company submitted its Main Brief. Mr. Martinez did not submit a Main Brief. No Reply Briefs were submitted. The record closed on April 26, 2024, the day following the expiration of the time for filing a Reply Brief.

For the reasons discussed below, the Complaint will be dismissed.

### FINDINGS OF FACT

1. The Complainant is Gilbert Martinez, who receives electric service from the Respondent at his residence in Reading, Berks County, Pennsylvania (service location).

2. The Respondent is Metropolitan Edison Company, a jurisdictional public utility providing electric service to the Complainant.

3. On September 11, 2019, the Company sent correspondence to the Complainant regarding the installation of a smart meter at the service location. (Tr. at 71; Met-Ed Exhibit JCA 8).

4. On October 3, 2019, Mr. Martinez advised the Company that he was refusing a smart meter installation at the service location. (Tr. at 71; Met-Ed Exhibit JCA 8).

5. On October 8, 2019, the Company sent a second correspondence to the Complainant regarding the installation of a smart meter at the service location. (Tr. at 71; Met-Ed Exhibit JCA 8).

6. On October 18, 2029, the Company sent the Complainant a pre-disconnection warning letter for the Complainant's refusal to allow the smart meter installation. (Tr. at 71; Met-Ed Exhibit JCA 8).

7. On October 25, 2019, in response to the pre-disconnection letter, the Complainant contacted the Company and stated if a smart meter is installed at the service location, he would file a lawsuit. (Tr. at 71-72; Met-Ed Exhibit JCA 8).

8. Met-Ed Exhibit JCA 9 is a copy of the Company's Commission-approved tariff provision, Rule 9, which permits the termination of a customer's service for refusal of the customer to allow the Company access to its meter. (Tr. at 75; Met-Ed Exhibit JCA 9).

9. On October 25, 2019, Mr. Martinez filed the within Complaint to prevent Met-Ed from terminating his electric service if he did not allow the smart meter installation and forcing him to have a smart meter installed at his residence. (Tr. at 9).

10. On November 22, 2019, during a meter read at the service location, the existing meter was found not to be working, and a smart meter was installed temporarily. (Tr. at 73; Met-Ed Exhibit JCA 8).

11. On December 26, 2019, Met-Ed removed the smart meter and installed a non-smart meter at the service location. (Tr. at 73-74).

12. During the time the smart meter was installed, the Complainant testified that he had migraine headaches, joint pains, and felt extremely ill. (Tr. at 22).

13. At the time of the hearing, there was no smart meter installed at the service location, and service was not terminated. (Tr. at 74).

14. Mr. Martinez testified that he has rheumatoid arthritis and "smart meters are a problem for me, because they give me migraines, they affect my body." (Tr. at 97).

15. Mr. Martinez testified that he has an immune disorder and anything with radiofrequency such as a smart meter causes "more disturbance to him"; therefore, he does not use the microwave and keeps his cellphone on airplane mode when not in use. (Tr. at 97-98).

16. Mr. Martinez did not present any expert testimony on any of the issues raised in the Complaint, including expert testimony demonstrating that smart meters are unhealthy, unsafe, or a violation of his privacy.

17. Mr. Martinez did not present any expert testimony that a smart meter affects his individual personal health or safety.

18. Act 129 of 2008 required electric distribution companies with more than 100,000 customers to adopt smart meter deployment plans. (Met-Ed Exhibit JCA 2).

19. Act 129 provides a list of required smart meter functionality, which was supplemented by Commission order. (Met-Ed Exhibit JCA 2).

20. The Company's Smart Meter Technology Procurement and Installation Plan was filed on August 10, 2009. *Joint Petition of Met-Ed Co., Pa. Elec. Co, Pa. Power Co. and West Penn Power Co. Approval of Smart Meter Technology Procurement and Installation Plan*, Docket No. M-2009-2123950 (Petition dated Aug. 10, 2009).

21. The Commission ultimately approved the smart meter deployment plan, with modifications, on June 9, 2010. *Joint Petition of Met-Ed Co., Pa. Elec. Co, Pa. Power Co. and West Penn Power Co. Approval of Smart Meter Technology Procurement and Installation Plan*, Docket No. M-2009-2123950 (Order entered June 9, 2010).

22. On December 31, 2012, the Companies filed their Joint Petition for Approval of their Smart Meter Deployment Plan, in which they requested that the Commission: (1) find that their proposed Deployment Plan satisfies the requirements of Act 129 and the Commission's Implementation Order; (2) approve the Companies' proposed procurement and deployment of approximately 2.1 million smart meters, over 98% of which should be installed by the end of 2019; (3) authorize the Companies to continue to recover smart meter costs; and (4) authorize the Companies to create a regulatory asset for their investment in their existing meters

to be replaced by smart meters. *Joint Petition of Met-Ed Co., Pa. Elec. Co., Pa/ Power Co. and West Penn Power Co. For Approval of Their Smart Meter Deployment Plan*, Docket Nos. M-2013-2341990, M-2013-2341991, M-2013-2341993, M-2013-2341994 (Revised Plan filed June 16, 2014).

23. On June 16, 2014, the Companies submitted their revised Smart Meter Deployment Plan, which, *inter alia*, accelerated the smart meter deployment schedule laid out in their original Deployment Plan. *Joint Petition of Met-Ed Co., Pa. Elec. Co., Pa/ Power Co. and West Penn Power Co. For Approval of Their Smart Meter Deployment Plan*, Docket Nos. M-2013-2341990, M-2013-2341991, M-2013-2341993, M-2013-2341994 (Petition filed Dec. 31, 2012).

24. The Company presented one witness in this proceeding, Mr. John C. Ahr, who has a Bachelor of Science degree in electrical engineering from Pennsylvania State University and is employed by FirstEnergy Service Company as Advisor, Regulatory Compliance – Smart Meters. (Tr. at 53).

25. Mr. Ahr explained that smart meters, and the communication network and supporting systems, are all referred together as advanced meter infrastructure or AMI, and allows for bi-directional communications between the meters and Met-Ed. (Tr. at 62).

26. Met-Ed's proposed smart meter records the customer's interval consumption of electricity and can record when a customer's electricity usage increases or decreases over the course of a day, but it cannot record what is causing the usage. (Tr. at 62, 65).

27. Met-Ed's Privacy Policy Plan, which was approved by the Commission, explains the type of customer information that can be submitted through the smart meters and addresses security protocols that are in place to protect against unauthorized access to a customer's usage information. (Tr. at 66-67; Met-Ed Exhibit JCA 5).

28. Only a customer's total electricity usage is transmitted through the smart meter network; no names, addresses, Social Security numbers or similar sensitive account numbers are transmitted. (Tr. at 68).

29. Mr. Ahr has no reason to believe that Met-Ed's proposed smart meter is unsafe. (Tr. at 68).

30. The Company's smart meters comply with all applicable requirements and standards for smart meters adopted by the Federal Communications Commission and the American National Standards Institute Tests. (Tr. at 69).

31. The Company's smart meters are Underwriters Laboratories (UL) certified, which means the meters were tested for Compliant UL standard 2735.72. (Tr. at 69).

## DISCUSSION

### Legal Standards

#### *General Burden of Proof*

As the party seeking affirmative relief from the Commission, a complainant has the burden of proof by a preponderance of the evidence. 66 Pa.C.S. § 332(a); *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm'n*, 578 A.2d 600 (Pa. Cmwlth. 1990). A preponderance of the evidence is evidence that is more convincing, by even the smallest amount, than that presented by the opposing party. *Se-Ling Hosiery, Inc. v. Margulies*, 70 A.2d 854 (Pa. 1950). As a matter of law, a complainant must show that the named utility is responsible or accountable for the problem described in the Complaint in order to prevail and that the offense is a violation of the Code, the Commission's regulations, or order. *Patterson v. Bell Tel. Co. of Pa.*, 72 Pa. P.U.C. 196 (1990); 66 Pa.C.S. § 701.

The burden of proof is comprised of two distinct burdens: (1) the burden of production; and (2) the burden of persuasion. *Hurley v. Hurley*, 754 A.2d 1283 (Pa. Super. 2000). The burden of production, also called the burden of going forward with the evidence, determines which party must come forward with evidence to support a particular claim or defense. *Moore v. Nat'l Fuel Gas Distrib.*, Docket No. C-2014-2458555 (Final Order entered Aug. 25, 2015) (*Moore*). The burden of production goes to the legal sufficiency of a party's claim or affirmative defense. *Id.* The burden of production may shift between the parties during a hearing. A complainant may establish a *prima facie* case with circumstantial evidence. *See, Milkie v. Pa. Pub. Util. Comm'n*, 768 A.2d 1217, 1220 (Pa. Cmwlth. 2001) (*Milkie*). If a complainant introduces sufficient evidence to establish legal sufficiency of the claim, also called a *prima facie* case, the burden of production shifts to the utility to rebut the complainant's evidence. *See, Moore*.

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

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

whole or in part, and may accept or reject inferences from the evidence. *See, Moore*, citing *Suber v. Pa. Comm'n on Crime and Delinquency*, 885 A.2d 678 (Pa. Cmwlth. 2005) (*Suber*).

Additionally, any decision of the Commission must be supported by substantial evidence in the record; more is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk & W. Ry. Co. v. Pa. Pub. Util. Comm'n*, 413 A.2d 1037 (Pa. 1980). As the Commission explained, “[O]pinions and conclusions cannot be relied upon as substantial evidence in a decision by this agency.” *Norman v. Phila. Gas Works*, Docket No. C-2018-2640719, at 30 (Opinion and Order entered Oct. 7, 2021) (*Norman*).

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

In *Povacz II*, which dealt with consolidated appeals involving the deployment of smart meters by PECO Energy Company, the Supreme Court of Pennsylvania (Supreme Court) reversed the Commonwealth Court’s October 8, 2020 decision in *Povacz I*, and thereby affirmed the Commission’s March 28, 2019 and May 9, 2019 Orders in *Povacz v. PECO Energy Co.*, C-2015-2475023 (*Povacz 2019 Order*), *Murphy v. PECO Energy Co.*, C-2015-2475726, and *Randall v. PECO Energy Co.*, C-2016-2537666. In *Povacz II*, the Supreme Court affirmatively established that there is no “opt-out” provision for installation of a smart meter pursuant to Act 129 and that to raise a viable challenge to smart meter installation, a customer must satisfy the preponderance of evidence standard for a violation of Section 1501 of the Code. *Povacz II*, 280 A.3d at 983-984.

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

Every public utility shall furnish and maintain adequate, efficient, safe, and reasonable service and facilities, and shall make all such repairs, changes, alterations, substitutions,

extensions, and improvements in or to such service and facilities as shall be necessary or proper for the accommodation, convenience, and safety of its patrons, employees, and the public . . . Such service and facilities shall be in conformity with the regulations and orders of the commission.

66 Pa.C.S. § 1501.

As previously noted, in *Povacz II*, the Pennsylvania Supreme Court not only affirmed the Commission’s determination that there is no “opt-out” provision for smart meter installation in either Act 129, the Code, Commission Regulations, or Orders, but also confirmed that challenges to smart meter installation, other than an “opt-out,” may arise under Section 1501 of the Code. Therein, the Supreme Court stated:

[W]e conclude that Act 129 does mandate that EDCs<sup>[8]</sup> furnish smart meters to all electric customers within an electric distribution service area and does not provide electric customers the ability to opt out of having a smart meter installed. An electric customer with concerns about smart meters may seek an accommodation from the PUC or EDC, but to obtain one the customer must establish by a preponderance of the evidence that installation of a smart meter violates Section 1501 [of the Code].

*Povacz II*, at 983-984; *See, Povacz 2013 Order*; *see also, Frompovich v. PECO Energy Co.*, Docket No. C-2015-2474602 (Opinion and Order entered May 3, 2018) (*Frompovich*).

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

Although Act 129 does not provide an electric customer [] with the right to opt-out of the installation of a smart meter at their residence, they [sic] may file a complaint raising a claim that installation of a smart meter violates Section 1501 of the Code.

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<sup>8</sup> Electric distribution companies.

Pursuant to [S]ection [1501 of the Code], an EDC (as a public utility) must provide service that is, *inter alia*, both safe and reasonable. To carry their burden of proof on a Section 1501 [of the Code] claim, a smart meter challenger may be required to present medical documentation and/or expert testimony demonstrating that the furnishing of a smart meter constitutes unsafe or unreasonable service in violation of Section 1501 [of the Code] under the circumstances presented. *Susan Kreider v. PECO Energy Co.*, P-2015-2495064, 2016 WL 406549, at \*14 (Pa. P.U.C. Jan. 28, 2016).

*Povacz II*, 280 A.3d at 999-1000 (footnote omitted).<sup>9</sup>

In applying the standard of proof to scientific or expert medical evidence in support of alleged adverse health effects, the Commission ruled in the *Povacz 2019 Order*, and was subsequently affirmed by the Supreme Court in *Povacz II*, that in order to prevail in a Section 1501 claim against an EDC alleging that an AMI meter caused or will cause adverse health effects or harm to human health, the Complainant must demonstrate by a preponderance of the evidence a “conclusive causal connection” between the harm to human health and the radio frequency fields (RFs)<sup>10</sup> from the AMI meter.<sup>11</sup>

#### Other Relevant Legal Standards

In addition to establishing that a complaint challenging the installation of a smart meter may arise under Section 1501, the Supreme Court’s decision in *Povacz II* acknowledged the Commonwealth Court’s rejection of a constitutional claim for exemption from smart meter installation predicated on a violation of “bodily integrity.” The Supreme Court noted the Commonwealth Court’s denial of a claim under the Fourteenth Amendment, stating:

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<sup>9</sup> With respect to the evidence necessary to support a challenge to smart meter installation under Section 1501, the Commonwealth Court has held that at the hearing, a complainant may prove his/her claim through the complainant’s own personal testimony and/or “the testimony of others as well as other evidence that goes to that issue.” *Romeo v. Pa. Pub. Util. Comm’n*, 154 A.3d 422, 430 (Pa. Cmwlth. 2017).

<sup>10</sup> RF is an abbreviation for radio frequency and is also used here to denote RF fields or RF signals.

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

The Commonwealth Court rejected Customers’ constitutional arguments, persuaded by the reasoning of *Naperville Smart Meter Awareness v. City of Naperville*, 69 F. Supp. 3d 830 (N.D. Ill. 2014) (“*Naperville II*”). Therein, a federal district court rejected the customers’ “*Fourteenth Amendment* bodily integrity argument because their complaint failed to identify an arbitrary deprivation of a recognized liberty or property interest” and to aver that the city’s decision to employ smart meters was arbitrary. *Id.* at 839 (internal quotations marks omitted).

*Povacz II*, 280 A.3d at 985, n.8. As the Supreme Court denied *allocator* as to any constitutional claims, the Commonwealth Court’s holding on this claim prevails.

Further, the Supreme Court noted that a customer must be connected to the distribution system to receive electric service confirming that EDCs operate in a universal basis. *Povacz II*, 280 A.3d at 993. As such, the Court concluded that by obtaining service from their incumbent EDC, customers contractually accept the EDC’s Commission-approved Tariff, including the installation of smart meter technology. *Id.* at 994. Therefore, the Supreme Court found that “the authority to select and install a certain type of electric meter rests solely with the EDCs, [...] not the customer.” *Id.*

#### Parties’ positions

The Complainant’s arguments focused on the legal directives and constitutionality of Act 129, as well as health, safety, and privacy concerns surrounding the installation of smart meters. Mr. Martinez spent significant time arguing that Act 129 does not mandate the installation of smart meters but contends that customers may either opt out of, or request, a smart meter installation. Mr. Martinez also contends that smart meters are unhealthy to customers in general, are unhealthy to him due to his medical condition, are unsafe because they can cause fires, and are used to illegally monitor his activities in violation of the Fourth Amendment to the United States Constitution. (Tr. at 99-103).<sup>12</sup> Mr. Martinez also argues that the testimony of the

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<sup>12</sup> The Complainant also wanted to testify as to his claim of incorrect charges or overbilling by the Company, arguing he raised such in his Response to Met-Ed’s Preliminary Objections. The Company objected. After reviewing the Complaint and the Complainant’s Response, ALJ Barnes denied this claim, finding this claim was not raised by the Complainant. (Tr. at 11-14).

Company's witness should not be considered credible "because he [Mr. Ahr] didn't want to admit that radiation causes health effects to the body." (Tr. at 102).

The Company argues that the Supreme Court's decision in *Povacz II* renders the Complaint moot because *Povacz II* held that Act 129 mandates the installation of smart meters and that even if a customer establishes that the smart meter's installation would violate Section 1501 of the Code, the customer is only entitled to an accommodation to the extent allowed by Act 129 and a utility's tariff. (Met-Ed Main Brief at 9-11).

Alternatively, the Company argues in its Main Brief (M.B.) that even if the instant Complaint is not deemed moot, *Povacz II* resolves the substantive issues raised in this proceeding. In addition to the argument above, the Company contends that Mr. Martinez failed to provide any reliable evidence in support of his health, safety, and privacy concerns related to smart meters and failed to demonstrate that the installation of a smart meter at the service location would constitute unreasonable or inadequate service under Section 1501 of the Code. (Met-Ed M.B. at 11-17). Further, the Company contends that *Povacz II* did not disturb the Commonwealth Court's finding in *Povacz I* that PECO was not a state actor, and Met-Ed, which is a similarly-situated Company, is also not a state actor that can violate the Complainant's constitutional rights. (*Id.* at 12).

The Company also argues that proposed exhibits offered by Mr. Martinez at the hearing were properly excluded as hearsay, no qualified expert testimony was presented as to any issue raised in the instant Complaint, and the Complainant's testimony regarding health, medical or scientific opinions, should carry no evidentiary weight since he was not qualified to testify or offer exhibits related to any issue outside of his direct personal knowledge. (Met-Ed M.B. at 18-19).

### Disposition

First, I agree with the Company that the Supreme Court's decision in *Povacz II* is applicable as to the issue of whether Act 129 mandates smart meter deployment by EDCs such as

Met-Ed. Under the Supreme Court's ruling in *Povacz II*, Act 129 requires the Company to install smart meters for all of its customers, including the Complainant. Neither Act 129 nor subsequent Commission orders and/or appellate court decisions related to smart meter installation and deployment permit customers to "opt-out" from smart meter installation. Thus, the Supreme Court's holding that there is no opt-out permitted is controlling to the instant case. *Povacz II*. Accordingly, the Complainant's claim on this basis must be dismissed.

Second, I find that the record evidence shows that the Complainant failed to establish a *prima facie* case evidencing that the Company's proposed installation of a smart meter constitutes a violation of Section 1501. Mr. Martinez did not present any reliable or credible evidence on any of the issues raised in the Complaint including expert testimony demonstrating that smart meters are unhealthy, unsafe, or a violation of his privacy. Further, the Complainant must demonstrate, by a preponderance of the evidence, a "conclusive causal connection" between the harm to human health and the RFs from the AMI meter. *See, Povacz II*, 280 A.3d at 1006.

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

In the instant case, in addition to the absence of expert testimony presented by the Complainant, there is no evidence that the Complainant is qualified to offer expert testimony as an engineer, doctor or other medical professional. While Mr. Martinez testified that he has

rheumatoid arthritis and smart meters give him migraines, there was no expert medical testimony to explain a causal connection between his health and any alleged harmful effects of a smart meter.<sup>13</sup> Without expert testimony and credible evidence, Mr. Martinez’s claims are reduced to unsubstantiated opinions. Assertions, personal opinions or perceptions do not constitute factual evidence. As the Commission explained, “[O]pinions and conclusions cannot be relied upon as substantial evidence in a decision by this agency.” *Norman* at 30.

Accordingly, the record evidence compels the conclusion that the Complainant has failed to carry his burden of proof that Met-Ed has provided unsafe or unreasonable service in violation of Section 1501.

Third, while this decision does not dismiss the Complaint as moot, as urged by the Company, I agree with the Company that the Commission cannot grant the specific relief requested by the Complainant – *i.e.*, to forbid the Company from replacing his analog meter with a smart meter, or requiring the Company to replace his analog meter with another analog meter. The Supreme Court expressly held that even *if* the Complainant proved that the installation of a smart meter at the service location violates Section 1501 of the Code, which he did not as discussed *supra.*, Mr. Martinez would be “entitled to an accommodation to the extent allowed by Act 129 and a utility’s tariff.” *Povacz II*, 280 A.3d at 1014. As pointed out by Met-Ed, the only accommodation set forth in the Company’s tariff is for the meter to be relocated to a different location on the property and for the customer, Mr. Martinez, to pay for the estimated relocation costs. (Met-Ed M.B. at 12, citing the applicable tariff provision).

Fourth, while the evidence in the record shows that the Company has not terminated Mr. Martinez’ service, under Section 1406(a)(4) of the Code, and Section 56.81(3) of the Commission’s regulations, a utility may terminate service to a customer who denies the

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<sup>13</sup> “To the extent Customers challenge the safety of smart meters based on their individualized concerns about adverse effects, we conclude that neither fear nor inconclusive scientific research is sufficient to prove that smart meter technology constitutes unsafe service under Section 1501. Allowing fear — however reasonable given the inconclusiveness of scientific research and studies — to support a finding or conclusion that smart meter technology is unsafe, in the absence of substantial evidence of causality between RF emissions and adverse human health effects, eliminates the requirement that a customer prove the utility is responsible or accountable for the problem described in the complaint.” *Povacz II*, 280 A.3d at 1005.

utility access to the service location to replace a meter. *See*, 66 Pa.C.S. §1406(a)(4); 52 Pa. Code § 56.81(3). Therefore, Met-Ed's threat of a service termination was authorized since the Complainant would not allow the Company access to the service location to replace the analog meter with a smart meter. (*See* Met-Ed Exhibit JCA 9).

Finally, I agree with the Company that *Povacz II* did not disturb the Commonwealth Court's finding in *Povacz I* that a utility must be a state actor to implicate the Complainant's constitutional rights under the Fourth Amendment to the United States Constitution. Therefore, since Met-Ed is not a state actor, the Complainant's constitutional claim must fail.<sup>14</sup>

In conclusion, Mr. Martinez failed to provide any reliable, credible evidence in support of his health, safety, and privacy concerns related to smart meters. Mr. Martinez also failed to demonstrate that the installation of a smart meter at the service location would constitute unreasonable or inadequate service under Section 1501 of the Code. Thus, he did not carry his burden of proof to establish that he is entitled to the relief requested from the Commission. Accordingly, in the ordering paragraphs below, the Complaint will be dismissed.

#### CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the subject matter and the parties to this proceeding. 66 Pa.C.S. § 701.
2. The party seeking relief from the Commission has the burden of proof. 66 Pa.C.S. § 332(a).

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<sup>14</sup> Nonetheless, I also note that there is no credible evidence presented by the Complainant that a smart meter performs some kind of surveillance of the service location. Met-Ed's witness credibly testified that only a customer's total electricity usage is transmitted through the smart meter network. Tr. at 68. *See also* Met-Ed's Privacy Policy Plan, which was approved by the Commission, and explains the type of customer information that can be submitted through the smart meters and addresses security protocols that are in place to protect against unauthorized access to a customer's usage information. Tr. at 66-67; Met-Ed Exhibit JCA 5.

3. "Burden of proof" means a duty to establish a fact by a preponderance of the evidence, or evidence more convincing, by even the smallest degree, than the evidence presented by the other party. *Se-Ling Hosiery v. Margulies*, 70 A.2d 854 (Pa. 1950).

4. Any decision of the Commission must be supported by substantial evidence in the record; more is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk & W. Ry. Co. v. Pa. Pub. Util. Comm'n*, 413 A.2d 1037 (Pa. 1980).

5. Assertions, personal opinions and conclusions cannot be relied upon as substantial evidence in a Commission decision. *Norman v. Phila. Gas Works*, Docket No. C-2018-2640719 (Opinion and Order entered Oct. 7, 2021).

6. The Public Utility Code mandates that a public utility must furnish and maintain adequate, efficient, safe, and reasonable service and facilities, and must make such repairs, changes, alterations, substitutions, and improvements in or to such service and facilities as shall be necessary or proper for the accommodation, convenience and safety of its patrons and the public. 66 Pa.C.S. § 1501.

7. When a complainant challenges the installation of a smart meter, there must be sufficient evidence to support a finding that complainant would be adversely affected by the smart meter or that the utility's use of a smart meter would constitute unsafe or unreasonable service in violation of Section 1501 under the circumstances of the case. *Kreider v. PECO Energy Co.*, Docket No. P-2015-2495064 (Order entered Jan. 28, 2016).

8. Specific to smart meters and RF emissions, the burden of proof is two-fold. First, a customer must present expert opinion rendered to a reasonable degree of scientific certainty that smart meters emit RFs and that RF emissions cause adverse health effects and, second, 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. *Povacz v. Pa. Pub. Util. Comm'n*, 280 A.3d 975 (Pa. 2022).

9. Act 129 of 2008 mandates that electric distribution companies furnish smart meters to all electric customers within an electric distribution service area and does not provide electric customers the ability to opt out of having a smart meter installed. *Povacz v. Pa. Pub. Util. Comm'n*, 241 A.3d 481 (Pa. Cmwlth. 2020).

10. A utility may threaten service termination to a customer if a customer does not permit access to meters, service connections, or other property of the public utility for the purpose of replacement, maintenance, repair, or meter reading, including the installation of a smart meter. 66 Pa.C.S. § 1406(a)(4); 52 Pa. Code § 56.81(3).

11. The Complainant failed to carry his burden of proof establishing that Metropolitan Edison Company violated the Code or a regulation or order of the Commission.

ORDER

THEREFORE,

IT IS ORDERED:

1. That, after hearing held, the Formal Complainant filed by Gilbert Martinez against Metropolitan Edison Company at Docket No. C-2019-3013798 is DENIED and DISMISSED.

2. That the docket at Docket No. C-2019-3013798 be marked closed.

Dated: July 24, 2024

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/s/  
Gail M. Chiodo  
Administrative Law Judge