

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

Public Meeting held March 13, 2025

Commissioners Present:

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

Gregory and Donna Kollmar

C-2019-3014650

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 of Gregory and Donna Kollmar (Complainants or Mr. Kollmar and/or Mrs. Kollmar) filed on June 8, 2024, in the

above-captioned proceeding.¹ The Exceptions were timely filed in response to the Initial Decision (I.D.) of Administrative Law Judge (ALJ) Emily I. DeVoe, which the Commission served on the Parties on May 21, 2024. On November 18, 2024, West Penn filed Reply Exceptions. For the reasons discussed below, we shall: (1) grant, in part, and deny, in part, the Complainants' Exceptions; (2) vacate the Initial Decision of ALJ DeVoe; and (3) remand this matter to the Office of Administrative Law Judge (OALJ), consistent with this Opinion and Order.

I. Background

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

¹ By Secretarial Letter issued November 7, 2024 (*November 2024 Secretarial Letter*), the Commission's Secretary: (1) issued a notice to the Parties indicating that it appears to the Commission that although the Complainants filed Exceptions and a Certificate of Service, the Complainants failed to actually send a copy of their Exceptions to West Penn Power Company (West Penn or Company or Respondent); and (2) enclosed the Exceptions, in order to constitute service under 52 Pa. Code §§ 1.54, 1.57, and 1.58. *November 2024 Secretarial Letter*. Therefore, pursuant to 52 Pa. Code § 5.535, the Respondent was given ten days, or until November 17, 2024, to file Replies to Exceptions. It is noted that November 17, 2024, was a Sunday. Therefore, Replies to Exceptions were due Monday, November 18, 2024

January 1, 2024.² The Complainants are West Penn customers who object to the installation of a smart meter at their residence due to safety and privacy concerns. Complaint at 4.

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 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, [EDCs] shall file a Smart Meter technology procurement and installation plan with the commission for approval. The plan shall describe the Smart Meter technologies the [EDC] proposes to install in accordance with paragraph (2).

(2) [EDCs] 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.

² 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) (*FirstEnergy PA Merger Proceeding*). Nonetheless, in this Opinion and Order, we shall refer to the Company as West Penn.

- (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 Implementation Order*). West Penn sought and obtained the Commission’s approval to complete the installation of AMI meters with substantially all customers to receive an AMI meter by mid-2019. *See Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company for Approval of Its Smart Meter Deployment Plan*, Docket Nos. M-2013-2341990, M-2013-2341991, M-2013-2341993, M-2013-2341994 (Opinion and Order entered June 25, 2014) (*2014 Smart Meter Order*).

II. History of the Proceeding

On November 26, 2019, the Complainants filed the instant Complaint against West Penn.³ In their Complaint, the Complainants indicated that West Penn threatened to shut off their electric service on November 25, 2019. The Complainants also asserted that smart meters are unsafe, create a fire risk, can be used as a tracking device, and violates 66 Pa.C.S. § 1501. As relief, the Complainants requested to “[n]egotiate and file [a] new contract with [West Penn] with other terms to accept smart meter if they pay me \$50,000.” Complaint at 4; *see also*, I.D. at 1-2.

On December 16, 2019, West Penn filed an Answer to the Complaint and New Matter (Answer and New Matter), which was properly endorsed with a Notice to Plead.⁴ Also, on December 16, 2019, West Penn filed a Preliminary Objection in response to the Complaint (Preliminary Objection), which was properly endorsed with a Notice to Plead.⁵ The Complainants did not file a response to either the Answer and New Matter or the Preliminary Objection. I.D. at 2.

In its Answer and New Matter, West Penn admitted, in part, and denied, in part, various material allegations in the Complaint. West Penn, *inter alia*, admitted that the Company provides residential electric service to the Complainants and issued a service termination notice to the Complainants because they refused to allow the

³ We note that the formal complaint form utilized by the Complainants indicates that an email address is “optional.” *See*, Complaint at 1. No email address was provided on page 1 of the Complaint; however, a copy of an email correspondence attached to the Complaint indicates the email address for “Donna Kollmar.” *See* Complaint at 1, 4. We further note that the Verification in the Complaint was signed solely by Mrs. Kollmar. *See* Complaint at 6.

⁴ We note that a Certificate of Service was attached to West Penn’s Answer and New Matter. *See* Answer and New Matter at 13.

⁵ We note that a Certificate of Service was attached to West Penn’s Preliminary Objection. *See* Preliminary Objection at 15.

Company access to its meter to replace it with a smart meter. Further, West Penn contended that the Company is required by Act 129 to deploy smart meters, consistent with 66 Pa.C.S. § 2807. Moreover, West Penn argued that neither the Company's Commission-approved Smart Meter Deployment Plan (SMDP), nor the law, permit the Company to refrain from the smart meter installation requirement or allow for an opt-out from smart meter installation. Answer and New Matter at 1-8 (citing 66 Pa.C.S. §§ 1406(a)(4), 2807(f)(1), (2); 52 Pa. Code § 56.81(3)); I.D. at 2.

In its Preliminary Objection, West Penn repeated its legal argument that, in accordance with Act 129 and the Commission's orders, the Company is required to develop and implement a smart meter installation plan. West Penn also argued that because the Complainants failed to allege that the Company committed or omitted an act in violation of its tariff or a Commission Statute, Regulation, or order, the Complaint is legally insufficient and, therefore, must be dismissed. Preliminary Objection at 7-8; I.D. at 2.

On January 31, 2020, Deputy Chief ALJ Hoyer issued an Interim Order which denied West Penn's Preliminary Objection.⁶ I.D. at 3.

⁶ On January 22, 2020, a Motion Judge Assignment Notice was issued (Motion Judge Assignment Notice, assigning this proceeding to Deputy Chief ALJ Hoyer. I.D. at 3.

On May 21, 2020, ALJ DeVoe issued an Interim Order which, *inter alia*, detailed the Commission's procedural rules regarding service, representation, and discovery.⁷ I.D. at 3.

On July 30, 2020, ALJ DeVoe issued an Interim Order (*July 2020 Interim Order*), which established a litigation schedule and directed the Parties to: (1) exchange witness information by August 14, 2020; (2) conclude discovery by October 9, 2020; and (3) file dispositive motions and status reports by October 16, 2020.⁸ I.D. at 3.

On October 16, 2020, West Penn filed a Status Report. The Complainants did not file a Status Report. I.D. at 3.

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. 66 Pa.C.S. § 1501 (*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 of pending smart meter complaints.

⁷ On May 20, 2020, the Commission issued a Judge Change Prehearing Conference Notice, which scheduled a prehearing conference for July 31, 2020, and reassigned the instant matter from Deputy Chief ALJ Hoyer to ALJ DeVoe. Subsequently, on July 30, 2020, Mrs. Kollmar contacted ALJ DeVoe's office requesting that the prehearing conference be cancelled. Consequently, on July 30, 2020, the prehearing conference was cancelled via a Cancellation Notice and Interim Order. I.D. at 3.

⁸ Upon review of the Commission's case management system, the July 2020 Interim Order was served electronically.

Notice was provided on November 14, 2023, informing Mr. Kollmar and Mrs. Kollmar of the lifting of the stay and their procedural rights and obligations under the Commission's Regulations. I.D. at 4-6.

On November 28, 2023, the ALJ issued an Interim Order Directing Complainants to Provide Expert Witness Information to Respondent and Setting Dispositive Motion Deadline (*November 2023 Interim Order*), which directed the Complainants to provide their expert witness information to West Penn and the ALJ by December 22, 2023.⁹ I.D. at 4; *November 2023 Interim Order* at 7-8.

On January 10, 2024, West Penn filed a Motion for Summary Judgment (Motion), which included a Notice to Plead directing the Complainants to file a response within twenty (20) days of service. The Complainants did not file a response to the Motion by February 9, 2024. I.D. at 7.

On February 13, 2024, the ALJ issued an Interim Order Closing the Record. I.D. at 7.

In the Initial Decision, issued on May 21, 2024, ALJ DeVoe granted West Penn's Motion and dismissed the Complaint due to the Complainants' repeated failure to comply with the ALJ's Interim Orders and identify their expert witnesses, which, the ALJ noted, cannot prevail as a matter of law on their smart meter Complaint without the testimony of expert witnesses. I.D. at 1, 15-16.

⁹ Upon review of the Commission's case management system, the *November 2023 Interim Order* was served electronically.

As noted above, the Complainants timely filed Exceptions on June 8, 2024.¹⁰ On November 18, 2024, West Penn timely filed Reply Exceptions.

III. Discussion

A. Legal Standards

1. General Burden of Proof for Complaint Proceeding

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*, 602 A.2d 863 (Pa. 1992). That is, the Complainants’ evidence must be more convincing, by even the smallest amount, than that presented by the respondent. *Se-Ling Hosiery, Inc. v. Margulies*, 70 A.2d 854 (Pa. 1950).

¹⁰ We note that the Complainants filed their Exceptions via Certified Mail through the United States Postal Service (USPS). Additionally, the Complainants have written “CONFIDENTIAL” at the top of their Exceptions. Pursuant to our Regulations at 52 Pa. Code § 5.365, a party seeking to protect a trade secret or other confidential information from disclosure on the public record must seek a Petition for Protective Order. Such a Petition will be granted only when a party demonstrates that the potential harm to the party of providing the information would be substantial and that the harm to the party if the information is disclosed without restriction outweighs the public’s interest in free and open access to the administrative hearing process. However, we note that there is no medical or other sensitive information in the Exceptions or in the record. *See Exc. at 1.*

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. *Scott and Linda Moore v. National Fuel Gas Distribution*, Docket No. C-2014-2458555 (Final Order entered August 25, 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*, 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. 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-finder¹¹ 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 and Delinquency*, 885 A.2d 678 (Pa. Cmwlth. 2005) (*Suber*).

2. Due Process

As an administrative agency of the Commonwealth, the Commission is required to provide due process to the parties appearing before it. Due process is satisfied when the parties are afforded notice and the opportunity to appear and be heard. *Schneider v. Pa. PUC*, 479 A.2d 10, 15 (Pa. Cmwlth. 1984). The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. *Montefiore Hospital Ass'n of Western Pennsylvania v. Pa. PUC*, 421 A.2d 481, 484 (Pa. Cmwlth. 1980).

B. ALJ's Initial Decision

In the Initial Decision, ALJ DeVoe made twenty-five (25) Findings of Fact (FOF) and reached eleven (11) Conclusions of Law (COL). *See I.D.* at 7-10, 16-17. 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.

¹¹ 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)).

The ALJ began by citing Section 5.102 of the Commission's Regulations, which provides the Commission's standard for a request for summary judgment. I.D. at 10 (citing 52 Pa. Code § 5.102(d)(1)-(2)). Specifically, the ALJ noted that the Commission is granted discretion to dismiss any complaint without a hearing if, in its opinion, a hearing is not necessary or in the public interest. I.D. at 11 (citing 66 Pa.C.S. § 703(b); 52 Pa. Code § 5.21(d)). The ALJ continued that a hearing is necessary only to resolve disputed questions of fact, and when the question presented is one of law, the Commission need not hold a hearing. I.D. at 11 (citing *Lehigh Valley Power Committee v. Pa. PUC*, 563 A.2d 548 (Pa. Cmwlth. 1989); *Edan Transp. Corp. v. Pa. PUC*, 623 A.2d 6 (Pa. Cmwlth. 1993)).

The ALJ then summarized West Penn's argument in its Motion that the Complaint should be dismissed in its entirety with prejudice because of the Complainants' inability to carry their burden of proof in support of their claims. The ALJ noted that in *Povacz, et al. v. Pa. PUC*, 280 A.3d 975 (Pa. 2022) (*Povacz II*), the Supreme Court clarified that in smart meter cases, a customer must present expert opinion rendered to a reasonable degree: (1) of scientific certainty that radio frequency (RF) emissions from smart meters cause adverse health effects; and (2) of medical certainty that RF emissions from the smart meters, either alone or cumulative to other RF emission sources, caused or would cause them harm.¹² I.D. at 11 (citing *Povacz II*). The ALJ reasoned that the Complainants are unable to meet their burden of proof as a matter of law because they failed to indicate they plan to provide any expert testimony evidencing, to a reasonable degree of scientific certainty, that smart meters emit RF and that such an emission would be a violation of 66 Pa.C.S. § 1501. Therefore, the ALJ found that the Complaint must be dismissed and considered West Penn's Motion as a Motion to dismiss the Complaint. I.D. at 11 (citing 66 Pa.C.S. § 1501).

¹² RF is an abbreviation for radio frequency and is also used here to denote RF fields or RF signals.

The ALJ also noted that the Supreme Court has found that: (1) in cases where customers challenge a smart meter installation, the customers must present expert testimony because without such testimony, the customers are unable to meet their burden of proof as a matter of law; (2) customers may file a complaint with the Commission raising a claim that installation of a smart meter violates Section 1501 of the Code, even though Act 129 does not provide customers with the right to opt-out of smart meter installation at their residence; (3) complainants seeking relief from the Commission must satisfy their burden of proof by a preponderance of the evidence; (4) inconclusive evidence, or evidence that does not lead to a conclusion of a definite result one way or the other, does not meet the minimal requirements of the preponderance of the evidence standard; and (5) evidence of a mere possibility that harm could result is insufficient to satisfy the preponderance of the evidence standard, even though a customer's evidence does not need to prove their assertion beyond any doubt. I.D. at 11-12 (citing *Povacz II* at 1005, 1008; 66 Pa.C.S. § 1501).

The ALJ also noted that regarding burden of proof, the Supreme Court has found that for Section 1501 claims involving the safety of smart meters and RF emissions, a customer must present expert opinion rendered to a reasonable degree: (1) of scientific certainty that RF emissions from smart meters cause adverse health effects; and (2) of medical certainty that RF emissions from smart meters, either alone or cumulative to other sources of RF emissions, caused them harm. I.D. at 12. The utility may then refute the customer's evidence by providing scientific and/or medical expert testimony that, within a reasonable degree of certainty, the RF emissions from smart meters did not cause the alleged harm. The ALJ continued that 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. I.D. at 12 (citing *Povacz II* at 1006, 1008).

The ALJ further noted the Supreme Court’s conclusions that: (1) fear and inconclusive scientific research were insufficient to prove that smart meter technology constitutes unsafe service under Section 1501; and (2) if a customer establishes by a preponderance of the evidence, based on the totality of the circumstances, that smart meter service violates Section 1501, they are entitled to an accommodation to the extent allowed by Act 129 and the utility’s tariff. However, the ALJ pointed out that the Supreme Court clarified that such accommodation may not rise to the level of an opt-out from smart meter installation because Act 129 mandates smart meter deployment. I.D. at 12 (citing *Povacz II* at 1005, 1015).

Here, the ALJ reasoned that the Complainants were given several opportunities to identify their expert witnesses, including: (1) the *July 2020 Interim Order*, which included a litigation schedule and directed parties to exchange witness information by August 14, 2020; and (2) the *November 2023 Interim Order*, which, *inter alia*: (a) directed the Complainants to provide their expert witness information to West Penn and the ALJ by December 22, 2023; and (b) explained that failure to provide this information by the deadline may result in dismissal of the Complaint. I.D. at 12-13.

The ALJ noted that both the *July 2020 Interim Order* and the *November 2023 Interim Order* “were eServed on [the] Complainants, consistent with their registration in the Commission’s eService program.”¹³ The ALJ added that, to date, the Complainants have failed to provide any expert witness information.¹⁴ I.D. at 13.

¹³ We note that FOF No. 10 of the Initial Decision states the following: “Prior to January 22, 2020, [the] Complainants enrolled in eService, such that they were eServed with all notices and Orders issued by the Commission, beginning with the Motion Judge Assignment Notice on January 22, 2020.” I.D. at 8, FOF No. 10.

¹⁴ As previously noted, the Initial Decision was issued on May 21, 2024.

The ALJ noted that the Commission has held that Parties must comply with the orders of an administrative law judge, and a complainant's failure to do so is a sufficient basis to support dismissal of the matter. I.D. at 13 (citing *Snyderville Community Development Corporation v. Philadelphia Gas Works*, Docket No. C-20055032 (Opinion and Order entered July 31, 2006) (*Snyderville*)). The ALJ found that the Complainants failed to comply with two of her Orders. I.D. at 13.

The ALJ also summarized the Commission's decision in *Carlock v. The United Telephone Company of Pennsylvania*, Docket No. F-00163617 (Opinion and Order entered July 14, 1993) (*Carlock*), noting that Commission precedent tends to afford unrepresented complainants the opportunity to orally set forth their cases on the record and cautions against dismissing cases on a preliminary basis. I.D. at 13-14 (citing *Carlock*).

The ALJ stated that in *Carlock*, a hearing was not held and the Complainants did not have an opportunity to be heard orally. The ALJ explained that the instant case is distinguishable from *Carlock* because in this present matter, the ALJ is dismissing the Complaint due to the Complainants' failure to provide expert witness information, which is required as a matter of law, for the Complainants to be able to make a *prima facie* case and have any chance of meeting their burden of proof. I.D. at 14-15 (citing *Povacz II*).

The ALJ also noted that Deputy Chief ALJ Hoyer denied the Preliminary Objection. Further, the ALJ noted that a litigation schedule was set, thereby moving the case toward a hearing, wherein the Parties would have the opportunity to develop the record. Moreover, the ALJ noted that the Complainants were given ample opportunity to provide their expert witness information. I.D. at 15 (citing *Carlock*).

The ALJ found that the lenience afforded to complainants must be weighed against the due process rights of the respondent, and while an unrepresented complainant has an interest in proceeding to a hearing, the respondent cannot be expected to expend resources and incur the expense of a hearing in cases where the complainants fail to demonstrate they will be able to make a *prima facie* case as a matter of law at a hearing, if one were held. Accordingly, the ALJ reasoned that to proceed to a hearing in this proceeding where the Complainants repeatedly failed to identify expert witnesses, and when expert witness testimony is required as a matter of law, would require the Respondent to expend time and resources where the Complainants could not meet their burden of proof, thereby violating the Respondent's due process rights. Therefore, the ALJ concluded that this instant case could not move forward because the Complainants have failed to identify their expert witnesses, as they were repeatedly ordered to do. I.D. at 15.

Furthermore, the ALJ found that an unrepresented complainant is not excused from complying with a presiding officer's interim orders, and a presiding officer is not prohibited from dismissing a complaint if a complainant fails to demonstrate they will be able to make a *prima facie* case as a matter of law. I.D. at 15 (citing *Carlock*). Accordingly, the ALJ dismissed the Complaint, finding that the Complainants failed to provide their witness information as ordered by the Interim Orders, and that a hearing in this matter is not necessary or appropriate, nor in the public interest. I.D. at 15-16.

C. Exceptions¹⁵

In their Exceptions, the Complainants state that they received the Initial Decision but argue that they were denied due process because they never had a hearing. As such, the Complainants contend that the Initial Decision should be rescinded until they have a hearing and an opportunity to submit a brief. Exc. at 1.

D. Replies to Exceptions

In its Replies, West Penn counters that the Complainants do not identify a reason for their failure to adhere to two of the ALJ's Orders. West Penn refers to the Initial Decision to note that the Commission has held that parties must comply with the orders of an ALJ, and a complainant's failure to do so is sufficient basis to dismiss the matter. R. Exc. at 3 (citing I.D. at 13; *Snyderville*). Further, West Penn notes that the ALJ found that to proceed to a hearing where the Complainants have repeatedly failed to identify expert witnesses and when expert witness testimony is required as a matter of law would require that the Respondent use time and resources in a case where the Complainants could not meet their burden of proof, thereby violating the Respondent's due process rights. As such, West Penn submits that the ALJ correctly found that this case could not move forward because the Complainants failed to identify their expert witnesses after repeatedly being ordered to do so. R. Exc. at 3 (citing I.D. at 15). Therefore, West Penn contends that the Complainants' due process rights have been protected. R. Exc. at 3.

¹⁵ 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 finding of fact and conclusions of law to which exceptions 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) and (d) of our Regulations, 52 Pa. Code § 1.2(a) and (d), to secure a just, speedy, and inexpensive determination.

West Penn also argues that the Complainants' requested relief, to opt-out of smart meter installation, is expressly forbidden by the Supreme Court's holding in *Povacz II*. R. Exc. at 4 (citing *Povacz II* at 1012-14). West Penn notes that the Complainants, in their Exceptions, do not address the Supreme Court's holding in *Povacz II* that: (1) Act 129 mandates the systemwide installation of smart meters; (2) the Commission applied the correct burden of proof standard in the smart meter complaint cases arising under Section 1501 of the Code; (3) an EDC is required to provide an accommodation to a customer absent a Section 1501 violation; and (4) even if a smart meter complainant meets their burden of proof, the complainant is only "entitled to an accommodation to the extent allowed by Act 129 and a utility's tariff." R. Exc. at 4 (citing *Povacz II* at 998).

As such, West Penn argues that the Company must install the smart meter at the Complainants' service address. R. Exc. at 4-5 (citing *Povacz II*, at 1014; 66 Pa.C.S. § 1501). Further, West Penn agrees with the ALJ's finding that the Supreme Court clarified in *Povacz II* that a customer must present expert opinion rendered to a reasonable degree: (1) of scientific certainty that RF emissions from smart meters cause adverse health effects; and (2) of medical certainty that RF emissions from smart meters, either alone or cumulatively, caused or would cause them harm. R. Exc. at 5 (citing I.D. at 11). Moreover, West Penn notes that the Company's tariff does not provide an opt-out of the smart meter, and the only accommodation available is that the meter be relocated to a mutually-agreeable location at the customer's expense. R. Exc. at 5.

West Penn also argues that the Company is legally required to install smart meters by the Code, the Commission's orders, the *Smart Meter Implementation Order*, and the Company's SMDP. West Penn adds that neither Act 129 nor *Povacz II* permit customers to opt-out of smart meter installation. R. Exc. at 5-6 (citing *2014 Smart Meter Order; Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company For Approval of Their*

Smart Meter Deployment Plan, Docket Nos. M-2013-2341990, M-2013-2341991, M-2013-2341993, and M-2013-2341994, *Smart Meter Deployment Plan* (filed December 31, 2012); *Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company, and Pennsylvania Power Company for Approval of Smart Meter Technology Procurement and Installation Plan*, Docket No. M-2009-2123950 (Opinion and Order entered on June 9, 2010); *Smart Meter Implementation Order*; 66 Pa.C.S. § 2807(f)). Moreover, West Penn contends that the Complainants' requests for relief conflict with the Code, the Commission's Regulations, the *Smart Meter Implementation Order*, the revised SMDP approved with the *2014 Smart Meter Order*, and the Supreme Court's holding in *Povacz II*. As such, West Penn submits that: (1) the Initial Decision should be affirmed without modification; and (2) the Complainants' requested relief is moot, to the extent that they succeed in advancing to an evidentiary hearing. R. Exc. at 6-7.

E. Disposition

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).

Upon consideration of the record in the instant proceeding, we will grant, in part, and deny, in part, the Exceptions. Our disposition that follows is based upon our finding that not every smart meter-related claim requires expert testimony.

As previously discussed, in the Initial Decision, the ALJ granted West Penn's Motion and dismissed the Complaint. The ALJ determined that customers

challenging smart meter installations are unable to meet their burden of proof if they do not present expert testimony. *See* I.D. at 1, 15. We disagree.

Consistent with our holding in *Erik McDarby v. Metropolitan Edison Company*, Docket No. C-2019-3007312 (Opinion and Order entered November 12, 2024), and with the holding in *Povacz II, supra*, not every smart meter-related claim requires expert testimony. When the Supreme Court held in *Povacz II* that expert testimony was needed to prove that smart meter installation constituted unreasonable service, its holding was limited to the need for expert testimony linking RF emissions with adverse health effects. That is, “[w]hether a causal connection exists between RF emissions and adverse health effects ‘involves explanations and inferences not within the range of ordinary training, knowledge, intelligence and experience.’” *Povacz II*, 280 A.3d at 1007.

Accordingly, we find that it was improper for the ALJ to grant West Penn’s Motion, as the Complainants were not required as a matter of law to present an expert witness to support their claims. Since the Complainants are not required, nor can they be forced, to provide expert testimony to support their smart meter claims, the *November 2023 Interim Order* requiring the identification of an expert witness cannot be used as a basis to dismiss the Complaint.

Thus, we believe it is prudent to grant, in part, and deny, in part, the Complainants’ Exceptions, vacate the ALJ’s Initial Decision, and remand this matter to the OALJ for further proceedings, as deemed necessary, consistent with this Opinion and Order.

IV. Conclusion

For the reasons discussed herein, we will: (1) grant, in part, and deny, in part, the Exceptions filed by Gregory and Donna Kollmar; (2) vacate the ALJ's Initial Decision; and (3) remand this matter to the OALJ for further proceedings as warranted, consistent with this Opinion and Order; **THEREFORE,**

IT IS ORDERED:

1. That the Exceptions filed by Gregory and Donna Kollmar on June 8, 2024, at Docket No. C-2019-3014650, are granted, in part, and denied, in part, consistent with this Opinion and Order.

2. That the Initial Decision of Administrative Law Judge Emily I. DeVoe, issued on May 21, 2024, at Docket No. C-2019-3014650, is vacated, consistent with this Opinion and Order.

3. That this matter, at Docket No. C-2019-3014650, be remanded to the Office of Administrative Law Judge for further proceedings as warranted.

4. That the Commission's Secretary's Bureau serve a copy of this Opinion and Order on Gregory and Donna Kollmar by both Certified Mail through the United States Postal Service and by electronic mail.

BY THE COMMISSION,

A handwritten signature in black ink, appearing to read "Rosemary Chiavetta". The signature is written in a cursive, flowing style.

Rosemary Chiavetta
Secretary

(SEAL)

ORDER ADOPTED: March 13, 2025

ORDER ENTERED: March 18, 2025