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November 15, 2024

VIA ELECTRONIC FILING

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
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Harrisburg, PA 17120

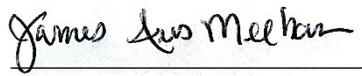
Re: Michael Jennings v. West Penn Power Company
Docket No. C-2018-3006031

Dear Secretary Chiavetta:

Enclosed please find the Reply Brief of FirstEnergy Pennsylvania Electric Company (West Penn Rate District) regarding the above-referenced matter. This document has been served as shown in the Certificate of Service.

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

Very truly yours,


James Austin Meehan

JAM/mlr
Enclosures

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**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

MICHAEL JENNINGS,

v.

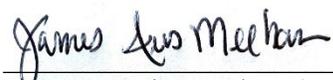
WEST PENN POWER COMPANY

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DOCKET NO. C-2018-3006031

REPLY BRIEF
ON BEHALF OF FIRSTENERGY PENNSYLVANIA ELECTRIC COMPANY
ON BEHALF OF ITS WEST PENN RATE DISTRICT

Dated: November 15, 2024


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I. PROCEDURAL HISTORY

The Procedural History for the above-captioned case is detailed in Sections II and III of FirstEnergy Pennsylvania Electric Company's, on behalf of its West Penn Rate District¹ ("Company") October 9, 2020 Main Brief ("MB") and will not be restated in full here. The Company incorporates Sections I and II of its MB as though fully set forth herein.

On March 20, 2024, a post-evidentiary hearing conference was held. There, both the Company and Michael T. Jennings ("Complainant") requested an opportunity to file Reply Briefs. That request was granted.²

On March 21, 2024, an Order was issued following the post hearing conference which formalized, *inter alia*, Administrative Law Judge Gail M. Chiodo's (hereinafter, the "ALJ") March 20, 2024, ruling permitting Reply Briefs. The March 21, 2024, Order also stated that the deadline for filing Reply Briefs would be determined following a review of a status report from the Complainant indicating whether he wished to reopen the evidentiary record to present expert testimony in light of the Pennsylvania Supreme Court's decision in *Povacz v. Pa. PUC*, 280 A.3d 975 (Pa. 2022) ("*Povacz II*").

On April 12, 2024, the Complainant submitted a status report indicating that he would not be pursuing expert testimony.

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 West Penn Power Company have their own separate and distinct rate district under FirstEnergy Pennsylvania Electric Company's tariff.

² On October 9, 2020, both parties filed Main Briefs. On October 12, 2020, the Complainant filed a Corrected Brief. The Complainant's Main Brief was 238 pages, inclusive of appendices, proposed findings of facts, conclusions of law, and ordering paragraphs. The Complainant's Corrected Brief amends one sentence on p. 58 of his Brief.

Although the parties were permitted to file Reply Briefs on or before November 10, 2020, this matter was stayed prior to that date. This Stay was lifted on November 14, 2023.

On May 17, 2024, the Complainant filed a Motion for Continuance, requesting that this proceeding be continued for six-months, or until November 30, 2024, to allow the Complainant time to recuperate from a medical event.

On October 1, 2024, the ALJ issued an order permitting the submission of Reply Briefs by both parties on or before November 15, 2024, and granting the Complainant's continuance request.

Pursuant to the October 1, 2024, Order, the Company hereby submits its Reply Brief.

II. LEGAL STANDARDS

Under Section 332(a) of the Public Utility Code, the Complainant maintains the burden of proof in this proceeding.³ The first step in carrying the burden of proof is establishing a *prima facie* case that the Company violated the Public Utility Code, the Pennsylvania Public Utility Commission's ("Commission") regulations, or a Commission order. Only if the Complainant establishes a *prima facie* case does it become the responsibility of the respondent to provide rebuttal evidence.⁴ In order to establish a *prima facie* case, more is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established.⁵ Mere bald assertions, personal opinions or perceptions, when not substantiated by facts, do not constitute evidence.⁶

Although the factual burden may shift during a proceeding, the Complainant always maintains the overarching burden of proof. It is clearly established that the Complainant's "burden of proof before administrative tribunals as well as before most civil proceedings is satisfied by establishing a preponderance of the evidence."⁷ A preponderance of evidence is demonstrated

³ 66 Pa.C.S. § 332(a); *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm'n*, 578 A.2d 600 (Pa. Cmwlth. 1990), *alloc. den.*, 602 A.2d 863 (Pa. 1992).

⁴ *Waldron v. Phila. Elec. Co.*, 54 Pa. P.U.C. 98 (Order entered Mar. 14, 1980).

⁵ *Norfolk and Western Ry. v. Pa. Pub. Util. Comm'n*, 413 A.2d 1037 (Pa. 1980).

⁶ *Pa. Bureau of Corrections v. City of Pittsburgh*, 532 A.2d 12 (Pa. 1987).

⁷ *Lansberry*, 578 A.2d at 602.

where the evidence presented is more convincing, even by the smallest degree, than the evidence presented by the opposing party.⁸

In order for the Commission to sustain a formal complaint, the Complainant must demonstrate that an “act or thing done or omitted to be done by any public utility [is] in violation, or claimed violation, of any law which the Commission has jurisdiction to administer, or of any regulation or order of the commission.”⁹ Section 1501 of the Public Utility Code states, in relevant part: “every public utility shall furnish and maintain adequate, efficient, safe and reasonable service and facilities.”¹⁰ As part of formal complaint proceedings, the Commission evaluates the reasonableness of public utility service and facilities pursuant to Section 1501. In complaint proceedings similar to the instant proceeding, the Commission has held that the relevant legal standard is whether the installation of a smart meter constitutes unsafe or unreasonable service in violation of Section 1501 of the Public Utility Code.¹¹ Relatedly, the Court in *Povacz II* made clear that Act 129 does not provide customers with the right to opt-out of smart meter installation at their residence, and that Complainants seeking smart meter related relief must carry a two-fold burden of proof for Section 1501 claims involving the safety of smart meters and radio-frequency (“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,

⁸ *Pa. Pub. Util. Comm’n v. HIKO Energy, LLC*, 2015 Pa. PUC LEXIS 364 (Initial Decision issued Aug. 21, 2015), *supra*.

⁹ 66 Pa.C.S. § 701.

¹⁰ 66 Pa.C.S. § 1501.

¹¹ *Frompovich v. PECO Energy Co.*, 2018 Pa. PUC LEXIS 160 (Opinion and Order entered May 3, 2018); *Susan Kreider v. PECO Energy Co.*, Docket No. C-2015-2469655 (Order on Reconsideration entered January 28, 2016).

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.¹² Once the parties have presented their evidence, the onus then falls on the ALJ to weigh the evidence and determine whether it is more likely than not that the smart meter caused the customer harm.¹³ The Supreme Court concluded that neither fear nor inconclusive scientific research was sufficient to prove that smart meter technology constitutes unsafe service under Section 1501.¹⁴ Further, the 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 may be entitled to an accommodation to the extent allowed by Act 129 and a utility’s tariff.¹⁵

III. SUMMARY OF REPLY ARGUMENT

The Complainant wholly failed to meet his burden of proof that the installation of a smart meter at the service location of 200 Brook Hollow Road, Mount Pleasant, PA 15666 (“Service Location”) would constitute unreasonable service in violation of Section 1501 of the Public Utility Code or would otherwise violate the Public Utility Code, a Commission regulation or order.

The Company has an absolute obligation to install smart meters at all of its customers’ service locations under Act 129 of 2008 (“Act 129”).¹⁶ Neither Act 129 nor subsequent Commission orders related to smart meter installation and deployment permit customers to “opt-out” from smart meter installation.¹⁷ Further, both Act 129 and the Commission’s Implementation Order require that Electric Distribution Companies (“EDCs”) install wireless smart meters with

¹² *Povacz II*, at 1008.

¹³ *Povacz II*, at 1006.

¹⁴ *Povacz II*, at 1005.

¹⁵ *Povacz II*, at 1015.

¹⁶ 66 Pa.C.S. § 2806.1, *et seq.*

¹⁷ *Id.*; see *Smart Meter Procurement and Installation*, Docket No. M-2009-2092655 (Order entered June 24, 2009) (“*Smart Meter Implementation Order*”).

specific functionality. The Company's smart meters adhere to the requirements of Act 129 and the Commission. The smart meter components and deployment of smart meters in the Company's territory were identified in the Company's Smart Meter Deployment Plan ("SMDP"), which was ultimately approved by the Commission on June 20, 2014.¹⁸ The Company will install a smart meter at the Complainant's Service Location in order to remain in compliance with Act 129, related Commission orders, and its SMDP. Despite the Complainant's arguments otherwise, the Company must install a smart meter at the Service Location, as it is required by Act 129, the Company's SMDP, and the Court's holding in *Povacz II*.

In addition, the Complainant failed to establish that the installation of a smart meter constitutes unreasonable service. The Complainant's statements related to health and safety concerns should be rejected as unsupported allegations. The Complainant offered no credible or convincing evidence to support his allegations. Moreover, the Complainant's concerns regarding health and safety are based exclusively upon his own personal beliefs regarding smart meters. The Complainant was not qualified to offer expert testimony and did not present the testimony of an expert on their behalf.¹⁹ Moreover, and importantly, while the Complainant argues that Act 129 does not mandate the installation of smart meters at the Service Location, such a reading of Act 129 was flatly rejected by the Court in *Povacz II*.²⁰

¹⁸ *Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company For Approval of Their Smart Meter Deployment Plan*, Docket Nos. M-2013-2341990, M-2013-2341991, M-2013-2341993, and M-2013-2341994 (Sec. Letter dated June 20, 2014) (hereinafter, "*Smart Meter Deployment Plan*" or "SMDP").

¹⁹ The Company notes that the Complainant expressly declined to present expert testimony through his April 12, 2024 Status Report.

²⁰ *Povacz II*, at 992 ("Our comprehensive reading of Act 129 leads us to conclude that the statute is not ambiguous, and that Section 2807(f)(2) imposes a mandate on EDCs to furnish smart meter technology to all electric customers within an electric distribution service area, regardless of a customer's preference.")

Furthermore, because the Company is not a state actor, it cannot violate the Complainant's alleged constitutional rights.²¹ Thus, any constitutional claims related to the mandated installation of a smart meter at the Service Location directed at the Company are as inappropriate for this proceeding as they are meritless.

Lastly, the Complainant's attempts to shoehorn in excluded, extra-evidence in the briefing stage of this proceeding are inappropriate and should not be considered by the Commission. Indeed, the Complainant had a fulsome opportunity to present all evidence during the Evidentiary Hearing. Much of this evidence was properly objected to and almost all of the Complainant's purported evidence in the form of exhibits was appropriately excluded. Further, the Complainant's unequivocal declination to present expert testimony further weighs against his late attempts to present various unauthenticated and/or excluded evidence in his Main Brief.

The evidence of record and the applicable law weighs heavily against the Complainant's allegations and assertions. Indeed, the lay testimony offered by the Complainant should carry little, if any, weight. Although the Pennsylvania Rules of Evidence are not strictly adhered to at the Commission, the Pennsylvania Supreme Court has unequivocally stated that any relaxation of the rules of evidence in administrative settings cannot allow lay witnesses to testify to technical matters "without personal knowledge or specialized training."²² Lay witness testimony only carries evidentiary weight where the witness has actually perceived the situation, and the opinion is not based on scientific, technical or specialized knowledge.²³ As such, all lay testimony from the Complainant related to more specialized topics, including health, safety, and radio frequency, should be disregarded and given no evidentiary weight under the Pennsylvania Rules of Evidence.

²¹ *Povacz v. Pa. PUC*, 241 A.3d 481, 486 n.9 (Pa. Cmwlth. 2020) ("*Povacz I*").

²² *Gibson v. W.C.A.B.*, 861 A.2d 938, 947 (Pa. 2004) (holding Rules of Evidence 602, 701 and 702 generally applicable in agency proceedings).

²³ Pa.R.E. 701.

Moreover, the overwhelming majority of the Complainant's on-record presentation was expressly rebuffed by the Court in *Povacz II*.

In sum, the Complainant failed to establish by a preponderance of the evidence that the Company violated a Commission statute, regulation, or order. Specifically, the Complainant has not met his burden of proof that the installation of a smart meter constitutes unreasonable service by the Company. Moreover, the Complainant's Main Brief merely litigated much of what was subsequently fully litigated in *Povacz II*. Accordingly, the Company respectfully urges the Commission to dismiss the Complaint with prejudice.

IV. REPLY ARGUMENT

A. THE SUPREME COURT'S *POVACZ II* DECISION RENDERS THE COMPLAINT MOOT AND, EVEN IF NOT MOOT, DISPOSES OF THE SUBSTANTIVE ISSUES IN THIS COMPLAINT PROCEEDING.

The Company submits that the Complaint should be dismissed because the Supreme Court's decision in *Povacz II* renders this complaint proceeding moot and, even if not moot, disposes of the substantive issues in this proceeding.

The Complainant's Main Brief pains to walk through the text and legislative history of Act 129. However, the Complainant's understanding of Act 129 – and the legislative history behind it, and the Commission's interpretation of the same – is obviated and wholly rebuffed by the Court's unequivocal holding in *Povacz II*. (*See* Complainant's MB, pp. 17-19.)

In *Povacz II*, the Pennsylvania Supreme Court held that: (1) Act 129 mandates the systemwide installation of smart meters; (2) the Commission applied the correct burden of proof standard in the smart meter complaint cases arising under Section 1501 of the Public Utility Code; (3) an EDC 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.”²⁴

As explained in the following sections, the instant Complaint is now moot and, even if it were not moot, the *Povacz II* decision disposes of the substantive issues before the Commission.

1. The Instant Complaint Is Moot.

The Supreme Court’s *Povacz II* decision has rendered the instant complaint moot. Consistent with the Court’s ruling in *Povacz II*, customers of the Company, such as the Complainant, 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. *See* 66 Pa.C.S. § 1501. Moreover, under *Povacz II*, smart meter related accommodations available to a customer of the Company must be consistent with the Company’s Commission-approved tariff.

It is well-established that dismissal on mootness grounds is appropriate “unless an actual case or controversy exists at all stages of the judicial or administrative process.”²⁵ “Where ‘intervening changes in the factual matrix of a pending case’ occur which eliminate an actual controversy and make it impossible for the court to grant the requested relief, the case will be dismissed as moot.”²⁶ Moreover, “[a]n issue before the court is moot if, in ruling upon the issue, the court cannot enter an order that has any legal force or effect.”²⁷ The only “limited exceptions” to the mootness doctrine are when: (1) “the conduct complained of is capable of repetition yet

²⁴ *See Povacz II*, at 1014.

²⁵ *Burns v. Dep’t of Human Servs.*, 190 A.3d 758, 762 (Pa. Cmwlth. 2018) (citing *Luzerne Cnty. Children & Youth Servs. v. Dep’t of Pub. Welfare*, 826 A.2d 84, 86 (Pa. Cmwlth. 2003)).

²⁶ *Pagnotta v. Pa. Interscholastic Ath. Ass’n*, 681 A.2d 235, 237 (Pa. Cmwlth. 1996) (emphasis added) (quoting *Zemprelli v. Thornburgh*, 466 A.2d 1123, 1124 (Pa. Cmwlth. 1983)).

²⁷ *Burns*, 190 A.3d at 762 (citation omitted).

evading review”; (2) the case “involves questions important to the public interest”; or (3) “one party” will “suffer some detriment without the Court’s decision.”²⁸

Here, the Complaint is moot because it is impossible for the Commission to grant the Complainant’s request for an opt-out of the smart meter. The Supreme Court held that Act 129 mandates the installation of smart meters and that even if a complainant establishes that the smart meter’s installation would violate Section 1501 of the Public Utility Code, the Complainant is only “entitled to an accommodation to the extent allowed by Act 129 and a utility’s tariff.”²⁹ The only accommodation permitted under the Company’s Commission-approved tariff is installing the smart meter at a different location at the customer’s expense.³⁰ This option has been available to the Complainant throughout this proceeding.

However, the Complainant requests that he be granted an opt-out of the smart meter’s installation entirely, which the Supreme Court held in *Povacz II* is not permissible. (*See* Complainant’s MB, pp. 2, 17-19.) Moreover, nothing in Act 129 or the Company’s Commission-approved tariff provides an opt-out of the smart meter’s installation as an available accommodation. Therefore, the Complaint is moot because it is impossible for the Commission to grant the Complainant’s requested relief.

Further, none of the three exceptions to the mootness doctrine apply here. First, the conduct complained of is not capable of repetition yet evading review. In fact, both the Commonwealth

²⁸ *Driscoll v. Zoning Bd. of Adjustment*, 201 A.3d 265, 269 (Pa. Cmwlth. 2018) (quoting *Clinkscale v. Dep’t of Pub. Welfare*, 101 A.3d 137, 139 (Pa. Cmwlth. 2014)).

²⁹ *Povacz II*, at 1014.

³⁰ FirstEnergy Pennsylvania Electric Company Tariff Rule 4, Electric Pa. P.U.C. No. 1, Original Page 40 (“A Customer desiring the removal, relocation or change of Company facilities or interruption shall submit a request to the Company. The Company may accept or reject said request in its sole and exclusive discretion. If the Company accepts said request, the Customer shall pay in advance the Company’s total estimated cost for any Customer requested temporary interruption in the Customer’s service due to construction, maintenance or other activities.”).

Court and the Supreme Court already reviewed the legal issues raised by EDCs installing smart meters in the *Povacz II* proceeding.

Second, the instant Complaint does not involve questions important to the public interest. Indeed, the only issue raised by this Complaint that arguably rises to the level of public importance, *i.e.*, whether Act 129 mandates the installation of smart meters, was resolved by the Pennsylvania Supreme Court in *Povacz II*.

Third, the Complainant will not suffer a detriment without the Commission's decision on the merits of the Complaint. Indeed, the Complainant has had a full and fair opportunity to fully litigate the claims related to the Complaint prior to the Court's decision in *Povacz II*. Indeed, as explained at further length in Section IV.B(1), *infra*, the Complainant failed to establish that the smart meter's installation and retention would cause him any harm. Also, 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. The only accommodation that the Company can offer the Complainant, even if he prevails in this Complaint, is the accommodation set forth in the Company's Commission-approved tariff, *i.e.*, relocating the meter's location at the customer's expense. As noted previously, that accommodation has been and remains available to the Complainant regardless of whether he prevails in this complaint proceeding. Thus, with or without the Commission sustaining or dismissing the Complaint, the Complainant will be in the same situation.

For these reasons, the Company respectfully submits that the Commission should dismiss the Complaint as moot.

2. Even if the Instant Complaint Were Not Moot, the *Povacz II* Decision Disposes of the Substantive Issues Before the Commission.

Even if the Complaint was not moot, the *Povacz II* decision resolved the substantive issues in this proceeding.

First, the Court's *Povacz II* decision resolved the issue of whether the Company is required by Act 129 to install smart meters for all of its customers, including the Complainant. In *Povacz II*, the Supreme Court "conclude[d] that Act 129 does mandate that EDCs," like the Company, "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."³¹ Moreover, even "[i]f 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."³² Nothing in the Company's tariff permits an opt-out of the smart meter's installation. The only accommodation set forth in the Company's tariff is for the meter to be relocated to a different location and for the customer to pay for the estimated relocation costs.³³ As a result, the Company must install smart meters for all of its customers, including the Complainant, under Act 129.

Second, the Supreme Court's decision resolved any issue about the Commission's burden of proof standard in smart meter complaint cases, which requires Complainants to prove, by a preponderance of the evidence, that there was a "conclusive causal connection" between the smart meters' RF emissions and adverse health effects. As noted by the Supreme Court, the Commission has been using the "conclusive causal connection" standard in RF emission cases "for almost three

³¹ *Povacz II*, 1014.

³² *Id.*

³³ See note 30, *supra*.

decades.”³⁴ In these types of cases “where scientific evidence is required to establish the safety of a service or facility, use of the evidentiary standard of ‘conclusive causal connection’ to assess the evidence is correct.”³⁵

Third, the *Povacz II* decision resolved the Complainant’s claim that the Company would violate his constitutional rights by installing the smart meter at the Service Location. The Commonwealth Court previously found that “[c]onstitutional protections apply against state actors,” and “PECO is not a state actor in relation to its installation of smart meters and provision of electricity to its customers.”³⁶ This finding was not disturbed by the Supreme Court’s *Povacz II* decision. Therefore, because PECO and the Company are similarly-situated EDCs, the Company is not a state actor that can violate the Complainant’s constitutional rights.

For these reasons, the Supreme Court’s *Povacz II* decision renders this complaint moot and, at the very least, disposes of the substantive issues in this matter.

B. EDCs MUST INSTALL SMART METERS FOR ALL CUSTOMERS.

In *Povacz II*, the Supreme Court held that EDCs, such as the Company, must install smart meters for all of their customers and that customers cannot opt out of the installations. Section 2807(f) of the Public Utility Code prescribes that EDCs, like the Company, must file smart plans and “**shall** furnish smart meter technology” in any of the three situations outlined in Section 2807(f)(2).³⁷ In interpreting the smart meter provisions of Act 129, the Commission correctly declared that EDCs must “deploy smart meters system-wide” because of the requirement in Section 2807(f)(2)(iii) that smart meters be deployed “in accordance with a depreciation schedule

³⁴ *Povacz II*, at 1004.

³⁵ *Id.*, 1007.

³⁶ *Povacz v. Pa. PUC*, 241 A.3d 481, 486 n.9 (Pa. Cmwlth. 2020).

³⁷ 66 Pa.C.S. § 2807(f)(1)-(2) (emphasis added).

not to exceed 15 years.”³⁸ In other words, Section 2807(f)(2)(iii) directs EDCs to install new smart meters for all customers and to depreciate those meters over a 15-year period. The Commission also “recognize[d] that deployment of smart meters on a piecemeal or individual basis could involve greater costs than a systematic system-wide deployment.”³⁹ Relatedly, the Supreme Court explained in *Povacz II* that “[i]f the General Assembly had intended to provide electric customers the ability to opt-out of smart meter installation, it would have used the same customer-choice language it used for the optional time-of-use rates and real-time price programs”⁴⁰

By way of additional background, on October 15, 2008, Act 129 was signed into law and codified as part of the Public Utility Code (“Code”).⁴¹ Act 129 required EDCs with at least 100,000 customers, such as the Company, to file a smart meter technology procurement and installation plan (“SMP Plan”) with the Commission for approval.⁴² 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.⁴³

Under Act 129, the Company has an absolute obligation to install smart meters at all of its customers’ service locations. Neither Act 129 nor subsequent Commission orders and/or appellate court decisions related to smart meter installation and deployment permit customers to “opt-out”

³⁸ *Smart Meter Implementation Order*, p. 14.

³⁹ *Id.*, pp. 9, 14; *see also Springirth v. Nat’l Fuel Gas Distrib. Corp.*, 1991 Pa. PUC LEXIS 44, at *1-3, 6, 16-17 (Order entered Apr. 12, 1991) (dismissing complaint of customer seeking to make installation of automated meter reading devices optional, noting that the PUC previously found in another case that “[t]he customer should not be given the option of refusing installation of equipment” because “[t]o permit customer discretion in this area would be inefficient and uneconomical”) (quoting *Stenker v. The York Water Co.*, Docket No. C-871318 (Order entered July 27, 1987)).

⁴⁰ *Povacz II*, at 999.

⁴¹ 66 Pa.C.S. § 101, *et seq.*

⁴² 66 Pa.C.S. § 2807(f).

⁴³ 66 Pa.C.S. § 2807(f)(2).

from smart meter installation. Consistent with this mandate, the Company's Commission-approved SMDP explicitly states that no opt-out option is available.⁴⁴ The Commission-approved SMDP mandates 100% of its meters to be replaced with smart meters. Therefore, the Complainant's request for an opt-out should be rejected.

Pursuant to Section 2807(f) of the Public Utility Code, the Company jointly filed its Petition for Approval of Smart Meter Technology Procurement and Installation Plan with Pennsylvania Electric Company, Pennsylvania Power Company and Metropolitan Edison Company (together with West Penn, collectively referred to hereafter as "the Companies") on August 14, 2009 ("2009 SMP Plan").⁴⁵ The Commission issued an Order on June 9, 2010, approving the 2009 SMP Plan with certain modifications.⁴⁶ 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.⁴⁷ On June 16, 2014, the Companies submitted their revised Smart Meter Deployment Plan, which *intra alia* accelerated

⁴⁴ *Smart Meter Deployment Plan*, at 9.

⁴⁵ *Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company For Approval of Smart Meter Technology Procurement and Installation Plan*, Docket No. M-2009-2123950 (Petition dated Aug. 10, 2009).

⁴⁶ *Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company For Approval of Smart Meter Technology Procurement and Installation Plan*, Docket No. M-2009-2123950 (Order entered June 9, 2010).

⁴⁷ *Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company For Approval of Their Smart Meter Deployment Plan*, Docket Nos. M-2013-2341990, M-2013-2341991, M-2013-2341993, M-2013-2341994 (Petition filed December 31, 2012).

the smart meter deployment schedule laid out in their original Deployment Plan.⁴⁸ Under the Revised Deployment Plan, the Companies proposed to deploy 170,000 smart meters by the end of 2015.⁴⁹ In its June 25, 2014 Opinion and Order, the Commission recognized the benefits of early deployment of smart meters and approved the revised Smart Meter Deployment Plan, stating:

[T]his Commission has already observed the benefits of early deployment. We find that the use of Penn Power as a case study may help the Companies identify other more cost-effective meter deployment strategies that can then be leveraged by FirstEnergy's other operating companies. If deployment and operational savings prove very positive, FirstEnergy may also be able to further accelerate smart meter deployment, thus enabling an option to enhance customer savings even more.⁵⁰

In this proceeding, the Complainant has argued that a smart meter should not be installed at the Service Location. This argument was based upon the Complainant's personal beliefs, including (a) that smart meters present health and safety issues, and (b) that the installation of a smart meter at the Service Location is not required by Act 129 but, rather, is optional.

At the outset, the Company notes that Commission precedent is uniform that the Commission cannot grant exceptions to the statutory directive that smart meters be installed by allowing customers to "opt-out." Neither the Company's Commission-approved SMDP nor Act 129 permit such opt-outs to occur.⁵¹ Furthermore, Section 2807(f)(2)(i) provides:

(2) Electric distribution companies shall furnish Smart Meter technology as follows:

⁴⁸ *Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company 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).

⁴⁹ *Id.*

⁵⁰ *Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company For Approval of Their Smart Meter Deployment Plan*, Docket Nos. M-2013-2341990, M-2013-2341991, M-2013-2341993, M-2013-2341994, p. 16 (Opinion and Order entered June 25, 2014).

⁵¹ *See Gorash v. West Penn Power Co.*, Docket No. C-2018-3006149 (Initial Decision issued Sept. 1, 2020), made final without further Commission action (Order entered Oct. 1, 2020).

(i) Upon request from a customer that agrees to pay the cost of the Smart Meter at the time of the request.⁵²

The Complainant failed to present any credible evidence to support his allegations that the Company's smart meter deployment is unsafe or violates Section 1501 of the Public Utility Code. Indeed, the crux of the Complainant's argument(s) was that Act 129 does not mandate smart meters at all. The Complainant did not substantiate his health and safety concerns on the record in this proceeding. In view of the Complainant's failure to fulfill his burden of proof, the Complaint should be denied and dismissed with prejudice.

1. The Installation of a Smart Meter Does Not Constitute Unreasonable or Inadequate Service.

Throughout the Complaint – and through the Evidentiary Hearing and in his Main Brief - the Complainant alleges various vague health and safety concerns related to smart meters but failed to provide any reliable evidence in support of these allegations at the Evidentiary Hearing. As such, the Complainant failed to establish his burden of proof to show that the deployment of smart meters is unreasonable or constitutes inadequate utility service.

Pursuant to Section 1501 of the Code, public utilities have a duty to maintain safe, adequate 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. Section 1501 of the Code provides, in pertinent part:

§ 1501. Character of service and facilities
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 also shall be reasonably continuous and without unreasonable

⁵² 66 Pa.C.S. § 2807(f)(2)(i).

interruptions or delay. Such service and facilities shall be in conformity with the regulations and orders of the commission.⁵³

The Complainant presented no expert testimony to corroborate his health, safety, or privacy allegations contained in the Complaint. In addition, the Complainant presented no evidence that he is qualified to offer expert testimony as engineers, doctors or other medical professionals.

As such, the Complainant wholly 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 Public Utility Code. In view of the Complainant's fulsome failure to fulfill his burden of proof, the Complaint should be denied and dismissed with prejudice.

2. The Installation of a Smart Meter at the Service Location Does Not Constitute Discriminatory Service.

The Complainant's allegations that the mandated installation of smart meters for all of the Company's customers is discriminatory and in violation of Section 1502 of the Public Utility Code is meritless. (See Complainant's MB, p. 21.) Indeed, as explained by the Court in *Povacz II*, "[c]onsidering the overall goal of Act 129 to promote energy efficiency and conservation in Pennsylvania, the plain language of Section 2807(f)(2) mandates the system-wide installation of smart meter technology, including smart meters, with no opt-out provision."⁵⁴ Here, to grant the Complainant an opt-out of the smart meter's installation would be discriminatory, rather than the Complainant's inverse argument. Indeed, because the Company is required to install smart meters for all of its customers, permitting a limited opt-out for the Complainant may raise Section 1502 concerns; applying the Court's holding in *Povacz II*, and the Company's Commission-approved Tariff, does not.

⁵³ 66 Pa.C.S. § 1501.

⁵⁴ *Povacz II*, at 998.

3. The Complainant’s Allegations with Respect to the Americans with Disabilities Act (“ADA”) and the Rehabilitation Act are Unfounded and Non-Jurisdictional Before the Commission.

The Complainant argues that the Company violated the ADA in refusing him to provide him with an “ADA accommodation,” among other accommodations based exclusively on federal or constitutional law related to disability accommodations. (Complainant’s MB, p. 3. 19-22.) This argument is meritless, and this issue is well settled. Determinations regarding the Americans with Disabilities Act, or disability law, generally, are beyond the scope of the Commission’s limited jurisdiction and should not be considered here.⁵⁵

4. The Complainant’s Assertion That the Company has Violated Federal Communications Commission Regulations is Unsupported and Meritless.

In their Main Brief, the Complainant argues, for the first time, that the Company did not comply with the requirements of certain Federal Trade Commission (“FCC”) regulations. (*See* Complainant’s MB, pp. 16, 28.) First, the Complainant did not raise these allegations until their Main Brief. Indeed, at no point during the lengthy procedural history of this proceeding did the Complainant contend that the Company did not comply with FCC regulations. The Complainant’s attempt to advance these allegations for the first time in his Main Brief (*i.e.*, after the record has closed) is improper and would deprive the Company of an opportunity to present evidence in response to the same.⁵⁶

⁵⁵ *Frompovich v. PECO Energy Company*, 2018 Pa. PUC LEXIS 160, *69, Docket No. C-2015-2474602 (Order Entered May 3, 2018) (“We find the Complainant’s Exceptions on this issue to be meritless. We affirm the ALJ’s conclusion that it is beyond the jurisdiction of Commission to determine whether the Complainant has a disability or a cause of action under the American with Disabilities Act.”)

⁵⁶ *Petition of Duquesne Light Co. for approval of smart meter procurement and installation plan*, 2010 Pa. PUC LEXIS 154, *63-64, Docket No. M-2009-2123948 (Initial Decision issued Jan. 28, 2010) (“[DEP’s] position in this proceeding was set forth for the first time in its Main Brief. This deprived all parties from testing the reasonableness of its position during the hearing or of addressing it in their respective Main Briefs.”) *adopted as modified* (Order Entered Apr. 15, 2010).

Furthermore, the record is devoid of evidence to support the Complainant's new allegations on this point. Indeed, the Complainant attempts to argue that the Company failed to "address fires or surges." (Complainant's MB, p. 17.) That said, the Complainant appears to reallocate the burden of proof to the Company, inappropriately, as he failed to introduce any substantive or credible evidence on the same. As the Complainant admits, "all of [Complainant's] exhibits showing pictures of explosions and fires and news articles of such were wrongfully expunged." (Complainant's MB, p. 17.) The Complainant simply overlooks the evidentiary rulings made against him in his attempt to argue his case through the briefing stage of this proceeding. In doing so, the Complainant also relies on alleged violations of 52 Pa. Code § 57.194. (Complainant's MB, p. 10) and 52 Pa. Code § 57.194. (Complainant's MB, pp. 10-11.) However, these arguments fail because the Complainant has failed to carry his burden of proof to show that the deployment of smart meters is unreasonable or constitutes inadequate utility service in the first instance.

C. THE COMPLAINANT'S ATTEMPTS TO RELY ON VOLUMINOUS EXTRA-RECORD EVIDENCE IS INAPPROPRIATE AND SHOULD NOT BE CONSIDERED.

Throughout his Main Brief, the Complainant improperly raises arguments that were not raised before the Commission and attempts to rely on extra-record evidence. Indeed, throughout his Main Brief, the Complainant makes reference to:

- (1) The "Sage Report" (Complainant's MB, pp. 12-13.)
- (2) Various websites not authored by the Complainant nor authenticated at the Evidentiary Hearing (Complainant's MB, p. 14.)
- (3) Purported testimony of witnesses from other, unrelated Commission proceedings (Complainant's MB, pp. 9.)
- (4) Research Summaries by "Dr. Henry Lai" (Complainant's MB, pp. 7-8.)

- (5) The “American Medical Association’s Medical Code of Ethics (Complainant’s MB, p. 17.)

None of these purported sources are part of the record in this proceeding, and should not be relied upon in making a decision in this case.

Further, the Complainant attempts to introduce and rely on several pieces of evidence appended to his Main Brief that are not part of the record in this proceeding, such as the following:

- A. Complainant’s Main Brief, Appendix A
- B. Complainant’s Main Brief, Appendix B
- C. Complainant’s Main Brief, Appendix C
- D. Complainant’s Main Brief, Appendix D
- E. Complainant’s Main Brief, Appendix E
- F. Complainant’s Main Brief, Appendix F
- G. Complainant’s Main Brief, Appendix G
- H. Complainant’s Main Brief, Appendix H-1
- I. Complainant’s Main Brief, Appendix H-2
- J. Complainant’s Main Brief, Appendix H-3
- K. Complainant’s Main Brief, Appendix I
- L. Complainant’s Main Brief, Appendix J
- M. Complainant’s Main Brief, Appendix K
- N. Complainant’s Main Brief, Appendix L
- O. Complainant’s Main Brief, Appendix M
- P. Complainant’s Main Brief, Appendix N
- Q. Complainant’s Main Brief, Appendix O

The Complainant cannot introduce and rely on this extra-record evidence.⁵⁷ Indeed, to permit the Complainant to present such evidence at this stage of the proceeding would deny the Company due process because the Company has no opportunity to present any evidence in rebuttal.⁵⁸ Therefore, the Commission should entirely disregard the Complainant's extra-record in this proceeding. Moreover, much of this evidence was properly excluded during the Evidentiary Hearing.⁵⁹ Furthermore, certain of the Complainant's allegations in his Main Brief relate to irrelevant and unsubstantiated concerns wholly unrelated to this smart meter dispute. (Complainant's MB, pp. 46-48), or were concerns/evidence that were voiced, and ultimately excluded from the record, during the Evidentiary Hearing. (Complainant's MB, pp. 49-53.) These concerns are meritless, irrelevant to the instant proceeding, and should not be considered.

D. THE COMPLAINANT'S ALLEGATIONS WITH RESPECT TO THE ADMINISTRATIVE PROCESS ARE MERITLESS.

Throughout the Complainant's Main Brief, he casts various aspersions related to alleged bias and prejudice against him throughout the litigation and hearing process as a *pro se* complainant. (Complainant's MB, pp. 24-26.) Pointedly, the Complainant explains that he has "heard that no one has won their case before the [Commission] in the 'smart' meter cases." (Complainant's MB, p. 24.) In turn, the Complainant takes this as evidence of prejudice. This argument misfires. The Commission and appellate courts since *Povacz II* have been bound by *Povacz II*'s reasoning. *Povacz II*'s reasoning, as applied to the instant case, must result in denial

⁵⁷ See *Kyu Son Yi v. State Bd. of Veterinary Med.*, 960 A.2d 864, 873 (Pa. Cmwlth. 2008) (citation omitted); *Umedman v. Unemployment Comp. Bd. of Review*, 52 A.3d 558, 564 (Pa. Cmwlth. 2012) (citations omitted); *Wheeler v. Delbalso*, 2015 Pa. Commw. Unpub. LEXIS 809, at *21 (Pa. Cmwlth. 2015) (citations omitted).

⁵⁸ See, e.g., *Hess v. Pa. PUC*, 107 A.3d 246, 266 (Pa. Cmwlth. 2014) (stating that "[a]mong the requirements of due process are notice and an opportunity to be heard on the issues, to be apprised of the evidence submitted, to cross-examine witnesses, to inspect documents, and to offer evidence in explanation or rebuttal"), appeal denied, 2015 Pa. LEXIS 1457 (Pa. 2015).

of the Complaint as the Complainant has failed to rebuff that: (1) Act 129 mandates the systemwide installation of smart meters; (2) an EDC cannot be required to provide an accommodation to a customer absent a Section 1501 violation; and (3) 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.”⁶⁰ Because the Complainant – and others before him – have failed to carry their burden to show a Section 1501 violation, he is not entitled to an accommodation. Moreover, to the extent that the Complainant did carry his burden, any accommodation must be allowed by the Company’s Tariff, which is apparently unacceptable relief to the Complainant.

Similarly, the Complainant raises gripes about the discovery process in this proceeding. (Complainant’s MB, pp. 27-28.) These concerns are entirely meritless. Even if they carried water, raising concerns about discovery disputes through the Main Brief is a late and unsuitable avenue to lodge alleged problems that occurred more than one-year prior to the Evidentiary Hearing in July of 2020.

Relatedly, the Complainant argues that the formal complaint procedure, in and of itself, fails to “afford due process to residential customers who are disabled, who are contesting AMI exposure as hazardous to the health; who cannot afford to pay for experts and lawyers to cross examined [the Company’s] hired experts; and, to understand and respond to all the legal processes involved.” (Complainant’s MB, p. 27.) This argument is an attempt to shift the burden of proof to the Company. As explained in Section II, *supra*, it is the Complainant’s burden of proof in this proceeding and attempts to invert this well-established burden should be rejected.

Further, the Complainant’s concerns with the transcript of the July 2020 Evidentiary Hearings are likewise meritless. Section 5.253 of the Commission’s regulations dictates that:

⁶⁰ See *Povacz II*, at 1014.

- (a) A correction in the official transcript may be made only to make it accurately reflect the evidence presented at the hearing and to speak the truth.
- (b) Proposed corrections of a transcript may be submitted by either of the following means:
 - (1) By written stipulation by the parties of record who were present when the transcription was taken.
 - (2) Upon written request of one or more parties of record present when the transcription was taken.
- (c) Proposed corrections shall be filed as follows:
 - (1) Within 10 days after the transcript has been filed with the Commission.
 - (2) Within 10 days after the electronically recorded testimony has been reviewed.
 - (3) Upon permission of the presiding officer granted prior to the closing of the record.
- (d) Objections or other comments to the proposed corrections shall be filed within 10 days of service of the proposed corrections.
- (e) Proposed corrections and objections or other comments shall be served upon the parties of record present when the original transcription was taken.
- (f) The presiding officer will rule upon a proposed correction of a transcript within 20 days of its receipt. A request for corrections not acted upon within 20 days is deemed to be:
 - (1) Denied if opposed in a timely manner.
 - (2) Granted if unopposed.
- (g) Subsections (a)—(f) supersede 1 Pa. Code § 35.132 (relating to transcript corrections).

52 Pa. Code § 5.253 (emphasis added).

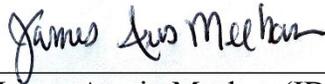
The Complainant did not make any proposed corrections prior to the briefing stage of this proceeding, well past the Commission's deadline(s) for proposed corrections. As such, these concerns are untimely and meritless.

V. CONCLUSION

WHEREFORE, FirstEnergy Pennsylvania Company on behalf of its West Penn Rate District respectfully requests that Administrative Law Judge Gail M. Chiodo recommend that the Pennsylvania Public Utility Commission dismiss the Formal Complaint of Michael Jennings with prejudice.

Respectfully submitted,

Dated: November 15, 2024



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**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

MICHAEL JENNINGS

v.

WEST PENN POWER COMPANY

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:
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Docket No. C-2018-3006031

CERTIFICATE OF SERVICE

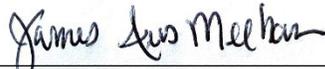
I hereby certify that I have this day served a true copy of the Reply Brief of FirstEnergy Pennsylvania Electric Company (West Penn Rate District) upon the individuals listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant).

Service by First Class Mail, postage prepaid, and electronic mail as follows:

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Administrative Law Judge Gail M. Chiodo
gchiodo@pa.gov

Dated: November 15, 2024


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