**BEFORE THE**
**PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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| Michael T. Jennings | : | |
| | : | |
| v. | : | C-2018-3006031 |
| | : | |
| West Penn Power Company | : | |

# INITIAL DECISION

Before
Gail M. Chiodo
Administrative Law Judge

## INTRODUCTION

This decision denies and dismisses the Formal Complaint of an electric service customer who seeks to prevent the utility from installing a smart meter at his residence. After an evidentiary hearing held, the customer did not meet his burden of proof evidencing any violation of a Commission statute, regulation, or order on the part of the utility, or that the customer is entitled to the relief he requests.

## HISTORY OF THE PROCEEDING

*Complaint / Discovery*

On November 14, 2018, Michael T. Jennings (Complainant) filed a Formal Complaint (Complaint) with the Pennsylvania Public Utility Commission (Commission or PUC) against West Penn Power Company (West Penn, Company or Respondent). Mr.

Jennings contests West Penn's planned installation of a smart meter at his residence.[1] Mr. Jennings alleges that the installation of a smart meter would be unlawful and unsafe for him, his spouse, and his son due to each of their health situations, but especially the unique, complex health situation of his son. Mr. Jennings avers that pursuant to the constitution, federal and state law, and in particular the American with Disabilities Act (ADA), that he is entitled to an accommodation in the form of allowing him to retain an analog meter on his property.

On December 5, 2018, the Company timely filed an Answer and New Matter as well as Preliminary Objections. In its Answer, the Company denied the material allegations and conclusions of law in the Complaint. In its New Matter and Preliminary Objections, the Company averred, *inter alia*, that the Complaint was legally insufficient because the Company was required to install smart meters under Act 129 of 2008 (Act 129) of the Public Utility Code (Code). 66 Pa.C.S. §§ 2806.1–2807. According to the Company, since there is no "opt-out" provision to the installation of a smart meter, the PUC is not authorized to grant the relief requested in the Complaint.

On December 15, 2018, the Complainant filed an Answer to the Company's Preliminary Objections.

On January 3, 2019, the Commission assigned Administrative Law Judge (ALJ) Jeffrey A. Watson to preside over this matter.

[1] On January 1, 2024, FirstEnergy Corporation's Pennsylvania operating companies including West Penn, Pennsylvania Electric Company, Pennsylvania Power Company, and Metropolitan Edison 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. For purposes of this decision, the Respondent will be referred to as "West Penn" and the caption will remain the same.

On January 25, 2019, the ALJ issued two Orders. One Order denied the Company's Preliminary Objections, and the other Order established a litigation schedule. Subsequently, the litigation schedule was revised three times by Interim Orders dated February 12, 2019; July 2, 2019; and August 12, 2019.

On July 5, 2019, the Complainant's Motion to Compel Discovery, which the Complainant filed on June 12, 2019, was granted in part and denied in part. On October 24, 2019, a Protective Order was issued upon a joint petition.

On November 22, 2019, the Complainant submitted a Revised Identification of Factual and Expert Witnesses. This document revised the letter Mr. Jennings filed on March 28, 2019, in which he identified his factual and expert witnesses and provided summaries of their expected testimony in accordance with the first litigation schedule. (*See* Interim Order dated February 12, 2019 at 1).

On November 25, 2019, the Complainant served on the Company his own written direct testimony and 62 exhibits dated November 20, 2019. Mr. Jennings also served the written testimony and exhibits of his expert and factual witnesses including the written testimony of Dr. Michael A. Semelka, the treating family physician of his wife and son. (Tr. 3/16/2020 at 8-9).

On January 21, 2020, the Complainant filed a letter he submitted to the Chief Administrative Law Judge requesting that a new judge be assigned to this proceeding who understands disabled customers and the PUC's responsibilities under the Federal Americans with Disabilities Act and the Pennsylvania Human Rights Act.

On February 3, 2020, a Notice was issued scheduling an in-person evidentiary hearing for July 23 and 24, 2020.

On March 16, 2020, a prehearing conference was held. The Complainant represented himself, and the Company was represented by Tori L. Giesler, Esquire, and Lauren Marissa Leposki, Esquire. During this conference, several procedural matters were discussed including the Company's objection to Complainant's submitted testimony and exhibits as untimely. The Company contended that pursuant to the Interim Order dated August 12, 2019, the Complainant's written testimony and exhibits were due on September 19, 2019, but they were not submitted by the Complainant until November 22, 2019. (Tr. 3/16/2020 at 7-8, 14). After explaining why his testimony and exhibits were late, including the need to attend to his son's health, the ALJ permitted the late submission and stated he would allow Mr. Jennings to offer his written submitted testimony, subject to any other evidentiary objections at the time of the hearing. (*Id.* at 27). As a result of this ruling, the Company's request to extend the discovery and rebuttal deadlines was granted, and the hearing date of July 23-24, 2020 remained the same. (*Id*. at 27-28, 40).

On March 18, 2020, the Complainant filed a Request for Subpoena, which the Company opposed in its response filed on March 19, 2020.

On May 1, 2020, West Penn served its rebuttal testimony and exhibits. On July 2, 2020, the Complainant filed a Motion in Limine seeking to strike the Company's rebuttal testimony. The Company timely filed a response opposing this Motion on July 22, 2020.

On July 7, 2020, the ALJ issued two Interim Orders. One Order denied the Complainant's Request for Subpoena. The other Order converted the in-person hearing scheduled for July 23-24, 2020 to a telephonic hearing on these same dates, and a

Hearing Notice was issued consistent with this Order.[2] The Order also directed the parties how to participate in the telephonic hearing and submit proposed exhibits in light of this change, which required email submission instead of service via the United postal office.

On July 15, 2020, the Complainant submitted for filing to the Secretary's Bureau, via postal mail, a revised version of his own written direct testimony dated July 1, 2020, along with two flash drives. This submission consisted of 114 pages of his testimony, and together with the exhibits, totaled over 250 pages. (*See* Certificate of Service dated July 15, 2020; Tr. 7/23/2020 at 158-59).

On July 23, 2020, the ALJ issued two Interim Orders. One Order denied the Complainant's letter requesting that a new ALJ be assigned to preside over this matter, which request was treated as a motion to disqualify the ALJ. The other Order denied the Complainant's Motion in Limine to strike the Company's rebuttal testimony.

*July 2020 Evidentiary Hearings*

On July 23 and 24, 2020, a telephonic evidentiary hearing was held. The Complainant represented himself and the Company was represented by Attorneys Giesler, Leposki, and Curtis S. Renner, Esquire. During the hearing, the Complainant's 95-page written direct testimony dated November 20, 2019, was admitted into evidence after the ALJ struck portions of it upon the objection of West Penn. Nearly all of the 62 exhibits the Complainant proposed were not admitted upon the objection of West Penn.[3]

[2] The Interim Order explained that telephonic hearings were being held due to the closure of the PUC physical offices from the onset of the COVID-19 pandemic.

[3] *See* Complainant's Main Brief (M.B.) at 12, in which he stated he submitted 62 exhibits, most of which were articles regarding the harmful effects of smart meters. Complainant Reply Brief (R.B.) at 12.

The written direct testimony of the Complainant's expert, Dr. Semelka, who was present at the hearing, was not admitted upon the objection of West Penn.

The Company's rebuttal testimony of one witness, John C. Ahr, and an exhibit sponsored by him, were both admitted. Other documents were admitted by the ALJ as Exhibits ALJ-1, ALJ-2, ALJ-3, ALJ-4 (Confidential), and ALJ-5. A complete list of all the admitted testimony and exhibits is discussed further below.

At the conclusion of the hearing, the parties agreed to file main briefs by October 9, 2020.

On September 3, 2020, a hearing transcript consisting of 369 pages was filed with the Commission. For ease of reference, for the remainder of this decision, any citation to this hearing transcript will be referred to as "Tr. at [page number]" and any citation to any other transcript will be identified with the date of that particular hearing or conference. Certain hearing exhibits were also filed on this date.

On October 9, 2020, both parties filed Main Briefs. On October 12, 2020, the Complaint filed a Corrected Main Brief.[4] The Complainant's Main Brief had numerous appendices attached to it that were either denied from the admission into evidence at the hearing, or otherwise are not part of the record.

On October 14, 2020, at the request of the Complainant, the parties were permitted to file Reply Briefs on or before November 10, 2020.

[4] The Complainant's Corrected Main Brief is 238 pages, inclusive of appendices, proposed findings of facts, conclusions of law, and ordering paragraphs, and amends one sentence on p. 58 of his Main Brief. (*See* Complainant's cover letter dated October 12, 2020 which explains this one correction).

*Stay Order*

On November 4, 2020, prior to the expiration of the time for filing Reply Briefs, this matter was stayed pursuant to the Commission's Order in *Smart Meter Procurement and Installation*, Dkt. No. M-2009-2092655 (Order entered Nov. 4, 2020) (*Stay Order*). The *Stay Order* instituted a stay of proceedings before the Commission challenging smart meter deployment as being in violation of Section 1501 of the Code, 66 Pa.C.S. § 1501 (Section 1501) (relating to reasonable service), as in the instant case.

On November 14, 2023, the *Stay Order* was lifted. *See* M-2009-2092655 (Order entered Nov. 14, 2023).

*Post-Stay Order*

On November 27, 2023, this matter was reassigned from ALJ Watson to the undersigned ALJ by a Judge Change Notice.

On December 12, 2023, the parties were issued my Post-evidentiary Hearing Conference Order advising them that a post evidentiary hearing conference would be scheduled by a separate notice. This Order explained that the purpose of this conference was to give the parties an opportunity to address procedural matters including whether the Complainant wanted an opportunity to reopen the evidentiary record to present expert testimony in light of the decision of the Supreme Court of Pennsylvania in *Povacz II*,[5] and whether either party wanted the opportunity to file a reply brief. I also had some concerns about the accuracy of the evidentiary record. This

[5] Referring to *Povacz v. Pa. PUC*, 280 A.3d 975 (Pa. 2022) (*Povacz II*), which case was the basis of the PUC's *Stay Order*.

same day, a Post-Hearing Conference Notice was issued scheduling a conference for February 27, 2024.

On December 13, 2023, the Complainant filed an Amended Complaint seeking to add the Complainant's spouse, Susan Jennings, as an additional complainant to this proceeding. On January 2, 2024, the Company timely filed an Answer and New Matter, as well as Preliminary Objections. The Company opposed the Complainant's proposed amendment as time-barred by 52 Pa. Code § 5.91(c) (relating to time limitations of amended pleadings). In response, on January 5, 2024, the Complainant withdrew his Amended Complaint.

Upon the unopposed request of the Complainant, the post-hearing conference scheduled for February 12, 2024, was continued until March 20, 2024.

On March 20, 2024, a post-hearing conference was held. The Complainant represented himself and the Company was represented by Daniel A. Garcia, Esquire. During the conference, several matters were discussed including the accuracy of the evidentiary record since my review showed that two exhibits admitted at the hearing in July 2020 were missing or incomplete—namely, the Complainant's 95-page written direct testimony and the Company's exhibit. (Tr. 3/20/2024 at 9-12).[6] Additionally, both parties requested to file a reply brief and Mr. Jennings requested time to consider whether he wished to request to reopen the evidentiary record.

The results of the discussion and my rulings at this conference were memorialized in an Order dated March 21, 2024. This Order provided: (i) that by

[6] *See also* Tr. at 368 where the ALJ noted that the Complainant's written direct testimony was submitted as a proposed exhibit via U.S. postal mail in anticipation of an in-person hearing, and not in an electronic format, and the ALJ indicated his office would submit the exhibit to the court reporter.

April 11, 2024, Mr. Jennings shall submit a status report indicating whether he wishes to reopen the evidentiary record to present expert testimony and if so, provide the name, address, and a brief summary of the proposed expert's testimony; (ii) that 14 days after the filing of the post-hearing conference transcript, the Company shall submit a status report, detailing whether it believes that the hearing exhibits admitted on July 23-24, 2020, were accurately filed of record and if not, to rectify any discrepancy where possible; and (iii) that the request of both parties to file a reply brief was granted and the deadline would be determined following the filing of the Complainant's status report.

On April 11, 2024, Mr. Jennings filed a Status Report stating that he was not requesting to reopen the evidentiary record to present expert testimony.

On May 14, 2024, Attorney Garcia emailed me and the Complainant a copy of his Status Report in the form of a letter to the PUC's Secretary. This Report stated that after the Company's review, the record was missing two admitted exhibits: (i) West Penn's Exhibit "JCA-1" (which is improperly identified as "JC8-1" in the transcript) and (ii) Complainant's 95-page written direct testimony, identified as "Statement B, testimony of Mr. Jennings" and marked as "Exhibit ALJ-5" (the transcript record shows "ALJ-5" is actually the rebuttal testimony of West Penn witness Mr. Ahr). Attorney Garcia attached the missing exhibits to his email and stated that the Status Report and the missing exhibits were electronically filed with the PUC on the same date of his email.

However, my review of the record does not show Attorney Garcia's filing. Therefore, in the interests of maintaining the accuracy of the evidentiary record, I have forwarded Mr. Garcia's May 14, 2024, email and missing exhibits to the Secretary's Bureau and requested that they be filed. West Penn's missing exhibit will be marked as "WPP Exhibit JCA-1," as so pre-marked by the Company when submitted as a proposed exhibit. The Complainant's written direct testimony will be marked as "Exhibit C-1."

Of note, Exhibit C-1 has the word "confidential" struck out on the top of some of the pages. Mr. Jennings explained at the hearing that although he originally submitted this exhibit as confidential due to medical information, he was no longer requesting that it or any testimony or exhibit he submitted, or any questioning that may occur of himself and his witnesses including Dr. Semelka at the hearing, be treated as confidential, preferring it all to be "put on the public record." (*See* Tr. at 10-14 for Mr. Jennings entire exchange with the ALJ to expressly clarify the Complainant's intentions and in particular, the Tr. at 10 wherein Mr. Jennings states, "We have no confidential requests.").[7]

On May 17, 2024, the Complainant filed a Motion for Continuance, requesting additional time to allow him time to recover from a major medical event.

By Order dated October 1, 2024, the parties were given until November 15, 2024, to file a Reply Brief. On November 15, 2024, both parties filed a Reply Brief. The Complainant's Reply Brief has numerous appendices attached to it that were either denied from admission at the hearing, or otherwise are not part of the record.

On January 9, 2025, the Complainant filed a "Petition to Re-open the Proceeding for the Purpose of Taking Additional Evidence." No response to the Petition was filed. This Petition will be addressed below.

[7] Notwithstanding the Complainant's statements at the hearing, to avoid confusion and out of an abundance of caution, Exhibit C-1 will be filed confidentially since it also contains other personal identifiable information including account numbers and Mr. Jennings was referring to medical testimony. However, consistent with Mr. Jennings' hearing statements, this decision will not redact the medical testimony that the Complainant indicated he wished to have on the public record. This approach is also consistent with the post-hearing filings in the Complainant's Main and Reply Briefs, neither of which was filed or marked by the Complainant as confidential and include references to medical information.

*Hearing Testimony and Exhibits*

The evidentiary record includes the following testimony and exhibits which were admitted at the hearing, as indicated by the index to Exhibit List (Tr. at 264); any discrepancies are noted:

**Exhibit ALJ-1**
"E-mail and attachment dated 9/2019 regarding Dr. Semelka"

Note: As filed, this exhibit does not include any attachment; however, *see* Exhibit ALJ-4 which appears to include this attachment

**Exhibit ALJ-2**
"E-mail and attachment dated 11/2019 regarding Dr. Semelka"

Note: As filed, this exhibit does not include any attachment; however, *see* Exhibit ALJ-4 which appears to include this attachment[8]

**Exhibit ALJ-3**
E-mail chain between OALJ staff and the Complainant regarding service of proposed exhibits due to the change of an in-person hearing to a telephonic hearing, including how to file a proposed large exhibit

**Exhibit ALJ-4**
Statement A, testimony of Dr. Michael Semelka marked "Confidential"[9]

**Exhibit ALJ-5**
Statement B, testimony of Mr. Jennings

[8] The attachments in the emails refer to Dr. Semelka's written testimony or his answers to questions posed by Mrs. Jennings in preparing in his testimony, which testimony is filed as Exhibit ALJ-4.

[9] The hearing ALJ explained that although he excluded the proposed testimony of Dr. Semelka, he was admitting this Exhibit "only for clarification because there was substantial discussion with regard to that item." (Tr. at 270). For the length of discussion of this exhibit including the exchange with Dr. Semelka, *see* Tr. at 50-155. This proposed exhibit is addressed further below since the Complainant contends it was improperly excluded.

Note: As filed, this Exhibit is not Mr. Jennings' written testimony but the rebuttal testimony of West Penn's witness, John C. Ahr, also pre-marked by West Penn as "WPP Statement No. 1-R"

**Exhibit A**
West Penn's Responses to Interrogatories, Sets I and II

Note: As filed, this exhibit contains certain responses that were not admitted upon objection of West Penn. The following Responses were not admitted: Responses to Set I, Nos. 32, 50, and 51; and Responses to all of Set II with the exception of No. 34. (Tr. at 278).

**Exhibit LL**
Complainant's photographs of the analog meter at his property, his son playing nearby, and his son's play area to show how close the meter is to the play area. (Tr. at 305).

**Exhibit C-1**
Direct Testimony of Complainant, Michael T. Jennings, dated November 20, 2019 (95 pages)[10]

Note: As filed, this exhibit contains portions that were either struck by the hearing ALJ or withdrawn by the Complainant upon the objection of West Penn. The following portions were stricken:

- p. 5, line 42 through p. 6, line 30; (Tr. at 231-32, 237);
- p. 7, line 35 through p. 14, line 5; (Tr. at 231-32, 237);
- p. 15, line 9 through p. 18, line 15; (Tr. at 231-32, 237);
- p. 28, line 12 through line 39 (Tr. at 231-32, 237);
- p. 29, line 20 through p. 33, line 1 (Tr. at 238);
- p. 33, line 3, through p. 37, line 15 (Tr. at 234, 239);
- p. 37, line 18 through p. 38, line 19 (Tr. at 243);

[10] During the hearing, the Complainant moved to admit, in place of his direct testimony dated November 20, 2019, his revised direct testimony dated July 1, 2020. Mr. Jennings explained that he submitted his revised testimony to the PUC's Secretary, in accordance with what he believed were the PUC's large filing rules and instructions by the ALJ's staff per Exhibit ALJ-3. The proposed revised testimony was excluded on the basis that neither the Company nor the ALJ received the revised testimony, only the Certificate of Service indicating that Mr. Jennings was filing it with the Secretary, and it was submitted past the deadline for submitting testimony and five days before the hearing. (Tr. 167, 177).

- p. 38, line 29, beginning with words “Beth Ann Schmidle” through p. 39, line 29 (Tr. at 245);
- p. 43, line 24, beginning with the words, “Even so,” through p. 70, line 5 (Tr. at 246);
- p. 70, line 10 through p. 80, line 13 (Tr. 249);
- p. 82, line 8 through line 28 (Tr. at 252-53);
- p. 82, line 37 through p. 83, line 7, beginning with words “this is” and ending with “invoicing tools” (Tr. 250);
- p. 83, line 7 through p. 83, line 38 (Tr. at 251); and
- p. 84 line 8 through p. 85, line 13 ( Tr. at 252).

Note: Mr. Jennings also proposed 62 exhibits, most of which were not admitted upon the objection of the Company with the exception of Exhibit LL. (*See* Tr. at 274-357 for the ruling on each exhibit).

**West Penn Exhibit JCA-1**

The Company’s Smart Meter Deployment Plan

This case is ready for disposition. For all the reasons discussed below, the Complaint must be denied and dismissed.

## FINDINGS OF FACT

1. The Complainant is Michael T. Jennings.

2. The Respondent is West Penn Power Company, a jurisdictional public utility.

3. Mr. Jennings receives residential electric service from the Company under two accounts on the same property (his residence and what he refers to as his “barn”) at 200 Brook Hollow Road, Mount Pleasant, Pennsylvania (service location). (Exhibit C-1 at 3).

4. The service location is a 14-acre farm. (Exhibit C-1 at 19).

5. The Complainant resides at the service location with his spouse, Susan Jennings, and their son, McKenzie Jennings (McKenzie). (Exhibit C-1 at 19).

6. Mr. and Mrs. Jennings (the Jennings) purchased the service location in 2015, but did not intend to move into the home until it was remodeled. (Exhibit C-1 at 19).

7. The Jennings previously resided in a residential development at 905 Country Club Drive, Greensburg, Pennsylvania, where they also received electric service from the Company. (Exhibit C-1 at 19).

8. The Jennings purchased the 14-acre property for their son's health and safety because they wanted to move out of the "city" and away from all of the WiFi that "surrounded them" from the nearby homes and businesses in the residential development in Greensburg. (Exhibit C-1 at 3, 19).

9. In March 2017, when the Jennings returned to their Greensburg home from a week-long vacation, McKenzie would not enter the home, instead sitting in the driveway for hours, and the Complainant had to "drag" him into the home. (Exhibit C-1 at 19).

10. Three days after the Jennings returned to their Greensburg home from their vacation, McKenzie started having refractory seizures[11] that would not stop

[11] Although not defined in the record, according to John Hopkins Medicine, a refractory seizure is one that does not response to standard anti-epileptic medications. *See* https://www.hopkinsmedicine.org/health/conditions-and-diseases/epilepsy/refractory-epilepsy (last visited 2/18/2025).

including 115 seizures on that third day and 109 seizures in the emergency room the next day. (Exhibit C-1 at 19, 24-25).

11. Mr. and Mrs. Jennings believed something was aggravating their son's epilepsy at the Greensburg home when they returned to it from vacation. (Exhibit C-1 at 19).

12. After the 2017 seizures, Mr. and Mrs. Jennings asked the Company whether it installed an RF/EMF-emitting device or smart meter at their Greensburg home while they were on vacation but "West Penn refused to answer our interrogatory requesting the date a [smart meter] was deployed on the home in Greensburg." (Exhibit C-1 at 19).

13. The Complainant filed a Motion to Compel Discovery on June 12, 2019, to compel the Company's responses to various questions including the response to Complainant's Set II, Interrogatory No. 2; this interrogatory asked for the date when the Company installed a smart meter at the Greensburg home. (Interim Order July 5, 2019).

14. The Company's objection to Complainant's Set II, Interrogatory No. 2 was sustained by Order dated July 5, 2019. (Interim Order July 5, 2019).

15. Because of the number of McKenzie's seizures after returning from their vacation in 2017—*i.e*, over 200 in three to four days, and their concern of the effects of the smart meter's radio frequency (RF) transmissions on their son which they believe was installed in their absence, the Jennings decided to move into the service location in 2017 even though the remodeling was not completed -- in order "to protect McKenzie" from RF/EFT emitting devices. (Exhibit C-1 at 3, 19).

16. McKenzie's medical conditions started at birth and continue today and include autism, epilepsy, intellectual and development disability, Sturge-Weber syndrome, hypothyroidism, Todd's paralysis, brain atrophy, pediatric acute-onset neuropsychiatric syndrome (PANS) with a mycoplasma coinfection, pediatric autoimmune neuropsychiatric disorders associated with streptococcal infections (PANDAS), pediatric infection triggered auto-immune neuropsychiatric syndrome, mild heart murmur, sudden unexpected death in epilepsy (SUDEP), and refractory seizures with possibility of SUDEP. (Exhibit C-1 at 23-24).

17. Caring for their son requires 24/7 diligence on the part of Mr. and Mrs. Jennings since their son graduated from school; at the time of the hearing their son was 25 years old. (Exhibit C-1 at 4).

18. McKenzie has numerous environmental sensitivities (Exhibit C-1 at 26).

19. One treating doctor advised the Complainant that his son has one of the lowest functioning immune systems he has seen out of thousands of PANDAS patients, which may account for his seizure threshold being so low. (Exhibit C-1 at 27).

20. Mr. and Mrs. Jennings believe that by moving to the service location, they reduced their WiFi exposure by 90% from their Greensburg home. (Exhibit C-1 at 19).

21. At the service location, the Jennings have undertaken numerous measures to reduce their RF exposure including the following:

- They do not use WIFI at the service location; all their equipment including their computers is hardwired in order to "take the EMF burden off of McKenzie's compromised system;"

- They chose to move to the 14-acre property so that other WiFi systems from other homes do not interfere and are a good distance from the other homes;

- They turn off everything that is run by electricity in their living room and office each night which are close to McKenzie's bedroom;

- They keep two cell phones for emergency purposes only, one of which does not have internet service, and they turn off their phones when not in use or keep them in airplane mode; they intend to get a "true landline;"

- They do not have any bluetooths or hotspots turned on;

- They do not use a microwave; and

- They only use battery-operated clocks.

Exhibit C-1 at 21-22.

22. Mr. Jennings has stage-4 colon cancer. (Exhibit C-1 at 27, 89).

23. Mrs. Jennings has multiple sclerosis. (Exhibit C-1 at 28, 89).

24. Mr. Jennings is retired, while employed he had worked as a loan officer or manager for various financial companies, and only claims to be an expert in his son's health. (Exhibit C-1 at 4; Tr. at 197).

25. The Complainant contends that McKenzie's immune system is too vulnerable for an RF/EMF-emitting invoicing tool. (Exhibit C-1 at 42).

26. After receiving notice from the Company that it intended to install a smart meter at the service location, the Jennings requested in writing via a letter to the

Company, an ADA accommodation in the form of being able to keep an analog meter; the Jennings' request was refused by the Company. (Exhibit C-1 at 5).

27. Mr. Jennings asked the Company if a customer can turn off the radio frequency RF transmission coming to and from the smart meter that West Penn proposed to install and the Company responded that turning off the RF transmission is equivalent to causing the smart meter to stop working and any customer found tampering with West Penn's meters or other equipment will be considered in violation of West Penn's PUC-approved tariff and regulations, which would result in termination of service. (Exhibit A, Response to Set I Interrogatory, No. 49).

28. At the time of the hearing, there was no smart meter installed at the service location, service was not terminated, and Mr. Jennings pays his electric bills in full and on time. (Exhibit C-1 at 74, 92).

29. The Company presented one witness, Mr. John C. Ahr.

30. Mr. Ahr has a Bachelor of Science degree in electrical engineering from Pennsylvania State University and has worked for FirstEnergy or its predecessor companies for over 36 years in various positions including Director of Systems Operations; Director of Energy Procurement; Director of Meter Reading and Collections; and his current position as Advisor, Regulatory Compliance for Smart Meters. (WPP St. No. 1R at 1).

31. Mr. Ahr's responsibilities includes ensuring regulatory compliance associated with the smart meter project, coordination of smart meter developments among the FirstEnergy operating companies; and serves as the Act 129 and smart meter subject matter expert. (WPP St. No. 1R at 2).

32. Mr. Ahr's rebuttal testimony is marked as Exhibit ALJ-5, but for ease of reference, and consistent with the briefs submitted by the parties, this rebuttal testimony will be cited as "WPP St. No. 1R" which can be found in the record under Exhibit ALJ-5.

33. Mr. Ahr sponsored one exhibit, WPP Exhibit JCA-1, which is the Company Smart Meter Deployment Plan. (WPP Exhibit JCA-1).

34. Act 129 requires all electric distribution companies with at least 100,000 customers, such as the Company, to install smart meters throughout their service territories. (WPP St. No. 1R at 4; WPP Exhibit JCA-1).

35. Act 129 provides a list of required smart meter functionality, which was supplemented by Commission order. (WPP St. No. 1R; WPP Exhibit JCA-1).

36. The Company's Smart Meter Technology Procurement and Installation Plan was filed on August 10, 2009. *Joint Petition of Met-Ed Co., Pa. Elec. Co, Pa. Power Co. and West Penn Power Co. Approval of Smart Meter Technology Procurement and Installation Plan,* No. M-2009-2123950 (Petition dated Aug. 10, 2009).

37. The Commission ultimately approved the smart meter deployment plan, with modifications, on June 9, 2010. *Joint Petition of Met-Ed Co., Pa. Elec. Co, Pa. Power Co. and West Penn Power Co. Approval of Smart Meter Technology Procurement and Installation Plan*, No. M-2009-2123950 (Order entered June 9, 2010).

38. 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. *Joint Petition of Met-Ed Co., Pa. Elec. Co., Pa/ Power Co. and West Penn Power Co. For Approval of Their Smart Meter Deployment Plan*, Nos. M-2013-2341990, M-2013-2341991, M-2013-2341993, M-2013-2341994 (Petition filed Dec. 31, 2012); (WPP Exhibit JCA-1).

39. 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. *Joint Petition of Met-Ed Co., Pa. Elec. Co., Pa/ Power Co. and West Penn Power Co. For Approval of Their Smart Meter Deployment Plan*, Nos. M-2013-2341990, M-2013-2341991, M-2013-2341993, M-2013-2341994 (Revise Plan filed June 16, 2014).

40. West Penn's Commission-approved Smart Meter Deployment Plan called for 98.5% of the Company's smart meter installation to be completed by 2019, with the remaining 1.5% of meters being installed by the end of 2020. (WPP Exhibit JCA-1 at 9-10).

41. The Company's smart meters comply with all applicable safety requirements and standards for smart meters established by various entities including the Federal Communications Commission (FCC), and the American National Standards Institute (ANSI). (WPP St. No. 1R at 12-13).

42. The Company's smart meters are Underwriters Laboratories (UL) certified, which means the meters were tested for Compliant UL standard 2735. (WPP St. No. 1R at 12-13).

43. The Complainant did not present any admissible expert testimony that a smart meter affects his individual personal health or safety, or the personal health and safety of his wife and son.

## DISCUSSION

### Legal Standards

#### *General Burden of Proof*

As the party seeking affirmative relief from the Commission, a complainant has the burden of proof by a preponderance of the evidence. 66 Pa.C.S. § 332(a); *Samuel J. Lansberry, Inc. v. Pa. PUC*, 578 A.2d 600 (Pa. Cmwlth. 1990). A preponderance of the evidence is evidence that is more convincing, by even the smallest amount, than that presented by the opposing party. *Se-Ling Hosiery, Inc. v. Margulies*, 70 A.2d 854 (Pa. 1950). As a matter of law, a complainant must show that the named utility is responsible or accountable for the problem described in the Complaint in order to prevail and that the offense is a violation of the Code, the Commission's regulations, or order. *Patterson v. Bell Tel. Co. of Pa.*, 72 Pa. P.U.C. 196 (1990); 66 Pa.C.S. § 701.

The burden of proof is comprised of two distinct burdens: (1) the burden of production; and (2) the burden of persuasion. *Hurley v. Hurley*, 754 A.2d 1283 (Pa. Super. 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. *Moore v. Nat'l Fuel Gas Distrib.*, Dkt. No. C-2014-2458555 (Final Order entered Aug. 25, 2015) (*Moore*). The burden of production goes to the legal sufficiency of a party's claim or affirmative defense. *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 (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*, 461 A.2d 1234 (Pa. 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. Cnty of Allegheny*, 633 A.2d 1325 (Pa. Cmwlth. 1993); *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-finder 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. Pa. Comm'n on Crime & Delinquency*, 885 A.2d 678 (Pa. Cmwlth. 2005) (*Suber*)).

Additionally, any decision of the Commission must be supported by substantial evidence in the record; more is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. 2 Pa.C.S. § 704; *Norfolk &*

*W. Ry. Co. v. Pa. PUC*, 413 A.2d 1037 (Pa. 1980). As the Commission explained, "[O]pinions and conclusions cannot be relied upon as substantial evidence in a decision by this agency." *Norman v. Phila. Gas Works*, Dkt. No. C-2018-2640719 at 30 (Opinion and Order entered Oct. 7, 2021) (*Norman*).

*Burden of Proof Applied to Section 1501 Challenging Smart Meter Installation*

In *Povacz II*, which dealt with consolidated appeals involving the deployment of smart meters by the utility company, PECO Energy Company (PECO), the Supreme Court of Pennsylvania (Supreme Court) reversed the Commonwealth Court's October 8, 2020 decision in *Povacz I*, and thereby affirmed the Commission's March 28, 2019 and May 9, 2019 Orders in *Povacz v. PECO Energy Co*., Dkt. No. C-2015-2475023 (*Povacz 2019 Order*), *Murphy v. PECO Energy Co.*, Dkt. No. C-2015-2475726, and *Randall v. PECO Energy Co.*, Dkt. No. C-2016-2537666. In *Povacz II,* the Supreme Court affirmatively established that there is no "opt-out" provision for installation of a smart 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 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:

> 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 Pennsylvania 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 confirmed that challenges to smart meter installation, other than an "opt-out," may arise under Section 1501 of the Code. Therein, the Supreme Court stated:

> [W]e conclude that Act 129 does mandate that EDCs[12] 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 2013 Order*; *see also, Frompovich v. PECO Energy Co*., Dkt. 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:

> 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

[12] Electric distribution companies.

> 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 (footnote omitted).

In applying the standard of proof to scientific or expert medical evidence in support of alleged adverse health effects, the Supreme Court ruled in *Povacz II*, that in order to prevail in a Section 1501 claim against an EDC alleging that a smart 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 radio frequency fields (RFs)[13] from the smart meter.[14]

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

[14] *See, Povacz 2019 Order* slip op., at 28-29 (citing *Letter of Notification of Phila. Elec. Co. 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 Cntys.*, 1993 WL 855896 (Pa. P.U.C. 1993), Dkt. No. A-110550F0055 (Final Order entered Nov. 12, 1993) (*Woodbourne-Heaton Final Order*), slip op. at 11).

Complainant's position

Mr. Jennings contends that the installation of a smart meter would be unlawful, unsafe, and unhealthy for him and his family due to each of their health situations, but especially the unique, complex health situation of his son, McKenzie. Mr. Jennings contends that pursuant to the constitution, federal and state law, and in particular the ADA, that he is entitled to an accommodation in the form of allowing him to retain an analog meter on his property. He argues that he is not asking for an opt-out of smart meter installation, but a reasonable ADA accommodation, and a denial of his request constitutes unreasonable service under Section 1501 of the Code. Mr. Jennings also contests several evidentiary rulings made during the litigation process and at the hearing, and asserts that the administrative process in general is biased against him as a *pro se*, disabled litigant who contests mandatory smart meter installation.

The Complainant explains that the heart of his Complaint is his request for a reasonable ADA accommodation whereby he is allowed to retain the analog meter at the service location. While he contends that he, his spouse and his son all have disabilities recognized under the ADA which would warrant his requested accommodation, it is evident throughout his testimony and briefs, that he is especially concerned for, and therefore focuses on, the safety of his son. The Complainant contends that McKenzie is uniquely vulnerable to the smart meter's RF radiation given McKenzie's numerous, complex medical conditions and impairments since birth. (Complainant R.B. at 1).

Mr. Jennings contends that given McKenzie's low seizure threshold and that environmental factors can affect his seizures, the RF radiation from smart meters could increase the likelihood of his son's seizures thereby increasing the likelihood of sudden death in epilepsy referred to as SUDEP. As evidence of his claim, he points to his and Mrs. Jennings' belief that a smart meter was installed in March 2017 at their prior

Greensburg residence while they were on vacation and that three days after they returned home, McKenzie experienced an alarming number of refractory seizures –*i.e*, 115 on the third day after they arrived home, and 95 the following day in the emergency room. Mr. Jennings explains that "something had changed" at their Greensburg home upon their return to it as it was the start of McKenzie's refractory seizures. The Complainant contends that the installation of a smart meter while they were away "most certainly could have been the [cause] of these seizures." (Complainant M.B. at 28).

Mr. Jennings contends that the ALJ erred by denying his discovery motion to compel the Company to reveal the exact date it deployed a smart meter at his former Greensburg residence. According to Mr. Jennings, had the Company answered that it did install a smart meter while they were away on vacation, that this would have contributed to him being able to meet his burden of conclusively proving a causal relationship between the smart meter installation and the harm to his son. According to the Complainant, this would have shown that the smart meter exacerbated McKenzie's epilepsy to the point of status epilepticus,[15] which could have caused his death through SUDEP. (Complainant M.B. at 27-28; Complainant R.B. at 13).

Further, Mr. Jennings contends that he is not relying solely upon his own assertion to prove his case. He contends that the ALJ erred in excluding from the evidentiary record various exhibits and testimony he proposed to introduce. Mr. Jennings explains that he tried to submit 12 letters from various doctors which would have established his, his wife's and his son's disabilities; and that he tried to submit numerous research articles which would have supported his position of the effects of RF radiation

[16] Although not defined in the record, according to John Hopkins Medicine, status epilepticus refers to a medical emergency that occurs when a person has a seizure that lasts more than 5 minutes, or having more than one within a 5-minute period without regaining consciousness in between. *See* https://www.hopkinsmedicine.org/health/conditions-and-diseases/status-epilepticus (last visited 2/18/2025).

as harmful, especially to someone with his son's medical condition. Mr. Jennings also contends that the proposed testimony of McKenzie's treating physician, Dr. Semelka, was improperly excluded, especially since Dr. Semelka was available for cross-examination at the hearing. (Complainant R.B. at 2, 13-14). Mr. Jennings argues, "[t]he Complainant was prevented from establishing a prima facia [sic.] case as he was stripped of his exhibits, testimony, and his due process rights . . . ." (Complainant R.B. at 14).

Mr. Jennings especially takes issue with the exclusion of Dr. Semelka's testimony since he was available for cross-examination. Mr. Jennings contends that Dr. Semelka would have supported his position by testifying that, given McKenzie's many conditions, he would recommend in his professional medical opinion that McKenzie should not be exposed to RF radiation from a smart meter because it may trigger uncontrollable seizures. The Complainant argues that Dr. Semelka would have testified that McKenzie has one of the lowest functioning immune systems that he has seen out of thousands of PANDAS patients, which may account for McKenzie's seizure threshold being so low. (Complainant M.B. at 27). Mr. Jennings argues that had Dr. Semelka's testimony and other exhibits been admitted, that he would have clearly met his burden of proof. (Complainant R.B. at 14).

Further, Mr. Jennings argues that by refusing to accommodate his family with an analog meter, that the Company is interfering with the doctor-patient relationship and preventing patients from following medical recommendations from their licensed medical doctors. (Complainant R.B. at 2). The Complainant also argues that while he acknowledges he is not a medical or engineering expert, that he and his wife are the experts in the care of their son as they have seen that various forms of electromagnetic radiation "definitively exacerbates" their son's seizure disorder. Mr. Jennings contends that the Company has not considered, nor is it qualified to consider, the uniqueness, vulnerability, and sustainability of their son's numerous medical conditions and

impairments in relation to how a wireless digital utility meter is deployed on their home. (Complainant R.B. at 23).

Next, the Complainant argues that his request is reasonable because he presently receives electric service through the analog meter without any problem and is billed accordingly, and he timely and fully pays all of his electric bills. Mr. Jennings also contends that his requested accommodation will not cause any undue burden on the Company, especially since FirstEnergy allows customers in Ohio and New Jersey to opt out of a smart meter. (Complainant R.B. at 1-2).

In addition to alleging an ADA violation, Mr. Jennings also contends that forcing mandated installation of a smart meter at his residence violates the United States and Pennsylvania Constitutions; that it is discriminatory against him and his family; and that it violates Federal Communications Commission (FCC) regulations. Mr. Jennings also complains of the PUC's administrative litigation process in general as it is bias against him as a *pro se*, disabled litigant. (Complaint M.B. at 3).

Company's position

The Company contends that the Complainant wholly failed to meet his burden of proof that the installation of a smart meter at the service location would constitute unreasonable service in violation of Section 1501 of the Code or would otherwise violate any other Code provision, Commission Regulation, or Commission Order. The Company contends that the Complainant failed to present the required expert testimony pursuant to *Povacz II* demonstrating that the furnishing of the Company's smart meter is unsafe or unreasonable service, and his statements related to health and safety concerns should be rejected as unsupported allegations. (West Penn R.B. at 4-5).

The Company argues that the Supreme Court's decision in *Povacz II* renders the Complaint moot because *Povacz II* held that Act 129 mandates the installation of smart meters. Further, the Company continues, even if a customer such as the Complainant establishes that the smart meter's installation would violate Section 1501 of the Code, the customer is only entitled to an accommodation to the extent allowed by Act 129 and a utility's tariff. The only accommodation set forth in the Company's tariff is for the meter to be relocated to a different location at the service location at the customer's expense, which accommodation is still available to the Complainant. (West Penn R.B. at 4-5, 11).

Alternatively, the Company argues that even if the instant Complaint is not deemed moot, *Povacz II* resolves the substantive issues raised in this proceeding. The Company contends that Mr. Jennings failed to provide any reliable evidence in support of his safety and health concerns related to smart meters and 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 Code. Further, the Company contends that *Povacz II* did not disturb the Commonwealth Court's finding in *Povacz I* that the utility company involved, PECO, was not a state actor, and West Penn, which is a similarly-situated Company, is also not a state actor that can violate the Complainant's constitutional rights. (West Penn R.B. at 7-11).

The Company also argues that the proposed exhibits offered by Mr. Jennings were properly excluded at the evidentiary hearing, and any attempt by Mr. Jennings to "shoehorn in excluded, extra-evidence in the briefing stage" are inappropriate and should not be considered. (West Penn R.B. at 6, 21). Further, the Company contends that no qualified expert testimony was presented as to any issue raised in the instant Complaint, and the Complainant's testimony regarding health, medical or scientific opinions, should carry no evidentiary weight since he was not qualified to testify or offer exhibits related to any issue outside of his direct personal knowledge. The

Company also points out that the Complainant declined to present expert testimony through his April 12, 2024 Status Report. (West Penn R.B. at 5-6).

Next, the Company addresses other issues raised by the Complainant in his briefs—namely, his constitutional and discriminatory claims. The Company also takes issue with the Complainant's contention that the Company did not comply with certain FCC regulations since this issue was raised for the first time in the Complainant's Main Brief, and his allegations with respect to the administrative process are entirely meritless. (West Penn R.B. at 21-23).

Disposition

After a careful and exhaustive review of all the record evidence in this matter, for all the reasons discussed below, I am constrained to conclude that the Complainant did not meet his burden of proof evidencing any violation of a Commission statute, regulation, or order on the part of the utility. Further, even if the Complainant met his burden of proof, Mr. Jennings is not entitled to the relief he requested which is to forbid the Company from installing a smart meter at the service location. I also find no evidentiary error or other complaints about the administrative process in general that would warrant granting the Complaint his requested relief.

*Complainant's Petition to Reopen the Evidentiary Record*

Before addressing the merits of the Complainant's issues, I initially address the Complainant's Petition filed on January 9, 2025, to reopen the record. On this date, the Complainant filed a "Petition to Re-open the Proceeding for the Purpose of Taking Additional Evidence." No response to the Petition was filed. However, through this Petition, Mr. Jennings does not seek to introduce any additional testimony or evidence, but responds to the Company's argument in its Reply Brief that the instant Complaint is

moot pursuant to *Povacz II*. Mr. Jennings argues that *Povacz II* does not render his Complaint moot and hence, it should be considered on the merits.

Accordingly, since the Petition merely puts forth additional argument to consider and grant his Complaint, and the Complainant does not in fact propose to present any additional evidence, this Petition will be denied.

*Smart Meter installation*

Next, I agree with the Company that the Supreme Court's decision in *Povacz II* is applicable and controlling to the primary issue raised by the Complainant. 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. Neither Act 129 nor subsequent Commission orders and/or appellate court decisions related to smart meter installation and deployment permit customers to "opt-out" from smart meter installation. Although Mr. Jennings argues that he is not requesting an opt-out from smart meter installation but an ADA accommodation, which will be addressed further below, to the extent that he argues in his briefs that the PUC incorrectly interpreted Act 129, the Supreme Court's holding that there is no opt-out permitted is controlling to the instant case. *Povacz II*.

Next, I find that the record evidence shows that the Complainant failed to establish a *prima facie* case evidencing that the Company's proposed installation of a smart meter constitutes a violation of Section 1501. Mr. Jennings did not present any admissible reliable or credible evidence on any of the issues raised in the Complaint including admissible expert testimony demonstrating that RF emissions from smart meters cause adverse health effects or caused him or his family harm. Further, 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 smart meter, and Mr. Jennings has not done so in the instant case. *See*, *Povacz II*, 280 A.3d at 1006.

The Supreme Court instructed that the burden of proof is two-fold for Section 1501 claims involving the safety of smart meters and RF emissions. First, a customer must present expert opinion rendered to a reasonable degree of scientific certainty that radio frequency emissions from smart meters cause adverse health effects. Next, a customer must present expert opinion rendered to a reasonable degree of medical certainty that RF emissions from the smart meters, either alone or cumulative to other sources of RF emissions, caused them harm. The utility may then refute the customer's evidence by providing scientific and/or medical expert testimony that, within a reasonable degree of scientific or medical certainty, the RF emissions from smart meters did not cause the alleged harm. *Id.* Once the parties have presented their evidence, the onus then falls on the fact finder to weigh the evidence and determine whether it is more likely than not that the smart meter caused the customer harm. *Id.* at 1006.

In the instant case, in addition to the absence of expert testimony presented by the Complainant, there is no evidence that the Complainant is qualified to offer scientific or medical expert opinion. While Mr. Jennings testified to the health conditions of McKenzie, himself, and his wife, there was no expert medical testimony to explain a causal connection between his health and any alleged harmful effects of a smart meter. Without expert testimony and credible evidence, Mr. Jennings' claims are reduced to unsubstantiated opinions. Assertions, personal opinions or perceptions do not constitute factual evidence. As the Commission explained, "opinions and conclusions cannot be relied upon as substantial evidence in a decision by this agency." *Norman* at 30.

For his part, the Complainant argues that he tried to present supporting medical and scientific evidence in the form of numerous research articles, physician visit summaries, lab work, phone call summary sheets, letters, or links to websites discussing

the effects of RF emission from smart meters, especially on those with disabilities. In the Complainant's view, these documents would show that "[s]cience has already established adverse health effects from RF/EMF emissions." (Complainant M.B. at 13).

However, upon objection of the Company, these proposed exhibits were excluded by the ALJ as hearsay and/or irrelevant. (*See* Tr. at 274-357 for the ruling on each exhibit).[16] The Complainant nonetheless attached many of these same articles or links to both his Main and Reply Briefs. I find that these documents were properly excluded from the record as hearsay or irrelevant as these documents were not authored by the Complainant or by someone who was available at the hearing for cross-examination, or related to the Complainant's case. Therefore, these exhibits were properly excluded during the hearing. Therefore, they constitute extra-record evidence during the briefing stage. As such, they will not be considered here. *See Zonca v. Met-Ed Co.*, Dkt. No. C- 2019-3007961 (Opinion and Order entered May 9, 2024) (refusing to consider extra-record materials that were not part of the record.)

Next, Mr. Jennings did try to present the written direct testimony of McKenzie's treating physician, Dr. Semelka, who was available for cross-examination at the hearing, but argues Dr. Semelka's testimony was improperly excluded.[17]

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[16] The Complainant identifies and further describes these exhibits in his Reply Brief as Exhibits C, F, G. H, I, J, K, L, M, N, P1, P2, P3, P4, P5, P6, P7, Q, R, S, T, U, V. W, X, Y, AA, BB, FF, GG, HH, II, JJ, QQ, RR, SS, YY, ZZ, AAA, AND JJJ. (Complainant R.B. at 39-42).

[17] I note that at one point Mr. Jennings stated, in response to the ALJ's questioning, that he had no "objection" to the Company's oral motion to exclude the testimony of Dr. Semelka. (Tr. at 154-55). However, my review of the record shows that a fair reading of this entire discussion and exchange regarding Dr. Semelka's testimony from pages 50 through 155 of the hearing is that the Complainant clearly desired to present Dr. Semelka's testimony and was only acknowledging he understood the Company's objection, and the ALJ's inclination to grant it, but was confused as to what further questions he should ask Dr. Semelka to authenticate the proposed exhibit. (*See*

(Complainant M.B. at 43). Mr. Jennings contends that Dr. Semelka would have supported his position by testifying that, in his medical opinion, given McKenzie's many conditions, he would recommend that McKenzie not be exposed to RF radiation from a smart meter because it may trigger uncontrollable seizures, given his extremely low threshold for seizures from environmental influences. (Complainant R.B. at 2, 13-14). The Complainant argues that Dr. Semelka would have testified that McKenzie has one of the lowest functioning immune systems that he has seen out of thousands of PANDAS patients, which may account for McKenzie's seizure threshold being so low, and hence, supports his medical recommendation. (Exhibit C-1 at 17; Complainant M.B. at 43-44).

The record shows that, following a lengthy discussion about the Complainant's proposed written testimony of Dr. Semelka, West Penn objected to its admission on the basis that Dr. Semelka could not authenticate the document that the Complainant was submitting into evidence. The basis of this objection stems from the discovery of two "versions" of Dr. Semelka's testimony, a shorter document and a longer document. Dr. Semelka, who appeared by telephone, did not have the same version (he had the shorter version) as that submitted by the Complainant to the ALJ and the Company as proposed exhibits (they had the longer version). (Tr. at 154). There was also some confusion and discrepancy as to the date of Dr. Semelka's electronic signature on each version.

My review of the transcript from pages 50 through 155, and Exhibits ALJ-1, ALJ-2 and ALJ-4, reveals that any discrepancy stemmed from all the following: the addition of seven questions and answers on the "longer" version regarding the doctor's professional and educational background; the date of Dr. Semelka's electronic signature on the longer version; Mrs. Jennings' attempt to separate the confidential material from

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Tr. 50-155 for entire discussion and in particular, Tr. at 153, noting the Complainant's confusion; *also see* Complainant M.B. at 43 addressing his confusion).

the non-confidential material, and Mrs. Jennings' attempt to conform the doctor's testimony to the proper format pursuant to 52 Pa. Code § 5.412(e) (relating to form of written testimony).[18] Mrs. Jennings explained that she originally drafted questions for Dr. Semelka, sent them via email to Dr. Semelka, who returned his answers to Mrs. Jennings via email which included his electronic signature dated September 9, 2019. This became the "shorter version" in which the questions were not numbered, did not include a statement of qualifications of Dr. Semelka, and did not include line numbers in the left-hand margin on each page, as required by Section 5.412(e). (*See* Exhibit ALJ-1 and ALJ-4).

Mrs. Jennings further explained that after she realized she did not include as part of the doctor's testimony any professional or educational background questions of the doctor to qualify him as an expert, Mrs. Jennings via another email to Dr. Semelka in October 2019, asked Dr. Semelka to answer an additional seven questions, all related to his professional and educational background. These questions asked Dr. Semelka to state his name and business address; occupation; employer and position; his educational background; his professional experience, and whether he was McKenzie's and Mrs. Jennings' primary care physician. (Tr. at 95-138).

Dr. Semelka testified that he sent back to Mrs. Jennings his responses to these background questions via email dated October 17, 2019. However, Dr. Semelka did not include an updated date on his electronic signature page to reflect the date he responded to these additional questions. (Tr. at 137-38, 140-42; Exhibit ALJ-1). Mrs.

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[18] *See* 52 Pa. Code § 5.412(e) which provides:

> (e) Form. Written testimony must normally be prepared in question and answer form, include a statement of the qualifications of the witness and be accompanied by exhibits to which it relates. A party offering prepared written testimony shall insert line numbers in the left-hand margin on each page....

Jennings then explained she drafted the proposed exhibit by placing all the questions and Dr. Semelka's answers and conformed them to requirements of Section 5.412(e), including inserting line numbers in the left-hand margin of each page, which created the longer version. Dr. Semelka apparently had the "shorter" version, and the emails in which he answered all the questions, and explained that all the answers were his answers. (Tr. at 62, 92-93). Hence, according to the Company, Dr. Semelka could not authenticate the document (the longer version) that the Complainant had submitted as a proposed exhibit and provided to the Company and ALJ and, therefore, requested its exclusion. (Tr. at 153-54).

Dr. Semelka's two "versions" both appear to be in Exhibit ALJ-4, which as explained above, the ALJ admitted not for the medical opinion or conclusion of Dr. Semelka but "only for clarification because there was substantial discussion with regard to that item." (Tr. at 270). My review of Exhibit ALJ-4 shows there are two "versions" of Dr. Semelka's testimony. The questions and answers on each version are identical except the longer version contains the background education and professional information of Dr. Semelka as indicated above, and include line numbers in the left-hand margin.[19] Both documents, however, are dated September 9, 2019.

However, I do not find it necessary to determine whether Dr. Semelka's testimony was properly excluded. Rather, my post-evidentiary hearing Order expressly gave the Complainant an opportunity at the post-evidentiary hearing conference to address whether he wanted an opportunity to reopen the evidentiary record to present expert testimony in light of the *Povacz II* decision. I deemed it in my discretion to provide this opportunity since the Supreme Court made clear for the first time in *Povacz II* that in any Section 1501 claim alleging adverse health effects from RF emissions, a

[19] *See* the longer version in Exhibit ALJ-4, lines 1 through 18, which are the question and answer format to the seven additional questions. Thereafter, the question and answers are identical in both versions.

customer must present expert opinion rendered to a reasonable degree of scientific and medical certainty that RF emissions from smart meters, either alone or cumulative to other sources of RF emissions, caused the adverse health effects . If the complainant does not present this expert testimony, then the complainant has failed to establish a *prima facie* case. Only when the customer presents this evidence is the utility required to refute such expert testimony to overcome complainant's *prima facie* case. *Povacz II.*

However, by his Status Report filed on April 11, 2024, Mr. Jennings explicitly stated that he was not requesting to reopen the evidentiary record to present expert testimony. Therefore, I find that the Complainant was given an adequate due process opportunity to present expert testimony as part of the evidentiary record.

Next, I note that in reaching my conclusion above, I do not question the health situation of Mr. and Mrs. Jennings or the complex health situation of their son, or that each has a disability as defined by the ADA. I also do not question the sincerity of the Jennings' position herein and their sincerely held beliefs of the effects of the RF emission. However, I emphasize that on the evidentiary record before me, which is devoid of any expert testimony, I am constrained by the applicable law to conclude that the Complainant has not met his burden of proof to initially establish a *prima facie* case of a Section 1501 violation. As the Supreme Court explained:

> To the extent Customers challenge the safety of smart meters based on their individualized concerns about adverse effects, we conclude that neither fear nor inconclusive scientific research is sufficient to prove that smart meter technology constitutes unsafe service under Section 1501. Allowing fear — however reasonable given the inconclusiveness of scientific research and studies — to support a finding or conclusion that smart meter technology is unsafe, in the absence of substantial evidence of causality between RF emissions and adverse human health effects, eliminates the requirement that a customer prove the utility

> is responsible or accountable for the problem described in the complaint.

*Povacz II*, 280 A.3d at 1005.

Accordingly, the record evidence compels the conclusion that the Complainant has failed to carry his burden of proof that West Penn has provided unsafe or unreasonable service in violation of Section 1501.

*ADA Accommodation*

Next, I must also agree with the Company even *if* the Complainant established a Section 1501 violation, that the Commission cannot grant the specific relief requested by the Complainant – *i.e*., to forbid the Company from replacing his analog meter with a smart meter. An ADA claim is not a cause of action over which the Commission has jurisdiction.

The Supreme Court expressly held that even *if* a customer proved that the installation of a smart meter at the service location violates Section 1501 of the Code, the customer would be "entitled to an accommodation to the extent allowed by Act 129 and a utility's tariff," not the ADA. *Povacz II*, 280 A.3d at 1014. As pointed out by the Company, the only accommodation set forth in the Company's tariff is for the meter to be relocated to a different location on the property and for the customer, Mr. Jennings, to pay for the estimated relocation costs. (West Penn R.B. at 11).

As explained in *Frompovich*, if the customer believes he has a valid ADA claim against the Company, the Commission is not the appropriate forum for this claim. The Commission explained the proper forum in *Frompovich*:

> [I]t 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 . . . If Ms. Frompovich [the customer] believes that she has a valid ADA claim against PECO, she must work through the federal courts or one of the federal enforcement agencies, which include the Department of Labor, the Equal Employment Opportunity Commission, the Department of Transportation, the Federal Communications Commission or the Department of Justice, but not this Commission.

*Frompovich*, Dkt. No. C-2015-2474602 at 43. Accordingly, Mr. Jennings' ADA claim is not a cause of action over which the Commission has jurisdiction.

*Constitutional and discriminatory claims*

The Complainant also contends that forcing him to have a smart meter installed at his residence violates the 14th Amendment to the United States Constitution and Article I of the Pennsylvania Constitution. The Complainant contends that these constitutional provisions afford the Jennings the right to make fundamental choices about their home, property, and bodies, and forcing them to endure harmful RF radiation emission would expose them to further harm and hence, is unconstitutional. (Complainant M.B. at 3).

I agree with the Company that *Povacz II* did not disturb the Commonwealth Court's finding in *Povacz I* that a utility must be a state actor to implicate the Complainant's constitutional rights. Therefore, since West Penn is not a state actor but a private entity, the Complainant's constitutional claims must fail.

The Complainant also contends that mandated smart meter installation is discriminatory and violates Section 1502 of the Code which provides:

§ 1502. Discrimination in service

> No public utility shall, as to service, make or grant any unreasonable preference or advantage to any person, corporation, or municipal corporation, or subject any person, corporation, or municipal corporation to any unreasonable prejudice or disadvantage. No public utility shall establish or maintain any unreasonable difference as to service, either as between localities or as between classes of service, but this section does not prohibit the establishment of reasonable classifications of service.

66 Pa.C.S. § 1502. The Complainant asserts two bases for his discrimination claim which are: (i) that there are people living in areas where small power companies are serving less than 100,000 customers who do not have to have a smart meter; and (ii) that people who have electromagnetic sensitivity and disabilities are being treated differently than those people without such sensitivity and/or disabilities. (Complainant M.B. at 19-24; Complainant R.B. at 19-21).

I agree with the Company that mandated smart meter installation is not discriminatory pursuant to Section 1502 of the Code because the Company is required to install smart meters for *all* of its customers. On the other hand, allowing Complainant *alone* to opt-out from the smart meter installation may in fact raise Section 1502 concerns. (*See* West Penn R.B. at 17). Further, as discussed above, the PUC's jurisdiction is limited. Determinations regarding the ADA, or a cause of action under the ADA, is not a cause of action that the Commission has jurisdiction over. *Frompovich.*

*FCC claim*

In his Main Brief, the Complainant contends that the Company did not comply with the requirements of certain FCC regulations, or should not have relied on certain FCC regulations because the FCC safety guidelines are, in the Complainant's view, outdated. (Complainant M.B. at 16, 28). The Company takes issue with these claims since they were not raised by the Complainant during the lengthy litigation

process, but raised for the first time in the Complainant's Main Brief. The Company contends that to consider this argument now has deprived the Company of an opportunity to present evidence in response to these FCC claims. (West Penn R.B. at 18).

I agree with the Company that these assertions were improperly raised by the Complainant for the first time in the briefing stage. As such, I agree that the Company was therefore deprived of an opportunity to present evidence during the hearing to respond to these allegations and as a result, the Company was not able to address these claims until the filing of its Reply Brief. *See Petition of Duquesne Light Co. for approval of smart meter procurement and installation plan*, Dkt. No. M-2009-2123948 (Initial Decision issued Jan. 28, 2010), adopted as modified (Opinion and Order entered May 11, 2010) (raising issues for the first time in a Main Brief deprives all parties from testing the reasonableness of the position during the hearing or of addressing it in their respective Main Briefs).

Accordingly, this claim will not be considered.

*General administrative process claims*

Throughout the Complainant's Main Brief, Mr. Jennings complains of bias and prejudice towards smart meter complainants in general and towards him as a *pro se* litigant and disabled person. For example, in his Main Brief, Mr. Jennings contends that "bias and prejudicial actions were evident even before [the Complainant] filed his formal complaint." (Complainant M.B. at 24). In support of this claim, Mr. Jennings points to the fact that he has "heard that no one has won their case before the [PUC] in the smart meter cases;" that the PUC "hides" smart meter cases on its website by "labeling" them as "miscellaneous/other disputes" for anyone wanting to search the PUC's documents; and since the PUC is funded by the industry itself, the PUC has a conflict of interest in regulating public utilities. (*Id*. at 24-25).

Further, Mr. Jennings complains that the PUC administrative process is essentially stacked against him as it does not afford due process to *pro se*, disabled litigants who are contesting smart meter installation such as himself. Mr. Jennings contends that he cannot afford, like other similarly situated *pro se* litigants, to pay for experts and lawyers to cross-examine the Company's experts and to help them understand and respond to all the legal processes involved. Mr. Jennings also complains that the PUC set an impossible bar for any complainant to find relief under Section 1501 by requiring complainants to prove a conclusive causal connection. Rather, Mr. Jennings asserts, it is "[t]he PUC [who] should [have to] prove safety [of smart meters]." (Complainant M.B. at 28).

Next, Mr. Jennings also complains that by the time he received his personal copy of the hearing transcript, that he did not have enough time to ask for corrections for the transcript because in his view, the transcript contains omissions or errors. Mr. Jennings lists these omissions in his Main Brief, which are comments allegedly made by the ALJ or counsel for the Company. (Complainant M.B. at 29).

For its part, the Company argues for various reasons that all of these complaints are meritless, untimely, and unsupported by the record. (West Penn R.B. at 21–23).

After a careful review of the record in this matter, I find that the Complainant's bias and prejudice claims are without merit and unsupported by the record. The Commission is bound by our state's Supreme Court ruling since *Povacz II* and its reasoning therein. As discussed above, the Supreme Court held that the burden of proof on Section 1501 claims involving the safety of smart meters and RF emissions falls on the customer bringing the claim. As such, the Commission, including the undersigned

ALJ, is not free to shift the burden of proof to the utility or the PUC which is what the Complainant is essentially requesting.

Finally, I agree with the Company that Mr. Jennings' concerns with the hearing transcript are untimely, and as far as I can tell, have been raised for the first time in the Complainant's Reply Brief. (*See* Complainant R.B. at 28-29). The Commission regulation at Section 5.253(c) provides that a party's proposed transcript corrections shall be filed (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, and (3) upon permission of the presiding officer granted prior to the closing of the record. 52 Pa. Code § 5.253(c).

In contravention of the requirements of Section 5.253(c), the Complainant did not make any proposed corrections to the transcript prior to the briefing stage of this proceeding. Furthermore, I have carefully reviewed all of the comments that the Complainant argues are missing from the hearing transcript, and conclude that none of them are substantive or even if included, would change the outcome of this matter.

Accordingly, for all the reasons discussed above, the record evidence compels that the Complaint must be dismissed.

## CONCLUSIONS OF LAW

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

2. The party seeking relief from the Commission has the burden of proof. 66 Pa.C.S. § 332(a).

3. "Burden of proof" means a duty to establish a fact by a preponderance of the evidence, or evidence more convincing, by even the smallest degree, than the evidence presented by the other party. *Se-Ling Hosiery v. Margulies*, 70 A.2d 854 (Pa. 1950).

4. Any decision of the Commission must be supported by substantial evidence in the record; more is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. 2 Pa.C.S. § 704; *Norfolk & W. Ry. Co. v. Pa. PUC*, 413 A.2d 1037 (Pa. 1980).

5. Assertions, personal opinions and conclusions cannot be relied upon as substantial evidence in a Commission decision. *Norman v. Phila. Gas Works*, Dkt. No. C-2018-2640719 (Opinion and Order entered Oct. 7, 2021).

6. The Public Utility Code mandates that a public utility must furnish and maintain adequate, efficient, safe, and reasonable service and facilities, and must make such repairs, changes, alterations, substitutions, and improvements in or to such service and facilities as shall be necessary or proper for the accommodation, convenience and safety of its patrons and the public. 66 Pa.C.S. § 1501.

7. When a complainant challenges the installation of a smart meter, there must be sufficient evidence to support a finding that complainant would be adversely affected by the smart meter or that the utility's use of a smart meter would constitute unsafe or unreasonable service in violation of Section 1501 under the circumstances of the case. *Kreider v. PECO Energy Co.*, Dkt. No. P-2015-2495064 (Opinion and Order entered Jan. 28, 2016).

8. Specific to smart meters and RF emissions, the burden of proof is two-fold. First, a customer must present expert opinion rendered to a reasonable degree

of scientific certainty that smart meters emit RFs and that RF emissions cause adverse health effects and, second, expert opinion rendered to a reasonable degree of medical certainty that RF emissions from the smart meters, either alone or cumulative to other sources of RF emissions, caused them harm. *Povacz v. Pa. PUC*, 280 A.3d 975 (Pa. 2022).

9. Act 129 of 2008 mandates that electric distribution companies 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. 66 Pa.C.S. §§ 2806.1–2807; *Povacz v. Pa. PUC*, 241 A.3d 481 (Pa. Cmwlth. 2020).

10. A utility may threaten service termination to a customer if a customer does not permit access to meters, service connections, or other property of the public utility for the purpose of replacement, maintenance, repair, or meter reading, including the installation of a smart meter. 66 Pa.C.S. § 1406(a)(4); 52 Pa. Code § 56.81(3).

11. The Complainant failed to carry his burden of proof establishing that West Penn Power Company violated the Code or a regulation or order of the Commission.

## ORDER

THEREFORE,

IT IS ORDERED:

1. That the Complainant's Petition to Re-open the Proceeding for the Purpose of Submitting Additional Evidence, filed on January 9, 2025, is denied.

2. That, after hearing held, the Formal Complainant filed by Michael T. Jennings against West Penn Power Company at Docket No. C-2018-3006031 is denied and dismissed.

3. That the docket at Docket No. C-2018-3006031 be marked closed.

Dated: February 28, 2025

/s/
Gail M. Chiodo
Administrative Law Judge