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November 18, 2024

VIA ELECTRONIC FILING

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

Re: Jeannette and Craig Pavlick v. West Penn Power Company
Docket No. C-2018-3002723

Dear Secretary Chiavetta:

Enclosed for filing please find the Replies of FirstEnergy Pennsylvania Electric Company, (“West Penn Rate District¹”) to the Exceptions of Jeannette and Craig Pavlick regarding the above-referenced matter. This document has been served on all parties as shown in the Certificate of Service.

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

Respectfully submitted,

Tori L. Giesler

TLG/mlr

Enclosures

c: As Per Certificate of Service
Office of Special Assistants (via email at ra-OSA@pa.gov)

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 (“FE PA”). Due to the merger transaction, FE PA became successor in interest to all matters previously belonging to the individual Pennsylvania operating companies. 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.

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Jeannette and Craig Pavlick,	:	
	:	
Complainants,	:	
	:	
v.	:	Docket No. C-2018-3002723
	:	
West Penn Power Company,	:	
	:	
Respondent	:	

**REPLY EXCEPTIONS OF WEST PENN POWER COMPANY TO THE
EXCEPTIONS OF JEANNETTE AND CRAIG PAVLICK**



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I. INTRODUCTION

FirstEnergy Pennsylvania Electric Company, on behalf of its West Penn Rate District¹ (the “Company”) hereby file its Replies to the Exceptions of Jeannette and Craig Pavlick (“Complainants”). The Company was served with the Complainants’ Exceptions on November 7, 2024.² Through their Exceptions, the Complainants take issue with various portions of the well-reasoned Initial Decision (“ID”) issued by the Administrative Law Judge Mary D. Long (hereinafter, the “ALJ”) on June 5, 2024. The ID dismissed the Complaint because the Complainants failed to meet their burden of proof. Indeed, at the September 29, 2020 Evidentiary Hearing, the Complainants presented their case on the contention that Act 129³ does not mandate the installation of smart meters at customers’ service addresses and that smart meters present safety concerns. (ID, at p. 6.) The Complainants’ reading of Act 129 and its smart meter mandate was expressly rebuffed by the Pennsylvania Supreme Court in *Povacz II*⁴ and is entirely meritless. Similarly, the Complainants offered no credible or admissible evidence to support their contention that smart meters are unsafe. (ID, at p. 6.)

Accordingly, the Company respectfully requests that the Pennsylvania Public Utility Commission (“Commission”) deny the Complainants’ Exceptions and adopt the ID without modification.

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 The Exceptions were served upon the Company via Secretarial Letter on November 7, 2024, as the Complainants did not serve the Company upon filing the Exceptions in June of 2024.

³ 66 Pa.C.S. §§ 2806.1–2807 (“Act 129”).

⁴ *Povacz v. Pa. PUC*, 280 A.3d 975 (Pa. 2022) (“*Povacz II*”).

II. REPLY TO EXCEPTION 1: THE COMMISSION IS BOUND BY THE SUPREME COURT'S DECISION IN POVACZ II

Through Exceptions, the Complainants attempt to relitigate the Supreme Court of Pennsylvania's decision in *Povacz II*. (Complainant's Exception No. 2, at pp. 11-25.) The arguments levied against *Povacz II*, and for the purported legislative history of Act 129, are meritless and should be rejected.

Indeed, the Complainants' reading of Act 129 and their requested relief is expressly forbidden by the Court's holding in *Povacz II*. On August 16, 2022, the Supreme Court of Pennsylvania issued its Opinion affirming in part and reversing in part the Commonwealth Court's decision in *Povacz I*.⁵ Specifically, the Supreme Court in *Povacz II* 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 Code; (3) an Electric Distribution Company ("EDC") 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."⁶

As clearly explained by the Court in *Povacz II*:

Considering 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.⁷

Therefore, the Company must install the smart meter at the Complainants' Service Address at 4200 Colonial Drive, Murrysville, PA 15668 ("Service Address"). Moreover, even if the Complainants

⁵ *Povacz v. Pa. PUC*, 241 A.3d 481 (Pa. Cmwlth. 2020) ("*Povacz I*")

⁶ *See Povacz II*, 280 A.3d 975, 1012-1014 (Pa. 2022).

⁷ *Povacz II*, at 998.

were to prove a Section 1501 violation – which they have not and cannot – they would only be entitled to “an accommodation to the extent allowed by Act 129 and a utility’s tariff.”⁸ Nothing in the Company’s tariff provides for an opt-out of the smart meter. Rather, the only accommodation that is available to customers is that the meter be relocated to a mutually-agreeable location at the customer’s expense.⁹ This option has been available to the Complainants throughout this proceeding.

The Company has an absolute obligation to install smart meters at all of its customers’ service locations under Act 129 and *Povacz II*. Neither Act 129 nor *Povacz II* permit customers to opt-out from smart meter installation. Further, both Act 129 and the Commission’s Implementation Order¹⁰ require that electric distribution companies (“EDC”) like the Company to install wireless smart meters with specific functionality. The Company is legally required to install the smart meters by the Public Utility Code, the Commission’s orders, and the Company’s Commission-approved Smart Meter Deployment Plan.¹¹ On June 24, 2009, the Commission issued its Smart Meter Implementation Order, which set forth requirements for the smart meter plans and procedures for the submission, review, and approval of the smart meter plans.¹²

On December 31, 2012, Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company, and West Penn Power Company (collectively, “the Companies”)

⁸ *Povacz II*, at 1014; *See* 66 Pa. C.S. § 1501.

⁹ 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.”)

¹⁰ *see Smart Meter Procurement and Installation*, Docket No. M-2009-2092655 (Order entered June 24, 2009) (“*Implementation Order*”).

¹¹ *See* 66 Pa.C.S. § 2807(f); *Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company, and Pennsylvania Power Company for Approval of Smart Meter Technology Procurement and Installation Plan*, Docket No. M-2009-2123950 (Order June 9, 2010).

¹² *See Smart Meter Procurement and Installation*, Docket No. M-2009-2092655 (Order entered June 24, 2009).

filed their Joint Petition for Approval of their Smart Meter Deployment Plan in compliance with the *Implementation Order*, 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 98.5% 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.¹³

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. Under the Revised Deployment Plan, the Companies proposed to deploy 170,000 smart meters by the end of 2015.¹⁴ The Commission entered its Opinion and Order approving the Revised Deployment Plan on June 25, 2014.¹⁵

Here, the Complainants' requests for relief directly conflict with the Public Utility Code, the Commission's regulations, the *Implementation Order*, the Revised Deployment Plan, and the Court's holding in *Povacz II*. Therefore, their arguments on this point should be denied, as it is clear that Act 129 mandates the system-wide installation of smart meters for the Company.

Furthermore, the Complainants' attempts to rely on extra-record evidence should be disregarded. In their Exceptions, the Complainants reproduce alleged testimony from a different

¹³ *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).

¹⁴ *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. 8 (Order entered June 25, 2014) ("*2014 Smart Meter Order*").

¹⁵ See *2014 Smart Meter Order*.

complaint proceeding to which the Complainants and the Company were not party to. (Complainants' Exception No. 2, at pp. 15-18.) This argument is not based on the record, and is an inappropriate attempt to shoehorn additional and irrelevant evidence for consideration at this late stage in the proceeding. As such, the Commission should disregard the Complainants' extra-record claims.

Additionally, the *Povacz II* decision resolved the Complainants' claim that the Company would violate their constitutional rights by installing the smart meter at the Service Address. (Complainants' Exception 1, at p. 24.) 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." 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 Complainants' constitutional rights. As such, the Complainants' constitutional argument(s) should be rejected.

III. REPLY TO EXCEPTION 2: THE COMPLAINANTS' ARGUMENTS WITH RESPECT TO THE FUNCTIONALITY AND MANDATORY INSTALLATION OF SMART METERS ARE MERITLESS AND UNSUPPORTED

The Complainants also except to the ID on the basis that, according to the Complainants, the "ALJ erred in failing to consider the FACT that the Commission's policy mandating universal installation of smart meters, would **force** the Complainants' properties to be **used** by [the Company] for purposes other than the collection of the Complainants' electricity usage data." (Complainants' Exception 2, at p. 26 (emphasis in original).) This argument is entirely unsupported by the record and is expressly rebuffed by the Court's holding in *Povacz II*. This is

explained in full in Section II, *supra*, and will not be restated in full here.¹⁶ Similarly, the Complainants' constitutional allegations are addressed in Section II, *supra*, and will not be restated here.

As such, the Complainants' various contentions on this point are baseless. As described above, *Povacz II* requires the installation of smart meters at the Complainants' Service Address. Furthermore, the Company cannot violate the Complainants' constitutional rights because it is not a state actor.¹⁷

IV. REPLY TO EXCEPTION 3: THE COMPLAINANTS' PROCEDURAL CONCERNS ARE MERITLESS AND SHOULD BE REJECTED

In Exception No. 3, the Complainants raise various procedural concerns with respect to various discovery processes throughout the course of this proceeding. (Complainants' Exception 3, at pp. 38-40.) None of these concerns warrant modifying or reversing the ID, nor are they appropriately raised at this late stage in the proceeding.

First, the Complainants identify alleged errors on the part of the Company with respect to certain discovery requests not in the record in this proceeding. These arguments are irrelevant to the ID's determination that the Complainants failed to carry their burden of proof. Indeed, the Commission has extensive regulations with respect to discovery rules and procedures for before the Commission.¹⁸ To the extent that the Complainants believed that the Company failed to adhere to the Commission's discovery rules – which it complied with – the Complainants could have filed a motion for sanctions pursuant to 52 Pa. Code § 5.371, or formally objected to the requests pursuant to 52 Pa. Code § 5.342(c). They did not. As such, to raise these concerns formally for

¹⁶ See also, Company Main Brief, Section (B)(1)-(2).

¹⁷ *Povacz I*, 241 A.3d 481, 486 n.9.

¹⁸ See 52 Pa. Code §§ 5.321 – 5.373.

the first time through exceptions, more than four (4) years after the Evidentiary Hearing took place, is untimely, inappropriate, and these concerns should be disregarded.

Second, the Complainants' allegations with respect to the Protective Order entered in this proceeding are meritless.¹⁹ (Complainants' Exception 3, at pp. 39-40.) The Complainants incorrectly argue that the Protective Order issued in this proceeding "provided no protection to the Complainants' data or their children's data who lived at the residence." (Complainants' Exception 3, at p. 39.) This is untrue. To the extent that the Complainants sought protection under the Protective Order during the discovery process, the Protective Order explicitly explained that:

That the information subject to this Protective Order is, all correspondence, documents, data, information, studies, methodologies and other materials, in whatever form produced, stored or contained, including computerized memory, magnetic, electronic or optical media, furnished in this proceeding that the producing party believes to be of a proprietary or confidential nature and are so designated by being stamped "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" protected material. Such materials are referred to in this Protective Order as "Proprietary Information." When a statement or exhibit is identified for the record, the portions thereof that constitute Proprietary Information shall be designated as such for the record.²⁰

Thus, the Complainants' potentially confidential, or highly confidential, information provided in discovery could have been marked as such in order to receive protection under the Protective Order. The Complainants do not cite to a single piece of evidence offered in this proceeding that they believe should have been, but was not, afforded proprietary information pursuant to the Protective Order. As such, the Complainants concerns on this point should be rejected.

¹⁹ See Protective Order, Docket No. C-2018-3002727 (issued Oct. 24, 2019).

²⁰ Protective Order, ¶ 3.

V. **REPLY TO EXCEPTION 4: THE COMPLAINANTS FAILED TO CARRY THEIR BURDEN OF PROOF**

In Exception No. 4, the Complainants argue that the ALJ erred in determining that the Complainants “failed to sustain their burden of proving that a smart meter would cause harm.” (Complainants’ Exception 4, at p. 41.) This is incorrect. While the Complainants argue that the burden of proof was “misplaced” in this proceeding, the Supreme Court’s holding in *Povacz II* unequivocally explained that “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.”²¹ Further, “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.”²² A conclusive causal connection in order to carry the Complainants’ burden of proof requires expert evidence.²³ The Complainants presented no expert evidence, thus, were foreclosed from carrying their burden of proof in order to prevail in this proceeding.

The Complainants also levy various arguments premised on extra-record evidence not in the record in this proceeding. (Complainants’ Exception 4, at pp. 41-42.) As this evidence is not in the record in this proceeding, and/or was properly excluded during the Evidentiary Hearing, it is not properly considered by the Commission in evaluating the Complainants’ Exceptions.

²¹ *Povacz II*, at 1007.

²² *Povacz II*, at 983-984.

²³ *Povacz II*, at 1014.

IV. CONCLUSION

WHEREFORE, for the foregoing reasons, and those set forth in the Initial Decision, the Exceptions of Jeannette and Craig Pavlick should be denied.



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Date: November 18, 2024

Counsel for FirstEnergy Pennsylvania
Electric Company (West Penn Rate District)

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing document upon the individuals listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant).

Service by electronic mail only as follows:

Jeannette and Craig Pavlick
nettpav@yahoo.com

Administrative Law Judge Mary D. Long
malong@pa.gov

Dated: November 18, 2024



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