

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Jan Kiefer	:	
	:	
v.	:	C-2018-3006172
	:	
West Penn Power Company	:	

INITIAL DECISION

Before
Jeffrey A. Watson
Administrative Law Judge

INTRODUCTION

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

BACKGROUND

On November 26, 2018, Jan Kiefer (Complainant) filed a Formal Complaint (Complaint) with the Pennsylvania Public Utility Commission (Commission) against West Penn Power Company (Respondent or Company), alleging that Respondent was threatening to shut off his electric service and objecting to the installation of a smart meter. Complainant also referenced health issues and purported scientific research regarding smart meters. As relief, Complainant requested that he not be required to have a smart meter installed at his property.

On December 17, 2018, Respondent filed an Answer and New Matter to the Complaint. Respondent admitted that it provides electric service to Complainant at 628

Homestead Avenue, Scottdale, Pennsylvania (Service Address or Service Location). Respondent further averred that Complainant refused to allow the Company access to its meter for the purpose of meter replacement, in violation of its Commission-approved tariff and is therefore subject to termination. Respondent denied any active intent to terminate service upon the filing of the Formal Complaint. Respondent denied the remaining material allegations set forth in the Complaint. Respondent further avers, *inter alia*, that it is required by Act 129 of 2008¹ (Act 129), to install a smart meter.

On December 17, 2018, Respondent also filed preliminary objections to the Complaint. Respondent averred that the request for relief for an exemption from the installation of a smart meter is not legally recoverable in the cause of action and that Complainant failed to allege that Respondent violated any Commission statute, regulation, order or tariff provision. Respondent further averred it is required by Act 129 to install a smart meter at the service location. Respondent argued that the Formal Complaint is legally insufficient because it fails to state a claim upon which the Commission can grant relief.

On December 28, 2018, Complainant filed a reply to the preliminary objections filed by Respondent.

A Motion Judge Assignment Notice was issued on January 22, 2019, and assigned to the undersigned presiding officer to this proceeding.

On June 11, 2019, an interim order was entered denying the Preliminary Objections filed by West Penn Power Company.

On June 10, 2019, an interim order was entered establishing a litigation schedule in this proceeding.

On October 25, 2019, Respondent filed a Status Report stating that Complainant failed to identify his fact and expert witnesses, but subsequently stated in Discovery Responses

¹ 66 Pa. C.S. §§2803, 2806.1, 2807, 2811, 2813-2815.

that his wife, Dr. Gauri Kiefer, “may” be a witness. Respondent further stated that it provided notice of its expert and fact witnesses in a timely manner.

On December 27, 2019, an interim order was entered permitting Respondent to engage in Discovery related to Complainant’s possible witness, Dr. Gauri Kiefer and any expert opinions or reports or writings related to this proceeding, to be completed on or before January 31, 2020. The Parties were directed to file a Status Report on or before January 27, 2020, and to indicate whether the Parties were requesting an in-person or telephone hearing and a hearing from dates provided to the parties.

On June 30, 2020, the evidentiary hearing was concluded in this proceeding. Complainant appeared without legal counsel, testified and provided testimony of Dr. Gauri Kiefer. Respondent was represented by Tori Giesler, Esquire, Lauren Lepkoskie, Esquire and Curtis Renner, Esquire. Respondent presented testimony from John Ahr, Dr. Christopher Davis, and Dr. Mark Israel. Respondent exhibits JCA 1-4, CD 1-8, and MI 1-4 were admitted into evidence. Upon conclusion of the hearing, the parties were advised that a briefing schedule would be established.

On July 7, 2020, an interim order was entered permitting the Parties to file briefs on or before September 4, 2020.

On September 4, 2020, Respondent filed its brief.

On October 19, 2020, an interim order was entered closing the evidentiary record.

On October 8, 2020, the Commonwealth Court of Pennsylvania (Commonwealth Court) issued an Opinion in *Povacz v. Pa. Public Utility Commission*,² (*Povacz I*), the first of several appeals involving PECO Energy Company’s (PECO) deployment of smart meter technology pursuant to Act 129. In the *Povacz I* consolidated opinion, the Commonwealth Court

² *Povacz v. Pa. Pub. Util. Comm’n*, 241 A.3d 481 (Pa. Cmwlth. 2020).

partially affirmed, and partially reversed and remanded, the Commission’s March 28, 2019, and May 9, 2019, Orders in *Maria Povacz*, and related cases.³

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

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

On August 16, 2022, the Pennsylvania Supreme Court issued its Opinion in *Povacz v. Pennsylvania Public Utility Commission*,⁴ (*Povacz II*), affirming the Commission’s determinations in all respects. The Supreme Court reversed the Commonwealth Court’s determination that Act 129 does not mandate smart meter installation and that Court’s remand to the Commission for consideration as to whether the installation of a smart meter was unreasonable service under Section 1501 of the Code.⁵ The Supreme Court did, however, affirm the Commonwealth Court’s conclusion that the “[c]ustomers failed to meet their burden of

³ *Povacz I* at 495.

⁴ *Povacz v. Pa. Pub. Util. Comm’n*, 280 A.3d 975 (Pa. 2022) (*Povacz II*).

⁵ 66 Pa.C.S. § 1501.

proving, by a preponderance of the evidence, a conclusive causal connection between [radio frequency] emissions from smart meters and adverse human health effects.⁶

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

Under the circumstances, an Interim Order was entered on December 6, 2023, re-opening the evidentiary record and providing the parties with an extension of time to file briefs or supplement briefs filed and to consider appropriate requests for relief, if any, on or before February 5, 2024.

On February 5, 2024, a supplemental brief was filed by Respondent.

The record closed by Interim Order entered on June 3, 2024.

FINDINGS OF FACT

1. Complainant is Jan Kiefer who resides at 628 Homestead Avenue, Scottsdale, Pennsylvania (Service Address or Service Location).

2. Respondent is West Penn Power Company, an electric distribution company that provides residential electrical service to Complainant at the service address.

3. Complainant presented no medical documentation containing any diagnosis, testing or a discussion of the Complainant or his wife having electromagnetic hypersensitivity. Tr. 199.

⁶ *Povacz II* at 1014.

4. Act 129 of 2008 required electric distribution companies with more than 100,000 customers to adopt smart meter deployment plans. Tr. 95-96.

5. Respondent's smart meters comply with all safety requirements and standards that were established by agencies such as the Federal Communications Commission. Tr. 108-109.

6. The meter manufacturer only permits certified personnel to perform required American National Standards Institute testing on smart meter products. Tr. 108.

7. Respondent's smart meters are Underwriters Laboratory certified and comply with UL-2735. Tr. 108-109.

8. Respondent has had contact with Complainant, including notices sent to him regarding the installation of the smart meter. Tr. 109-114.

9. The Company attempted to reach out to the Complainant after receiving a letter indicating he did not want a smart meter installed, through pre-complaint, pre-disconnection letters the Company sent the Complainant. Tr. 109-114.

10. Respondent is permitted to terminate service where a customer denies it access to its smart meters, however it ceased termination procedures once the Formal Complaint was filed by Complainant and has not installed the meter at the Service Location. Tr. 113-114.

11. Customers are not permitted to elect to opt-out of the installation of smart meters under Act 129. Tr. 106-107.

12. Respondent witness, Dr. Christopher Davis, is a Fellow of the Institute of Electrical and Electronics Engineers and past chair of the IEEE Subcommittee on Radiofrequency Fields Committee on BAN and Radiation. Tr. 149.

13. Dr. Davis described the RF fields emitted by cell phones and smart meters and concluded that, generally speaking a cellphone puts out more power than a smart meter. Tr. 156-157.

14. Complainant was using a cell phone to testify at the hearing and has used his phone for approximately ten minutes a day. Tr. 157.

15. Dr. Davis concluded, assuming that Complainant used his cellphone at arm's length, he would have to sit about three meters in front of his smart meter for nearly nine years to get the same level of exposure as he gets from his cellphone, used ten minutes per day. Tr. 157-58.

16. Dr. Davis opined that the “sticker” or “so-called protective device” that Mr. Kiefer testified to attaching to his cell phone does not provide protection to Complainant. Tr. 158.

17. The two radios used in West Penn’s smart meters are the LAN radio and the Zigbee radio. The RF exposure from the LAN radio, which is the main radio in the smart meter, is smaller than the safety standards set by the Federal Communications Commission’s (FCC) safety standards. Tr. 162.

18. Dr. Davis testified that the RF exposure from the Zigbee radio is less than the FCC standards. Tr. 162.

19. Dr. Davis opined, to a reasonable degree of scientific certainty, the emissions from the smart meters is so small that “there's no way at all that it could cause any hazardous effects to humans.” Tr. 167.

20. Dr. Davis also opined there was no reliable medical basis on which to conclude that radiofrequency fields cause or contributed to any health effect or any medical condition. Tr. 202.

21. Respondent presented the expert testimony of Dr. Mark Israel, a medical doctor, scientific researcher and the National Executive Director of the Israel Cancer Research Fund. Tr. 184.

22. Respondent witness Dr. Israel described a number of public health authorities that had concluded that the symptoms allegedly associated with “electromagnetic hypersensitivity” or “idiopathic environmental intolerance” were not associated with RF exposure. Tr. 208.

23. It is not generally accepted in the medical community that exposure to RF fields cause “electromagnetic hypersensitivity” or “idiopathic environmental intolerance.” Tr. 208.

24. Dr. Israel opined there is not a reliable scientific basis to conclude that radiofrequency fields cause or contribute to the development of any adverse health conditions or exaggerate any ongoing health conditions. Tr. 209.

DISCUSSION

Legal Standards

Under Section 332(a) of the Public Utility Code,⁷ “the proponent of a rule or order has the burden of proof.” It is well-established that “[a] litigant’s burden of proof before administrative tribunals as well as before most civil proceedings is satisfied by establishing a preponderance of evidence which is substantial and legally credible.”⁸ The preponderance of evidence standard requires proof by a greater weight of the evidence.⁹ This standard is satisfied

⁷ 66 Pa.C.S. § 332(a).

⁸ *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm’n*, 578 A.2d 600, 602 (Pa. Cmwlth. 1990).

⁹ *Commonwealth v. Williams*, 732 A.2d 1167 (Pa. 1999).

by presenting evidence more convincing, by even the smallest amount, than that presented by another party.¹⁰

If the party seeking a rule or order from the Commission sets forth a *prima facie* case, then the burden shifts to the opponent.¹¹ Establishing a *prima facie* case requires either evidence sufficient to make a finding of fact permissible or evidence to create a presumption against an opponent which, if not met, results in an obligatory decision for the proponent. Once a *prima facie* case has been established, if contrary evidence is not presented, there is no requirement that the party seeking a rule or order from the Commission must produce additional evidence to sustain its burden of proof.¹²

In *Povacz II*, the Pennsylvania Supreme Court concluded 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.¹³ 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.¹⁴ The Supreme Court

¹⁰ *Brown v. Commonwealth*, 940 A.2d 610 (Pa. Cmwlth. 2008).

¹¹ *MacDonald v. Pa. R.R. Co.*, 36 A.2d 492 (Pa. 1944).

¹² *See Replogle v. Pa. Elec. Co.*, 54 Pa.P.U.C. 528 (Order entered Oct. 9, 1980); *see also Dist. of Columbia's Appeal*, 21 A.2d 883 (Pa. 1941); *Application of Pennsylvania-American Water Co. for Approval of the Right To Offer, Render, Furnish or Supply Water Serv. to the Pub. in Additional Portions Of Mahoning Twp., Lawrence County, Pa.*, Docket No. A-212285F0148 (Opinion and Order entered Oct. 29, 2008).

¹³ *Povacz II*

¹⁴ *Id.* at 1006.

concluded that neither fear nor inconclusive scientific research was sufficient to prove that smart meter technology constitutes unsafe service under Section 1501.¹⁵

The Commission has exclusive jurisdiction to adjudicate “issues involving the reasonableness, adequacy, and sufficiency” of a public utility’s facilities and services.¹⁶

On October 15, 2008, Act 129 was signed into law and codified as part of the Public Utility Code (Code).¹⁷ Act 129 required EDCs with at least 100,000 customers, such as Respondent, to file a smart meter technology procurement and installation plan (SMP Plan) with the Commission for approval.¹⁸ Specifically, Section 2807(f)(2) of the Code directed EDCs to furnish smart meter technology as follows: 1) upon request from a customer that agrees to pay the cost of the smart meter at the time of the request; 2) in new building construction; and 3) in accordance with a depreciation schedule not to exceed fifteen years.¹⁹

Smart Meter Mandate

In this proceeding, Complainant has argued that a smart meter should not be installed, or installation delayed, at the Service Location. This position is based primarily upon the Complainant’s personal beliefs, including that smart meters present health and safety issues. Complainant testified that when he is exposed to electromagnetic fields from his home he feels confused, flustered, dizzy or dazed. He testified he would like to have his old meter left in place.²⁰ Complainant’s wife, Dr. Gauri Kiefer, also provided lay testimony arguing that

¹⁵ *Id.* at 1005.

¹⁶ *See Elkin v. Bell of Pa.*, 420 A.2d 371, 374 (Pa. 1980) (citations omitted).

¹⁷ 66 Pa.C.S. § 101–3316.

¹⁸ 66 Pa.C.S. § 2807(f).

¹⁹ 66 Pa.C.S. § 2807(f)(2).

²⁰ Tr. 53.

exposure to radiation and electromagnetic exposure should be limited to only that which is necessary.²¹

As explained above, in *Povacz II*, the Supreme Court concluded that Act 129 mandates smart meter deployment and requires the system-wide installation of smart meter technology by EDCs.²²

Unsafe, Unreasonable or Inadequate Service under Section 1501

The Supreme Court noted that while Act 129 does not provide customers with the right to opt-out of smart meter installation at their residence, they may file a complaint with the Commission raising a claim that installation of a smart meter violates Section 1501 of the Code.²³ 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 preponderance of the evidence standard.²⁴

Since Respondent must install a smart meter at the Service Address, the only remaining issue is whether the Company's smart meter practices are adequate, efficient, safe, and reasonable, as required by Section 1501 of the Public Utility Code.²⁵ The evidence established that Respondent has provided adequate, efficient, safe, and reasonable service to Complainant.

When presented with a challenge to a smart meter installation, the Commission has pronounced that “[t]he ALJ’s role . . . will be to determine based on the record in [the]

²¹ Tr. 136-143.

²² *Povacz II* at 992.

²³ 66 Pa.C.S. § 1501.

²⁴ *Povacz II* at 1005.

²⁵ 66 Pa.C.S. § 1501.

particular case, whether there is sufficient evidence to support a finding that Complainant was adversely affected by the smart meter or whether [the utility's] use of a smart meter will constitute unsafe or unreasonable service in violation of Section 1501 under the circumstances in this case.”²⁶ The Commonwealth Court has clarified a complainant’s burden of proof, instructing, “[c]onsumers may establish a violation of that mandate by showing the wireless smart meter requirement is either unsafe *or* unreasonable.”²⁷ Therefore, a complainant in smart meter matters bears the burden to prove by a preponderance of the evidence that installation of a wireless smart meter constitutes unsafe *or* unreasonable service in violation of Section 1501 of the Public Utility Code.

In order to prove that smart meters are unsafe or unreasonable under Section 1501, complainants must present substantial evidence that either: (1) there is a “conclusive causal connection between [smart meter emissions] and adverse human health effects;” or (2) the installation of a smart meter “would create a proven exposure to harm.”²⁸

At the evidentiary hearing, Complainant presented little evidence supporting his general claims that smart meters may have harmful health impacts. Complainant presented no expert testimony to corroborate his health and safety allegations. Complainant offered the testimony of his wife, Dr. Gauri Kiefer, as a medical expert at the hearing, but the proposed evidence was excluded, and Dr. Kiefer was prohibited from providing expert testimony.²⁹ Dr. Kiefer was permitted to testify as a fact witness.³⁰ Furthermore, Complainant did not offer any exhibits to support his Complaint.

²⁶ *Kreider v. PECO Energy Co.*, Docket No. P-2015-2495064 at 23 (Order entered Jan. 28, 2016) (citing *Woodbourne-Heaton*, 1992 Pa. PUC Lexis 160, at *12-13). *Frompovich v. PECO Energy Co.*, Docket No. C-2015-2474602 (Opinion and Order entered May 3, 2018 at 10).

²⁷ *Povacz I* (emphasis in original).

²⁸ *Povacz I*.

²⁹ Tr. 50.

³⁰ Tr. 50.

Complainant presented no expert testimony to corroborate his health or safety allegations. To the extent the Complainant relied upon hearsay or other inadmissible evidence to attempt to support his claims, this evidence was properly objected to upon hearsay and relevance grounds and cannot support a finding of fact.

Although Complainant raised concerns about health and safety, these claims consisted of Complainant's lay opinions and beliefs. Assertions, personal opinions, or perceptions do not constitute evidence.³¹ As such, there is no record evidence to support Complainant's claim that installation of a smart meter at the service location would constitute a violation of Section 1501.

Despite failing to support his allegations with any reliable expert evidence, Respondent still rebutted the Complainant's allegations related to the Company's smart meters.

Respondent witness Mr. Ahr rebutted Complainant's health and safety concerns. Mr. Ahr testified that Respondent's smart meters comply with the safety requirements and standards established by agencies such as the Federal Communications Commission.³² He also explained that the meter manufacturer only permits certified personnel to perform required American National Standards Institute testing on smart meter products.³³ Mr. Ahr testified that the Company's smart meters are Underwriters Laboratory certified and comply with UL-2735.³⁴

Respondent also presented expert testimony of Dr. Christopher Davis, a professor at the University of Maryland, where he teaches in the fields of Physics, Electrical Engineering, and RF Electromagnetics, among others. Dr. Davis also has more than 40 years' experience conducting research in these scientific fields.³⁵ Dr. Davis has authored more than 260 scientific

³¹ *Pa. Bureau of Corr. v. City of Pittsburgh*, 532 A.2d 12 (Pa. 1987).

³² Tr. 108-109.

³³ Tr. 108.

³⁴ Tr. 108-109.

³⁵ WPP Ex CD-1.

articles, including many studies on RF fields.³⁶ Dr. Davis also is a Fellow of the Institute of Electrical and Electronics Engineers (IEEE) and past chair of the IEEE Subcommittee on Radiofrequency Fields Committee on Man and Radiation.³⁷ At the hearing, Dr. Davis was accepted without objection as an expert in the fields of Physics, Biophysics, Chemistry, Electrical Engineering, Electromagnetics, Bioelectromagnetics, Radiofrequency Bioelectromagnetics and Dosimetry.³⁸

Dr. Davis testified that the national safety standards for public exposures to RF fields adopted by the Federal Communication Commission (FCC) provide a scientifically reliable basis for evaluating the safety of RF fields from the smart meters being used by the company.³⁹ Dr. Davis calculated the RF levels from the two radios used in West Penn’s smart meters (i.e., the LAN radio and the Zigbee radio) and compared them to the FCC National safety standards for public exposure to RF in the United States. Dr. Davis testified that the RF from the LAN radio, which is the main radio in the smart meter, is smaller than the safety standard set by the FCC.⁴⁰ In addition, Dr. Davis testified that the RF levels from the Zigbee radio is less than the FCC standards.⁴¹

Dr. Davis also compared the very low levels of RF fields from the smart meter to Mr. Kiefer’s voluntary exposure to RF fields from his cell phone. Based on Mr. Kiefer’s testimony that he used his cellphone for approximately ten minutes a day,⁴² Dr. Davis concluded that Mr. Kiefer would have to sit near a smart meter “for nearly nine years” to get a level of RF fields equivalent to each day’s use of his cell phone.⁴³

³⁶ WPP Ex CD-1; Tr. 147.

³⁷ Tr. 149; *see also* West Penn Exh. CD-1.

³⁸ Tr 152-153.

³⁹ Tr 160.

⁴⁰ Tr. 162.

⁴¹ Tr. 162.

⁴² Tr. 157.

⁴³ Tr. 157-158.

Dr. Davis also calculated RF fields broadcast by UHF TV towers in the vicinity of the Kiefer residence. His calculations show that the prevailing background levels of RF fields at the Kiefer residence are about 22.5 times higher than the RF fields from the smart meter being used by the Company.⁴⁴

Dr. Davis concluded that the RF fields from smart meters are at such a low level that they cannot cause biological effects in humans and that the RF fields from the smart meter will not cause any hazardous effects to humans.⁴⁵

Respondent also presented the expert testimony of Dr. Mark Israel, a medical doctor, professor of medicine, medical researcher and the executive director of an international charitable fund for research on cancer.⁴⁶ In addition to his service at the National Institutes of Health and his Professorship at the University of California, Dr. Israel directed the Norris Cotton Cancer Center at Dartmouth, where he was responsible for the operations of a major medical center providing care to over 30,000 patients a year.⁴⁷

At the hearing, Dr. Israel was accepted as an expert in “medicine and medical research, including particularly radiofrequency fields and health.”⁴⁸

Dr. Israel testified that he had conducted a review of the scientific research on RF fields and health, including particularly cancer and a condition described as “electromagnetic hypersensitivity.”⁴⁹ Dr. Israel testified that, based on his evaluation of the extensive scientific

⁴⁴ Tr 165.

⁴⁵ Tr. 163, 167.

⁴⁶ Tr. 184.

⁴⁷ Tr. 185-187.

⁴⁸ Tr. 197-198.

⁴⁹ Tr. 199.

research on RF fields, there is no reliable basis to conclude that RF fields cause or contribute to any health effect or any medical condition.⁵⁰

Dr. Israel noted that although Mr. Kiefer claimed he was sensitive to RF fields, he had provided no medical documentation showing any diagnosis, testing or even a discussion about the Complainant or his wife having “electromagnetic hypersensitivity.”⁵¹ Dr. Israel further testified that the scientific studies on claimed electromagnetic hypersensitivity have not shown a connection between the alleged symptoms of the condition and actual exposure to RF fields.⁵² He also noted that public health authorities have concluded that the symptoms allegedly associated with “electromagnetic hypersensitivity” or “idiopathic environmental intolerance” were not associated with RF exposure, and testified it was not generally accepted in the medical community that exposure to RF fields caused “electromagnetic hypersensitivity” or “idiopathic environmental intolerance.”⁵³ Dr. Israel concluded that “there’s not a reliable scientific basis to conclude that radiofrequency fields cause or contribute to the development of any adverse health conditions or exaggerate any ongoing health conditions.”⁵⁴

In this case, Complainant raised concerns about health and safety, but these claims consisted solely of Complainant’s lay opinions and beliefs. Assertions, personal opinions, or perceptions do not constitute evidence.⁵⁵ As such, there is no record evidence to support Complainant’s claim that installation of a smart meter at the service location would constitute a violation of Section 1501.

⁵⁰ Tr 203.

⁵¹ Tr. 199.

⁵² Tr 207-208.

⁵³ Tr. 208.

⁵⁴ Tr. 209.

⁵⁵ *Pa. Bureau of Corr. v. City of Pittsburgh*, 532 A.2d 12 (Pa. 1987).

Complainant also raised several other issues during his testimony, which were not relevant to the material issues in this case or were not supported by the record evidence.⁵⁶

Whether Complainant is Nevertheless Entitled to An Accommodation

Complainant filed his Complaint objecting to the installation of a smart meter at his residence. Complainant testified his health and safety concerns and sensitivity to electromagnetic frequencies but did not establish that the installation of Respondent's smart meter would exacerbate any of Complainant's health or safety concerns. The only relief or accommodation requested by Complainant was that he be permitted to opt-out of or delay the planned smart meter installation.

Complainant was provided a full and fair hearing and an opportunity to present evidence regarding his requests for relief as well as his claims, including whether the installation of a smart meter would be unsafe or unreasonable under Section 1501. Subsequent to the conclusion of the hearing, the Supreme Court decided the *Povacz II* case. The record in the instant case is complete and permits the consideration of whether accommodations to Complainant are reasonable in this proceeding, through consideration of the claims advanced and the relief requested, while balancing the interests of the parties.

An accommodation can only be made if a violation of Section 1501 has occurred. Since there was no Section 1501 violation here, there can be no accommodation. “[A] customer can file a claim under Section 1501 that smart meter technology service is unsafe and/or unreasonable. If the 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. Thus, by operation of

⁵⁶ Tr. at 113, 118-19. Complainant asserted that Act 129 does not require Respondent to install a smart meter at the Service Address and suggested that it may violate the Fourth and Fourteenth Amendments to the United States Constitution and Article I of the Pennsylvania Constitution. However, the Commonwealth Court has determined that Act 129 violates neither the Fourth nor Fourteenth Amendments. *See Povacz I; Hughes v. PPL Elec. Utils. Corp.*, -- A.3d --, 2024 WL 3608382 (Cmwlth. Ct. 2024).

the statute, an EDC cannot be required to provide accommodation without the finding of a Section 1501 violation.⁵⁷

Since Complainant failed to prove any actual harm or risk of harm, Complainant's interest in not having a smart meter is essentially protection against a speculative risk, and peace of mind that he is protected against the same. Under the circumstances, the Complaint must be dismissed.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the parties and the subject matter in this proceeding. 66 Pa.C.S. §701.

2. The proponent of a rule or order has the burden of proof. 66 Pa.C.S. § 332(a).

3. "A litigant's burden of proof before administrative tribunals as well as before most civil proceedings is satisfied by establishing a preponderance of evidence which is substantial and legally credible." *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm'n*, 578 A.2d 600, 602 (Pa. Cmwlth. 1990).

4. The preponderance of evidence standard requires proof by a greater weight of the evidence. *Commonwealth v. Williams*, 732 A.2d 1167 (Pa. 1999). This standard is satisfied by presenting evidence that makes the existence of a contested fact more likely than its nonexistence. *Brown v. Commonwealth*, 940 A.2d 610, 614 n.14 (Pa. Cmwlth. 2008) (citation omitted).

5. In smart meter-related matters, the Commission has held that "[t]he Complainant will have the burden of proof during the proceeding to demonstrate, by a

⁵⁷ *Povacz II*, at 1014 (emphasis added); 66 Pa.C.S. § 1505.

preponderance of the evidence, that [the utility] is responsible or accountable for the problem described in the Complaint.” *Kreider v. PECO Energy Co.*, Docket No. P-2015-2495064, p. 18 (Opinion and Order entered Sept. 3, 2015).

6. To satisfy his or her burden of proof, a complainant must demonstrate that the utility violated the Public Utility Code or a regulation or order of the Commission. 66 Pa.C.S. § 701.

7. When presented with a challenge to a smart meter installation, the Commission has pronounced that “[t]he ALJ’s role . . . will be to determine based on the record in this particular case, whether there is sufficient evidence to support a finding that Complainant was adversely affected by the smart meter or whether [the utility’s] use of a smart meter will constitute unsafe or unreasonable service in violation of Section 1501 under the circumstances in this case.” *Kreider v. PECO Energy Co.*, Docket No. P-2015-2495064, p. 23 (Opinion and Order entered Jan. 28, 2016) (citation omitted).

8. Consumers may establish a violation of that mandate by showing the wireless smart meter requirement is either unsafe or unreasonable. *Povacz v. Pa. Pub. Util. Comm’n*, 241 A.3d 481 (Pa. Cmwlth. 2020).

9. In order to prove that smart meters are unsafe or unreasonable under Section 1501, a complainant must present substantial evidence that either: (1) there is a “conclusive causal connection between [smart meter emissions] and adverse human health effects;” or (2) the installation of a smart meter “would create a proven exposure to harm.” *Povacz v. Pa. Pub. Util. Comm’n*, 241 A.3d 481, 495 (Pa. Cmwlth. 2020).

10. For claims involving the safety of smart meters and RF emissions a customer must present (1) expert opinion rendered to a reasonable degree of scientific certainty that radio frequency emissions from smart meters cause adverse health effects; and (2) 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.

11. Assertions, personal opinions, or perceptions do not constitute evidence. *Pa. Bureau of Corr. v. City of Pittsburgh*, 532 A.2d 12 (Pa. 1987).

12. A public utility is required to provide adequate, efficient, safe, and reasonable service. 66 Pa.C.S. § 1501.

13. A utility may issue written notice of 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).

14. An EDC cannot be required to provide accommodation without the finding of a Section 1501 violation.” *Povacz v. Pa. Pub. Util. Comm'n*, 280 A.3d 975 (Pa. 2022); 66 Pa.C.S. § 1505.

15. Complainant failed to carry his burden of proof establishing that Respondent Company violated the Public Utility Code or a regulation or order of the Commission in installing a smart meter at Complainant’s property. 66 Pa.C.S. § 332.

16. Complainant failed to carry his burden of proof establishing that Respondent provided unsafe or unreasonable service in violation of 66 Pa.C.S. § 1501.

ORDER

THEREFORE,

IT IS ORDERED:

1. That the Formal Complaint of Jan Kiefer in Jan Kiefer v. West Penn Power Company at Docket No. C-2018-3006172 is dismissed with prejudice.
2. That Docket No. C-2018-3006172 be marked closed.

Date: August 29, 2024

/s/
Jeffrey A. Watson
Administrative Law Judge