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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: Andrew and Theresa Sabatini v. West Penn Power Company
Docket No. C-2018-3005177

Dear Secretary Chiavetta:

Enclosed for filing please find the Replies of FirstEnergy Pennsylvania Electric Company, (“West Penn Rate District¹”) to the Exceptions of Andrew and Theresa Sabatini 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**

Andrew and Theresa Sabatini,	:	
	:	
Complainants,	:	
	:	
v.	:	Docket No. C-2018-3005177
	:	
West Penn Power Company,	:	
	:	
Respondent	:	

**REPLY EXCEPTIONS OF WEST PENN POWER COMPANY TO THE
EXCEPTIONS OF ANDREW AND THERESA SABATINI**



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I. INTRODUCTION

FirstEnergy Pennsylvania Electric Company, on behalf of its West Penn Rate District¹ (the “Company”) hereby files its Replies to the Exceptions of Andrew and Theresa Sabatini (“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 Emily I. DeVoe (hereinafter, the “ALJ”) on June 4, 2024. The ID dismissed the Complaint because the Complainants failed to meet their burden of proof. Indeed, at the February 20, 2020 Evidentiary Hearing, the Complainants presented their case on the sole contention that Act 129 does not mandate the installation of smart meters at customers’ service addresses. (ID, at p. 18.) This position was expressly rebuffed by the Pennsylvania Supreme Court in *Povacz II*³ and is entirely meritless.

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

II. REPLY TO EXCEPTION 1: THE COMMISSION HAS JURISDICTION OVER THE COMPLAINT

In their Exceptions, the Complainants take issue with the ALJ's conclusion that the Commission has jurisdiction to consider the Complaint. (Complainants' Exception No. 1, at pp. 6-7.) The Complainants argue, for the first time, that "this is not a matter for the [Commission], it is a matter for the Supreme Court of Pennsylvania, the General Assembly of the State of Pennsylvania, and/or the Federal Court systems." (Complainant's Exception No. 1, at p. 8.) This argument is meritless. As the ID correctly explained, Section 701 of the Public Utility Code ("Code") is the basis for the Commission's jurisdiction in utility complaint cases. *See* 66 Pa.C.S. § 701 (ID, at p. 19, Conclusion of Law No. 1.) Section 701 of the Code dictates that:

The commission, or any person, corporation, or municipal corporation having an interest in the subject matter, or any public utility concerned, may complain in writing, setting forth any act or thing done or omitted to be done by any public utility in violation, or claimed violation, of any law which the commission has jurisdiction to administer, or of any regulation or order of the commission. Any public utility, or other person, or corporation likewise may complain of any regulation or order of the commission, which the complainant is or has been required by the commission to observe or carry into effect. The Commonwealth through the Attorney General may be a complainant before the commission in any matter solely as an advocate for the Commonwealth as a consumer of public utility services. The commission may prescribe the form of complaints filed under this section.

66 Pa.C.S. § 701 (emphasis added).

The Complainants provide no legal reasoning for why they believe that the Commission no longer has jurisdiction over the subject matter of the Complaint. Rather, this legal assertion appears to be premised on a general disagreement on the part of the Complainants as to the outcome of other similar smart meter-related cases before the Commission and appellate courts. This is not a basis

to argue that the Commission does not have jurisdiction over the instant Complaint. Indeed, the Commission has a long history of evaluating similar smart meter-related complaints.⁴

Therefore, the Company respectfully submits that the Commission has jurisdiction over this complaint proceeding, and that the Commission should adopt the ID without modification and reject the Complainants' Exception on this point.

III. REPLY TO EXCEPTION 2: 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. 8-24.) The arguments levied against *Povacz II* 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*:

⁴ *Kreider v. PECO Energy Co.*, Docket No. P-2015-2495064 (Order entered Jan. 28, 2016); *Kline v. PPL Electric Utilities Corp.*, Docket No. C-2017-2621072 (Order entered Oct. 8, 2020); *Macey v. West Penn Power Co.*, Docket No. C-2019-3012705 (Order entered Mar. 14, 2024); *Zonca v. Metropolitan Edison Co.*, Docket No. C-2019-3007961 (Order entered May 9, 2024).

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).

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 120 Fawn Lane, Acme, PA 15610 ("Service Address"). Moreover, even if the Complainants 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

⁷ *Povacz II*, at 998.

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).

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”) 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

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

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*.

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 Complainant's reproduce alleged testimony from a different 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.

Similarly, the Complainants, for the first time in their Exceptions, appear to allege that the Company is violating various federal laws in pursuing smart meter installation at the Service Address. (Complainant's Exception 2, at pp. 22-23.) This is the first time the Complainants have made these allegations, and they should be disregarded. There is no record evidence to suggest that the Company has violated any law, be it state or federal, in attempting to deploy smart meters for all of its customers as is required by Act 129 and the Court's holding in *Povacz II*. Moreover, the Commission does not have jurisdiction to evaluate claims that arise under federal law.¹⁶ The Commission, as an administrative agency, possesses only those powers expressly conferred on it by statute or those powers which are necessarily implied from its express powers.¹⁷

¹⁶ *Feitt v. Duquesne Light Co.*, Docket No. C-2022-3037095 (Order entered Dec. 7, 2023); *Alkhatib v. PECO Energy Co.*, Docket C-2011-2242125 (Order entered Jan. 12, 2012).

¹⁷ *Norfolk Southern Ry. Co. v. Pa. PUC*, 875 A.2d 1243 (Pa. Cmwlth. 2005).

Lastly, 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. 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.

IV. CONCLUSION

WHEREFORE, for the foregoing reasons, and those set forth in the Initial Decision, the Exceptions of Andrew and Theresa Sabatini should be denied.



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Date: November 18, 2024

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Electric Company (West Penn Rate District)

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	:	
West Penn Power Company,	:	
	:	
Respondent	:	

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:

Andrew and Theresa Sabatini
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Administrative Law Judge Emily I. DeVoe
edevoe@pa.gov

Dated: November 18, 2024



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