BEFORE THE

PENNSYLVANIA PUBLIC UTILITY COMMISSION

Terry and Betty Bente	**:**	
	:	**Docket No. C-2025-3054387**
v.	**:**	
FirstEnergy Pennsylvania Electric Company	**:**	
	:	

April 12, 2025

Terry and Betty Bente
865 Hilltown Rd
Biglerville, PA 17307
717-372-3275

VIA ELECTRONIC FILING

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

Re: Terry and Betty Bente v. FirstEnergy Pennsylvania Electric Company
Docket No. C-2025-3054387

Dear Secretary Homsher:

Please find our as attached filed as ***Supplemental Information*** for Exceptions to the Initial Decisions in the above case. Please do not hesitate to contact us should you have any questions.

Sincerely,

Terry Bente

Terry Bente

Betty Bente

Betty Bente

cc Tori L. Giesler
FirstEnergy Service Company
341 White Pond Drive
Akron, OH 44320
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BEFORE THE

PENNSYLVANIA PUBLIC UTILITY COMMISSION

Terry and Betty Bente	**:**	
	:	**Docket No. C-2025-3054387**
v.	**:**	
FirstEnergy Pennsylvania Electric Company	**:**	
	:	

COMPLAINANTS' EXHIBIT PACKET IN SUPPORT OF EXCEPTIONS TO INITIAL DECISION

Filed Pursuant to 52 Pa. Code § 5.533

Cover Statement

Complainants submit the following exhibits in support of their Exceptions to the Initial Decision issued July 23, 2025, by Administrative Law Judge Erin L.

Gannon. These exhibits are filed as a separate document pursuant to 52 Pa. Code § 5.533(b) to avoid affecting the Exceptions page limit, but are expressly incorporated by reference into the Exceptions.

Each exhibit is numbered sequentially, with a brief description. Where appropriate, full case law opinions are attached for the Commission's reference.

CERTIFICATE OF SERVICE

We hereby certify that we have this day served a true and correct copy of the Complainants' Exhibit Packet in Support of Exceptions to Initial Decision of ALJ G Gannon upon the individuals listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant):

Service by electronic mail:
James Austin Meehan – jameehan@firstenergycorp.com
Tori L. Giesler – tgiesler@firstenergycorp.com
FirstEnergy Service Company (Met-Ed)
341 White Pond Drive
Akron, OH 44320

ra-OSA@pa.gov

Terry Bente, pro se

Terry Bente

Respectfully submitted,

Betty Bente, pro se

Betty Bente

Dated: 8/12/25

EXHIBITS LIST

Exhibit A – Testimony of Representative Thomas Yewcic before the Pennsylvania Public Utility Commission in *Yewcic v. Penelec*, Docket No. C-2018-3001276 (Full transcript).

·1· · · · · · · ·COMMONWEALTH OF PENNSYLVANIA
· · · · · ·PENNSYLVANIA PUBLIC UTILITY COMMISSION
·2· · · · · ·OFFICE OF ADMINISTRATIVE LAW JUDGE
· · · · · · · · · · · · · · · ·* * *
·3
·4· ·SHERRY YEWCIC,· · · · · · · · :· ·C-2018-3001276
· · · · · · · · · · · ·Plaintiffs· · :
·5· · · · · · · · · · · · · · · · · ·:
· · · · · · · · ·vs.· · · · · · · · · :
·6· · · · · · · · · · · · · · · · · ·:
· · ·PENNSYLVANIA ELECTRIC COMPANY,:
·7· · · · · · · · · ·Defendant· · ·:
·8· · · · · · · · · · · · · · ·* * *
·9· · · · · · ·Remote telephonic PUC hearing before Judge
10· ·Jeffrey A. Watson, beginning at 10:00 a.m., on
11· ·Wednesday, July 22, 2020, before Karen A. Stevens,
12· ·Court Reporter and Notary Public, there being
13· ·remotely present:
14
15
16
17
18· ·(Pages 1 - 81)
19
20
21
22
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25

·1· · · **A P P E A R A N C E S :**

·2· · · · · · ·**TORI GIESLER, ESQUIRE**
· · · · · · · ·**LAUREN LEPKOSKI, ESQUIRE**
·3· · · · · · ·**FIRSTENERGY SERVICES COMPANY**
· · · · · · · ·**PO Box 16001**
·4· · · · · · ·**2800 Pottsville Pike**
· · · · · · · ·**Reading, Pennsylvania· 19612**
·5· · · · · · ·**(610) 921-6203**
·6
·7
·8
· · · · · · · ·**ALSO PRESENT: James Yewcic, Sherry Yewcic,**
·9· · · · · · · · · · · · · ·**John Ahr**
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·1· · · · · · · · · · · **I N D E X**
·2· · · · · · · · · · · · · *** * ***
·3· ·**WITNESS:· James Yewcic**
·4· ·**QUESTIONED BY:· · · · · · · · · · · · · · · PAGE**
·5· ·**Ms. Giesler· · · · · · · · · · · · · · · · · 46**

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·1· · · · · · · · · · · · ·* * *
·2· · · · · · · · · · · ·PROCEEDING
·3· · · · · · · · · · · · ·* * *
·4· · · · · ·JUDGE WATSON:· We are on the record in the
·5· · · · case of Sherry Yewcic versus Pennsylvania
·6· · · · Electric Company, filed at Docket Number
·7· · · · C-2018-3001276.· Today is Wednesday, July 22,
·8· · · · 2020, and the time is now 10:01 a.m.· This
·9· · · · hearing was scheduled at 10 o'clock.· My name
10· · · · is Jeff Watson.· I've been assigned to preside
11· · · · over this matter and to render a decision. I
12· · · · joined the conference call at 10 o'clock and
13· · · · while we were off the record I had Counsel and
14· · · · Ms. Yewcic identify themselves.· We did not

15· · · · talk about the case, nor did I have any
16· · · · conversation with anyone to the exclusion of
17· · · · anyone else.· In addition, Ms. Yewcic indicated
18· · · · that Thomas Yewcic is also on the telephone
19· · · · line with her.· This is a telephonic hearing.
20· · · · Attorney Giesler and Lepkoski are present.
21· · · · With that said, Ms. Yewcic, you're trailing
22· · · · off.· You're very soft spoken, so if you can
23· · · · speak up, keep your voice up, I'd appreciate
24· · · · it.· If we are proactive we'll make a good
25· · · · clean and clear record.· Okay?

·1· · · · · · ·MS. YEWCIC:· Okay.
·2· · · · · · ·JUDGE WATSON:· Very good.· Hearing notice
·3· · · · was issued on May 5th, 2020 concerning this
·4· · · · hearing.· As I indicated, my name is Jeff
·5· · · · Watson.· I've been assigned to handle this
·6· · · · case.· This is a telephonic hearing.· The
·7· · · · Commission offices are closed due to the Corona
·8· · · · virus pandemic; however, the Commission is
·9· · · · functioning through telephone and other means.
10· · · · So we are conducting hearings presently by
11· · · · telephone.· The parties are submitting proposed
12· · · · evidence electronically and I have received the
13· · · · exhibits in the case electronically.
14· · · · · · ·Miss Yewcic, since you're not an attorney
15· · · · and you don't do this every day, I want to take
16· · · · a few minutes and go over the procedure that
17· · · · we'll follow to give you a better understanding
18· · · · of how we'll proceed today.
19· · · · · · ·MS. YEWCIC:· Okay.
20· · · · · · ·JUDGE WATSON:· We begin with the
21· · · · Complainants, because they have the burden of
22· · · · proof to show that the Company has violated
23· · · · some order or law or regulation of the

24· · · · Commission.· So the Complainant will go first.
25· · · · They may present testimony, offer exhibits and

·1· · · · offer testimony from Complainant or others.
·2· · · · The Company has the right to object to any
·3· · · · evidence, whether it be by testimony, a portion
·4· · · · of testimony or exhibits or any other evidence.
·5· · · · If there is an objection, and since this matter
·6· · · · is being recorded by the official reporter, I
·7· · · · would ask that everyone take your time, let one
·8· · · · person speak at a time and I'll hear from both
·9· · · · sides on any objection.· I'll make a ruling and
10· · · · we'll proceed consistent with that ruling.
11· · · · · · ·Once the Complainant or any of their
12· · · · witnesses testify, they would be subject to
13· · · · cross examination.· The other party would be
14· · · · permitted to ask that witness questions.· Once
15· · · · the Complainant has finished her case and
16· · · · presented all of her evidence and they rest,
17· · · · then the Company has the right to also present
18· · · · evidence.· If Miss Yewcic has any objection to
19· · · · any of the testimony or portion of the
20· · · · testimony or exhibits or other evidence or
21· · · · portion of the evidence, Miss Yewcic can simply
22· · · · raise that objection timely so I can consider
23· · · · it.· And again, I will hear from both sides and
24· · · · then I'll make a ruling on the objection and
25· · · · then we'll proceed consistent with the ruling.

·1· · · · · · ·Miss Yewcic has the right to cross examine
·2· · · · the witnesses from the Company and object to
·3· · · · any exhibits or evidence.· If something new has
·4· · · · been presented by the Company in their
·5· · · · evidence, I will consider rebuttal evidence by
·6· · · · the Complainant if requested by the
·7· · · · Complainant.· Once we hear all the evidence,

·8· · · · the parties will be given an opportunity to
·9· · · · give a summary or an argument if you'd like to
10· · · · do that.· I have found the parties typically
11· · · · prefer to submit written briefs.· And if the
12· · · · parties would prefer to do that, I will
13· · · · certainly accommodate that request and give the
14· · · · parties ample time to put together a written
15· · · · brief where they can summarize their evidence
16· · · · and outline their interpretation of the law and
17· · · · how their interpretation of the law would
18· · · · support their positions in this case.
19· · · · · · ·Typically we would set a deadline a couple
20· · · · months after today's hearing to give the
21· · · · parties plenty of time to get that submitted
22· · · · and filed with the Commission's secretary.· So
23· · · · we'll make that determination at the conclusion
24· · · · of the hearing and I'll give you a deadline for
25· · · · submitting briefs at the conclusion of the

·1· · · · hearing, so everyone will know what date that
·2· · · · will be if the parties wish to submit briefs.
·3· · · · · · ·Once I have reviewed all the evidence and
·4· · · · briefs in this matter, I will issue what's
·5· · · · called an initial decision.· That's a written
·6· · · · decision.· And the parties will receive that --
·7· · · · if the parties are receiving E-service you'll
·8· · · · get that through E-service.· Otherwise, if you
·9· · · · have an E-mail address, obviously you all do
10· · · · because you submitted exhibits electronically,
11· · · · so you'll receive that electronically.· And
12· · · · what we'll do is you'll get that initial
13· · · · decision along with a letter from the
14· · · · Commission's secretary indicating what my
15· · · · decision is and also you will be given
16· · · · instructions as to how to file an appeal or

17· · · · exceptions to my decision.· If any party is not
18· · · · happy with my decision, you can file
19· · · · exceptions.· Do that timely.· And the
20· · · · Commission may then issue an order and/or
21· · · · opinion addressing those exceptions or appeal
22· · · · of my decision.· If for some reason the parties
23· · · · would not be satisfied with a decision of the
24· · · · Public Utility Commission, then the parties may
25· · · · file an appeal with the PennsylvaniaCommonwealth Court.· Again, you want to make

·2· · · · certain that your appeal is filed timely so it

·3· · · · may be considered.· That's an overview of how

·4· · · · the hearing works and how the appeal process

·5· · · · works.

·6· · · · · · ·As I indicated, there is an official

·7· · · · reporter present today taking down everything

·8· · · · that is said.· Everything that is said is on

·9· · · · the record.· In other words, it's recorded by

10· · · · the official reporter.· That's the only

11· · · · recording of this proceeding.· In addition,

12· · · · that's the only recording permitted of this

13· · · · proceeding.· So if there are individuals

14· · · · present who are recording this, I have to

15· · · · instruct you now that you must terminate any

16· · · · recording device.

17· · · · · · ·Obviously you can take notes, though. I

18· · · · would encourage you to take notes during the

19· · · · testimony in this case.· Along those lines,

20· · · · Miss Yewcic, I found it's helpful for parties

21· · · · who aren't represented by counsel to take your

22· · · · time and take notes during the testimony,

23· · · · because that can typically help you when you're

24· · · · cross examining witnesses from the other side.

25· · · · Take your time.· If you need a moment, let me

·1· · · · know.· We have plenty of time today.· Everyone

·2· · · · is afforded plenty of time and opportunity to

·3· · · · present their evidence.· I'll make sure that

·4· · · · occurs.· There may be times where we'd go off

·5· · · · the record.· Note that we will not go off the

·6· · · · record unless I clearly tell everyone we are

·7· · · · off the record.· That would be for maybe some

·8· · · · housekeeping matters or maybe to address some

·9· · · · confidential matter.· But you'll know clearly

10· · · · when we are on the record and off the record.

11· · · · Obviously we are on the record.

12· · · · · · ·With all that said, as I indicated, the

13· · · · Complainant goes first.· So they can call any

14· · · · witnesses, subject to objection from the

15· · · · Company, and those witnesses would be subject

16· · · · to Cross examination.· All testimony is

17· · · · presented under oath or affirmation.· I think

18· · · · that covers how we'll proceed.

19· · · · · · ·Ms. Yewcic, do you have any questions

20· · · · before we start with the testimony?

21· · · · · · ·MS. YEWCIC:· Yeah.· I was going to have my

22· · · · husband speak for me and I was just going to

23· · · · state where I'm at and how I got to this

24· · · · position.

25· · · · · · ·JUDGE WATSON:· So you're going to make a

·1· · · · statement and we'll let the Company cross

·2· · · · examine you and then your husband, Thomas

·3· · · · Yewcic, is going to take over and provide his

·4· · · · own testimony.· Is that fair?

·5· · · · · · ·MS. YEWCIC:· Or I'll let him go first and

·6· · · · me go last.· I don't care.

·7· · · · · · ·JUDGE WATSON:· Okay.· So Mr. Yewcic, can

·8· · · · you hear me okay?

·9· · · · · · ·MR. YEWCIC:· Yes, I can.

10· · · · · · ·JUDGE WATSON:· If anybody can't hear, let

11· · · · me know so we are keeping a good clean record.

12· · · · Mr. Yewcic, can you state your full name and

13· · · · spell your last name for the record?

14· · · · · · ·MR. YEWCIC:· Thomas Yewcic, Y-E-W-C-I-C.

15· · · · · · ·JUDGE WATSON:· And your address?

16· · · · · · ·MR. YEWCIC:· 125 Pudliner Lane, Johnstown,

17· · · · Pennsylvania, 15909.

18· · · · · · ·JUDGE WATSON:· Could you spell the name of

19· · · · the road or lane?

20· · · · · · ·MR. YEWCIC:· P-U-D-L-I-N-E-R.

21· · · · · · ·JUDGE WATSON:· Just like it sounds.· And

22· · · · is that the address which is the subject of the

23· · · · complaint filed by Miss Yewcic?

24· · · · · · ·MR. YEWCIC:· Yes.

25· · · · · · ·JUDGE WATSON:· Is there a smart meter

1· · · · installed at that property at this time?

·2· · · · · · ·MR. YEWCIC:· No.

·3· · · · · · ·JUDGE WATSON:· All right.· Miss Yewcic, do

·4· · · · you want to ask Mr. Yewcic any questions?

·5· · · · · · ·MS. YEWCIC:· No.

·6· · · · · · ·JUDGE WATSON:· He just has some

·7· · · · information you want him to provide?

·8· · · · · · ·MS. YEWCIC:· Yes.· And I would like him to

·9· · · · state that he seen the way I am and the way

10· · · · everything is affecting me.· He's my witness.

11· · · · Nobody else is going to be able to do this.· We

12· · · · are like pioneers.· Nobody's been through this.

13· · · · All this is new.· We have all this technology

14· · · · and doctors don't know why.· I've been to a lot

15· · · · of specialists.· They're just trying to figure

16· · · · out what to do.· We are like people out in
17· · · · space.· We're aliens.· They don't know what to
18· · · · do with us.
19· · · · · · ·JUDGE WATSON:· Mr. Yewcic is coming in
20· · · · loud and clearly, so, Miss Yewcic, if you yell
21· · · · at me when you talk everybody can hear you.
22· · · · Just keep your voice up.· I'd appreciate it.
23· · · · This isn't the optimal way to have a hearing,
24· · · · but it works and everybody can participate
25· · · · fairly.· It's the best process we have at the
·1· · · · moment.
·2· · · · · · ·MS. YEWCIC:· I can't be where all the cell
·3· · · · phones are.
·4· · · · · · ·JUDGE WATSON:· I understand.· Mr. Yewcic,
·5· · · · I am asking you, would you like to explain what
·6· · · · you've observed with regard to Miss Yewcic and
·7· · · · the reasons for the filing of the complaint and
·8· · · · what you're requesting from the Commission?
·9· · · · And just keep in mind, take your time, speak
10· · · · slowly and clearly.· If there is an objection,
11· · · · Miss Giesler or Miss Lepkoski will raise an
12· · · · objection.· If there is an objection, I'd ask
13· · · · that the party speaking stop, let the person
14· · · · make the objection and I'll go back and let the

15· · · · person respond that was talking and the court

16· · · · reporter will be very happy, or at least as

17· · · · happy as possible, so the record will be clean.

18· · · · · · ·Go ahead, Mr. Yewcic, if you want to

19· · · · explain why the complaint was filed and what

20· · · · you're seeking.

21· · · · · · ·MR. YEWCIC:· Sure.· I'd like to provide a

22· · · · little bit of background to show where she was

23· · · · and where she is today.

24· · · · · · ·JUDGE WATSON:· Let me swear you in.

25· · · · · · · · · · · · ·* * *

·1· · · · · · · · · · · · THOMAS YEWCIC,

·2· · · · · · after having been first duly sworn, was

·3· · · · · · examined and testified as follows:

·4· · · · · · · · · · · · ·* * *

·5· · · · · · ·JUDGE WATSON:· Go ahead, sir.· Thank you.

·6· · · · · · ·MS. YEWCIC:· What happened to God in that?

JUDGE WATSON:· Maybe I didn't say it

·8· · · · right.· Go ahead, Mr. Yewcic.

·9· · · · · · ·MR. YEWCIC:· Little bit of background.· We

10· · · · have been married 37 years and my wife was

11· · · · always a people-person, always out in public.

12· · · · When I became a state representative she ran my

13· · · · campaign.· I was elected in 1992 and retired in

14· · · · 2008.· Subsequent to that, as we age a little

15· · · · bit you notice changes.· She went to the doctor

16· · · · and we thought it was just menopause.

17· · · · · · ·JUDGE WATSON:· What's the time period

18· · · · here?

19· · · · · · ·MR. YEWCIC:· Three, four years ago.· What

20· · · · we noticed were the symptoms, but the symptoms

21· · · · wouldn't go away.· And as we started to research the symptoms they became consistent

23· · · · with advanced Lyme disease.· At that point we

24· · · · looked for Lyme doctors, which there aren't

25· · · · really any in our area or specialists thatcould help with her condition.· We ended up at

·2· · · · Cleveland Clinic where extensive testing was

·3· · · · completed, where it shows she had the Lyme, of

·4· · · · course, with the co-infects of Borrelia and

·5· · · · adrenal problems, thyroid problems, digestion

·6· · · · problems.· She's not absorbing vitamins,

·7· · · · minerals, enzymes, that sort of thing.· Her

·8· · · · system was failing her and her immune system's

·9· · · · compromised.· She was actually supposed to be

10· · · · in court.· She was called to court, jury duty,

11· · · · last week or so where we had to get a letter

12· · · · from her doctor at the Cleveland Clinic stating

13· · · · her immune system is compromised and she was

14· · · · excused.

15· · · · · · ·We found as she was shopping at Walmart or

16· · · · TJ Max or wherever she went, she became

17· · · · irritable, her ears would -- she had tinnitus,

18· · · · her ears would jingle.· If she stayed in that

19· · · · environment too long she would have heart

20· · · · palpitations.· And we couldn't figure out why

21· · · · that was happening.· As it turned out, we came

22· · · · across the EMF and hypersensitivity issues.

23· · · · Moving forward from there, we tried to narrow

24· · · · it down and we start slowly getting rid of

25· · · · everything electric in our home that had a

·1· · · · wave, a radio frequency or microwave, such as uch as

·2· · · · corded phones, laptops, Wifi, cell phones.· We

·3· · · · couldn't have that in our house.· We eliminated

·4· · · · those things and she could stay in our house,

·5· · · · she's fine.

·6· · · · · · ·However, when she would visit her mom

·7· · · · who's elderly, upper '80s, she has no Wifi,

·8· · · · smart phones or anything like that.· But when

·9· · · · she would visit her mom she could only stay two

10· · · · hours until these symptoms from EMF that she

11· · · · had at Walmart or somewhere affected her.· And

12· · · · before she would stay at her mom's, watch over

13· · · · her, be with her, visit her and she had no

14· · · · problem.· When the smart reader was installed,

15· · · · she could no longer stay more than two hours.

16· · · · · · ·JUDGE WATSON:· The smart meter was

17· · · · installed at her mother's house?

18· · · · · · ·MR. YEWCIC:· Yes.· The meter's not on her

19· · · · house, it's on her garage.· The garage is

20· · · · connected to her house.· But she still had

21· · · · issues there.· So we got rid of -- we bought

22· · · · her mom corded phones instead of cordless, she

23· · · · can't use the microwave, don't turn anything on

24· · · · and see how she does.· LED lightbulbs, same

25· · · · thing.· We can only use incandescent bulbs in

·1· · · · our home, because it irritated her at the

·2· · · · molecular level, we understand.· I don't

·3· · · · understand this, but that's what happened.· So

·4· · · · all these things were changed and she'd go to

·5· · · · her mom's after the meter was installed and she

·6· · · · could only stay a short time until the ringing

·7· · · · in the ears and heart palpitations if she

·8· · · · stayed too long occurred.

·9· · · · · · ·JUDGE WATSON:· What was the approximate

10· · · · time period when the smart meter was installed

11· · · · at the mother's house?

12· · · · · · ·MR. YEWCIC:· I don't recall.

13· · · · · · ·JUDGE WATSON:· As best you know.· I'll ask

14· · · · Miss Yewcic as well or she can provide

15· · · · testimony.· Okay.· Go ahead.

16· · · · · · ·MR. YEWCIC:· I don't recall.· If she went

17· · · · to her mom's house today she can't stay very

18· · · · long.· She has to go in the backyard and stay

19· · · · away from the house currently.· When she's

20· · · · home, we don't have that issue.· It's been like

21· · · · that now for a couple years basically where

22· · · · it's an accumulative effect.· If there is a

23· · · · smart meter, she's incapable of staying there

24· · · · very long.· If she goes for a walk on a trail

25· · · · in the woods someplace where there is no --

·1· · · · nothing, someone could be walking the other

·2· · · · direction and she'll say, "Someone's here," and

·3· · · · we are looking at her like, "What do you mean?"

·4· · · · Well, if they have a cell phone the frequency

·5· · · · they're using, it affects her.· The documents

·6· · · · that we had sent, now that I read the order I

·7· · · · thought it was five days, my fault.· I think it

·8· · · · was five days.· I sent it in last Friday.· The

·9· · · · purpose is to show that EMF do affect the human

10· · · · body and she's one of those few people,

11· · · · unfortunately, that it affects.· We can not

12· · · · live here if we have a smart meter.· We are

13· · · · talking about selling our house, probably

14· · · · moving someplace where we are not affected by

15· · · · this.· It's unfortunate, but that's where we

16· · · · are.· That's about it.

17· · · · · · ·JUDGE WATSON:· Thank you, Mr. Yewcic. I

18· · · · appreciate the testimony and taking your time

19· · · · and keeping your voice up.· I appreciate that

20· · · · very much.· Miss Yewcic?

21· · · · · · ·MS. YEWCIC:· Yes.

22· · · · · · ·JUDGE WATSON:· Are there any specific

23· · · · questions you'd like to ask Mr. Yewcic maybe

24· · · · that he didn't cover?

25· · · · · · ·MS. YEWCIC:· He knows I just want to ask

·1· · · · the difference between me then and now and I

·2· · · · can go around people and do everything and be

·3· · · · just fine.· Now, forget it.

·4· · · · · · ·JUDGE WATSON:· Okay.· When you say then

·5· · · · and now, then meaning you believe these

·6· · · · symptoms or manifestations have increased at

·7· · · · the present time?

·8· · · · · · ·MS. YEWCIC:· Yes.

·9· · · · · · ·JUDGE WATSON:· And, Mr. Yewcic, is there

10· · · · anything you want to add regarding that topic

11· · · · that Miss Yewcic has raised?

12· · · · · · ·MR. YEWCIC:· Between then and now?

13· · · · · · ·JUDGE WATSON:· Then and now meaning about

14· · · · the last four years to the present.

15· · · · · · ·MR. YEWCIC:· Yes.· Yes.· It's different

16· · · · because we can't just go visit her mom, and

17· · · · she's 86, 87.· We can't visit our grandchildren

18· · · · because they have the Wifi and things like that

19· · · · and smart meters.· Those things have to be

20· · · · turned off.· We have to stay away from those

21· · · · things.· Those are all new occurrences that we

22· · · · have.· We don't want to be here during this.

23· · · · That's the last thing I want to do, believe me.

24· · · · To us it's life and death.· It causes harm to

25· · · · her.

25· · · · The evidence we did submit, the first

·1· · · · article shows that square waves and pulsating

·2· · · · Wifi affects the human body.· It's real to us

·3· · · · and it's real to her, whether you accept it or

·4· · · · not.· We can't live here if we have a smart

·5· · · · meter until she's better.

·6· · · · · · ·I understand people do get better.· It

·7· · · · takes time for their body to heal.· Whether

·8· · · · it's a molecular level thing where there's

·9· · · · inflammation in the cells, I don't understand

10· · · · that.· It's new.· This is similar to when I

11· · · · went to Pitt back in the '70s, University of

12· · · · Pittsburgh, back in the '70s, I remember

13· · · · hearing a doctor talking about medical --

14· · · · medicine evolved and certain things they didn't

15· · · · understand in the past.· For instance, he

16· · · · brought up hypoglycemia.· Back then there

17· · · · wasn't -- doctors didn't recognize it.· They

18· · · · gave you a pill for anxiety and sent you home.

19· · · · Today you get treated for it.· Medicine has

20· · · · evolved.· And with technology today, I don't

21· · · · understand the effect all these radio waves and

22· · · · magnetic waves have on the body, but they do

23· · · · impact the body.· They do impact in testing of

24· · · · humans and animals.· That's where she's at

25· · · · today, where we are trying to keep her away

·1· · · · from that until her body heals and she can at

·2· · · · least be comfortable in that environment again.

·3· · · · It's frustrating.· We can't be around a lot of

·4· · · · people and they all have cell phones.· We

·5· · · · always visit people.· I know a ton of people in

·6· · · · my former position and our life has changed

·7· · · · drastically because of that.

·8· · · · · · ·JUDGE WATSON:· I understand.· Thank you,

·9· · · · sir.· Miss Yewcic, any other questions for

10· · · · Mr. Yewcic?

11· · · · · · ·MS. YEWCIC:· No, sir.

12· · · · · · ·JUDGE WATSON:· Thank you for your

13· · · · testimony.· Miss Giesler, who represents the

14· · · · Company, may have some questions for you.· Take

15· · · · your time and you can answer her questions and

16· · · · I'll entertain any objections and we'll go

17· · · · ahead with the Cross-examination.· Okay, sir?

18· · · · · · ·MR. YEWCIC:· Okay.

19· · · · · · ·JUDGE WATSON:· I apologize.· I didn't talk

20· · · · about this earlier, but if anyone needs a break

21· · · · we can take breaks.· I don't like to take

22· · · · breaks during testimony.· So when we finish a

23· · · · witness, that's a good time to take a break.

24· · · · But if anybody needs a break, please let me

25· · · · know and we'll accommodate that the best we

·1· · · · can.· Miss Geisler?

·2· · · · · · ·MS. GIESLER:· I have no Cross-examination,

·3· · · · your Honor.

·4· · · · · · ·JUDGE WATSON:· Thank you, Mr. Yewcic for

·5· · · · your testimony.· Miss Yewcic, would you like to

·6· · · · testify, ma'am?

·7· · · · · · ·MS. YEWCIC:· Sure.

·8· · · · · · ·JUDGE WATSON:· Let me get you sworn in.

·9· · · · · · · · · · · · · ·* * *

10· · · · · · · · · · · · · SHERRY YEWCIC,

11· · · · · · after having been first duly sworn, was

12· · · · · · examined and testified as follows:

13· · · · · · · · · · · · · ·* * *

14· · · · · · ·JUDGE WATSON:· Go ahead, ma'am.

15· · · · · · ·MS. YEWCIC:· I just want to let you know

16· · · · I'm not an activist.· I just want to live in my

17· · · · house and have peace.· That's all this is

18· · · · about.· I don't want one more thing slapped on

19· · · · top of me.· I'm trying to heal.· It's a slow

20· · · · process.· I've been to a lot of doctors and I

21· · · · want to let you know I have been to Cleveland

22· · · · Clinic, doctors all over the state and Virginia

23· · · · and just trying to find an answer to this.· But

24· · · · they send me to another specialist and another

25· · · · specialist and they said they know it exists.

·1· · · · They're trying to help, trying different

·2· · · · protocols.· And when your system's beat down

·3· · · · because I have all these viruses and Lyme, you

·4· · · · know, your body can't fight.· And my resistance

·5· · · · is down and I'm vulnerable to this stuff.· And

·6· · · · they still don't understand what to do and

·7· · · · they're trying and I've been trying with them,

·8· · · · trying anything they want to try.· This

·9· · · · hypersensitivity is scary, because I get to a

10· · · · point where I can't do anything.· I can't go to

11· · · · a restaurant.· Welcome to my world, these

12· · · · people that are crying about this Corona virus.

13· · · · I can't see anybody unless they come without

14· · · · their phone.· I can't go to their house,

15· · · · because everybody is loaded with all their

16· · · · stuff.· I'm living proof.· There is nothing I

17· · · · can do.

18· · · · · · ·And I even got vertigo at my daughter's

19· · · · house.· I had to run in the house one day and I

20· · · · hit the wall it was so strong with the Wifi

21· · · · stuff.· As soon as I get away from it I go back

22· · · · to normal.

23· · · · · · ·JUDGE WATSON:· When you say you hit the

24· · · · wall, were you meaning that you lost your

25· · · · balance and fell against the wall?

·1· · · · · · ·MS. YEWCIC:· Yeah, I did.· It affects you.

·2· · · · It just gets stronger and stronger.· It builds

·3· · · · up, so you have to stay away from it.· So I

·4· · · · learned not to go over there unless I'm
·5· · · · outside.· I can't last that long anyway.· You
·6· · · · pick and choose what you want to do.· I have so
·7· · · · much and it builds up and you know your time's
·8· · · · up and you have to go.
·9· · · · · · ·We did change all our light bulbs.· I have
10· · · · a toaster oven.· I can't use that.· We are
11· · · · going to get a gas one.· I use the dishwasher
12· · · · and washer and drier when I go for a walk with
13· · · · the dog or go for a hike, then we turn them on.
14· · · · We have notes everywhere to remember to do it.
15· · · · If I go to my mom's for a little, we do it
16· · · · then.· When I have to go into the bedroom, we
17· · · · shut the doors.· Like if I go to bed sometimes
18· · · · I get away with that.· But that's my life.· I'm
19· · · · just trying to keep this stuff away from me.
20· · · · · · ·Then I have cordless phones.· We had to go
21· · · · back to these stupid corded phones.· That's why
22· · · · you can't hear me.· No smart appliances.· I had
23· · · · to get rid of my dehumidifier.· I have an old
24· · · · computer we hooked up with ethernet.· It's very
25· · · · little.· It throws out a small amount of EMF.
·1· · · · Q· · Are you aware of the fact that there have
·2· ·been numerous unsuccessful attempts to implement an
·3· ·opt out revision to Act 129 as it exists today?

·4· · · · A· · Yes, I am aware legislation has been
·5· ·introduced and it has not passed.
·6· · · · Q· · It's correct that you voted for Act 129 as
·7· ·it's currently written today in support of it,
·8· ·correct?
·9· · · · A· · I voted for Act 129 in 2008 because as I
10· ·stated, there were no mandates.· There was no
11· ·suggestion of a mandate.· Those didn't come until
12· ·later.
13· · · · Q· · Correct me if I'm wrong, Mr. Yewcic.
14· ·Isn't it true that all bills would also pass through
15· ·the legislative reference bureau?
16· · · · A· · Pardon me?
17· · · · Q· · Wouldn't they have gone through a
18· ·legislative legal review?
19· · · · A· · What's that?
20· · · · Q· · During the passage process?· Did you ask
21· ·what is that?
22· · · · A· · You mean Act 129?· Yeah, it goes to the
23· ·legislative reprocess, yes.
24· · · · Q· · So wouldn't a bunch of lawyers have looked
25· ·over it for interpretation errors or any issues that

·1· ·might be presented if passed with that language?
·2· · · · A· · I do not recall any communication of any
·3· ·lawyer in a reference bureau regarding the house
·4· ·bill before it passed.· Nobody stated there was a
·5· ·mandate to implement smart meters.· The house record
·6· ·and senate record are available and I'm pretty
·7· ·certain somebody, I think in the senate, maybe Fumo,
·8· ·former senator or somebody stated there was no
·9· ·mandate in the bill, and it was an opt in bill, not
10· ·a mandate.· That's my recollection.
11· · · · Q· · Doesn't it stand to reason that if a bunch
12· ·of the state legislators today will not agree to put

13· ·in an opt out provision into the law, that it's
14· ·possible that some of you just misunderstood what
15· ·you were voting for?
16· · · · A· · No.· That's nonsense.· Every legislative
17· ·session is different.· There are a lot of external
18· ·reasons why people support and don't support
19· ·legislation having to do with fundraising, perhaps
20· ·jobs for children, family members.· Who knows?
21· ·There are a lot of reasons why things happen and
22· ·don't happen in legislature and I don't think we are
23· ·going to solve that problem here.
24· · · · · · ·MS. GIESLER:· I have nothing further for
25· · · · Mr. Yewcic, your Honor.

·1· · · · · · ·JUDGE WATSON:· Thank you, Mr. Yewcic.
·2· · · · Miss Giesler, any Cross-examination for Ms.
·3· · · · Yewcic?
·4· · · · · · ·MS. GIESLER:· Your Honor, I'm going to
·5· · · · waive cross on Ms. Yewcic.
·6· · · · · · ·JUDGE WATSON:· Very good.· Anything
·7· · · · further, Mr. Yewcic, by way of testimony?
·8· · · · · · ·MR. YEWCIC:· No, sir.
·9· · · · · · ·JUDGE WATSON:· Ms. Yewcic?
10· · · · · · ·MS. YEWCIC:· No, sir.
11· · · · · · ·JUDGE WATSON:· With that, the Complainants
12· · · · rest, and Miss Giesler?
13· · · · · · ·MS. GIESLER:· I'm going to hand it over to
14· · · · Miss Lepkoski who is going to present the
15· · · · Company's witness.
16· · · · · · ·JUDGE WATSON:· The time is now 11:22.· If
17· · · · you all need a short break I'd be more than
18· · · · happy to do that.· Mr. and Mrs. Yewcic, would
19· · · · you like to take a break before we proceed with
20· · · · the next witness?
21· · · · · · ·MR. YEWCIC:· We are fine.

22· · · · · · ·JUDGE WATSON:· Okay.· The Company's
23· · · · willing to proceed?
24· · · · · · ·MS. GIESLER:· Yes, your Honor.
25· · · · · · ·JUDGE WATSON:· Attorney Lepkoski is going

·1· · · · to take over and so we'll turn it over to her.
·2· · · · · · ·MS. LEPKOSKI:· Thank you, your Honor.· The
·3· · · · Company would be calling John Ahr as their
·4· · · · witness.
·5· · · · · · ·JUDGE WATSON:· Everyone keep your voice
·6· · · · up.· Mr. Ahr, your business address for the
·7· · · · record?
·8· · · · · · ·THE WITNESS:· My business address is 800
·9· · · · Abinsdale Drive, Greensburg, Pennsylvania,
10· · · · 15601.
11· · · · · · ·JUDGE WATSON:· Mr. and Mrs. Yewcic, Miss
12· · · · Lepkoski is going to ask Mr. Ahr some
13· · · · questions, so I encourage you to jot down some
14· · · · notes that may be helpful for you in the event
15· · · · that you would want to ask any questions or
16· · · · cross-examination of Mr. Ahr.· Okay?
17· · · · · · ·MR. YEWCIC:· Okay.
18· · · · · · ·JUDGE WATSON:· Go ahead, Miss Lepkoski.
19· · · · · · ·MS. LEPKOSKI:· Thank you, your Honor.
20· · · · · · · · · · · · ·* * *
21· · · · · · · · · · · D I R E C T
22· · · · · · · · · E X A M I N A T I O N
23· · · · · · · · · · · · ·* * *
24· ·BY MS. LEPKOSKI:
25· · · · Q· · Mr. Ahr, by whom are you employed and in

·1· ·what capacity?
·2· · · · A· · Good morning.· I am employed by First
·3· ·Energy Service Company, which is a subsidiary of
·4· ·First Energy Corporation.· I am the adviser of
·5· ·regulatory compliance of smart meter and previously

·6· ·it's precursor position of manager of regulatory
·7· ·compliance of smart meter.
·8· · · · Q· · How long have you worked for First Energy
·9· ·Service Company?
10· · · · A· · I've worked for over 36 years with
11· ·subsidiaries of First Energy or its predecessor
12· ·companies.· I've worked in a variety of positions in
13· ·engineering operations, customer services,
14· ·transmission, customer support, energy efficiency
15· ·and emerging technologies of various other
16· ·companies.
17· · · · Q· · How long have you been employed in your
18· ·current position?
19· · · · A· · I've been employed in my current position
20· ·since 2018 and its precursor position since 2012.
21· · · · Q· · Can you please describe your educational
22· ·background and work experience?
23· · · · A· · Yes.· I'm a graduate of Pennsylvania State
24· ·University with a Bachelor of Science Degree in
25· ·Electrical Engineering, Master's Degree in Business

·1· ·Administration from the University of Pittsburgh. I
·2· ·began work with the Company in 1984 as an engineer
·3· ·in the distribution planning area and was promoted
·4· ·to supervisor of transmission and distribution
·5· ·operations in 1992.· I've subsequently held a number
·6· ·of management positions until promoted to the
·7· ·director of system operations in 1999.· Other
·8· ·positions I've held include director of energy
·9· ·procurement, director of meter reading and
10· ·collections, senior consultant, manager customer
11· ·support and manager of regulatory compliance smart
12· ·meter.
13· · · · Q· · Can you please describe your duties and
14· ·responsibilities as an adviser in regulatory

15· ·compliance for the smart meter group?
16· · · · A· · Yes.· As the adviser of regulatory
17· ·compliance smart meter I am responsible for
18· ·regulatory compliance associated with the smart
19· ·meter project.· This includes all filings and
20· ·resulting regulatory processes associated with the
21· ·plan and approval.· Within my role I provide
22· ·leadership expert guidance, management subject
23· ·matter expertise for the smart meter project, and I
24· ·coordinate smart meter developments among the First
25· ·Energy's operating companies.· I serve as the Act

·1· ·129 and smart meter subject matter expert and
·2· ·represent the smart meter project and First Energy's
·3· ·operating companies on regulatory matters.· I assist
·4· ·in preparing for regulatory proceedings regarding
·5· ·smart meters, I manage external consultants and
·6· ·expert witnesses related to the smart meter project.
·7· · · · Q· · On whose behalf are you testifying in this
·8· ·proceeding?
·9· · · · A· · I'm testifying on behalf of Pennsylvania
10· ·Electric Company, Penn Electric.
11· · · · Q· · Have you previously testified before the
12· ·Pennsylvania Public Utility Commission or any other
13· ·regulatory bodies?
14· · · · A· · Yes, I've testified before the Commission
15· ·in the 2009 petition of Westend Fire Company doing
16· ·business as Allegheny Power for expedited approval
17· ·of its smart meter technology procurement and
18· ·installation plan, and in formal complaint
19· ·proceedings related to smart meters.· I've also
20· ·provided testimony before the West Virginia Public
21· ·Service Commission in a general investigation into
22· ·the standards that were set forth in the Energy
23· ·Independent and Security Act of 2007 and I've also

24· ·testified before the Maryland Public Service
25· ·Commission, the Maryland Public Service Commission

·1· ·in an adjustment of a fuel rate case in 1999.
·2· · · · · · ·MS. LEPKOSKI:· Your Honor, I would like to
·3· · · · note for the record, on July 13th the Company
·4· · · · had served exhibits to your Honor as well as
·5· · · · Mr. and Mrs. Yewcic and we will have John Ahr
·6· · · · go through these exhibits here.· However, we
·7· · · · want to let everyone know, due to the
·8· · · · testimony, we will not be going through all of
·9· · · · the exhibits.
10· · · · · · ·JUDGE WATSON:· Mr. and Mrs. Yewcic, do you
11· · · · have those proposed exhibits that were
12· · · · submitted by the Company?
13· · · · · · ·MR. YEWCIC:· We don't have them printed
14· · · · out, no.
15· · · · · · ·JUDGE WATSON:· I'm at a disadvantage too,
16· · · · because I don't have them printed out either.
17· · · · But I do have them electronically on my
18· · · · computer.· If you'd like to take a moment and
19· · · · pull them on up and review them, that's fine.
20· · · · · · ·MR. YEWCIC:· I reviewed them already.
21· · · · · · ·JUDGE WATSON:· Okay.· That's acceptable to
22· · · · proceed as well, Ms Yewcic?
23· · · · · · ·MS. YEWCIC:· Yes.
24· · · · · · ·JUDGE WATSON:· Proceed, Miss Lepkoski.
25

·1· ·BY MS. LEPKOSKI:
·2· · · · Q· · Mr. Ahr, what happened to cause Penn
·3· ·Electric to begin exploring smart meter
·4· ·implementation?
·5· · · · A· · The Pennsylvania legislature adopted Act
·6· ·129 in 2008 requiring all electric distribution
·7· ·companies or EDCs with at least one hundred

·8· ·thousands customers to install smart meters
·9· ·throughout service territories, which includes Penn
10· ·Electric.
11· · · · Q· · Was Act 129 clarified in the Public
12· ·Utility Code?
13· · · · A· · Yes.· Chapter 28 of the Title 66 of the
14· ·Public Utility Code reflects the changes that were
15· ·made by Act 129.
16· · · · Q· · Can you identify for the record what has
17· ·been previously marked as Public Document, or PD-1?
18· · · · A· · Yes.· This document is a copy of Chapter
19· ·28, Title 66 of the Public Utility Code.
20· · · · · · ·MS. LEPKOSKI:· Your Honor, at this time I
21· · · · would request that your Honor take judicial or
22· · · · official notice of what has been premarked as
23· · · · PD-1.
24· · · · · · ·JUDGE WATSON:· Mr. and Mrs. Yewcic, there
25· · · · is a request that I take official or judicial

·1· · · · notice of what's been marked as PD-1, which
·2· · · · means that document would not be admitted as an
·3· · · · exhibit.· However, the Company's requesting
·4· · · · that I take official or judicial notice of that
·5· · · · document, and that I would consider that law in
·6· · · · making my decision.· Do you have any objection
·7· · · · to me taking notice of that document,
·8· · · · Mr. Yewcic?
·9· · · · · · ·MR. YEWCIC:· Yes and no.· The document --
10· · · · Act 129 happened.· It's the law.· I understand
11· · · · that.· The problem we have is the effects of
12· · · · that law and how it affects my wife having a
13· · · · mandated smart meter attached to my house.
14· · · · This is more of a health issue than a law
15· · · · issue, but I understand what you're saying the
16· · · · law says.· I may disagree with some of it,

17· · · · but....
18· · · · · · ·JUDGE WATSON:· I understand, Mr. Yewcic.
19· · · · · · ·MR. YEWCIC:· I would object to that point.
20· · · · It's more of a health issue.· I don't know what
21· · · · effect a judicial notice would make of that,
22· · · · how it affects my wife's case.
23· · · · · · ·JUDGE WATSON:· Okay.· Ms. Yewcic,
24· · · · anything?
25· · · · · · ·MS. YEWCIC:· No.· That's fine.

·1· · · · · · · ·COMMONWEALTH OF PENNSYLVANIA

· · · · · ·PENNSYLVANIA PUBLIC UTILITY COMMISSION

·2· · · · · ·OFFICE OF ADMINISTRATIVE LAW JUDGE

· · · · · · · · · · · · · · · ·* * *

·3

·4· ·SHERRY YEWCIC,· · · · · · · · :· ·C-2018-3001276

· · · · · · · · · · · ·Plaintiffs· · :

·5· · · · · · · · · · · · · · · · · ·:

· · · · · · · · ·vs.· · · · · · · · · ·:

·6· · · · · · · · · · · · · · · · · ·:

· · ·PENNSYLVANIA ELECTRIC COMPANY,:

·7· · · · · · · · · · ·Defendant· · ·:

·8· · · · · · · · · · · · · · ·* * *

·9· · · · · · ·Remote telephonic PUC hearing before Judge

10· ·Jeffrey A. Watson, beginning at 10:00 a.m., on

11· ·Wednesday, July 22, 2020, before Karen A. Stevens,

12· ·Court Reporter and Notary Public, there being

13· ·remotely present:

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18· ·(Pages 1 - 81)

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22

23

24

25

·1· · · A P P E A R A N C E S :

·2· · · · · · ·TORI GIESLER, ESQUIRE

· · · · · · · ·LAUREN LEPKOSKI, ESQUIRE

·3· · · · · · ·FIRSTENERGY SERVICES COMPANY

· · · · · · · ·PO Box 16001

·4· · · · · · ·2800 Pottsville Pike

· · · · · · · ·Reading, Pennsylvania· 19612

·5· · · · · · ·(610) 921-6203

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· · · · · · · ·ALSO PRESENT: James Yewcic, Sherry Yewcic,

·9· · · · · · · · · · · · · ·**John Ahr**

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·1· · · · · · · · · · · · · **I N D E X**

·2· · · · · · · · · · · · · · * * *

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·1· · · · · · · · · · · · · · ·* * *

·2· · · · · · · · · · · · ·PROCEEDING

·3· · · · · · · · · · · · · · ·* * *

·4· · · · · · ·JUDGE WATSON:· We are on the record in the

·5· · · · case of Sherry Yewcic versus Pennsylvania

·6· · · · Electric Company, filed at Docket Number

·7· · · · C-2018-3001276.· Today is Wednesday, July 22,

·8· · · · 2020, and the time is now 10:01 a.m.· This

·9· · · · hearing was scheduled at 10 o'clock.· My name

10· · · · is Jeff Watson.· I've been assigned to preside

11· · · · over this matter and to render a decision. I

12· · · · joined the conference call at 10 o'clock and

13· · · · while we were off the record I had Counsel and

14· · · · Ms. Yewcic identify themselves.· We did not

15· · · · talk about the case, nor did I have any

16· · · · conversation with anyone to the exclusion of

17· · · · anyone else.· In addition, Ms. Yewcic indicated

18· · · · that Thomas Yewcic is also on the telephone

19· · · · line with her.· This is a telephonic hearing.

20· · · · Attorney Giesler and Lepkoski are present.

21· · · · With that said, Ms. Yewcic, you're trailing

22· · · · off.· You're very soft spoken, so if you can

23· · · · speak up, keep your voice up, I'd appreciate

24· · · · it.· If we are proactive we'll make a good

25· · · · clean and clear record.· Okay?

·1· · · · · · ·MS. YEWCIC:· Okay.

·2· · · · · · ·JUDGE WATSON:· Very good.· Hearing notice

·3· · · · was issued on May 5th, 2020 concerning this

·4· · · · hearing.· As I indicated, my name is Jeff

·5· · · · Watson.· I've been assigned to handle this

·6· · · · case.· This is a telephonic hearing.· The

·7· · · · Commission offices are closed due to the Corona

·8· · · · virus pandemic; however, the Commission is

·9· · · · functioning through telephone and other means.

10· · · · So we are conducting hearings presently by

11· · · · telephone.· The parties are submitting proposed

12· · · · evidence electronically and I have received the

13· · · · exhibits in the case electronically.

14· · · · · · ·Miss Yewcic, since you're not an attorney

15· · · · and you don't do this every day, I want to take

16· · · · a few minutes and go over the procedure that

17· · · · we'll follow to give you a better understanding

18· · · · of how we'll proceed today.

19· · · · · · ·MS. YEWCIC:· Okay.

20· · · · · · ·JUDGE WATSON:· We begin with the

21· · · · Complainants, because they have the burden of

22· · · · proof to show that the Company has violated

23· · · · some order or law or regulation of the

24· · · · Commission.· So the Complainant will go first.

25· · · · They may present testimony, offer exhibits and

·1· · · · offer testimony from Complainant or others.

·2· · · · The Company has the right to object to any

·3· · · · evidence, whether it be by testimony, a portion

·4· · · · of testimony or exhibits or any other evidence.

·5· · · · If there is an objection, and since this matter

·6· · · · is being recorded by the official reporter, I

·7· · · · would ask that everyone take your time, let one

·8· · · · person speak at a time and I'll hear from both

·9· · · · sides on any objection.· I'll make a ruling and

10· · · · we'll proceed consistent with that ruling.

11· · · · · · ·Once the Complainant or any of their

12· · · · witnesses testify, they would be subject to

13· · · · cross examination.· The other party would be

14· · · · permitted to ask that witness questions.· Once

15· · · · the Complainant has finished her case and

16· · · · presented all of her evidence and they rest,

17· · · · then the Company has the right to also present

18· · · · evidence.· If Miss Yewcic has any objection to

19· · · · any of the testimony or portion of the

20· · · · testimony or exhibits or other evidence or

21· · · · portion of the evidence, Miss Yewcic can simply

22· · · · raise that objection timely so I can consider

23· · · · it.· And again, I will hear from both sides and

24· · · · then I'll make a ruling on the objection and

25· · · · then we'll proceed consistent with the ruling.

·1· · · · · · ·Miss Yewcic has the right to cross examine

·2· · · · the witnesses from the Company and object to

·3· · · · any exhibits or evidence.· If something new has

·4· · · · been presented by the Company in their
·5· · · · evidence, I will consider rebuttal evidence by
·6· · · · the Complainant if requested by the
·7· · · · Complainant.· Once we hear all the evidence,
·8· · · · the parties will be given an opportunity to
·9· · · · give a summary or an argument if you'd like to
10· · · · do that.· I have found the parties typically
11· · · · prefer to submit written briefs.· And if the
12· · · · parties would prefer to do that, I will
13· · · · certainly accommodate that request and give the
14· · · · parties ample time to put together a written
15· · · · brief where they can summarize their evidence
16· · · · and outline their interpretation of the law and
17· · · · how their interpretation of the law would
18· · · · support their positions in this case.
19· · · · · · ·Typically we would set a deadline a couple
20· · · · months after today's hearing to give the
21· · · · parties plenty of time to get that submitted
22· · · · and filed with the Commission's secretary.· So
23· · · · we'll make that determination at the conclusion
24· · · · of the hearing and I'll give you a deadline for
25· · · · submitting briefs at the conclusion of the
·1· · · · hearing, so everyone will know what date that
·2· · · · will be if the parties wish to submit briefs.

·3· · · · · · ·Once I have reviewed all the evidence and

·4· · · · briefs in this matter, I will issue what's

·5· · · · called an initial decision.· That's a written

·6· · · · decision.· And the parties will receive that --

·7· · · · if the parties are receiving E-service you'll

·8· · · · get that through E-service.· Otherwise, if you

·9· · · · have an E-mail address, obviously you all do

10· · · · because you submitted exhibits electronically,

11· · · · so you'll receive that electronically.· And

12· · · · what we'll do is you'll get that initial

13· · · · decision along with a letter from the

14· · · · Commission's secretary indicating what my

15· · · · decision is and also you will be given

16· · · · instructions as to how to file an appeal or

17· · · · exceptions to my decision.· If any party is not

18· · · · happy with my decision, you can file

19· · · · exceptions.· Do that timely.· And the

20· · · · Commission may then issue an order and/or

21· · · · opinion addressing those exceptions or appeal

22· · · · of my decision.· If for some reason the parties

23· · · · would not be satisfied with a decision of the

24· · · · Public Utility Commission, then the parties may

25· · · · file an appeal with the Pennsylvania

·1· · · · Commonwealth Court.· Again, you want to make

·2· · · · certain that your appeal is filed timely so it

·3· · · · may be considered.· That's an overview of how

·4· · · · the hearing works and how the appeal process

·5· · · · works.

·6· · · · · · ·As I indicated, there is an official

·7· · · · reporter present today taking down everything

·8· · · · that is said.· Everything that is said is on

·9· · · · the record.· In other words, it's recorded by

10· · · · the official reporter.· That's the only

11· · · · recording of this proceeding.· In addition,

12· · · · that's the only recording permitted of this

13· · · · proceeding.· So if there are individuals

14· · · · present who are recording this, I have to

15· · · · instruct you now that you must terminate any

16· · · · recording device.

17· · · · · · ·Obviously you can take notes, though. I

18· · · · would encourage you to take notes during the

19· · · · testimony in this case.· Along those lines,

20· · · · Miss Yewcic, I found it's helpful for parties

21· · · · who aren't represented by counsel to take your

22· · · · time and take notes during the testimony,

23· · · · because that can typically help you when you're

24· · · · cross examining witnesses from the other side.

25· · · · Take your time.· If you need a moment, let me

·1· · · · know.· We have plenty of time today.· Everyone
·2· · · · is afforded plenty of time and opportunity to
·3· · · · present their evidence.· I'll make sure that
·4· · · · occurs.· There may be times where we'd go off
·5· · · · the record.· Note that we will not go off the
·6· · · · record unless I clearly tell everyone we are
·7· · · · off the record.· That would be for maybe some
·8· · · · housekeeping matters or maybe to address some
·9· · · · confidential matter.· But you'll know clearly
10· · · · when we are on the record and off the record.
11· · · · Obviously we are on the record.
12· · · · · · ·With all that said, as I indicated, the
13· · · · Complainant goes first.· So they can call any
14· · · · witnesses, subject to objection from the
15· · · · Company, and those witnesses would be subject
16· · · · to Cross examination.· All testimony is
17· · · · presented under oath or affirmation.· I think
18· · · · that covers how we'll proceed.
19· · · · · · ·Ms. Yewcic, do you have any questions
20· · · · before we start with the testimony?
21· · · · · · ·MS. YEWCIC:· Yeah.· I was going to have my
22· · · · husband speak for me and I was just going to
23· · · · state where I'm at and how I got to this
24· · · · position.

25· · · · · · ·JUDGE WATSON:· So you're going to make a

·1· · · · statement and we'll let the Company cross

·2· · · · examine you and then your husband, Thomas

·3· · · · Yewcic, is going to take over and provide his

·4· · · · own testimony.· Is that fair?

·5· · · · · · ·MS. YEWCIC:· Or I'll let him go first and

·6· · · · me go last.· I don't care.

·7· · · · · · ·JUDGE WATSON:· Okay.· So Mr. Yewcic, can

·8· · · · you hear me okay?

·9· · · · · · ·MR. YEWCIC:· Yes, I can.

10· · · · · · ·JUDGE WATSON:· If anybody can't hear, let

11· · · · me know so we are keeping a good clean record.

12· · · · Mr. Yewcic, can you state your full name and

13· · · · spell your last name for the record?

14· · · · · · ·MR. YEWCIC:· Thomas Yewcic, Y-E-W-C-I-C.

15· · · · · · ·JUDGE WATSON:· And your address?

16· · · · · · ·MR. YEWCIC:· 125 Pudliner Lane, Johnstown,

17· · · · Pennsylvania, 15909.

18· · · · · · ·JUDGE WATSON:· Could you spell the name of

19· · · · the road or lane?

20· · · · · · ·MR. YEWCIC:· P-U-D-L-I-N-E-R.

21· · · · · · ·JUDGE WATSON:· Just like it sounds.· And

22· · · · is that the address which is the subject of the

23· · · · complaint filed by Miss Yewcic?

24· · · · · · ·MR. YEWCIC:· Yes.

25· · · · · · ·JUDGE WATSON:· Is there a smart meter

·1· · · · installed at that property at this time?

·2· · · · · · ·MR. YEWCIC:· No.

·3· · · · · · ·JUDGE WATSON:· All right.· Miss Yewcic, do

·4· · · · you want to ask Mr. Yewcic any questions?

·5· · · · · · ·MS. YEWCIC:· No.

·6· · · · · · ·JUDGE WATSON:· He just has some

·7· · · · information you want him to provide?

·8· · · · · · ·MS. YEWCIC:· Yes.· And I would like him to

·9· · · · state that he seen the way I am and the way

10· · · · everything is affecting me.· He's my witness.

11· · · · Nobody else is going to be able to do this.· We

12· · · · are like pioneers.· Nobody's been through this.

13· · · · All this is new.· We have all this technology

14· · · · and doctors don't know why.· I've been to a lot

15· · · · of specialists.· They're just trying to figure

16· · · · out what to do.· We are like people out in

17· · · · space.· We're aliens.· They don't know what to

18· · · · do with us.

19· · · · · · ·JUDGE WATSON:· Mr. Yewcic is coming in

20· · · · loud and clearly, so, Miss Yewcic, if you yell

21· · · · at me when you talk everybody can hear you.

22· · · · Just keep your voice up.· I'd appreciate it.

23· · · · This isn't the optimal way to have a hearing,

24· · · · but it works and everybody can participate

25· · · · fairly.· It's the best process we have at the

·1· · · · moment.

·2· · · · · · ·MS. YEWCIC:· I can't be where all the cell

·3· · · · phones are.

·4· · · · · · ·JUDGE WATSON:· I understand.· Mr. Yewcic,

·5· · · · I am asking you, would you like to explain what

·6· · · · you've observed with regard to Miss Yewcic and

·7· · · · the reasons for the filing of the complaint and

·8· · · · what you're requesting from the Commission?

·9· · · · And just keep in mind, take your time, speak

10· · · · slowly and clearly.· If there is an objection,

11· · · · Miss Giesler or Miss Lepkoski will raise an

12· · · · objection.· If there is an objection, I'd ask

13· · · · that the party speaking stop, let the person

14· · · · make the objection and I'll go back and let the

15· · · · person respond that was talking and the court

16· · · · reporter will be very happy, or at least as

17· · · · happy as possible, so the record will be clean.

18· · · · · · ·Go ahead, Mr. Yewcic, if you want to

19· · · · explain why the complaint was filed and what

20· · · · you're seeking.

21· · · · · · ·MR. YEWCIC:· Sure.· I'd like to provide a

22· · · · little bit of background to show where she was

23· · · · and where she is today.

24· · · · · · ·JUDGE WATSON:· Let me swear you in.

25· · · · · · · · · · · · · ·* * *

·1· · · · · · · · · · · · · THOMAS YEWCIC,

·2· · · · · · after having been first duly sworn, was

·3· · · · · · examined and testified as follows:

·4· · · · · · · · · · · · · ·* * *

·5· · · · · · ·JUDGE WATSON:· Go ahead, sir.· Thank you.

·6· · · · · · ·MS. YEWCIC:· What happened to God in that?

·7· · · · · · ·JUDGE WATSON:· Maybe I didn't say it

·8· · · · right.· Go ahead, Mr. Yewcic.

·9· · · · · · ·MR. YEWCIC:· Little bit of background.· We

10· · · · have been married 37 years and my wife was

11· · · · always a people-person, always out in public.

12· · · · When I became a state representative she ran my

13· · · · campaign.· I was elected in 1992 and retired in

14· · · · 2008.· Subsequent to that, as we age a little

15· · · · bit you notice changes.· She went to the doctor

16· · · · and we thought it was just menopause.

17· · · · · · ·JUDGE WATSON:· What's the time period

18· · · · here?

19· · · · · · ·MR. YEWCIC:· Three, four years ago.· What

20· · · · we noticed were the symptoms, but the symptoms

21· · · · wouldn't go away.· And as we started to

22· · · · research the symptoms they became consistent

23· · · · with advanced Lyme disease.· At that point we

24· · · · looked for Lyme doctors, which there aren't

25· · · · really any in our area or specialists that

·1· · · · could help with her condition.· We ended up at

·2· · · · Cleveland Clinic where extensive testing was

·3· · · · completed, where it shows she had the Lyme, of

·4· · · · course, with the co-infects of Borrelia and

·5· · · · adrenal problems, thyroid problems, digestion

·6· · · · problems.· She's not absorbing vitamins,

·7· · · · minerals, enzymes, that sort of thing.· Her

·8· · · · system was failing her and her immune system's

·9· · · · compromised.· She was actually supposed to be

10· · · · in court.· She was called to court, jury duty,

11· · · · last week or so where we had to get a letter

12· · · · from her doctor at the Cleveland Clinic stating

13· · · · her immune system is compromised and she was

14· · · · excused.

15· · · · · · ·We found as she was shopping at Walmart or

16· · · · TJ Max or wherever she went, she became

17· · · · irritable, her ears would -- she had tinnitus,

18· · · · her ears would jingle.· If she stayed in that

19· · · · environment too long she would have heart

20· · · · palpitations.· And we couldn't figure out why

21· · · · that was happening.· As it turned out, we came

22· · · · across the EMF and hypersensitivity issues.

23· · · · Moving forward from there, we tried to narrow

24· · · · it down and we start slowly getting rid of

25· · · · everything electric in our home that had a

·1· · · · wave, a radio frequency or microwave, such as

·2· · · · corded phones, laptops, Wifi, cell phones.· We

·3· · · · couldn't have that in our house.· We eliminated

·4· · · · those things and she could stay in our house,

·5· · · · she's fine.

·6· · · · · · ·However, when she would visit her mom

·7· · · · who's elderly, upper '80s, she has no Wifi,

·8· · · · smart phones or anything like that.· But when

·9· · · · she would visit her mom she could only stay two

10· · · · hours until these symptoms from EMF that she

11· · · · had at Walmart or somewhere affected her.· And

12· · · · before she would stay at her mom's, watch over

13· · · · her, be with her, visit her and she had no

14· · · · problem.· When the smart reader was installed,

15· · · · she could no longer stay more than two hours.

16· · · · · · ·JUDGE WATSON:· The smart meter was

17· · · · installed at her mother's house?

18· · · · · · ·MR. YEWCIC:· Yes.· The meter's not on her

19· · · · house, it's on her garage.· The garage is

20· · · · connected to her house.· But she still had

21· · · · issues there.· So we got rid of -- we bought

22· · · · her mom corded phones instead of cordless, she

23· · · · can't use the microwave, don't turn anything on

24· · · · and see how she does.· LED lightbulbs, same

25· · · · thing.· We can only use incandescent bulbs in

·1· · · · our home, because it irritated her at the

·2· · · · molecular level, we understand.· I don't

·3· · · · understand this, but that's what happened.· So

·4· · · · all these things were changed and she'd go to

·5· · · · her mom's after the meter was installed and she

·6· · · · could only stay a short time until the ringing

·7· · · · in the ears and heart palpitations if she

·8· · · · stayed too long occurred.

·9· · · · · · ·JUDGE WATSON:· What was the approximate

10· · · · time period when the smart meter was installed

11· · · · at the mother's house?

12· · · · · · ·MR. YEWCIC:· I don't recall.

13· · · · · · ·JUDGE WATSON:· As best you know.· I'll ask

14· · · · Miss Yewcic as well or she can provide

15· · · · testimony.· Okay.· Go ahead.

16· · · · · · ·MR. YEWCIC:· I don't recall.· If she went

17· · · · to her mom's house today she can't stay very

18· · · · long.· She has to go in the backyard and stay

19· · · · away from the house currently.· When she's

20· · · · home, we don't have that issue.· It's been like

21· · · · that now for a couple years basically where

22· · · · it's an accumulative effect.· If there is a

23· · · · smart meter, she's incapable of staying there

24· · · · very long.· If she goes for a walk on a trail

25· · · · in the woods someplace where there is no --

·1· · · · nothing, someone could be walking the other

·2· · · · direction and she'll say, "Someone's here," and

·3· · · · we are looking at her like, "What do you mean?"

·4· · · · Well, if they have a cell phone the frequency

·5· · · · they're using, it affects her.· The documents

·6· · · · that we had sent, now that I read the order I

·7· · · · thought it was five days, my fault.· I think it

·8· · · · was five days.· I sent it in last Friday.· The

·9· · · · purpose is to show that EMF do affect the human

10· · · · body and she's one of those few people,

11· · · · unfortunately, that it affects.· We can not

12· · · · live here if we have a smart meter.· We are

13· · · · talking about selling our house, probably

14· · · · moving someplace where we are not affected by

15· · · · this.· It's unfortunate, but that's where we

16· · · · are.· That's about it.

17· · · · · · ·JUDGE WATSON:· Thank you, Mr. Yewcic. I

18· · · · appreciate the testimony and taking your time

19· · · · and keeping your voice up.· I appreciate that

20· · · · very much.· Miss Yewcic?

21· · · · · · ·MS. YEWCIC:· Yes.

22· · · · · · ·JUDGE WATSON:· Are there any specific

23· · · · questions you'd like to ask Mr. Yewcic maybe

24· · · · that he didn't cover?

25· · · · · · ·MS. YEWCIC:· He knows I just want to ask

·1· · · · the difference between me then and now and I

·2· · · · can go around people and do everything and be

·3· · · · just fine.· Now, forget it.

·4· · · · · · ·JUDGE WATSON:· Okay.· When you say then

·5· · · · and now, then meaning you believe these

·6· · · · symptoms or manifestations have increased at

·7· · · · the present time?

·8· · · · · · ·MS. YEWCIC:· Yes.

·9· · · · · · ·JUDGE WATSON:· And, Mr. Yewcic, is there

10· · · · anything you want to add regarding that topic

11· · · · that Miss Yewcic has raised?

12· · · · · · ·MR. YEWCIC:· Between then and now?

13· · · · · · ·JUDGE WATSON:· Then and now meaning about

14· · · · the last four years to the present.

15· · · · · · ·MR. YEWCIC:· Yes.· Yes.· It's different

16· · · · because we can't just go visit her mom, and

17· · · · she's 86, 87.· We can't visit our grandchildren

18· · · · because they have the Wifi and things like that

19· · · · and smart meters.· Those things have to be

20· · · · turned off.· We have to stay away from those

21· · · · things.· Those are all new occurrences that we

22· · · · have.· We don't want to be here during this.

23· · · · That's the last thing I want to do, believe me.

24· · · · To us it's life and death.· It causes harm to

25· · · · her.· The evidence we did submit, the first

·1· · · · article shows that square waves and pulsating

·2· · · · Wifi affects the human body.· It's real to us

·3· · · · and it's real to her, whether you accept it or

·4· · · · not.· We can't live here if we have a smart

·5· · · · meter until she's better.

·6· · · · · · ·I understand people do get better.· It

·7· · · · takes time for their body to heal.· Whether

·8· · · · it's a molecular level thing where there's

·9· · · · inflammation in the cells, I don't understand

10· · · · that.· It's new.· This is similar to when I

11· · · · went to Pitt back in the '70s, University of

12· · · · Pittsburgh, back in the '70s, I remember

13· · · · hearing a doctor talking about medical --

14· · · · medicine evolved and certain things they didn't

15· · · · understand in the past.· For instance, he

16· · · · brought up hypoglycemia.· Back then there

17· · · · wasn't -- doctors didn't recognize it.· They

18· · · · gave you a pill for anxiety and sent you home.

19· · · · Today you get treated for it.· Medicine has

20· · · · evolved.· And with technology today, I don't

21· · · · understand the effect all these radio waves and

22· · · · magnetic waves have on the body, but they do

23· · · · impact the body.· They do impact in testing of

24· · · · humans and animals.· That's where she's at

25· · · · today, where we are trying to keep her away

·1· · · · from that until her body heals and she can at

·2· · · · least be comfortable in that environment again.

·3· · · · It's frustrating.· We can't be around a lot of

·4· · · · people and they all have cell phones.· We

·5· · · · always visit people.· I know a ton of people in

·6· · · · my former position and our life has changed

·7· · · · drastically because of that.

·8· · · · · · ·JUDGE WATSON:· I understand.· Thank you,

·9· · · · sir.· Miss Yewcic, any other questions for

10· · · · Mr. Yewcic?

11· · · · · · ·MS. YEWCIC:· No, sir.

12· · · · · · ·JUDGE WATSON:· Thank you for your

13· · · · testimony.· Miss Giesler, who represents the

14· · · · Company, may have some questions for you.· Take

15· · · · your time and you can answer her questions and

16· · · · I'll entertain any objections and we'll go

17· · · · ahead with the Cross-examination.· Okay, sir?

18· · · · · · ·MR. YEWCIC:· Okay.

19· · · · · · ·JUDGE WATSON:· I apologize.· I didn't talk

20· · · · about this earlier, but if anyone needs a break

21· · · · we can take breaks.· I don't like to take

22· · · · breaks during testimony.· So when we finish a

23· · · · witness, that's a good time to take a break.

24· · · · But if anybody needs a break, please let me

25· · · · know and we'll accommodate that the best we

·1· · · · can.· Miss Geisler?

·2· · · · · · ·MS. GIESLER:· I have no Cross-examination,

·3· · · · your Honor.

·4· · · · · · ·JUDGE WATSON:· Thank you, Mr. Yewcic for

·5· · · · your testimony.· Miss Yewcic, would you like to

·6· · · · testify, ma'am?

·7· · · · · · ·MS. YEWCIC:· Sure.

·8· · · · · · ·JUDGE WATSON:· Let me get you sworn in.

·9· · · · · · · · · · · · · ·* * *

10· · · · · · · · · · · · SHERRY YEWCIC,

11· · · · · · after having been first duly sworn, was

12· · · · · · examined and testified as follows:

13· · · · · · · · · · · · · ·* * *

14· · · · · · ·JUDGE WATSON:· Go ahead, ma'am.

15· · · · · · ·MS. YEWCIC:· I just want to let you know

16· · · · I'm not an activist.· I just want to live in my

17· · · · house and have peace.· That's all this is

18· · · · about.· I don't want one more thing slapped on

19· · · · top of me.· I'm trying to heal.· It's a slow

20· · · · process.· I've been to a lot of doctors and I

21· · · · want to let you know I have been to Cleveland

22· · · · Clinic, doctors all over the state and Virginia

23· · · · and just trying to find an answer to this.· But

24· · · · they send me to another specialist and another

25· · · · specialist and they said they know it exists.

·1· · · · They're trying to help, trying different

·2· · · · protocols.· And when your system's beat down

·3· · · · because I have all these viruses and Lyme, you

·4· · · · know, your body can't fight.· And my resistance

·5· · · · is down and I'm vulnerable to this stuff.· And

·6· · · · they still don't understand what to do and

·7· · · · they're trying and I've been trying with them,

·8· · · · trying anything they want to try.· This

·9· · · · hypersensitivity is scary, because I get to a

10· · · · point where I can't do anything.· I can't go to

11· · · · a restaurant.· Welcome to my world, these

12· · · · people that are crying about this Corona virus.

13· · · · I can't see anybody unless they come without

14· · · · their phone.· I can't go to their house,

15· · · · because everybody is loaded with all their

16· · · · stuff.· I'm living proof.· There is nothing I

17· · · · can do.

18· · · · · · ·And I even got vertigo at my daughter's

19· · · · house.· I had to run in the house one day and I

20· · · · hit the wall it was so strong with the Wifi

21· · · · stuff.· As soon as I get away from it I go back

22· · · · to normal.

23· · · · · · ·JUDGE WATSON:· When you say you hit the

24· · · · wall, were you meaning that you lost your

25· · · · balance and fell against the wall?

·1· · · · · · ·MS. YEWCIC:· Yeah, I did.· It affects you.

·2· · · · It just gets stronger and stronger.· It builds

·3· · · · up, so you have to stay away from it.· So I

·4· · · · learned not to go over there unless I'm

·5· · · · outside.· I can't last that long anyway.· You

·6· · · · pick and choose what you want to do.· I have so

·7· · · · much and it builds up and you know your time's

·8· · · · up and you have to go.

·9· · · · · · ·We did change all our light bulbs.· I have

10· · · · a toaster oven.· I can't use that.· We are

11· · · · going to get a gas one.· I use the dishwasher

12· · · · and washer and drier when I go for a walk with

13· · · · the dog or go for a hike, then we turn them on.

14· · · · We have notes everywhere to remember to do it.

15· · · · If I go to my mom's for a little, we do it

16· · · · then.· When I have to go into the bedroom, we

17· · · · shut the doors.· Like if I go to bed sometimes

18· · · · I get away with that.· But that's my life.· I'm

19· · · · just trying to keep this stuff away from me.

20· · · · · · ·Then I have cordless phones.· We had to go

21· · · · back to these stupid corded phones.· That's why

22· · · · you can't hear me.· No smart appliances.· I had

23· · · · to get rid of my dehumidifier.· I have an old

24· · · · computer we hooked up with ethernet.· It's very

25· · · · little.· It throws out a small amount of EMF.

·1· · · · I can tell the difference.· I use grounding

·2· · · · mats and stuff and anything that helps.

·3· · · · Doctors are trying to help me, but this is like

·4· · · · Daniel Boone going out.· I have a friend who is

·5· · · · exactly like me.· She's a mess, too, and she

·6· · · · has Lyme and EMF problems also.· Thank God I

·7· · · · have her.· God put her there for me.

·8· · · · · · ·I just want to let you know when I did go

·9· · · · to my mom's before she had the smart meter, I

10· · · · could stay overnight, get all the grandkids

11· · · · over, we'd have a powwow and a sleepover.· And

12· · · · she didn't tell me she got the smart meter on

13· · · · and she wanted to see if this was real with me.

14· · · · So we changed all the phones and all the

15· · · · lightbulbs.· She doesn't have all the modern

16· · · · technologies.· But I had to gather the kids one

17· · · · morning and I ran out of the house.· Next day I

18· · · · asked her, "What is different here?· What's

19· · · · going on?"· She said they put a smart meter in.

20· · · · And I asked her why she didn't tell me and she

21· · · · said she wanted to see if this was for real.

22· · · · Anyway, that happened and that's what scares

23· · · · me, too.· Then my husband uses his cell phone,

24· · · · so he has to keep it out in the garage and stay

25· · · · away from me.· It's at the other end of our

·1· · · · house.· We do everything we can.

·2· · · · · · ·I'm not a lazy person.· I'm not crazy.· We

·3· · · · built our house.· I really don't want to leave

·4· · · · it and my kids, because I have grandkids.· And

·5· · · · with COVID I had them every day in the summer.

·6· · · · And I don't want to have to move to a state

·7· · · · where they have compassion on people and let

·8· · · · them -- who have to move from their house.

·9· · · · That's what I'm going to have to do.· I don't

10· · · · want to leave my kids, because I take care of

11· · · · them and I can't live like this.· It's so hard.

12· · · · Sorry.· Doctors don't know what to do.· They

13· · · · pan you off.· I've been to so many doctors and

14· · · · they don't know what to do with me.· This is

15· · · · where I'm at and all I'm asking for is some

16· · · · mercy from the Company.· Where is America, home

17· · · · of the free and the brave and the people that

18· · · · want to live in their homes the way they're

19· · · · supposed to be able to?· That's all I'm asking

20· · · · for.· I don't want to leave my grandkids.

21· · · · · · ·JUDGE WATSON:· Let me ask you this.· What

22· · · · relief specifically are you asking for from the

23· · · · Commission?

24· · · · · · ·MS. YEWCIC:· I want to live in my house

25· · · · without that thing.

·1· · · · · · ·JUDGE WATSON:· Do you have an analogue

·2· · · · meter at your home?

·3· · · · · · ·MS. YEWCIC:· Yes, I do.

·4· · · · · · ·JUDGE WATSON:· You're asking to keep the

·5· · · · analogue meter and not have a smart meter

·6· · · · installed in your home?

·7· · · · · · ·MS. YEWCIC:· Yes.· I can't run the air

·8· · · · conditioner.· I have to turn it off after ten

·9· · · · minutes.· If I put the meter on I have to be

10· · · · out in the yard or move.· That's all I'm asking

11· · · · for, to keep my old meter on so I can live

12· · · · here, the one place in the world I have.

13· · · · · · ·JUDGE WATSON:· Let me ask you this, ma'am.

14· · · · You submitted some proposed exhibits and

15· · · · oftentimes the Company will object to some of

16· · · · these exhibits based upon certain rules, but

17· · · · would you like to offer the exhibits that you

18· · · · submitted into evidence?

19· · · · · · ·MS. YEWCIC:· Sure.

20· · · · · · ·JUDGE WATSON:· Do you have those handy?

21· · · · · · ·MR. YEWCIC:· I have them in front of me.

22· · · · · · ·JUDGE WATSON:· Thank you.· Miss Giesler,

23· · · · do you have those handy as well?

24· · · · · · ·MS. GIESLER:· I do, your Honor.

25· · · · · · ·JUDGE WATSON:· We are going to, as we go

·1· · · · along, mark these so we know what we are

·2· · · · dealing with.· I have a cover letter from Miss

·3· · · · Yewcic providing her proposed exhibits.· I'm

·4· · · · going in order from what's submitted

·5· · · · electronically.· The very first proposed

·6· · · · exhibit looks like Electromagnetic Fields Act

·7· · · · Via Activation Of Voltage Gated Calcium

·8· · · · Channels To Produce Beneficial Or Adverse

·9· · · · Effects.· Miss Yewcic, would you prefer

10· · · · Mr. Yewcic can handle these exhibits or do them

11· · · · jointly?

12· · · · · · ·MS. YEWCIC:· We both can.

13· · · · · · ·JUDGE WATSON:· Okay.· I'm looking at that

14· · · · document.· I don't see page numbers, but I'm

15· · · · scrolling through this on my computer.· Second

16· · · · Page 959.· The next page I see is 960.· See

17· · · · those?

18· · · · · · ·MR. YEWCIC:· Yes.

19· · · · · · ·JUDGE WATSON:· Next page is 961, 962, 963,

20· · · · 964, 965.

21· · · · · · ·MR. YEWCIC:· Which concludes that

22· · · · document.

23· · · · · · ·JUDGE WATSON:· That would conclude that

24· · · · document.· Through Page 965.· Back at the top

25· · · · I'll make notes so we keep these exhibits

·1· · · · straight.· I'm going to mark this first one as

·2· · · · Complainant Exhibit 1.· That's going to be I

·3· · · · think we said through 965 and it begins with

·4· · · · the title I just identified.· Then as I

·5· · · · indicated, the second page is 959.· There will

·6· · · · be a title page and then 959 through 965.· This
·7· · · · document at the top just below the title has
·8· · · · the name of an individual, Martin L. Pall,
·9· · · · P-A-L-L.· Either Mr. or Mrs. Yewcic, explain
10· · · · without getting into the substance of the
11· · · · document, what is this document, where did you
12· · · · get it and what's the purpose that you're
13· · · · offering it into evidence?
14· · · · · · ·MR. YEWCIC:· The purpose of this document
15· · · · and the others is to show how the EMFs,
16· · · · including smart meters, affect human tissue.
17· · · · I'm not a biochemist as Martin Poll is.· We got
18· · · · these off the internet to find out what's
19· · · · affecting my wife so we can help her.· When you
20· · · · read the article, there is no conclusive
21· · · · evidence in some areas of how these things
22· · · · occur and why they occur.· I don't understand
23· · · · the whole article.· It's biochemistry.· But on
24· · · · Page 961 it talks discussions and conclusions.
25· · · · You can read those where they note it affects
·1· · · · human tissue perhaps at the cellular level,
·2· · · · calcium, things your body needs and how it
·3· · · · affects those things.· That's why we introduced
·4· · · · this to show there is evidence and papers.

·5· · · · This goes back to 2013 where these type of
·6· · · · waves or pulses affect the human body or animal
·7· · · · bodies they've tested.· We are trying to
·8· · · · discover what her problem is so we can make her
·9· · · · better.
10· · · · · · ·JUDGE WATSON:· Now, this Mr. Poll, who
11· · · · appears to be the author of this document, is
12· · · · there any indication that this is an official
13· · · · government report or public document or is this
14· · · · just research study conducted by Mr. Poll?
15· · · · · · ·MR. YEWCIC:· It appears to be research.
16· · · · It was printed in a journal of molecular
17· · · · medicine.· I don't think it is a -- it was
18· · · · copyrighted by the author.· It's not an
19· · · · official government report.
20· · · · · · ·JUDGE WATSON:· You're offering that as
21· · · · Complainant Exhibit 1.· Fair?
22· · · · · · ·MR. YEWCIC:· Sure.· Sure.
23· · · · · · ·JUDGE WATSON:· Miss Giesler, any objection
24· · · · to what's been marked as Complainant Exhibit 1?
25· · · · · · ·MS. GIESLER:· Yes, your Honor.
·1· · · · Unfortunately, given that we didn't have the
·2· · · · author available today and given what we have
·3· · · · heard about the backdrop of it, it cannot be

·4· · · · properly authenticated and it's hearsay in that
·5· · · · Mr. Poll is not available for Cross-examination
·6· · · · today.· And Mr. Yewcic himself pointed out that
·7· · · · he doesn't have the scientific qualifications
·8· · · · to be able to draw conclusions therefrom.· That
·9· · · · being the case, without an expert witness or
10· · · · the author themselves available today, this
11· · · · should be excluded as impermissible hearsay.
12· · · · · · ·JUDGE WATSON:· Mr. and Mrs. Yewcic, based
13· · · · upon Counsel's objection and the reason for it,
14· · · · do you have any response?
15· · · · · · ·MR. YEWCIC:· Mr. Poll is a professor of
16· · · · biochemistry at Washington State University.
17· · · · I'm sure he's qualified.· This is pioneering
18· · · · information.· When I first took office in 1992
19· · · · the internet was smaller.· We didn't have a lot
20· · · · of issues.· I think the references at the end
21· · · · of the article is very well documented.· We are
22· · · · not trying to hide something, we are trying to
23· · · · get something to help my wife.
24· · · · · · ·JUDGE WATSON:· I understand.
25· · · · · · ·MR. YEWCIC:· It's not an official document
·1· · · · from the government, but the government isn't
·2· · · · always right, either.· I've been there.

·3· · · · · · ·JUDGE WATSON:· I understand.· We are going

·4· · · · to address that concern you've identified.· But

·5· · · · as far as Complainant Exhibit 1, Counsel is

·6· · · · correct.· It does constitute hearsay because

·7· · · · the author is not available for

·8· · · · cross-examination and hasn't been established

·9· · · · as an expert to provide the conclusions

10· · · · presented in the document.· I have to sustain

11· · · · the objection and I can't admit Complainant

12· · · · Exhibit 1 into evidence.· However, I have

13· · · · marked Complainant 1 for identification

14· · · · purposes for the record, so that ruling may be

15· · · · reviewed by the Commission if requested by the

16· · · · Complainant.· Let's go to the second document.

17· · · · I appreciate the work you spent in downloading

18· · · · this information and getting it to me and to

19· · · · Counsel electronically.· Sometimes it can be

20· · · · challenging and I appreciate it very much.· I'm

21· · · · looking at the second document.· Just to be

22· · · · clear, it appears as though the second document

23· · · · has in the upper left-hand corner the date of

24· · · · 7/17/2020, and next to the date it says

25· · · · Electromagnetic Field-Induced Biomedical

·1· · · · Effects In Humans Pubmed.· Then down further,

·2· · · · but still in the top third of the page in

·3· · · · larger font, it appears to be the title

·4· · · · Electromagnet Field-Induced Biological Effects

·5· · · · In Humans.· Is that the second exhibit, Mr. and

·6· · · · Mrs. Yewcic?

·7· · · · · · ·MR. YEWCIC:· Yes.

·8· · · · · · ·JUDGE WATSON:· That looks like the bottom

·9· · · · of that page says one slash two, which

10· · · · represents it's the first page of two.· The

11· · · · next page also says one of two, so I'm assuming

12· · · · this document is the one page.· I'm going to

13· · · · mark that as Complainant 2.· Either Mr. or

14· · · · Mrs. Yewcic, if you want to identify what that

15· · · · document is and why you're asking that it be

16· · · · admitted into evidence.

17· · · · · · ·MR. YEWCIC:· As the title says,

18· · · · Electromagnetic Field-Induced Biological

19· · · · Effects In Humans, again, we are going to have

20· · · · the same problem as the first bit of evidence.

21· · · · It's not an official document.· It appears this

22· · · · is from Poland where they did do a study on

23· · · · this, but it's not official.· We have no

24· · · · witnesses.· The purpose is to show there is an

25· · · · effect that my wife described adequately I

·1· · · · think when she testified of how this impacts
·2· · · · her body.
·3· · · · · · ·JUDGE WATSON:· Thank you, sir.· Counsel?
·4· · · · · · ·MS. GIESLER:· Your Honor, Mr. Yewcic is
·5· · · · correct that I do have all the same objections
·6· · · · here relating to authentication and hearsay. I
·7· · · · would also note that frankly even apart from
·8· · · · those issues, we would also have an objection
·9· · · · on the basis that the document is incomplete.
10· · · · This appears, I'm not sure what Page two would
11· · · · contain, but I'm fairly confident it would not
12· · · · contain the entirety of the report itself and
13· · · · doesn't contain the full content of the study
14· · · · that was performed.
15· · · · · · ·JUDGE WATSON:· Any response, Mr. or
16· · · · Mrs. Yewcic?
17· · · · · · ·MR. YEWCIC:· If I recall, the second page
18· · · · and the next one I think was blank or they had
19· · · · links.· But, okay, no other objections, no.
20· · · · · · ·JUDGE WATSON:· Okay.· Under the
21· · · · circumstances, the document is hearsay, so I'm
22· · · · not going to be able to admit the document. I
23· · · · have marked it for identification purposes. I
24· · · · understand the concern and want to address all

25· · · · of these and determine what documents are

·1· · · · admissible, if any, and we'll address a couple

·2· · · · other issues that Mr. Yewcic raised.· Let's go

·3· · · · to the next document that I'll mark as

·4· · · · Complainant Exhibit 3.· That has the title of

·5· · · · Electromagnetic Hypersensitivity-An Increasing

·6· · · · Challenge To The Medical Profession.· That

·7· · · · document indicates one of two.· It does consist

·8· · · · of one page.· Go ahead, Mr. Yewcic, if you want

·9· · · · to explain what this is and the reason you're

10· · · · offering it.

11· · · · · · ·MR. YEWCIC:· The same reason as before.

12· · · · People have hypersensitivity to these things

13· · · · and it's a challenge to the medical profession,

14· · · · as my wife Sherry testified to.· Again, these

15· · · · people aren't here present.· It's not an

16· · · · official government document, but hopefully

17· · · · people will read this and understand what the

18· · · · problems are with a small percentage of people.

19· · · · · · ·JUDGE WATSON:· Thank you, sir.· Counsel?

20· · · · · · ·MS. GIESLER:· Your Honor, I would object

21· · · · to this on the same basis as we did to Exhibit

22· · · · Number 2.

23· · · · · · ·JUDGE WATSON:· Any other response, Mr. or

24· · · · Mrs. Yewcic?

25· · · · · · ·MR. YEWCIC:· No.

·1· · · · · · ·JUDGE WATSON:· I have to sustain the

·2· · · · objection under the circumstances.· I'm going

·3· · · · to address these matters once we conclude a

·4· · · · review of all proposed exhibits.· The next one

·5· · · · I have is entitled EMF Wise, W-I-S-E.· There

·6· · · · are some photographs along the top portion of

·7· · · · the first page, then there is a heading,

·8· · · · Electromagnetic Sensitivity.· The first page is

·9· · · · marked in the lower right-hand corner one slash

10· · · · five, the next page two slash five, then three

11· · · · slash five, next page is four slash five, the

12· · · · next page, five slash five.· Mr. Yewcic, if you

13· · · · could please identify that document and the

14· · · · purpose for its proposed admission.

15· · · · · · ·MR. YEWCIC:· Again, it's another article

16· · · · talking about the electromagnetic sensitivity.

17· · · · It talks about the symptoms which are

18· · · · consistent in all these articles.· If you do a

19· · · · Google search you'll find the same information.

20· · · · People are experiencing these things.· It's

21· · · · real.· If you note on the pictures on top of

22· · · · this page, there is a smart meter on the right

23· · · · along with everything else we talked about.

24· · · · The things that Sherry talked about earlier are

25· · · · all pictured here that affect her horrendously.

·1· · · · Again, we have no person here to testify to the

·2· · · · authenticity of this article, so it is what it

·3· · · · is.· It's education purposes to show these

·4· · · · symptoms are across the board no matter who

·5· · · · writes the article, from the professor down to

·6· · · · who these other people are.· Everything is

·7· · · · consistent.· There are people that have these

·8· · · · problems and it's a concern.· That's about it.

·9· · · · · · ·JUDGE WATSON:· Fair to say that this

10· · · · document essentially in part, at least, is

11· · · · consistent with the testimony from Ms. Yewcic

12· · · · that she suffers from the various symptoms that

13· · · · she described under certain circumstances,

14· · · · including her testimony that when she's in the

15· · · · presence of a smart meter such as at her

16· · · · mother's house?· Is that fair.

17· · · · · · ·MR. YEWCIC:· Yes.· It shows that on the

18· · · · first page under symptoms.· She has the heart

19· · · · palpitations and the other things under

20· · · · neurologic headaches and ringing of the ears,

21· · · · all those things.· She has those problems and

22· · · · they're all related.· She doesn't have them so

23· · · · much here in my house because we eliminated

24· · · · everything, but if she's she goes to her mom's

25· · · · where she has a smart meter, yes, she has those

·1· · · · problems, or if she goes shopping she has those

·2· · · · problems.

·3· · · · · · ·JUDGE WATSON:· Okay.· The testimony from

·4· · · · Miss Yewcic and from you was establishing what

·5· · · · you've observed regarding Miss Yewcic's

·6· · · · symptoms and her testimony regarding symptoms.

·7· · · · And then this document is being offered to show

·8· · · · that those types of symptoms are caused by the

·9· · · · exposure to electromagnetic frequencies and the

10· · · · other matters identified in the report.· Is

11· · · · that fair?

12· · · · · · ·MR. YEWCIC:· That's fair.

13· · · · · · ·JUDGE WATSON:· Counsel?

14· · · · · · ·MS. GIESLER:· Your Honor, unfortunately we

15· · · · are going to object to this one as well.· It

16· · · · constitutes hearsay.· The earlier proposed

17· · · · documents I would note while it provides a

18· · · · compilation of studies, it doesn't provide full

19· · · · content of any of them and the hearsay is

20· · · · layered within this document.· And for those

21· · · · reasons, it should be excluded.

22· · · · · · ·JUDGE WATSON:· All right.· Any response,

23· · · · Mr. Yewcic or Ms. Yewcic?

24· · · · · · ·MR. YEWCIC:· Well, I understand you're

25· · · · saying it's hearsay, but my wife's testimony is

·1· · · · not hearsay.· It's real, what she testified to.

·2· · · · But I understand where you're coming from.

·3· · · · These thing are real.· If we can just get

·4· · · · through this and help someone else down the

·5· · · · road, so be it.· But we are trying to help my

·6· · · · wife here.

·7· · · · · · ·JUDGE WATSON:· I appreciate that.· I agree

·8· · · · Ms. Yewcic's testimony is in the record and

·9· · · · I'll consider it.· I understand her testimony

10· · · · and symptoms that she's described.· The

11· · · · document itself marked as Complainant Exhibit 4

12· · · · is hearsay and it's not a complete document, so

13· · · · I have to sustain the objection.· So

14· · · · Complainant Exhibit 4 won't be admitted into

15· · · · the record.· But Ms. Yewcic's testimony is in

16· · · · the record and I will certainly consider that.

17· · · · The next document I have here is first page at

18· · · · about the top third of the page in large font

19· · · · and bold font is entitled, Should You Be

20· · · · Worried About EMF Exposure?· I've marked this

21· · · · as Complainant Exhibit 5.· First page indicates

22· · · · in the lower right-hand corner one slash 15,

23· · · · next page two slash 15, next page three slash

24· · · · 15, next page five slash 15, next page six

25· · · · slash 15, next page seven slash 15, next page

·1· · · · eight slash 15, and then we appear to go to a

·2· · · · different document.· I want to go through pages

·3· · · · one slash 15 through three slash 15 and five

·4· · · · slash 15 through eight slash 15.· That appears

·5· · · · to be the next exhibit.· Go ahead and indicate

·6· · · · what this document is and the purpose for the

·7· · · · document, sir.

·8· · · · · · ·MR. YEWCIC:· Same thing.· It shows across

·9· · · · the board, whether you're in Poland or in the

10· · · · State of Washington or you're a doctor

11· · · · someplace, people are identifying EMF exposure

12· · · · as an issue.· It's not medically accepted

13· · · · today.· They don't even know what Lyme disease

14· · · · is today.· They can't treat it long-term.· It's

15· · · · more information that shows things that are

16· · · · happening to my wife are real and other people

17· · · · are experiencing these things.

18· · · · · · ·JUDGE WATSON:· Counsel?

19· · · · · · ·MS. GIESLER:· Your Honor, I would note

20· · · · there are an author or reviewing doctor who are

21· · · · cited at the outset of this document, neither

22· · · · of whom are available to authenticate the

23· · · · document or be cross examined.· This does

24· · · · constitute hearsay and we'd object.· I'd also

25· · · · note it appears there is a fair amount of

·1· · · · content that could be missing from this

·2· · · · document given that it only goes to Page eight

·3· · · · of 15, and there is a page missing from the

·4· · · · midst of that.· So it would also be excludable

·5· · · · on that basis.

·6· · · · · · ·JUDGE WATSON:· Any response --

·7· · · · · · ·MR. YEWCIC:· No.

·8· · · · · · ·JUDGE WATSON:· In reviewing this document

·9· · · · it doesn't seem to be, based on my review of

10· · · · the document at this time, any conclusive

11· · · · opinions regarding the subject matter.· But I

12· · · · do note that at page six of 15 there is a

13· · · · section involving symptoms of EMF exposure and

14· · · · I would note that Ms. and Mr. Yewcic testified

15· · · · as to the symptoms being exhibited by Ms.

16· · · · Yewcic and also the circumstances when those

17· · · · symptoms are being manifested and related to

18· · · · the presence of a smart meter and the other

19· · · · testimony.· I obviously will consider that

20· · · · testimony by Mr. and Mrs. Yewcic as far as the

21· · · · document itself.· Complainant Exhibit-5, I have

22· · · · to sustain the objection and that document will

23· · · · not be admitted, but as I indicated the

24· · · · testimony regarding the symptoms and the

25· · · · circumstances surrounding the manifestation of

·1· · · · those symptoms is in the record and I will

·2· · · · consider it that.· The next document I have

·3· · · · after the last Page 8 slash 15 of Complainant

·4· · · · Exhibit 5 I'll mark as Complainant Exhibit 6,

·5· · · · entitled My Ill Health From Wireless Smart

·6· · · · Meters.· This is again Exhibit 6 for

·7· · · · identification purposes.· The pages themselves

·8· · · · are not marked or numbered by the author,

·9· · · · whoever compiled the exhibits.· However, based

10· · · · upon the color of the font and the font itself,

11· · · · it appears to be all one exhibit and appears to

12· · · · be the final exhibit in the packet submitted by

13· · · · Ms. Yewcic prior to the certificate of service.

14· · · · Is that fair?

15· · · · · · ·MR. YEWCIC:· Yes.

16· · · · · · ·JUDGE WATSON:· Very good.· Mr. and

17· · · · Mrs. Yewcic, if you want to indicate what that

18· · · · document is and the purpose for the offer of

19· · · · its admission.

20· · · · · · ·MR. YEWCIC:· Again, this document is from

21· · · · England, United Kingdom.· Other documents were

22· · · · from Poland, another from this country.· It

23· · · · shows there are symptoms, similar problems or

24· · · · concerns of people who are subjected to this

25· · · · type of technology.· This article offers a lot

·1· · · · of peoples testimony of what effect smart

·2· · · · meters are having on them, as my wife testified

·3· · · · to.· It's just more information.· It's not

·4· · · · official.· I don't have anyone to testify to

·5· · · · the authenticity of this article.· It shows

·6· · · · across the board the problem exists and you

·7· · · · can't get away from it.· These may be hearsay.

·8· · · · My wife, she's not hearsay.· It's real.

·9· · · · · · ·JUDGE WATSON:· Thank you, Mr. Yewcic.

10· · · · Counsel?

11· · · · · · ·MS. GIESLER:· Your Honor, the Company is

12· · · · going to object to this on the basis of

13· · · · hearsay.

14· · · · · · ·JUDGE WATSON:· Looks like a seven-page

15· · · · document that I previously identified.· If

16· · · · there's nothing further, I'm going to sustain

17· · · · the objection.· I'm not going to admit

18· · · · Complainant Exhibit 6 as hearsay.· Again,

19· · · · Mr. and Mrs. Yewcic have submitted detailed

20· · · · testimony and that is in the record and that

21· · · · will be considered.· With that said, Ms.

22· · · · Yewcic, is there any other evidence that you

23· · · · would like to present for me to consider at

24· · · · this time?

25· · · · · · ·MS. YEWCIC:· In Sweden it is illegal in a

·1· · · · workplace to have an employee subjected to EMF

·2· · · · in a current of over two MGs.· That is Swedish

·3· · · · government scientists that have done this.

·4· · · · They proved the human tissue subjected to this

·5· · · · type of field for an extended period of time

·6· · · · there is a reasonable probability of developing

·7· · · · cancer.

·8· · · · · · ·MS. GIESLER:· Objection, your Honor.· Move

·9· · · · to strike on the basis of hearsay.

10· · · · · · ·MS. YEWCIC:· I'd like to submit it.

11· · · · · · ·MS. GIESLER:· I would also object on the

12· · · · basis of relevance.· We are not in Sweden.

13· · · · · · ·JUDGE WATSON:· Is this a document you have

14· · · · that you would want me to consider?

15· · · · · · ·MS. YEWCIC:· Yeah, if you would like to

16· · · · read it I can have it sent to you.

17· · · · · · ·JUDGE WATSON:· If it's a document and

18· · · · something you want me to consider, I'll give

19· · · · you an opportunity to submit it as a

20· · · · late-filing exhibit.· Counsel is indicating

21· · · · that they believe that based upon the

22· · · · identification of the document, at this point

23· · · · that Counsel would question the relevance of

24· · · · this document to this proceeding based upon the

25· · · · limited information that's been provided today

·1· · · · that hasn't been shared with anyone as of yet.

·2· · · · What I'm saying is if this is something that

·3· · · · you feel will help your case and you want to

·4· · · · submit this as a late-filed exhibit, providing

·5· · · · the full document and the reasons that you

·6· · · · believe that it's admissible and relevant to

·7· · · · this case, I'll let you do that.· I'll let

·8· · · · Counsel have an opportunity then to submit

·9· · · · objections and then I can make a ruling if

10· · · · that's something you want to do.· If it's

11· · · · something you don't believe is that viable to

12· · · · the case, that's up to you.· You can step away

13· · · · from the phone if you'd like.

14· · · · · · ·MR. YEWCIC:· Yes, give us a minute.

15· · · · · · ·JUDGE WATSON:· Take your time.· If you

16· · · · think it's admissible I'd be more than happy to

17· · · · consider it.

18· · · · · · ·MR. YEWCIC:· We'll move on from that.· We

19· · · · won't submit that.

20· · · · · · ·JUDGE WATSON:· Okay.· Anything else you'd

21· · · · like to present today?· I'm going to give you

22· · · · an opportunity to present a summary, which

23· · · · isn't testimony but a summary, and also a brief

24· · · · to address your summery of the case, as well as

25· · · · your interpretation of the law and how the law

·1· · · · as you interpret it would support your request

·2· · · · for relief.· Okay?

·3· · · · · · ·MR. YEWCIC:· What law are you referring

·4· · · · to?

·5· · · · · · ·JUDGE WATSON:· Whatever law you all would

·6· · · · like to present.· There has been law which was

·7· · · · referenced in the Company's answer and new

·8· · · · matter in this case.· So that's probably a good

·9· · · · starting point if the parties want to review

10· · · · the legal authority that was addressed in the

11· · · · pleadings.· I think that's a good starting

12· · · · point.· As far as the brief, I'll give you all

13· · · · plenty of time to do that.

14· · · · · · ·MR. YEWCIC:· We can do the summary and the

15· · · · a brief, yes.

16· · · · · · ·JUDGE WATSON:· If there is no other

17· · · · testimony or evidence from the Complainants --

18· · · · · · ·MR. YEWCIC:· One question.· Would her

19· · · · medical records be admissive?

20· · · · · · ·JUDGE WATSON:· I don't see any medical

21· · · · records.· Do you have those?

22· · · · · · ·MR. YEWCIC:· We have them here.· No, she

23· · · · doesn't want her medical records released.

24· · · · · · ·JUDGE WATSON:· Anything else, Mr. Yewcic?

25· · · · Ms. Yewcic, anything further?

·1· · · · · · ·MS. YEWCIC:· No, thank you.

·2· · · · · · ·JUDGE WATSON:· Thank you very much.· The

·3· · · · Complainants rest.· At this point does the

·4· · · · Company have any evidence that the Company

·5· · · · would like to submit into evidence?

·6· · · · · · ·MS. GIESLER:· Yes, your Honor.· This is

·7· · · · Miss Giesler.· Before we do that, I do have, if

·8· · · · possible, some limited Cross-examination for

·9· · · · Mr. and Mrs. Yewcic on the basis of everything

10· · · · we just heard here.

11· · · · · · ·JUDGE WATSON:· I apologize.· Is it okay if

12· · · · we start with Mr. Yewcic?

13· · · · · · ·MS. GIESLER:· Yes.

14· · · · · · ·JUDGE WATSON:· Mr. Yewcic, Miss Giesler

15· · · · has some questions now for you for

16· · · · Cross-examination.· Take your time.

17· · · · · · · · · · · · · · * * *

18· · · · · · · · · ·E X A M I N A T I O N

19· · · · · · · · · · · · · · * * *

20· ·BY MS. GIESLER:

21· · · · Q· · Thank you for your testimony, Mr. Yewcic.

22· ·I just want to clarify a couple things for our

23· ·purposes for the record.· Is it your understanding

24· ·that the law in Pennsylvania as it stands today

25· ·requires you to receive a smart meter or do you

·1· ·believe you have the option of a smart meter under

·2· ·the law?

·3· · · · A· · Are you referring to Act 129?

·4· · · · Q· · Yes.

·5· · · · A· · When I retired from the legislature in

·6· ·2008 it went through my committee, Act 129.· I have

·7· ·no recollect -- I don't recall anyone at any time

·8· ·stating that smart meters were a mandate, and they

·9· ·weren't.· As I recall, there was language that

10· ·talked about a customer, ratepayer or consumer may

11· ·opt in.· There was no other language.· When I left

12· ·the legislature, what happened in the courts,

13· ·whatever the decisions were, I don't know.· I did

14· ·look at your testimony.· I reviewed it.· But the

15· ·courts weren't in the legislature, I was.· There was

16· ·no mention of a mandate.· If there was a mandate in

17· ·2008 I doubt seriously it would have made it out of

18· ·committee.· It just wasn't the case.· I assume it

19· ·had to go to court down the road, at which I already

20· ·left the legislature and wasn't paying attention to

21· ·the process then.· As far as am I mandated to put

22· ·something on my house?· I made no agreement to

23· ·change the meter on my house, but our objection is

24· ·the ill health it causes my wife.· If the law states

25· ·that we have to do something that's harmful to

·1· ·somebody, then there is a problem with the law. I

·2· ·think common sense should prevail.

·3· · · · Q· · Are you aware of the fact that there have

·4· ·been numerous efforts to implement an opt out under

·5· ·the law that have not passed?

·6· · · · A· · Well, yeah.· I've been in the process.

·7· ·Those things aren't going to happen unless there is

·8· ·an agreement between the house and government, the

·9· ·governor and probably the industry.· I know how the

10· ·process works.· That's one of the reasons why I

11· ·opted to retire early.· Those efforts failed.· Just

12· ·because a state rep introduces language doesn't mean

13· ·it's going to go anywhere unless there is an

14· ·agreement to make it happen.· I've been there.

15· ·That's just not a good example of how things get

16· ·done or not get done in the legislature as far as

17· ·legislation is concerned.· We have talked to the

18· ·prime sponsor of that legislation and the new

19· ·chairman of the committee last year when Godshaw

20· ·retired is unable to get -- just doesn't seem to be

21· ·any support to do it.· I have my reasons why I

22· ·believe that.

23· · · · Q· · So that's a yes; is that correct?· I need

24· ·a yes or no.· It's a yes or no question.

25· · · · A· · State the question again.

·1· · · · Q· · Are you aware of the fact that there have

·2· ·been numerous unsuccessful attempts to implement an

·3· ·opt out revision to Act 129 as it exists today?

·4· · · · A· · Yes, I am aware legislation has been

·5· ·introduced and it has not passed.

·6· · · · Q· · It's correct that you voted for Act 129 as

·7· ·it's currently written today in support of it,

·8· ·correct?

·9· · · · A· · I voted for Act 129 in 2008 because as I

10· ·stated, there were no mandates.· There was no

11· ·suggestion of a mandate.· Those didn't come until

12· ·later.

13· · · · Q· · Correct me if I'm wrong, Mr. Yewcic.

14· ·Isn't it true that all bills would also pass through

15· ·the legislative reference bureau?

16· · · · A· · Pardon me?

17· · · · Q· · Wouldn't they have gone through a

18· ·legislative legal review?

19· · · · A· · What's that?

20· · · · Q· · During the passage process?· Did you ask

21· ·what is that?

22· · · · A· · You mean Act 129?· Yeah, it goes to the

23· ·legislative reprocess, yes.

24· · · · Q· · So wouldn't a bunch of lawyers have looked

25· ·over it for interpretation errors or any issues that

·1· ·might be presented if passed with that language?

·2· · · · A· · I do not recall any communication of any

·3· ·lawyer in a reference bureau regarding the house

·4· ·bill before it passed.· Nobody stated there was a

·5· ·mandate to implement smart meters.· The house record

·6· ·and senate record are available and I'm pretty

·7· ·certain somebody, I think in the senate, maybe Fumo,

·8· ·former senator or somebody stated there was no
·9· ·mandate in the bill, and it was an opt in bill, not
10· ·a mandate.· That's my recollection.
11· · · · Q· · Doesn't it stand to reason that if a bunch
12· ·of the state legislators today will not agree to put
13· ·in an opt out provision into the law, that it's
14· ·possible that some of you just misunderstood what
15· ·you were voting for?
16· · · · A· · No.· That's nonsense.· Every legislative
17· ·session is different.· There are a lot of external
18· ·reasons why people support and don't support
19· ·legislation having to do with fundraising, perhaps
20· ·jobs for children, family members.· Who knows?
21· ·There are a lot of reasons why things happen and
22· ·don't happen in legislature and I don't think we are
23· ·going to solve that problem here.
24· · · · · · ·MS. GIESLER:· I have nothing further for
25· · · · Mr. Yewcic, your Honor.
·1· · · · · · ·JUDGE WATSON:· Thank you, Mr. Yewcic.
·2· · · · Miss Giesler, any Cross-examination for Ms.
·3· · · · Yewcic?
·4· · · · · · ·MS. GIESLER:· Your Honor, I'm going to
·5· · · · waive cross on Ms. Yewcic.
·6· · · · · · ·JUDGE WATSON:· Very good.· Anything

·7· · · · further, Mr. Yewcic, by way of testimony?

·8· · · · · · ·MR. YEWCIC:· No, sir.

·9· · · · · · ·JUDGE WATSON:· Ms. Yewcic?

10· · · · · · ·MS. YEWCIC:· No, sir.

11· · · · · · ·JUDGE WATSON:· With that, the Complainants

12· · · · rest, and Miss Giesler?

13· · · · · · ·MS. GIESLER:· I'm going to hand it over to

14· · · · Miss Lepkoski who is going to present the

15· · · · Company's witness.

16· · · · · · ·JUDGE WATSON:· The time is now 11:22.· If

17· · · · you all need a short break I'd be more than

18· · · · happy to do that.· Mr. and Mrs. Yewcic, would

19· · · · you like to take a break before we proceed with

20· · · · the next witness?

21· · · · · · ·MR. YEWCIC:· We are fine.

22· · · · · · ·JUDGE WATSON:· Okay.· The Company's

23· · · · willing to proceed?

24· · · · · · ·MS. GIESLER:· Yes, your Honor.

25· · · · · · ·JUDGE WATSON:· Attorney Lepkoski is going

·1· · · · to take over and so we'll turn it over to her.

·2· · · · · · ·MS. LEPKOSKI:· Thank you, your Honor.· The

·3· · · · Company would be calling John Ahr as their

·4· · · · witness.

·5· · · · · · ·JUDGE WATSON:· Everyone keep your voice

·6· · · · up.· Mr. Ahr, your business address for the

·7· · · · record?

·8· · · · · · ·THE WITNESS:· My business address is 800

·9· · · · Abinsdale Drive, Greensburg, Pennsylvania,

10· · · · 15601.

11· · · · · · ·JUDGE WATSON:· Mr. and Mrs. Yewcic, Miss

12· · · · Lepkoski is going to ask Mr. Ahr some

13· · · · questions, so I encourage you to jot down some

14· · · · notes that may be helpful for you in the event

15· · · · that you would want to ask any questions or

16· · · · cross-examination of Mr. Ahr.· Okay?

17· · · · · · ·MR. YEWCIC:· Okay.

18· · · · · · ·JUDGE WATSON:· Go ahead, Miss Lepkoski.

19· · · · · · ·MS. LEPKOSKI:· Thank you, your Honor.

20· · · · · · · · · · · · ·* * *

21· · · · · · · · · · · D I R E C T

22· · · · · · · · · E X A M I N A T I O N

23· · · · · · · · · · · · ·* * *

24· ·BY MS. LEPKOSKI:

25· · · · Q· · Mr. Ahr, by whom are you employed and in

·1· ·what capacity?

·2· · · · A· · Good morning.· I am employed by First

·3· ·Energy Service Company, which is a subsidiary of

·4· ·First Energy Corporation.· I am the adviser of

·5· ·regulatory compliance of smart meter and previously

·6· ·it's precursor position of manager of regulatory

·7· ·compliance of smart meter.

·8· · · · Q· · How long have you worked for First Energy

·9· ·Service Company?

10· · · · A· · I've worked for over 36 years with

11· ·subsidiaries of First Energy or its predecessor

12· ·companies.· I've worked in a variety of positions in

13· ·engineering operations, customer services,

14· ·transmission, customer support, energy efficiency

15· ·and emerging technologies of various other

16· ·companies.

17· · · · Q· · How long have you been employed in your

18· ·current position?

19· · · · A· · I've been employed in my current position

20· ·since 2018 and its precursor position since 2012.

21· · · · Q· · Can you please describe your educational

22· ·background and work experience?

23· · · · A· · Yes.· I'm a graduate of Pennsylvania State

24· ·University with a Bachelor of Science Degree in

25· ·Electrical Engineering, Master's Degree in Business

·1· ·Administration from the University of Pittsburgh. I

·2· ·began work with the Company in 1984 as an engineer

·3· ·in the distribution planning area and was promoted

·4· ·to supervisor of transmission and distribution

·5· ·operations in 1992.· I've subsequently held a number

·6· ·of management positions until promoted to the

·7· ·director of system operations in 1999.· Other

·8· ·positions I've held include director of energy

·9· ·procurement, director of meter reading and

10· ·collections, senior consultant, manager customer

11· ·support and manager of regulatory compliance smart

12· ·meter.

13· · · · Q· · Can you please describe your duties and

14· ·responsibilities as an adviser in regulatory

15· ·compliance for the smart meter group?

16· · · · A· · Yes.· As the adviser of regulatory

17· ·compliance smart meter I am responsible for

18· ·regulatory compliance associated with the smart

19· ·meter project.· This includes all filings and

20· ·resulting regulatory processes associated with the

21· ·plan and approval.· Within my role I provide

22· ·leadership expert guidance, management subject

23· ·matter expertise for the smart meter project, and I

24· ·coordinate smart meter developments among the First

25· ·Energy's operating companies.· I serve as the Act

·1· ·129 and smart meter subject matter expert and

·2· ·represent the smart meter project and First Energy's

·3· ·operating companies on regulatory matters.· I assist
·4· ·in preparing for regulatory proceedings regarding
·5· ·smart meters, I manage external consultants and
·6· ·expert witnesses related to the smart meter project.
·7· · · · Q· · On whose behalf are you testifying in this
·8· ·proceeding?
·9· · · · A· · I'm testifying on behalf of Pennsylvania
10· ·Electric Company, Penn Electric.
11· · · · Q· · Have you previously testified before the
12· ·Pennsylvania Public Utility Commission or any other
13· ·regulatory bodies?
14· · · · A· · Yes, I've testified before the Commission
15· ·in the 2009 petition of Westend Fire Company doing
16· ·business as Allegheny Power for expedited approval
17· ·of its smart meter technology procurement and
18· ·installation plan, and in formal complaint
19· ·proceedings related to smart meters.· I've also
20· ·provided testimony before the West Virginia Public
21· ·Service Commission in a general investigation into
22· ·the standards that were set forth in the Energy
23· ·Independent and Security Act of 2007 and I've also
24· ·testified before the Maryland Public Service
25· ·Commission, the Maryland Public Service Commission
·1· ·in an adjustment of a fuel rate case in 1999.

·2· · · · · · ·MS. LEPKOSKI:· Your Honor, I would like to

·3· · · · note for the record, on July 13th the Company

·4· · · · had served exhibits to your Honor as well as

·5· · · · Mr. and Mrs. Yewcic and we will have John Ahr

·6· · · · go through these exhibits here.· However, we

·7· · · · want to let everyone know, due to the

·8· · · · testimony, we will not be going through all of

·9· · · · the exhibits.

10· · · · · · ·JUDGE WATSON:· Mr. and Mrs. Yewcic, do you

11· · · · have those proposed exhibits that were

12· · · · submitted by the Company?

13· · · · · · ·MR. YEWCIC:· We don't have them printed

14· · · · out, no.

15· · · · · · ·JUDGE WATSON:· I'm at a disadvantage too,

16· · · · because I don't have them printed out either.

17· · · · But I do have them electronically on my

18· · · · computer.· If you'd like to take a moment and

19· · · · pull them on up and review them, that's fine.

20· · · · · · ·MR. YEWCIC:· I reviewed them already.

21· · · · · · ·JUDGE WATSON:· Okay.· That's acceptable to

22· · · · proceed as well, Ms Yewcic?

23· · · · · · ·MS. YEWCIC:· Yes.

24· · · · · · ·JUDGE WATSON:· Proceed, Miss Lepkoski.

25

·1· ·**BY MS. LEPKOSKI:**

·2· · · · **Q· · Mr. Ahr, what happened to cause Penn**

·3· ·**Electric to begin exploring smart meter**

·4· ·**implementation?**

·5· · · · **A· · The Pennsylvania legislature adopted Act**

·6· ·**129 in 2008 requiring all electric distribution**

·7· ·**companies or EDCs with at least one hundred**

·8· ·**thousands customers to install smart meters**

·9· ·**throughout service territories, which includes Penn**

10· ·**Electric.**

11· · · · **Q· · Was Act 129 clarified in the Public**

12· ·**Utility Code?**

13· · · · **A· · Yes.· Chapter 28 of the Title 66 of the**

14· ·**Public Utility Code reflects the changes that were**

15· ·**made by Act 129.**

16· · · · **Q· · Can you identify for the record what has**

17· ·**been previously marked as Public Document, or PD-1?**

18· · · · **A· · Yes.· This document is a copy of Chapter**

19· ·**28, Title 66 of the Public Utility Code.**

20· · · · · · ·**MS. LEPKOSKI:· Your Honor, at this time I**

21· · · · **would request that your Honor take judicial or**

22· · · · **official notice of what has been premarked as**

23· · · · **PD-1.**

24· · · · · · ·**JUDGE WATSON:· Mr. and Mrs. Yewcic, there**

25· · · · is a request that I take official or judicial

·1· · · · notice of what's been marked as PD-1, which

·2· · · · means that document would not be admitted as an

·3· · · · exhibit.· However, the Company's requesting

·4· · · · that I take official or judicial notice of that

·5· · · · document, and that I would consider that law in

·6· · · · making my decision.· Do you have any objection

·7· · · · to me taking notice of that document,

·8· · · · Mr. Yewcic?

·9· · · · · · ·MR. YEWCIC:· Yes and no.· The document --

10· · · · Act 129 happened.· It's the law.· I understand

11· · · · that.· The problem we have is the effects of

12· · · · that law and how it affects my wife having a

13· · · · mandated smart meter attached to my house.

14· · · · This is more of a health issue than a law

15· · · · issue, but I understand what you're saying the

16· · · · law says.· I may disagree with some of it,

17· · · · but....

18· · · · · · ·JUDGE WATSON:· I understand, Mr. Yewcic.

19· · · · · · ·MR. YEWCIC:· I would object to that point.

20· · · · It's more of a health issue.· I don't know what

21· · · · effect a judicial notice would make of that,

22· · · · how it affects my wife's case.

23· · · · · · ·JUDGE WATSON:· Okay.· Ms. Yewcic,

24· · · · anything?

25· · · · · · ·MS. YEWCIC:· No.· That's fine.

·1· · · · · · ·JUDGE WATSON:· I am going to take official

·2· · · · notice of what's been marked as PD-1.· It is

·3· · · · the law.· I will consider it when making my

·4· · · · decision.· However, it's important for the

·5· · · · parties to understand that the parties can also

·6· · · · reference that law in their briefs and their

·7· · · · arguments and can express their interpretation

·8· · · · of that law and how the parties believe that

·9· · · · law would in fact impact the claims raised in

10· · · · this case by the parties and also the relief

11· · · · requested.· With that said, thank you for your

12· · · · input.· Miss Lepkoski, go ahead.

13· · · · · · ·MS. LEPKOSKI:· Thank you, your Honor.

14· ·BY MS. LEPKOSKI:

15· · · · Q· · Mr. Ahr, does Act 129 apply to Penn Elec?

16· · · · A· · Yes.· Penn Elec is an EDC with at least

17· ·one hundred thousand customers and they're required

18· ·to install the smart meters which have the specific

19· ·characteristics defined in the Act throughout its

20· ·service territory.

21· · · · Q· · What steps were taken by the Pennsylvania

22· ·Public Utility Commission after Act 129 was adopted?

23· · · · A· · The Commission issued an implementation

24· ·order on June 24th of 2009.· This provided the

25· ·general direction to EDCs regarding their adoption

·1· ·of smart meter programs which required Penn Elec to

·2· ·submit a smart meter implementation and plan.

·3· · · · Q· · Can you please identify for the record

·4· ·what has been previously marked as Public Document

·5· ·or PD-2?

·6· · · · A· · Yes.· This is a copy of the Commission's

·7· ·implementation order.· It was entered on June 24th,

·8· ·2009.

·9· · · · · · ·MS. LEPKOSKI:· Your Honor, I would like to

10· · · · request that your Honor take official or

11· · · · judicial notice of the document premarked as PD

12· · · · Number 2.

13· · · · · · ·JUDGE WATSON:· Any objection, Mr. Yewcic?

14· · · · · · ·MR. YEWCIC:· No.· I would just ask if

15· · · · there were objections to any of this being --

16· · · · were there objections to the installation or do

17· · · · I cross examine later?

18· · · · · · ·JUDGE WATSON:· No.· I'll give you an

19· · · · opportunity to cross examine, but are you

20· · · · asking Counsel regarding the document itself?

21· · · · · · ·MR. YEWCIC:· I have no objection.· Go

22· · · · ahead.

23· · · · · · ·JUDGE WATSON:· I'll take official notice

24· · · · of PD-2.· Go ahead, Miss Lepkoski.

25

·1· ·BY MS. LEPKOSKI:

·2· · · · Q· · Mr. Ahr, did Penn Elec comply with the

·3· ·Pennsylvania Public Utility Commission directive of

·4· ·filing an initial smart meter technology procurement

·5· ·and installation plan?

·6· · · · A· · Yes.· Penn Elec's smart meter procurement

·7· ·and installation plan was submitted to the

·8· ·Commission on August 14th of 2009.

·9· · · · Q· · Did the Pennsylvania Public Utility

10· ·Commission approve Penn Elec's smart meter

11· ·technology procurement and installation plan?

12· · · · A· · Yes.· On June 9, 2010 the Commission

13· ·issued its order approving Penn Elec's smart meter

14· ·procurement and installation plan with

15· ·modifications.

16· · · · Q· · Can you please identify for the record

17· ·what has been previously marked as Public Document

18· ·or PD-3?

19· · · · A· · Yes.· It's a copy of the Commission's

20· ·June 9th, 2010 order approving Penn Elec's smart

21· ·meter procurement and installation plan.

22· · · · · ·MS. LEPKOSKI:· Your Honor, I would ask

23· · · · that your Honor take judicial or official

24· · · · notice of the document that's previously marked

25· · · · as PD-3.

·1· · · · · ·JUDGE WATSON:· Mr. and Mrs. Yewcic, the

·2· · · · Company is asking that I take official notice

·3· · · · or consider in making my decision what's been

·4· · · · marked as PD-3, the joint petition of

·5· · · · Metropolitan Edison Company, Pennsylvania

·6· · · · Electric Company and Pennsylvania Power Company

·7· · · · for approval of its smart meter technology

·8· · · · procurement and installation plan with the

·9· · · · order dated June 9th, 2010.· Is there any

10· · · · objection to the taking of official or judicial

11· · · · notice of that document?

12· · · · · ·MR. YEWCIC:· Of the document, no.· Of the

13· · · · plan, yes.

14· · · · · ·JUDGE WATSON:· You don't agree with the

15· · · · content of it, but you don't have an objection

16· · · · of me reviewing the document itself?

17· · · · · ·MR. YEWCIC:· No, I don't have any

18· · · · objection to it, no.

19· · · · · ·JUDGE WATSON:· Mrs. Yewcic, any objection?

20· · · · · · ·MS. YEWCIC:· No.

21· · · · · · ·JUDGE WATSON:· I will take official notice

22· · · · of what's marked as PD-3, Miss Lepkoski.

23· · · · · · ·MS. LEPKOSKI:· Thank you, your Honor.

24· ·BY MS. LEPKOSKI:

25· · · · Q· · Mr. Ahr, after Penn Elec's smart meter

·1· ·technology procurement and installation plan was

·2· ·approved, what steps did Penn Elec take towards

·3· ·smart meter deployment?

·4· · · · A· · Penn Elec began evaluating potential smart

·5· ·meter technology system.

·6· · · · Q· · Did Penn Elec file a smart meter

·7· ·deployment plan with the Commission?

·8· · · · A· · Yes, Penn Elec filed it's initial

·9· ·deployment plan with the Commission on December 31st

10· ·of 2012.

11· · · · Q· · Are you familiar with Penn Elec's smart

12· ·meter deployment plan?

13· · · · A· · Yes, I am.· I assisted with the

14· ·development and filing of the joint petition for

15· ·approval of Penn Elec's smart meter deployment plan.

16· ·This was filed in conjunction with Penn Elec's

17· ·sister Pennsylvania operating companies. I

18· ·participated in each stage of the review of the

19· ·deployment plan.· I was involved in changes made to

20· ·the deployment plan that were consistent with the

21· ·Commission's March 6, 2013 order.

22· · · · Q· · Are you familiar with the smart meter

23· ·technology that's in accordance with Act 129?

24· · · · A· · Yes, I am.· The smart meter technology

25· ·includes but it's not limited to the smart meters

·1· ·themselves.· There are also connected routers, range

·2· ·extenders, a head end that consists of a flexion

·3· ·engine and fields network director and a meter data

·4· ·management system.

·5· · · · Q· · Was Penn Elec's smart meter deployment

·6· ·plan approved by the Pennsylvania Public Utility

·7· ·Commission?

·8· · · · A· · Yes.· Following a review process and

·9· ·certain modifications the Commission did ultimately

10· ·approve Penn Elec's panel smart meter deployment

11· ·plan on June 25th of 2014.

12· · · · Q· · Would you identify what has been

13· ·previously marked as Public Document or PD-4?

14· · · · A· · Yes.· This is a copy of the Commission's

15· ·June 25, 2014 order approving Penn Elec's final

16· ·smart meter deployment plan.

17· · · · · · ·MS. LEPKOSKI:· Your Honor, I would like to

18· · · · request that your Honor take judicial or

19· · · · official notice of what's been marked as PD-4.

20· · · · · · ·JUDGE WATSON:· Thank you.· Mrs. and

21· · · · Mr. Yewcic, I've been requested to take

22· · · · official or judicial notice of PD-4.· Is there

23· · · · any objection to that request?

24· · · · · · ·MR. YEWCIC:· Nope.

25· · · · · · ·JUDGE WATSON:· Ms. Yewcic, any objection?

·1· · · · · · ·MS. YEWCIC:· No.

·2· · · · · · ·JUDGE WATSON:· Without objection, I will

·3· · · · take official or judicial notice of what's been

·4· · · · marked as PD-4.· Thank you, Miss Lepkoski?

·5· ·BY MS. LEPKOSKI:

·6· · · · Q· · Mr. Ahr, can you identify what's been

·7· ·previously marked as JCA-1?

·8· · · · A· · Yes.· This is a copy of Penn Elec's final

·9· ·approved deployment plan.

10· · · · Q· · What type of information does this smart

11· ·meter deployment plan contain?

12· · · · A· · The plan identifies how Penn Elec's smart

13· ·meter technology was chosen, features and

14· ·characteristics of the smart meter technology, the

15· ·communication process between the smart meters and

16· ·Penn Elec and the cost and savings associated with

17· ·the deployment of smart meters.

18· · · · Q· · How did Penn Elec choose its smart meter

19· ·technology?

20· · · · A· · Penn Elec conducted multiple rounds of

21· ·requests for information and requests for proposals

22· ·from vendors of smart meter systems and equipment.

23· · · · Q· · Can you generally describe the smart meter

24· ·technology being deployed by Penn Elec?

25· · · · A· · Yes.· The smart meters and the

·1· ·communication network and the supporting systems are

·2· ·all referred to as advanced metering infrastructure,

·3· ·or AMI.· AMI is the system that allows for the

·4· ·bi-directional communication between the smart

·5· ·meters and Penn Elec.· It records customers'

·6· ·interval consumption of electricity, it allows for

·7· ·the transmission of meter readings over a

·8· ·communication network to a central connection point

·9· ·and supporting systems.

10· · · · Q· · What is the specific type of AMI used by

11· ·Penn Elec?

12· · · · A· · It's an Itron open wave centron smart

13· ·meter.· Itron is the manufacturer of Penn Elec's

14· ·smart meters.· They are also the vendor in charge of

15· ·the smart meter communication system.

16· · · · Q· · Is Penn Elec required to follow the smart

17· ·meter deployment plan?

18· · · · A· · Yes, they are.· Any plan approved by

19· ·Commission order is legally binding on Penn Elec.

20· · · · Q· · Based on your understanding of Act 129,

21· ·the Commission's orders related to smart meters you

22· ·just went over, the Company's commission approved

23· ·smart meter plan you just went over, do you believe

24· ·a customer has the ability to opt out of having a

25· ·smart meter installed at his or her home?

·1· · · · A· · No.· Act 129 requires that all EDCs with

·2· ·more than one hundred thousand customers install

·3· ·smart meters throughout their service territories.

·4· ·It doesn't allow for any customers or EDCs to opt

·5· ·out of this smart meter installation.· In addition,

·6· ·Penn Elec's smart meter deployment plan was approved

·7· ·by the Commission under an assumption that no

·8· ·customers may opt out of the installation.

·9· · · · Q· · Just to clarify for the record, can you

10· ·describe what you mean when you said assumption?

11· · · · A· · Yes.· Referring to what's been marked as

12· ·Penn Elec Exhibit number JCA-1, on Page 47 of 80 of

13· ·the deployment plan it specifically states the

14· ·following.· "At this pace the Company expects to

15· ·install approximately 98 and a half percent of all

16· ·meters by mid 2019 with the remaining 1.5 percent of

17· ·the meters being installed thereafter through

18· ·December 31st of 2022.· The 1.5 percent of the

19· ·installations represent those installations that may

20· ·require alternative communication solutions or

21· ·difficult to reach locations, such as remote hunting

22· ·cabins."

23· · · · Q· · Is it significant to you that the plan

24· ·refers to the deployment of 98.5 percent meters

25· ·followed by the remaining 1.5 percent of smart

·1· ·meters?

·2· · · · A· · Yes.· When added together those

·3· ·percentages equal 100 percent of meters.· Clearly

·4· ·this plan requires Penn Elec to install smart meters

·5· ·at all customer service locations.

·6· · · · Q· · Do you have any reason to believe based on

·7· ·your experience and the testimony submitted here

·8· ·today by Mr. and Mrs. Yewcic that the smart meters

·9· ·being installed by the Company are unsafe?

10· · · · A· · No, I don't.· The smart meters that Penn

11· ·Elec is installing comply with all the safety

12· ·requirements and standards that were established by

13· ·agencies such as the Federal Communications

14· ·Commission.· The meter manufacturer for Penn Elec

15· ·smart meters, Itron, enlist certified personnel to

16· ·perform ANSI or American National Standards

17· ·Institute tests on metered products that are

18· ·commercialized by Itron.· These Itron certified

19· ·personnel were involved early in the development

20· ·phase of the project, therefore, requiring design

21· ·knowledge of the metering product.· Having this

22· ·knowledge of the design means these individuals are

23· ·aware of product behavior and are therefore able to

24· ·dissect product anomalies, if any, during all of the

25· ·testing.· And the smart meters that Penn Elec are

·1· ·installing are UL certified.· This means the

·2· ·personnel has performed testing to conform

·3· ·compliance to UL 27-35.

·4· · · · Q· · Has the company violated any Commission

·5· ·order regulation or statue in this proceeding?

·6· · · · A· · No.

·7· · · · Q· · Does this conclude your testimony for

·8· ·today?

·9· · · · A· · Yes, it does.

10· · · · · · ·MS. LEPKOSKI:· Your Honor, at this time I

11· · · · would like to enter into the record Exhibit

12· · · · JCA-1 subject to Mr. Ahr's Cross-examination,

13· · · · and he's available.

14· · · · · · ·JUDGE WATSON:· Ms. Yewcic, do you have any

15· · · · questions for Mr. Ahr?

16· · · · · · ·MR. YEWCIC:· I have a couple questions.

17· · · · · · ·JUDGE WATSON:· Go ahead, Mr. Yewcic.

18· · · · · · ·MS. GIESLER:· Your Honor, I'm going to

19· · · · object.· Mr. Yewscic is not one of the

20· · · · complainants in this matter and for that reason

21· · · · he should not be representing Ms. Yewcic in

22· · · · this proceeding.

23· · · · · · ·MR. YEWCIC:· Your Honor, she's my wife and

24· · · · this is my house.

25· · · · · · ·MS. YEWCIC:· And my health is not well.

·1· · · · · · ·JUDGE WATSON:· Okay.· Miss Yewcic, I

·2· · · · understand you indicated your health is not

·3· · · · well.· What I want you to do is take a couple

·4· · · · moments and speak with Mr. Yewcic so that

·5· · · · you're on the same page as to what questions

·6· · · · you would like to ask Mr. Ahr.· And you're

·7· · · · asking that Mr. Yewcic ask the questions given

·8· · · · your health situation.· Is that fair,

·9· · · · Mrs. Yewcic?

10· · · · · · ·MS. YEWCIC:· Yeah, that's fair.

11· · · · · · ·JUDGE WATSON:· I understand Counsel has

12· · · · objected to that and Counsel is correct that

13· · · · Mr. Yewcic is not a party to this proceeding.

14· · · · And I'm going to give Mr. and Mrs. Yewcic some

15· · · · latitude and given Mrs. Yewcic's request, I'm

16· · · · going to let Mr. Yewcic ask the

17· · · · Cross-examination questions.· You're going to

18· · · · yield to Mr. Yewcic in lieu of you asking the

19· · · · questions; is that right, Mrs. Yewcic?

20· · · · · · ·MS. YEWCIC:· Yes.

21· · · · · · ·JUDGE WATSON:· Okay.· Go ahead,

22· · · · Mr. Yewcic.

23· · · · · · ·MR. YEWCIC:· Okay.· Give me one minute,

24· · · · okay?

25· · · · · · ·JUDGE WATSON:· Take your time.

·1· · · · · · · · · · · · · * * *

·2· · · · · · · · · · · ·C R O S S

·3· · · · · · · · · ·E X A M I N A T I O N

·4· · · · · · · · · · · · ·* * *

·5· ·BY MR. YEWCIC:

·6· · · · Q· · Mr. Ahr, can you tell me when the safety

·7· ·standards by the FCC were set which you eluded to?

·8· · · · A· · I'm not aware when they were originally

·9· ·set.· I do know that they were reaffirmed this past

10· ·December from the FCC when they reviewed those

11· ·standards and found that no changes were required

12· ·with those standards.· That occurred in December.

13· · · · Q· · I understand they were reaffirmed, but you

14· ·don't know when they originally set the standard?

15· ·Were they in the 1990s?· You don't know?

16· · · · A· · Yes, I believe I've said that already.

17· · · · Q· · You believe that's when it occurred, in

18· ·the '90s?

19· · · · A· · No, sir.· I believe I answered that I'm

20· ·not aware when they were.

21· · · · Q· · So we are not aware when FCC set those

22· ·standards.· The reason I ask is a lot of things have

23· ·changed since the 1990s.

24· · · · · · ·MS. GIESLER:· Your Honor, I'm going to

25· · · · object.· This is the time to ask questions not

·1· · · · explain or testify of why.

·2· ·BY MR. YEWCIC:

·3· · · · Q· · I'll move on.· Are you aware of any other

·4· ·customers complaining about the health effects that

·5· ·these meters may cause?

·6· · · · A· · Yes.

·7· · · · Q· · What kind of health concern did they have?

·8· · · · · · ·MS. GIESLER:· Objection.· Relevance, your

·9· · · · Honor.

10· · · · · · ·JUDGE WATSON:· Sorry.· There was an

11· · · · objection to the relevance.· Give a response,

12· · · · Mr. Yewcic.

13· · · · · · ·MR. YEWCIC:· The question goes to the

14· · · · heart of the case.· He testified that he's

15· · · · aware of customers complaining about the health

16· · · · effects and I think it's important to know what

17· · · · those health effects are.· Are they similar to

18· · · · what my wife testified to?

19· · · · · · ·JUDGE WATSON:· I'm going to allow the

20· · · · question.· Go ahead, Mr. Ahr.

21· · · · · · ·THE WITNESS:· Certainly.· Could you repeat

22· · · · the question?

23· ·BY MR. YEWCIC:

24· · · · Q· · What health effects have customers

25· ·reported or complained to you concerning smart

·1· ·meters?

·2· · · · A· · In general I'd say I've heard of other

·3· ·customers complaining of similar health effects that

·4· ·we have heard today from you and your wife.

·5· · · · Q· · So basically the same symptoms?· Is that

·6· ·what you're saying?

·7· · · · A· · I don't know if I could testify to the

·8· ·exact same symptoms, but in general the same as what

·9· ·I've heard this morning during your testimony.

10· · · · Q· · Okay.· The meters themselves, did they

11· ·operate on a particular frequency?

12· · · · A· · Yes.· Meters, when they transmit your

13· ·energy consumption, operate over a 900 megahertz

14· ·frequency.

15· · · · Q· · Is that a pulsating frequency or is it

16· ·continuous?

17· · · · A· · No.· The meters -- I don't know if I would

18· ·characterize it as either of those two options.· The

19· ·meters communicate typically less than a total of

20· ·three minutes per day as they are communicating the

21· ·usage information.

22· · · · Q· · And what kind of information do they send

23· ·back to the Company?

24· · · · A· · It's the customer's interval usage

25· ·information that's sent back over a secured

·1· ·communication network.· There is no personal

·2· ·identifiable information that's transmitted over the

·3· ·smart meter communications network, nothing like

·4· ·your name or accounts or any information like that.

·5· ·It's the usage information that the area is

·6· ·regarding.

·7· · · · Q· · Is that information absent personal

·8· ·identification sold to vendors or used for marketing

·9· ·purposes?

10· · · · A· · Sorry, just to clarify, did you say sold

11· ·to vendors?

12· · · · Q· · Sold or shared to vendors for marketing

13· ·purposes, yes.

14· · · · A· · No, it's not.

15· · · · Q· · Okay.

16· · · · A· · The Company has a privacy policy that was

17· ·approved by the Commission which states that the

18· ·companies do not sell or share any of what's

19· ·identified as sensitive customer information to

20· ·third parties.

21· · · · Q· · Has the company ever addressed issues that

22· ·smart meters may have caused harm to its customers?

23· · · · A· · The companies do not believe that the

24· ·meters are unsafe in any manner for that.

25· · · · Q· · The company does not believe, okay.· But

·1· ·you have heard complaints that similar symptoms that

·2· ·my wife may have have occurred, though?· You're

·3· ·aware of those?

·4· · · · A· · I'm not aware of the symptoms, no.

·5· · · · Q· · But you're aware of the concerns?

·6· · · · A· · I believe I've answered that.

·7· · · · Q· · Yeah, you did.· Okay.

·8· · · · · · ·MR. YEWCIC:· No other questions, your

·9· · · · Honor.

10· · · · · · ·JUDGE WATSON:· Ms. Yewcic, anything else?

11· · · · · · ·MS. YEWCIC:· No, sir.

12· · · · · · ·JUDGE WATSON:· Any Redirect, Miss

13· · · · Lepkoski?

14· · · · · · ·MS. LEPKOSKI:· No, your Honor.

15· · · · · · ·JUDGE WATSON:· The Company offered JCA-1,

16· · · · the Company's final approved deployment plan.

17· · · · Do you have any objection to the admission of

18· · · · that document into evidence, Mr.or Mrs. Yewcic?

19· · · · · · ·MR. YEWCIC:· I do not.

20· · · · · · ·MS. YEWCIC:· No.

21· · · · · · ·JUDGE WATSON:· All right.· JCA-1 will be

22· · · · admitted.· Does the Company have any additional

23· · · · evidence?

24· · · · · · ·MS. LEPKOSKI:· No, your Honor.

25· · · · · · ·JUDGE WATSON:· Thank you.· Ms. Yewcic, do

·1· · · · you have any additional evidence that you'd

·2· · · · like to submit today?

·3· · · · · · ·MS. YEWCIC:· No, sir.

·4· · · · · · ·JUDGE WATSON:· Mr. Yewcic, anything else

·5· · · · today with regard to evidence?

·6· · · · · · ·MR. YEWCIC:· No.

·7· · · · · · ·JUDGE WATSON:· We are going to close the

·8· · · · record with regard to evidence being received.

·9· · · · I know the parties have indicated a desire to

10· · · · submit briefs in this matter.· Today is

11· · · · July 22nd, so I'd be looking at briefs, this is

12· · · · a general timeframe, by the end of September.

13· · · · Would that give you sufficient time to prepare

14· · · · your written brief, Ms. Yewcic?

15· · · · · · ·MS. YEWCIC:· It will.

16· · · · · · ·JUDGE WATSON:· Okay, great.· Does the

17· · · · Company want to propose a briefing deadline?

18· · · · · · ·MS. GIESLER:· Yes, your Honor.· This is

19· · · · Ms. Giesler.· It's my expectation that we

20· · · · should have the transcript by the end of

21· · · · August.· That being the case, I think we

22· · · · propose September 25th as the due date for the

23· · · · brief in this matter.· That's a Friday.

24· · · · · · ·JUDGE WATSON:· Thank you.· Does that give

25· · · · Mr. and Mrs. Yewcic enough time to prepare your

·1· · · · brief?

·2· · · · · · ·MR. YEWCIC:· Yes, sir, that's fine.

·3· · · · · · ·JUDGE WATSON:· If you wish to purchase a

·4· · · · copy of the transcript you can contact my

·5· · · · office in Pittsburgh, Office of Administrative

·6· · · · Law Judge in Pittsburgh.· There is no one there

·7· · · · presently because of the Corona virus pandemic,

·8· · · · but there is an answering machine that is

·9· · · · checked on a daily basis.· If you leave a

10· · · · message someone will get back to you promptly

11· · · · and give you the information to contact the

12· · · · court reporting service.· In the event that the

13· · · · parties do not wish to purchase a transcript,

14· · · · you can make arrangements to view the

15· · · · transcript, but it's not necessary that you

16· · · · cite to the record or to the transcript when

17· · · · you summarize the case.· You can rely on your

18· · · · notes and simply summarize your position and

19· · · · set forth your legal arguments and that's fine.

20· · · · If you're concerned about how to write your

21· · · · brief, Pennsylvania Code on-line, PA Code

22· · · · on-line, you can look that up on the internet

23· · · · and do a search for briefs.· That will give you

24· · · · information you need regarding the briefs.

25· · · · With that, we'll set a deadline for briefs to

·1· · · · be submitted by September 25th.· Those should

·2· · · · be filed electronically and you can provide a

·3· · · · copy to me and the opposing party

·4· · · · electronically as well by the 25th of

·5· · · · September.· Again, as I indicated, after I

·6· · · · review the briefs of the parties I'll issue my

·7· · · · initial decision.· They will receive that along

·8· · · · with the letter from the Commission secretary

·9· · · · advising the parties of how to appeal or file

10· · · · exceptions to my decision.· I think that covers

11· · · · everything.· I want to thank the parties.

12· · · · Everyone has been very gracious and patient in

13· · · · conducting this telephone hearing. I

14· · · · appreciate that.· Thank you.· Counsel, anything

15· · · · further before we conclude?

16· · · · · · ·MS. GIESLER:· We do not, your Honor.

17· · · · · · ·JUDGE WATSON:· Mr. Yewcic, anything else?

18· · · · · · ·MR. YEWCIC:· No, sir.

19· · · · · · ·JUDGE WATSON:· Ms. Yewcic, the time is now

20· · · · 12:09 and you get the last word.

21· · · · · · ·MS. YEWCIC:· Thank you all for being

22· · · · patient.· Sorry I lost it there for a while,

23· · · · but it's just hard.

24· · · · · · ·JUDGE WATSON:· I understand.· I hope the

25· · · · hearing wasn't as difficult as what may be

·1· · · · anticipated.· Hopefully it went smoothly for

·2· · · · you.· We try our best to reduce anxiety and try

·3· · · · to help so that this doesn't have to be a

·4· · · · stressful situation.· Although sometimes there

·5· · · · is no way to avoid it.· I appreciate

·6· · · · everybody's patience and professionalism.

·7· · · · Nothing further, I'll conclude this hearing.

·8· · · · Time is now 12:10 and we are adjourned.· Thank

·9· · · · you.

10· · · · · · · · · · · · · ·* * *

11· · · · · · · · · · (Witness excused.)

12· · · · · · · · · · · · · ·* * *

13· · · · · · · · (Whereupon, the hearing concluded

14· · · · · ·at 12:10 p.m.)

15· · · · · · · · · · · · · ·* * *

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·2· · · · · · · · · **C E R T I F I C A T I O N**

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· · · · · · · · · ·**I, Karen A. Stevens, a Court Reporter**

·5· · · · · **and Notary Public, do hereby certify the**

· · · · · ·**foregoing to be a true and accurate transcript**

·6· · · · ·**of the proceedings in this matter, as**

· · · · · ·**transcribed from the stenographic notes taken**

·7· · · · ·**by me.**

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· · · · · · · · · · · · · · · · · · ·___________________

·9· · · · · · · · · · · · · · · · ·**Karen A. Stevens**

· · · · · · · · · · · · · · · · · · ·**Court Reporter**

10· · · · · · · · · · · · · · · · ·**Notary Public**

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15· · · · · · · · ·**(The foregoing certification of this**

· · · · · · **transcript does not apply to any reproduction**

16· · · · · **of the same by any means, unless under the**

· · · · · · **direct control and/or supervision of the**

17· · · · · **certifying reporter.)**

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Exhibit B – Pennsylvania Constitutional Provisions:

PENNSYLVANIA CONSTITUTION PROVISIONS

Article I, Section 1 – Inherent Rights of Mankind

All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.

Article I, Section 3 – Religious Freedom

All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; no man can of right be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent; no human authority can, in any case whatever, control or interfere with the rights of conscience, and no preference shall ever be given by law to any religious establishments or modes of worship.

Article I, Section 8 – Security from Searches and Seizures

The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed to by the affiant.

Article I, Section 26 – No Discrimination by Commonwealth and Its Political Subdivisions
Neither the Commonwealth nor any political subdivision thereof shall deny to any person the enjoyment of any civil right, nor discriminate against any person in the exercise of any civil right.

Article I, Section 27 – Natural Resources and the Public Estate
The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

Exhibit C –U.S. Constitution – Selected Amendments:

First Amendment

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Fourth Amendment

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Ninth Amendment

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

Tenth Amendment

“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”

Fourteenth Amendment, Section 1

“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside; No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

Exhibit D – ***Povacz v. Pennsylvania Public Utility Commission*****, 285 A.3d 542 (Pa. 2022) – Full Opinion.**

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Maria Povacz, :

Petitioner :

:

v. : No. 492 C.D. 2019

:

Pennsylvania Public Utility :

Commission, :

Respondent :

Laura Sunstein Murphy, :

Petitioner :

:

v. : No. 606 C.D. 2019

:

Pennsylvania Public Utility :

Commission, :

Respondent :

Cynthia Randall and Paul Albrecht, :

Petitioners :

:

v. : No. 607 C.D. 2019

:

Pennsylvania Public Utility :

Commission, :

Respondent : ARGUED: June 10, 2020

BEFORE: HONORABLE MARY HANNAH LEAVITT, President Judge

HONORABLE PATRICIA A. McCULLOUGH, Judge

HONORABLE MICHAEL H. WOJCIK, Judge

HONORABLE CHRISTINE FIZZANO CANNON, Judge

HONORABLE ELLEN CEISLER, Judge

HONORABLE J. ANDREW CROMPTON, Judge

OPINION BY JUDGE CEISLER FILED: October 8, 2020

Petitioners, Maria Povacz, Laura Sunstein Murphy, and Cynthia Randall and

Paul Albrecht (collectively, Consumers) are individual electricity consumers

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receiving electricity distribution services from PECO Energy Company, formerly

the Philadelphia Electric Company (PECO). In these consolidated petitions for review, Consumers seek review of denials by Respondent, the Pennsylvania Public Utility Commission (PUC), of Consumers’ requests to be exempted from installation by PECO of wireless smart electric meters in or on their homes. PECO has intervened in the action. After thorough review, we affirm the PUC’s decisions in part, reverse and remand in part, and vacate and remand in part.

I. Background

Consumers are customers in PECO’s electricity service area. They claim they are hypersensitive to emissions of radiofrequency electromagnetic energy (RF).[1,2] They have health issues they contend are or may be worsened by RF exposure. They have taken extraordinary measures to eliminate RF in their home environments and to minimize their RF exposure elsewhere. They provided expert medical evidence from their treating physicians that their exposure to RF should be minimized in order to avoid risks of harm to their health. They also offered expert testimony that emerging research indicates health risks at much lower levels of RF exposure than current federal regulations allow.

Consumers currently have automatic meter reading (AMR) meters at their

homes. Consumers received notices from PECO that wireless smart meters[3] would

be installed in or on their homes to replace their current electric meters. They

1 The Federal Communications Commission has a radiofrequency electromagnetic energy

(RF) Safety FAQ web page here: https://www.fcc.gov/engineering-technology/electromagnetic-

compatibility-division/radio-frequency-safety/faq/rf-safety#Q5 (last visited October 7, 2020).

The web page contains information about potential effects of RF exposure.

2 As the Public Utility Commission (PUC) explained in its decisions, the term

"electromagnetic field" (EMF), which also appears in the record, is synonymous with RF.

3 Wireless smart meters are also known as advanced metering infrastructure (AMI) meters.

3

informed PECO that they would not allow installation of the replacement meters

because of the RF emitted by wireless smart meters. PECO notified them that their

electricity would be cut off entirely unless they allowed installation of wireless smart

meters. Consumers then filed complaints with the PUC seeking to avoid forced

installation of wireless smart meters in or on their homes.

An administrative law judge (ALJ) sustained, in part, PECO's preliminary

objections to the complaints. The ALJ found that opting out of smart meter

installation was not an available remedy under the law. However, the ALJ allowed

the complaints to go forward for determinations of whether the individual

Consumers were entitled to accommodations in light of their health issues.

After several omnibus hearings, the ALJ found one of the Consumers, Maria

Povacz, had demonstrated a prima facie case that attaching a smart meter to her

home would exacerbate her health condition. The ALJ ordered PECO to move Ms.

Povacz's meter socket away from her house4 and absorb the cost of moving it. The

ALJ otherwise denied relief to Ms. Povacz. The ALJ denied all relief to the other

Consumers.

Consumers filed exceptions with the PUC. PECO filed exceptions to the

portion of the ALJ's decision regarding Ms. Povacz that required relocation of her

4 PECO has, albeit reluctantly, accommodated at least one other customer with health

concerns by moving his smart meter away from his home. See, e.g., Benlian v. PECO Energy

Corp. (E.D. Pa., No. 15-1218, filed July 20, 2016), slip op. at __, 2016 U.S. Dist. LEXIS 95082,

at *10. In Benlian, a disabled veteran, after prior notice to PECO, removed a smart meter from his

home and replaced it with an analog meter because he claimed he began suffering from additional

health issues after installation of the smart meter. Although PECO allegedly agreed to install a

smart meter on a pole away from the house, it did not do so. Instead, PECO shut off the electricity

to the home, notwithstanding the plaintiff's known, medically documented dependence on

breathing equipment that required electricity, because he would not allow reinstallation of the

smart meter on the house. Following the intervention of a Veterans' Administration social worker

and a township supervisor, PECO eventually installed a smart meter on a pole away from the

house, after leaving the home without power for several weeks.

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meter. The PUC overruled Consumers' exceptions, granted PECO's exception, and

denied all relief to Consumers. Consumers then filed petitions for review in this

Court.

II. Issues

Consumers raise six interrelated issues on appeal,5 all of which relate to

Consumers' desire to avoid RF emissions that would result from having wireless

smart meters installed in or on their homes. Their arguments on appeal are

summarized as follows:

A. The PUC's interpretation of the 2008 amendment to the PUC Code, known as

Act 129,6 as precluding opt-outs from installation of wireless smart meters violates Consumers' constitutional liberty interest in their personal bodily integrity.

B. Contrary to the PUC's interpretation, Act 129 does not mandate installation

of wireless smart meters in all homes and does not preclude the PUC from granting Consumers appropriate relief.

C. Because electrical service must, by law, be both reasonable and safe, the PUC

erred by requiring Consumers to prove wireless smart meters would be both unreasonable and unsafe, in that proving either in the disjunctive would entitle

Consumers to relief.

D. Regarding reasonableness, Consumers proved mandatory installations of wireless smart meters in their homes would be unreasonable in light of their sincere and medically supported concerns and in the absence of any

5 This Court's review is limited to determining whether the Commission violated

constitutional rights, committed an error of law, rendered a decision not supported by substantial

evidence, or violated its rules of practice. Romeo v. Pa. Pub. Util. Comm'n, 154 A.3d 422 (Pa.

Cmwlth. 2017).

6 Act of October 15, 2008, P.L. 1592, No. 129, 66 Pa. C.S. § 2807.

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compelling reason to impose the wireless meter requirement without

exceptions.

E. Regarding safety, the PUC applied an incorrect burden of proof by requiring

Consumers to show a conclusive causal connection between RF exposure and

adverse health effects, rather than simply showing a risk of harm.

F. Had the PUC applied the correct burden of proof, it would have been

compelled to find the installation of wireless smart meters would be unsafe

for Consumers.

III. Discussion

Act 129

Act 129 was enacted to reduce energy consumption and demand. Romeo v.

Pa. Pub. Util. Comm'n, 154 A.3d 422 (Pa. Cmwlth. 2017). Act 129 addresses

electric distribution and default service provider responsibilities, including smart

meter technology. 66 Pa. C.S. § 2807(f); Romeo, 154 A.3d at 424. PECO is a

privately owned utility and functions as a distribution and default service provider

in its service area. Thus, Act 129 applies to PECO.

In pertinent part, Act 129 imposes the following requirements concerning an

electric distribution company's obligations to furnish smart meter technology to its

customers:

(f) Smart meter technology and time of use rates.

(1) Within nine months after the effective date of this

paragraph, electric distribution companies shall file a smart

meter technology procurement and installation plan with the commission for approval. The plan shall describe the smart meter technologies the electric distribution company proposes to install in accordance with paragraph (2).

(2) Electric distribution companies shall furnish smart meter technology as follows:

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

(ii) In new building construction.

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

66 Pa.C.S. § 2807(f) (emphasis added).

Act 129 defines "smart meter technology" as follows:

(g) Definition.--As used in this section, the term "smart meter technology" means technology, including metering technology and network communications technology capable of bidirectional communication, that records electricity usage on at least an hourly basis, including related electric distribution system upgrades to enable the technology. The technology shall provide customers with direct access to and use of price and consumption information. The technology shall also:

(1) Directly provide customers with information on their hourly consumption.

(2) Enable time-of-use rates and real-time price programs.

66 Pa.C.S. § 2807(g).

A. Constitutional Interest in Bodily Integrity

The Fourteenth Amendment provides, in pertinent part: "No state shall make

or enforce any law which shall abridge the privileges or immunities of citizens of

the United States; nor shall any state deprive any person of life, liberty, or property,

without due process of law. . . ." U.S. CONST. amend. XIV, § 1. Consumers contend

they have a constitutional liberty interest in their personal bodily integrity under the

Fourteenth Amendment's due process clause. They argue this is a fundamental right

which the government violates when its own actions create the violative condition.

RF is a measurable physical force. Consumers reason that forcing them to

endure involuntary exposure to such a force implicates their fundamental liberty

interest in personal bodily integrity. Forgoing electricity service completely is not a

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feasible option.7 Also, very few states other than Pennsylvania have precluded

opt-outs from smart meter installation.8 Therefore, Consumers assert that this Court

should interpret Act 129 so as to avoid the constitutional issue they claim is raised

by the PUC's interpretation.9

The PUC's decision gave comparatively little attention to this issue. It

observed that Fourteenth Amendment due process requires only notice and an

opportunity to be heard. Then, based on its conclusion that Consumers failed to

prove they would suffer adverse health effects from installation of wireless smart

meters in their homes, the PUC found Consumers failed to show that forced RF

exposure from the meters would violate "basic principles of respect for bodily

integrity." Povacz v. PECO Energy Co. (Pa. P.U.C., No. C-2015-2475023, filed

Mar. 28, 2019), slip op. at 99-100.

7 Nonetheless, it is notable that along with Consumers' complaints to the PUC, a fourth

complaint was initially filed by Stephen and Diane Van Schoyck. However, the Van Schoycks

later removed their home completely from the electric grid and withdrew their complaint against

PECO.

8 Exhibit F to the amicus brief of Friends of Merrymeeting Bay* (Merrymeeting) contained

a listing, with citations of authority, of the 40 states that have so far approved consumer opt-outs

from wireless smart meter requirements. PECO moved to exclude portions of the amicus brief

that relied on information not part of the agency record. This Court granted PECO's request with

regard to issues raised by Merrymeeting that were not preserved before the PUC, including the

information in Exhibit F to its amicus brief.

*** Merrymeeting is a conservation organization with a mission "[t]o preserve, protect,**

and improve the unique ecosystems of Merrymeeting Bay," a "[m]id-coast Maine

riverine delta consisting of the Kennebec, Androscoggin, Cathance, Muddy,

Eastern and Abagadasset Rivers and surrounding towns." See

http://www.friendsofmerrymeetingbay.org/ (last visited October 7, 2020). What, if

any, interest this organization has in this litigation is not clear.

9 Constitutional protections apply against state actors. PECO is not a state actor in relation

to its installation of smart meters and provision of electricity to its customers. Benlian, slip op. at

__, 2016 U.S. Dist. LEXIS 95082, at *16-*19. Hence, Consumers assert their constitutional

argument only against the PUC.

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In Naperville Smart Meter Awareness v. City of Naperville, 69 F. Supp. 3d

830 (N.D. Ill. 2014) (Naperville II), a federal court addressed the same issue

Consumers raise here. The federal court explained the right at issue as follows:

The Fourteenth Amendment provides that the government shall

not "deprive any person of life, liberty, or property without due process

of law." U.S. [CONST.] [a]mend. XIV. But "there can be no claim of a

denial of due process, either substantive or procedural, absent deprivation of either a liberty or a property right." Eichman v. Ind. State Univ. Bd. of Tr[ustee]s[], 597 F.2d 1104, 1109 (7th Cir. 1979). Furthermore, the right to "substantive due process is 'very limited,'" Viehweg v. City of Mount Olive, 559 F. App'x 550, 552 (7th Cir. 2014) (quoting Tun v. Whitticker, 398 F.3d 899, 900 (7th Cir. 2005)), and the Due Process Clause "does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society." Collins v. City of Harker Heights, Tex., 503 U.S. 115 . . . (1992) (internal citations omitted). Furthermore, to survive a motion to dismiss a claim for deprivation of substantive due process, a plaintiff must allege facts tending to suggest that the government's action was arbitrary. See Jeffries v. Turkey Run Consol. Sch. Dist., 492 F.2d 1, 3-4 (7th Cir. 1974).

Id. at 839.

The Naperville II court rejected the plaintiffs' Fourteenth Amendment bodily integrity argument because their complaint failed to "identify an arbitrary deprivation of a recognized liberty or property interest." Id.

First, the court found: "even assuming as true that [RF] waves emitted by smart meters are capable of causing harm, [plaintiffs'] allegations suggest only that the [c]ity negligently increased a risk of injury. Allegations of such risk exposure are insufficient to state a claim for deprivation of bodily integrity under the

Fourteenth Amendment." Id. (citing Upsher v. Grosse Pointe Pub. Sch. Sys., 285

F.3d 448, 453-54 (6th Cir. 2002) (asbestos under carpeting did not violate rights of

bodily integrity); Hood v. Suffolk City Sch. Bd., 469 F. App'x 154, 159 (4th Cir.

2012) (liberty interest in bodily integrity not violated by dangerous conditions in

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school caused by excessive mold and bacteria); Lewellen v. Metro. Gov't of

Nashville & Davidson Cty., Tenn., 34 F.3d 345 (6th Cir. 1994) (construction of

school beneath dangerous high-voltage conductor line was not a constitutional

violation of bodily integrity); Goss ex rel. Goss v. Alloway Twp. Sch., 790 F. Supp.

2d 221, 227-28 (D.N.J. 2011) (design of cement playground, rather than safer non-

cement playground, was not a deprivation of the liberty interest in bodily integrity)).

Second, the Naperville II court found that even assuming the plaintiffs'

complaint had identified a cognizable liberty interest in their bodily integrity, their

constitutional claim still was not viable, because they also failed to plead facts

showing that the decision to implement the installation of smart meters was arbitrary.

Rather, the court found, the plan was "part of a nationwide effort to modernize the

electrical power grid, and the program's goals include increasing energy efficiency,

reducing emissions, and lowering electricity consumption costs." Id. at 839-40. As

such, it was not arbitrary, but rather, was "rationally and appropriately based on

energy policy decisions within the purview of local government. . . ." Id. at 840.

The Naperville II court's analysis is persuasive, and we follow it here. We

decline to recognize a viable claim by Consumers regarding a violation of their

Fourteenth Amendment liberty interests in bodily integrity. We therefore affirm the

PUC's decision on this issue.

B. Act 129's Requirements

Consumers next challenge the PUC's conclusion that Act 129 mandates

installation of wireless smart meters in all customers' homes. Consumers assert that

the language of Act 129 does not require universal installation of wireless smart

meters regardless of consumers' wishes. Therefore, the PUC is also incorrect in its

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conclusion that it lacks authority to grant the appropriate relief Consumers seek.10

This argument by Consumers is persuasive.

Act 129 mandates that an electric distribution company, such as PECO, "shall

furnish smart meter technology . . . in accordance with a depreciation schedule not

to exceed 15 years." 66 Pa.C.S. §2807(f)(2)(iii). However, nothing in the statutory

language affirmatively mandates that customers must allow installation of wireless

smart meters.11

To "furnish" means "to provide with what is needed; . . . supply, give."

Webster's Ninth New Collegiate Dictionary 499 (1985). The definition does not

imply that the recipient is forced to accept that which is offered. Therefore, we find

the PUC is incorrect in concluding that Act 129 facially precludes any customer

refusal of installation of smart meters.

Act 129 requires an electric distribution company to "furnish smart meter

technology," 66 Pa.C.S. § 2807(f)(2)(iii), but does not require every customer to

avail himself of every aspect of that technology. Notably, several provisions of Act

129 seem to contemplate customer choice in the degree to which the smart meter

technology is used.

For example, Act 129 requires the customer's consent in order for the electric

distribution company to allow either direct meter access or electronic access to the

customer's meter data by third parties such as electric generation suppliers or

providers of conservation and load management services. 66 Pa.C.S. § 2807(f)(3).

10 In Benlian, a federal district court stated, without elaboration, that "Act 129 does not

permit customers to opt out of the installation of smart meters and mandates that '[e]lectric

distribution companies shall furnish smart meter technology.'" Slip op. at __, 2016 U.S. Dist.

LEXIS 95082, at *3-*4. This Court, however, is not bound by a federal district court's

interpretation of a Pennsylvania statute. In re Stevenson, 40 A.3d 1212 (Pa. 2012).

11 Notably, "wireless" meters are not mentioned at all in the statute.

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Accommodation of a customer's request to deactivate the meter's RF emissions

would not be inconsistent with this provision, since information could not be shared

with third parties without the customer's consent in any event.

Similarly, Act 129 requires an electric distribution company to develop time-

of-use rates and real-time price plans and to "offer the time-of-use rates and real-

time price plan to all customers that have been provided with smart meter technology

under paragraph (2)(iii)." 66 Pa.C.S. § 2807(f)(5) (emphasis added). "Residential

or commercial customers may elect to participate in time-of-use rates or real-time

pricing." Id. (emphasis added). They are not required to do so. Again,

accommodating a customer's request to avoid RF emissions would not violate the

requirement to offer time-of-use rates and real-time price plans, since customers are

not required to participate in such plans.

In addition, as Consumers correctly argue, Act 129's definition of "smart

meter technology" leaves the door open for accommodations of customer requests

to avoid RF emissions from smart meters. The language of the definition is

consistently couched in permissive terms, as it relates to customers' use of the

available smart meter technology:

[T]he term "smart meter technology" means technology, including

[(not necessarily limited to)] metering technology and network

communications technology capable of [(not "requiring")]

bidirectional communication, that records [(not "transmits")]

electricity usage on at least an hourly basis, including related electric

distribution system upgrades to enable the technology. The technology

shall provide customers with direct access to and use of [(not

mandatory use of)] price and consumption information. The

technology shall also:

(1) Directly provide customers with information on their

hourly consumption.

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(2) Enable time-of-use rates and real-time price programs.

[(As discussed above, customer is not required to participate.)]

(3) Effectively support [(not require)] the automatic
control of the customer's electricity consumption by one or more
of the following as selected by the customer:

(i) the customer [(the customer retains control)];

(ii) the customer's utility; or

(iii) a third party engaged by the customer or the
customer's utility.

66 Pa.C.S. § 2807(g) (emphasis added).

Notably, the PUC's own internet consumer information page concerning
Act 129 repeatedly speaks in permissive language. For example, it provides:
"Act 129 of 2008 provides Pennsylvania electric utility consumers
opportunities
to take energy efficiency and conservation to the next level." "Energy
Efficiency & Conservation Information for your Home,"
http://www.puc.state.pa.us/General/consumer_ed/pdf/EEC_Home-FS.pdf (last
visited October 7, 2020) (emphasis added). "In creating [energy efficiency and
conservation programs (EE&C)], the [PUC] recognized a 'one-size-fits-all'
approach would not be the best approach. The [PUC] balances the needs of
consumers with those of the [electric distribution companies (EDCs)]. . . ." Id.
(emphasis added). "The PUC's program standards provided each EDC with
the
ability to tailor its energy efficiency and conservation plan to its service
territory and
consumers." Id. The EDCs' plans include "incentive programs" to
"encourage"

residential consumers to purchase energy-efficient products. Id. (emphasis added).

EDCs must provide consumers with specific information "on the money-saving

EE&C programs available to them because of Act 129. Id. (emphasis added). These

programs are designed to help consumers use electricity efficiently, curb

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consumption and reduce overall demand for electricity. Many of these programs

include subsidies from the EDC to encourage the use and employment of energy

efficiency measures." Id. (emphasis added).

Moreover, nothing in the language of Act 129 appears to preclude either

PECO or the PUC from granting an accommodation to a customer who desires to

avoid RF emissions from a wireless smart meter. In Benlian v. PECO Energy Corp.

(E.D. Pa., No. 15-1218, filed July 20, 2016), 2016 U.S. Dist. LEXIS 95082, for

example, PECO installed a smart meter on a pole some distance from the plaintiff's

home in accommodation of his claim that the prior installation of the meter on his

home had caused new or exacerbated health problems. Id., slip op. at __, 2016 U.S.

Dist. LEXIS 95082, at *10.

Thus, although Act 129 does appear to anticipate installation of smart meters

on customers' premises, nothing in the language of Act 129 facially requires every

customer to endure involuntary exposure to RF emissions from a smart meter.

Rather, the language of Act 129 seems calculated to support customer choice in the

use of smart meter technology. Therefore, we conclude that Act 129 does not

preclude either PECO or the PUC from accommodating a customer's request to have

RF emissions from that customer's meter turned off, to have a smart meter relocated

to a point remote from the customer's house, or some other reasonable

accommodation. We reverse that portion of the PUC's decisions finding it lacked

authority for accommodations of customers' requests to avoid RF emissions. We

remand to the PUC to allow consideration of Consumers' requests for

accommodations, and determination of what, if any, accommodations are

appropriate, in light of this Court's conclusion that Act 129 does not forbid such

accommodations.

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C. Burden of Proof – Conjunctive vs. Disjunctive

Consumers argue they are not seeking relief in the form of a system-wide

"opt-out" provision based merely on their "preference," but rather, an administrative

remedy for a proven violation of the safety and reasonableness requirement of

Section 1501 of the Public Utility Code, 66 Pa. C.S. § 1501 (Section 1501),12 in their individual cases. They insist that nothing in Act 129 limits the Commission's authority to grant such relief.

Consumers assert that because the law requires electricity service to be both reasonable and safe, the PUC erred in requiring Consumers to prove that requiring wireless meters in their homes would be both unreasonable and unsafe in order to establish a violation of Section 1501. That is, because the statute requires, in the conjunctive, both safety and reasonableness, Consumers could disprove either, in the disjunctive, to prove a violation. Therefore, the PUC erred in requiring Consumers to prove "conclusively" that wireless smart meters would cause medical harm, i.e., lack of safety, while ignoring whether requiring wireless smart meters would be unreasonable under all the circumstances, regardless of whether medical harm was shown. Consumers assert that requiring wireless smart meters in their homes is unsafe and unreasonable, but those are alternative arguments.

The PUC's position on the burden of proof issue is inconsistent. At one point, the PUC appears to concede the correctness of Consumers' position. The PUC states the ALJ's role is to determine whether "'use of a smart meter . . . will constitute

unsafe or unreasonable service . . . .'" Povacz (Pa. P.U.C., No. C-2015-2475023,

12 "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 . . . ."

66 Pa. C.S. § 1501 (emphasis added).

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filed Mar. 28, 2019), slip op. at 15 (quoting Kreider v. PECO Energy Co. (Pa.

P.U.C., No. P-2015-2495064, filed Jan. 28, 2016), slip op. at 21-23) (emphasis

added).

Elsewhere in its opinion, however, the PUC posits that Consumers "must

prove, by a preponderance of the evidence, that [their] exposure to the RF fields

from the wireless smart meter that PECO plans to install . . . will 'exacerbate' or

'adversely affect' [their] health and, therefore, constitute unsafe and unreasonable

service . . . ." Povacz (Pa. P.U.C., No. C-2015-2475023, filed Mar. 28, 2019), slip

op. at 27 (emphasis added).

We infer from its inconsistent language that the PUC did not recognize this

distinction in the context of Consumers' claims. In fact, a review of the PUC's

decision does not indicate whether the distinction was significant to the PUC's reasoning. The PUC's decision does not clearly purport to require Consumers to prove the meter installation is both unsafe and unreasonable as applied to them. However, Consumers are logically correct that because PECO has a mandate to provide safe and reasonable service, Consumers may establish a violation of that mandate by showing the wireless smart meter requirement is either unsafe or unreasonable.

To the extent, if any, that the PUC applied a conjunctive burden of proof, we vacate and remand its decision for reconsideration expressly applying the correct disjunctive burden of proof.

D. Reasonableness of Mandatory Installations

Next, Consumers contend they established that mandatory installations of wireless smart meters in their homes would be unreasonable under the circumstances as to all of the individual Consumers. They contend RF is unquestionably a physical

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force, and mandating exposure is unreasonable in light of Consumers' sincere concerns, supported by their medical experts and an expert witness concerning RF, and in the absence of some compelling reason to mandate their exposure. Consumers assert that neither the PUC nor PECO identified any compelling

reason to impose wireless smart meters on every customer without exceptions for

health or safety considerations. PECO and the PUC simply assert – incorrectly,

according to Consumers – that Act 129 compels it.

Moreover, Consumers insist their concerns are reasonable in light of their

health conditions and their doctors' recommendations, and demonstrably sincere in

light of the comprehensive, lengthy, and expensive actions they have undertaken in

order to minimize their RF exposure. Finally, they contend that scientific studies,

including comprehensive government studies, even if not yet universally accepted,

support the reasonableness of Consumers' concerns about the health risks of RF

exposure, as well as the safety hazards of installing wireless smart meters that create

such exposure.13

13 Evidence presented before the ALJ indicated the RF emissions from wireless smart

meters are less than 1% of the level adjudged safe by the Federal Communications Commission

(FCC), and moving a wireless smart meter 20 feet from a home would reduce even that minute

level of emission by an additional 99%. Consumers respond that the FCC relies on outdated

studies and that a safe level of exposure to RF emissions is actually exponentially lower than the

level approved decades ago by the FCC.

In that regard, we note that on January 9, 2020, the PUC filed a letter notice, pursuant to

Pa. R.A.P. 2501(b), of an order entered by the FCC on November 27, 2019, declining to propose

amendments to its existing limits on RF emissions. The FCC's order is available on its website:

https://www.fcc.gov/document/fcc-maintains-current-rf-exposure-safety-standards (last visited

October 7, 2020).

Consumers filed applications for relief pursuant to Pa. R.A.P. 123 in the form of motions

to strike the PUC's letter notice. Consumers asserted the notice did not relate to new legal

authority, as contemplated by Rule 2501(b), because the FCC's RF emission limits were

referenced only as part of the background facts of this case. The PUC responded that the FCC

standards have the force of law and that Rule 2501(b) mandated the letter notice by the PUC.

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As discussed above, the PUC's position that Act 129 requires installation of

wireless smart meters in all consumer residences is incorrect. Accordingly, the PUC

is also incorrect in finding that PECO may not or need not offer any accommodation

to Consumers.

Because this portion of the PUC's decision is dependent on its erroneous

conclusion that Act 129 does not allow accommodations, we vacate this portion of

the PUC's decision and remand for further consideration.

However, as discussed in the next section, we affirm the PUC's application of

the correct burden of proof concerning the risk of harm from RF emissions.

Therefore, in considering accommodations to Consumers on remand, the PUC

should consider whether accommodations are appropriate without proof of harm, so

that Consumers may choose to avoid RF emissions from wireless smart meters,

while allowing PECO to comply with Act 129's mandate concerning availability of

smart meter technology.

The question here is much murkier than simply stating the correct burden of

proof. What is the proper course when RF emissions do have known dangers, but

research has not yet determined the extent of those dangers? Should Consumers

bear the risk that RF emissions are more harmful to them than to others because of

their sensitivity and underlying health conditions? Conversely, should PECO be

required to accommodate Consumers' fears even though medical research has not

yet definitively determined the degree of risk posed by the level of RF exposure at

issue?

This Court directed submission of the applications for relief and any responses thereto

along with the merits of Consumers' petitions for review. In our disposition of the petitions for

review, we have not relied on either the FCC standards or the FCC's recent order declining to

propose amendments to those standards. We therefore dismiss the applications for relief as moot.

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Logic, safety concerns, and fairness require some balancing of the parties'

interests. Consumers argue the burden to PECO of accommodating their desire to

avoid RF emissions is minimal, and they claim they are willing to pay any additional

cost of the accommodations.

The record does not contain evidence from PECO that it would incur any

extreme costs by accommodating Consumers' desires to avoid RF emissions in three

homes in PECO's service area. Even if Consumers obtain the relief they seek, it is

difficult to imagine that large numbers of other PECO customers will then flood the

utility with requests to avoid RF emissions at increased cost. Thus, even though the

actual risk to Consumers' health is uncertain, their suggestion that the burden to them

of forced exposure to additional RF emissions outweighs any minimal burden to

PECO is well taken.

Consumers argue that wired smart meters exist. They also suggest that if

wireless meters must be installed, turning off the emissions upon a customer's

request should be allowed. Notably, in Naperville Smart Meter Awareness v. City

of Naperville (N.D. Ill., No. 11 C 9299, filed Mar. 22, 2013), U.S. Dist. LEXIS

40432 (Naperville I), a city ordinance concerning installation of smart meters

allowed customers with health concerns to have the meters' RF emissions turned

off. Here, the PUC and PECO offer no such option. Further, the parties' briefs do

not offer any substantial discussion of the viability of the option of allowing RF

emissions to be turned off.

The PUC should consider all these issues on remand.

E. Burden of Proof – Conclusive vs. Potential Harm

Consumers' next theory of recovery asserts that the PUC erred in requiring

them to prove a "conclusive causal connection" between RF exposure and adverse

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human health effects. They argue the PUC should have considered the potential for

harm, rather than imposing a tort-like burden of proving causation. They insist

safety includes freedom from risk of harm, not merely freedom from the harm itself.

They suggest the plain language of Section 1501 requires neither proof of actual

harm nor proof of proximate causation in order to show lack of safety.

PECO argues Consumers had to prove by a preponderance of the evidence

that exposing them to RF from smart meters would cause, contribute to, or

exacerbate their health conditions. Consumers failed to meet this standard of proof.

Consumers' proposed standard of proof would essentially shift the burden of proof

to PECO to show the smart meters could not harm Consumers. PECO has spent

$750 million to install the smart meter system throughout its territory as required by

Act 129 and the PUC, and Consumers' standard of proof would effectively convey

veto power over the system to any customer with a sincere belief that there was any

risk of harm. Moreover, the PUC already articulated the standard of proof, i.e., that

a customer complainant alleging adverse health effects must prove "a conclusive

causal connection" between RF exposure and those adverse health effects – a burden

that cannot be satisfied by research and studies that are inconclusive.14

The PUC found the ALJ correctly imposed a burden of proof requiring

Consumers to demonstrate adverse health effects by a preponderance of the

14 PECO cites: Kreider; Letter of Notification of Philadelphia Electric Company Relative

to the Reconstructing and Rebuilding of the Existing 138 kV Line to Operate as the Woodbourne-

Heaton 230 kV Line in Montgomery and Bucks Counties (Pa. P.U.C., No. A-110550F0055, filed

Mar. 26, 1993), slip op. at __, 1992 Pa. P.U.C., Lexis 160, at *7-*8; Letter of Notification of

Philadelphia Electric Company Relative to the Reconstructing and Rebuilding of the Existing 138

kV Line to Operate as the Woodbourne-Heaton 230 kV Line in Montgomery and Bucks Counties

(Pa. P.U.C., No. 110550F0055, filed Nov. 12, 1993), 1993 WL 855896. Notably, these authorities

are at least 27 years old, and any research on which they relied is necessarily even older, a fact

which tends to lend support to Consumers' point that PECO and its expert witness relied on

outdated information concerning the danger from RF emissions.

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evidence. This required Consumers to prove that there was a "conclusive causal

connection" between RF exposure from smart meters and adverse human health

effects.

The PUC concedes Consumers were not required to prove harm had actually

occurred; the PUC's authority extends to claims seeking to prevent harm. However,

where prevention of harm was Consumers' aim, the burden of proof still required

demonstration by a preponderance of the evidence that the utility's proposed conduct

would create a "proven exposure to harm." Povacz (Pa. P.U.C., No. C-2015-

2475023, filed Mar. 28, 2019), slip op. at 29. The PUC argues that although the

occurrence of harm need not be certain, or even probable, Consumers incorrectly

equated any hazard, however slight, with exposure to harm. The Naperville I

court considered this issue and found that even without an option to deactivate the

radio transmitters in the smart meters, the plaintiffs' claim would not have been

viable. Like Consumers here, the Naperville I plaintiffs based their claim on "a

theory that the radio waves emitted from the smart meters, together with other RF-

wave-emitting devices in the environment, have the potential to be harmful." Id.,

slip op. at __, 2013 U.S. Dist. LEXIS 40432, at *28-*29 (emphasis added). The

court in Naperville I acknowledged the plaintiffs' contention that "certain doctors

believe that over time the public's cumulative exposure to low-level RF from devices

such as cell phones, radio towers, and smart meters may pose health risks, such that

more accurate guidelines and standards regarding the safety of RF exposure are

necessary." Id., slip op. at __, 2013 U.S. Dist. LEXIS 40432, at *29 (emphasis

added). Nonetheless, the court concluded "[t]he bare allegation that it is unknown

whether [p]laintiffs are actually being harmed by the level of RF waves emitted from

one smart meter is insufficient" to raise a claim for relief that is more than

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speculative. Id., slip op. at __, 2013 U.S. Dist. LEXIS 40432, at *29 (citing Bell Atl.

Corp. v. Twombly, 550 U.S. 544, 570 (2007)).

The reasoning of Naperville I concerning the applicable burden of proof is

persuasive. We therefore affirm the burden applied by the PUC concerning proof of

harm from RF emissions.

However, as discussed above, the PUC appears to have based its decision

largely on its conclusion that Act 129 mandated installation of wireless smart meters

on every residence and did not permit the PUC to grant any form of relief to

Consumers to accommodate their desire to avoid RF emissions. On remand, the

PUC should consider whether reasonable accommodations should be provided in

light of the conclusion that Act 129 does not preclude such accommodations of

customers' health concerns, regardless of proof of harm.

F. Risk of Harm – Sufficiency of Evidence

Finally, Consumers insist the correct burden of proof would compel the PUC

to find the use of wireless smart meters would be unsafe for the individual

Consumers. They also argue their evidence demonstrated a risk of harm, and the

PUC should not have disregarded that evidence, including the testimony of

Consumers' expert witness and the federal government study on which that witness

relied. Consumers further contend the PUC should not have relied on the testimony

of PECO's expert that "conclusive" proof of harm is impossible; rather, the correct

standard was whether there was proof of a risk of harm. Further, Consumers assert

PECO's expert relied on outdated FCC findings from 1986;15 the study cited by

Consumers' expert is the most recent study and should not have been disregarded by

either PECO or the PUC.

15 See discussion in note 13 above.

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This argument is closely related to the previous argument. To the extent

Consumers are arguing there was not substantial evidence to support the PUC's

decision, this Court will not revisit the PUC's findings of fact. To the extent

Consumers contend the burden of proof should have been different, that issue is

addressed in the previous section. We affirm the PUC's findings of fact as based on

substantial evidence.

IV. Conclusion

Based on the foregoing discussion, we affirm the PUC's rejection of

Consumers' constitutional challenge. We reverse the PUC's conclusion that it lacks

authority to accommodate Consumers' desire to avoid RF emissions from smart

meters and vacate the PUC's determination that such accommodation would not be

reasonable. We affirm the PUC's determination of the burden of proving harm. We

affirm the PUC's findings of fact. We remand this matter to the PUC for

determinations of whether accommodations are appropriate for each of the

Consumers, and if so, what those accommodations should be. On remand, the PUC

should consider all reasonable accommodations, including, but not limited to,

deactivation of the RF emitting functions of the smart meters; installation of the

smart meters at locations remote from Consumers' homes; and installation of wired

rather than wireless smart meters, if (as Consumers contend) such technology is

available.

____

ELLEN CEISLER, Judge

Judge Covey did not participate in the decision of this case.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Maria Povacz, :

Petitioner :

:

v. : No. 492 C.D. 2019

:

Pennsylvania Public Utility :

Commission, :

Respondent :

Laura Sunstein Murphy, :

Petitioner :

:

v. : No. 606 C.D. 2019

:

Pennsylvania Public Utility :

Commission, :

Respondent :

Cynthia Randall and Paul Albrecht, :

Petitioners :

:

v. : No. 607 C.D. 2019

:

Pennsylvania Public Utility :

Commission, :

Respondent :

O R D E R

AND NOW, this 8th day of October, 2020, the orders of the Pennsylvania Public Utility Commission (PUC) are AFFIRMED in part, REVERSED in part,

and VACATED in part, as follows:

1. The PUC's rejection of the constitutional challenge of Maria Povacz, Laura Sunstein Murphy, Cynthia Randall, and Paul Albrecht (jointly, Consumers) is AFFIRMED.

2. The PUC's conclusion that it lacks authority to accommodate Consumers' desire to avoid radiofrequency (RF) emissions from smart meters is REVERSED. This matter is REMANDED to the PUC for consideration of Consumers' requests for accommodations and determinations of what, if any, accommodations are appropriate for each individual Consumer. The PUC on remand may consider all reasonable accommodations, including deactivation of the RF emitting functions of smart meters at Consumers' homes; installation of the smart meters at locations remote from Consumers' homes; or installation of wired rather than wireless smart meters, if (as Consumers contend) such technology is available.

3. The PUC's determination that Consumers' requested accommodations would not be reasonable is VACATED, and this matter is REMANDED for application of the correct burden of proof. On remand, Consumers need not prove that mandatory installation of

smart meters is both unsafe and unreasonable; rather, Consumers need only prove that mandatory installation of smart meters is either unsafe or unreasonable.

4. The PUC's determination that Consumers failed to meet their burden to prove unreasonableness is VACATED. Because the PUC's determination was based on its conclusion that the 2008 amendment to the Public Utility Code, known as Act 129, Act of October 15, 2008, P.L. 1592, 66 Pa. C.S. § 2807, does not allow accommodations, this issue is REMANDED for further consideration. Further, on remand, the PUC should balance the parties' interests and consider whether refusal of accommodations was unreasonable without proof of actual harm to Consumers.

5. The PUC's determination that in order to prove lack of safety of the smart meters (as opposed to lack of reasonableness in refusal of accommodations by PECO Energy Company (formerly the Philadelphia Electric Company)), Consumers had to show a conclusive causal connection between RF exposure and adverse health effects is AFFIRMED.

6. The PUC's findings of fact on the safety of smart meters are AFFIRMED.

Consumers' applications for relief in the form of motions to strike the PUC's letter notice of the Federal Communications Commission's November 27, 2019 order declining to propose amendment of its RF emission standards are DENIED as moot.

Jurisdiction is relinquished.

____

ELLEN CEISLER, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Maria Povacz, :

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:

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Pennsylvania Public Utility :

Commission, :

Respondent :

Cynthia Randall and Paul Albrecht, :

Petitioners :

:

v. : No. 607 C.D. 2019

: Argued: June 10, 2020

Pennsylvania Public Utility :

Commission, :

Respondent :

BEFORE: HONORABLE MARY HANNAH LEAVITT, President Judge

HONORABLE PATRICIA A. McCULLOUGH, Judge

HONORABLE MICHAEL H. WOJCIK, Judge

HONORABLE CHRISTINE FIZZANO CANNON, Judge

HONORABLE ELLEN CEISLER, Judge

HONORABLE J. ANDREW CROMPTON, Judge

CONCURRING AND

DISSENTING OPINION

BY JUDGE CROMPTON FILED: October 8, 2020

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Respectfully, I concur in part and dissent in part. I concur in the result

to the extent the majority has determined (1) the Consumers'[1] constitutional rights

were not violated, (2) the Public Utility Commission's (PUC) findings of fact

regarding the safety of smart meters were based on the substantial competent

evidence of record, (3) the PUC properly concluded the Consumers were required

to show a conclusive causal connection between radio frequency (RF) exposure and

adverse health effects, and (4) that the matter should be remanded to the PUC, albeit

for a limited purpose as described herein. I do, however, diverge from the majority

in its view that Act 129 (Act)2 requires an electric distribution company to "furnish

smart meter technology," per 66 Pa.C.S. §2807(f)(2)(iii), but does not necessarily

require every customer to accept same.

Section 2807(f) of the Public Utility Code reads, in pertinent part, as

follows:

(f) Smart meter technology and time of use rates.--

(1) Within nine months after the effective date of this paragraph,

electric distribution companies shall file a smart meter

technology procurement and installation plan with the

commission for approval. The plan shall describe the smart meter

technologies the electric distribution company proposes to install

in accordance with paragraph (2).

(2) Electric distribution companies shall furnish smart

meter technology as follows:

(i) Upon request from a customer that agrees to pay the cost

of the smart meter at the time of the request.

(ii) In new building construction.

1 The Consumers in this matter are Petitioners Maria Povacz, Laura Sunstein Murphy, and

Cynthia Randall and Paul Albrecht.

2 66 Pa.C.S. §2807.

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

(3) Electric distribution companies shall, with customer consent, make available direct meter access and electronic access to customer meter data to third parties, including electric generation suppliers and providers of conservation and load management services.

. . . .

(5) By January 1, 2010, or at the end of the applicable generation rate cap period, whichever is later, a default service provider shall submit to the [PUC] one or more proposed time-of-use rates and real-time price plans. The [PUC] shall approve or modify the time-of-use rates and real-time price plan within six months of submittal. The default service provider shall offer the time-of-use rates and real-time price plan to all customers that have been provided with smart meter technology under paragraph (2)(iii). Residential or commercial customers may elect to participate in time-of-use rates or real-time pricing.

. . . .

66 Pa.C.S. §2807(f) (emphasis added).

The majority interprets 66 Pa.C.S. §2807(f)(3) and (f)(5) to suggest an overall reading of the Act that does not comport with its plain meaning or well-established intent. Simply because customers are provided pricing options and

control over the use of their meter data does not mean the installation of smart meters

may be interpreted to be optional. If it was, the General Assembly would have said

as much. Instead, the General Assembly chose the word "shall" in requiring electric

distribution companies to furnish smart meter technology. At no point did the

General Assembly add in the words "which the consumer may or may not choose to

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accept," or other words to that effect, and it is not our role to read in such language

now.3

The intent of the General Assembly was not ambiguous. Smart meters

are mandatory in the Commonwealth. There is no opt-out provision. In the 12 years

since the passage of Act 129, several utilities, including PECO (Intervenor), have

invested substantial resources and relied on the certainty of the meaning of the Act

to fulfill the State mandate. If the General Assembly had wished to provide an

exception to the mandate, it could have done so in 2008, or in any year since that

3 If the plain reading of the Act is not enough, I note here that, in 2008, when Governor

Rendell announced the signing of the legislation into law, the following was reported:

Governor Edward G. Rendell, Harrisburg, PA, U.S.A. —

(METERING.COM) — October 16, 2008 – Pennsylvania's Energy Conservation Bill, including provisions for smart metering, was signed into law yesterday by state governor Edward G. Rendell.

In terms of the bill, state electric distributors are required to file their smart meter technology procurement and installation plan with the Public Utility Commission (PUC) within nine months. Within 15 years all homes and businesses in the state are to be equipped with smart meters.

Energy saving targets that have been set includes cuts of 1 percent by 2011 and 3 percent by 2013, as well as a 4.5 percent reduction of peak demand by 2013. Utilities that fail to meet these requirements will face steep penalties.

(Emphasis added.) See https://www.smart-energy.com/regional-news/north-america/pennsylvania-energy-bill-signed/ (last visited on October 7, 2020).

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time. However, it has not, and it is not this Court's role to create an opt-out provision where none exists statutorily.4

This does not mean, however, that the Consumers should not have an opportunity to request accommodation. Section 1501 states, in pertinent part, that "[e]very public utility shall furnish and maintain adequate, efficient, safe, and reasonable service and facilities." 66 Pa.C.S. §1501 (emphasis added). I agree with

the majority's position that the Consumers were not required to prove that the use of

smart meters is both unreasonable and unsafe. In other words, it is an either-or

proposition. The Consumers would have to demonstrate only that the smart meter

was either unsafe or unreasonable as provided to them to show a violation of the

mandate, not that the smart meter is both unsafe and unreasonable. The majority

writes:

The PUC states the [Administrative Law Judge (ALJ)] ALJ's

role is to determine whether "'use of a smart meter . . . will

constitute unsafe or unreasonable service . . . .'" Povacz v. PECO

Energy Co., (Pa. P.U.C. No. C-2015-2475023, filed Mar. 28,

2019), slip op. at 15 (quoting Kreider v. PECO Energy Co., (Pa.

P.U.C. No. P-2015-2495064, filed Jan. 28, 2019), slip op. at 21-

23 (emphasis added). Elsewhere in its opinion, however, the

PUC posits that [the] Consumers "must prove, by a

4 In an August 20, 2019 article from the National Conference of State Legislatures (NCSL)

titled "Smart Meter Opt-Out Policies," NCSL provides an overview of state laws governing the

use of smart meters. In each of the states that had smart meter laws as of August 20, 2019, many

had some kind of opt-out or opt-in provision. However, in each state where options were offered,

they were offered through statute or regulation, at the option of the utility, or as required by the

state's public utility commission or similar entity. I have seen no evidence that the options were

imposed by the courts, and I do not believe we should do so here in Pennsylvania. Daniel Shea

and Kate Bell, Smart Meter Opt-Out Policies, https://www.ncsl.org/research/energy/smart-meter-

opt-out-policies.aspx (last visited on October 7, 2020).

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preponderance of the evidence, that [their] exposure to the RF

fields from the wireless smart meter that PECO plans to install. .

. will 'exacerbate' or 'adversely affect' [their] health and,

therefore, constitute unsafe and unreasonable service . . . ."

Povacz, slip op. at 27 (emphasis added). We infer from its

inconsistent language that the PUC did not recognize this

distinction in the context of [the] Consumers' claims. In fact, a

review of the PUC's decision does not indicate whether the

distinction was significant to the PUC's reasoning. The PUC's

decision does not clearly purport to require [the] Consumers to

prove the meter installation is both unsafe and unreasonable as

applied to them. However, [the] Consumers are logically correct

that because PECO has a mandate to provide safe and reasonable

service, [the] Consumers may establish a violation of that

mandate by showing the wireless smart meter requirement is

either unsafe or unreasonable.

Povacz v. Pa. Pub. Util. Comm’n (Pa. Cmwlth. No. 492 C.D. 2019, filed October 8,

2020), slip op. at 14.

The majority focuses on the PUC’s Povacz opinion to suggest that the

PUC may have incorrectly applied “a conjunctive burden of proof,” rather than a

“disjunctive burden of proof.” It is, however, unclear in this matter whether the PUC

applied the correct standard and merely stated it incorrectly in its opinion or whether

the wrong standard was in fact applied. Interestingly, the PUC’s Administrative

Law Judge’s (ALJ) decisions in the two companion cases (i.e., Murphy v. Public

Utility Commission and Randall and Albrecht v. Public Utility Commission, as

identified in the caption above), clearly enunciated, as conclusions of law, that utility

companies are required to furnish safe and reasonable service and that, in the case

of Murphy, there was “no evidence that a PECO smart meter was unsafe or

unreasonable.” Reproduced Record (R.R.) at 87a-120a; Murphy v. PECO Energy

Co. (Pa. P.U.C. No. C-2015-2475726, filed Feb. 21, 2018) (emphasis added). In the

Randall and Albrecht matter, the ALJ determined that the consumers had not met

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their burden of showing a violation of the Public Utility Code,5 which includes the

requirement to demonstrate the smart meter was unsafe or unreasonable. R.R. at

121a-45a; Randall and Albrecht v. PECO Energy Co. (Pa. P.U.C. No. C-2016-

2537666, filed Feb. 21, 2018) (emphasis added). Further, in the very Povacz opinion

referenced by the majority, and as noted above, the PUC stated:

In reaching our conclusion in Kreider[, Kreider v. PECO Energy

Co., (Pa. P.U.C. No. P-2015-2495064, filed Jan. 28, 2019] that

we could hear and adjudicate a complainant's allegation(s) of

unsafe service and facilities related to a . . . smart meter, we did

not modify the standard or burden of proof that applies to a

complainant in a formal complaint proceeding under Section

1501 before the [PUC] . . . .

Because the complainant in that case had alleged that her health

was "adversely affected" by the smart meter installed outside of

her bedroom and that PECO's use of a smart meter would violate

Code § 1501, we explained that it would be the role of the ALJ

to determine whether there is sufficient evidence to support a

finding that the [c]omplainant was adversely affected by the

smart meter or whether PECO's use of a smart meter to

measure this [c]omplainant's usage would constitute unsafe or

unreasonable service in violation of Section 1501 under the

circumstances in that case. Those statements appearing in

Kreider, in our opinion, are an accurate summary of

applicable law . . . .

Povacz v. PECO Energy Co. (Pa. P.U.C. No. C-2015-2475023, filed Mar. 28, 2019)

(2019 Povacz Order), slip op., at 26-27 (emphasis added).

This statement suggests that perhaps the PUC was not confused about

the standard by which it should measure whether the smart meter fulfills the

requirement of Section 1501. Nonetheless, because it is unclear in the instant matter,

5 66 Pa.C.S. §§101-3316.

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and the PUC may have utilized a conjunctive burden of proof, improperly requiring

the Consumers to prove that the smart meters are both unsafe and unreasonable, I

would remand for the PUC to re-examine the existing record to ensure application

of the correct standard without taking additional evidence.

While I maintain that Section 1501 must be given its due weight and

the utility, in this case PECO, is mandated by the Act to provide a smart meter to

each of its customers, there is no language in the Act that precludes the PUC from

directing the utility to explore a reasonable alternative where a customer successfully

demonstrates the smart meter is unsafe or unreasonable.

I disagree with the majority's suggestion that the PUC determined the

Consumers failed to meet their burden of proving unreasonableness based on the erroneous conclusion that Act 129 does not allow accommodations. While the statute does not provide an opt-out provision, and the utility is required to provide smart meters thereunder, there is nothing in the statute that suggests an accommodation cannot be provided when the provision to the individual is either unsafe or unreasonable. The Consumers here properly sought relief under Section 1501 of the Public Utility Code, 66 Pa.C.S. §1501, arguing for an alternative to smart meters on the grounds that the meters were either unsafe or unreasonable in their particular circumstances. Here, the Consumers, in light of their respective medical conditions, rightly focused on the safety of the meters. While I do not think that the Consumers should be permitted to re-litigate the issue of safety and reasonableness, I believe the Consumers are entitled to have the PUC review the existing record to

determine whether it reflects that the installation of a smart meter is, or would be, unsafe or unreasonable, per Section 1501.

For the foregoing reasons, I would affirm the PUC’s order, in part, but

remand solely for the PUC to review the existing record to determine whether it

applied the correct standard, as addressed above, and to issue a new decision and

order accordingly.

J. ANDREW CROMPTON, Judge

Judge Fizzano Cannon joins in this concurring and dissenting opinion.

5

service territory, and charge a smart meter technology surcharge to all of its metered customers, the ALJ concluded that the Commission does not have the authority, absent a legislative directive, to prohibit PECO from installing a smart
meter even if a customer does not want one. The ALJ did not address either Romeo's preemption issue or his allegation that the meters were unsafe. Romeo's exceptions to the ALJ's decision only asserted that the ALJ ignored his argument that federal law preempts Act 129. He went on to argue that
the ALJ's conclusion that the Commission does not have the authority to prohibit
PECO from installing smart meters is incorrect and "rather, federal law compels
the Commission to direct PECO to cease and desist in its attempts to force installation of the smart meter." (Romeo's Exceptions to the ALJ's Initial Decision Granting Preliminary Objections, dated July 20, 2015 at 1, ¶ 1 (emphasis
in original).) He contended that the ALJ mischaracterized his arguments as "merely seeking to 'opt out' of the installation of the smart meter" when, in fact, he
"is asking the Commission to recognize that PECO's acts are being taken in violation of federal law." (Id. at 2, ¶ 2.)
The Commission denied the exceptions,9 adopted the ALJ's decision,

and supplemented the ALJ's decision by addressing Romeo's federal preemption
challenge.10 Concluding that Act 129 was not preempted by the Energy Policy Act,
the Commission explained:
9 The Commission declined to consider PECO's replies to the exceptions because they
were untimely filed. It noted that PECO had filed replies to the exceptions ten days after the
July 30, 2015 deadline to file, and PECO did not request or receive an extension of time for
filing the replies nor provide any reason for failing to meet the deadline.
10 Because the ALJ failed to consider Romeo's federal preemption challenge,
Commissioner Pamela A. Witmer motioned before a public meeting that the ALJ's initial
(Footnote continued on next page…)

6
Section 1252 of the Energy Policy Act amended the
Public Utility Regulatory Policies Act of 1978 (PURPA),
16 U.S.C. §[] 2621(d), to add provisions relating to smart
metering. PURPA expressly allows state regulatory
authorities, such as the Commission, to adopt, pursuant to
state law, standards or rules affecting electric utilities that
are different from the standards set forth in 16 U.S.C.
§§ 2621, et seq. 16 U.S.C. § 2627(b).
(Commission's March 3, 2016 Opinion at 8-9.) While Romeo did not raise it as an
exception, the Commission's decision also addressed Romeo's claim that smart
meters were dangerous. It concluded that Romeo's challenge to the meters on that
basis was legally insufficient because Romeo "has not presented a claim to which
he could personally testify that would support a finding that a smart meter

was
responsible for any fire or damage or other specific safety or health affects he experienced within his home." (Id. at 9.) Romeo petitioned this Court for review,
and PECO intervened.
On appeal,11 Romeo again contends that Act 129 is preempted by the federal Energy Policy Act. Romeo also argues that the Commission's decision is
(continued…)
decision be modified consistent with staff recommendation and prior Commission Orders to
include a discussion and legal determination addressing why PECO's mandatory installation of
smart meters is not in violation of the Energy Policy Act. Commissioner Witmer moved that the
initial decision be modified and that an opinion and order consistent with the motion be drafted.
That motion also stated that it did not support the referral of Romeo's health and safety concerns
to the Investigation and Enforcement Bureau because his exceptions were limited to the
preemption issue and prior referrals involving other complainants had already been referred.
11 This Court's review is limited to determining whether the Commission violated
constitutional rights, committed an error of law, rendered a decision that is not supported by
substantial evidence, or violated its rules of practice. United Transp. Union v. Pa. Pub. Util.
Comm'n, 68 A.3d 1026, 1032 (Pa. Cmwlth.), appeal denied, 80 A.3d 779 (Pa. 2013).

7

contrary to Section 1501 of the Code, 66 Pa. C.S. § 1501, which requires public

utilities to maintain adequate, efficient, safe and reasonable service and facilities
for their customers, claiming that the smart meters are unsafe, and that the Commission erred in denying him a hearing regarding the safety concerns he raised. The Commission responds that it properly concluded that federal law does
not preempt Act 129 and that Romeo waived the remaining issues by not raising
them in his exceptions to the ALJ's Initial Decision.
With regard to preemption, Romeo directs our attention to
Section 2621(d)(14)(A) of PURPA, 16 U.S.C. § 2621(d)(14)(A), which provides:
Not later than 18 months after August 8, 2005, each
electric utility shall offer each of its customer classes, and
provide individual customers upon customer request, a
time-based rate schedule under which the rate charged by
the electric utility varies during different time periods
and reflects the variance, if any, in the utility's costs of
generating and purchasing electricity at the wholesale
level. The time-based rate schedule shall enable the
electric consumer to manage energy use and cost through
advanced metering and communications technology.
(Emphasis added.) Citing to the Supremacy Clause of the United States Constitution,12 Romeo argues that because Congress has declined to make the installation of smart meters mandatory, Act 129's compulsory installation is contrary to federal law and must be reversed.
12 The Supremacy Clause provides, in relevant part:
This Constitution, and the Laws of the United States . . . shall be the supreme Law
of the Land; and the Judges in every State shall be bound thereby, any Thing in
the Constitution or Laws of any State to the Contrary notwithstanding.
U.S. Const. art. VI, cl. 2.

8

Our Supreme Court has established the three ways federal law may

preempt state law:

First, state law may be preempted where the United States Congress enacts a provision which expressly preempts the state enactment. [Second], preemption may be found where Congress has legislated in a field so comprehensively that it has implicitly expressed an intention to occupy the given field to the exclusion of state law. Finally, a state enactment will be preempted where a state law conflicts with a federal law. Such a conflict may be found in two instances, when it is impossible to comply with both federal and state law or where the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

Office of Disciplinary Counsel v. Marcone, 855 A.2d 654, 664 (Pa. 2004) (internal citations and quotation marks omitted).

The "critical question in any preemption analysis is whether Congress intended that the federal enactment supersede state law." Krentz v. Consol. Rail Corp., 910 A.2d 20, 32 (Pa. 2006). If a federal statute has an express preemption provision, the plain words of that expression of preemption guide our preemption analysis. Id. Section 2627(b) of PURPA, 26 U.S.C. § 2627(b), entitled "Relationship to State law," explicitly provides that it does not preempt state law:

"Nothing in this chapter prohibits any State regulatory authority or nonregulated electric utility from adopting, pursuant to State law, any standard or rule affecting electric utilities which is different from any standard established by this subchapter." Congress has not enacted a provision that preempts Act 129, but rather, has expressly provided for state agencies such as the Commission to

adopt
standards or rules affecting electric utilities that are different from the standards set
forth in PURPA or the Energy Policy Act.

9

Moreover, Section 2621(a) of PURPA, 26 U.S.C. § 2621(a), deals with the interaction between federal and state law and specifically provides that the
standards set forth in that act supplement, not preempt, state law:
Each State regulatory authority (with respect to each electric utility for which it has ratemaking authority) and each nonregulated electric utility shall consider each standard established by subsection (d) of this section and make a determination concerning whether or not it is appropriate to implement such standard to carry out the purposes of this chapter. For purposes of such consideration and determination in accordance with subsections (b) and (c) of this section, and for purposes of any review of such consideration and determination in any court in accordance with section 2633 of this title, the purposes of this chapter supplement otherwise applicable State law. Nothing in this subsection prohibits any State regulatory authority or nonregulated electric utility from making any determination that it is not appropriate to implement any such standard, pursuant to its authority under otherwise applicable State law.
(Emphases added.) The language of this provision expressly provides that after
considering the federal standards, state authorities have the power to choose whether or not to adopt said standards or adopt their own standards. Because federal standards are a supplement to the state standards, and the state is only required to consider the federal standards, the federal and state

standards are not and cannot be in conflict. Moreover, Congress's enactment of
multiple provisions under PURPA, all providing that the state is entitled to adopt
its own guidelines that are different from those provided under PURPA, is
indicative of Congress's lack of intent to occupy the field. Rather, it is indicative
of Congress's objective to allow states to regulate how they choose. As such,

10

PURPA and the Energy Policy Act do not preempt the smart meter provisions of
the Code or of Act 129.

As to the remaining issues, the Commission argues that because the
sole issue Romeo raised in his exceptions in this case is whether the smart meter
provision of Act 129 is preempted by federal law, Romeo has preserved only that
issue for appeal. Section 335(a) of the Code, 66 Pa. C.S. § 335(a), however, provides:

(a) Procedures.--When the commission does not preside
at the reception of evidence, the presiding officer shall
initially decide the case, unless the commission requires,
either in specific cases or by general rule, the entire
record to be certified to it for decision. When the
presiding officer makes an initial decision, that decision
then shall be approved by the commission and may
become the opinion of the commission without further
proceeding within the time provided by commission rule.
On review of the initial decision, the commission has all
the powers which it would have in making the initial
decision except as it may limit the issues on notice or by
rule. When the commission makes the decision in a rate
determination proceeding without having presided at the
reception of the evidence, the presiding officer shall

make a recommended decision to the commission in
accordance with the provisions of this part. Alternatively,
in all other matters:
(1) the commission may issue a tentative decision
or one of its responsible employees may
recommend a decision; or
(2) this procedure may be omitted in a case in
which the commission finds on the record that due
and timely execution of the functions imperatively
and unavoidably so requires.

11
(Emphasis added.) In Energy Pipeline Company v. Pennsylvania Public Utility Commission, 662 A.2d 641 (Pa. 1995), our Supreme Court explained that pursuant
to Section 335(a) of the Code:
[I]f exceptions are filed, then the matter is taken to the
[Commission], where "the [Commission] has all the
powers which it would have had in making the initial
decision . . . ." 66 Pa. C.S. § 335(a). The [Commission]
has the power to conduct its own fact finding, to adopt or
reject the ALJ's decision, or to come to an entirely
different resolution. Thus, if exceptions are filed, only
the [Commission] can take action, and the ALJ's decision
cannot take on the force and effect of an order.
Energy Pipeline Co., 662 A.2d at 644. Thus, under Section 335 of the
Code, once exceptions are filed or once the Commission takes a decision for
review sua sponte pursuant to 52 Pa. Code § 5.536,13 the Commission may review
the ALJ's decision in its entirety without limit. Thus, the Commission may
confine its review to issues raised in exceptions or may review issues not raised in
exceptions. There is nothing in the record in this case to indicate that the
Commission limited its review by notice or rule. To the contrary, based upon the

Commission's order, it is apparent that the Commission reviewed more than the
single exception raised by Romeo.
Had the Commission limited its review to the exception raised by
Romeo, then the additional issue now raised by Romeo—whether the Commission
erred in failing to provide Romeo with a hearing regarding safety concerns—would
have been waived. See Springfield Twp. v. Pa. Pub. Util. Comm'n, 676 A.2d 304,
13 52 Pa. Code § 5.536 permits the Commission to review an ALJ's decision to which no
exception has been filed if two Commissioners request review within fifteen days of the issuance
of the ALJ's decision.

12
309 (Pa. Cmwlth. 1996) (holding that where exception was not raised and "was not
considered by" Commission, that issue is waived); see also Capital City Cab Serv.
v. Pa. Pub. Util. Comm'n, 138 A.3d 119, 132 (Pa. Cmwlth. 2016) (en banc)
(holding that where issue is not raised by exception filed with Commission, "it is
not preserved for our review."); accord Pa. Power Co. v. Pa. Pub. Util. Comm'n,
561 A.2d 43 (Pa. Cmwlth. 1989) (en banc), aff'd, 587 A.2d 312 (Pa.), cert. denied,
502 U.S. 821 (1991). This waiver principle, however, is not applicable here, where
the Commission elected to consider an issue not raised by an exception. Under the
circumstances present in this case, where the Commission conducts a review that
encompasses issues not raised by an exception, Romeo is not precluded on

appeal
from raising issues specifically addressed by the Commission.14
Having concluded that the remaining issues raised by Romeo are not
waived, we now consider the merits of Romeo's arguments. With regard to
Section 1501 of the Code and the safety and other concerns raised by Romeo,
Romeo argues that the Commission erred in not affording him a hearing
regarding
his concerns, especially in light of the "clear evidence of the dangers these
smart
meters pose and [Romeo] should not be forced to have suffered damage to his
home or his family's health . . . in order to have the opportunity to challenge
the
installation of a smart meter at his home." (Romeo's Brief at 8.) The
Commission
argues, however, that because he cannot personally testify that a smart meter
was
responsible for any fire, health, or safety defect, Romeo's complaint is legally
insufficient as a matter of law.
14 This interpretation is particularly necessary in light of 52 Pa. Code § 5.536,
which
permits review without exceptions having been filed, because otherwise all
issues arguably
would be waived and the Commission's order could not be challenged.

13
What was before the Commission was PECO's preliminary
objections, in which all factual allegations are taken as true. Romeo claimed
that
the smart meters cause safety and fire hazards and have a negative health
impact.
Just because he cannot personally testify as to the health and safety effects
does not
mean that his complaint is legally insufficient. He could make out his claim
through the testimony of others as well as other evidence that goes to that
issue.

Because his complaint was not legally insufficient, the Commission erred in dismissing the complaint.
Accordingly, for the foregoing reasons, to the extent that the
Commission's order concluded that federal law did not preempt Act 129 as to the
installation of smart meters, the Commission's order is affirmed. The portion of
the Commission's order, however, sustaining PECO's preliminary objections and
dismissing for legal insufficiency Romeo's complaint that smart meters present
health and safety concerns is reversed, and the matter is remanded to the Commission for proceedings consistent with this opinion.
P. KEVIN BROBSON, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA
Antonio Romeo, :
Petitioner :
:
v. : No. 498 C.D. 2016
:
Pennsylvania Public Utility :
Commission, :
Respondent :
O R D E R
AND NOW, this 8th day of February, 2017, the order of the
Pennsylvania Public Utility Commission, dated March 3, 2016, is AFFIRMED, in
part, and REVERSED, in part. The order is AFFIRMED to the extent that it
concluded that federal law did not preempt Act 129 of 2008, 66 Pa. C.S. § 2807,
as to the installation of smart meters. The order is REVERSED to the extent that it
sustained PECO Energy Company's preliminary objection based on legal
insufficiency and dismissed Petitioner Anthony Romeo's claim that smart

meters
present a health and safety concern. This matter is REMANDED to the Commission for proceedings consistent with this opinion.
Jurisdiction relinquished.
P. KEVIN BROBSON, Judge

Exhibit E

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Paula and Charles Hughes, :

:

Petitioners :

:

v. : No. 827 C.D. 2020

: Submitted: May 7, 2024

Pennsylvania Public Utility :

Commission, :

:

Respondent :

BEFORE: HONORABLE PATRICIA A. McCULLOUGH, Judge

HONORABLE MICHAEL H. WOJCIK, Judge

HONORABLE STACY WALLACE, Judge

OPINION BY JUDGE WOJCIK FILED: August 1, 2024

Paula and Charles Hughes (Consumers), proceeding pro se, seek

review of the Pennsylvania Public Utility Commission's (PUC) order denying

Consumers' exceptions, adopting an administrative law judge's (ALJ) initial

decision, and dismissing their complaint. The PUC determined that Act 129 of 2008

(Act 129),1 which amended the Public Utility Code (Code),2 mandates the

installation of smart meters and does not include an opt-out provision. Additionally,

the PUC found that Consumers did not prove, by a preponderance of the evidence,

1 Act of October 15, 2008, P.L. 1592, No. 129, 66 Pa. C.S. §§2803, 2806.1, 2807, 2811,

2813-2815.

2 66 Pa. C.S. §§101-3316.

2

that Intervenor PPL Electric Utilities Corporation's (PPL) installation of a smart

meter constituted unsafe or unreasonable service under Section 1501 of the Code,

66 Pa. C.S. §1501. Consumers assert that the installation of smart meters violates

their constitutional rights against unreasonable searches and seizures. They further

contend that the PUC erred and/or abused its discretion by applying an erroneous

burden of proof and issuing a determination that is not supported by substantial

evidence. Upon review, we affirm.

I. Background

In October 2008, the General Assembly amended the Code by enacting

Act 129. Act 129 amended the Electricity Generation Customer Choice and

Competition Act3 for the purpose of promoting energy efficiency and conservation

across the Commonwealth. Povacz v. Pennsylvania Public Utility Commission, 280

A.3d 975, 982 (Pa. 2022) (Povacz II). Through Act 129, the General Assembly

mandated PPL and other electric distribution companies (EDCs) with more than

100,000 customers to "furnish smart meter technology." Section 2807(f)(2) of the

Code, 66 Pa. C.S. §2807(f)(2). Specifically, Section 2807(f) of the Code provides:

(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 [PUC] for

approval. The plan shall describe the smart meter

technologies the [EDC] proposes to install in accordance

with paragraph (2).

3 Act of December 3, 1996, P.L. 802, 66 Pa. C.S. §§2801-2815 (deregulating electricity

generation in Pennsylvania and providing customers with the opportunity to select an electricity

generation supplier).

3

(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.

(ii) In new building construction.

(iii) In accordance with a depreciation schedule not

to exceed 15 years.

(3) [EDCs] shall, with customer consent, make available direct meter access and electronic access to customer meter data to third parties, including electric generation suppliers and providers of conservation and load management services.
(4) In no event shall lost or decreased revenues by an [EDC] due to reduced electricity consumption or shifting energy demand be considered any of the following:
(i) A cost of smart meter technology recoverable under a reconcilable automatic adjustment clause under section 1307(b), except that decreased revenues and reduced energy consumption may be reflected in the revenue and sales data used to calculate rates in a distribution rate base rate proceeding filed under section 1308 (relating to voluntary changes in rates).
(ii) A recoverable cost.
(5) By January 1, 2010, or at the end of the applicable generation rate cap period, whichever is later, a default service provider shall submit to the [PUC] one or more proposed time-of-use rates and real-time price plans. The [PUC] shall approve or modify the time-of-use rates and real-time price plan within six months of submittal. The default service provider shall offer the time-of-use rates and real-time price plan to all customers that have been

provided with smart meter technology under paragraph (2)(iii). Residential or commercial customers may elect to participate in time-of-use rates or real-time pricing. The default service provider shall submit an annual report to

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the price programs and the efficacy of the programs in affecting energy demand and consumption and the effect on wholesale market prices.

(6) The provisions of this subsection shall not apply to an [EDC] with 100,000 or fewer customers.

(7) An [EDC] may recover reasonable and prudent costs of providing smart meter technology under paragraph (2)(ii) and (iii), as determined by the [PUC]. This paragraph includes annual depreciation and capital costs over the life of the smart meter technology and the cost of any system upgrades that the [EDC] may require to enable the use of the smart meter technology which are incurred after the effective date of this paragraph, less operating and capital cost savings realized by the [EDC] from the installation and use of the smart meter technology. Smart meter technology shall be deemed to be a new service offered for the first time under section 2804(4)(vi). An [EDC] may recover smart meter technology costs:

(i) through base rates, including a deferral for future base rate recovery of current basis with carrying charge as determined by the [PUC]; or

(ii) on a full and current basis through a reconcilable automatic adjustment clause under section 1307.

In turn, Section 2807(g) of the Code defines "smart meter technology" as follows:

(g) . . . [T]he term "smart meter technology" means technology, including metering technology and network communications technology capable of bidirectional communication, that records electricity usage on at least an hourly basis, including related electric distribution system upgrades to enable the technology. The technology shall provide customers with direct access to and use of price and consumption information. The technology shall also:

5

(1) Directly provide customers with information on their hourly consumption.

(2) Enable time-of-use rates and real-time price programs.

(3) Effectively support the automatic control of the customer's electricity consumption by one or more of the following as selected by the customer:

(i) the customer;

(ii) the customer's utility; or

(iii) a third party engaged by the customer or the

customer's utility.

66 Pa. C.S. §2807(g). Smart meters, also known as advanced metering infrastructure

(AMI) meters, record electricity consumption on at least an hourly basis using radio

frequency (RF) electromagnetic energy. Povacz II, 280 A.3d at 983-84; Section

2807(g) of the Code, 66 Pa. C.S. §2807(g).

Act 129 directed the PUC to "adopt an energy efficiency and

conservation program to require [EDCs] to adopt and implement cost-effective

energy efficiency and conservation plans to reduce energy demand and

consumption" within their service territories. Section 2806.1(a) of the Code,

66 Pa. C.S. §2806.1(a). After Act 129 took effect, the PUC directed subject EDCs,

including PPL, to submit plans to the PUC for the deployment of smart meter

technology within their respective service territories.

In response, PPL sought and obtained the PUC's approval to complete

the deployment and installation of smart meters for its customers within its service

territory by the end of 2019. PPL notified its electric customers, including

6

Consumers, of its intent to replace their existing powerline carrier meters with smart

meters at their residences. Consumers refused to have a smart meter installed.

On February 4, 2019, Consumers filed a formal complaint with the PUC

to opt out of a smart meter installation at their residence citing health

(hypersensitivity to the RF emissions), safety, and privacy concerns. PPL filed an

answer in response denying that smart meters cause adverse health effects and

asserting that Act 129 requires PPL to install smart meters for all customers, without

exception, and that it has the right to terminate service for customers that refuse

installation.

In September 2019, a hearing before the ALJ ensued. At the hearing,

Consumers, who appeared pro se, testified and presented 17 exhibits. Consumers'

evidence included medical letters regarding their underlying health conditions and

an article titled "Stop Smart Meters NY" relating to the safety and privacy of smart

meters. PPL appeared, represented by counsel, and presented 15 exhibits and 4

expert witnesses. All exhibits were admitted into evidence. Following the close of

the record, the ALJ issued an initial decision denying Consumers' formal complaint

and Consumers filed exceptions.4

By opinion and order dated July 16, 2020, the PUC denied the

exceptions, adopted the ALJ's initial decision, and dismissed Consumers'

complaint. The PUC held that Act 129 mandates EDCs, such as PPL, to furnish

smart meters to all electric customers within its electric distribution service area,

4 In an attempt to bolster their claims, Consumers attached evidence that was not part of

the record before the ALJ. The evidence included "Excerpt A - A section about the Federal Trade

Commission Act from a 'Consumer Compliance Handbook' and Excerpt B - Selected pages from

a Congressional Research Service Report titled 'Smart Meter Data: Privacy and Cybersecurity'

dated February 3, 2012." PUC Opinion and Order, 7/16/20, at 15. The PUC disregarded this

extra-record evidence on the basis that the parties cannot introduce new evidence at the exceptions

stage. Id.

7

without exception. Act 129 does not provide customers with a right to opt out of

smart meter installation. However, electric customers may seek an accommodation

by filing a claim under Section 1501 of the Code, 66 Pa. C.S. §1501, and proving,

by a preponderance of the evidence, that the installation of a smart meter is unsafe

and/or unreasonable. The PUC found that Consumers failed to show a conclusive

causal connection between the low-level RF fields emitted from the smart meter and

the alleged adverse health effects by a preponderance of the evidence.

From this decision, Consumers petitioned for review with this Court.

PPL intervened. At Consumers' request, this Court stayed the installation of a smart

meter at their residence pending disposition of three consolidated appeals involving

similar issues: Povacz v. Pennsylvania Public Utility Commission (Pa. Cmwlth.,

No. 492 C.D. 2019), Murphy v. Pennsylvania Public Utility Commission

(Pa. Cmwlth., No. 606 C.D. 2019), and Randall v. Pennsylvania Public Utility

Commission (Pa. Cmwlth., No. 607 C.D. 2019).

On October 8, 2020, this Court decided the three consolidated appeals

and affirmed in part, reversed and remanded in part, and vacated and remanded in

part the PUC orders. Povacz. v. Pennsylvania Public Utility Commission, 241 A.3d

481 (Pa. Cmwlth. 2020) (Povacz I), rev'd in part, aff'd in part, Povacz II. In

Povacz I, this Court stated:

[W]e affirm the PUC's rejection of [the c]onsumers'

constitutional challenge. We reverse the PUC's

conclusion that it lacks authority to accommodate [the

c]onsumers' desire to avoid RF emissions from smart

meters and vacate the PUC's determination that such

accommodation would not be reasonable. We affirm the

PUC's determination of the burden of proving harm. We

affirm the PUC's findings of fact. We remand this matter

to the PUC for determinations of whether

accommodations are appropriate for each of the

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[c]onsumers, and if so, what those accommodations

should be.

241 A.3d at 494-95. From the Povacz I decision, all parties petitioned for allowance

of appeal with the Pennsylvania Supreme Court, which was granted. Meanwhile, in

this matter, we continued the stay pending the Supreme Court's disposition of the

Povacz I appeal.

In Povacz II, the Pennsylvania Supreme Court affirmed in part and

reversed in part this Court's decision in Povacz I, thereby affirming the PUC Orders

underlying the appeals. The Supreme Court concluded that Act 129 mandates EDCs

to "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." Povacz II, 280 A.3d at 983. "An electric customer with

concerns about smart meters may seek an accommodation from the PUC or EDC

. . . ." Id. at 983-84 (footnote omitted). However, to obtain an accommodation, the

customer must prove that the installation of a smart meter violates Section 1501 of

the Code, which requires utilities to provide safe and reasonable service. Id. To do

so, the customer must establish a "conclusive causal connection" between RF

exposure and the claimed health effects by a "preponderance of the evidence." Id.

at 984. Applying this standard, the Supreme Court determined that the electric

customers did not prove that installation of a smart meter at their premises violated

Section 1501. Id. As a result, the PUC was not required to prescribe any

accommodation. Id. Thus, the Supreme Court ordered:

[W]e reverse the Commonwealth Court's ruling that Act

129 does not mandate the installation of smart meters. We

affirm the Commonwealth Court's conclusion that the

PUC did not err in finding that [the c]ustomers failed to

meet their burden of proving, by a preponderance of the

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evidence, a conclusive causal connection between RF

emissions from smart meters and adverse human health

effects. We reverse the Commonwealth Court's remand to

the PUC for consideration of whether [the c]ustomers

established that smart meter service is unreasonable under

Section 1501.

Id. at 1014. Following Povacz II, this Court lifted the stay in this matter and directed

the parties to file briefs. We now consider Consumers' petition for review.5

II. Issues

We have distilled Consumers' statement of questions involved into

three central arguments. First, Consumers assert that Act 129 violates their

constitutional rights arising under the Fourth Amendment of the United States (U.S.)

Constitution, U.S. Const. amend. IV, and article I, section 8 of the Pennsylvania

Constitution, Pa. Const. art. I, §8, against unreasonable searches and seizures.

Second, they contend that the PUC applied an erroneous burden of proof by

requiring Consumers to establish a violation of Section 1501 of the Code. Third,

they argue that the PUC's determination is not supported by substantial evidence.

III. Discussion

A. Unreasonable Search and Seizure

Consumers argue that, because the Pennsylvania Supreme Court ruled

that Act 129 was mandatory, it follows then that EDCs under the PUC's jurisdiction

5 This Court's review is limited to determining whether the PUC violated a constitutional

right, committed an error of law, rendered a decision not supported by substantial evidence, or

violated its rules of practice. Romeo v. Pennsylvania Public Utility Commission, 154 A.3d 422

(Pa. Cmwlth. 2017). For questions of constitutional law, including whether an individual's

constitutional right to be free from unreasonable searches has been violated, our standard of review

is de novo, and our scope of review is plenary. See Commonwealth v. Leed, 186 A.3d 405, 414

n.4 (Pa. 2018); Commonwealth v. Shabezz, 166 A.3d 278, 285 (Pa. 2017).

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are now state actors subject to the constitutional proscriptions against unreasonable

searches and seizures. According to Consumers, the collection of data that can

identify what appliances are being used in a person's home constitutes a warrantless

search that violates the Fourth Amendment of the U.S. Constitution and article 1,

section 8 of the Pennsylvania Constitution. Given the constitutional violation, they

maintain that they should be entitled to opt out of the installation.

In Povacz II, the Supreme Court concluded that "Act 129 is mandatory,

requiring the system-wide installation of smart meter technology by EDCs,

including smart meters." 280 A.3d at 1014. Act 129 "imposes a mandate on EDCs

to furnish smart meter technology to all electric customers within an electric

distribution service area, regardless of a customer's preference." Id. at 992 (emphasis added). There is no opt-out provision. Id. at 1014. Although the customers in Povacz I raised substantive due process claims, the Supreme Court denied allocatur as to any constitutional issues.6 Povacz II, 280 A.3d at 985 n.8.

The Fourth Amendment of the U.S. Constitution (Fourth Amendment) protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. Similarly, article I, section 8 of the Pennsylvania Constitution, Pa. Const. art. I, §8, affords people the same security against unreasonable searches and seizures. See Interest of T.W., 261 A.3d 409, 417-18 (Pa. 2021).

6 In Povacz I, this Court declined to recognize a viable claim regarding a violation of rights under the Fourteenth Amendment of the U.S. Constitution, U.S. Const. amend. XIV. 241 A.3d at 488. Relying on the persuasive reasoning in Naperville Smart Meter Awareness v. City of Naperville, 69 F. Supp. 3d 830 (N.D. Ill. 2014) (Naperville I), which addressed the same issue, we rejected the customers' substantive due process argument because they failed to identify an arbitrary deprivation of a recognized liberty or property interest. Povacz I, 241 A.3d at 488.

Because the Supreme Court declined to grant review of any constitutional issues, see Povacz II,

280 A.3d at 985 n.8, our holding on this issue stands.

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A "search" occurs when "an expectation of privacy that society is

prepared to consider reasonable is infringed." United States v. Jacobsen, 466 U.S.

109, 113 (1984). "[A]t the [Fourth Amendment's] very core stands the right of a

man to retreat into his own home and there be free from unreasonable government

intrusion." Silverman v. United States, 365 U.S. 505, 511 (1961). This protection,

which was previously limited to common law trespass, now encompasses searches

of the home made possible by "advancing technology." Kyllo v. United States,

533 U.S. 27, 35 (2001) (contemplating "imaging technology that could discern all

human activity in the home"). Any other rule would "erode the privacy guaranteed

by the Fourth Amendment." Id. at 34.

"The touchstone of the Fourth Amendment is reasonableness." Florida

v. Jimeno, 500 U.S. 248, 250 (1991). Where the data collection is not performed as

part of a criminal investigation, the courts must balance the intrusion on the

individual's Fourth Amendment interests against the promotion of legitimate

government interest. Hiibel v. Sixth Judicial District Court, 542 U.S. 177, 187-88

(2004).

Significant to our analysis here, the Fourth Amendment's protection

against unlawful searches and seizures applies to "only governmental action."

Jacobsen, 466 U.S. at 113. It follows, therefore, that "the proscriptions of the Fourth

Amendment and [a]rticle I, [section] 8 [of the Pennsylvania Constitution], do not

apply to searches and seizures conducted by private [actors]." Commonwealth v.

Harris, 817 A.2d 1033, 1047 (Pa. 2002) (citing Coolidge v. New Hampshire, 403

U.S. 443 (1971); Burdeau v. McDowell, 256 U.S. 465 (1921); Commonwealth v.

Corley, 491 A.2d 829 (Pa. 1985)). It does not apply to searches, even unreasonable

ones, effected by private actors "not acting as an agent of the Government or with

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the participation or knowledge of any governmental official." Jacobsen, 466 U.S.

at 113.

Where the action complained of was taken by a private actor, such as a

privately-owned utility company, we must examine whether the conduct itself

involves private or state action. Jackson v. Metropolitan Edison Co., 419 U.S. 345,

350 (1974). "The mere fact that a business is subject to state regulation does not by

itself convert its action into that of the State for purposes of the Fourteenth

Amendment. Nor does the fact that the regulation is extensive and detailed, as in

the case of most public utilities, do so." Id. (footnote and citation omitted).

"[T]he inquiry must be whether there is a sufficiently close nexus

between the State and the challenged action of the regulated entity so that the action

of the latter may be fairly treated as that of the State itself." Jackson, 419 U.S. at

351. As the U.S. Supreme Court explained in Blum v. Yaretsky, 457 U.S. 991, 1004

(1982):

The purpose of this requirement is to assure that

constitutional standards are invoked only when it can be

said that the State is responsible for the specific conduct

of which the plaintiff complains. The importance of this

assurance is evident when . . . the complaining party seeks

to hold the State liable for the actions of private parties.

(Emphasis added.)

Pennsylvania courts have historically "rejected the contention that the

furnishing of utility services is . . . a state function." Jackson, 419 U.S. at 353 (citing

Girard Life Insurance Co. v. City of Philadelphia, 88 Pa. 393 (1879); Baily v.

Philadelphia, 39 A. 494 (Pa. 1898)). In Jackson, the U.S. Supreme Court also

rejected the contention that a utility is a state actor even where the utility is "a heavily

regulated, privately owned utility, enjoying at least a partial monopoly in the

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providing of electrical service within its territory" and takes action "in a manner

which the [PUC] found permissible under state law." Id. at 358.

Notably, in Povacz I, this Court held that "[c]onstitutional protections

apply [only] against state actors" and the EDC involved therein, PECO, was "not a

state actor in relation to its installation of smart meters and provision of electricity

to its customers." Povacz I, 241 A.3d at 486 n.9. The Pennsylvania Supreme Court

did not disturb this finding on appeal. See Povacz II, 280 A.3d at 985 n.8 (declining

to address any constitutional issues).

Nevertheless, Consumers argue that PPL is operating as a state actor

under Act 129's mandate to install smart meters, and they rely on Naperville Smart

Meter Awareness v. City of Naperville, 900 F.3d 521, 529 (7th Cir. 2018) (Naperville

II),7 for this limited proposition. In Naperville II, customers subject to smart meter

installation asserted Fourth Amendment violations against the City of Naperville.

Notably, the City of Naperville owned and operated the public utility that provided

electricity to the city's residents. Naperville II, 900 F.3d 524. Because the public

utility was a government actor, the federal court proceeded to address whether the

City's use of smart meters constituted a search and whether the search was

unreasonable under the Fourth Amendment. Id. at 525-29. The federal court

ultimately concluded that, although smart meter data collection constituted a search,

it was not an unreasonable one. Id. Thus, the federal court rejected the customers'

constitutional claims. Id.

However, unlike in Naperville II, PPL is not a government-owned

utility. Rather, PPL is a privately owned corporation that is highly regulated, just

7 We may consider decisions from other states as persuasive authority. See League of

Women Voters v. Commonwealth, 178 A.3d 737, 803 (Pa. 2018); Commonwealth v. Small,

189 A.3d 961, 973 (Pa. 2018); Koken v. Reliance Insurance Co., 893 A.2d 70, 83 (Pa. 2006).

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like PECO in Povacz I. Although Act 129 mandates PPL and other EDCs to install

smart meters in their territories, PPL's compliance with Act 129 does not make it an

agent of the state. Povacz I. There is no evidence in this case that the government

controls the operations of PPL or that PPL acts as an agent of the government.

As for the smart meter's data collection, there is no evidence that the

government is performing the search or using the data collected. PPL filed a detailed

AMI Customer Privacy Policy as part of its smart meter plan, which sets forth the

data to be collected from the smart meters, steps PPL will take to protect the data,

and how PPL will use the data. The PUC summarized PPL's evidence:

[Kevin] Durkin's written testimony explained what data

the AMI meter collects and how [PPL] protects the data.

PPL states that [it] does not collect any specific

information about the use of individual appliances at the

premises. Rather, [PPL] only collects information about

the total electric usage at the premises. PPL states that it

does not share AMI data, except as required or permitted

by law, regulatory agencies, or governmental authorities.

. . . [T]here is no record evidence that PPL easily shares

AMI data with law enforcement or other third parties.

PUC Opinion, 7/16/20, at 24 (citations omitted). PPL collects data on a premise's

energy consumption for billing purposes and to determine significant event

information, such as outages, voltage, heat alarms, and meter tampering alerts. Id.

Upon review, we conclude that PPL is not acting as an agent of the state when

installing smart meters. Accordingly, we reject Consumers' claim that the

installation of a smart meter violates their constitutional rights under the Fourth

Amendment and article I, section 8 of the Pennsylvania Constitution.

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B. Burden of Proof

Next, Consumers contend that the PUC erred by placing a high burden

on customers to prove a violation of Section 1501 of the Code by requiring them to

establish a conclusive causal connection by a preponderance of the evidence.

According to Consumers, "[n]othing in Section 1501 supports the position that

[they] were required[] to prove that RF exposure from PPL's [smart meter] will

cause harm or that there is a 'conclusive causal connection.'" Petitioners' Brief at

50. Instead, they argue that the PUC should have concluded that "evidence of a risk

of harm is sufficient to establish a violation of Section 1501." Id.

"Although Act 129 does not provide [] electric customer[s] with the

right to opt[ ]out of the installation of a smart meter at their residence, they may file

a complaint raising a claim that installation of a smart meter violates Section 1501

of the Code." Povacz II, 280 A.3d at 999. Section 1501 of the Code provides:

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. . . . .

66 Pa. C.S. §1501 (emphasis added).

Because an EDC must furnish service that is both safe and reasonable,

"[t]o carry their burden of proof on a Section 1501 claim, [] smart meter

challenger[s] 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 under the circumstances

presented." Povacz II, 280 A.3d at 1000. Under Act 129, "an EDC cannot be

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required to provide accommodation without the finding of a Section 1501

violation."8 Id. at 1014.

To satisfy this burden, the Supreme Court held that customers must

establish a "conclusive causal connection" by a preponderance of the evidence

standard. Povacz II, 280 A.3d at 1006. The Supreme Court explained:

"Conclusive causal connection" means that the proffered

evidence must support the conclusion that a causal

connection existed between a service or facility and the

alleged harm. It is not possible for evidence that is

inconclusive to be sufficient to meet the preponderance of

the evidence standard. Inconclusive means that the

evidence does not lead to a conclusion of a definite result

one way or the other. While the preponderance of the

evidence standard is not stringent, it does require that the

plaintiff's evidence ever so slightly (like, with the weight

of a feather) supports the plaintiff's contention. Evidence

that does not support a conclusion (or is inconclusive)

cannot meet that minimal burden . . . . Thus, where

scientific evidence is required to establish the safety of a

service or facility, use of the evidentiary standard of

'conclusive causal connection' to assess the evidence is

correct.

Id. at 1006-07 (emphasis added) (internal citations omitted). In short, customers

"need to prove, by a preponderance of the evidence – with expert opinion within a

reasonable degree of certainty – that the service or facility is unsafe and that a causal

connection exists between the allegedly unsafe service or facility and harm, either

8 As the Supreme Court noted: "This holding does not preclude an electric utility from

providing a reasonable accommodation to an electric customer in the absence of a [S]ection 1501

violation pursuant to a customer service policy." Povacz II, 280 A.3d at 984 n.5. However, the

Supreme Court made clear that to require an accommodation, a violation of Section 1501 must be

established. Id. at 1014.

to the public at large or to specific individuals." Id. at 1007. Upon review, the PUC

did not err in applying this burden.

C. Substantial Evidence

Lastly, Consumers assert that the PUC's findings are not supported by

substantial evidence. They contend that the PUC erred by not accepting their

evidence and instead accepting PPL's "extreme and unreasonable position" that RF

exposure from smart meters is incapable of causing harm. Petitioners' Brief at 49.

According to Consumers, reliable scientific evidence clearly shows that RF exposure

from smart meters may be harmful to persons, like Consumers, who have a

hypersensitivity to RF.

The PUC is the ultimate finder of fact in formal complaint proceedings.

Milkie v. Pennsylvania Public Utility Commission, 768 A.2d 1217, 1220 n.7 (Pa.

Cmwlth. 2001); Section 335 of the Code, 66 Pa. C.S. §335. As factfinder, the PUC

is empowered to review record evidence, make credibility determinations, and

accord evidentiary weight. Milkie, 768 A.2d at 1221; Verizon Pennsylvania LLC v.

Pennsylvania Public Utility Commission, 303 A.3d 219, 239 (Pa. Cmwlth. 2023).

When reviewing a decision of the PUC, an appellate court "should neither substitute

its judgment for that of the PUC when substantial evidence supports the PUC's decision on a matter within the PUC's expertise, nor should it indulge in the process of weighing evidence and resolving conflicting testimony." Lehigh Valley Transportation Services, Inc. v. Pennsylvania Public Utility Commission, 56 A.3d 49, 56 (Pa. Cmwlth. 2012). Substantial evidence is "relevant evidence which a reasonable mind would accept as adequate to support the conclusion reached." Township of Exeter v. Zoning Hearing Board of Exeter Township, 962 A.2d 653,

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659 (Pa. 2009) (citation and quotation omitted). The PUC's findings are conclusive where they are supported by substantial evidence. Hess v. Pennsylvania Public Utility Commission, 107 A.3d 246, 258 n.7 (Pa. Cmwlth. 2014).

As discussed above, to establish a violation of Section 1501, Consumers "need[ed] to prove, by a preponderance of the evidence – with expert opinion within a reasonable degree of certainty – that the service or facility is unsafe and that a causal connection exists between the allegedly unsafe service or facility and harm, either to the public at large or to specific individuals." Povacz II, 280 A.3d at 1007. "Whether 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." Id. (citation and

quotation omitted). Expert evidence is required. Id.

In Povacz II, the parties presented competing expert testimony.

"Although [the c]ustomers claimed individualized injury based on exposure to RF

emissions, their expert evidence fell short of proving by the preponderance of the

evidence that [PECO] was responsible or accountable for the problem described in

their complaints." 280 A.3d at 1008. PECO challenged the customers' evidence

with expert testimony, which the PUC found persuasive. One expert testified, "to a

reasonable degree of scientific certainty, that there is no reliable scientific basis to

conclude that exposure to RF emissions from a smart meter can cause any adverse

biological effects in people, including [the c]ustomers." Id. at 1001. Another PECO

expert testified, "based upon his own evaluation of whether RF emissions from smart

meters can cause, contribute to, or exacerbate the conditions described by [the

c]ustomers," and "to a reasonable degree of medical certainty, that there is no

reliable medical basis on which to conclude that RF emissions from smart meters

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caused, contributed to, or exacerbated or will cause, contribute to, or exacerbate any

of their self-reported symptoms or conditions." Id. Based upon the credited

evidence, the PUC determined that the customers failed to satisfy their burden. Id.

Like the customers in Povacz II, Consumers similarly failed to prove

that the installation of smart meters at their residence would constitute unsafe or

unreasonable service in violation of Section 1501 of the Code. Although Consumers

testified and presented medical letters describing their health conditions and the

health conditions of family members and claimed those conditions would be

exacerbated by exposure to a smart meter, they did not present expert testimony to

support their claims. Instead, they relied upon an article to establish a causal

connection between the low-level RF fields from a smart meter and adverse health

effects, titled "Stop Smart Meters NY."9 However, the PUC found that the article

constituted "unreliable hearsay evidence" because the author was not available for

cross-examination at the hearing.10 PUC Opinion at 11, 19-21. The PUC was not

persuaded by Consumers' lay opinions as to the purported health effects that RF

emissions from smart meters would cause. Id. at 11.

Even if Consumers met their threshold burden, the PUC found that

PPL's credible expert evidence successfully rebutted any premise that the

9 On appeal, Consumers again attempt to rely on extra-record evidence in support of their

claims. See Petitioners' Brief at 22, 32-33, 42, 49, 50, 52-57. However, this Court "cannot

consider new evidence, and instead, must rely upon the evidence contained in the record certified

by the agency." Weaver v. Pennsylvania Board of Probation and Parole, 688 A.2d 766, 773 (Pa.

Cmwlth. 1997).

10 Although the "'technical' rules of evidence do not limit administrative hearings, where

all relevant evidence of reasonably probative value is admissible," Gasparro v. Pennsylvania

Public Utility Commission, 814 A.2d 1282, 1284 (Pa. Cmwlth. 2003), this does not undermine the

PUC's authority, as factfinder, to assign evidentiary weight to the evidence. Milkie, 768 A.2d at

1221.

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installation of the PPL smart meter could cause adverse health effects or exacerbate

Consumers' underlying health conditions. Specifically, Mark Israel, M.D. (Dr.

Israel), a medical expert, testified that "claimed symptoms related to

Electromagnetic Hypersensitivity (EHS) are more accurately described as Idiopathic

Environmental Intolerance (IEI), in which 'idiopathic' means 'cause unknown.'"

PUC Opinion at 11. The PUC found that Dr. Israel testified to a reasonable degree

of medical certainty that there is no reliable medical basis to conclude that RF fields

from the PPL smart meter will cause or contribute to the development of illness or

diseases. Id.

In addition, Christopher Davis, Ph.D. (Dr. Davis), a professor of

electrical and computer engineering with a Ph.D. in Physics, testified that the PPL

smart meter would not cause adverse health effects. He testified that the levels of

RF fields from the PPL smart meters are 98,000 times lower than the RF exposure

safety limits established by the Federal Communications Commission (FCC).11 PUC

Opinion at 12. He also testified that the RF fields from the PPL smart meter are

much lower than typical sources such as cell phones, which can be over 260,000

times higher than a smart meter. Id. at 18. Persuaded by PPL's expert evidence, the

PUC concluded that there is no reliable medical basis to conclude that RF fields from

the PPL smart meter would cause, contribute to, or exacerbate any of the symptoms

claimed by Consumers, or any other adverse health effects. PUC Opinion at 20.

As in Povacz II, the PUC in this case found that the evidence of

potential harm was inconclusive and determined that Consumers failed to sustain

11 The PUC noted that the FCC has determined safe public exposure levels for RF fields

from devices that transmit RF signals, such as the smart meters. PUC Opinion at 11. Those limits

are based on evaluations of the body of scientific research on RF fields and were adopted in

consultation with other federal agencies, including the Food and Drug Administration and the

Environmental Protection Agency. Id. at 11-12.

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their burden of proof. The PUC weighed the evidence presented and found that

Consumers' lay testimony regarding the potential harm from smart meters was

outweighed by the contrary expert evidence. Such determinations are the sole

province of the PUC as factfinder, and we will not disturb them on appeal. See

Milkie, 768 A.2d at 1221. Upon review, we conclude that the PUC's findings are

supported by substantial evidence and support the conclusion that no causal

connection exists between smart meters and the alleged harm.

IV. Conclusion

Accordingly, we affirm the PUC's order.

MICHAEL H. WOJCIK, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Paula and Charles Hughes, :

:

Petitioners :

:

v. : No. 827 C.D. 2020

:

Pennsylvania Public Utility :

Commission, :

:

Respondent :

O R D E R

AND NOW, this 1st day of August, 2024, the order of the Pennsylvania Public Utility Commission, dated July 16, 2020, is AFFIRMED.

____

MICHAEL H. WOJCIK, Judge

Exhibit F – *Union Pacific Railway Co. v. Botsford*, 141 U.S. 250 (1891) – Full Opinion.

UNION PAC. RY. CO. v. BOTSFORD.

- **Supreme Court**

141 U.S. 250

11 S.Ct. 1000

35 L.Ed. 734

UNION PAC. RY. CO.
v.
BOTSFORD.

May 25, 1891.

In error to the circuit court of the United States for the district of Indiana.

The original action was by Clara L. Botsford against the Union Pacific Railway Company for negligence in the construction and care of an upper berth in a sleeping-car in which she was a passenger, by reason of which the berth fell upon her head, bruising and wounding her, rupturing the membranes of the brain and spinal cord, and causing a concussion of the same, resulting in great suffering and pain to her in body and mind, and in permanent and increasing injuries. Answer, a general denial. Three days before the trial (as appeared by the defendant's bill of exceptions) 'the defendant moved the court for an order against the plaintiff, requiring her to submit to a surgical examination in the presence of her own surgeon and attorneys, if she desired their presence; it being proposed by the defendant that such examination should be made in manner not to expose the person of the plaintiff in any indelicate manner, the defendant at the time informing the court that such examination was necessary to enable a correct diagnosis of the case, and that without such examination the defendant would be with out any witnesses as to her condition. The court overruled said motion, and refused to make said order, upon the sole ground that this court had no legal right or power to make and enforce such order.' To this ruling and action of the court the defendant duly excepted, and after a trial, at which the plaintiff and other witnesses testified in her behalf, and which resulted in a verdict and judgment for her in the sum of $10,000, sued out this writ of error.

***John F. Dillon*, for plaintiff in error.**

***A. C. Harris*, for defendant in error.**

Mr. Justice GRAY, after stating the facts as above, delivered the opinion of the court.

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The single question presented by this record is whether in a civil action for an injury to the person, the court, on application of the defendant, and in advance of the trial may order the plaintiff without his or her consent, to submit to a surgical examination as to the extent of the injury sued for. We concur with the circuit court in holding that it had no legal right or power to make and enforce such an order. No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law. As well said by Judge Cooley: 'The right to one's person may be said to be a right of complete immunity; to be let alone.' Cooley, Torts, 29. For instance, not only wearing apparel, but a watch or a jewel, worn on the person, is, for the time being, privileged from being taken under distress for rent, or attachment on mesne process or execution for debt, or writ of replevin. 3 Bl. Comm. 8; Sunbolf v. Alford, 3 Mees, & W. 248, 253, 254; Mack v. Parks, 8 Gray, 517; Maxham v. Day, 16 Gray, 213. The inviolability of the person is as much invaded by a compulsory stripping and exposure as by a blow. To compel any one, and especially a woman, to lay bare the body, or to submit it to the touch of a stranger, without lawful authority, is an indignity, an assault, and a trespass; and no order of process, commanding such an exposure or submission, was ever known to the common law in the administration of justice between individuals, ecep t in a very small number of cases, based upon special reasons, and upon ancient practice, coming down from ruder ages, now mostly obsolete in England, and never, so far as we are a ware, introduced into this country. In former times, the English courts of common law might, if they saw fit, try by inspection or examination, without the aid of a jury, the question of the infancy or of the identity of a party; or, on an appeal of mayhem, the issue of mayhem or no mayhem; and, in an action of trespass for mayhem, or for an atrocious battery, might after a verdict for the plaintiff, and on his motion, and upon their own inspection of the wound, ***super visum*** **vulneris, increase the damages at their discretion. In each of those exceptional cases, as Blackstone tells us, 'it is not thought necessary to summon a jury to decide it,' because 'the fact, from its nature, must be evident to the court, either from ocular demonstration or other irrefragable proof;'**

and therefore, 'the law departs from its usual resort, the verdict of twelve men and relies on the judgment of the court alone.' The inspection was not had for the purpose of submitting the result to the jury, but the question was thought too easy of decision to need submission to a jury at all. 3 Bl. Comm. 331-333. The authority of courts of divorce, in determining a question of impotence as affecting the validity of a marriage, to order an inspection by surgeons of the person of either party, rests upon the interest which the public, as well as the parties, have in the question of upholding or dissolving the marriage state, and upon the necessity of such evidence to enable the court to exercise its jurisdiction, and is derived from the civil and canon law, as administered in spiritual and ecclesiastical courts, not proceeding in any respect according to the course of the common law. Briggs v. Morgan 2 Hagg. Coust. 324, 3 Phillim. Ecc. 325; Devanbagh v. Devanbagh, 5 Paige, 554; Le Barron v. Le Barron 35 Vt. 365. The writ *de ventre inspiciendo*, to ascertain whether a woman convicted of a capital crime was quick with child, was allowed by the common law, in order to guard against the taking of the life of an unborn child for the crime of the mother.

2

The only purpose, we believe, for which the like writ was allowed by the common law, in a matter of civil right, was to protect the rightful succession to the property of a deceased person against fraudulent claims of bastards, when a widow was suspected to feign herself with child in order to produce a supposititious heir to the estate, in which case the heir or devisee might have this writ to examine whether she was with child or not, and, if she was, to keep her under proper restraint till delivered. 1 Bl. Comm. 456; Bac. Abr. 'Bastard, A.' In cases of that class, the writ has been issued in England in quite recent times. In re Blakemore, 14 Law J. Ch. 336. But the learning and research of the counsel for the plaintiff in error have failed to produce an instance of its ever having been considered, in any part of the United States, as suited to the habits and condition of the people. So far as the books within our reach show, no order to inspect the body of a party in a personal action appears to have been made, or even moved for, in any of the English courts of common law, at any period of their history. The most analogous cases in England that have come under our notice are two in the common bench, in each of which an

order for the inspection of a building was asked for in an action for work and labor done thereon, and was refused for want of power in the court to make or enforce it. In one of them, decided in 1838, counsel moved for an order that the plaintiff and his witnesses have a view of the building, and an inspection of the work done thereon; and stated that the object of the motion was to prevent great expense, to obviate the necessity of calling a host of surveyors, and to avoid being considered trespassers. Thereupon one of the judgessai d, 'Then you are asking the court to make an order for you to commit a trespass;' and Chief Justice TINDAL said: 'Suppose the defendants keep the door shut; you will come to us to grant an attachment. Could we grant it in such a case? You had better see if you can find any authority to support you, and mention it to the court again.' On a subsequent day, the counsel stated that he had not been able to find any case in point, and therefore took nothing by his motion. Newham v. Tate, 1 Arn. 244, 6 Scott, 574. In the other case, in 1840, the court discharged a similar order, saying: 'The order, if valid, might, upon disobedience to it, be enforced by attachment. Then it is evidently one which a judge has no power to make. If the party should refuse so reasonable a thing as an inspection, it may be a matter of argument before the jury, but the court has no power to enforce it.' Turquand v. Strand Union, 8 Dowl. 201, 4 Jur. 74. In the English common law procedure act of 1854, enlarging the powers which the courts had before, and authorizing them, on the application of either party, to make an order 'for the inspection by the jury, or by himself, or by his witnesses, of any real or personal property, the inspection of which may be material to the proper determination of the question in dispute,' the omission to mention inspection of the person is significant evidence that no such inspection, without consent, was allowed by the law of England. Tayl. Ev. (6th Ed.) §§ 502-504. Even orders for the inspection of documents could not be made by a court of common law, until expressly authorized by statute, except when the document was counted or pleaded on, or might be considered as held in trust for the moving party. Tayl. Ev. §§ 1588-1595; 1 Greenl. Ev. § 559.

3

In the case at bar, it was argued that the plaintiff in an action for personal injury may be permitted by the court, as in Mulhado v. Railroad, 30 N. Y. 370, to exhibit his wounds to the jury in order to show their nature and extent, and

to enable a surgeon to testify on that subject, and therefore may be required by the court to do the same thing, for the same purpose, upon the motion of the defendant. But the answer to this is that any one may expose his body, if he chooses, with a due regard to decency, and with the permission of the court; but that he cannot be compelled to do so, in a civil action, without his consent. If he unreasonably refuses to show his injuries, when asked to do so, that fact may be considered by the jury as bearing on his good faith, as in any other case of a party declining to produce the best evidence in his power. Clifton v. U. S., 4 How. 242; Bryant v. Stilwell, 24 Pa. St. 314; Turquand v. Strand Union, above cited. In this country, the earliest instance of an order for the inspection of the body of the plaintiff in an action for a personal injury appears to have been in 1868, by a judge of the superior court of the city of New York in Walsh v. Sayre, 52 How. Pr. 334, since overruled by decisions in general term in the same state. Roberts v. Railroad, 29 Hun, 154; Neuman v. Railroad, 50 N. Y. Super. Ct. 412; McSwyny v. Railroad Co., 7 N. Y. Supp. 456. And the power to make such an order was peremptorily denied in 1873 by the superme court of Missouri, and in 1882 by the supreme court of Illinois. Loyd v. Railroad Co., 53 Mo. 509; Parker v. Enslow, 102 Ill. 272. Within the last 15 years, indeed, as appears by the cases cited in the brief of the plaintiff in error,[1] a practice to grant such orders has prevailed in the courts of several of the western and southern states, following the lead of the supreme court of Iowa in a case decided in 1877. The consideration due to the decisions of those courts has induced us fully to examine, as we have done above, the precedents and analogies on which they rely. Upon mature advisement, we retain our original opinion that such an order has no warrant of law. In the state of Indiana, the question appears not to be settled. The opinions of its highest court are conflicting and indecisive. Kern v. Bridwell, 119 Ind. 226, 229, 21 N. E. Rep. 664; Hess v. Lowrey, 122 Ind. 225, 233, 23 N. E. Rep. 156; Railroad v. Brunker, (Ind.) 26 N. E. Rep. 178. And the only statute which could be supposed to bear upon the question simply authorizes the court to order a view of real or personal property which is the subject of litigation, or of the place in which any material fact occurred. Rev. St. Ind. 1881, c. 2, § 538.

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But this is not a question which is governed by the law or practice of the state in which the trial is had. It depends upon the power of the national courts, under the constitution and laws of the United States. The constitution, in the seventh amendment, declares that in all suits at common law, where the value in controversy shall exceed $20, trial by jury shall be preserved. Congress has enacted that 'the mode of proof in the trial of actions at common law shall be by oral testimony and examination of witnesses in open court, except as hereinafter provided,' and has then made special provision, for taking depositions. Rev. St. §§ 861, 863 et seq. The only power of discovery or inspection conferred by congress is to 'require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery,' and to nonsuit or default a party failing to comply with such an order. Rev. St. § 724. And the provisions of section 914, by which the practice, pleadings, and forms and modes of proceeding in the courts of each state are to be followed in actions at law in the courts of the United States held within the same state, neither restricts nor enlarges the power of these courts to order the examination of parties out of court. Nudd v. Burrows, 91 U. S. 426, 442; Railroad Co. v. Horst, 93 U. S. 291, 300; Ex parte Fisk, 113 U. S. 713, 5 Sup. Ct. Rep. 724; Chateaugay Ore & Iron Co., 128 U. S. 544, 554, 9 Sup. Ct. Rep. 150. In Ex parte Fisk, just cited, the question was whether a statute of New York, permitting a party to an action at law to be examined by his adversary as a witness in advance of the trial, was applicable after an action begun in a court of the state had been removed into the circuit court of the United States. It was argued that the object of section 861 of the Revised Statutes of the United States was to provide a mode of proof on the trial, and not to affect this proceeding in the nature of discovery, conducted in accordance with the practice prevailing in New York. 113 U. S. 717, 5 Sup. Ct. Rep. 724. But this court, speaking by Mr. Justice MILLER, held that this was a matter of evidence, and governed by that section, saying: 'Its purpose is clear to provide a mode of proof in trials at law, to the exclusion of all other modes of proof.' 'It is not according to common usage to call a party in advance of the trial at law, and subject him to all the skill of opposing counsel, to extract something

which he may use or not as it suits his purpose.' 'Every action at law in a court of the United States must be governed by the rule or by the exceptions which the statute provides. There is no for exceptions made by state statutes. The court is not at liberty to adopt them, or to require a party to conform to them. It has no power to subject a party to such an examination as this.' 113 U. S. 724, 5 Sup. Ct. Rep. 724. So we say her. T he order moved for, subjecting the plaintiff's person to examination by a surgeon, without her consent and in advance of the trial, was not according to the common law, to common usage, or to the statutes of the United States. The circuit court, to adopt the words of Mr. Justice MILLER, 'has no power to subject a party to such an examination as this.'

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Judgment affirmed.

BREWER, J., (*dissenting*.)

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Mr. Justice BROWN and myself dissent from the foregoing opinion. The silence of common-law authorities upon the question in cases of this kind proves little or nothing. The number of actions to recover damages, in early days, was, compared with later times, limited; and very few of those difficult questions, as to the nature and extent of the injuries, which now form an important part of such litigations, were then presented to the courts. If an examination was asked, doubtless it was conceded without objection, as one of those matters the right to which was beyond dispute. Certainly the power of the courts and of the common-law courts to compel a personal examination was, in many cases, often exercised, and unchallenged. Indeed, wherever the interests of justice seemed to require such an examination, it was ordered. The instances of this are familiar; and in those instances the proceedings were, as a rule, adverse to the party whose examination was ordered. It would be strange that, if the power to order such an examination was conceded in proceedings adverse to the party ordered to submit thereto, it should be denied where the suit is by the party whose examination is sought. In this country the decisions of the highest courts of the various states are conflicting. This is the first time

it has been presented to this court, and it is therefore an open question. There is here no inquiry as to the extent to which such an examination may be required, or the conditions under which it may be held, or the proper provisions against oppression or redeness, nor any inquiry as to what the court may do for the purpose of enforcing its order. As the question is presented, it is only whether the court can make such an order.

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The end of litigation is justice. Knowledge of the truth is essential thereto. It is conceded, and it is a matter of frequent occurrence, that in the trial of suits of this nature the plaintiff may make in the courtroom, in the presence of the jury, any not indecent exposure of his person to show the extent of his injuries; and it is conceded, and also a matter of frequent occurrence, that in private he may call his personal friends and his own physicians into a room, and there permit them a full examination of his person, in order that they may testify as to what they see and find. In other words, he may thus disclose the actual facts to the jury if his interest require; but by this decision, if his interests are against such a disclosure, it cannot be compelled. It seems strange that a plaintiff may, in the presence of a jury, be permitted to roll up his sleeve and disclose on his arm a wound of which he testifies; but, when he testifies as to the existence of such a wound, the court, though persuaded that he is perjuring himself, cannot require him to roll up his sleeve, and thus make manifest the truth, nor require him, in the like interest of truth, to step into an adjoining room, and lay bare his arm to the inspection of surgeons. It is said that there is a sanctity of the person which may not be outraged. We believe that truth and justice are more sacred than any personal consideration; and if in other cases, in the interests of justice, or from considerations of mercy, the courts may, as they often do, require such personal examination, why should they not exercise the same power in cases like this, to prevent wrong and injustice?

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It is not necessary, nor is it claimed, that the court has power to fine and imprison for disobedience of such an order. Disobedience to it is not a matter of contempt. It is an order like those requiring security for costs. The court

never fines or imprisons for disobedience thereof. It simply dismisses the case or stays the trial until the security is given. So it seems to us that justice requires, and that the court has the power to order, that a party who voluntarily comes into court alleging personal injuries, and demanding damages therefor, should permit disinterested witnesses to see the nature and extent of those injuries, in order that the jury may be informed thereof by other than the plaintiff and his friends; and that compliance with such an order may be enforced by staying the trial or dismissing the case. For these reasons we dissent.

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Schroeder v. Railway Co., 47 Iowa, 375; Turnpike Co. v. Baily, 37 Ohio St. 104; Railroad Co. v. Thul, 29 Kan. 466; White v. Railway Co., 61 Wis. 536, 21 N. W. Rep. 524; Hatfield v. Railroad Co., 33 Minn. 130, 22 N. W. Rep. 176; Stuart v. Havens, 17 Neb. 211, 22 N. W. Rep. 419; Owens v. Railroad Co., 95 Mo. 169, 8 S. W. Rep. 350; Sibley v. Smith, 46 Ark. 275; Railroad Co. v. Johnson, 72 Tex. 95, 10 S. W. Rep. 325; Railroad Co. v. Childress, 82 Ga. 719, 9 S. E. Rep. 602; Railroad Co. v. Hill, 90 Ala. 71, 8 South. Rep. 90.

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Exhibit G – *Tandon v. Newsom*, 141 S.Ct. 1294 (2021) – Full Opinion.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RITESH TANDON; KAREN BUSCH;

TERRY GANNON; CAROLYN GANNON;

JEREMY WONG; JULIE EVARKIOU;

DHRUV KHANNA; CONNIE RICHARDS;

FRANCES BEAUDET; MAYA

MANSOUR,

Plaintiffs-Appellants,

v.

GAVIN NEWSOM; XAVIER BECERRA;

SANDRA SHEWRY; ERICA PAN;

JEFFREY V. SMITH; SARA H. CODY,

Defendants-Appellees.

No. 21-15228

D.C. No. 5:20-cv-07108-LHK

Northern District of California,

San Jose

ORDER

Before: M. SMITH, BADE, and BUMATAY, Circuit Judges.

Order by Judges M. SMITH and BADE, Partial Dissent and Partial Concurrence by

Judge BUMATAY

This appeal challenges the district court's February 5, 2021 order denying

Appellants' motion for a preliminary injunction. Appellants now move for an

emergency injunction pending appeal, seeking to prohibit the enforcement of

California's restrictions on private "gatherings" and various limitations on

businesses as applied to Appellants' in-home Bible studies, political activities, and

business operations. We conclude that the Appellants have not satisfied the

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U.S. COURT OF APPEALS

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requirements for the extraordinary remedy of an injunction pending appeal. See

Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 22 (2008) ("[I]njunctive relief [is]

an extraordinary remedy that may only be awarded upon a clear showing that the

plaintiff is entitled to such relief."). Therefore, we deny the emergency motion.

I.

A.

In the district court, Appellants challenged the State's and Santa Clara County's restrictions on private "gatherings." However, in this motion, Appellants limit their challenges to the State's restrictions.1 These restrictions "appl[y] to private gatherings, and all other gatherings not covered by existing sector guidance are prohibited." Cal. Dep't of Pub. Health, Guidance for the Prevention of COVID-19 Transmission for Gatherings, https://cdph.ca.gov/programs/cid/dcdc/pages/covid-19/guidance-for-the-prevention-of-covid-19-transmission-for-gatherings-november-2020.aspx (last visited Mar. 30, 2021). "Gatherings are defined as social situations that bring

1 The State restrictions assign counties to different tiers based on factors such as adjusted COVID-19 case rates, positivity rates, a health equity metric, and vaccination rates. See Cal. Dep't of Pub. Health, Blueprint for a Safer Economy, https://covid19.ca.gov/safer-economy/#tier-assignments (last visited Mar. 30, 2021). These tiers are assigned number and color designations in descending order of risk: Widespread (Tier 1 or purple); Substantial (Tier 2 or red); Moderate (Tier 3 or orange); and Minimal (Tier 4 or yellow). See id. Appellants reside in Santa Clara

County, which is currently a Tier 2 county.

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together people from different households at the same time in a single space or

place." Id. Under these restrictions, indoor and outdoor gatherings are limited to

three households, but indoor gatherings are prohibited in Tier 1 and "strongly

discouraged" in the remaining tiers. Id. The gatherings restrictions also limit

gatherings in public parks or other outdoor spaces to three households. Id. A

gathering must be in a space that is "large enough" to allow physical distancing of

six feet, should be two hours or less in duration, and attendees must wear face

coverings. Id. Finally, singing, chanting, shouting, cheering, and similar activities

are allowed at outdoor gatherings with restrictions, but singing and chanting are not

allowed at indoor gatherings. Id.

Appellants assert that the State's gatherings restrictions provide exemptions,

which allow outdoor gatherings with social distancing, political protests and rallies,

worship services, and cultural events such as weddings and funerals. Therefore, we

also consider the restrictions that apply to these events. Under the State's

restrictions, outdoor services with social distancing are allowed at houses of

worship, such as churches, mosques, temples, and synagogues. About COVID-19

Restrictions, https://covid19.ca.gov/stay-home-except-for-essential-needs (under

"Can I Go to Church" tab) (last visited Mar. 30, 2021). Indoor services at houses of

worship are subject to capacity restrictions (25% of capacity in Tier 1 and 2 counties,

and 50% of capacity in Tier 3 and 4 counties), and other safety modifications

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including face coverings, COVID-19 prevention training, social distancing, cleaning

and disinfection protocols, and restrictions on singing and chanting. Id.; see also

Industry Guidance to Reduce Risk, https://covid19.ca.gov/industry-

guidance#worship (under "Places of worship and cultural ceremonies—updated

February 22, 2021" tab) (last visited Mar. 30, 2021).

The restrictions for houses of worship also apply to cultural ceremonies such

as funerals and wedding ceremonies. About COVID-19 Restrictions,

https://covid19.ca.gov/stay-home-except-for-essential-needs/ (under "Are weddings

allowed?" tab) (last visited Mar. 30, 2021). However, wedding receptions are

subject to the gatherings restrictions, so in Tier 1 receptions must take place outdoors

and are limited to three households, while outdoor or indoor receptions, limited to

three households, are allowed in the other tiers. Id.

"[S]tate public health directives do not prohibit in-person outdoor protests and

rallies" with social distancing and face coverings. Id. (under "Can I engage in

political rallies and protest gatherings?" tab) (emphasis in original). The terms

"protests" and "rallies" are not defined,2 but the guidance states that "Local Health

Officers are advised to consider appropriate limitations on outdoor attendance

capacities," and that failure to follow the social distancing restrictions and to wear

2 One dictionary defines a "rally" as "a mass meeting intending to arouse

group enthusiasm." See Rally, MERRIAM-WEBSTER, https://www.merriam-

webster.com/dictionary/rally (last visited Mar. 30, 2021).

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face coverings "may result in an order to disperse or other enforcement action." Id.

Indoor protests and rallies are not allowed in Tier 1 counties but are allowed in other

counties subject to the capacity restrictions for places of worship, social distancing,

face covering requirements, and prohibitions on singing and chanting. Id.

B.

Appellants challenge the restrictions on three grounds. First, Appellants

Pastor Jeremy Wong and Karen Busch argue that the gatherings restrictions violate

their right to free exercise of religion because they prevent them from holding in-

home Bible studies and communal worship with more than three households in

attendance. Second, Appellants Ritesh Tandon and Terry and Carolyn Gannon

argue that the gatherings restrictions violate their First Amendment rights to freedom

of speech and assembly. Tandon was a candidate for the United States Congress in

2020 and plans to run again in 2022, and he claims that the gatherings restrictions

prevent him from holding in-person campaign events and fundraisers. The Gannons

assert that the restrictions prohibit them from hosting forums on public affairs at

their home. Finally, the business owner Appellants argue that the gatherings

restriction, capacity limitations, and other regulations on their businesses violate

their Fourteenth Amendment substantive due process and equal protection rights.

C.

In determining whether to grant an injunction pending appeal, we apply the

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test for preliminary injunctions. Se. Alaska Conservation Council v. U.S. Army

Corps of Eng'rs, 472 F.3d 1097, 1100 (9th Cir. 2006). "A plaintiff seeking a

preliminary injunction must establish that he is likely to succeed on the merits, that

he is likely to suffer irreparable harm in the absence of preliminary relief, that the

balance of equities tips in his favor, and that an injunction is in the public interest."

Winter, 555 U.S. at 20.

II.

A.

We first address Appellants' free exercise claim. The district court denied

Appellants' motion for a preliminary injunction because it concluded that

California's private gatherings restrictions are neutral and generally applicable, and

rationally related to a legitimate government interest. Tandon v. Newsom, No. 20-

CV-07108-LHK, 2021 WL 411375, at *38 (N.D. Cal. Feb. 5, 2021). Alternatively,

the district court concluded that the restrictions would satisfy strict scrutiny. Id.

Appellants argue that the district court erred in applying rational basis review, that

the restrictions do not meet the heightened standard of strict scrutiny, and that we

should therefore issue an injunction pending appeal.3

3 Appellants do not argue that the State's restrictions on gatherings would fail

rational basis review. Under that deferential standard, regulations "must be upheld

. . . if there is any reasonably conceivable state of facts that could provide a rational

basis for the classification." Heller v. Doe, 509 U.S. 312, 320 (1993) (quoting

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Specifically, Appellants assert that the Supreme Court's decisions in Gateway

City Church v. Newsom, __ S. Ct. __, 2021 WL 753575 (Feb. 26, 2021), South Bay

United Pentecostal Church v. Newsom, 141 S. Ct. 716 (2021) (South Bay II), and

Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63 (2020) (per curiam),

establish that the restrictions at issue are not "neutral and generally applicable" and

thus strict scrutiny applies.4 In these cases, the Court addressed free exercise

F.C.C. v. Beach Commc'ns, Inc., 508 U.S. 307, 313 (1993)). In contrast, under strict

scrutiny, the regulations "must be 'narrowly tailored' to serve a 'compelling' state

interest." Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 67 (2020)

(per curiam) (quoting Church of the Lukumi Babalu Aye, Inc., v. City of Hialeah,

508 U.S. 520, 546 (1993)).

4 The parties do not discuss, or even cite, the Supreme Court's recent decisions

in Harvest Rock Church v. Newsom, ___ S. Ct. ___, No. 20A137, 2021 WL 406257

(Feb. 5, 2021) (per curiam), and Harvest Rock Church v. Newsom, 141 S. Ct. 889

(2020) (mem.). In the first of these two decisions in the same case, without

elaboration, the Court treated an application for injunctive relief as a petition for writ

of certiorari before judgment and granted the petition, vacated the district court's

judgment, and remanded to this court to remand to the district court for "further

consideration in light of" Roman Catholic Diocese. 141 S. Ct. 889.

In the second decision, the Court considered the same prohibitions on indoor

services at house of worship that were at issue in Gateway, 2021 WL 3086060, at

***4, and South Bay II, 141 S. Ct. at 716, and granted an application for injunctive**

relief pending appeal and enjoined the State from enforcing the Tier 1 prohibition

on indoor worship services but denied the application with respect to the percentage

capacity limitations and the singing and chanting restrictions during indoor services.

2021 WL 406257 at *1. While some Justices noted that they would have granted

the application for injunctive relief in full and other Justices noted that they

dissented, those Justices only referenced their statements in South Bay II. See id.

Thus, Harvest Rock does not substantively add to the body of case law informing

our analysis, as our dissenting colleague apparently agrees. See Dissent at 7 (noting

that "Roman Catholic Diocese, South Bay [II], and Gateway City Church instruct

us").

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challenges to COVID-19-based capacity limitations at public places of worship that

were more prohibitive than capacity limitations at comparable businesses. See

Gateway, __ S. Ct. __, 2021 WL 753575; South Bay II, 141 S. Ct. 716; Roman

Catholic Diocese, 141 S. Ct. 63.

Appellants further argue that the State's current restrictions on in-home or

private religious gatherings fail strict scrutiny because they do not apply to "a host

of comparable secular activities," such as entering crowded train stations, airports,

malls, salons, and retail stores, waiting in long check-out lines, and riding on buses.

Thus, Appellants argue that the State's gatherings restriction is underinclusive

because it does not "include in its prohibition substantial, comparable secular

conduct that would similarly threaten the government's interest." Stormans, Inc., v.

Wiesman, 794 F.3d 1064, 1079 (9th Cir. 2015).

But as we explain below, from our review of these recent Supreme Court

decisions, we conclude that Appellants are making the wrong comparison because

the record does not support that private religious gatherings in homes are

comparable—in terms of risk to public health or reasonable safety measures to

address that risk—to commercial activities, or even to religious activities, in public

buildings. When compared to analogous secular in-home private gatherings, the

State's restrictions on in-home private religious gatherings are neutral and generally

applicable and, thus, subject to rational basis review. See Church of the Lukumi

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Babalu Aye, Inc., v. City of Hialeah, 508 U.S. 520, 531 (1993) (holding that "a law

that is neutral and of general applicability . . . even if the law has the incidental effect

of burdening a particular religious practice" must only survive rational basis review).

Therefore, we conclude that Appellants have not established a likelihood of success

on the merits. See Winter, 555 U.S. at 20.

B.

As Appellants argue, three recent Supreme Court decisions addressing free

exercise challenges to COVID-19 restrictions are relevant to our analysis. First, in

Roman Catholic Diocese, the Court held that New York's COVID-19 restrictions

triggered strict scrutiny because "[t]he applicants . . . made a strong showing that the

challenged restrictions violate 'the minimum requirement of neutrality' to religion."

141 S. Ct. at 66 (quoting Lukumi, 508 U.S. at 533). The Court wrote that "the

regulations cannot be viewed as neutral because they single out houses of worship

for especially harsh treatment." Id.

As proof of this "especially harsh treatment," the Court pointed out that "while

a synagogue or church may not admit more than 10 persons, businesses categorized

as 'essential' may admit as many people as they wish," and that those "essential

businesses" included "acupuncture facilities, camp grounds, garages, as well as . . .

all plants manufacturing chemicals and microelectronics and all transportation

facilities." Id.; see also id. at 69 (Gorsuch, J., concurring) ("People may gather

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inside for extended periods in bus stations and airports, in laundromats and banks,

in hardware stores and liquor shops. No apparent reason exists why people may not

gather, subject to identical restrictions, in churches or synagogues . . . ."). Because

"a large store in Brooklyn . . . could 'literally have hundreds of people shopping

there on any given day,'" but "a nearby church or synagogue would be prohibited

from allowing more than 10 or 25 people inside for a worship service," the

restrictions were not neutral or generally applicable. Id. at 67 (citation omitted). The

Court further held that the restrictions did not pass strict scrutiny. Id.

Then, in South Bay II, the Court reviewed California's Tier 1 restrictions, which included a total "prohibition on indoor worship services," and enjoined enforcement of this restriction. 141 S. Ct. at 716. Justice Gorsuch, joined by Justices

Thomas and Alito, and with whom Justices Kavanaugh and Barrett agreed,5 wrote:

California has openly imposed more stringent regulations on religious institutions than on many businesses. The State's spreadsheet summarizing its pandemic rules even assigns places of worship their own row. [For the Tier 1 regulations] applicable [at that time] in most of the State, California forbids any kind of indoor worship. Meanwhile, the State allows most retail operations to proceed indoors with 25% occupancy, and other businesses operate at 50% occupancy or more. Apparently, California is the only State in the country that has gone so far to ban all indoor religious services.

5 Justice Barrett did not join Justice Gorsuch's statement, but she "agree[d] with [that] statement, save" one issue not relevant to this appeal. South Bay II, 141

S. Ct. at 717 (Barrett, J., joined by Kavanaugh, J., concurring in the partial grant of

application for injunctive relief).

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Id. at 717 (Statement of Gorsuch, J.) (citations omitted). Justice Gorsuch also compared indoor religious services to the "scores [that] might pack into train stations

or wait in long checkout lines in the businesses the State allows to remain open." Id.

at 718. And he questioned California's arguments about close physical proximity,

even as it allowed certain businesses to permit closer physical interactions. Id. at

718–19.

Finally, the Court addressed Santa Clara County's restrictions in Gateway, __

S. Ct. __, 2021 WL 753575. Santa Clara County had enacted a restriction that

"[p]rohibited" all indoor gatherings. As examples, Santa Clara County listed

"political events, weddings, funerals, worship services, movie showings, [and]

cardroom operations." But the county imposed different restrictions for "a number

of businesses and activity types, including retail stores," which were allowed to

operate at 20% capacity indoors. Gateway City Church v. Newsom, No. 20-08241,

2021 WL 308606, at *4 (N.D. Cal. Jan. 29, 2021). Our court affirmed the district

court's ruling and held that this regulation, which restricted indoor gatherings in

"places of worship," "applie[d] equally to all indoor gatherings of any kind or type,

whether public or private, religious or secular" because it did "not 'single out houses

of worship' for worse treatment than secular activities." Gateway City Church v.

Newsom, 2021 WL 781981, at *1 (9th Cir. Feb. 12, 2021) (quoting Roman Catholic

Diocese, 141 S. Ct. at 66). The Court rejected this reasoning, stating: “The Ninth

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Circuit’s failure to grant relief was erroneous. This outcome is clearly dictated by

[the] Court’s decision in” South Bay II. Gateway, 2021 WL 753575, at *1.

C.

Reviewing this precedent, we conclude that the regulations at issue in Gateway and South Bay II, which applied total bans on indoor services at houses of worship, differ significantly from those at issue in this case. The gatherings restrictions at issue here do not impose a total ban on all indoor religious services, but instead limit private indoor and outdoor gatherings to three households. There is no indication that the State is applying the restrictions to in-home private religious gatherings any differently than to in-home private secular gatherings.

“[I]f the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral.” Lukumi, 508 U.S. at 533. But here, the gatherings restrictions apply equally to private religious and private secular gatherings, and there is no indication, or claim, of animus toward religious gatherings. The restrictions do not list examples of prohibited gatherings or single out religious gatherings. See Blueprint for a Safer Economy,

https://www.cdph.ca.gov/Programs/CID/DCDC/CDPH%20Document%20Library/

COVID-19/Dimmer-Framework-September_2020.pdf (last visited Mar. 30, 2021).

Thus, the gatherings restrictions are neutral on their face. See Lukumi, 508 U.S. at

533 (holding that for a law that burdens religious practice to be neutral, it must at

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least be neutral on its face).

However, "[f]acial neutrality is not determinative." Id. at 534.6 Instead, we

must also "survey meticulously the circumstances of governmental categories" to

determine whether there are "subtle departures from neutrality" or "religious

gerrymander[ing]," which could indicate that the object of the law is to restrict

religious practices. Id. (citations and internal quotation marks omitted). Here,

Appellants have not asserted that the object of the gatherings restrictions is to restrict

religious practices, and there is no indication that the restrictions were adopted for

discriminatory purposes instead of addressing public health concerns.

Accordingly, we must consider whether the regulations nonetheless "treat[]

religious observers unequally," and thus are not laws of general applicability. See

Parents for Privacy v. Barr, 949 F.3d 1210, 1235 (9th Cir. 2020). One way to assess

whether a law is selectively applicable is to determine whether the law's restrictions

"substantially underinclude non-religiously motivated conduct that might endanger

the same governmental interest that the law is designed to protect." Stormans, 794

6 Thus, we agree with our dissenting colleague that "the fact that a restriction

is itself phrased without reference to religion is not dispositive." Dissent at 6.

However, we note that, unlike in South Bay II, where California's "spreadsheet

summarizing its pandemic rules even assign[ed] places of worship their own row,"

141 S. Ct. at 717 (Statement of Gorsuch, J.), the gatherings restrictions here never

mention religion. See also Agudath Israel of Am. v. Cuomo, 979 F.3d 177, 182 (2d

Cir. 2020) (Park, J., dissenting) ("In each zone, the order subjects only 'houses of

worship' to special 'capacity limit[s].'").

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F.3d at 1079 (citing Lukumi, 508 U.S. at 542–46). "In other words, if a law pursues

the government's interest 'only against conduct motivated by religious belief' but

fails to include in its prohibitions substantial, comparable secular conduct that would

similarly threaten the government's interest, then the law is not generally

applicable." Id. (quoting Lukumi, 508 U.S. at 545).

Appellants argue that pursuant to the reasoning of Roman Catholic Diocese,

South Bay II, and Gateway, the gatherings restrictions at issue in this case are

underinclusive because the State applies different restrictions to commercial activity

in public buildings. Appellants compare the restrictions on private gatherings to the

restrictions on commercial activities in public buildings, such as train stations, malls,

salons, and airports. But in Roman Catholic Diocese, South Bay II, and Gateway,

the Court did not make similar comparisons. Instead, in each case in which the

Supreme Court compared religious activity to commercial activity, it did so in the

context of comparing public-facing houses of worship to public-facing businesses.7

7 The dissent argues that "when California allows greater freedoms for some

sectors, it may not leave religious activities behind" and that "the suppression of

some comparable secular activity in a similar fashion to religious activity is not

dispositive." Dissent at 12, 17–18 (citing Roman Catholic Diocese, 141 S. Ct. at 73

(Kavanagh, J., concurring). Although Justice Kavanaugh's concurrence in Roman

Catholic Diocese is not the controlling opinion, the dissent mischaracterizes that

opinion. Justice Kavanaugh wrote that "under [the Supreme] Court's precedents, it

does not suffice for a State to point out that, as compared to houses of worship, some

secular businesses are subject to similarly severe or even more severe restrictions."

Roman Catholic Diocese, 141 S. Ct. at 73 (Kavanaugh, J., concurring) (some

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Because we identify the comparison applied in these cases—houses of

worship compared to secular businesses—our dissenting colleague suggests that we

are holding that First Amendment free exercise rights apply only in houses of

worship. Dissent at 15. He misses the point. We note that in these cases the

Supreme Court addressed restrictions on houses of worship—not because we are

suggesting that the Constitution's protections for the free exercise of religion apply

only in houses of worship—but rather because the Court's precedent directs us to

compare restrictions on religious activities to restrictions on "analogous" secular

activities. See Lukumi, 508 U.S. at 546. In its recent decisions, the Supreme Court

held that restrictions subjected worship services to disparate treatment because the

settings at issue were similar and subject to meaningful comparisons—houses of

worship such as churches, mosques, synagogues, and temples compared to public

buildings for commercial activities such as stores, malls, and other businesses.

The dissent's argument that "businesses are analogous comparators to

religious practice in the pandemic context," Dissent at 6, oversimplifies the issue

here. Although the Supreme Court has compared regulation of religious activities

to regulation of business activities under comparable circumstances, it has never

framed its analysis in the general terms of "religious practice" and

emphasis added). Thus, Justice Kavanaugh, in line with the controlling opinions and

orders in Roman Catholic Diocese, South Bay II, and Gateway, compared businesses

only to houses of worship, not to all religious activities.

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"businesses." Rather, it has focused on the circumstances surrounding the regulated

religious activities to determine whether those particular classes of religious activity

were being treated less favorably than comparable classes of secular activity. Thus,

it was essential in the recent Supreme Court decisions that the regulations in question

implicated religious activity in houses of worship. See South Bay, 141 S. Ct. at 717

(Roberts, C.J., concurring) ("[T]he State's present determination—that the

maximum number of adherents who can safely worship in the most cavernous

cathedral is zero—appears to reflect not expertise or discretion, but instead

insufficient appreciation or consideration of the interests at stake."); Roman Catholic

Diocese, 141 S. Ct. at 67 (analyzing regulations that "single out houses of worship

for especially harsh treatment" and noting that "the maximum attendance at a

religious service could be tied to the size of the church or synagogue").

Moreover, when the Court granted injunctive relief as to gathering restrictions

in South Bay and Harvest Rock, it did not issue a blanket injunction covering all state

regulation of "religious practice." Instead, it distinguished between restrictions on

operating houses of worship—which were impermissible under the circumstances—

and capacity limitations and restrictions on "indoor singing and chanting," which it

declined to enjoin because the plaintiffs had not carried their burden (at least at that

stage of the proceedings) of showing "that the State is not applying

the . . . prohibition . . . in a generally applicable manner." Harvest Rock Church v.

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Newsom, No. 20A137, __ S. Ct. __, 2021 WL 406257, at *1 (Feb. 5, 2021); South

Bay, 141 S. Ct. at 716 ("This order is without prejudice to the appellants presenting new evidence to the District Court that the State is not applying the percentage capacity limitations or the prohibition on singing and chanting in a generally applicable manner.").

By taking this approach, we absolutely do not "confine religious freedom to 'free exercise zones,'" Dissent at 15, as the dissent suggests. We simply recognize that the Supreme Court's free exercise analysis—which first requires determining which tier of scrutiny to apply—fundamentally turns on whether a state discriminates against religious practice. In turn, to determine whether a state discriminates, the Supreme Court instructs us to compare "analogous non-religious conduct," Lukumi, 508 U.S. at 546 (emphasis added), not to compare all non-religious conduct. See also Roman Catholic Diocese, 141 S. Ct. at 69 (Gorsuch, J., concurring) (noting that the First "Amendment prohibits government officials from treating religious exercises worse than comparable secular activities, unless they are pursuing a compelling interest and using the least restrictive means available." (emphasis added)); Stormans, 794 F.3d at 1079 (describing how Lukumi requires analyzing "prohibitions on substantial, comparable secular conduct that would

similarly threaten the government's interest" (emphasis added)).

An analogy requires "[a] corresponding similarity or likeness." Analogy,

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BLACK'S LAW DICTIONARY (11th ed. 2019). Thus, we cannot answer the question

of whether the state discriminates without first framing the correct comparison. And

not every activity is analogous to every other activity. That would empty all meaning

from the word "analogy." Unsurprisingly, then, this analysis depends on the type,

location, and circumstances of the regulated activities.

Here, Appellants' underinclusivity argument relies on a comparison of

gatherings in private homes to commercial activity in public buildings, and in

particular they point to commercial activity in large buildings such as train stations,

airports, and shopping malls.8 But nothing in the record supports Appellants'

suggestions that these commercial activities are proper comparators to in-home

private religious gatherings. Instead, it appears Appellants are arguing that we

should reach the conclusion the Supreme Court rejected when it did not enjoin

capacity limitations and singing restrictions in houses of worship: that any

restrictions that have an incidental effect on religious conduct can be appropriately

compared to restrictions on any secular conduct.

Based on the record, the district court concluded that the State reasonably

distinguishes in-home private gatherings from the commercial activity Appellants

8 Appellants also mention salons in a laundry list of indoor commercial

activities that are not limited to three households. But Appellants do not explain

why salons should be considered analogous secular conduct and they point to

nothing in the record to support that comparison.

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assert is comparable. For example, the district court found that the State reasonably

concluded that when people gather in social settings, their interactions are likely to

be longer than they would be in a commercial setting; that participants in a social

gathering are more likely to be involved in prolonged conversations; that private

houses are typically smaller and less ventilated than commercial establishments; and

that social distancing and mask-wearing are less likely in private settings and

enforcement is more difficult. Tandon, 2021 WL 411375, at *30. Appellants do not

dispute any of these findings. Therefore, we conclude that Appellants have not

established that strict scrutiny applies to the gatherings restrictions. Appellants do

not contend that the State's restrictions fail rational basis review, and we agree with

the district court that the capacity restrictions likely meet that low bar. See id. at

***40. Therefore, Appellants have not shown a likelihood of success on the merits of**

the free exercise claim.

D.

Our dissenting colleague apparently agrees with Appellants' argument that

broadly compares private religious gatherings to secular or commercial activity,

although unlike Appellants he focuses on the comparison to small businesses, such

as barbershops and tattoo parlors. These small businesses are not subject to the

three-household restriction for private gatherings or the capacity restrictions that

apply to other businesses and to houses of worship. See Cal. Dep't of Pub. Health,

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Blueprint for a Safer Economy, https://covid19.ca.gov/safer-economy/#tier-

assignments (last visited Mar. 30, 2021).

Nonetheless, the State requires that these small businesses implement

extensive safety protocols, explained in a fourteen-page, single-spaced document,

which incorporates the Guidance on Face Coverings and therefore "requires the use

of face coverings for both members of the public and workers in all public and

workplace settings." See COVID-19 Industry Guidance: Expanded Personal Care

Services, at 3 (Oct. 20, 2020), https://files.covid19.ca.gov/pdf/guidance-expanded-

personal-care-services--en.pdf. Among other things, the Industry Guidance also

requires that such businesses:

• "Establish a written workplace-specific COVID-19 prevention plan," train workers on that plan and COVID-19 safety in general, and "[r]egularly evaluate the workplace for compliance with the plan."

• "Provide temperature and/or symptom screenings for all workers at the beginning of their shifts."

• "Contact customers before visits to confirm appointments and ask if they or someone in their household is exhibiting any COVID-19 symptoms."

• "Tell customers that no additional friends or family will be permitted in the facility, except for a parent or guardian accompanying a minor."

• "Use hospital grade, Environmental Protection Agency (EPA)-approved products to clean and disinfect anything the client came in contact with."

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• "Implement measures to ensure physical distancing of at least six feet between and among workers and customers, except while providing the services that require close contact."

• "Maintain at least six feet of physical distance between each work

station area, and/or use impermeable barriers between work stations to protect customers from each other and workers."

- **Require that "workers who consistently must be within six feet of customers or co-workers must wear a secondary barrier (e.g., face shield or safety goggles) in addition to a face covering."**
- **"Stagger appointments to reduce reception congestion and ensure adequate time for proper cleaning and disinfection between each customer visit."**
- **"Ask customers to wait outside or in their cars . . . [r]eception areas should only have one customer at a time."**

Id. at 4–10. These businesses are also subject to ventilation, cleaning, and disinfecting protocols. Id. at 7–9. The Industry Guidance also provides additional restrictions for specific services such as esthetic and skin care services, electrology services, nail services, massage services, and restrictions for body art professionals, tattoo parlors, and piercing shops. Id. at 11–14. These restrictions, for example, "suspend piercing and tattooing services for the mouth/nose area," allow "tattooing or piercing services for only one customer at a time," and state that "[f]acial massages should not be performed if it requires removal of the client's face

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covering." Id. at 14.9

These restrictions for businesses that provide personal care services establish

that there is very little basis for comparing these businesses to private in-home religious gatherings. For example, they refer extensively to policies these businesses should adopt regarding "customers," "appointments," and "workers," which do not appear to translate readily to in-home gatherings. Also, ensuring public-facing businesses comply with these regulations is a fundamentally different task from regulating conduct in private homes, which government authorities cannot simply enter at will. See, e.g., Florida v. Jardines, 569 U.S. 1, 6 (2013) ("At the [Fourth] Amendment's very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." (quotation marks and citation omitted)). Thus, it appears that "personal care services" are not analogous secular businesses or appropriate comparators to private in-home religious gatherings.

Significantly, we do not ground our conclusion on any speculation outside the

9 The dissent repeatedly emphasizes tattoo parlors, see Dissent at 9, 10, 14, 17, 21, which might provide a useful rhetorical foil for in-home Bible studies, but the parties do not cite tattoo parlors as a point of comparison for in-home religious activities. Our dissenting colleague's implication is that tattoo parlors are subject to

less onerous restrictions than in-home Bible study (apparently based on his opinion

that a three-household limit is more onerous than the detailed restrictions that apply

to businesses that provide personal care services) and that they significantly

contribute to the spread of COVID-19 in California (or else they would not be

relevant comparators to in-home religious gatherings).

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record about the circumstances in which "personal care services" typically take

place. The dissent, in contrast, does make such speculations about personal care

services. See Dissent at 8–10. We remind our colleague, however, that Appellants

bear the burden of showing a likelihood of success on the merits to justify an

injunction pending appeal. To do so on the basis that the regulation fails under strict

scrutiny, they (not the State) bear the further burden of showing that the regulation

triggers strict scrutiny by regulating religious activities more strictly than

comparable secular activities. See Doe v. Harris, 772 F.3d 563, 570 (9th Cir. 2014)

(explaining that for a preliminary injunction "in the First Amendment context, the

moving party bears the initial burden of making a colorable claim that its First

Amendment rights have been infringed, or are being threatened with infringement,

at which point the burden shifts to the government to justify the restriction." (citation
omitted)). They have failed to make that showing here.[10]

E.

Our dissenting colleague also argues that the gatherings restrictions are not
neutral because they favor certain political activities, specifically outdoor rallies and

10 Additionally, our dissenting colleague appears to conflate the two steps of
the free exercise analysis when he argues that California's regulation of these
businesses "is a sure sign that narrower tailoring is possible for in-home religious
practice." Dissent at 18. We need not, and do not, analyze whether California's
gatherings restriction is narrowly tailored because we conclude that it does not
disfavor religious practice and therefore does not trigger strict scrutiny.

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protests, over outdoor religious activities. Dissent at 10–11. However, he
recognizes that outdoor religious activities are allowed at houses of worship and are
not limited to three households. See About COVID-19 Restrictions,
https://covid19.ca.gov/stay-home-except-for-essential-needs (under "Can I go to
church?" tab) (last visited Mar. 30, 2021). Also, indoor rallies and protests are
subject to the same restrictions as public indoor religious gatherings at houses of

worship. Id. (under "Can I engage in political rallies and protest gatherings?" tab)

(explicitly applying the restrictions for indoor services at houses of worship to indoor

rallies and protests). Therefore, in arguing that outdoor religious and secular

activities in private homes are treated differently, it appears that the dissent assumes

that outdoor "rallies" and "protests" are allowed in backyards of private homes.

Dissent at 10–11. But this is not at all clear from the plain language of the

restrictions, which fail to define "rallies" and "protests" and do not clearly delineate

where these events are allowed, and so the dissent's argument necessarily depends

on assumptions and speculation.

If we were to apply the dictionary definition of "rally," we could conclude

that outdoor "rallies" and "protests" refer to mass public gatherings, typically

organized outside government buildings, not private gatherings in backyards. See

Rally, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/rally

(last visited Mar. 30, 2021). Moreover, other language in the restrictions suggests

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that rallies and protests are public political events that are treated the same as public

religious activities. For example, indoor public religious activities and indoor rallies

and protests are subject to the same capacity, face covering, and other safety restrictions. See About COVID-19 Restrictions, https://covid19.ca.gov/stay-home-except-for-essential-needs/ (under "Can I engage in political rallies and protest gatherings?" tab) (last visited Mar. 30, 2021). In addressing rallies and protests, the State encourages "Local Health Officers" to consider outdoor attendance capacities, which appears to refer to capacities in public locations, not backyards. See id. The restrictions also state that participants at rallies and protests "must maintain a physical distance of at least 6 feet from any uniformed peace officers." Id. While it is perhaps conceivable that uniformed peace officers would be at rallies and protests in private backyards, this restriction certainly suggests the State is addressing outdoor rallies and protests in public locations. Finally, the restrictions encourage those for whom "collective action in physical space is important" to consider participating in protests from their cars. Id. (under "I want to express my political views. How can I make my voice heard without raising public health concerns?" tab). Again, this suggests that rallies and protests would occur in public spaces that can accommodate participation from cars, which would seem to exclude the

backyards of most private homes.

But again, we need not, and do not, rely on speculation outside the record to

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determine whether Appellants have shown that rallies and protests are comparable secular activities. Rather, we decline to grant the “drastic and extraordinary remedy,” Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139, 165 (2010), of emergency injunctive relief on the speculative grounds raised by our dissenting colleague because Appellants have failed to carry their burden on these issues. See Winter, 555 U.S. at 22 (“[I]njunctive relief [is] an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.”).

Even as we deny Appellants’ motion for an injunction pending appeal, we do so without prejudice to the possibility that a plaintiff could conceivably prevail based on the political activities argument that the dissent makes—assuming, of course, that plaintiff could make the necessary factual showings in support of those arguments. But because these plaintiffs have not made this argument, and the State has had no reason or opportunity to respond to them, we decline to express an opinion on them now, let alone rely on them to grant the extraordinary remedy of an injunction pending appeal.11

*** * ***

We believe the best interpretation of Roman Catholic Diocese, South Bay II,

11 Although our dissenting colleague writes that we "appear[] to share [his]

concerns regarding California's exemption for political rallies and protests, but not

for religious activity," Dissent at 19, we expressly make no ruling pertaining to the

substance of that argument.

27

and Gateway is that rational basis review should apply to the State's gatherings

restrictions because in-home secular and religious gatherings are treated the same,

and because Appellants' underinclusivity argument fails as they have not provided

any support for the conclusion that private gatherings are comparable to commercial

activities in public venues in terms of threats to public health or the safety measures

that reasonably may be implemented. Thus, Appellants have not shown that

gatherings in private homes and public businesses "similarly threaten the

government's interest," and therefore they have not shown that strict scrutiny

applies.

Even if our dissenting colleague's interpretation of the Supreme Court's

precedent is plausible, that is not enough for Appellants to succeed at this stage of

the litigation. When a party asks for an emergency injunction pending appeal, we

ask whether that party "is likely to succeed on the merits." Winter, 555 U.S. at 20

(emphasis added). The facts before us and the Supreme Court's current case law do

not support the outcome advocated by our dissenting colleague. Thus, it is

inappropriate to issue an injunction based on Appellants' free exercise claims at this

time.12

12 Because the first Winter factor is dispositive of Appellants' emergency

motion, we need not address the other factors. See California v. Azar, 911 F.3d 558,

575 (9th Cir. 2018) ("Likelihood of success on the merits is 'the most important'

factor; if a movant fails to meet this 'threshold inquiry,' we need not consider the

other factors." (citation omitted)).

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III.

We also deny as unnecessary Appellants' request for an injunction on their

free speech and assembly claims. Tandon seeks to host political activities such as

debates, fundraisers, and meet-the-candidate events, while the Gannons wish to hold

small-group political discussions. The district court concluded, without explanation,

that "the State's private gatherings restrictions do not apply to the political campaign

events Tandon wishes to hold." Tandon, 2021 WL 411375, at *25. Earlier, in its

summary of the various restrictions at issue, the district court stated that "the State

permits unlimited attendance at . . . outdoor political events." Id. at *15. The district

court also stated that Tandon challenged Santa Clara County's restrictions, while the

Gannons challenged the State's restrictions. Id. at 13. But the district court did not

explain why the State's restrictions would apply to the Gannons but not Tandon, and

did not explain how, or if, any of these political gatherings would be considered

rallies or protests.

On appeal, the State does not challenge the district court's ruling. And

Appellants seem to assume that the gatherings restrictions prohibit all political

gatherings at issue here, except Tandon's campaign rallies. The parties do not define

"rallies," or explain when or where such events are permitted, or whether any

restrictions or safety protocols apply to these events. Nonetheless, based on the

district court's ruling, the State's gatherings restrictions do not apply to Tandon's

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requested political activities, and given the State's failure to define rallies or

distinguish Tandon's political activities from the Gannons' political activities, we

conclude that, on the record before us, the State's restrictions do not apply to the

Gannons' political activities. Therefore, Appellants have not established that an

injunction is necessary, and we deny as moot the emergency motion for injunctive

relief on these claims.13

IV.

Finally, we conclude that the business owner Appellants have not established

a likelihood of success on their challenge. We have "never held that the right to

pursue work is a fundamental right," and, as such, the district court likely did not err

in applying rational basis review to their due process claims. See Sagana v. Tenorio,

384 F.3d 731, 743 (9th Cir. 2004); Tandon, 2021 WL 411375, at *16–19. Likewise,

business owners are not a suspect class, and the district court correctly applied

rational basis review to their equal protection claims. See Williamson v. Lee Optical,

348 U.S. 483, 489, 491 (1955); Tandon, 2021 WL 411375, at *19–25.

V.

Appellants have not demonstrated a likelihood of success on the merits for

13 This denial is without prejudice to a party asserting in subsequent

proceedings that either Tandon's or the Gannons' motion for an injunction is not

mooted by the district court's ruling limiting the scope of California's gatherings

restriction.

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their free exercise, due process, or equal protection claims, nor have they

demonstrated that injunctive relief is necessary for their free speech claims.

Therefore, we deny the emergency motion for an injunction pending appeal.

DENIED.

1

Ritesh Tandon v. Gavin Newsom, No. 21-15228

BUMATAY, J., Circuit Judge, dissenting in part and concurring in part:

In this uncertain time, only a few things are clear:

First, courts are not competent to respond to the COVID-19 crisis.

California, like other States, is charged with the authority and the responsibility of

guiding her people through this pandemic. And courts shouldn't engage in

unnecessary second-guessing or hindsight quarterbacking when it comes to matters

of health and safety.

Second, and most foundational, the Constitution is enduring. The rights

enshrined by the Constitution persist in times of crisis and tranquility. Thus, at all

times, courts must fulfill their duty to ensure that constitutional rights are protected.

Equally certain are the Supreme Court's instructions for navigating the

intersection of these two principles. While States possess the discretion to respond

to the pandemic, we can never abdicate our role as the bulwark against constitutional

violations. In adjudicating challenges to COVID-19 restrictions, we must recognize

that the right to the free exercise of religion guaranteed by the First Amendment is

among our most fundamental freedoms. No State, in implementing a COVID-19

response, can arbitrarily discriminate against the exercise of religion.

Three times before, the Supreme Court has found that our court failed to strike

the proper balance between these principles. Unfortunately, we make the same

mistake here. California currently bans all indoor and outdoor gatherings at home

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with more than three households. Pastor Jeremy Wong and Karen Busch seek to

enjoin that restriction to allow them to host Bible studies and communal worship in

their homes without the three-household limitation. By failing to grant their

requested injunction, we disregard the lessons from the Court and turn a blind eye

to discrimination against religious practice.

I agree with the majority that (1) an injunction is unnecessary on Appellants'

free speech and assembly claims since California's gatherings restrictions do not

apply to their political activities, and (2) Appellants have not demonstrated that the

State's commercial restrictions violate due process or equal protection. But I would

hold that California has clearly infringed on Wong and Busch's free exercise rights.

Accordingly, I would grant their requested injunction pending appeal of their

religious freedom claim. For this reason, I respectfully dissent.

I.

The Free Exercise Clause forbids the government from subjecting religious

activity to "unequal treatment." Church of the Lukumi Babalu Aye, Inc. v. City of

Hialeah, 508 U.S. 520, 542 (1993) (simplified). To that end, a law that burdens

religious practice must be both neutral and generally applicable. Id. at 546.

Otherwise, it must be subjected to "the most rigorous of scrutiny." Id. Restrictions

are not generally applicable if they burden religious activity more than "analogous"

secular conduct. Id.

3

When it comes to Free Exercise challenges to COVID-19 restrictions, we are

no longer writing on a blank slate. Just last month, the Supreme Court corrected us

in three separate cases—each time enjoining portions of California's emergency

restrictions on Free Exercise grounds. See S. Bay United Pentecostal Church v.

Newsom, 141 S. Ct. 716 (2021) (South Bay); Harvest Rock Church v. Newsom, No.

20A137, __ S. Ct. __, 2021 WL 406257 (Feb. 5, 2021); Gateway City Church v.

Newsom, No. 20A138, __ S. Ct. __, 2021 WL 753575 (Feb. 26, 2021). Even before

then, the Court provided significant direction on how to evaluate COVID-19

limitations on religious exercise. See Roman Catholic Diocese of Brooklyn v.

Cuomo, 141 S. Ct. 63 (2020) (per curiam). Cumulatively, the message has been

clear: States may not disfavor religious activity in responding to the pandemic.

Our first lesson was in Roman Catholic Diocese of Brooklyn, when the Court

enjoined a New York executive order that limited attendance at religious services to

10 or 25 people, depending on whether the service took place in a "red" or "orange"

zone. Id. at 65–66. The Court explained that the restriction effected "disparate

treatment" because analogous businesses—including acupuncture facilities,

campgrounds, garages, and retail stores—were not subject to capacity limits. Id. at

66. It therefore applied strict scrutiny and concluded that the order was not narrowly

tailored. Id. at 67. Justice Kavanaugh further explained that it did not matter that

"some secular businesses are subject to similarly severe or even more severe

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restrictions." Id. at 73 (Kavanaugh, J., concurring) (emphasis original). When

restrictions create a "favored class" of businesses, the State must justify excluding

houses of worship from that class. Id.

After Roman Catholic Diocese came Harvest Rock Church. That case

required two interventions by the Supreme Court. On the first trip up to the Court,

we had declined to enjoin California's total prohibition on indoor worship services

in Tier 1—the most severe level of COVID-19 restrictions. Harvest Rock Church,

Inc. v. Newsom, 977 F.3d 728, 730–31 (9th Cir. 2020) (Harvest Rock II). The

Supreme Court gave us a second chance, vacating that order and remanding in light

of Roman Catholic Diocese. No. 20A94, __ S. Ct. __, 2020 WL 7061630 (Dec. 3,

2020) (Harvest Rock III). On the second trip to the Court, we again denied relief in

a largely unreasoned decision. 985 F.3d 771 (9th Cir. 2021) (Harvest Rock IV). The

Court once more stepped in and enjoined the prohibition. Harvest Rock Church,

2021 WL 406257, at *1.

Our court seemed to take the hint in South Bay, which challenged the same

ban on indoor religious services as in Harvest Rock Church. When the district court

denied injunctive relief, we vacated and remanded in light of Roman Catholic

Diocese and Harvest Rock Church. S. Bay United Pentecostal Church v. Newsom,

981 F.3d 765 (9th Cir. 2020) (South Bay II). But when the district court again denied

relief, we simply affirmed, reaching the astounding conclusion that the total ban

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satisfied strict scrutiny. S. Bay United Pentecostal Church v. Newsom, 985 F.3d

1128, 1146–48 (9th Cir. 2021) (South Bay III). This time, the Court responded

decisively.

Justice Gorsuch, joined in relevant part by four other members of the Court,

explained that California's total ban on indoor religious services "single[d] out

religion for worse treatment than many secular activities," triggering strict scrutiny.

South Bay, 141 S. Ct. at 719 (statement of Gorsuch, J.). And the Court had already

"made it abundantly clear that edicts like California's fail strict scrutiny and violate

the Constitution." Id. (citing Roman Catholic Diocese, 141 S. Ct. 63). Specifically,

the State failed to show that less-restrictive alternatives, like those afforded to

secular activities, were insufficient to address COVID-19 concerns. Id. at 718–19.

The Court's order, therefore, "should have been needless" because of the "extensive guidance" made available to lower courts. Id. But our failure to apply Roman Catholic Diocese compelled the Court itself to enjoin the ban.

Finally came Gateway City Church. There, Santa Clara County's order restricted religious activity by shuttering indoor "[g]atherings (e.g., political events, weddings, funerals, worship services, movie showings, cardroom operations)." Gateway City Church v. Newsom, No. 20-cv-8241, 2021 WL 308606, at *4 (N.D. Cal. Jan 29, 2021) (Gateway City Church II). As here, exceptions were made for certain favored activities but not worship services. Id at *10. Nevertheless, we

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denied an injunction pending appeal simply because the County's order restricted "gatherings" without specific reference to religion. No. 21-15189, 2021 WL 781981, at *1 (9th Cir. Feb. 12, 2021) (Gateway City Church III). In our view, that made the order neutral and generally applicable. Id. The plaintiffs appealed to the Supreme Court, and you can guess the rest: it granted the injunction in a one-paragraph opinion, tersely faulting our court for again failing to apply its precedents. Gateway City Church, 2021 WL 753575, at *1. Once again, we should have recognized that the Court's prior decisions "clearly dictated" enjoining the restriction. Id. At this point, a tale as old as time.

The instructions provided by the Court are clear and, by now, redundant. First, regulations must place religious activities on par with the most favored class of comparable secular activities, or face strict scrutiny. Roman Catholic Diocese, 141 S. Ct. at 66–67. States do not satisfy the Free Exercise Clause merely by permitting some secular businesses to languish in disfavored status alongside religious activity. Id. Second, the fact that a restriction is itself phrased without reference to religion is not dispositive. See Gateway City Church, 2021 WL 753575, at *1. So long as some comparable secular activities are less burdened than religious activity, strict scrutiny applies. Third, businesses are analogous comparators to religious practice in the pandemic context. Roman Catholic Diocese, 141 S. Ct. at 67.

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II.

Pastor Jeremy Wong and Karen Busch each seek an injunction of the California restriction preventing them from hosting Bible studies and communal worship services with more than three total households of fellow worshippers. To succeed, they must establish (1) a strong likelihood of success on the merits, (2) a

possibility of irreparable injury if relief is not granted, (3) a balance of hardships in

their favor, and (4) advancement of the public interest. Winter v. Nat. Res. Def.

Council, Inc., 555 U.S. 7, 20 (2008). Likelihood of success on the merits is the most

important preliminary injunction factor. Doe #1 v. Trump, 984 F.3d 848, 861 (9th

Cir. 2020). Furthermore, because the government is a party to the case, the third and

fourth factors merge. Id.

A.

Based on the legal background above, California's gatherings restriction as

applied to in-home worship and Bible study is subject to strict scrutiny, and the State

has not sustained its burden to prove the household limitations are narrowly tailored.

Consequently, Wong and Busch have shown a clear likelihood of success on the

merits, and the first Winter factor tips strongly in favor of granting the injunction.

1.

As Roman Catholic Diocese, South Bay, and Gateway City Church instruct

us, we must apply strict scrutiny to any restriction that disparately impacts religious

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practice compared to analogous secular conduct. For purposes of this comparison,

“[w]hether conduct is analogous . . . does not depend on whether the religious and

secular conduct involve similar forms of activity[,]” but is instead “measured against

the interests the State offers in support of its restrictions on conduct.” Monclova

Christian Acad. v. Toledo-Lucas Cnty. Health Dep’t, 984 F.3d 477, 480 (6th Cir.

2020) (applying Roman Catholic Diocese to a regulation on all schools given its

impact on religious schools).

Here, the State’s worthy interest is in mitigating the transmission of COVID-

19. But California’s limitations on in-home religious activities is noticeably more

restrictive than analogous secular activities. The gatherings order limits Wong’s and

Busch’s Bible study and home worship to three households, even when held

outdoors.1 Yet California permits the operation of many comparable secular

activities without similar household limitations, despite implicating the same interest

in preventing the spread of COVID-19.

In particular, hair salons, barbershops, and “personal care services” may open

indoors without maximum household restrictions.2 “Personal care services” include

1 CDPH Guidance for the Prevention of COVID-19 Transmission for

Gatherings, California Department of Public Health (Nov. 13, 2020),

https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Guidance-for-

the-Prevention-of-COVID-19-Transmission-for-Gatherings-November-2020.aspx.

2 See California Department of Public Health, COVID-19 Industry Guidance:

Hair Salons and Barbershops (Oct. 20, 2020),

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many businesses where hours-long physical proximity and touching is required, such

as nail salons, tattoo parlors, body waxing, facials and other skincare services, and

massages.3 So too with barbershops and hair salons. Discussions of faith and

scripture, by comparison, can take place while socially distanced.

Some personal care services may even allow their clients to forego masking.

Facials, electrolysis, and other like services necessarily require ready access to a

client's face, and California permits clients in such circumstances to go maskless.4

The result is that a beauty shop may host an unrestricted number of households, half

of them bare-faced and in immediate proximity to the other half. But Wong, in a

space of the same size—even an outdoor space—would be limited to three

households, despite donning masks and maintaining a six-foot distance.

Likewise, Busch, whose Bible study is attended by couples, can host only two

other couples in her house or backyard, no matter how much distance they maintain

or the size of her living room. But tattoo artists may inject ink into the arms, legs,

https://files.covid19.ca.gov/pdf/guidance-hair-salons--en.pdf; California

Department of Public Health, COVID-19 Industry Guidance: Expanded Personal

Care Services (Oct. 20, 2020), https://files.covid19.ca.gov/pdf/guidance-expanded-

personal-care-services--en.pdf.

3 See Industry guidance to reduce risk, Covid.CA.gov,

https://covid19.ca.gov/industry-guidance/#personal-care-services (updated Oct. 20,

2020).4 California Department of Public Health, COVID-19 Industry Guidance:

Expanded Personal Care Services 11 (Oct. 20, 2020),

https://files.covid19.ca.gov/pdf/guidance-expanded-personal-care-services--en.pdf.

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and faces of clients with no household limitation—meaning, in a space the same size

as Busch's living room, tattoo parlors may accommodate perhaps double or triple

the number of households.

The disparity of treatment between secular and religious activities is even

more pronounced when we consider the outdoor-gatherings rules. Under

California's restrictions, except at places of worship,5 outdoor gatherings for

religious activities are subject to a three-household maximum. Nevertheless,

outdoor gatherings for rallies and protests are subject to no household maximum, so

long as attendees stay six feet away from others of different households.6

Accordingly, if Wong and Busch move their Bible studies or prayer groups to their

backyards, the three-household maximum would still be in effect. But if a political

party or organization wants to hold a rally or protest at the same or any other

location, then maximum household limits are off the table. Under the Constitution,

what's good for political rallies and protests should also be good for religious

5 Although California restricts indoor capacity at places of worship to 25% in

Tiers 1 and 2 and to 50% in Tiers 3 and 4, it does not impose maximum household

limits on outdoor activities. See Industry guidance to reduce risk, Covid.CA.gov,

https://covid19.ca.gov/industry-guidance/ (under the "Places of worship and cultural

ceremonies" tab) (updated Feb. 22, 2021).

6 About COVID-19 restrictions, Covid19.CA.gov (Mar. 22, 2021),

https://covid19.ca.gov/stay-home-except-for-essential-needs/ (under the "Can I

engage in political rallies and protest gatherings?" tab).

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worship. In other words, California cannot treat religious exercise worse than

political expression.

A law is not generally applicable when its restrictions "substantially

underinclude non-religiously motivated conduct that might endanger the same governmental interest that the law is designed to protect." Stormans, Inc. v. Wiesman, 794 F.3d 1064, 1079 (9th Cir. 2015) (citing Lukumi, 508 U.S. at 542–46).

But California is guilty of doing just that. The State makes exemptions based on the subject matter of the gathering by lifting household caps for political expression but not for religious expression. If people want to gather to engage in an outdoor political rally or protest, California's message to them is, "Go right ahead!" But if those same people wish to gather outdoors to pray, unless at a place of worship, California says, "Not so fast!" Political rallies and protests are favored—even though the State admits that they "present special public health concerns for high risk of COVID-19 transmission."[7] Religious gatherings are not. This sort of religious gerrymander is odious to the First Amendment and to the Supreme Court's precedents. Consequently, California's restrictions have the same problem as in Gateway City Church: once again providing exceptions for certain favored activities but excluding religious activities. 2021 WL 308606, at *10.

7 About COVID-19 restrictions, Covid19.CA.gov (Mar. 22, 2021), https://covid19.ca.gov/stay-home-except-for-essential-needs/ (under the "Can I engage in political rallies and protest gatherings?" tab).

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These inconsistent regulations amount to disparate treatment of religious

practice and are accordingly not generally applicable. See Roman Catholic Diocese,

141 S. Ct. at 66–67; South Bay, 141 S. Ct. at 717 (statement of Gorsuch, J.).

California's COVID-19 restrictions patently favor analogous, secular activities over

in-home worship and Bible studies. Thus, these restrictions are subject to the "most

rigorous of scrutiny." Lukumi, 508 U.S. at 546. I do not begrudge business owners

their reprieve, but when California allows greater freedoms for some sectors, it may

not leave religious activities behind. The Court's recent decisions "clearly dictate[]"

the outcome here. Gateway City Church, 2021 WL 753575, at *1. Strict scrutiny

applies.

2.

To satisfy strict scrutiny, California must show that the restriction is narrowly

tailored to serve a compelling state interest. Roman Catholic Diocese, 141 S. Ct. at

67. Managing the COVID-19 pandemic is doubtless a compelling interest. Id. But

California has not met its burden of demonstrating that the gatherings restriction is

narrowly tailored.

Our strict scrutiny review is no less exacting because of our unusual times.

Even in the face of a pandemic, "[i]t has never been enough for the State to insist on

deference or demand that individual rights give way to collective interests." South

Bay, 141 S. Ct. at 718 (statement of Gorsuch, J.). While "we are not scientists," we

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do not "abandon the field when government officials with experts in tow seek to

infringe a constitutionally protected liberty." Id.

California asserts the gatherings restriction is narrowly tailored because it is

based on "objective risk criteria," and baldly claims that less-restrictive alternatives

will not do. See Tandon v. Newsom, No. 20-cv-7108, 2021 WL 411375, at *18 (N.D.

Cal. Feb. 5, 2021). The criteria are:

(1) the ability to accommodate face covering wearing at all times; (2)

the ability to physically distance between individuals of different

households; (3) the ability to limit the number of people per square foot;

(4) the ability to limit the duration of exposure; (5) the ability to limit

the amount of mixing of people from different households; (6) the

ability to limit the amount of physical interactions; (7) the ability to

optimize ventilation; and (8) the ability to limit activities that are known

to increase the possibility of viral spread, such as singing, shouting, and

heavy breathing.

Id. But these criteria are nearly word for word the same ones rejected by the Supreme Court as insufficient to justify the shutdown of places of worship under strict scrutiny. See South Bay III, 985 F.3d at 1134 (listing criteria); South Bay, 141 S. Ct. at 718 (statement of Gorsuch, J.) (noting that these factors—while "legitimate concerns"—do not justify a total ban on places of worship).

The reasoning of South Bay applies with equal force to worship and prayer within the home. The above factors are not "always present in [in-home] worship," even with more than three households, and they are not "always absent from the other secular activities its regulations allow." 141 S. Ct. at 718. An in-home Bible

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study including more than three households may be conducted with face coverings and physical distancing; for a limited duration; with no "mixing" of households, physical interactions, or singing or shouting; and with open windows and doors. The same can hardly be said of tattoo parlors and nail salons. This sort of mismatch is a "telltale sign[]" of the lack of narrow tailoring. Id. California's failure to even attempt to distinguish South Bay only underscores this inevitable conclusion.

Even if studying scripture at home risks some level of transmission of

COVID-19, the exemptions for barbershops, tattoo and nail parlors, and other personal care businesses reveal that less-restrictive alternatives are available to
California to mitigate that concern. If the State is truly concerned about the "proximity, length, and interaction" of private gatherings, as it claims, it could regulate those aspects of religious gatherings in a narrowly tailored way. But the
one thing California cannot do is privilege tattoo parlors over Bible studies when
loosening household limitations.8

8 The majority falsely charges me with implying that tattoo parlors "significantly contribute" to the spread of COVID-19 in California. Maj. Op. 22
n.9. I make no such implication. Indeed, the majority cites to nothing in my dissent
for this needless accusation. I draw the comparison between the two because tattoo
parlors require close interactions, while Bible studies do not. That California treats
them differently should be given the highest scrutiny.

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Accordingly, the gatherings restriction fails strict scrutiny when applied to religious practices, and so Wong and Busch are likely to prevail on their Free Exercise claim.

3.

The majority concludes that Wong and Busch are unlikely to succeed on the

merits because California bans in-home gatherings with more than three households

across the board. The majority insists that we look to California's treatment of other

in-home activities, and not to secular businesses, to determine if the Constitution

was violated. It confines Roman Catholic Diocese, South Bay, and Gateway City

Church to only places of worship. This is wrong for several reasons.

Neither the Constitution nor the Court's precedents limit the right to free

exercise to places of worship. The text of the First Amendment confers protection

on religious "exercise," not "places of worship." U.S. Const. amend. I. Thus, the

freedom to practice one's religion inheres without respect to location. So whether

at church, mosque, synagogue, or at home, the State may not infringe on the free

exercise right—at least not without a compelling interest and narrow tailoring.

The majority draws a different rule, allowing States to disfavor religious

exercise at home, as long as they ensure places of worship maintain equal footing

with business interests. But there is no basis under the Free Exercise Clause or the

Supreme Court's precedents to confine religious freedom to "free exercise zones,"

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while worship elsewhere is left in the cold. The majority only gets there by narrowing Roman Catholic Diocese, South Bay, and Gateway City Church's applicability to places of worship so that they have no binding or even persuasive value in any other context. But as lower court judges, we "don't have license to adopt a cramped reading of a case" or to "create razor-thin distinctions" to evade the reach of precedent. Nat'l Lab. Rels. Bd. v. Int'l Ass'n of Bridge, Structural, Ornamental, & Reinforcing Iron Workers, Loc. 229, AFL-CIO, 974 F.3d 1106, 1117 (9th Cir. 2020) (Bumatay, J., dissenting). Rather, we often look to the "reasoning" of the Court's precedents for instruction, not just a simplistic comparison of facts. Langere v. Verizon Wireless Servs. LLC, 983 F.3d 1115, 1121–22 (9th Cir. 2020).

By limiting these precedents to houses of worship, the majority loses sight of why houses of worship are protected at all: because of the religious exercise that occurs therein. The Constitution shields churches, synagogues, and mosques not because of their magnificent architecture or superlative acoustics, but because they are a sanctuary for religious observers to practice their faith. And that religious practice is worthy of protection no matter where it happens. As singer Brandon

Flowers puts it, "[t]his church of mine may not be recognized by steeple / But that doesn't mean that I will walk without a God." Playing With Fire, Flamingo (Island Records 2010). So while Wong and Busch's prayer groups and Bible studies do not

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take place in a building topped with a steeple, the First Amendment is broad enough to shelter their worship.

The majority artificially creates narrow lines of comparison by refusing to consider California's treatment of secular businesses. This flies in the face of the Court's instructions, which analogized places of worship to a broad range of facilities, including schools, garages, and campgrounds. Roman Catholic Diocese, 141 S. Ct. at 66. Under California's stated interest in reducing the transmission of COVID-19, it's hard to see why in-home religious gatherings should be treated differently from personal care businesses. Indeed, it does not take a scientist or doctor to understand that hair salons, barbershops, and tattoo parlors can operate in spaces similar in size to a home; that they could host a similar number of households as a Bible study; or that they could service customers for as long as a prayer meeting.

The majority does not refute any of this. Instead, it cites to the district court's

findings regarding the relative risk of transmission between social gatherings in

general and grocery and retail shopping. See Maj. Op. 19 (citing Tandon, 2021 WL

411375, at *30). None of this is dispositive for comparison to personal care

businesses.

Given the similarities between these activities, we should not myopically

focus only on California's treatment of in-home activities to determine whether the

State unconstitutionally infringes on religious rights. As explained above, the

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suppression of some comparable secular activity in a similar fashion as religious

activity is not dispositive. See Roman Catholic Diocese, 141 S. Ct. at 73

(Kavanaugh, J., concurring). That California treats all in-home activities in an

equally poor manner does not grant it a pass on strict scrutiny review.

The majority also emphasizes that nail parlors and other small businesses are

not analogous to in-home worship because, though exempt from maximum

household limitations, they must disinfect surfaces and take other protective

measures. Maj. Op. 20–22. This only proves my point: there is no apparent reason

why California cannot provide health and safety guidance for in-home worship as it

does for businesses.9 That California believes these measures allow businesses—

even those requiring physical proximity and unmasking, like facial providers—to

open without a three-household limitation is a sure sign that narrower tailoring is

possible for in-home religious practice. While such measures may be intrusive,

preventing Wong and Busch from practicing their religion as they see fit is even

more intrusive.10

9 The majority also makes the most circular of arguments here: that personal

care businesses are not proper comparators to in-home religious worship precisely

because California imposed different COVID-19 restrictions on the two. Maj. Op.

22. But this roundabout reasoning permits the State to shield itself from strict

scrutiny by imposing a regulatory disparity, which instead should trigger strict

scrutiny. Courts then become nothing more than rubberstamps for State regulation.

10 The majority reasons that the Fourth Amendment's core protection of the

home somehow supports the banning of religious exercises at that same home. Maj.

Op. 22. I disagree with that understanding of the Fourth Amendment.

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Finally, the majority appears to share my concerns regarding California's

exemption for political rallies and protests but not for religious activity. The

majority prefers not to reach that issue because Wong and Busch have not made the

precise argument here. Maj. Op. 26. But, as Justice Thurgood Marshall once wrote,

"[w]hen an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law." Kamen v. Kemper Fin. Servs., Inc., 500 U.S. 90, 99 (1991). In addition to the other indicia of disparate treatment, the political rallies and protests exemption demonstrates a clear disfavoring of religious activity. Accordingly, we should have held that Appellants are likely to succeed on the merits.[11]

B.

The irreparable harm factor also cuts strongly in favor of granting the injunction. California's gatherings restriction unquestionably causes "irreparable harm." Winter, 555 U.S. at 20. As enforced, the household limitation bars Wong and Busch from hosting in-home Bible studies or communal prayers with their group of fellow worshipers. But even during a pandemic, the "loss of First Amendment

11 Under our recent precedents, a motions panel's decision is not binding on a later merits panel in the same case. See, e.g., City & Cnty. of San Francisco v. U.S. Citizenship & Immigr. Servs., 981 F.3d 742, 753 (9th Cir. 2020). While I question

the wisdom of this precedent, the merits panel in this case is free to revisit the majority's erroneous view of the law.

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freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." Roman Catholic Diocese, 141 S. Ct. at 67 (quoting Elrod v. Burns, 427 U.S. 347, 373 (1976) (plurality opinion)).

Here, the loss has been far greater than just a day. Although both Wong and Busch regularly held these religious gatherings in the years leading up to the pandemic, California has barred them from meeting as a group for nearly a year. And absent injunctive relief, their religious practices will continue to be interrupted for the foreseeable future.

C.

The public interest also favors an injunction. Protecting religious liberty is "obviously" in the public interest. California v. Azar, 911 F.3d 558, 582 (9th Cir. 2018). Indeed, the "Constitution and laws have made the protection of religious liberty fundamental." Apache Stronghold v. United States, No. 21-15295, 2021 U.S. App. LEXIS 6562, at *20 (9th Cir. Mar. 5, 2021) (Bumatay, J., dissenting). Here, Wong and Busch request a very narrow injunction, seeking only to prevent

California from prohibiting them from hosting religious gatherings at their homes

with more than three households during the pendency of this appeal. They have not

requested a State-wide injunction of the gatherings rule. Such a targeted injunction

is eminently justified compared to the "profound interest in men and women of faith

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worshiping together." On Fire Christian Ctr., Inc. v. Fischer, 453 F. Supp. 3d 901,

914 (W.D. Ky. 2020).

California asserts, and I agree, that "the public has a powerful interest in

curbing COVID-19 to prevent illness and death as well as preventing the State's

hospital system from being overwhelmed." Opp'n 29. Nevertheless, there is no

indication that "public health would be imperiled if less restrictive measures were

imposed." Roman Catholic Diocese, 141 S. Ct. at 68. Nothing in the record supports

the view that Wong's and Busch's in-home worship is more dangerous for the spread

of COVID-19 than the operation of other businesses open for customers without

household caps.

At bottom, the public interest is not "served by maintaining an

unconstitutional policy when constitutional alternatives are available to achieve the

same goal." Agudath Israel of Am. v. Cuomo, 983 F.3d 620, 637 (2d Cir. 2020).

Instead, California has amply demonstrated that such alternatives are available given

that hair salons, tattoo parlors, and piercing shops are all operating without strict

household limitations.

III.

The purpose of the Constitution was to place certain freedoms beyond the

whims of the government. Even in times of crisis, we do not shrink from our duty

to safeguard those rights. Freedom of worship is one of those enshrined rights, and

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the Supreme Court's instructions have been clear, repeated, and insistent: no

COVID-19 restriction can disfavor religious practice. Yet our court today trudges

out another denial of relief to those seeking to practice their faith in the face of

discriminatory restrictions. I respectfully dissent.

Exhibit H – ***Pennsylvania Environmental Defense Foundation v. Commonwealth*****, 255 A.3d 289 (Pa. 2021) – Full Opinion.**

[J-82-2021] - 22
(1) Rents and royalties from oil and gas leases of land
owned by the Commonwealth, except rents and

royalties received from game and fish lands.
(2) Amounts as provided under section 5 of the act of
October 8, 2012 (P.L. 1194, No. 147), known as the
Indigenous Mineral Resources Development Act.
(3) Any other money appropriated or transferred to the
fund.
(c) Use. -- Money in the fund may only be used as provided
under subsection (e) or as annually appropriated by the
General Assembly. In making an appropriation from the fund,
the General Assembly shall consider the Commonwealth's
trustee duties under section 27 of Article I of the Constitution
of Pennsylvania.
(d) Priority. -- Money appropriated from the fund under a
General Appropriation Act or other appropriation act shall be
distributed prior to allocations under subsection (e).
(e) Annual transfers. -- The following apply:
(1)(i) Except as provided under subparagraph (ii), for
the 2017-2018 fiscal year and each fiscal year
thereafter, $20,000,000 shall be transferred from the
fund to the Marcellus Legacy Fund for distribution to
the Environmental Stewardship Fund.
(ii) No amount shall be transferred from the fund to the
Marcellus Legacy Fund for distribution to the
Environmental Stewardship Fund for the 2019-2020,
2020-2021 and 2021-2022 fiscal year.
(2) For the 2017-2018 fiscal year and each fiscal year
thereafter, $15,000,000 shall be transferred from the
fund to the Marcellus Legacy Fund for distribution to
the Hazardous Sites Cleanup Fund.
72 P.S. § 1601.2-E.

to remove the Lease Fund from the sole control of the DCNR, where its use was restricted
to "conservation, recreation, dams, or flood control," and instead to transfer

the control to
the General Assembly. 71 P.S. § 1331 (repealed). Subsection (c), however, directs that
"[m]oney in the [Lease Fund] may only be used as provided under subsection (e)
[directing specific annual transfers] or as annually appropriated by the General
Assembly." 72 P.S. § 1601.2-E(c). Subsection (c) additionally mandates that "the
General Assembly shall consider the Commonwealth's trustee duties under section 27 of
Article I of the Constitution of Pennsylvania," when making appropriations from the Lease
Fund. 72 P.S. § 1601.2-E(c).
PEDF asserts that the repeal of the Oil and Gas Lease Fund Act and transfer of
the Lease Fund in Section 1601.2-E violated the Environmental Rights Amendment
because the General Assembly eliminated the restrictions on the use of the funds that
had been explicitly imposed by the Oil and Gas Lease Fund Act. It also claims that the
removal of the Lease Fund from DCNR's control eliminated the prior arrangement
whereby DCNR had the statutory authority both to lease State forest and park lands for
oil and gas exploration and extraction and to dispense funds to remedy any harm resulting
from those leases. PEDF deems the restrictions imposed by subsection (c) on the
General Assembly to be insufficient, asserting that subsection (c) fails to restrict Lease
Fund monies solely for conservation and maintenance of Pennsylvania's natural

resources.
In response, the Commonwealth emphasizes that the repeal and transfer did not
result in the elimination of the Lease Fund but rather the explicit continuation of the Lease
Fund as a "special fund in the State Treasury," 72 P.S. § 1601.2-E(a). Moreover, the
Commonwealth highlights this Court's observation in PEDF II, that "the legislature's
diversion of funds from the Lease Fund (and from the DCNR's exclusive control) does
not, in and of itself, constitute a violation of Section 27," as the ERA imposes trustee

duties not merely on the DCNR but on all Commonwealth entities. Cmwlth. Brief at 19
(quoting PEDF II, 161 A.3d at 939).
The Commonwealth additionally highlights that the plain language of subsection
(c) explicitly directs the General Assembly to consider its trustee duties under the ERA
when making appropriations, in contrast to the provisions deemed unconstitutional in
PEDF II, which allowed for unrestricted transfers to the General Fund for non-trust uses.
Indeed, it argues that any appropriation by the General Assembly of Lease Fund monies
for non-trust purposes would violate Section 1601.2-E(c), in addition to Section 27.
The Commonwealth Court addressed PEDF's challenges to subsections (a) and
(c) separately. In addressing the "continuation" of the Lease Fund in subsection (a), the
Commonwealth Court rejected PEDF's facial challenge, concluding that the

absence of
explicit restrictions on the use of the Lease Fund in the text of Section 1601.2-E(a) did
not violate Section 27, given that all Commonwealth entities were bound by "Section 27's
constitutional requirement that trust principal must be used for trust purposes." PEDF IV,
2020 WL 6193643, at *11.
The court, however, found support in PEDF II for PEDF's challenge to subsection
(c). Specifically, it equated subsection (c)'s language, dictating that the "General
Assembly shall consider the Commonwealth's trustee duties under [S]ection 27," to
language that this Court deemed inadequate to remedy the constitutional violation in
PEDF II, where Section 1602-E instructed that the "General Assembly shall consider the
adoption of an allocation to municipalities impacted by a Marcellus well." PEDF IV, 2020
WL 6193643, at *13.
The Commonwealth Court, nevertheless, concluded that Section 1601.2-E(c) did
not facially violate Section 27 relying again upon its analysis in PEDF III, which deemed
it permissible to use one-third of the non-royalty revenues for non-trust purposes. In so
doing, the court distinguished the section deemed unconstitutional by this Court in PEDF

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II, which solely involved a transfer of royalties, from the section at issue in the current
case, which directed a transfer from the Lease Fund generally. Given that it was possible

that the transfers could be encompassed within the one-third that it viewed as permissible to use for non-trust purposes, the court concluded that PEDF failed to demonstrate that Section 1601.2-E(c) facially violated the ERA. Accordingly, the Commonwealth Court granted the Commonwealth's application for declaratory relief and denied PEDF's contrary application.

As with the Commonwealth Court's analysis of PEDF's challenge to the use of Lease Fund assets for DCNR's general operations, we affirm the court's denial of PEDF's proposed declaration but diverge from its reasoning to the extent it relies upon the now-rejected analysis in PEDF III permitting one-third of non-royalty revenues to be used for non-trust purposes. In contrast, we conclude that the decision in PEDF II answers PEDF's challenge to both Subsections 1601.2-E(a) and (c).

In PEDF II, we observed that "that the legislature's diversion of funds from the Lease Fund (and from the DCNR's exclusive control) does not, in and of itself, constitute a violation of Section 27," because DCNR is not the only Commonwealth entity with a fiduciary duty under Section 27. PEDF II, 161 A.3d at 939. Instead, all Commonwealth entities, including the General Assembly, are bound to conserve and maintain Pennsylvania's public natural resources. PEDF II, 161 A.3d at 931 n.23. Thus, as we explained in both PEDF II and PEDF V, "the General Assembly would not run afoul of the constitution by appropriating trust funds to some other initiative or agency dedicated to

effectuating Section 27." PEDF II, 161 A.3d at 939; PEDF V, 255 A.3d at 314 n.21.
Section 1601.2-E(c) expressly reminds the General Assembly of its duties in administering the Lease Fund mandating that "the General Assembly shall consider the
Commonwealth's trustee duties under section 27 of Article I of the Constitution of
Pennsylvania." 72 P.S. § 1601.2-E(c). In contrast to the Commonwealth Court and the

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Concurring and Dissenting Opinion, we find subsection (c)'s reiteration of the General
Assembly's Section 27 duties to be entirely distinguishable from the constitutionally
insufficient provision in Section 1602-E, under review in PEDF II, which merely directed
the Commonwealth to "consider . . . an allocation to municipalities impacted by a
Marcellus well." 72 P.S. § 1602-E. The fact that both statutes use the verb "consider"
does not render them equivalent. Rather, the operative portion of the provision is what
follows the verb: specifically, what must be considered. While one requires consideration
of mandatory trustee duties imposed by Section 27, the other suggests a specific
allocation of resources to one of many potentially constitutional purposes.
We further observe that the language of subsection (c) seems intended to remedy
the fault identified in PEDF II. In that case, we criticized the statute reviewed therein for
the absence of any "indication that the General Assembly considered the purposes of the
public trust or exercised reasonable care in managing the royalties in a

manner consistent
with its Section 27 trustee duties." PEDF II, 161 A.3d at 938. The current language
addresses these failings by expressly requiring that "the General Assembly shall consider
the Commonwealth's trustee duties under section 27 of Article I of the Constitution of
Pennsylvania." 72 P.S. § 1601.2-E(c). Thus, we reject PEDF's facial challenge to the
repeal of the Oil and Gas Lease Fund Act and its continuation in Section 1601.2-E. 21
21 In rejecting PEDF's challenge, we agree with Justice Dougherty's statement that
Section 27 and our decisions in PEDF II and V require the General Assembly to "'exercise
reasonable care' in administering the trust." Concurring and Dissenting Opinion at 4
(quoting PEDF II, 161 A.3d at 938) (Dougherty, J.). Respectfully, we diverge from the
responsive opinion because we read the current language of Section 1601.2-E(c) to
incorporate the duty to exercise reasonable care. See 1 Pa.C.S. § 1922(3) (providing
that in interpreting legislative intent, courts may presume "[t]hat the General Assembly
does not intend to violate the Constitution").
As stated above, Section 1601.2-E(c) instructs that the General Assembly "shall
consider the Commonwealth's trustee duties under section 27 of Article I of the

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While Section 1601.2-E(c) is facially constitutional as it requires the General Assembly to consider its mandatory trustee duties and does not authorize the Commonwealth to use trust assets for non-trust purposes, our holding herein

does not
negate the potential of an as applied challenge to the General Assembly's ultimate
appropriation of the Lease Fund. We reiterate that in expending funds from the newly
transferred Lease Fund, the General Assembly has a duty to conserve and maintain the
Section 27 trust assets which "implicates a duty to prevent and remedy the degradation,
diminution, or depletion of our public natural resources" and a duty to act toward the
corpus of the trust "with prudence, loyalty, and impartiality." PEDF II, 161 A.3d at 932
(quoting Robinson Twp., 83 A.3d at 956–57). 22
D. Section 1601.2-E(b) – Commingling of Funds
PEDF next challenges the constitutionality of Section 1601.2-E(b), which sets forth
the "sources" of the Lease Fund. Specifically, it provides for the inclusion in the Lease
Constitution of Pennsylvania." While the responsive opinion reads this phrase as
providing for the General Assembly's "mere consideration" of its trustee duties, we view
this language as an express reminder to the General Assembly of its mandatory duties
imposed by the Constitution. Concurring and Dissenting Opinion at 8. The statute's
arguably inarticulate use of the verb "consider" does not negate the mandatory nature of
the General Assembly's Section 27 duties.
These duties, as interpreted by this Court in PEDF II and V, include, inter alia, the
duty to act with prudence toward the corpus of the trust, which is defined as incorporating

the duty of "exercising reasonable care, skill and caution" in administering the trust. 20
Pa.C.S. § 7774. While the General Assembly could have listed each of the Section 27
trustee duties or quoted this Court's summary of those duties, including the exercise of
reasonable care, the absence of such explication does not undermine the constitutionality
of Section 1601.2-E(c).
22 In conjunction with this and the other arguments raised, PEDF seeks a declaration that
the Commonwealth must "petition the court for a declaration of compliance with Section
27 prior" to engaging in the challenged activities. PEDF Brief at 58. We reject this
argument outright as our constitution's tripartite system of government does not provide
for judicial pre-approval of legislative or executive action.

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Fund of trust assets of "rents and royalties from oil and gas leases of land owned by the
Commonwealth" along with funds derived from the Indigenous Mineral Resources
Development Act and "[a]ny other money appropriated or transferred to the fund."23
PEDF contends that this comingling of trust and non-trust assets violates the basic trust
principle requiring a trustee to maintain separate accounts for trust assets. The
Commonwealth responds that Section 27 does not mandate separate accounts.
The Commonwealth Court rejected PEDF's assertions, determining that the
addition of other funds to the Oil and Gas Lease Fund did not render the statute facially
unconstitutional given that the statute could be applied constitutionally if the

Commonwealth appropriated the entirety of the funds solely for trust purposes. The court cautioned, however, that a constitutional issue could arise if the Lease Fund was used for non-trust purposes. Thus, it opined that the Commonwealth trustees should maintain "a clear accounting and identification of corpus funds . . . to ensure that these funds are properly used in strict compliance with Section 27." 24 Id. at *12. It concluded, however, that while the Commonwealth should engage in an accounting, the absence of language requiring an accounting did not render Section 1601.2-E(b) unconstitutional.

We affirm the Commonwealth Court's holding. We reiterate that a party challenging a duly-enacted statute has the burden of demonstrating that the statute "clearly, plainly, and palpably violates the Constitution." PEDF II, 161 A.3d at 929 (internal quotation marks omitted). In this case, PEDF failed to demonstrate that Section 1601.2-

23 Section 1601.2-E(b) is set forth in full supra at 22, n.20.

24 The court granted PEDF's separate request for a declaration that the "Commonwealth, as trustee of Pennsylvania's public natural resources, is required to keep detailed accounts of the trust monies derived from the oil and gas leases and track how they are spent as part of its administration of the trust." PEDF IV, 2020 WL 6193643, at *17. The Commonwealth has not appealed that holding to this Court.

E(b) is facially unconstitutional given that the Commonwealth may fulfill the dictates of Section 1601.2-E(b) without violating its trustee duties under Section 27, by

segregating
the monies from the different funds and keeping an accurate accounting.25
Moreover, as
noted by the Commonwealth Court, it may avoid improper expenditure of the
funds by
restricting the Lease Fund's use solely to trust purposes. Accordingly, we
conclude that
PEDF failed to demonstrate that Section 1601.2-E(b) is facially
unconstitutional.
E. Section 1726-G of the Fiscal Code
Finally, PEDF challenges Section 1726-G's transfer of funds from the
Keystone
Recreation, Park and Conservation Fund ("Keystone Fund") to the General
Fund. 26 It
emphasizes that the Keystone Fund had previously been used by the DCNR to
improve
25 A trustee has a duty to maintain "adequate records of the administration of
the trust"
and to "keep trust property separate from the trustee's own property." 20
Pa.C.S.
§ 7780(a), (b).
26 Section 1726-G of the Fiscal Code, entitled "Fund transfers," provides as
follows:
During the 2017-2018 fiscal year, $300,000,000 shall be
transferred from amounts available in special funds and
restricted accounts to the General Fund. The transfers under
this section shall be in accordance with the following:
(1) The Secretary of the Budget shall transmit to the State
Treasurer a list of amounts to be transferred from special
funds and restricted accounts to the General Fund.
(2) Upon receipt of the list under paragraph (1), the State
Treasurer shall cause the transfers under paragraph (1) to
occur.
72 P.S. § 1726-G. Included in the $300,000,000 was a transfer of $10,000,000

**from the
Keystone Fund to the General Fund. See Petitioner's Brief in Supp. of Application for
Summ. Relief, Exhibit J, Commonwealth's Supplemental Answer and Objections to First
Set of Interrogatories, ¶16.**

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**State forest and parks. 27 PEDF claims that reducing this line of funding constitutes a
violation of the Commonwealth's trustee obligations under Section 27, which should have
entailed public notice and an evaluation of the effect of the transfer of these funds on
DCNR and the projects affected by the reduced funding.**

**The Commonwealth Court denied relief to PEDF. The court observed that the
Keystone Fund derives not from the proceeds of oil and gas leasing but instead from the
sales of bonds and notes and the State Realty Transfer Tax. PEDF IV, 2020 WL
6193643, at *15 (citing 32 P.S. § 2014). Thus, it opined that "the transfer of funds from
the Keystone Fund to the General Fund does not run afoul of Section 27 or impugn the
Commonwealth's fiduciary duties as trustee." Id.**

**The Commonwealth Court additionally rejected PEDF's claim that the
Commonwealth entities breached their fiduciary duties by failing to provide public
evaluation of the environmental impact of the transfer from the Keystone Fund. The court
concluded that Commonwealth entities are not obligated by their fiduciary responsibilities
under Section 27 to provide public evaluation of every transfer of non-trust funds that
might implicate Pennsylvania's natural resources.**

We affirm the Commonwealth Court's denial of PEDF's proposed declaration in
regard to Section 1726-G based upon its conclusion that the transfer from the Keystone
Fund does not implicate Section 27. As the Commonwealth Court observed, the
Keystone Fund does not involve trust assets but rather allocates funds derived from non-
trust sources of Commonwealth revenue. We likewise do not find support in Section 27
or basic trust law for PEDF's claim that the Commonwealth must provide a public
evaluation for every decision that could potentially impact Pennsylvania's natural
resource trust.
27 The General Assembly provided that one of the purposes of the Keystone Act, which
created the Keystone Fund is to provide "[a] predictable and stable source of funding"
funding for state parks. 32 P.S. § 2012(6).

Exhibit I – *Denoncourt v. State Ethics Commission*, 470 A.2d 945 (Pa. 1983) – Full Opinion.

Denoncourt v. Com., State Ethics Com'n

504 Pa. 191 (1983)

470 A.2d 945

Ann DENONCOURT, Donald R. Tinsman, Linda T. Butler and Rudolph E. Butler, Jr., Appellants, v. COMMONWEALTH of Pennsylvania, STATE ETHICS COMMISSION, Appellee.

Supreme Court of Pennsylvania.

Argued October 18, 1983.

Decided December 30, 1983.

***192 *193 Michael I. Levin, Harrisburg, for appellants.**

Sandra S. Christianson, Gen. Counsel, Harrisburg, for appellee.

Before ROBERTS, C.J., and NIX, LARSEN, FLAHERTY, McDERMOTT, HUTCHINSON and ZAPPALA, JJ.

OPINION OF THE COURT[1]

FLAHERTY, Justice.

This is an appeal from an order of the Commonwealth Court, 73 Pa.Cmwlth. 59, 457 A.2d 213, granting summary *194 judgment to the State Ethics Commission in a class action[2] brought by incumbent school directors seeking declaratory and injunctive relief from the enforcement of Sections 4, 5 and 9 of the Public Officials Ethics Act (Ethics Act)[3] on the grounds that these sections of the act are unconstitutional. These sections of the act provide, in essence, that a public official must, as a condition for taking the oath of office or continuing to perform his duties, and as a condition to receive payment for his services, file a statement of financial interests, § 404(d), which statement shall include the following information with respect to the public official and members of his "immediate family," i.e., "[a] spouse residing in the person's household and minor dependent children," § 402:

(1) The name, address and position of the person required to file the statement. (2) The occupations or professions of the person required to file the statement and those of his immediate family. (3) Any direct or indirect interest in any real estate which was sold or leased to the Commonwealth, any of its agencies or political subdivisions; purchased or leased from the Commonwealth, any of its agencies or political subdivisions; or which was the subject of any condemnation proceedings by the Commonwealth, any of its agencies or political subdivisions. (4) The name and address of each creditor to whom is owed in excess of $5,000 and the interest rate thereon. However, loans or credit extended between members of the immediate family and mortgages securing real property *195 which is the principal residence of the

person filing or of his spouse shall not be included. (5) The name and address of any person who is the direct or indirect source of income totalling in the aggregate $500 or more. However, this provision shall not be construed to require the divulgence of confidential information protected by statute or existing professional codes of ethics. (6) The name and address of any person from whom a gift or gifts valued in the aggregate at $200 or more were received, and the value and the circumstances of each gift. However, this provision shall not be applicable to gifts received from the individual's spouse, parents, parents by marriage, siblings, children or grandchildren. (7) The source of any honorarium received which is in excess of $100. (8) Any office, directorship or employment of any nature whatsoever in any business entity. (9) Any financial interest in any legal entity engaged in business for profit. (c) The statement of financial interest need not include specific amounts for any of the items required to be listed.

65 Pa.C.S.A. § 405(b), (c). The penalty section of the act provides, in pertinent part:

(b) Any person who violates the provisions of . . . section 4 [section 404 of Title 65] is guilty of a misdemeanor and shall be fined not more than $1,000 or imprisoned for not more than one year, or be both fined and imprisoned.

65 Pa.C.S.A. § 409(b). This appeal followed Commonwealth Court's grant of summary judgment to the Ethics Commission.

Appellant school directors allege that these provisions of the Ethics Act are unconstitutional as to the directors in that the statutory provision for criminal prosecution in the event of non-disclosure of the financial affairs of members of his immediate family denies due process to the school director because, in the case of these directors, the act *196 would impose criminal liability based on an inability to comply with the act's requirements, not an unwillingness to comply. Further, appellants urge that the reporting requirements of the act are unconstitutional as to the immediate families in that the requirements of the act invade the family members' right of privacy. We agree that both due process and privacy violations render the family reporting provisions of the act unconstitutional.

I.

The penalty section of the act, § 409, supra, by its terms, provides that a public official who does not file the information required by § 404 "is guilty of a misdemeanor and shall be fined . . . or imprisoned . . . or . . . both." No mention is made of a requirement of criminal intent or criminal culpability. To the contrary, criminal liability may be imposed by the mere non-compliance with the reporting requirements of the act. The public official, therefore, on the one hand, is required to file financial information concerning himself and his immediate family, and failure to do this may result in criminal liability; but on the other hand, the official may have no means to acquire and file the information he is required to produce. As we have had occasion to observe before, a married couple is not a single entity, but separate individuals, each of whom controls or has the right to control his own life, associations, finances, and affairs generally:

Any presumption of identity of interest [between husband and wife] is based upon the same outmoded social conditions and policy as was the common law legal fiction of unity of person of husband and wife. * * * * * * Modern conditions demand that courts no longer engage in automatic and unsupported assumption that one's pecuniary or proprietary interest is identical to that of one's spouse.

Estate of Grossman, 486 Pa. 460, 472-73, 406 A.2d 726 (1979). See also Snider v. Thornburgh, 496 Pa. 159, 180 *197 (Opinion of Mr. Justice Flaherty), 186 (Opinion in Support of Reversal, Mr. Chief Justice Roberts), 436 A.2d 593 (1981). Thus, under the terms of the Ethics Act, criminal liability may result from non-compliance with reporting requirements with which a public official may have no ability to comply. Imposition of such criminal liability offends due process, for it is axiomatic that criminal liability may not be imposed for the failure to perform acts which a person has no power to perform. Rather, the essence of our criminal law is the imposition of criminal liability for voluntary, culpable acts, see 18 Pa.C.S.A. §§ 301, 302, which are offensive to public order and decency. Thus, the reporting requirements of the Ethics Act do not withstand a due process challenge.[4]

II.

Equally troublesome, however, is the act's infringement on the privacy rights of the public official's family. This Court has recognized the existence of a constitutionally guaranteed right of privacy based on Article 1, § 1 of the Pennsylvania Constitution, which provides:

All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.

Following the suggestion of the United States Supreme Court in Whalen v. Roe, 429 U.S. 589, 97 S. Ct. 869, 51 L. Ed. 2d 64 (1977), we have adopted a two pronged analysis of privacy as involving (1) a freedom from disclosure of personal matters and (2) the freedom to make certain important *198 decisions.[5]In Re June 1979 Allegheny County Investigating Grand Jury, 490 Pa. 143, 150-51, 415 A.2d 73, 77 (1980). The interest in avoiding a disclosure of personal matters, this Court has said, "finds explicit protection in the Pennsylvania Constitution, Art. 1, § 1. . . ." Id.[6] Thus, there is a recognized privacy interest sought to be protected in this case; it is in the nature of freedom from disclosure of personal matters; and it is constitutionally based.

While it is true that the disclosures required by the act do not require the listing of particular sums of money, business associations are, nevertheless, required to be listed and particular individuals and business entities named. As to an office holder himself, such reporting requirements are a permissible intrusion into one's privacy, Snider v. Thornburgh, 496 Pa. 159, 436 A.2d 593 (1981), but such an intrusion into privacy must be viewed quite differently when it affects private persons who, unlike the public official, do not hold themselves out as public figures or as seekers for public office.

It is not the case, of course, that every intrusion into an individual's privacy is impermissible. As just mentioned, this Court has approved the very intrusions at issue in this case as applied to the office holder himself, Id. We have also held that an investigating grand jury may subpoena hospital medical records containing reports of patients' tissue specimens, In Re June 1979 Allegheny County Investigating Grand Jury, supra; that a commission of the General Assembly may compel a person to reveal his personal affairs to the extent that

such disclosure is reasonably required for the general purpose of the inquiry, Annenberg v. Roberts, 333 Pa. 203, 2 A.2d 612 (1938). On the other hand, we have held that the right to be free from unreasonable searches and seizures under Art. I, § 8 of the *199 Pennsylvania Constitution "is tied to the implicit right to privacy in this Commonwealth," which protects a customer's "legitimate expectation of privacy in records pertaining to their affairs kept at the bank," Commonwealth v. DeJohn, 486 Pa. 32, 49, 403 A.2d 1283, 1291 (1979). In all these cases there is implicit a balancing of an individual's right to privacy against a counterveiling state interest which may or may not justify, in the circumstances, an intrusion on privacy.

This balancing process must be carried out with recognition of the nature of the privacy right and its important relationship to other basic rights. Mr. Justice Brandeis has ably described the right of privacy and its relation to our sustained viability as free and healthy individuals as follows:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone the most comprehensive of rights and the right most valued by civilized men.

Olmstead v. United States, 277 U.S. 438, 478, 48 S. Ct. 564, 572, 72 L. Ed. 944, 956 (1928) (Dissenting Opinion of Mr. Justice Brandeis) (Emphasis supplied). Thus, it may be said that government's intrusion into a person's private affairs is constitutionally justified when the government interest[7]*200 is significant and there is no alternate reasonable method of lesser intrusiveness to accomplish the governmental purpose.[8] Whether there is a significant state interest will depend, in part, on whether the state's intrusion will effect its purpose; for if the intrusion does not effect the state's purpose, it is a gratuitous intrusion, not a purposeful one. Here, while the family reporting requirement does great damage to privacy interests, it does not realistically hold out much hope for effectiveness: a public official determined to evade the

financial reporting requirements of the act will merely transfer various property interests to individuals or business entities outside of his immediate family. Thus, although certain financial disclosures of an office holder's family may be of public interest, it cannot fairly be said that such disclosures represent a significant state interest. Moreover, when one considers the likely impact of the Ethics Act upon the associational rights of the family members under the United States Constitution and the *201 Pennsylvania Constitution,[9] the infirmities of the act for overbreadth become apparent:

A law is void on its face if it "does not aim specifically at evils within the allowable area of [government] control, but . . . sweeps within its ambit other activities that constitute an exercise" of protected expressive or associational rights.

Tribe, American Constitutional Law, § 12-24, p. 710 (1978), quoting Thornhill v. Alabama, 310 U.S. 88, 97, 60 S. Ct. 736, 741, 84 L. Ed. 1093, 1100 (1939). While it may be true that some public officials would be apprehended after they had breached the public trust or dissuaded from improper activity by the family reporting requirement of the Ethics Act, it is certainly true that all of a public official's family members will suffer a chilling effect on their freedom to associate with persons or business entities of their own choice, knowing that these associations will be subject to public scrutiny and appraisal.[10]

For these reasons, we hold that the reporting provisions of the Ethics Act relating to family members are unconstitutional *202 in that they violate the due process rights of the public official and the family's right to privacy under Art. 1 § 1 of the Pennsylvania Constitution.

Reversed.

ROBERTS, C.J., joins Part I of this opinion.

HUTCHINSON, J., files a concurring and dissenting opinion.

NIX, J., files a dissenting opinion in which LARSEN, J., joins.

HUTCHINSON, Justice, concurring and dissenting.

I concur in the result the majority reaches only insofar as it finds unconstitutional the spousal disclosure provisions of our Public Officials'

Ethics Act. Such disclosure is in my view based on outmoded notions of spousal unity and subservience. Although I share the dissent's concern that removal of this requirement may render the act meaningless in its application to some officials who are members of traditional families, I believe that concern is outweighed by the danger of imposing the sanction of removal or the sanctions of the criminal laws on other public officials whose spouses commonly follow independent private careers and would be unwilling or unable to make the disclosure called for by the statute. In such cases the requirement of spousal disclosure seems to me to subject such officials to prosecution based on status. That result seems to me to offend the provisions of Article I, Section I, of the Declaration of Rights in our Pennsylvania Constitution. On this independent state ground alone, analogous to Fourteenth Amendment due process, I agree with the majority that a public official cannot be required to disclose spouse's financial interests under pain of criminal sanctions.

However, I wish to disassociate myself entirely from what I consider is the majority's unnecessary discussion of the shadowy reaches of the right of privacy the judiciary has interpolated into our state and federal constitutions. Moreover, I see no reason why a parent who seeks or *203 accepts public office cannot be required to disclose the financial interests of children dependent on him.

For these reasons I concur in the result with respect to spousal disclosure, but dissent with respect to minor dependent children.

NIX, Justice, dissenting.

I dissent. The General Assembly has clearly identified the important state interest sought to be furthered by the Ethics Act:

The Legislature hereby declares that public office is a public trust and that any effort to realize personal financial gain through public office other than compensation provided by law is a violation of that trust. In order to strengthen the faith and confidence of the people of the State in their government, the Legislature further declares that the people have a right to be assured that the financial interests of holders of or candidates for public office

present neither a conflict nor the appearance of a conflict with the public trust. Because public confidence in government can best be sustained by assuring the people of the impartiality and honesty of public officials, this act shall be liberally construed to promote complete disclosure. Act of October 4, 1978, P.L. 883, No. 170, § 1, 65 P.S. § 401 (Supp. 1983-84).

We are here concerned with a conflict between the spousal disclosure provisions of the Ethics Act and the constitutional right to privacy. The right of privacy as has been defined by the decisions of the United States Supreme Court encompasses two distinct privacy interests. First, there is an "autonomy" interest, which relates to personal decision-making in matters of fundamental importance. See e.g., Paul v. Davis, 424 U.S. 693, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1976); Paris Adult Theatre I v. Slaton, 413 U.S. 49, 93 S. Ct. 2628, 37 L. Ed. 2d 446 (1973); Roe v. Wade, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973). This autonomy interest may be overridden by the legislature *204 only where the state can demonstrate a compelling interest which cannot be effectuated by less restrictive means. See e.g., Paul v. Davis, supra; Paris Adult Theatre I v. Slaton, supra; Roe v. Wade, supra. Second, there is a lesser but nonetheless important interest in the "confidentiality" of one's personal affairs. See Whalen v. Roe, 429 U.S. 589, 97 S. Ct. 869, 51 L. Ed. 2d 64 (1977). The constitutionality of legislation which impinges upon this right to confidentiality is determined by balancing the public interest to be served against the personal interest affected. In addition, there must be a rational relationship between the means employed by the legislature and the goals sought to be achieved. See Dandridge v. Williams, 397 U.S. 471, 90 S. Ct. 1153, 25 L. Ed. 2d 491 (1970).

The privacy interest implicated in the instant matter, namely the right of the spouse of a public official to confidentiality in his or her financial dealings, clearly falls within the "confidentiality" category. Thus the balancing test and the rational relationship test are here applicable.

Employing the balancing test, I am of the view that the state interest in strengthening and maintaining public confidence in government far outweighs the interest of spouses of government officials in their personal financial affairs. I do not believe such a conclusion works an undue hardship. Public

service, with its attendant sacrifices to spouses as well as office holders, is not forced upon the public official. The spouse of a public official undoubtedly plays a role in that official's career and shares in the prestige and honor as well as the inevitable sacrifices of public office. Thus the burden of public financial disclosure is merely an additional inconvenience that must be accepted by the marital unit if one of the members seeks to hold public office.

I am also convinced that the Ethics Act's mandatory periodic disclosure scheme is a reasonable and practicable means of achieving the legislature's purposes. The majority improperly projects that public officials will deliberately evade the Ethics Act's disclosure requirements, thus frustrating those purposes. I question the propriety of prejudging *205 the efficacy of the legislation under scrutiny, nor do I impute to the average hard working and dedicated public official such a nefarious intent. This Court has declared on innumerable occasions that it is not our function to pass upon the wisdom of legislation. E.g., Wanamaker v. Philadelphia School District, 441 Pa. 567, 274 A.2d 524 (1971); Commonwealth v. Philadelphia Eagles, Inc., 437 Pa. 25, 261 A.2d 309 (1970); Shankey v. Staisey, 436 Pa. 65, 257 A.2d 897 (1969); Williams v. Department of Highways, 423 Pa. 219, 223 A.2d 865 (1966). Thus under both tests the spousal disclosure provisions clearly fall within permissible constitutional bounds.

I am likewise in disagreement with the majority's conclusion that the penal provisions of section 9(b) of the Ethics Act, 65 P.S. § 409(b), violate due process. Section 5 of the Ethics Act, 65 P.S. § 405, which specifies the contents of a statement of financial interests, is not mentioned in section 9(b). The majority nevertheless interprets section 9(b) as imposing absolute criminal liability upon individuals unable to comply with section 5, and bases its finding of a due process violation upon that interpretation. Such a reading violates two well established principles of statutory construction. First, it must be presumed that the General Assembly does not intend to violate the Constitutions of the United States or of this Commonwealth. 1 Pa.C.S. § 1922(3). Second, penal provisions such as section 9(b) must be strictly construed. 1 Pa.C.S. § 1928(b)(1).[1]

Section 9(b) explicitly provides criminal sanctions for violation of section 4 of the Ethics Act, 65 P.S. § 404, which prescribes who must file a statement of financial interests and when and where such statements must be filed. Normal usage commands the conclusion that the conduct proscribed by section 9(b) is failure to file the required statement in compliance with section 4. Since section 9(b) does not refer to the conduct described in section 5, there is no *206 basis for suggesting the applicability of section 9(b) to section 5.

More importantly, the liability for the content of the disclosure statement is explicitly governed by section 5(a), which requires that document to be "signed under penalty of perjury." 65 P.S. § 405(a). Therefore, in my judgment, section 9(b) may not be interpreted as providing that a public official or candidate unable to obtain financial data from his or her spouse is subject to the "automatic" penalties of section 9(b). It is clear in such case the disclosure of the spouse's unwillingness to supply such information satisfies the mandate of section 5.

Accordingly, I would affirm the order of the Commonwealth Court.

LARSEN, J., joins in this dissenting opinion.

NOTES

[1] Reassigned to this writer on December 16, 1983.

[2] The class was composed of "all incumbent public school directors, public school directors that served at any time during 1981 or thereafter and candidates for the office of public school director and who are married and/or have minor dependent children, and (2) spouses of all incumbent school directors, public school directors that served at any time during 1981 or thereafter and candidates for the office of public school director."

[3] Act of October 4, 1978, P.L. 883, No. 170, §§ 4, 5, 9, 65 Pa.C.S.A. §§ 404, 405, 409 (Supp. 1983-84).

[4] As Mr. Chief Justice Roberts wrote in Snider v. Thornburgh:

Where disqualification from office and criminal liability result not from unwillingness, but from inability to comply with the [Ethics] act's requirements, the imposition of these sanctions is fundamentally unfair and

clearly violates the due process requirements of the Constitutions of the United States and Pennsylvania.

496 Pa. 159, 186, 436 A.2d 593, 606 (1981) (Opinion in Support of Reversal).

[5] See, generally, Annotation, "Supreme Court's Views as to the Federal Legal Aspects of the Right of Privacy," 43 L. Ed. 2d 871.

[6] The Allegheny County Grand Jury case was a plurality opinion, but Mr. Justice Larsen and this writer, albeit in dissenting opinions, joined the majority in recognizing a constitutionally based right of privacy.

[7] The nature of the governmental purpose in this case is well expressed at the beginning of the act:

The Legislature hereby declares that public office is a public trust and that any effort to realize personal financial gain through public office other than compensation provided by law is a violation of that trust. In order to strengthen the faith and confidence of the people of the State in their government, the Legislature further declares that the people have a right to be assured that the financial interests of holders of or candidates for public office present neither a conflict nor the appearance of a conflict with the public trust. Because public confidence in government can best be sustained by assuring the people of the impartiality and honesty of public officials, this act shall be liberally construed to promote complete disclosure.

65 Pa.C.S.A. § 401.

[8] Compare Roe v. Wade, where the United States Supreme Court concluded that an individual's decision to have an abortion implicates that person's privacy rights, which are fundamental, if not absolute:

Where certain "fundamental rights" are involved, the Court has held that regulation limiting these rights may be justified only by a "compelling state interest," Kramer v. Union Free School District, 395 U.S. 621, 627, 23 L. Ed. 2d 583, 89 S. Ct. 1886 [1890] (1969); Shapiro v. Thompson, 394 U.S. 618, 634, 22 L. Ed. 2d 600, 89 S. Ct. 1322 [1331] (1969); Sherbert v. Verner, 374 U.S. 398, 406, 10 L. Ed. 2d 965, 83 S. Ct. 1790 [1795] (1963), and that legislative enactments must be narrowly drawn to express only the legitimate state

interests at stake. Griswold v. Connecticut, 381 U.S. [479], at 485 [85 S. Ct. 1678 at 1682], 14 L. Ed. 2d 510; Aptheker v. Secretary of State, 378 U.S. 500, 508, 12 L. Ed. 2d 992, 84 S. Ct. 1659 [1664] (1964); Cantwell v. Connecticut, 310 U.S. 296, 307-308, 84 L. Ed. 1213, 60 S. Ct. 900 [904-905], 128 A.L.R. 1352 (1940). . . .

410 U.S. 113, 155, 93 S. Ct. 705, 728, 35 L. Ed. 2d 147, 178 (1973).

[9] See Annotation "Supreme Court's Views as to the Federal Legal Aspects of the Right of Privacy" 43 L. Ed. 2d 871 § 11 Freedom of Association:

The First Amendment has been held to impose limitations upon governmental abridgment of freedom to associate and privacy in one's associations. NAACP v. Alabama, (1958) 357 US 449, 2 L Ed 2d 1488, 78 S Ct 1163; Bates v. Little Rock (1960) 361 US 516, 4 L Ed 2d 480, 80 S Ct 412; Gibson v. Florida Legislative Investigation Committee (1963) 372 US 539, 9 L Ed 2d 929, 83 S Ct 889; Griswold v. Connecticut (1965) 381 US 479, 14 L Ed 2d 510, 85 S Ct 1678 (where the court stated that the First Amendment right of association has a penumbra where privacy is protected from governmental intrusion); De Gregory v. Att. Gen. of New Hampshire (1966) 383 US 825, 16 L Ed 2d 292, 86 S Ct 1148; Katz v. United States, (1967) 389 US 347, 19 L Ed 2d 576, 88 S Ct 507 (recognizing rule.)

See also Annotation, "The First Amendment Right of Association," 33 L. Ed. 2d 865 § 8, and Tribe, American Constitutional Law, "Rights of Privacy and Personhood," § 15-3 pp. 893-94 (1978).

[10] In Kolender v. Lawson, the majority of the United States Supreme Court, agreeing with two dissenting justices, wrote, "[T]he overbreadth doctrine permits facial challenge of a law that reaches a substantial amount of conduct protected by the First Amendment." 461 U.S. 352, 361-362, n. 10, 103 S. Ct. 1855, 1860, n. 10, 75 L. Ed. 2d 903 (1983).

[1] Section 105 of the new Crimes Code, 18 Pa.C.S. § 105, is not applicable since this is not a provision under that Code.

Exhibit J – *Balent v. City of Wilkes-Barre*, 669 A.2d 309 (Pa. 1995) – Full Opinion.

Balent v. City of Wilkes-Barre

167 Pa. Commonwealth Ct. 556 (1994)

648 A.2d 1273

Joseph J. BALENT and George Barto, v. CITY OF WILKES-BARRE, Appellant.

Commonwealth Court of Pennsylvania.

Argued April 12, 1994.

Decided September 22, 1994.

Petition for Allowance of Appeal Granted December 29, 1994.

***559 Christine Mayernick for appellant.**

Mark A. Ciavarella, Jr. for appellees.

Before SMITH and PELLEGRINI, JJ., and KELTON, Senior Judge.

KELTON, Senior Judge.

The City of Wilkes-Barre (City) appeals from the June 9, 1993 judgment of the Court of Common Pleas of Luzerne County (trial court) which denied the

City's motion for post-trial relief and affirmed a jury verdict of $30,000 in favor of Joseph J. Balent and George Barto (Owners). Claiming that the City had razed the Owners' fire-damaged building without giving the Owners prior notice, the Owners had sought damages under 42 U.S.C. § 1983 (Section 1983)[1] for an alleged violation of their right to procedural due process under the 5th and 14th Amendments of the United States Constitution. We affirm the judgment.

ISSUES

On appeal, the City argues: 1) that the question of the City's liability has already been litigated in a prior eminent domain action and that the Owners were collaterally estopped here from seeking civil rights damages under Section 1983; 2) that the trial judge erred in his jury instructions on Section *560 1983 damages; and 3) that the evidence was insufficient to permit the jury to find that the City was liable under the federal civil rights statute for failure to give notice to the Owners before destroying their building.

The Owners argue that the judgment in the eminent domain action did not estop them from maintaining the Section 1983 action; that there was sufficient evidence of reckless or wanton conduct to establish a pattern, practice or custom of unconstitutional activity; and that the trial judge correctly charged the jury on the City's potential liability for a civil rights violation.

BACKGROUND

On March 9, 1980, the Owners' property, a two-story frame building, was destroyed by fire. One day after the fire, Thomas Hughes, the Chief Building Inspector for the City, mailed the following form letter notice to the Owners:

On March 9, 1980 fire damaged your building at the above address to such an extent it is a fire, health, and physical hazard to occupants and the public in violation of the Wilkes-Barre City Building Code, Ordinance No. 32 of 1976, and Ordinance No. 16 of 1971 of the Wilkes-Barre Housing Code. You are hereby ordered to have the building enclosed within ten (10) days of this notice and to correct all violations to comply with the Codes of the City of Wilkes-Barre or have the building razed. This work must be completed not later than April 9, 1980. If this order is not complied with, it will result in legal

action which may result in a fine or imprisonment. Any person aggrieved by the decision of the Building Inspector may within ten (10) days of this notice appeal to the Board of Appeals for a review of the decision in accordance with the procedures prescribed by the board.

(R.R. 276a.) (Emphasis in original). Owners did not file an appeal.

***561 The City's Bureau of Housing allegedly sent Owner Barto a letter dated May 18, 1981 in which he was informed that the building must be enclosed by the Owners within 10 days and all violations corrected or the building razed no later than June 16, 1981. The letter (if in fact it was sent) further informed Owner that:**

If this order is not complied with on or before June 26, 1981 the above property will be razed by the City of Wilkes-Barre under Wilkes-Barre City Housing Code Ordinance No. 16 of 1971.

(R.R. 259a.) The letter also informed Barto that he had the right to appeal that order within 10 days. However, there was testimony at trial by Barto and by the City's Assistant Housing Administrator which was sufficient to permit the jury to conclude that the May 18, 1981 letter was never sent. (R.R. 73a, 136a.)

By letter dated June 3, 1981, Owner Barto was again informed that he must correct the code violations by June 10, 1981; but the June letter did not state that the City would raze the building if the Owners failed to correct the violations.

Owners did not take any action to correct the building code violations and on December 14, 1981, the City hired a construction company which proceeded to demolish the building.

Prior to the cause of action which is the subject of this appeal, the Owners had filed a complaint against the City in the Court of Common Pleas of Luzerne County requesting that the court appoint a Board of Viewers pursuant to the Eminent Domain Code to determine the damages incurred in an alleged de facto condemnation of the building. The City filed preliminary objections in the nature of a demurrer which the trial court sustained. The Owners

appealed the trial court's decision to this Court at No. 2180 C.D.1983. We affirmed the court's order to sustain the preliminary objections and dismiss the complaint. Balent v. City of Wilkes-Barre, 89 Pa.Commonwealth Ct. 578, 492 A.2d 1196 (1984) (Hereinafter "Balent I"). The Supreme Court denied the *562 Owners' petition for allowance of appeal at No. 792 E.D. Allocatur Docket 1985.

On May 14, 1985, the Owners filed a complaint in the instant proceeding against the City in the Court of Common Pleas of Luzerne County. In their complaint, the Owners allege that the actions taken by the City in demolishing their building deprived them of a right, privilege and immunity secured by the 5th and 14th amendments of the U.S. Constitution. Owners sought damages pursuant to Section 1983.

MOTION FOR SUMMARY JUDGMENT

Because the parties quite appropriately proceeded to jury trial following the trial court's denial of the City's motion for summary judgment, we will not apply our normal scope of summary judgment review which would have been to determine whether the trial court made an error of law or abused its discretion in its ruling on the motion. See Salerno v. LaBarr, 159 Pa.Commonwealth Ct. 99, 632 A.2d 1002 (1993) for a review of the normal scope of review standards.

Here, we merely determine that the City by filing its motion, preserved for appellate review the question of whether this cause of action is barred under the doctrine of res judicata (Initial Decision p. 3, 11, 12, 13) or collateral estoppel(Initial Decision p. 3, 12, 13). For res judicata (Initial Decision p. 3, 11, 12, 13) to apply, there must be a concurrence of four conditions: (1) identity of the thing sued upon or for; (2) identity of the causes of action; (3) identity of the person and parties to the action; and, (4) identity of the quality or capacity of the parties suing or being sued. Iwinski v. Commonwealth, State Horse Racing Commission, 85 Pa.Commonwealth Ct. 176, 481 A.2d 370 (1984).

Collateral estoppel (p. 3, 11, 12, 13) will apply only when the issue decided in the prior adjudication was identical with the one presented in the later action; when there was a final judgment on the merits; when the party against whom

the plea is asserted was a party or in privity with a party to the prior adjudication; and, when the party against whom it is asserted has had a full and fair opportunity to litigate the issue in question in a prior action.

***563 The City argues that the trial court erred in declining to grant its motion for summary judgment on the issue of collateral estoppel and res judicata on the basis of the prior action filed by Owners. The City contends that the prior eminent domain action litigated all the issues before the trial court in this constitutional tort cause of action.**

Specifically, the City argues that it was decided in the prior action that, in demolishing the building, the City had relied upon the emergency provision in the ordinance which allows the building inspector to cause the necessary work to be done where the building poses an actual and immediate danger to life or property; that the Owners had failed to exhaust their administrative remedies to object to the demolition order; that the Owners were given notice that the building posed a safety hazard; that the Owners had been given notice that they could appeal the building inspectors decision to the Board of Appeals; and, that the Owners had no standing to contend that there was a de facto taking of their property.

Neither res judicata (Initial Decision p. 3, 11,12, 13) nor collateral estoppel (Initial Decision p. 3, 12, 13) applies to this cause of action. While the parties to both causes of action are the same, the prior action between the Owners and the City involved an in rem eminent domain proceeding. In Balent I we held that an "otherwise valid" exercise of the police power does not effectuate a constitutional taking of property for public use. 89 Pa.Commonwealth Ct. at 581, 492 A.2d at 1197. This second lawsuit is one based on theories of trespass and constitutional torts and raises the issue of whether the police power was in fact validly exercised under Section 1983. The eminent domain proceeding did not litigate and decide whether the City violated the Owners' constitutional rights to due process under the 5th and 14th amendments. The eminent domain proceeding merely determined that the City's actions in demolishing the Owners' property were an exercise of the police power and did not amount to a compensatory taking under the Eminent Domain Act. Balent I did not

hold that the City's power was exercised in a valid manner under the federal civil rights statute.

***564 For those reasons, we find that the trial court did not err in holding that the civil rights action was not barred by the unsuccessful eminent domain action.**

MOTION FOR COMPULSORY NON-SUIT

The City further argues that the trial court erred in denying its motion for a compulsory non-suit at the close of Owners' case, i.e. that there was no evidence of a pattern or practice of unconstitutional activity on the part of the City as required for recovery under Section 1983. We will address the merits of the City's argument regarding the requirements of Section 1983 in the next section of this opinion. Here, however, we will not review the denial of the motion.

Following the completion of the plaintiff's case, the City's counsel made a motion for compulsory nonsuit. Following the denial of the motion, the City then chose to offer evidence (R.R. 195a), thus rendering moot the question of whether or not the trial court erred in denying the City's motion for a non-suit. As the Supreme Court has noted:

We hold that the refusal of a motion for nonsuit is not a valid reason for a new trial in this or any case where the defendant offers testimony. A defendant's right to request a non-suit is based on his offering no evidence, and the court cannot grant a non-suit after the introduction of evidence by the defendant. . . . If a non-suit motion made at the close of the plaintiff's case is refused by the trial judge, the defendant has an option either to rest on that motion and present no evidence, or put in a case. If the defendant elects to proceed, . . . the non-suit stage is over, and the correctness of the court's ruling is moot.

F.W. Wise Gas Co. v. Beech Creek Railroad Co., 437 Pa. 389, 391-92, 263 A.2d 313, 315 (1970).

JURY CHARGE ON SECTION 1983 LIABILITY

The trial court charged the jury on the issue of the City's liability under Section 1983 as follows:

***565 To prevail against a municipal corporation, such as the Defendant herein, the City of Wilkes-Barre, under Section 1983; however, the Plaintiffs must show that a governmental policy or custom was responsible for the constitutional violation alleged or was the result of a single act of a high ranking official. A custom may be entered [sic] from acts or omissions of municipality supervisory officials serious enough to constitute reckless conduct, gross negligence or gross constitutional rights of the Plaintiff, whether or not such custom as [sic] received approval through official decision-making challenges. Reckless conduct is intentional acting or failing to act in complete disregard of a risk of harm to others which is known or should be known to be highly probable and with a conscious indifference to the consequences. Reckless conduct is acting or failing to act when existing danger is actually known and with an awareness that harm is reasonably certain to occur.**

(R.R. at 241-42a.)

A jury charge constitutes reversible error where it is erroneous and harmful to the complaining party. Leaphardt v. Whiting Corporation, 387 Pa.Superior Ct. 253, 564 A.2d 165 (1989). A motion for a new trial should be granted where a reading of the jury charge against the background of the evidence reveals that the jury charge might have been prejudicial to the complaining party. Lilley v. Johns-Manville Corp., 408 Pa.Superior Ct. 83, 596 A.2d 203 (1991). We find that a reading of the jury charge as a whole reveals that the court did not erroneously charge the jury with the law of Section 1983 municipal liability and thereby did not prejudice the City.

The City argues that the trial court erred in its charge to the jury concerning a municipality's liability for acts of its employees because there was no evidence of a pattern, practice or custom of unconstitutional activity by the City.

***566 In Monell v. Department of Social Services of New York, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978), the Supreme Court exhaustively examined the legislative history behind the language of Section 1983 and concluded that municipalities could be sued for violating constitutional rights under that section. The Supreme Court concluded as follows:**

[T]he language of § 1983, read against the background of the same legislative history, compels the conclusion that Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort. In particular, we conclude that a municipality cannot be held liable solely because it employs a tortfeasor or, in other words, a municipality cannot be held liable under § 1983 on a respondeat superior theory.

Id. at 691, 98 S. Ct. at 2036.

The Supreme Court found that when the execution of official government policy or custom inflicts injury, municipal liability under Section 1983 may occur. It is not the acts of its employees or agents which creates the liability. However, the Court expressly stated that "we have no occasion to address, and do not address, what the full contours of municipal liability under [Section] 1983 may be. . . . [W]e expressly leave further development of this action to another day." Monell, 436 U.S. at 695, 98 S. Ct. at 2038.

The City policy, as set forth in the ordinances, requires written notice to the owners of a property before it can be razed. Section 1009.1 directs the city employees as to the type of notification they must give a property owner when a violation of the Housing Code exists. Section 1009 provides that the minimum notice should be in writing, include a description of the real estate, specify the violations that exist and the remedial action required, allow reasonable time for performance, indicate that an appeal procedure exists and indicate which violations may require a city permit in order to correct the violation. The notice should be given to the property's owner either by personal delivery, through a notice of violation, by leaving the notice with a responsible person in *567 the family, or by sending the letter certified mail. If the letter is returned to the office unclaimed, notice is to be posted on the property.

The City argues that the jury charge gave the jury the impression that the City could be responsible under a theory of respondeat superior because a City employee violated this policy. We disagree. The jury charge informed the jury that the City could be liable if the Owners showed "that a governmental

policy was responsible for the constitutional violation OR was the result of a single act of a high ranking official." (R.R. at 241-42a.) (Emphasis added).

The May 18, 1981 letter informing the Owners that their building would be razed, which the jury could find the Owners never received, was signed by Joseph Chabala, the City's Chief Housing and Zoning Officer. We believe that the trial judge could conclude as a matter of law that he was a person "whose edicts or acts may fairly be said to represent official policy." Parkway Garage, Inc. v. City of Philadelphia, 5 F.3d 685 (3d Cir.1993).

Parkway involved a civil rights claim filed against the City of Philadelphia and the Philadelphia Parking Authority (Authority). Parkway is a parking garage which is located on Philadelphia city property leased to the Authority. The land was subleased for 36 years by the Authority to John McShain, Inc., which agreed to build and operate a parking garage on the property. In its complaint, Parkway alleged that Philadelphia and the Authority misused the police power to benefit themselves as landlord and garage owner.

Based on a report it commissioned, Philadelphia determined that Parkway's sale price is limited by the long-term lease to John McShain, Inc. Philadelphia city officials closed the entire garage without notice, claiming it was in imminent danger of collapse. The closing took place pursuant to a meeting of high Philadelphia city officials and Authority officials at Mayor Wilson Goode's office. Parkway claimed that the garage was not in imminent danger of collapse and that *568 the City of Philadelphia and the Authority conspired to close the garage to benefit themselves.

The jury and the Third Circuit agreed with Parkway. The jury found that Parkway's right to due process was violated by the City of Philadelphia. It further found that the Authority and the City of Philadelphia conspired to deprive Parkway of its right to due process. The Third Circuit found that "the jury could have reasonably found that the City's and the Authority's actions leading up to the closing of the garage belie a proper motive for the closing." 5 F.3d at 693. The Court further found that the Mayor ordered the closing and that the jury could properly conclude that the Mayor knew of and personally possessed improper motives for closing the garage.

To hold the City of Wilkes-Barre liable for municipal policy or procedure under Parkway, "scienter-type evidence must have been adduced with respect to a high-level official determined by the [trial] court, in accordance with local law, to have final policymaking authority in the areas in question." Parkway, 5 F.3d at 692 (quoting Simmons v. Philadelphia, 947 F.2d 1042, 1063 (3d Cir.1991)). Moreover, under Parkway, the plaintiff must produce sufficient evidence that the high-ranking official knew of or recklessly disregarded relevant facts concerning the improper actions taken by the City. Recklessness is "`[f]ailure of a municipality to fulfill a duty to guard against foreseeable harm when its officials have knowledge of circumstances making that harm likely.'" Parkway, 5 F.3d at 693 (quoting Simmons, 947 F.2d at 1090).

The Chief Housing and Zoning Officer, Joseph Chabala, signed the May 18, 1981 letter informing the Owners that their building would be razed unless they complied with the ordinance. The jury could reasonably find that Owners never received that letter. Joseph Chabala never determined that the Owners had received that letter before the demolition of their building occurred.

The Supreme Court has stated that "an unconstitutional government policy could be inferred from a single decision *569 taken from the highest officials responsible for setting policy in that area of the government's business." City of St. Louis v. Praprotnik, 485 U.S. 112, 123, 108 S. Ct. 915, 924, 99 L. Ed. 2d 107 (1988). Only persons who have "final policymaking authority" may subject the government to Section 1983 liability. Whether one has "final policymaking authority" is a question of state law, but "the challenged action must have been taken pursuant to a policy adopted by the official or officials responsible under state law for making policy in that area of the city's business." Id. at 123, 108 S. Ct. at 924.

In Jett v. Dallas Independent School District, 491 U.S. 701, 109 S. Ct. 2702, 105 L. Ed. 2d 598 (1989), the Supreme Court stated that "`whether a particular official has `final policy making authority' is a question of state law.'" Jett, 491 U.S. at 737, 109 S. Ct. at 2723 (quoting St. Louis v. Praprotnik, 485 U.S. 112, 108 S. Ct. 915, 99 L. Ed. 2d 107 (1988)). The Court further stated in Jett that "the identification of those officials whose decisions represent the

official policy of the local governmental unit itself is a legal question to be resolved by the trial judge before the case is submitted to the jury. . . . [T]he trial judge must identify those officials or governmental bodies who speak with final policy-making authority for the local governmental actor concerning the action alleged to have caused the particular constitutional or statutory violation at issue." Jett, 491 U.S. at 737, 491 U.S. at 2724. See also, Bennett v. City of Slidell, 728 F.2d 762 (5th Cir.1984).

In his charge to the jury, the trial judge stated that to prevail against the City, the plaintiffs must show either a governmental policy or custom or that the constitutional violation was a result of a single act of a high-ranking official. It is implicit in this charge that the trial judge determined that the jury reasonably could find that the Chief Housing and Zoning Officer, Joseph Chabala, was a high-ranking policy-making official on whose actions the jury could impute municipal liability to the City. Therefore, the jury charge was not erroneous and the trial judge did not err in denying the City's motion for a new trial.

*570 JUDGMENT NOTWITHSTANDING THE VERDICT

Our scope of review of a denial of a motion for judgment notwithstanding the verdict is limited to determining whether the trial court abused its discretion or committed legal error. United States Fidelity & Guaranty Co. v. Royer Garden Center and Greenhouse Inc., 143 Pa.Commonwealth Ct. 31, 598 A.2d 583 (1991), petition for allowance of appeal denied, 530 Pa. 663, 609 A.2d 170 (1992). We must view the record in a light most favorable to the Owners as verdict winners and grant them every inference. Id.

The City contends that the trial court erred by failing to enter a judgment notwithstanding the verdict in its favor arguing that the Owners failed to establish a pattern, policy or custom of unconstitutional activity on its part. We disagree and find that the evidence was sufficient to sustain a jury finding of a Section 1983 violation.

The evidence showed that the Owners received one notice in March concerning their building and another notice in June. The June letter did not inform the Owners of their right to appeal the building inspector's

determination. In fact, the portions of the form letter which would have given appeal rights had been crossed out on the form. (R.R. at 263a.) Neither notice informed the Owners that failure to fix the violations would result in their building being razed. Further, there is evidence which the jury could believe that the Owners never received the May notice informing them that their building would be razed by the City if they did not comply with the ordinance. The City did not even post notice on the property as required under the ordinance. Also, the City did not act quickly in demolishing the building. It waited until December to raze the building without providing the Owners with any last minute notice despite the fact that one of the Owners often visited the building inspector's office.

Finally, because the City never perfected the notice as required under the ordinance, it essentially entrusted the building official with the final decision-making authority to raze the building, which he exercised.

***571 Based on the evidence, we believe the jury could find a pattern or a series of acts by the City which denied the Owners their constitutional rights. The jury could also find gross negligence by a high-ranking, policy-making official. Therefore, the trial court did not abuse its discretion in refusing the City's motion for judgment notwithstanding the verdict.**

For the reasons stated above, we affirm the order of the Court of Common Pleas of Luzerne County denying the City's motions for post-trial relief and entering judgment in favor of the Owners.

ORDER

AND NOW, this 22nd day of September, 1994, the order of the Court of Common Pleas of Luzerne County at No. 5123-C of 1983 is hereby affirmed.

PELLEGRINI, Judge, dissenting.

I respectfully dissent. The majority characterizes a single inadvertent mistake on the part of the City's Chief Housing Officer not insuring that notice had been perfected before demolishing an unsafe building as establishing a policy imposing liability in a Section 1983 action on the City of Wilkes-Barre (City). While the Owners could avail themselves of state remedies, I would hold that

Section 1983 liability does not exist for failure to receive notice when it was the result of a simple mistake.

On March 9, 1980, a building owned by Joseph J. Balent and George Barto (Owners) containing a tavern on the first floor and rental apartments on the second and third floors was severely damaged by fire. There was fire damage throughout the entire structure and through the roof causing considerable structural damage.

As a result of the fire, the Wilkes-Barre Bureau of Building Inspection began to undertake action against the property to have the Owners first secure and then either repair or demolish the property. It prepared three violation notices concerning *572 the building's condition, of which two were actually received.

On March 10, 1980, the City advised the Owners to "close" the building within 10 days and to correct all violations to the building by April 9, 1980. The notice informed the Owners that they had 10 days to appeal the decision to the Board of Building Review. No appeal was taken. There is no question that the Owners received this violation notice but took no action to abate the conditions.

On March 18, 1981, because the Owners had done nothing to repair the property, the City sent another violation notice to them stating that the building was going to be razed if repairs were not completed by June 26, 1981. It also notified Owners that the violation notice could be appealed to the Wilkes-Barre Board of Review. Although a PS Form 3800 receipt for certified mailing of this notice had been found as well as a PS Form 3811, the green card that is returned to a sender of certified mail evidencing its receipt with a postmark dated May 20, 1981, stamped on the back side, the City could produce no evidence of a card that was signed by Owners. Owners failed to receive this notice and this is the basis for Owners' Section 1983 action.

On June 3, 1981, having received no response from the Owners, the City sent a third violation notice to the Owners, stating that the repairs to the building were to be completed no later than June 10, 1981. No warning was given in this notice that the building was going to be razed if repairs were not made. However, this violation notice specifically said "THIS NOTICE DOES NOT

SUPERSEDE VIOLATION NOTICE ISSUED 5-18-81." Owners received this notice but took no action to abate the conditions or inquire as to what was contained in the referenced May 18, 1981 violation notice.

Because Owners had made no repairs to the property and, since the fire, vandalism, rotting wood and wind damage had made the building unsafe and an immediate hazard, on December 14, 1981, the City contracted to have the building demolished. Under the emergency provision, if it finds that the *573 building constitutes an immediate danger, the City is to take immediate action to demolish the structure.[1]

After its Petition for the Appointment of Viewers alleging that the City's action in demolishing the building was a de facto take was dismissed, and an appeal to this court failed (Balent I), Owners filed a Section 1983[2] action claiming that because they did not receive the May 18, 1981 violation notice that their property was to be razed if repairs were not made, their building was taken without due process of law in violation of the Fifth and Fourteenth Amendments to the United States Constitution. After filing its answer, the City filed a motion for summary judgment claiming that either res judicata or collateral estoppel applied because of Owners' unsuccessful eminent domain proceeding. The trial court denied the motion and the case proceeded to a jury trial. The jury, finding that Owners' rights under the Constitution were violated, awarded Owners $30,000 in damages.[3]

On appeal, the City contends that the trial court erred as a matter of law in instructing the jury that Joseph Chabala, the *574 City's Chief Housing and Zoning Officer (Chief Housing Officer) was a policymaker or that any of his actions could be considered to have instituted a policy not to perfect notice to property owners whose property was to be demolished because it was unsafe or open, vacant or vandalized. It contends that the Chief Housing Officer cannot be considered a policymaker because the City's policy is contained in the Wilkes-Barre Housing Code and it requires that notice be given to all property owners before any property is demolished, absent a finding that the property is in danger of immediate collapse. Because the evidence established that this was the only instance that a violation notice had not been sent out, the City contends that Owners were only able to establish that there was an

inadvertent mistake, not a policy not to perfect notice before demolishing unsafe buildings.

The majority rejects that contention because "[t]he May 18, 1981 letter informing the Owners that their building would be razed, which the jury could find was never received, was signed by Joseph Chabala, the City's Chief Housing and Zoning Officer . . . that the trial court could conclude as a matter of law that he was a person `whose edicts or acts may fairly be said to represent official policy.'" Because the Chief Housing Officer cosigned this letter, the majority then goes on to hold that he is personally responsible for insuring that notice was perfected and his failure to check this one notice this one time is a policy upon which Section 1983 liability can be imposed on the City.

I disagree with the majority that Owners have established any policy or custom not to give notice prior to demolishing deteriorated properties because the City's Chief Housing Officer is not the policymaker who has the power to alter the notice requirements to be given to owners of property to be razed for failure to repair, and even if he was a policymaker, that any policy was created by his failure to perfect notice in this one case. Moreover, I disagree with the majority that Balent I's claim on issue preclusion does not bar or control the issues in this action.

***575 I.**

Section 1983 provides a remedy against "any person" who, under color of state law, deprives another of a federally-protected right. In Monell v. Department of Social Services, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978), the Supreme Court held that municipalities and other local governmental entities are persons to whom Section 1983 applies. 436 U.S. at 690, 98 S. Ct. at 2035-36. At the same time, the court made it clear that municipalities may not be held liable "unless action pursuant to official municipal policy of some nature caused a constitutional tort." Id. at 691, 98 S. Ct. at 2036. The court emphasized that "a municipality cannot be held liable solely because it employs a tort-feasor or, in other words, a municipality cannot be held liable under Section 1983 on a respondeat superior theory. Therefore, . . . a local government may not be sued under § 1983 for an injury

inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." Id. at 691, 694, 98 S. Ct. at 2036, 2037.

Because Monell only imposes liability when the deprivation of a civil right results from ". . . a government's policy or custom, whether made by its lawmakers or those whose edicts or acts may fairly be said to represent official policy . . ." 436 U.S. at 694, questions arose as to who beyond lawmakers can set official policy as well as which "edicts or acts constitute official policy." As a result of three decisions in three years, the Supreme Court has provided a framework to answer those questions. In Pembauer v. City of Cincinnati, 475 U.S. 469, 106 S. Ct. 1292, 89 L. Ed. 2d 452 (1986), the Supreme Court stated that "[m]unicipal liability attaches only when the decision maker possesses final authority to establish municipal policy with respect to the action ordered." 475 U.S. at 483, 106 S. Ct. at 1299. Whether an official possesses policymaking authority with regard to a particular matter is a question that will be determined by state law. Id. Justice Brennan, writing *576 for the plurality, however, suggested that state law was only a starting point, and that the policymaker is not the only one who legally has the power, but also includes those who actually exercised the policymaking powers. Under Brennan's view, the factfinder was the one who ultimately would determine in whom actual final policymaking would reside.

In the second plurality opinion, this time written by Justice O'Connor, City of St. Louis v. Praprotnik, 485 U.S. 112, 108 S. Ct. 915, 99 L. Ed. 2d 107 (1987), the court rejected the notion that the factfinder was to determine who was the policymaker. It held that the question of who is a policymaker is one of law for the courts to decide by reference to state law. The plurality also stated the importance of who was the final decision maker and the distinction between the authority to make final decisions and the authority to make discretionary decisions. "When an official's discretionary decisions are constrained by policies not of the official's making, those policies, rather than the subordinate's departures from them, are the act of the municipality." Id. at 127, 108 S. Ct. at 926. For a subordinate's decision to be that of the

governmental entity, the policymakers as determined by state law must affirmatively approve of the subordinate's decisions. "Simply going along with the discretionary decisions of one subordinate . . . is not a delegation to them to make policy." Id. at 130, 108 S. Ct. at 927.

Finally, in Jeff v. Dallas Independent School District, 491 U.S. 701, 109 S. Ct. 2702, 105 L. Ed. 2d 598 (1989), the court adopted the common elements of Pembauer and Praprotnik in a majority opinion. In that decision, the court determined that for a local government to be liable:

1. the judge as a matter of law must determine the official or governmental bodies by reference to state law or custom or usage that has the force of state law. Id. [491 U.S. at 735-36, 109 S.Ct.] at 2723; and 2. once the judge has determined who is the policymaker, the factfinder determines whether the policymaker's actions deprived them of their civil rights by their policy or acquiescence in a long-standing practice or custom that constitutes *577 the "standard operating procedure" of the governmental entity. Id.

Implementing the principles in Pembauer, Praprotnik and Jett, the Seventh Circuit in Auriemma v. Rice, 957 F.2d 397 (7th Cir.1992), held that a public official that implements a policy at variance with legislative mandates of that entity cannot change policy by acting contrary to that policy. In Auriemma, the City of Chicago police chief reshuffled the senior ranks of the Police Department purportedly along racial and political lines but, as here, the City had an ordinance that unequivocally bans racial and political discrimination. The Seventh Circuit held that the actions of the police chief did not establish a policy "because" if, in the course of selecting senior staff, Rice discriminated on account of race and politics, he violated rather than implemented the policy of Chicago. On Rice [not the City] falls the responsibility for his deeds." Id. at 401. See also Wulf v. City of Wichita, 883 F.2d 842 (10th Cir.1989) (police chief's actions may have violated an employee's first amendment rights and he may be subject to individual liability because the manager was the final policymaker on terminations, the municipality cannot be held liable.)

Just as in Auriemma, the final policymaker in this was the City Council when it enacted the Housing Code and the Chief Housing Officer was merely a subordinate. Even if the Chief Housing Officer intended not to send Owners a

notice or not to check on the return, that is totally at variance with the final policy set forth in Section 1009.1 of the Wilkes-Barre Housing Code. That section requires notice of demolition to be in writing, a description of the real estate to be included, allowance for a reasonable time for remedial acts to make the property safe before demolishing the building, and notification to the property owner that appeal procedures exist to challenge the notice. The notice is to be sent by certified mail or other methods where, unlike here, when the proper address of the owner cannot be ascertained. If the Chief Housing Officer did not give notice, he violated rather than implemented City policy.

***578 Because the determination as to who is a policymaker is a legal one and, in this case, it is clear that City Council is the final policymaker to determine the notice that should be received, I would reverse the trial court's determination that the Chief Housing Officer was the final policymaker and his actions could impose liability on the City.**

II.

Assuming that the Chief Housing Officer is a policymaker, I disagree that the failure to check to see that Owners received the notice is a policy. The majority finds that the Chief Housing Officer created a policy merely because he cosigned the May 18, 1981 letter to the Owners that their building would be razed unless they complied with the ordinance and did not insure that the notice was received. Contrary to the majority's holding, policy is not a mistake; policy is the deliberate choice of a local policymaker to pursue or not pursue a particular course of conduct. Praprotnik. Nothing in the record indicates that there was any intentional policy by the Chief Housing Officer not to send the notice of demolition or not to check to see if notice was received. Failure to check in one instance does not make a policy as the majority holds because a policy requires an intentional act on the policymaker and not, as here, a mistake.

That there is no policy became evident from the testimony of Kenneth F. Eick, the City's assistant administrator that the Owners called on cross. He testified that it was the City's practice at one time to determine whether notice had been perfected prior to letting a contractor demolish a property. (74a.)

Moreover, he testified that he did not know of any other case in which notice was not received before this building was razed. Owners, who have the burden of proof, offered no other testimony as to the City's practices in perfecting notice. No policy, no custom,[4] no usage, no Section 1983 liability against the City.

***579 III.**

The City also contends that the prior de facto taking case decided adversely to the Owners' acts to bar the claim that a Fifth Amendment taking has occurred or at least precludes certain issues in this case. Specifically, the City contends that the trial court's dismissing the de facto taking action and finding that the City demolished the building under a Housing Code provision authorizing the building inspector to take immediate action where an emergency conditions exists is res judicata or, at the very least, collateral estoppel offset on the Section 1983 action. The majority declines to apply either of these doctrines because a Section 1983 action is based on theories of trespass and constitutional tort, while in Balent I, we only found that there was not an unconstitutional taking. The majority's implication is that Section 1983 itself gives some sort of right different than the underlying federal right that a plaintiff is claiming was denied, and state actions litigating that right do not have preclusive effect.

In Urbanic v. Rosenfeld, 150 Pa.Commonwealth Ct. 468, 479, 616 A.2d 46, 52 (1992), we explained that was not the case by stating:

[A] Section 1983 action does not create any substantive rights, but merely serves as a "vehicle or . . . `device' by which a citizen is able to challenge conduct by a state official whom he claims has deprived or will deprive him of his civil rights." Harry Blackmun, Section 1983 and Federal Protection of Civil Rights Will The Statute Remain Alive or Fade Away?, 60 N.Y.U.L.Rev. 1, 1 (1985). "[O]ne cannot go *580 into court and claim a `violation of Section 1983' for Sec. 1983 by itself does not protect anyone against anything." Chapman v. Houston Welfare Rights Organization, 441 U.S. 600, 617, 99 S. Ct. 1905, 1916, 60 L. Ed. 2d 508 (1979). In effect, Section 1983 is a form of action akin to mandamus or equity which requires a party to meet certain threshold requirements before relief can be granted on the underlying

violation. To maintain a cause of action under Section 1983, a plaintiff is required to establish only that some person has deprived him or her of some cognizable federal right; and deprived him or her of that right while acting under color of state law. West v. Atkins, 487 U.S. 42, 108 S. Ct. 2250, 101 L. Ed. 2d 40 (1988); Gomez v. Toledo, 446 U.S. 635, 100 S. Ct. 1920, 64 L. Ed. 2d 572 (1980); Flagg Brothers, Inc. v. Brooks, 436 U.S. 149, 98 S. Ct. 1729, 56 L. Ed. 2d 185 (1978).

Section 1983 is just the form of the action establishing that certain preconditions be met to be able to maintain the action based on a deprivation of a federal right. Just because these preconditions need to be met and it's a constitutional tort does not mean, as the majority seems to suggest, that claim or issue preclusion cannot be applied to a Section 1983 action. If a claim or a fact has been determined in previous litigation, the normal rules of claim and issue preclusion[5] determine the *581 effect that judgment has on a Section 1983 action and vice versa. Federal, e.g., Kirkland v. City of Peekskill, 828 F.2d 104, 109 (2nd Cir.1987) (applying claim preclusion as a result of an adverse state proceeding). As well as state courts, e.g., Swofford v. Stafford, 295 Ark. 433, 748 S.W.2d 660 (1988) (replevin); Barnes v. City of Atlanta, 186 Ga.App. 187, 366 S.E.2d 822 (1988) (mandamus), have applied these doctrines to Section 1983 actions.

Owners are claiming in this action that there was a deprivation of their Fifth Amendment rights because the property was taken without just compensation and without due process required by the Fourteenth Amendment. Balent I decided on the merit that a de facto taking did not occur. A de facto taking case is filed under Section 502 of the Eminent Domain Code, 26 P.S. § 1-502. Section 502 requires that the property owner establish that an entity clothed with the power of eminent domain has taken its property without first filing a declaration of taking. Appeal of Miller, 55 Pa.Commonwealth Ct. 612, 423 A.2d 1354 (1980). That's exactly the underlying violation that Owners are required to establish in this action, i.e., that they received no notice and the City took their property. There is no need to decide if issue or claim preclusion applies because both have the same ultimate effect preventing the relitigation of the underlying constitutional issues on which the Section 1983 action is

based. Because the underlying constitutional issues have already been *582 litigated, I do not believe Owners can maintain a Section 1983 action.

Because of the foregoing, I would reverse.

NOTES

[1] § 1983 Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

[1] In Balent v. City of Wilkes-Barre, 89 Pa.Commonwealth Ct. 578, 492 A.2d 1196 (1984) (Balent I), we stated that the trial court found that "the City's Chief Building Inspector ordered the demolition under the emergency provision of Ordinance No. 32 of the Wilkes-Barre Code, Wilkes-Barre, Pa., Code § 7-23, Ord. No. 32-76, § 1 (1976), which provides as follows:

Emergency Work. In case there shall be, in the opinion of the building inspector's office, actual immediate danger of failure or collapse of a building or any part thereof so as to endanger life or property, the building inspector's office shall cause the necessary work to be done to render said building or structure or part thereof, temporarily safe, whether the procedure prescribed in this section has been instituted or not."

[2] The section states, in relevant part:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an

action at law, suit in equity, or other proper proceeding for redress. . . ." 42 U.S.C. § 1983.

[3] Owners placed a value on the property of $37,000, while the City real estate appraiser placed a value on the property of minus $1,700 because the land was encumbered by the building.

[4] Mr. Eick's testimony also establishes that there is no custom not to perfect notice. Monell recognizes that a practice in a local government can be "so permanent and well settled as to constitute a `custom or usage' with the force of law." 436 U.S. at 692. Unlike a custom where the violation occurs because of actions of the policymaker, a custom is a pattern of conduct undertaken by employees of a governmental body. The "custom or usage" in question will be attributable to the governmental body if it has been in existence for a sufficient length of time that reasonable policymakers knew or should have known that such practices had become customary. See Praprotnik. Because it must be a custom, isolated instances of violations by employees are not actionable against the government body. Carter v. District of Columbia, 795 F.2d 116 (D.C.Cir.1986). But here, the uncontroverted facts show that no custom or usage exists either not to give notice or not to see that notice has been perfected.

[5] Res judicata or claim preclusion is when a former judgment bars a later action proceeding on all or part of the very claim which was the subject of the former. As now interpreted under res judicata (Initial Decision p. 3, 11, 12, 13) or claim preclusion, any final, valid judgment on the merits by a court of competent jurisdiction or, in the case of Section 1983 under federal law, an administrative proceeding (see University of Tennessee v. Elliott, 478 U.S. 788, 106 S. Ct. 3220, 92 L. Ed. 2d 635 (1986)) precludes any future suit or action between the parties or their privies on the same cause of action. That judgment is conclusive as between the parties and their privies in respect to every fact which properly could have been considered in reaching the determination, and in respect to all points of law, relating directly to the cause of action and affecting the subject matter before the court. Claim preclusion applies not only to matters which were actually litigated, but also to matters

which should have been litigated at the first proceeding if they were part of the same cause of action.

Collateral estoppel (Initial Decision p. 3, 12, 13) or issue preclusion deals with an issue determined in a first action when the same issue arises in a later action based upon a different claim or demand. It forecloses relitigation in a later action of an issue of fact or law which was actually litigated and which was necessary to the original judgment. Unlike claim preclusion, there is no requirement that there be an identity of parties between the two actions to preclude relitigation of an issue, and issue preclusion may be asserted as either a "sword or a shield" by a stranger to the prior action as long as the party against whom it is asserted was a party or in privity with a party. There is another important distinction between the principles of claim preclusion and issue preclusion. Claim preclusion involves the same claim or cause of action in both the prior and subsequent actions, but issue preclusion operates to prevent relitigation of an issue in a later action based upon a claim or cause of action different from the claim or cause of action previously asserted. Issue preclusion is designed to prevent relitigation of issues which have once been decided and have remained substantially static, factually and legally. See generally, Hebden v. Workmen's Compensation Appeal Board (Bethenergy Mines), 142 Pa.Commonwealth Ct. 176, 597 A.2d 182 (1991), reversed on other grounds, 534 Pa. 327, 632 A.2d 1302 (1992).

Exhibit K – *Henion v. Pennsylvania Public Utility Commission*, 856 A.2d 95 (Pa. Cmwlth. 2004) – Full Opinion. Supplemental later.

Exhibit L – *City of Pittsburgh v. Pennsylvania Public Utility Commission*, 43 A.2d 348 (Pa. 1945) – Full Opinion.

Exhibit M – *Mathews v. Eldridge*, 424 U.S. 319 (1976) – Full Opinion.

BEFORE THE

PENNSYLVANIA PUBLIC UTILITY COMMISSION

Deborah Rebar	:	
	:	
v.	:	
	:	
Norfolk Southern Railway Co., PennDOT,	:	C-2023-3038274
Washington County Solicitor, North	:	
Charleroi Borough Mayor	:	

FIRST INTERIM ORDER

HOLDING PRELIMINARY OBJECTIONS IN ABEYANCE

PENDING PREHEARING CONFERNCE

PROCEDURAL BACKGROUND

On January 26, 2023, Deborah Rebar (Complainant or Ms. Rebar) filed a Formal Complaint with the Pennsylvania Public Utility Commission (Commission) against Respondents, Norfolk Southern Railway Co. (Norfolk), PennDOT, Washington County Solicitor, and North Charleroi Borough Mayor, at Docket No. C-2023-3038274. Complainant alleges that during the 35 years she has lived in her home trains have not been parked near her home until recently. Ms. Rebar claims, "They idle for days on end. The fumes can be noxious, as well as carcinogenic, the shrill noise can be deafening, and causes headaches, and the running literally shakes our homes." Complaint ¶ 4. For relief, Complainant asks the Commission to order Norfolk to "move the trains further back where they won't be so injurious to our lives and health...." Complaint ¶ 5.

The Commission Secretary's Bureau, by Secretarial Letter dated February 16, 2023, served the Formal Complaint upon all Respondents.

On February 27, 2023, the Pennsylvania Department of Transportation (PennDOT) filed an Answer, arguing that ". . . the Complaint constitutes a request for relief, for

which no response is required." PennDOT Answer ¶ 4. For relief, PennDOT requests that the Commission direct Norfolk to move their trains further back from Complainant's residence.

On March 6, 2023, Washington County Solicitor (Washington Solicitor) filed and served Preliminary Objections (POs) to the Formal Complaint. In support of the POs, Washington Solicitor argues as follows:

> [A] formal complaint filed with the PUC must include both a "clear and
>
> concise statement of the act or omission being complained of" as well as a "clear and concise statement of the relief sought." See 52 Pa. Code §22(5) and (6). The Complaint filed by Complainant includes no reference whatsoever to Respondent, aside from naming Respondent as a party in this case. Furthermore, neither Complainant's allegations, nor Complainant's requested relief, is directed to or implicative of any action by or on behalf of Respondent. Simply put, the
>
> Complaint includes no alleged wrongdoing by Respondent; therefore, Complainant cannot maintain her alleged claim against Respondent.
>
> As a result, Complainant's formal complaint is legally insufficient as to Respondent and should therefore be dismissed.

Washington Solicitor POs ¶ II b.

> Alternatively, if the PUC is unwilling to dismiss the Complaint for its legal insufficiency, Complainant's allegations remain insufficiently specific to allow an adequate opportunity to respond to the allegations against Respondent. As previously stated, the formal complaint itself fails to include any allegations whatsoever directed at Respondent. Further, Complainant's allegations, and the relief requested, are directed only at Respondent Norfolk Southern.
>
> As a result, the formal complaint lacks sufficient specificity in violation of 52 Pa. Code §5.101(4) and should be dismissed. In the alternative, Complainant should be directed to file an Amended Complaint to correct this deficiency.

Washington Solicitor POs ¶ II c. Washington Solicitor's POs contained a Notice to Plead to the POs within 10 days of the date of service.

On March 8, 2023, Norfolk filed and served an Answer and New Matter denying the material allegations of the Complaint and arguing that the Commission lacks jurisdiction "to regulate the noise and fume allegations which are the subject of the Complaint and additionally any state regulation over matters concerning Norfolk Southern's operations is preempted by federal law." New Matter ¶ 7. Norfolk' filing contained a Notice to Plead to the New Matter within 20 days of the date of service. Concurrent with the filing, Norfolk filed and served Preliminary Objections reiterating its jurisdictional argument. Norfolk's Preliminary Objections (POs) contained a Notice to Plead to the POs within 10 days of the date of service. For relief, Norfolk submits the following:

WHEREFORE, as the Public Utility Commission has no authority under the Public Utility Code to regulate the noise and fume allegations which are the subject of the Complaint, and additionally any state regulation over matters which are byproducts of Norfolk Southern operations is preempted by federal law, Norfolk Southern Railway Company respectfully requests that the Complaint of Deborah Rebar be dismissed.

Norfolk POs Request for Relief.

North Charleroi Borough Mayor did not file a response to the Formal Complainant in the time prescribed by the Commission's regulations.[1]

Complainant did not file a reply to Norfolk's New Matter within 20 days of the date of service.[2] Complainant did not file an answer to the POs filed by Washington Solicitor nor Norfolk.[3]

---

[1] (a) *Time for filing.* Unless a different time is prescribed by statute, the Commission, or the presiding office, answers to complainants and petitions shall be filed with the Commission within 20 days after the date of service. 52 Pa.Code § 5.61(a).

[2] (a) Unless otherwise ordered by the Commission, replies to answers seeking affirmative relief or to new matter shall be filed with the Commission and served within 20 days after dates of service of the answer, but no later than 5 days prior to the date set for the commencement of the hearing. 52 Pa.Code § 5.63(a).

[3] (f) *Answers to a preliminary objection.*

(1) *Time for filing.* An answer to a preliminary objection may be filed within 10 days of date of service. 52 Pa.Code § 5.101(7)(f)(1).

By Motion Judge Assignment Notice dated March 24, 2023, the Parties were informed that this proceeding as assigned to the me.

DISCUSSION

Legal Principles

Complaints

Section 701 of the Code, 66 Pa.C.S. § 701, provides that any person may complain, in writing, about any act or thing done or omitted to be done by a public utility in violation, or claimed violation, of any law which the Commission has the jurisdiction to administer, or of any regulation or order of the Commission.

Commission Jurisdiction

As in every case coming before this forum, the Commission must decide initially whether it has jurisdiction over the parties and the subject matter of this dispute. As a creature of legislation, the Commission possesses only the authority the state legislature has specifically granted to it in the Public Utility Code. 66 Pa. C.S. §§ 101, et seq. Its jurisdiction must arise from the express language of the pertinent enabling legislation or by strong and necessary implication therefrom. *Feingold v. Bell of Pa.*, 383 A.2d 791 (Pa. 1977).

The Commission must act within, and cannot exceed, its jurisdiction. *City of Pittsburgh v. Pa. Pub. Util. Comm'n*, 43 A.2d 348 (Pa. Super. 1945). Jurisdiction may not be conferred by the parties where none exists. *Roberts v. Martorano,* 235 A.2d 602 (Pa. 1967). Neither silence nor agreement of the parties will confer jurisdiction where it otherwise would not exist, *Commonwealth v. Van Buskirk,* 449 A.2d 621 (Pa. Super. 1982), nor can jurisdiction be obtained by waiver or estoppel, *In Re Borough of Valley-Hi,* 420 A.2d 15 (Pa. Commw. 1980).

Subject matter jurisdiction is a prerequisite to the exercise of the power to decide a controversy. Cf., *Hughes v. PA State Police*, 152 Pa. Commw. 409, 619 A.2d 390 (1992), *alloc. den.*, 637 A.2d 293 (1993).

Analysis

As noted above Ms. Rebar did not file a reply to Norfolk's New Matter as provided by the Commission's regulations, 52 Pa.Code § 5.63, nor did she file a response to the Norfolk's and Washington Solicitor's Preliminary Objections, as provided for under 52 Pa.Code § 5.101. Norfolk argues the Commission lacks jurisdiction or authority to regulate the noise and fume allegations which are the subject of the Complaint. Norfolk submits that any state regulation over Norfolk's operations is preempted by federal law. Washington Solicitor argues the Formal Complaint is legally insufficient because Ms. Behar does not allege any wrongdoing on the part of Washington Solicitor; accordingly, the Formal Complaint should be dismissed.

However, Complainant is appearing *pro se*, that is, self-represented, before the Commission. Traditionally, the Commission is hesitant to rule unfavorably against *pro se* litigants based on technical grounds. *See, e.g., Destefano v. Peoples Natural Gas Company*, 56 Pa. P.U.C. 489 (1982); *Halpern v. The Bell Telephone Company of Pennsylvania*, Docket No. C-00923950 (October 19, 1992); *William Schlinder v. The Bell Telephone Company of Pennsylvania*, Docket No. F-00161252 (March 26, 1993). Instead, it is in the public interest that all litigants, particularly *pro se* litigants**,** be afforded a meaningful opportunity to be heard.

Accordingly, in order to secure the just, speedy, and inexpensive resolution of this case, in the ordering paragraphs below, Norfolk's and Washington Solicitor's Preliminary Objections will be held in abeyance. The Parties will have the opportunity to argue the Preliminary Objections at the on-the-record prehearing conference to be scheduled in this matter.

The Parties are encouraged to talk with each other to resolve these matters or some portion thereof. It is the Commission's policy to encourage settlements. 52 Pa.Code § 5.231.

THEREFORE,

IT IS ORDERED:

1. That the Preliminary Objections of Respondents, Norfolk Southern Railway Company and Washington County Solicitor, filed in this proceeding are held in abeyance pending arguments on the Preliminary Objections at the on-the-record prehearing conference to be held in this matter.

2. That the Scheduling Staff of the Office of Administrative Law Judge shall schedule a telephonic prehearing conference for the case, Deborah Rebar v. Norfolk Southern Railway Co., PennDOT, Washington County Solicitor, North Charleroi Borough Mayor, at Docket No. C-2023-3038274, and so notify the parties in writing.

Date: April 24, 2023

Conrad A. Johnson
Administrative Law Judge

C-2023-3038274 - DEBORAH REBAR v. NORFOLK SOUTHERN RAILWAY CO

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Exhibit N – Arkansas Game & Fish Commission v. United States, 568 U.S. 23 (2012) – Full Opinion.

court to judge, in every case, whether a given government interference with property is a taking. In view of the nearly infinite variety of ways in which government ac- tions or regulations can affect property interests, the Court has recognized few invariable rules in this area. True, we have drawn some bright lines, notably, the rule that a permanent physical occupation of property authorized by government is a taking. Loretto v. Tele- prompter Manhattan CATV Corp., 458 U. S. 419, 426 (1982). So, too, is a regulation that permanently requires a property owner to sacrifice all economically beneficial uses of his or her land. Lucas v. South Carolina Coastal Council, 505 U. S. 1003, 1019 (1992). But aside from the cases attended by rules of this order, most takings claims turn on situation-specific factual inquiries. See Penn Central, 438 U. S., at 124. With this in mind, we turn to the question presented here—whether temporary flooding can ever give rise to a takings claim.

The Court first ruled that government-induced flooding can constitute a taking in Pumpelly v. Green Bay Co., 13 Wall. 166 (1872). The Wisconsin Legislature had author-

ized the defendant to build a dam which led to the creation of a lake, permanently submerging the plaintiff's land. The defendant argued that the land had not been taken because the government did not exercise the right of eminent domain to acquire title to the affected property. Moreover, the defendant urged, the damage was merely "a consequential result" of the dam's construction near the plaintiff's property. Id., at 177. Rejecting that crabbed reading of the Takings Clause, the Court held that "where real estate is actually invaded by superinduced additions of water, earth, sand, or other material . . . so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the Constitution." Id., at 181.
Following Pumpelly, the Court recognized that seasonally recurring flooding could constitute a taking. United

States v. Cress, 243 U. S. 316 (1917), involved the Government's construction of a lock and dam, which subjected the plaintiff's land to "intermittent but inevitably recurring overflows." Id., at 328. The Court held that the regularly recurring flooding gave rise to a takings claim no less valid than the claim of an owner whose land was continuously kept under water. Id., at 328–329.
Furthermore, our decisions confirm that takings temporary in duration can be compensable. This principle was solidly established in the World War II era, when "[c]ondemnation for indefinite periods of occupancy [took hold as] a practical response to the uncertainties of the Government's needs in wartime." United States v. Westinghouse Elec. & Mfg. Co., 339 U. S. 261, 267 (1950). In support of the war effort, the Government took temporary possession of many properties. These exercises of government authority, the Court recognized, qualified as

compensable temporary takings. See Pewee Coal Co., 341 U. S. 114; Kimball Laundry Co. v. United States, 338 U. S. 1 (1949); United States v. General Motors Corp., 323 U. S. 373 (1945). Notably in relation to the question before us, the takings claims approved in these cases were not confined to instances in which the Government took outright physical possession of the property involved. A temporary takings claim could be maintained as well when government action occurring outside the property gave rise to "a direct and immediate interference with the enjoyment and use of the land." United States v. Causby, 328 U. S. 256, 266 (1946) (frequent overflights from a nearby airport resulted in a taking, for the flights deprived the property owner of the customary use of his property as a chicken farm); cf. United States v. Dickinson, 331 U. S. 745, 751 (1947) (flooding of claimant's land was a taking even though claimant successfully "reclaimed most of his land which the Government originally took by flooding").
Ever since, we have rejected the argument that govern-

ment action must be permanent to qualify as a taking. Once the government's actions have worked a taking of property, "no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." First English, 482 U. S., at 321. See also Tahoe-Sierra, 535 U. S., at 337 ("[W]e do not hold that the temporary nature of a land-use restriction precludes finding that it effects a taking; we simply recognize that it should not be given exclusive significance one way or the other.").

Because government-induced flooding can constitute a taking of property, and because a taking need not be permanent to be compensable, our precedent indicates

that government-induced flooding of limited duration may be compensable. No decision of this Court authorizes a blanket temporary-flooding exception to our Takings Clause jurisprudence, and we decline to create such an exception in this case.

III

In advocating a temporary-flooding exception, the Government relies primarily on Sanguinetti, 264 U. S. 146. That case involved a canal constructed by the Government connecting a slough and a river. The claimant's land was positioned between the slough and the river above the canal. The year after the canal's construction, a "flood of unprecedented severity" caused the canal to overflow onto the claimant's land; less severe flooding and overflow occurred in later years. Id., at 147.

The Court held there was no taking on these facts. This outcome rested on settled principles of foreseeability and causation. The Court emphasized that the Government did not intend to flood the land or have "any reason to expect that such [a] result would follow" from construction of the canal. Id., at 148. Moreover, the property was subject to seasonal flooding prior to the construction of the

canal, and the landowner failed to show a causal connection between the canal and the increased flooding, which may well have been occasioned by changes in weather patterns. See id., at 149 (characterizing the causal relationship asserted by the landowner as "purely conjectural"). These case-specific features were more than sufficient to dispose of the property owner's claim.

In the course of the Sanguinetti decision, however, the Court summarized prior flooding cases as standing for the proposition that "in order to create an enforceable liability

against the Government, it is, at least, necessary that the overflow be the direct result of the structure, and constitute an actual, permanent invasion of the land." Ibid. The Government would have us extract from this statement a definitive rule that there can be no temporary taking caused by floods.

We do not read so much into the word "permanent" as it appears in a nondispositive sentence in Sanguinetti. That case, we note, was decided in 1924, well before the World War II-era cases and First English, in which the Court first homed in on the matter of compensation for temporary takings. That time factor, we think, renders understandable the Court's passing reference to permanence. If the Court indeed meant to express a general limitation on the Takings Clause, that limitation has been superseded by subsequent developments in our jurisprudence.

There is certainly no suggestion in Sanguinetti that flooding cases should be set apart from the mine run of takings claims. The sentence in question was composed to summarize the flooding cases the Court had encountered up to that point, which had unexceptionally involved permanent, rather than temporary, government-induced flooding. 264 U. S., at 149. See Cress, 243 U. S., at 328; United States v. Lynah, 188 U. S. 445, 469 (1903). But as just explained, no distinction between permanent and temporary flooding was material to the result in San-

guinetti. We resist reading a single sentence unnecessary to the decision as having done so much work. In this regard, we recall Chief Justice Marshall's sage observation that "general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected,

but ought not to control the judgment in a subsequent suit when the very point is presented for decision." Cohens v. Virginia, 6 Wheat. 264, 399 (1821).

The Government also asserts that the Court in Loretto interpreted Sanguinetti the same way the Federal Circuit did in this case. That assertion bears careful inspection. A section of the Court's opinion in Loretto discussing permanent physical occupations parenthetically quotes Sanguinetti's statement that flooding is a taking if it constitutes an "actual, permanent invasion of the land." 458 U. S., at 428. But the first rule of case law as well as statutory interpretation is: Read on. Later in the Loretto opinion, the Court clarified that it scarcely intended to adopt a "flooding-is-different" rule by the obscure means of quoting parenthetically a fragment from a 1924 opinion. The Court distinguished permanent physical occupations from temporary invasions of property, expressly including flooding cases, and said that "temporary limitations are subject to a more complex balancing process to determine whether they are a taking." Id., at 435, n. 12.

There is thus no solid grounding in precedent for setting flooding apart from all other government intrusions on property. And the Government has presented no other persuasive reason to do so. Its primary argument is of the in for a penny, in for a pound genre: reversing the decision below, the Government worries, risks disruption of public works dedicated to flood control. "[E]very passing flood attributable to the government's operation of a flood-control project, no matter how brief," the Government hypothesizes, might qualify as a compensable taking.

Brief for United States 29. To reject a categorical bar to temporary-flooding takings claims, however, is scarcely

to credit all, or even many, such claims. It is of course incumbent on courts to weigh carefully the relevant factors and circumstances in each case, as instructed by our decisions. See infra, at 14.

The slippery slope argument, we note, is hardly novel or unique to flooding cases. Time and again in Takings Clause cases, the Court has heard the prophecy that recognizing a just compensation claim would unduly impede the government's ability to act in the public interest. Causby, 328 U. S., at 275 (Black, J., dissenting); Loretto, 458 U. S., at 455 (Blackmun, J., dissenting). We have rejected this argument when deployed to urge blanket exemptions from the Fifth Amendment's instruction. While we recognize the importance of the public interests the Government advances in this case, we do not see them as categorically different from the interests at stake in myriad other Takings Clause cases. The sky did not fall after Causby, and today's modest decision augurs no deluge of takings liability.

Tellingly, the Government qualifies its defense of the Federal Circuit's exclusion of flood invasions from temporary takings analysis. It sensibly acknowledges that a taking might be found where there is a "sufficiently prolonged series of nominally temporary but substantively identical deviations." Brief for United States 21. This concession is in some tension with the categorical rule adopted by the Court of Appeals. Indeed, once it is recognized that at least some repeated nonpermanent flooding can amount to a taking of property, the question presented to us has been essentially answered. Flooding cases, like other takings cases, should be assessed with reference to the "particular circumstances of each case," and not by resorting to blanket exclusionary rules. United States v. Central Eureka Mining Co., 357 U. S. 155, 168 (1958)

(citing Pennsylvania Coal Co. v. Mahon, 260 U. S. 393, 416 (1922)). See Penn Central, 438 U. S., at 124.
At oral argument, the Government tendered a different justification for the Federal Circuit's judgment, one not aired in the courts below, and barely hinted at in the brief the Government filed in this Court: Whether the damage is permanent or temporary, damage to downstream property, however foreseeable, is collateral or incidental; it is not aimed at any particular landowner and therefore does not qualify as an occupation compensable under the Takings Clause. Tr. of Oral Arg. 30–39; Brief for United States 26–27. "[M]indful that we are a court of review, not of first view," Cutter v. Wilkinson, 544 U. S. 709, 718, n. 7 (2005), we express no opinion on the proposed upstream/downstream distinction and confine our opinion to the issue explored and decided by the Federal Circuit. For the same reason, we are not equipped to address the bearing, if any, of Arkansas water-rights law on this case.1
The determination whether a taking has occurred includes consideration of the property owner's distinct investment-backed expectations, a matter often informed by the law in force in the State in which the property is located. Lucas, 505 U. S., at 1027–1029; Phillips v. Washington Legal Foundation, 524 U. S. 156, 164 (1998). But Arkansas law was not examined by the Federal Circuit, and therefore is not properly pursued in this Court. Whether arguments for an upstream/downstream distinction and on the relevance of Arkansas law have been preserved and, if so, whether they have merit, are questions appropriately addressed to the Court of Appeals on remand. See Glover v. United States, 531 U. S. 198, 205 (2001).
____

1 Arkansas water law is barely discussed in the parties' briefs, see Brief for United States 43, but has been urged at length in a brief amicus curiae filed by Professors of Law Teaching in the Property Law and Water Rights Fields.

IV

We rule today, simply and only, that government-induced flooding temporary in duration gains no automatic exemption from Takings Clause inspection. When regulation or temporary physical invasion by government interferes with private property, our decisions recognize, time is indeed a factor in determining the existence vel non of a compensable taking. See Loretto, 458 U. S., at 435, n. 12 (temporary physical invasions should be assessed by case-specific factual inquiry); Tahoe-Sierra, 535 U. S., at 342 (duration of regulatory restriction is a factor for court to consider); National Bd. of YMCA v. United States, 395 U. S. 85, 93 (1969) ("temporary, unplanned occupation" of building by troops under exigent circumstances is not a taking).

Also relevant to the takings inquiry is the degree to which the invasion is intended or is the foreseeable result of authorized government action. See supra, at 9; John Horstmann Co. v. United States, 257 U. S. 138, 146 (1921) (no takings liability when damage caused by government action could not have been foreseen). See also Ridge Line, Inc. v. United States, 346 F. 3d 1346, 1355–1356 (CA Fed. 2003); In re Chicago, Milwaukee, St. Paul & Pacific R. Co., 799 F. 2d 317, 325–326 (CA7 1986). So, too, are the character of the land at issue and the owner's "reasonable investment-backed expectations" regarding the land's use. Palazzolo v. Rhode Island, 533 U. S. 606, 618 (2001). For example, the Management Area lies in a floodplain below

a dam, and had experienced flooding in the past. But the trial court found the Area had not been exposed to flooding comparable to the 1990's accumulations in any other time span either prior to or after the construction of the Dam. See supra, at 4–5. Severity of the interference figures in the calculus as well. See Penn Central, 438 U. S., at 130–131; Portsmouth Harbor Land & Hotel Co. v. United States, 260 U. S. 327, 329–330 (1922) ("[W]hile a single act

may not be enough, a continuance of them in sufficient number and for a sufficient time may prove [a taking]. Every successive trespass adds to the force of the evidence.").

The Court of Federal Claims found that the flooding the Commission assails was foreseeable. In this regard, the court noted the Commission's repeated complaints to the Corps about the destructive impact of the successive planned deviations from the Water Control Manual. Further, the court determined that the interference with the Commission's property was severe: The Commission had been deprived of the customary use of the Management Area as a forest and wildlife preserve, as the bottomland hardwood forest turned, over time, into a "headwater swamp." 87 Fed. Cl., at 610 (internal quotation marks omitted); see supra, at 5.2

The Government, however, challenged several of the trial court's factfindings, including those relating to causation, foreseeability, substantiality, and the amount of damages. Because the Federal Circuit rested its decision entirely on the temporary duration of the flooding, it did not address those challenges. As earlier noted, see supra, at 13, preserved issues remain open for consideration on remand.

* * *

For the reasons stated, the judgment of the Court of
Appeals for the Federal Circuit is reversed, and the case is
remanded for further proceedings consistent with this
opinion.

It is so ordered.

———————

2 The Commission is endeavoring to reclaim the land through a restoration program. The prospect of reclamation, however, does not disqualify a landowner from receipt of just compensation for a taking. United States v. Dickinson, 331 U. S. 745, 751 (1947).

J USTICE K AGAN took no part in the consideration or

decision of this case.

Exhibit O – Bente Letter-Supplemental

Exhibit P – Exhibit P- Robinson Township v. Commonwealth, 83 A.3d 901 (Pa. 2013)
1

Robinson Township. v. Commonwealth of Pennsylvania (PA Supreme

Court), 83 A.3d 901 (2013)

[Note: The Pennsylvania Supreme Court has 7 members; Justice Castille wrote on behalf of a 3-

person plurality. Justice Baer concurred. Justice Saylor dissented, and was joined by 2 other

justices. This is a highly redacted version of a 120 page opinion. Internal references and text are

omitted without notation.]

Chief Justice CASTILLE.

In this matter, multiple issues of constitutional import arise in cross-appeals taken from

the decision of the Commonwealth Court ruling upon expedited challenges to Act 13 of 2012, a

statute amending the Pennsylvania Oil and Gas Act ("Act 13"). Act 13 comprises sweeping

legislation affecting Pennsylvania's environment and, in particular, the exploitation and

recovery of natural gas in a geological formation known as the Marcellus Shale. The litigation

proceeded below in an accelerated fashion, in part because the legislation itself was designed to

take effect quickly and imposed obligations which required the challengers to formulate their

legal positions swiftly; and in part in recognition of the obvious economic importance of the

legislation to the Commonwealth and its citizens.

The litigation implicates, among many other sources of law, a provision of this

Commonwealth's organic charter, specifically Section 27 of the Declaration of Rights in the

Pennsylvania Constitution, which states:

"The people have a right to clean air, pure water, and to the preservation of the natural,

scenic, historic and esthetic values of the environment. Pennsylvania's public natural

resources are the common property of all the people, including generations yet to come.

As trustee of these resources, the Commonwealth shall conserve and maintain them for

the benefit of all the people."

PA. CONST. art. I, § 27 (the "Environmental Rights Amendment").

Following careful deliberation, this Court holds that several challenged provisions of Act

13 are unconstitutional, albeit the Court majority affirming the finding of unconstitutionality is

not of one mind concerning the ground for decision. This Opinion, representing the views of this

author, Madame Justice Todd, and Mr. Justice McCaffery, finds that several core provisions of

Act 13 violate the Commonwealth's duties as trustee of Pennsylvania's public natural resources

under the Environmental Rights Amendment; other challenges lack merit; and still further

issues require additional examination in the Commonwealth Court. Mr. Justice Baer, in

concurrence, concurs in the mandate, and joins the Majority Opinion in all parts except Parts III

and VI(C); briefly stated, rather than grounding merits affirmance in the Environmental Rights

Amendment, Justice Baer would find that the core constitutional infirmity sounds in substantive

due process. Accordingly, we affirm in part and reverse in part the Commonwealth Court's

decision, and remand for further proceedings consistent with specific directives later set forth in

this Opinion. See Part VI (Conclusion and Mandate).

I. Background

The Marcellus Shale Formation has been a known natural gas reservoir (containing

primarily methane) for more than 75 years. Particularly in northeastern Pennsylvania, the shale

rock is organic-rich and thick. Early drilling efforts revealed that the gas occurred in "pockets"

within the rock formations, and that the flow of natural gas from wells was not continuous.

Nonetheless, geological surveys in the 1970s showed that the Marcellus Shale Formation had

“excellent potential to fill the needs of users” if expected technological development continued

and natural gas prices increased. Those developments materialized and they permitted shale

drilling in the Marcellus Formation to start in 2003; production began in 2005.

In shale formations, organic matter in the soil generates gas molecules that absorb onto

the matrix of the rock. Over time, tectonic and hydraulic stresses fracture the rock and natural

gas (e.g., methane) migrates to fill the fractures or pockets. In the Marcellus Shale Formation,

fractures in the rock and naturally-occurring gas pockets are insufficient in size and number to

sustain consistent industrial production of natural gas. The industry uses two techniques that

enhance recovery of natural gas from these “unconventional” gas wells: hydraulic fracturing or

“fracking” (usually slick-water fracking) and horizontal drilling. Both techniques inevitably do

violence to the landscape. Slick-water fracking involves pumping at high pressure into the rock

formation a mixture of sand and freshwater treated with a gel friction reducer, until the rock

cracks, resulting in greater gas mobility. Horizontal drilling requires the drilling of a vertical

hole to 5,500 to 6,500 feet—several hundred feet above the target natural gas pocket or

reservoir—and then directing the drill bit through an arc until the drilling proceeds sideways or

horizontally. One unconventional gas well in the Marcellus Shale uses several million gallons of

water. The development of the natural gas industry in the Marcellus Shale Formation prompted

enactment of Act 13.

In February 2012, the Governor of Pennsylvania, Thomas W. Corbett, signed Act 13 into

law. Act 13 repealed parts of the existing Pennsylvania Oil and Gas Act and added provisions re-

codified into six new chapters in Title 58 of the Pennsylvania Consolidated Statutes. The new

chapters of the Oil and Gas Act are:

— Chapter 23, which establishes a fee schedule for the unconventional gas well industry,

and provides for the collection and distribution of these fees;

— Chapter 25, which provides for appropriation and allocation of funds from the Oil and

Gas Lease Fund;

— Chapter 27, which creates a natural gas energy development program to fund public or

private projects for converting vehicles to utilize natural gas fuel;

— Chapter 32, which describes the well permitting process and defines statewide

limitations on oil and gas development;

— Chapter 33, which prohibits any local regulation of oil and gas operations, including

via environmental legislation, and requires statewide uniformity among local zoning ordinances

with respect to the development of oil and gas resources;

— Chapter 35, which provides that producers, rather than landowners, are responsible

for payment of the unconventional gas well fees authorized under Chapter 23.

See 58 Pa.C.S. §§ 2301–3504. Chapter 23's fee schedule became effective immediately

upon Act 13 being signed into law, on February 14, 2012, while the remaining chapters were to

take effect sixty days later, on April 16, 2012.

III. The Constitutionality of Act 13

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As noted, on the merits, the Commonwealth Court held that certain specific provisions of

Act 13 were unconstitutional. The en banc panel enjoined enforcement of Sections 3215(b)(4)

and 3304 of Act 13, and of those provisions of Chapter 33 which enforce Section 3304. The effect

of the injunction was to prohibit the Department of Environmental Protection from granting

waivers of mandatory setbacks from certain types of waters of the Commonwealth, and to

permit local government to enforce existing zoning ordinances, and adopt new ordinances, that

diverge from the Act 13 legal regime, without concern for the legal or financial consequences

that would otherwise attend non-compliance with Act 13.

The Commonwealth Court rejected the citizens' remaining claims. Specifically, the panel

sustained the Commonwealth's preliminary objections to claims: (1) that provisions of Act 13

violate the Environmental Rights Amendment, Article I, Section 27 of the Pennsylvania

Constitution …

*** * * ***

By any measure, the citizens argue, Act 13 works a remarkable revolution in zoning in

this Commonwealth. The Act introduces heavy-duty industrial uses—natural gas development

and processing, including permission to store wastewater (a drilling by-product)—into all

existing zoning districts as of right, including residential, agricultural, and commercial. The

intrusion is made, according to the citizens, regardless of whether the district is suitable for

industrial use, whether the industrial use is compatible with existing uses and expectations, and

whether dictated accompanying setbacks are sufficient to protect the environmental health,

safety, and welfare of residents in particular affected communities. The citizens describe the

development process of shale drilling for natural gas.

*** * * ***

For example, one affidavit of record recounts the experience of a homeowner in a

previously rural, non-industrialized area of Amwell Township, Washington County. The

homeowner, a nurse, leased her mineral rights and drilling operations (three wells, a fracking

fluid impoundment, and a drill cuttings pit) began approximately 1,500 feet from her home.

Access to the drilling site occurred mainly via a dirt road running approximately fifteen feet

from her residence. The homeowner describes that, during the initial construction process, the

access road was used daily and continuously by heavy truck traffic, causing structural damage to

her home's foundation, road collapse, as well as large amounts of dust and deterioration to the

air quality; the gas company subsequently repaired the damage to her home, and widened and

paved the access road to accommodate additional traffic. Moreover, and unsurprisingly, the 24–

hour–a–day traffic caused significant noise pollution, which affected the homeowner's ability to

enjoy her property.

Once drilling and fracking operations began, and over the next several years, the

homeowner noticed significant degradation in the quality of the well water which had supplied

her homestead and those of several neighbors with fresh and clean water during the century in

which her family had owned the property. In the homeowner’s words: “my well water began to

stink like rotten eggs and garbage with a sulfur chemical smell[,] ... when running water to take

a bath, my bathtub filled with black sediment and again smelled like rotten eggs.” The gas

company gave the homeowner a “water buffalo” as a replacement water source. Air quality also

became degraded, beginning “to smell of rotten eggs, sulfur, and chemicals” and seeping into the

home and the owner’s belongings. Several pets died as a result of their exposure to

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contaminated water. Finally, upon her physician’s advice, the homeowner abandoned her family

home because the exposure to the toxic water and air caused her and her children severe health

problems such as constant and debilitating headaches, nosebleeds, nausea, difficulty and

shortness of breath, skin rashes and lesions, bone and muscle pain, inability to concentrate, and

severe fatigue.

Moreover, the citizens state, communities "have a reasonable concern over the impact on

property values due to the perceived or real risk associated with living near industrial activity."

Property values, according to the citizens, will decrease with the prospect of storing drilling

wastewater "less than a football field's distance from ... homes," and the prospect of

contamination of the soil, air, and water supply. The citizens state that they "relied on the zoning

ordinances in their respective municipalities to protect their investments in their homes and

businesses, and to provide safe, healthy, and desirable places in which to live, work, raise

families, and engage in recreational activities." Act 13's blunt "one size-fits-all" accommodation

of the oil and gas industry, the citizens argue, will change the character of existing residential

neighborhoods and affect planning for future orderly growth in municipalities with significant

shale gas reserves, the very neighborhoods which zoning laws encouraged and currently protect.

One aspect of the new law, for example, provides for setbacks of 300 feet from "existing

structures," which does not account for currently undeveloped properties or large parcels, much

less roads and property lines. In more sparsely-populated rural communities, the effect of Act 13

will be, according to the citizens, "unlimited drilling; drilling rigs and transportation of the

same; flaring, including carcinogenic and hazardous emissions; damage to roads; an unbridled

spider web of pipeline; installation, construction and placement of impoundment areas;

compressor stations and processing plants; and unlimited hours of operation, all of which may

take place in residentially zoned areas." The citizens conclude that, as a zoning regulation, Act 13

fails to meet the standards of Article I, Section 1 of the Pennsylvania Constitution, the

Fourteenth Amendment of the U.S. Constitution, and the caselaw that interprets those

respective constitutional provisions.

*** * * ***

According to the citizens, the Commonwealth Court erred in failing to recognize that the

municipalities' fiduciary obligation under Section 27 to evaluate short-term and long-term

discrete and cumulative effects on public resources continues to exist even though the General

Assembly bluntly sought to occupy the field of environmental regulation insofar as the oil and

gas industry is concerned. These oil and gas operations, according to the citizens, present risks

and "will cause degradation and diminution of trust resources" protected by the Environmental

Rights Amendment. The citizens claim that Act 13 removes the municipalities' capacity to

evaluate and react appropriately and meaningfully to the potential impact of oil and gas

operations and, as a result, impedes the municipalities' ability to comply with their

constitutional duties. The basic error, the citizens state, derives from the conclusion that the

Municipalities Planning Code is the source of the municipalities' obligations rather than the

Constitution. A statutory enactment such as Act 13 simply cannot eliminate organic

constitutional obligations.

The Commonwealth responds that Act 13 does not violate the Environmental Rights

Amendment, found in Section 27 of Article I of our charter. According to the Commonwealth,

municipalities have no powers outside those granted by the General Assembly, and the General

Assembly has acted via Act 13 to preempt the field and excuse any obligation that municipalities

may have had previously "to plan for environmental concerns for oil and gas operations."

Section 27, the Commonwealth states, is not a basis to expand the trustee role or the powers of

governmental entities, such as municipalities, beyond those granted by the General Assembly.

The Commonwealth argues that, "[t]hrough the legislative process," the General Assembly

balanced Section 27 concerns, and the constitutional provision does not confer a right upon the

municipalities to challenge the General Assembly's policy judgments or for citizens to oppose

actions of the General Assembly with which they disagree.

The Commonwealth adds that Section 27 "provides specific constitutional authority for

the [General Assembly] to enact laws like Act 13 which serve to manage and protect the

environment while allowing for the development of Pennsylvania's valuable natural resources."

Moreover, while the Commonwealth agrees that municipalities have some duties and

responsibilities under Section 27, the Commonwealth disputes that Section 27 grants

municipalities any power to protect public natural resources beyond that granted by the General

Assembly. The Commonwealth claims that, as named trustee, the sovereign is "plainly" given

"the authority and the obligation to control Pennsylvania's natural resources." The

municipalities have no power to assert authority under Section 27 "as against the Legislature."

In short, the Commonwealth's position is that the Environmental Rights Amendment recognizes

or confers no right upon citizens and no right or inherent obligation upon municipalities; rather,

the constitutional provision exists only to guide the General Assembly, which alone determines

what is best for public natural resources, and the environment generally, in Pennsylvania. The

Commonwealth thus requests that we affirm the decision of the Commonwealth Court in this

respect.

****

Article I is the Commonwealth's Declaration of Rights, which delineates the terms of the

social contract between government and the people that are of such "general, great and

essential" quality as to be ensconced as "inviolate." PA. CONST. art. I, Preamble & § 25; see also

PA. CONST. art. I, § 2 ("All power is inherent in the people, and all free governments are

founded on their authority and instituted for their peace, safety and happiness."); accord

Edmunds, 586 A.2d at 896 (since 1776, Declaration of Rights has been "organic part" of

Constitution, and "appear[s] (not coincidentally) first in that document"). The Declaration of

Rights assumes that the rights of the people articulated in Article I of our Constitution—vis-à-vis

the government created by the people—are inherent in man's nature and preserved rather than

created by the Pennsylvania Constitution. … accord Edmunds, 586 A.2d at 896 (Pennsylvania's

original constitution of 1776 "reduce[d] to writing a deep history of unwritten legal and moral

codes which had guided the colonists from the beginning of William Penn's charter in 1681.").

This concept is illustrated in the basic two-part scheme of our Constitution, which has persisted

since the original post-colonial document: one part establishes a government and another part

limits that government's powers. … The Declaration of Rights is that general part of the

Pennsylvania Constitution which limits the power of state government; additionally, "particular

sections of the Declaration of Rights represent specific limits on governmental power."

The first section of Article I "affirms, among other things, that all citizens 'have certain

inherent and indefeasible rights.' " … Among the inherent rights of the people of Pennsylvania

are those enumerated in Section 27, the Environmental Rights Amendment:

The people have a right to clean air, pure water, and to the preservation of the natural,

scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources

are the common property of all the people, including generations yet to come. As trustee of these

resources, the Commonwealth shall conserve and maintain them for the benefit of all the

people.

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PA. CONST. art. I, § 27 (Natural resources and the public estate).

Before examining the application of Section 27 to the controversy before us, it is

necessary to identify and appreciate the rights protected by this provision of the Constitution. …

Much as is the case with other Declaration of Rights provisions, Article I, Section 27 articulates

principles of relatively broad application, whose development in practice often is left primarily

to the judicial and legislative branches. … Articulating judicial standards in the realm of

constitutional rights may be a difficult task, as our developing jurisprudence vis-à-vis rights

affirmed in the Pennsylvania Constitution well before environmental rights amply shows. …

The actions brought under Section 27 since its ratification, which we will describe further

below, have provided this Court with little opportunity to develop a comprehensive analytical

scheme based on the constitutional provision. Moreover, it would appear that the

jurisprudential development in this area in the lower courts has weakened the clear import of

the plain language of the constitutional provision in unexpected ways. As a jurisprudential

matter (and, as we explain below, as a matter of substantive law), these precedents do not

preclude recognition and enforcement of the plain and original understanding of the

Environmental Rights Amendment. … The matter now before us offers appropriate

circumstances to undertake the necessary explication of the Environmental Rights Amendment,

including foundational matters. …

4. Plain language

Initially, we note that the Environmental Rights Amendment accomplishes two primary

goals, via prohibitory and non-prohibitory clauses: (1) the provision identifies protected rights,

to prevent the state from acting in certain ways, and (2) the provision establishes a nascent

framework for the Commonwealth to participate affirmatively in the development and

enforcement of these rights. Section 27 is structured into three mandatory clauses that define

rights and obligations to accomplish these twin purposes; and each clause mentions “the

people.”

A legal challenge pursuant to Section 27 may proceed upon alternate theories that either

the government has infringed upon citizens' rights or the government has failed in its trustee

obligations, or upon both theories, given that the two paradigms, while serving different

purposes in the amendatory scheme, are also related and overlap to a significant degree. Accord

1970 Pa. Legislative Journal–House 2269, 2272 (April 14, 1970) (Section 27 "can be viewed

almost as two separate bills—albeit there is considerable interaction between them, and the legal

doctrines invoked by each should tend mutually to support and reinforce the other because of

their inclusion in a single amendment."). Facing a claim premised upon Section 27 rights and

obligations, the courts must conduct a principled analysis of whether the Environmental Rights

Amendment has been violated. See Payne, 361 A.2d at 273.

To determine the merits of a claim that the General Assembly's exercise of its police

power is unconstitutional, we inquire into more than the intent of the legislative body and focus

upon the effect of the law on the right allegedly violated. The General Assembly's declaration of

policy does not control the judicial inquiry into constitutionality. Indeed, "for this Court to

accept the notion that legislative pronouncements of benign intent can control a constitutional

inquiry ... would be tantamount to ceding our constitutional duty, and our independence, to the

legislative branch."

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I. First Clause of Section 27—Individual Environmental Rights

According to the plain language of Section 27, the provision establishes two separate

rights in the people of the Commonwealth. The first—in the initial, prohibitory clause of Section

27—is the declared "right" of citizens to clean air and pure water, and to the preservation of

natural, scenic, historic and esthetic values of the environment.39 This clause affirms a limitation

on the state's power to act contrary to this right. While the subject of the right certainly may be

regulated by the Commonwealth, any regulation is "subordinate to the enjoyment of the right ...

[and] must be regulation purely, not destruction"; laws of the Commonwealth that unreasonably

impair the right are unconstitutional.

The terms "clean air" and "pure water" leave no doubt as to the importance of these

specific qualities of the environment for the proponents of the constitutional amendment and

for the ratifying voters. Moreover, the constitutional provision directs the "preservation" of

broadly defined values of the environment, a construct that necessarily emphasizes the

importance of each value separately, but also implicates a holistic analytical approach to ensure

both the protection from harm or damage and to ensure the maintenance and perpetuation of

an environment of quality for the benefit of future generations.

Although the first clause of Section 27 does not impose express duties on the political

branches to enact specific affirmative measures to promote clean air, pure water, and the

preservation of the different values of our environment, the right articulated is neither

meaningless nor merely aspirational. The corollary of the people's Section 27 reservation of right

to an environment of quality is an obligation on the government's behalf to refrain from unduly

infringing upon or violating the right, including by legislative enactment or executive action.

Clause one of Section 27 requires each branch of government to consider in advance of

proceeding the environmental effect of any proposed action on the constitutionally protected

features. The failure to obtain information regarding environmental effects does not excuse the

constitutional obligation because the obligation exists a priori to any statute purporting to

create a cause of action.

Moreover, as the citizens argue, the constitutional obligation binds all government, state

or local, concurrently.

Also apparent from the language of the constitutional provision are the substantive

standards by which we decide a claim for violation of a right protected by the first clause of

Section 27. The right to "clean air" and "pure water" sets plain conditions by which government

must abide. We recognize that, as a practical matter, air and water quality have relative rather

than absolute attributes. Furthermore, state and federal laws and regulations both govern "clean

air" and "pure water" standards and, as with any other technical standards, the courts generally

defer to agency expertise in making a factual determination whether the benchmarks were met.

Accord 35 P.S. § 6026.102(4) (recognizing that General Assembly "has a duty" to implement

Section 27 and devise environmental remediation standards). That is not to say, however, that

courts can play no role in enforcing the substantive requirements articulated by the

Environmental Rights Amendment in the context of an appropriate challenge. Courts are

equipped and obliged to weigh parties' competing evidence and arguments, and to issue

reasoned decisions regarding constitutional compliance by the other branches of government.

The benchmark for decision is the express purpose of the Environmental Rights Amendment to

be a bulwark against actual or likely degradation of, inter alia, our air and water quality.

Section 27 also separately requires the preservation of "natural, scenic, historic and

esthetic values of the environment." PA. CONST. art. I, § 27. By calling for the "preservation" of

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these broad environmental values, the Constitution again protects the people from

governmental action that unreasonably causes actual or likely deterioration of these features.

The Environmental Rights Amendment does not call for a stagnant landscape; nor, as we

explain below, for the derailment of economic or social development; nor for a sacrifice of other

fundamental values. But, when government acts, the action must, on balance, reasonably

account for the environmental features of the affected locale, as further explained in this

decision, if it is to pass constitutional muster.

The right delineated in the first clause of Section 27 presumptively is on par with, and

enforceable to the same extent as, any other right reserved to the people in Article I. See PA.

CONST. art. I, § 25 ("everything" in Article I is excepted from government's general powers and

is to remain inviolate); accord 1970 Pa. Legislative Journal–House at 2272 ("If we are to save

our natural environment we must therefore give it the same Constitutional protection we give to

our political environment."); This parity between constitutional provisions may serve to limit

the extent to which constitutional environmental rights may be asserted against the government

if such rights are perceived as potentially competing with, for example, property rights as

guaranteed in Sections 1, 9, and 10. PA. CONST. art. I, §§ 1, 9, 10, 27.

Relatedly, while economic interests of the people are not a specific subject of the

Pennsylvania Declaration of Rights, we recognize that development promoting the economic

well-being of the citizenry obviously is a legitimate state interest. In this respect, and relevant

here, it is important to note that we do not perceive Section 27 as expressing the intent of either

the unanimous legislative sponsors or the ratifying voters to deprive persons of the use of their

property or to derail development leading to an increase in the general welfare, convenience,

and prosperity of the people. But, to achieve recognition of the environmental rights

enumerated in the first clause of Section 27 as "inviolate" necessarily implies that economic

development cannot take place at the expense of an unreasonable degradation of the

environment. As respects the environment, the state's plenary police power, which serves to

promote said welfare, convenience, and prosperity, must be exercised in a manner that

promotes sustainable property use and economic development.

II. The Second and Third Clauses of Section 27—The Public Trust

The second right reserved by Section 27 is the common ownership of the people,

including future generations, of Pennsylvania's public natural resources. On its terms, the

second clause of Section 27 applies to a narrower category of "public" natural resources than the

first clause of the provision. The drafters, however, left unqualified the phrase public natural

resources, suggesting that the term fairly implicates relatively broad aspects of the environment,

and is amenable to change over time to conform, for example, with the development of related

legal and societal concerns. Accord 1970 Pa. Legislative Journal–House at 2274. At present, the

concept of public natural resources includes not only state-owned lands, waterways, and mineral

reserves, but also resources that implicate the public interest, such as ambient air, surface and

ground water, wild flora, and fauna (including fish) that are outside the scope of purely private

property.

The legislative history of the amendment supports this plain interpretation. In its

original draft, the second clause of the proposed Environmental Rights Amendment included an

enumeration of the public natural resources to be protected. The resources named were "the air,

waters, fish, wildlife, and the public lands and property of the Commonwealth...." But, after

members of the General Assembly expressed disquietude that the enumeration of resources

would be interpreted "to limit, rather than expand, [the] basic concept" of public natural

resources, Section 27 was amended and subsequently adopted in its existing, unrestricted, form.

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The drafters seemingly signaled an intent that the concept of public natural resources would be

flexible to capture the full array of resources implicating the public interest, as these may be

defined by statute or at common law.

The third clause of Section 27 establishes the Commonwealth's duties with respect to

Pennsylvania's commonly-owned public natural resources, which are both negative (i.e.,

prohibitory) and affirmative (i.e., implicating enactment of legislation and regulations). The

provision establishes the public trust doctrine with respect to these natural resources (the

corpus of the trust), and designates "the Commonwealth" as trustee and the people as the

named beneficiaries. Payne, 361 A.2d at 272. The terms of the trust are construed according to

the intent of the settlor which, in this instance, is "the people."

"Trust" and "trustee" are terms of art that carried legal implications well developed at

Pennsylvania law at the time the amendment was adopted. … The statement offered in the

General Assembly in support of the amendment explained the distinction between the roles of

proprietor and trustee in these terms:

Under the proprietary theory, government deals at arms['] length with its citizens,

measuring its gains by the balance sheet profits and appreciation it realizes from its resources

operations. Under the trust theory, it deals with its citizens as a fiduciary, measuring its

successes by the benefits it bestows upon all its citizens in their utilization of natural resources

under law.

It is an affirmation of the duty of the state to protect the people's common heritage of

streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare

cases when the abandonment of that right is consistent with the purposes of the trust.”). The

trust relationship does not contemplate a settlor placing blind faith in the uncontrolled

discretion of a trustee; the settlor is entitled to maintain some control and flexibility, exercised

by granting the trustee considerable discretion to accomplish the purposes of the trust. An

exposition here is not necessary on all the ramifications that the term trustee may have in the

context of Section 27. As in our discussion of the Environmental Rights Amendment generally,

we merely outline foundational principles relevant to our disposition of this matter.

This environmental public trust was created by the people of Pennsylvania, as the

common owners of the Commonwealth’s public natural resources; this concept is consistent

with the ratification process of the constitutional amendment delineating the terms of the trust.

The Commonwealth is named trustee and, notably, duties and powers attendant to the trust are

not vested exclusively in any single branch of Pennsylvania’s government. The plain intent of the

provision is to permit the checks and balances of government to operate in their usual fashion

for the benefit of the people in order to accomplish the purposes of the trust. This includes local

government.

As trustee, the Commonwealth is a fiduciary obligated to comply with the terms of the

trust and with standards governing a fiduciary's conduct. The explicit terms of the trust require

the government to "conserve and maintain" the corpus of the trust. See PA. CONST. art. I, § 27.

The plain meaning of the terms conserve and maintain implicates a duty to prevent and remedy

the degradation, diminution, or depletion of our public natural resources. As a fiduciary, the

Commonwealth has a duty to act toward the corpus of the trust—the public natural resources—

with prudence, loyalty, and impartiality.

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As the parties here illustrate, two separate Commonwealth obligations are implicit in the

nature of the trustee-beneficiary relationship. The first obligation arises from the prohibitory

nature of the constitutional clause creating the trust, and is similar to other negative rights

articulated in the Declaration of Rights. Stated otherwise, the Commonwealth has an obligation

to refrain from performing its trustee duties respecting the environment unreasonably,

including via legislative enactments or executive action. As trustee, the Commonwealth has a

duty to refrain from permitting or encouraging the degradation, diminution, or depletion of

public natural resources, whether such degradation, diminution, or depletion would occur

through direct state action or indirectly, e.g., because of the state's failure to restrain the actions

of private parties. In this sense, the third clause of the Environmental Rights Amendment is

complete because it establishes broad but concrete substantive parameters within which the

Commonwealth may act. Compare PA. CONST. art. I, § 27 with, e.g., PA. CONST. art. I, § 28.

This Court perceives no impediment to citizen beneficiaries enforcing the constitutional

prohibition in accordance with established principles of judicial review….

The second obligation peculiar to the trustee is, as the Commonwealth recognizes, to act

affirmatively to protect the environment, via legislative action. The General Assembly has not

shied from this duty; it has enacted environmental statutes, most notably the Clean Streams Act,

see 35 P.S. § 691.1 et seq.; the Air Pollution Control Act, see 35 P.S. § 4001 et seq.; and the Solid

Waste Management Act, see 35 P.S. § 6018.101 et seq. As these statutes (and related regulations)

illustrate, legislative enactments serve to define regulatory powers and duties, to describe

prohibited conduct of private individuals and entities, to provide procedural safeguards, and to

enunciate technical standards of environmental protection. These administrative details are

appropriately addressed by legislation because, like other "great ordinances" in our Declaration

of Rights, the generalized terms comprising the Environmental Rights Amendment do not

articulate them. The call for complementary legislation, however, does not override the

otherwise plain conferral of rights upon the people.

Of course, the trust's express directions to conserve and maintain public natural

resources do not require a freeze of the existing public natural resource stock; rather, as with the

rights affirmed by the first clause of Section 27, the duties to conserve and maintain are

tempered by legitimate development tending to improve upon the lot of Pennsylvania's

citizenry, with the evident goal of promoting sustainable development.

Within the public trust paradigm of Section 27, the beneficiaries of the trust are "all the

people" of Pennsylvania, including generations yet to come. The trust's beneficiary designation

has two obvious implications: first, the trustee has an obligation to deal impartially with all

beneficiaries and, second, the trustee has an obligation to balance the interests of present and future beneficiaries. Moreover, this aspect of Section 27 recognizes the practical reality that environmental changes, whether positive or negative, have the potential to be incremental, have a compounding effect, and develop over generations. The Environmental Rights Amendment offers protection equally against actions with immediate severe impact on public natural resources and against actions with minimal or insignificant present consequences that are actually or likely to have significant or irreversible effects in the short or long term.

Section 27 is explicit regarding the respective rights of the people and obligations of the Commonwealth, and considerations upon which we typically rely in statutory construction confirm our development of the basic principles enunciated by its drafters. Among the relevant considerations are the occasion and necessity for the constitutional provision, the legislative

history and circumstances of enactment and ratification, the mischief to be remedied and the object to be attained.

That Pennsylvania deliberately chose a course different from virtually all of its sister

states speaks to the Commonwealth's experience of having the benefit of vast natural resources

whose virtually unrestrained exploitation, while initially a boon to investors, industry, and

citizens, led to destructive and lasting consequences not only for the environment but also for

the citizens' quality of life. Later generations paid and continue to pay a tribute to early

uncontrolled and unsustainable development financially, in health and quality of life

consequences, and with the relegation to history books of valuable natural and esthetic aspects

of our environmental inheritance. The drafters and the citizens of the Commonwealth who

ratified the Environmental Rights Amendment, aware of this history, articulated the people's

rights and the government's duties to the people in broad and flexible terms that would permit

not only reactive but also anticipatory protection of the environment for the benefit of current

and future generations. Moreover, public trustee duties were delegated concomitantly to all

branches and levels of government in recognition that the quality of the environment is a task

with both local and statewide implications, and to ensure that all government neither infringed

upon the people's rights nor failed to act for the benefit of the people in this area crucial to the

well-being of all Pennsylvanians.

C. Article I, Section 27 Rights in Application

We underscore that the citizens raise claims which implicate primarily the

Commonwealth's duties as trustee under the Environmental Rights Amendment. The

Commonwealth's position on the municipalities' role following Act 13's land use revolution

respecting oil and gas operations is similar to its stance regarding the authority of the judiciary

to entertain and decide this dispute: in the Commonwealth's view, there is no role. According to

the Commonwealth, the question here is strictly one of policy, which only the General Assembly

may formulate pursuant to its police powers and authority as trustee of Pennsylvania's public

natural resources. By the Commonwealth's reasoning, municipalities have no authority to

articulate or implement a different policy, and they have no authority even to claim that the

General Assembly's policy violates the Commonwealth's organic charter. The Commonwealth

suggests that Act 13 is an enactment based on valid legislative objectives and, therefore, falls

properly within its exclusive discretionary policy judgment.

In contrast, the citizens construe the Environmental Rights Amendment as protecting

individual rights and devolving duties upon various actors within the political system; and they

claim that breaches of those duties or encroachments upon those rights is, at a minimum,

actionable. According to the citizens, this dispute is not about municipal power, statutory or

otherwise, to develop local policy, but it is instead about compliance with constitutional duties.

Unless the Declaration of Rights is to have no meaning, the citizens are correct.

In relevant part, as we have explained previously, the Environmental Rights Amendment

to the Pennsylvania Constitution delineates limitations on the Commonwealth's power to act as

trustee of the public natural resources. It is worth reiterating that, insofar as the Amendment's

prohibitory trustee language is concerned, the constitutional provision speaks on behalf of the

people, to the people directly, rather than through the filter of the people's elected

representatives to the General Assembly.

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The Commonwealth's obligations as trustee to conserve and maintain the public natural

resources for the benefit of the people, including generations yet to come, create a right in the

people to seek to enforce the obligations.

We recognize that, along with articulating the people's rights as beneficiaries of the

public trust, the Environmental Rights Amendment also encourages the General Assembly to

exercise its trustee powers to enact environmental legislation that serves the purposes of the

trust. But, in this litigation, the citizens' constitutional challenge is not to the General

Assembly's power to enact such legislation; that is a power the General Assembly

unquestionably possesses. The question arising from the Commonwealth's litigation stance is

whether the General Assembly can perform the legislative function in a manner inconsistent

with the constitutional mandate.

Act 13 is not generalized environmental legislation, but is instead a statute that regulates

a single, important industry—oil and gas extraction and development. Oil and gas resources are

both privately owned and partly public, i.e., insofar as they are on public lands. Act 13 does not

remotely purport to regulate simply those oil and gas resources that are part of the public trust

corpus, but rather, it addresses the exploitation of all oil and gas resources throughout

Pennsylvania. Act 13's primary stated purpose is not to effectuate the constitutional obligation to

protect and preserve Pennsylvania's natural environment. Rather, the purpose of the statute is

to provide a maximally favorable environment for industry operators to exploit Pennsylvania's

oil and natural gas resources, including those in the Marcellus Shale Formation. As the citizens

illustrate, development of the natural gas industry in the Commonwealth unquestionably has

and will have a lasting, and undeniably detrimental, impact on the quality of these core aspects

of Pennsylvania's environment, which are part of the public trust.

As we have explained, Pennsylvania has a notable history of what appears retrospectively

to have been a shortsighted exploitation of its bounteous environment, affecting its minerals, its

water, its air, its flora and fauna, and its people. The lessons learned from that history led

directly to the Environmental Rights Amendment, a measure which received overwhelming

support from legislators and the voters alike. When coal was "King," there was no

Environmental Rights Amendment to constrain exploitation of the resource, to protect the

people and the environment, or to impose the sort of specific duty as trustee upon the

Commonwealth as is found in the Amendment. Pennsylvania's very real and mixed past is

visible today to anyone travelling across Pennsylvania's spectacular, rolling, varied terrain. The

forests may not be primordial, but they have returned and are beautiful nonetheless; the

mountains and valleys remain; the riverways remain, too, not as pure as when William Penn

first laid eyes upon his colonial charter, but cleaner and better than they were in a relatively

recent past, when the citizenry was less attuned to the environmental effects of the exploitation

of subsurface natural resources. But, the landscape bears visible scars, too, as reminders of the

past efforts of man to exploit Pennsylvania's natural assets. Pennsylvania's past is the necessary

prologue here: the reserved rights, and the concomitant duties and constraints, embraced by the

Environmental Rights Amendment, are a product of our unique history.

The type of constitutional challenge presented today is as unprecedented in Pennsylvania

as is the legislation that engendered it. But, the challenge is in response to history seeming to

repeat itself: an industry, offering the very real prospect of jobs and other important economic

benefits, seeks to exploit a Pennsylvania resource, to supply an energy source much in demand.

The political branches have responded with a comprehensive scheme that accommodates the

recovery of the resource. By any responsible account, the exploitation of the Marcellus Shale

Formation will produce a detrimental effect on the environment, on the people, their children,

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and future generations, and potentially on the public purse, perhaps rivaling the environmental effects of coal extraction. The litigation response was not available in the nineteenth century, since there was no Environmental Rights Amendment. The response is available now.

The challenge here is premised upon that part of our organic charter that now explicitly guarantees the people's right to an environment of quality and the concomitant expressed reservation of a right to benefit from the Commonwealth's duty of management of our public natural resources. The challengers here are citizens—just like the citizenry that reserved the right in our charter. They are residents or members of local legislative and executive bodies, and several localities directly affected by natural gas development and extraction in the Marcellus Shale Formation. Contrary to the Commonwealth's characterization of the dispute, the citizens seek not to expand the authority of local government but to vindicate fundamental constitutional rights that, they say, have been compromised by a legislative determination that

violates a public trust. The Commonwealth's efforts to minimize the import of this litigation by

suggesting it is simply a dispute over public policy voiced by a disappointed minority requires a

blindness to the reality here and to Pennsylvania history, including Pennsylvania constitutional

history; and, the position ignores the reality that Act 13 has the potential to affect the reserved

rights of every citizen of this Commonwealth now, and in the future. We will proceed now to the

merits.

VI. Conclusion and Mandate

For these reasons, the Commonwealth Court's decision is affirmed in part and reversed

in part. We hold that:

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C. Sections 3215(b)(4), 3215(d), 3303, and 3304 violate the Environmental Rights

Amendment. We do not reach other constitutional issues raised by the parties with respect to

these provisions. As a result, the Commonwealth Court's decision is affirmed with respect to

Sections 3215(b)(4) and 3304 (on different grounds), and reversed with respect to Sections

3215(d) and 3303. Accordingly, application and enforcement of Sections 3215(b)(4), 3215(d),

3303, and 3304 is hereby enjoined.

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E. The Commonwealth Court erred in sustaining the Commonwealth's preliminary

objections to Counts IV and V of the citizens' petition for review. The lower court's decision in

these respects is reversed and the citizens' claims are remanded for decision on the merits.

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Jurisdiction relinquished.

[Concurring and dissenting opinions omitted.

Exhibit Q – Office of Consumer Advocate testimony on Smart Meter Cost-Effectiveness – Full document. Supplemental later. (Smart Meter Procurement and Installation Plans Docket No. M-2009-2092655).

Exhibit R – Fire Marshal Reports, Public Safety Records, and Utility Reports regarding Smart Meter fires, underground wiring faults, and premature meter replacements. Supplemental later.

Exhibit S – Affidavit of Terry Bente – Religious and Privacy Objections

AFFIDAVIT OF TERRY BENTE

(Religious Objection to Smart Meter Installation)

I, Terry Bente, being duly sworn, state as follows:

1. I am a resident of Pennsylvania and a customer of FirstEnergy Pennsylvania Electric Company d/b/a Met-Ed.
2. I have sincerely held religious beliefs, grounded in my faith, which prohibit me from accepting the installation of a wireless smart meter on my home.
3. These beliefs are based on the dictates of my conscience, and my understanding of my duty to protect my family, health, and home from harm.
4. The installation of a smart meter, which emits radiofrequency (RF) radiation and enables constant surveillance of private energy usage, is inconsistent with my religious convictions regarding bodily integrity, personal privacy, and stewardship of the home.
5. Our safety has been compromised as several small appliances and our electric stove malfunctioned during the outages, further confirming my

concerns about the reliability and effects of the company's electrical equipment.

6. I affirm that these beliefs are not newly adopted for the purpose of avoiding the smart meter mandate but are consistent with my long-standing faith and practices.
7. I make this statement freely, without coercion, and under penalty of perjury, believing it to be true and correct.

Terry Bente, Pro Se

Terry Bente

Date: August 12, 2025

Exhibit T – Affidavits of Betty Bente – Religious and Privacy Objections

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(Religious Objection to Smart Meter Installation)

I, Betty Bente, being duly sworn, state as follows:

1. I am a resident of Pennsylvania and a customer of FirstEnergy Pennsylvania Electric Company d/b/a Met-Ed.
2. I have sincerely held religious beliefs, grounded in my faith, which prohibit me from accepting the installation of a wireless smart meter on my home.
3. These beliefs are based on the dictates of my conscience, and my understanding of my duty to protect my family, health, and home from harm.
4. The installation of a smart meter, which emits radiofrequency (RF) radiation and enables constant surveillance of private energy usage, is inconsistent

with my religious convictions regarding bodily integrity, personal privacy, and stewardship of the home.

5. Our safety has been compromised as several small appliances and our electric stove malfunctioned during the outages, further confirming my concerns about the reliability and effects of the company's electrical equipment.
6. I affirm that these beliefs are not newly adopted for the purpose of avoiding the smart meter mandate but are consistent with my long-standing faith and practices.
7. I make this statement freely, without coercion, and under penalty of perjury, believing it to be true and correct.

Betty Bente, Pro Se

Betty Bente

Date: August 12, 2025

Exhibit U-Multiple Underground Line Failures

AFFIDAVIT OF TERRY BENTE

(Electrical Outages, Equipment Malfunctions, and Underground Line Faults)

I, Terry Bente, being duly sworn, state as follows:

1. I am a resident of Pennsylvania and a customer of FirstEnergy Pennsylvania Electric Company d/b/a Met-Ed.

2. My property has experienced repeated electrical outages and service interruptions that I attribute to defects or faults in the company's distribution infrastructure, including documented underground line failures.
3. During these outages, our safety has been compromised as several small appliances and our electric stove malfunctioned, creating additional hardship and expense.
4. These underground line faults have required repeated visits and repairs by Met-Ed personnel, including linemen, who confirmed that the service interruptions were caused by faulty underground wiring and related equipment issues.
5. I believe the installation of a wireless smart meter under these existing infrastructure conditions poses additional risks to the safety and reliability of electric service, as the meter would be connected to the same compromised distribution lines and equipment.
6. I make this statement freely, without coercion, and under penalty of perjury, believing it to be true and correct.

Terry Bente, Pro Se

Terry Bente
____

Date : August 12, 2025