

**PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17120**

Public Meeting held December 19, 2024

Commissioners Present:

Stephen M. DeFrank, Chairman
Kimberly Barrow, Vice Chair
Kathryn L. Zerfuss
John F. Coleman, Jr.
Ralph V. Yanora

Andrew and Theresa Sabatini

C-2018-3005177

v.

West Penn Power Company

OPINION AND ORDER

BY THE COMMISSION:

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition are the Exceptions filed by Andrew and Theresa Sabatini (the Complainants or Sabatinis) on June 24, 2024, in response to the Initial Decision (Initial Decision or I.D.) of Administrative Law Judge (ALJ) Emily I. DeVoe, which was issued on June 4, 2024, in the above-captioned proceeding. Replies to Exceptions were filed by West Penn Power Company (West Penn or the Company) on

November 18, 2024.^{1,2} In her Initial Decision, ALJ DeVoe recommended that the Commission dismiss, with prejudice, the Formal Complaint (Complaint) filed by the Complainants on October 9, 2018, as amended on June 19, 2019 (Amended Complaint). For the reasons discussed below, we shall deny the Complainants' Exceptions, adopt the Initial Decision of ALJ DeVoe, and dismiss the Complaint, with prejudice, consistent with this Opinion and Order.

I. Background

This case involves a Complaint concerning the safety of the advanced metering infrastructure (AMI), or smart meter, that West Penn proposes to install at the Complainants' residence and use in the ordinary course of business to measure the Complainants' electricity consumption. The Complainants refuse to have a smart meter installed for health, safety, privacy, and reliability reasons. Complaint at 3. The Complainants contend that the smart meter installation would be a violation of their Constitutional rights. Complaint at 3. In their Amended Complaint, the Complainants requested, *inter alia*, that: (1) the Commission allow the Complainants to keep their

¹ By Secretarial Letter dated November 8, 2024 (*November 2024 Secretarial Letter*), the Commission's Secretary issued a notice to the Parties advising that the Commission was perfecting service of the Complainants' Exceptions which may not have been properly served. Along with the *November 2024 Secretarial Letter*, the Commission included the Complainants' Exceptions in order to constitute service under 52 Pa. Code §§ 1.54, 1.57-1.58. *November 2024 Secretarial Letter*. Therefore, pursuant to 52 Pa. Code § 5.535, *Replies*, West Penn was given ten days, or until November 18, 2024, to make a responsive filing. West Penn's Replies to Exceptions were accepted on November 18, 2024 by the Commission.

² On November 25, 2024, the Complainants filed a Motion to Strike the Company's Replies as untimely filed. However, given that the Company was served by the Exceptions via the *November 2024 Secretarial Letter*, and in an exercise of our discretion, we will accept the Replies pursuant to Section 1.2(a) of our Regulations, 52 Pa. Code § 1.2(a), in order to secure a just, speedy, and inexpensive determination in this proceeding. Accordingly, the Complainant's Motion to Strike is denied.

analog meter in place; and (2) the Commission prevent West Penn from installing a smart meter until the final days of the “alleged 15 year ‘smart meter’ deployment mandate, in 2023...” Amended Complaint at 1.

West Penn, now a part of FirstEnergy Pennsylvania Electric Company,³ is an electric distribution company (EDC) subject to the jurisdiction of the Commission, furnishes, owns and maintains the meters in its distribution system. *See*, FirstEnergy Pennsylvania Electric Company Tariff Electric Pa. P.U.C. No. 1 (FirstEnergy PA Tariff), Rule 8 at Original Page No. 44, effective January 1, 2024 (FirstEnergy PA Tariff Rule 8).

The Complainants, Andrew and Theresa Sabatini, are West Penn customers who have been notified of West Penn’s intent to install a smart meter at the service address. Answer to Amended Complaint at 2-3.

Act 129 of 2008 (Act 129 or Act), *inter alia*, amended Chapter 28 of the Public Utility Code (Code) and required EDCs with more than 100,000 customers to file smart meter technology procurement and installation plans for Commission approval and

³ At the time of initiation of the instant proceeding, FirstEnergy PA consisted of four separate companies: Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company, and West Penn. However, these companies have since been merged into a single entity, known as FirstEnergy Pennsylvania Electric Company. *See, Joint Application of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company, West Penn Power Company, Keystone Appalachian Transmission Company, Mid-Atlantic Interstate Transmission, LLC, and FirstEnergy Pennsylvania Electric Company, et.al.*, Docket Nos. A-2023-3038771, *et. al* (Final Order entered December 7, 2023). Nonetheless, in this Opinion and Order, we shall refer to the Company as West Penn.

to furnish smart meter technology within its service territory in accordance with the provisions of the Act. Section 2807(f) of the Code provides as follows:

(f) *Smart Meter technology and time of use rates.*

(1) Within nine months after the effective date of this paragraph, electric distribution companies shall file a Smart Meter technology procurement and installation plan with the commission for approval. The plan shall describe the Smart Meter technologies the electric distribution company proposes to install in accordance with paragraph (2).

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

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

(ii) In new building construction.

(iii) In accordance with a depreciation schedule not to exceed 15 years.

66 Pa.C.S. § 2807(f). The General Assembly found that it was “in the public interest” to implement the measures set forth in Act 129 and that the universal installation of smart meters would enhance the “health, safety and prosperity” of Pennsylvania’s citizens through the “availability of adequate, reliable, affordable, efficient and environmentally sustainable electric service at the least cost.” *See*, H.B. 2200, 192d Gen. Assemb., Reg. Sess. (Pa. 2008).

By Order entered in 2009, the Commission directed all EDCs subject to Act 129’s smart meter requirements, including West Penn, to universally deploy smart meter technology within their respective service territories in the Commonwealth in accordance with a depreciation schedule not to exceed fifteen years and in accordance with other guidelines established therein. *See, Smart Meter Procurement and*

Installation, Docket No. M-2009-2092655 (Implementation Order entered June 24, 2009) (*Smart Meter Installation Order*). West Penn sought and obtained the Commission's approval to complete the installation of AMI meters for substantially all customers within its service territory by mid-2019. *See, 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 No. M-2013-2341990 (Opinion and Order entered March 6, 2014) (*2014 Smart Meter Order*).

II. History of the Proceeding⁴

On October 9, 2018, the Sabatinis filed their Complaint against West Penn with the Commission at Docket No. C-2018-3005177 seeking to prevent the installation of a smart meter at the service address due to alleged health, safety, privacy, and reliability concerns. The Complainants also averred that installation of a smart meter would violate their Constitutional rights. I.D. at 1; Complaint at 3.

On October 29, 2018, West Penn filed its Answer and New Matter denying the material allegations in the Complaint and requesting the scheduling of a prehearing conference. On October 19, 2018, West Penn also filed Preliminary Objections. I.D. at 2.

On November 6, 2018, the Complainants filed a Reply to Preliminary Objections. On November 18, 2018, the Complainants filed a Reply to Answer and New Matter. *Id.*

⁴ A more extensive discussion of the history of this proceeding is presented in the Initial Decision at 1-13.

A Motion Judge Assignment Notice was issued on November 26, 2018, assigning this matter to ALJ Jeffrey A. Watson. *Id.*

On December 19, 2018, ALJ Watson issued an Interim Order denying the Preliminary Objections. *Id.*

Also on December 19, 2018, ALJ Watson issued an Interim Order establishing a litigation schedule. ALJ Watson directed the parties to exchange fact and expert witness information with each other by February 14, 2019, conclude discovery by April 15, 2019, and file a status report by May 2, 2019. The Order also provided information about the procedural rules of the Commission. I.D. at 3.

On June 19, 2019, the Complainants filed their Amended Complaint. Therein, they alleged West Penn's proposal to install a smart meter at the location of their current meter violates regulations of the Federal Communications Commission (FCC). Additionally, they amended their requested relief to include a request to keep their analog meter or, in the alternative, allow them to keep their analog meter "until the final days of [the] alleged 15 year 'smart meter' deployment mandate, in 2023, to grant [them] time required for legislative correction of Act 129's implementation according to its original purpose and intent." I.D. at 5.

On June 26, 2019, the Complainants filed a letter with the Commission's Secretary's Bureau to register a complaint against ALJ Watson. The Complainants alleged, *inter alia*, that ALJ Watson was not being "equitable" in his decisions and communications with them. *Id.*

On June 26, 2019, a prehearing conference was held as previously scheduled. The Complainant, Mr. Sabatini, participated in the conference. Tori Giesler, Esq., and Lauren Lepkoski, Esq., appeared for West Penn. The Parties addressed the

litigation schedule in this matter and other outstanding issues in this case. In addition, Mr. Sabatini and West Penn discussed the possibility of entering into a stipulation and submitting this case on briefs without the need for an evidentiary hearing. *Id.*

On July 1, 2019, ALJ Watson served an Interim Order directing the Parties to file a status report, either jointly or separately, by July 10, 2019, to indicate their agreed upon stipulations, if any, and provide dates for an evidentiary hearing, should one be necessary. *Id.*

On July 10, 2019, West Penn filed an Answer and New Matter to the Amended Complaint. The Answer and New Matter to the Amended Complaint included a Notice to Plead, directing the Complainants to file a response to the New Matter within twenty days of service. *Id.*

In its Answer, West Penn averred, *inter alia*, that its actions have been reasonable and performed in accordance with all applicable laws, as well as the Company's Commission-approved tariffs, the Code, and Commission Regulations and Orders. In its New Matter, West Penn argued there is no opt-out provision in Act 129, and smart meter installation is mandatory. I.D. at 5-6.

On July 10, 2019, the Complainants filed a status report and indicated that they were in need of an extension of the litigation schedule as set forth in prior orders. I.D. at 6.

On July 10, 2019, West Penn also filed a status report. West Penn indicated that the Complainants have not submitted their witness notification. On July 12, 2019, West Penn filed an updated status report. *Id.*

Based upon the representations of the Complainants that they did not have an adequate understanding and knowledge of how to handle the process of their Complaint and prepare for a hearing, ALJ Watson issued an Interim Order dated August 22, 2019, extending the deadlines for the Complainants to exchange witness information and conduct discovery. The Parties were directed to exchange fact and expert witness information by September 20, 2019, and conclude discovery by October 10, 2019. ALJ Watson again provided information regarding the Commission's procedural rules. *Id.*

On October 22, 2019, West Penn filed a status report advising it had still not received witness information from the Complainants and provided its availability for an evidentiary hearing. *Id.*

On October 24, 2019, ALJ Watson issued an Interim Order scheduling an in-person evidentiary hearing for December 11, 2019, and explaining the hearing procedures. ALJ Watson provided instructions regarding calling witnesses and offering documents into evidence. *Id.*

On October 25, 2019, the Commission issued a Hearing Notice, scheduling the hearing for December 11, 2019. *Id.*

On November 25, 2019, ALJ Watson received West Penn's proposed exhibits and other enumerated documents. No such documents were received from the Complainants. I.D. at 7.

On December 3, 2019, ALJ Watson received a document entitled "Request for Extension/Continuance." The Complainants requested a continuance of the hearing scheduled for December 11, 2019, and an extension of the litigation schedule. *Id.*

On December 4, 2019, ALJ Watson issued an Interim Order regarding the Complainants' requests. ALJ Watson found that the Complainants had established good cause to continue the evidentiary hearing but failed to establish good cause for another extension of the litigation schedule. ALJ Watson denied the Complainants' request to further extend the litigation schedule, continued the evidentiary hearing, directed the parties to meet and confer regarding a new hearing date, and submit a status report by December 16, 2019. *Id.*

On December 5, 2019, the Commission issued a Cancellation Notice cancelling the December 11, 2019 evidentiary hearing. *Id.*

On December 16, 2019, West Penn filed a status report providing information regarding the Company's availability for an evidentiary hearing and its attempts to meet and confer with the Complainants. *Id.*

On December 16, 2019, ALJ Watson received correspondence from the Complainants requesting reconsideration of their request for an extension of the litigation schedule in this proceeding. *Id.*

On December 26, 2019, ALJ Watson issued an Interim Order denying the Complainants' request. *Id.*

On January 13, 2020, the Complainants filed a request directed to the Commission's Secretary's Bureau to extend the litigation schedule in order to secure legal representation. *Id.*

On January 22, 2020, the Commission issued a Notice, scheduling an in-person hearing for February 20, 2020. I.D. at 8.

On January 24, 2020, ALJ Watson issued an Interim Order, denying the Complainants' request to further delay the evidentiary hearing to allow the Complainants to secure legal representation. ALJ Watson explained that the "Complainants were previously advised, early in the proceeding of their right to obtain legal counsel and chose to represent themselves. Under the circumstances in this case, [the] Complainants have not established good cause to grant an additional extension in this proceeding." *Id.*

On January 30, 2020, the Complainants filed a second request to delay the evidentiary hearing in order to secure legal representation. ALJ Watson did not issue an Interim Order on the Complainants' second request. *Id.*

The evidentiary hearing convened as scheduled on February 20, 2020. The Complainants were present and represented themselves. Ms. Giesler and Ms. Lepkowski again appeared on behalf of the Company. Mr. Sabatini testified on behalf of the Complainants and proffered several exhibits for admission into the record. Complainants' Exhibits PD-A, PD-B, PD-C, and JCA-1 were admitted into the record. West Penn offered no witness testimony but did proffer several exhibits. West Penn's Exhibits PD-1, PD-2, PD-3, and PD-4 were admitted into the record. *Id.*

At the conclusion of the hearing, ALJ Watson set a briefing schedule. ALJ Watson advised the parties that main briefs were due on May 18, 2020. *Id.*

On April 7, 2020, ALJ Watson issued an Interim Order, revising the deadline for briefs and directing parties to file briefs, if any, by May 29, 2020. *Id.*

On May 22, 2020, the Complainants filed a request to extend the briefing schedule due to their inability to access the transcript due to the closure of the Commission's offices as a result of the Covid-19 pandemic. I.D. at 9.

On May 28, 2020, ALJ Watson issued an Interim Order, extending the deadline to file briefs to July 10, 2020. *Id.*

The transcript for the hearing was filed June 29, 2020. *Id.*

On July 2, 2020, the Complainants filed a request to further extend the deadline for the filing of briefs, again due to their inability to access the transcript. *Id.*

On July 8, 2020, ALJ Watson issued an Interim Order, further extending the deadline to file briefs to September 1, 2020. *Id.*

On August 25, 2020, the Complainants again submitted a request to further extend the deadline to file briefs. *Id.*

On October 20, 2020, ALJ Watson issued an Interim Order, further extending the deadline to file briefs to December 18, 2020. *Id.*

On November 4, 2020, the Commission entered an Order and Notice, at Docket No. M-2009-2092655, pursuant to 66 Pa.C.S. § 501, instituting a stay of certain formal complaint proceedings then pending before the Commission involving challenges to EDC deployment of smart meter technology as being in violation of Section 1501 of the Code (*November 2020 Stay Order*). The *November 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. By Order entered November 14, 2023, at Docket No. M-2009-2092655, the Commission lifted the stay. Notice was provided on November 14, 2023, informing the Complainants of the lifting of the stay and their procedural rights and obligations under the Commission's regulations.

On November 27, 2023, the Commission issued a Judge Change Notice reassigning this matter to ALJ DeVoe. I.D. at 11.

Upon review of the extensive procedural history in this case, ALJ DeVoe determined it was appropriate to set a deadline for the filing of briefs and the filing of any appropriate motions. *Id.*

On December 5, 2023, ALJ DeVoe issued an Interim Order directing the parties to file main briefs by January 12, 2024, and any appropriate motion by January 12, 2024, and responses to any motions by January 26, 2024. I.D. at 12.

On January 9, 2024, three days prior to the January 12, 2024 deadline, the Complainants served ALJ DeVoe with a request to extend the deadline for the filing of their brief, requesting a six month extension of the deadline to file their brief. *Id.*

On January 10, 2024, ALJ DeVoe issued an Interim Order denying the Complainants' request to extend the deadline for filing briefs. The ALJ noted, *inter alia*, although this matter was stayed until November 9, 2023, the Complainants were served with notice the stay was lifted on November 14, 2023. At no point after August 9, 2020 (when Commission offices reopened), or after November 14, 2023 (when the Complainants received notice the stay was lifted), or after December 5, 2023, (when ALJ DeVoe issued an Order setting the deadline of January 12, 2024), did the Complainants make arrangements to come to the Pittsburgh Office of Administrative Law Judge (OALJ) to review the transcript. *Id.*

The ALJ further explained that she had reviewed the transcript and admitted exhibits and found the record was complete. ALJ DeVoe advised the parties that she would be able to render an initial decision without the aid of briefs from the

parties. ALJ DeVoe reiterated that the filing of briefs was optional, and whether a party chose to file a brief would not affect the ALJ's ultimate decision. *Id.*

On January 12, 2024, West Penn filed its main brief. *Id.*

On January 25, 2024, the Complainants filed correspondence again requesting an extension of the briefing deadline. They again proposed they be permitted an additional six months to prepare their brief. *Id.*

Also on January 25, 2024, the Complainants filed a Motion to Strike West Penn's brief, alleging that the brief was untimely filed. The ALJ reviewed the Commission's records in this matter and determined that West Penn's brief was timely filed and denied the Complainants' Motion to Strike West Penn's brief. I.D. at 13.

On March 8, 2024, the ALJ issued an Interim Order closing the evidentiary record. *Id.*

On June 4, 2024, the Commission served ALJ DeVoe's Initial Decision in *Andrew and Theresa Sabatini v. West Penn Power Company*, Docket No. C-2018-3005177.

As noted above, on June 24, 2024, the Complainants filed Exceptions to the Initial Decision. On November 18, 2024, West Penn filed Replies to Exceptions.

III. Discussion

A. Legal Standards

1. General Burden of Proof for Complaint Proceeding

As the party seeking affirmative relief from the Commission, the complainant in a formal complaint proceeding has the burden of proof. 66 Pa.C.S. § 332(a). The evidence necessary to meet that burden must be substantial. 2 Pa.C.S. § 704. “Substantial evidence” is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion. *Consolidated Edison Company of New York v. National Labor Relations Board*, 305 U.S. 197, 229, 59 S.Ct. 206, 217. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk & Western Ry. Co. v. Pa. PUC*, 413 A.2d 1037 (Pa. 1980).

To establish a sufficient case and satisfy the burden of proof, the complainant must show that the respondent utility is responsible or accountable for the problem described in the Complaint. *Patterson v. The Bell Telephone Company of Pennsylvania*, 72 Pa. P.U.C. 196 (1990). The offense must be a violation of the Code, a Commission Regulation or Order or a violation of a Commission-approved tariff. 66 Pa.C.S. § 701. Such a showing must be by a “preponderance of the evidence.” *Samuel J. Lansberry, Inc. v. Pa. PUC*, 578 A.2d 600 (Pa. Cmwlth. 1990), *alloc. denied*, 529 Pa. 654, 602 A.2d 863 (1992). That is, the Complainant’s evidence must be more convincing, by even the smallest amount, than that presented by the respondent. *Se-Ling Hosiery, Inc. v. Margulies*, 364 Pa. 45, 70 A.2d 854 (1950).

The burden of proof is comprised of two distinct burdens: (1) the burden of production; and (2) the burden of persuasion. *Hurley v. Hurley*, 2000 Pa. Super. 178, 754 A.2d 1283 (2000). The burden of production, also called the burden of going

forward with the evidence, determines which party must come forward with evidence to support a particular claim or defense. *Scott and Linda Moore v. National Fuel Gas Distribution*, Docket No. C-2014-2458555 (Initial Decision issued May 11, 2015) (*Moore*). The burden of production goes to the legal sufficiency of a party's claim or affirmative defense. *See, Id.* The burden of production may shift between the parties during a hearing. A complainant may establish a *prima facie* case with circumstantial evidence. *See, Milkie v. Pa. PUC*, 768 A.2d 1217, 1220 (Pa. Cmwlth. 2001) (*Milkie*). If a complainant introduces sufficient evidence to establish legal sufficiency of the claim, also called a *prima facie* case, the burden of production shifts to the utility to rebut the complainant's evidence. *See, Moore*.

If the utility introduces evidence sufficient to balance the evidence introduced by the complainant, that is, evidence of co-equal value or weight, the complainant's burden of proof has not been satisfied and the burden of going forward with the evidence shifts back to the complainant, who must provide some additional evidence favorable to the complainant's claim. *See, Milkie*, 768 A.2d at 1220; *see also, Burleson v. Pa. PUC*, 443 A.2d 1373 (Pa. Cmwlth. 1982), *aff'd*, 501 Pa. 433, 461 A.2d 1234 (1983).

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

determining whether a complainant has met the burden of persuasion, the fact-finder⁵ may engage in determinations of credibility, may accept or reject testimony of any witness in whole or in part, and may accept or reject inferences from the evidence. *See, Moore*, citing *Suber v. Pennsylvania Com'n on Crime and Delinquency*, 885 A. 2d 678, 682 (Pa. Cmwlth. 2005) (*Suber*).

2. Burden of Proof Applied to Section 1501⁶ Complaint Challenging Smart Meter Installation

In *Povacz, et al. v. Pa. PUC*, 280 A.3d 975 (Pa. 2022) (*Povacz II*), which dealt with consolidated appeals involving the deployment of smart meters by PECO Energy Company, the Supreme Court of Pennsylvania (Supreme Court) reversed the Commonwealth Court's October 8, 2020 decision in *Povacz v. Pa. PUC* (241 A.3d 481) (*Povacz I*), and thereby affirmed the Commission's March 28, 2019 and May 9, 2019 Orders in *Maria Povacz v. PECO Energy Company*, C-2015-2475023 (*Povacz 2019 Order*); *Laura Sunstein Murphy v. PECO Energy Company*, C-2015-2475726 (*Laura Sunstein Murphy*); and *Cynthia Randall and Paul Albrecht v. PECO Energy Company*, C-2016-2537666 (*Cynthia Randall*). By *Povacz II*, the Supreme Court affirmatively established that there is no "opt-out" provision for installation of a smart

⁵ In formal complaint proceedings, the Commission, not the ALJ, is the ultimate fact-finder; it weighs the evidence and resolves conflicts in testimony. When reviewing the initial decision of an ALJ, the Commission has all the powers that it would have had in making the initial decision except as to any limits that it may impose by notice or by rule. *Milkie*, 768 A.2d at 1220, n. 7 (citing, *inter alia*, 66 Pa.C.S. § 335(a)).

⁶ The applicable Commission Regulation governing an EDC's provision of safe service is codified at 52 Pa. Code § 57.28(a)(1). Pursuant to Section 57.28(a)(1), an EDC must use reasonable efforts to properly warn and protect the public from danger and to exercise reasonable care to reduce the hazards to which customers may be subjected to by reason of the EDC's provision of electric utility service and its associated equipment and facilities. *See*, 52 Pa. Code § 57.28(a)(1). *See, Final Rulemaking Order, Rulemaking Re: Electric Safety Regulations, 52 Pa. Code Chapter 57, Docket No. L-2015-2500632* (Order entered April 20, 2017) (*Electric Safety Final Rulemaking Order*).

meter pursuant to Act 129 and that to raise a viable challenge to smart meter installation, a customer must satisfy the preponderance of evidence standard for a violation of Section 1501 of the Code. *Povacz II*, 280 A. 3d at 983-984.

Pursuant to Section 1501 of the Code, all public utilities have a duty to maintain “adequate, efficient, safe, and reasonable service⁷ and facilities” and to make repairs, changes, and improvements that are necessary or proper for the accommodation, convenience, and safety of its patrons, employees, and the public. *See*, 66 Pa.C.S. § 1501. Section 1501 of the Code, provides, in pertinent part, as follows:

Every public utility shall furnish and maintain adequate, efficient, safe, and reasonable service and facilities, and shall make all such repairs, changes, alterations, substitutions, extensions, and improvements in or to such service and facilities as shall be necessary or proper for the accommodation, convenience, and safety of its patrons, employees, and the public . . . Such service and facilities shall be in conformity with the regulations and orders of the commission.

66 Pa.C.S. § 1501.

As previously noted, in *Povacz II*, the Supreme Court not only affirmed the Commission’s determination that there is no “opt-out” provision for smart meter installation in either Act 129, the Code, Commission Regulations, or Orders, but also

⁷ The term “service” is defined broadly under Section 102 of the Code to include any and all acts done or rendered or performed and any and all things furnished or supplied and any and all facilities, used, furnished or supplied by public utilities. *See*, 66 Pa.C.S. § 102. The statutory definition of “service” is also to be broadly construed by the Commission and the courts. *Country Place Waste Treatment Co., Inc. v. Pa. PUC*, 654 A.2d 72 (Pa. Cmwlth. 1995).

confirmed that challenges to smart meter installation, other than an “opt-out,” may arise under Section 1501⁸ of the Code. Therein, the Supreme Court stated:

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

Povacz II, at 983-984; *See, Povacz v. PECO Energy Company*, Docket No. C-2012-2317176 (Opinion and Order entered January 24, 2013) (*Povacz 2013 Order*); *see also, Frompovich v. PECO Energy Co.*, Docket No. C-2015-2474602 (Opinion and Order entered May 3, 2018) (*Frompovich*).

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

A customer seeking affirmative relief from the [Commission] must prove by a preponderance of the evidence that the named utility was responsible or accountable for the problem described in the complaint and that the offense was a violation of the Code, a [Commission] regulation or [o]rder, or a violation of a [Commission]-approved tariff.

⁸ The Commission has also determined that if a customer’s formal complaint raises a claim under Section 1501, related to the safety of a utility’s installation and use of a smart meter at the customer’s residence, such a claim is legally sufficient to proceed to an evidentiary hearing before an ALJ. To satisfy the burden of proof a complainant may be required to present medical documentation and/or expert testimony demonstrating that the installation of a smart meter constitutes unsafe or unreasonable service. *Povacz II* at 1000, citing *Susan Kreider v. PECO Energy Company*, P-2015-2495064, 2016 WL 406549, at *14 (Pa. P.U.C. January 28, 2016) (*Kreider*).

[See] 66 Pa.C.S. §§ 332(a), 701; *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm'n*, . . . 134 Pa. Commw. 218, 578 A.2d 600 ([Pa. Cmwlth.] 1990)[.] . . .

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

. . . .

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

Povacz II, 280 A. 3d at 999-1000 (emphasis added; footnote omitted).⁹

In applying the standard of proof to scientific or expert medical evidence in support of alleged adverse health effects, the Commission ruled in the *Povacz 2019 Order*, and was subsequently affirmed by the Supreme Court in *Povacz II*, that in order to prevail in a Section 1501 claim against an EDC alleging that an AMI meter caused or will cause adverse health effects or harm to human health, the complainant must demonstrate

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

by a preponderance of the evidence a “conclusive causal connection” between the harm to human health and the radio frequency fields (RFs)¹⁰ from the AMI meter.¹¹

3. Other Relevant Legal Standards

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

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

Povacz II at 985, n. 8. As the Supreme Court denied allocatur as to any constitutional claims, the Commonwealth Court’s holding stands.

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

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

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

Finally, we note that any argument or Exception that we do not specifically delineate shall be deemed to have been duly considered and denied without further discussion. The Commission is not required to consider expressly or at length each contention or argument raised by the parties. *Consolidated Rail Corp. v. Pa. PUC*, 625 A.2d 741 (Pa. Cmwlth. 1993); *see also, generally, University of Pennsylvania v. Pa. PUC*, 485 A.2d 1217 (Pa. Cmwlth. 1984).

B. ALJ's Initial Decision

In the Initial Decision, ALJ DeVoe made thirteen (13) Findings of Fact (FOF) and reached six (6) Conclusions of Law (COL). I.D. at 13-14, 19. The Findings of Fact and Conclusions of Law are incorporated herein by reference and are adopted without comment unless they are either expressly or by necessary implication rejected or modified by this Opinion and Order.

The ALJ provided a discussion of *Povacz I*, *Povacz II*, and the Commission's Stay Order. I.D. at 9-11.

In her disposition, ALJ DeVoe addressed, *inter alia*, the Complainants' case-in-chief and whether the Complainants met their burden of proof. I.D. at 15-18.

1. Complainants' Case-in-Chief

The ALJ noted that Mr. Sabatini testified that the Pennsylvania legislature intended Act 129 to be an “opt-in” rather than be mandatory. Mr. Sabatini referenced the legislative record for Act 129 to support his position. I.D. at 15 -16 (citing Tr. at 123, 124-26, 138-39). The ALJ provided that Mr. Sabatini testified that the Commission altered the language of Act 129 by interpreting Act 129 to mandate smart meter installation which is a violation of the Pennsylvania Constitution. I.D. at 16 (citing Tr. at 123).

At Mr. Sabatini's request, the ALJ took official notice of Act 129 and three sections of the Legislative Journal. West Penn did not present any testimony but requested that ALJ Watson take official notice of several documents including the Commission's *Smart Meter Implementation Order* and West Penn's Smart Meter Deployment Plan, which the Commission approved in the *2014 Smart Meter Order*. I.D. at 16.

2. Whether the Complainants Met Their Burden of Proof

The ALJ explained that the Complainants presented no evidence or argument at the hearing to support their alleged health, safety, privacy and reliability concerns in their initial Complaint. The ALJ reasoned that the Complainants allegations in their Complaint were merely allegations, as the Complainants did not present substantial evidence to support those claims at the hearing. I. D. at 16 (citing 52 Pa. Code § 5.405).

ALJ DeVoe stated that ALJ Watson thoroughly explained the hearing process to the Complainants at the start of the hearing. Subsequently, ALJ DeVoe explained, the Complainants decided to present their case solely on the premise that

Act 129 does not mandate smart meter installation. The ALJ reasoned that this argument was addressed and is rendered moot by the Supreme Court's decision in *Povacz II*, I.D. at 18. The ALJ provided that the Complainants did not address or present evidence or testimony on any other claim or argument. The ALJ further noted that the Complainants did not claim that they were seeking an accommodation under Section 1501. Therefore, the ALJ dismissed the Complainants' claims for failure to meet their burden of proof. *Id.*

Based on all the above, the ALJ recommended that the Commission deny and dismiss the Amended Complaint, with prejudice, for failure by the Complainants to meet their burden of proof. I.D. at 18.

C. Exceptions, Replies, and Disposition

The Complainants' Exceptions consist of a five-page Preamble, two Exceptions, a Summary, a Conclusion section, and an attachment titled "State Action Doctrine." Much of the Complainants' arguments have already been addressed by the Supreme Court in *Povacz II* or in other recent cases that have been before the Commission. The Complainants' Exceptions¹² generally pertain to the following: (1) COL No. 1 regarding the Commission's jurisdiction, and (2) COL No. 3 that states that Act 129 mandates the installation of smart meters. *See*, I.D. at 19.

¹² We acknowledge that the format of the Complainants' Exceptions does not strictly comply with Section 5.533(b) of our Regulations, 52 Pa. Code § 5.533(b), which requires that Exceptions be numbered, identify the findings of fact and conclusions of law to which exception is taken, and cite to the relevant pages of the Initial Decision. Nevertheless, particularly because the Complainants are appearing *pro se*, we will accept the Exceptions as filed pursuant to Section 1.2(a) of our Regulations, 52 Pa. Code § 1.2(a), in order to secure a just, speedy, and economical determination. The Complainants' Exceptions, in some cases, repeat arguments or overlap.

To the extent the Complainants' Exceptions include commentary alleging bias without foundation, such commentary is deemed to be immaterial, impertinent, and otherwise irrelevant to the disposition of this matter. Therefore, pursuant to 52 Pa. Code § 1.4(e), we shall strike such statements from our consideration of the Complainants' Exceptions.

To the extent the Complainants used extra-record materials in their Exceptions, such materials will be disregarded. It is well-established that parties cannot introduce new evidence following the close of the record. *Application of Apollo Gas Co.*, 1994 Pa. PUC Lexis, at *8-14 (Order entered February 10, 1994) (*Apollo Gas*). Accordingly, any extra-record information the Complainants used in their Exceptions will not be considered. *Apollo Gas*.

Where the Complainants have offered new arguments in their Exceptions not previously addressed in the record, we note that these arguments cannot be considered after the record has been closed. 52 Pa Code § 5.431.

1. Complainants' Argument Regarding Commission Jurisdiction

a. Exception No. 1

In their Exception No. 1, the Complainants disagree with COL No. 1, which states, as follows:

COL No. 1: The Commission has jurisdiction over the subject matter of this Complaint. 66 Pa.C.S. § 701.

I.D. at 19.

The Complainants contend that:

[W]e do not believe that the PUC has jurisdiction over the issues at hand, which have to do with the legislative intent of Act 129, which was not fully addressed in the PA Supreme Court decisions in Povacz II. So this is NOT a matter for the PUC, it is a matter for the Supreme Court of Pennsylvania, the General Assembly of the State of Pennsylvania, and/or the Federal Court System.

Exc. at 7.

b. Replies

West Penn argues that the Complainants have provided no legal reasoning for why they believe the Commission no longer has jurisdiction over the subject matter of the Complaint. West Penn provides that the Commission has a long history of evaluating similar smart meter complaints. R. Exc. at 2-3 (citing *Kreider v. PECO Energy Co.*, Docket No. P-2015-2495064 (Order entered January 28, 2016); *Kline v. PPL Electric Utilities Corp.*, Docket No. C-2017-2621072 (Order entered October 8, 2020); *Macey v. West Penn Power Co.*, Docket No. C-2019-3012705 (Order entered March 14, 2024); *Zonca v. Metropolitan Edison Co.*, Docket No. C-2019- 3007961 (Order entered May 9, 2024)).

c. Disposition

The Complainants contend that the Commission does not have jurisdiction regarding the “legislative intent of Act 129, which was not fully addressed in the PA Supreme Court decision in Povacz II.” The Complainants argue that “[t]he PUC and the Supreme Court have undermined the General Assembly, subverting both the meaning and intention of Act 129.” Exc. at 7.

We disagree with the Complainants' argument that the Commission does not have jurisdiction over the subject of the Complaint. The Complainants averred in their Complaint that they had safety, privacy and health concerns related to the installation of a smart meter. COL No. 1, *supra*, cites to 66 Pa.C.S. § 701 which states 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...

Therefore, under Section 701, the Commission has jurisdiction over the Complainants' allegations in their Complaint regarding the safety, privacy, health and reliability of the smart meter. Although the Complainants disagree with the findings of the Supreme Court in *Povacz II*, the Court's holding in *Povacz II* is controlling precedent on the present dispute. We find no error in COL No. 1. Accordingly, we shall dismiss the Complainants' Exception No. 1.

2. Complainants' Arguments Regarding Act 129 and an Opt-out

a. Exception No. 2

In their Exception No. 2, the Complainants disagree with COL No. 3:

COL No. 3: Act 129 mandates the systemwide installation of smart meters. *Povacz v. Pa. Pub. Util. Comm'n*, 280 A.3d 975 (Pa. 2022).

I.D. at 19.

The Complainants repeat their argument that the Supreme Court’s decision in *Povacz II* is incorrect, because, according to the Complainants, it ignores the legislative intent in the development of Act 129. Exc. at 8-20.

Additionally, the Complainants argue that the installation of a smart meter is unconstitutional. Exc. at 20-23. The Complainants also provide several new arguments not presented at the hearing, or in their Complaint, regarding health, safety, data privacy, and termination of service. *Id.* at 24-28.

b. Replies

West Penn provides that the Complainants attempt to relitigate *Povacz II* in their Exceptions. R. Exc. at 3 (citing Exc. at 8-24). West Penn avers that the Company must install a smart meter at the service address. West Penn explains that neither Act 129 nor *Povacz II* allow an “opt-out” for the Complainants. R. Exc. at 4.

West Penn also submits that the Commission should disregard the Complainants’ extra-record claims. R. Exc. at 6 (citing Exc. at 15-18). Additionally, West Penn notes that the Complainants appear to allege that the Company is violating various federal laws in their efforts to install a smart meter at the service address. R. Exc. at 6 (citing Exc. at 22-23). West Penn maintains that this is the first time the Complainants have made these allegations and that there is no record evidence to suggest that West Penn has violated any law, state or federal, in attempting to deploy smart meters in its service territory. R. Exc. at 6. Finally, West Penn avers that it is not a “state actor” and cannot violate the Complainants’ constitutional rights. R. Exc. at 7.

c. Disposition

In *Povacz II*, the Supreme Court expressly concluded that the complainant's assertion of the right to "opt-out" of Act 129 was unfounded. The Supreme Court further found that a customer may seek an accommodation to smart meter installation, provided the customer first established a violation under Section 1501 of the Code. Therein, the Supreme Court stated:

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

Povacz II, at 983-84.

Therefore, by establishing that there is no "opt-out" permitting a customer to refuse smart meter installation, the Supreme Court's holding in *Povacz II* is controlling on the question. In the present case, the Complainants' Exceptions fail to establish any violation by the utility under Section 1501 of the Code, as a prerequisite to seeking an accommodation. To the extent the Complainants' arguments challenge the Supreme Court's holding in *Povacz II*, that there is no opt out from smart meter implementation, we reject the Complainants' arguments. *Povacz II* is settled law, and we find no merit in the Complainants' argument that *Povacz II* was wrongly decided. Accordingly, to the extent the Complainants assert a right to opt out of Act 129 to refuse smart meter installation, we shall deny the Complainants' Exception No. 2.

We further note that the Complainants have made several new claims in their Exceptions regarding health and safety, termination of service and constitutional rights. Exc. at 24-28. ALJ Watson advised the Complainants at the hearing that the only evidence and testimony that would be considered was that which was entered into evidence. Tr. at 92-93. The Complainants made the decision at the evidentiary hearing to limit their testimony to the issue of whether Act 129 mandates the installation of a smart meter. I.D. at 18. The Complainants did not provide evidence or testimony related to a Section 1501 violation or to support the request for an accommodation under Section 1501. I.D. at 18.

As noted, *supra*, in affirming the Commission's 2019 *Povacz Order*, the Supreme Court held in *Povacz II* that, in order to prevail in a Section 1501 claim involving the safety of smart meters, and specially, against an EDC alleging that an AMI meter caused, or will cause, adverse health effects or harm to human health, the Complainant must demonstrate, by a preponderance of the evidence, a "conclusive causal connection" between the harm to human health and the RFs from the AMI meter. *See, Povacz II* at 1006. In that context, the lay opinion of the Complainant does not provide a conclusive, causal connection between the harm to human health and the RFs from the AMI meter. *Id. Therefore*, the Complainants Exceptions regarding unsubstantiated dangers posed to health and safety by the proposed smarter are denied.

In addition, we disagree with the Complainants' argument that the Company cannot lawfully terminate their electric service for failure to provide access to the meter. Exc. at 27. The Commission has stated that "[i]t is well-settled that where a customer refuses a utility access to its meter, the utility may terminate service after required notice is provided." *Frompovich*. Accordingly, the Complainants' Exceptions regarding termination of service where the customer prevents access for installation of the meter are denied.

Further, we agree with West Penn's argument that the Company is not a state actor, and therefore, the Complainants fail to assert a constitutional claim. *Commonwealth v. Corley*, 491 A.2d 829, 832 (Pa. 1985) (additional citations omitted). In *Povacz II*, the Supreme Court noted the Commonwealth Court's conclusion that the assertion of a constitutional right to refuse installation of a smart meter was unfounded. *See, Povacz II* at 985, n. 8. As previously noted, *supra*, the Commonwealth Court's decision is binding on the question. Accordingly, to the extent the Complainants assert a constitutional right to refuse smart meter installation, we shall deny the Complainants' Exceptions on this issue without further discussion.

Finally, we note that, while our above disposition references our agreement with the positions argued by the Company in its Replies, our disposition and finding against the Complainants' position turns on the existing controlling legal precedent and our finding that the record lacks substantial evidence to support the Complainants' position, which established sufficient basis to deny the Exceptions, without reliance upon the arguments raised in the Replies.

IV. Conclusion

In light of the above discussion, we shall: (1) deny the Complainants' Exceptions; (2) deny the Complainants' Motion to Strike the Company's Replies; (3) adopt the ALJ's Initial Decision; and (4) dismiss the Complaint, consistent with this Opinion and Order; **THEREFORE,**

IT IS ORDERED:

1. That the Exceptions filed by Andrew and Theresa Sabatini on June 24, 2024, to the Initial Decision of Administrative Law Judge Emily I. DeVoe

issued on June 4, 2024, at Docket No. C-2018-3005177, are denied, consistent with this Opinion and Order.

2. The Motion to Strike filed by Andrew and Theresa Sabatini on November 25, 2024 in response to the Replies to Exceptions filed by West Penn Power Company on November 18, 2024, is denied.

3. That the Initial Decision of Administrative Law Judge Emily I. DeVoe, issued on June 4, 2024, at Docket No. C-2018-3005177, is adopted, consistent with this Opinion and Order.

4. That the Formal Complaint filed by Andrew and Theresa Sabatini, on October 9, 2018, and amended on June 19, 2019, at Docket No. C-2018-3005177, is dismissed, with prejudice.

5. That this proceeding be marked closed.

BY THE COMMISSION,



Rosemary Chiavetta
Secretary

(SEAL)

ORDER ADOPTED: December 19, 2024

ORDER ENTERED: December 19, 2024