

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Brian A. Hoeft	:	
	:	
v.	:	C-2019-3011586
	:	
Metropolitan Edison Company	:	

INITIAL DECISION

Before
Emily A. Farren
Administrative Law Judge

INTRODUCTION

Complainant filed a Formal Complaint against Respondent objecting to the installation of a smart meter at his residence. This decision dismisses the Formal Complaint due to Complainant’s failure to meet his burden of proof.

HISTORY OF THE PROCEEDING

On July 15, 2019, Brian A. Hoeft (Complainant) filed a Formal Complaint (Complaint) against Metropolitan Edison Company¹ (Met-Ed or Respondent) with the

¹ On January 1, 2024, FirstEnergy's Pennsylvania operating companies (i.e., Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company, and West Penn Power Company) merged into FirstEnergy Pennsylvania Electric Company. Due to the merger transaction, the affected operating companies’ tariffs were consolidated into a single tariff, with each former operating company’s rates

Pennsylvania Public Utility Commission (Commission), challenging the authority of Met-Ed to install a smart meter at his service address.

On August 6, 2019, Respondent filed an Answer with New Matter.

On August 6, 2019, Respondent filed Preliminary Objections.

On August 21, 2019, Complainant filed a Reply to Respondent's Answer.

On August 21, 2019, Complainant filed an Answer to Respondent's Preliminary Objections.

On August 28, 2019, a Motion Judge Assignment Notice was issued, assigning this proceeding to Administrative Law Judge (ALJ) Dennis J. Buckley.

On August 29, 2019, a Pre-Hearing Conference Notice was issued, scheduling a prehearing conference/oral argument for September 30, 2019, at 10:00 a.m.

On September 30, 2019, ALJ Buckley convened the prehearing conference/oral argument on Respondent's Preliminary Objections, and the parties agreed to submit main briefs on November 15, 2019, and reply briefs on December 20, 2019.

On November 15, 2019, both parties filed main briefs.

On December 20, 2019, both parties filed reply briefs.

becoming its own rate district. As such, the customers of the former Metropolitan Edison Company have their own separate and distinct rate district under FirstEnergy Pennsylvania Electric Company's tariff.

On August 17, 2020, ALJ Buckley issued a Prehearing Order Addressing the Scope of the Proceeding, ordering that: (1) the scope of the proceeding would be limited to issues related to the safety of a smart meter; and (2) further argument will not be heard on the legality of Act 129,² its interpretation, or its constitutionality.

On October 8, 2020, the Commonwealth Court of Pennsylvania (Commonwealth Court) issued an Opinion in *Povacz v. Pennsylvania Public Utility Commission*, 241 A.3d 481 (Pa. Cmwlth. 2020) (*Povacz I*), wherein it held, amongst other things, that Act 129 does not mandate the installation of smart meters, and that the Commission had the authority to grant customers accommodations based on their health concerns. *Id.* at 490.

On November 4, 2020, the Commission entered an Order and Notice, at Docket No. M-2009-2092655, pursuant to 66 Pa.C.S. § 501, instituting a stay of certain formal complaint proceedings then-pending before the Commission involving challenges to electric distribution company deployment of smart meter technology as being in violation of Section 1501 of the Code. *Smart Meter Procurement and Installation*, Docket No. M-2009-2092655 (Order entered Nov. 4, 2020) (Stay Order). The Stay Order directed that the stay would remain in place until it was lifted by further Commission action. The Stay Order was applied to and was docketed at this instant case.

On August 16, 2022, the Supreme Court of Pennsylvania (Supreme Court) issued an Opinion and Order at *Povacz v. Pennsylvania Public Utility Commission*, 280 A.3d 975 (Pa. 2022) (*Povacz II*). In its Opinion and Order in *Povacz II*, the Supreme Court reversed the Commonwealth Court. The Supreme Court held, amongst other things, that Act 129 does mandate smart meter deployment requiring the system-wide installation of smart meter technology by electric distribution companies. *Id.* at 992.

² 66 Pa.C.S. §§ 2803, 2806.1, 2807, 2811, 2813-2815 (Act 129).

On November 14, 2023, given the Supreme Court's decision in *Povacz II*, the Commission lifted the stay implemented by the Stay Order. The Commission entered an Order at Docket No. M-2009-2092655, explaining that cases pending before the Office of Administrative Law Judge, such as this instant case, would proceed as directed by the assigned presiding officer. *See Smart Meter Procurement and Installation*, Docket No. M-2009-2092655 (Order entered Nov. 14, 2023).

On March 19, 2024, ALJ Buckley convened a prehearing conference. The Complainant did not appear.³ An eight-page transcript of the prehearing conference was filed with the Commission on April 5, 2024.

On March 21, 2024, the Commission issued an Evidentiary Hearing Notice, setting a hearing for May 23, 2024.

On May 6, 2024, Respondent filed a Motion for Continuance of the May 3, 2024 hearing.

On May 16, 2024, ALJ Buckley issued an Order granting a continuance of the May 23, 2024 hearing.

On July 11, 2024, the Commission issued an Evidentiary Hearing Notice, setting a hearing for September 9, 2024.

³ On April 19, 2024, the Complainant filed a document titled Complainant's Motion for Rehearing, which stated that Complainant did not receive notice of the March 19, 2024 prehearing conference. A review of the record does not reflect any response by Respondent or ALJ Buckley.

On August 29, 2024, the Respondent filed a Motion for Continuance of the September 9, 2024 hearing. The Motion was granted, and the hearing was rescheduled for December 19, 2024.

On December 19, 2024, ALJ Buckley convened the hearing. The Complainant presented testimony and offered no exhibits. The Company did not present any witness testimony nor offered any exhibits. The transcript from the hearing was filed with the Commission on January 6, 2025.

On April 23, 2025, the Commission issued a Judge Change – Assignment Notice, informing the parties that this matter is now assigned to me.⁴

This matter is now ripe for decision, and for the reasons discussed below, the Complaint will be dismissed.

FINDINGS OF FACT

1. Complainant in this case is Brian A. Hoeft who resides at 760 White Oaks Manor Drive, East Stroudsburg, Pennsylvania 18301 (Service Address).
2. Respondent in this case is Metropolitan Edison Company, a rate district of FirstEnergy Pennsylvania Electric Company.
3. On July 15, 2019, Complainant challenged the installation of a smart meter as the Service Address, alleging Act 129 does not mandate the installation of smart meters.

⁴ The record does not reflect any other activity between the filing of the December 19, 2024, hearing transcript and the April 23, 2025, judge change notice.

4. On August 6, 2019, Met-Ed filed its Answer and New Matter, denying the material allegations in the Complaint.

5. Also on August 6, 2019, Met-Ed filed Preliminary Objections seeking dismissal of the Complaint on the grounds that it is legally insufficient, because it fails to state a claim upon which the Commission can grant relief.

6. On October 15, 2008, Act 129 was signed into law and codified as part of the Public Utility Code.

7. Act 129 required electric distribution companies (EDCs) with at least 100,000 customers to file a smart meter technology procurement and installation plan with the Commission for approval.

8. Met-Ed is an EDC with at least 100,000 customers. Met-Ed M.B. at 2.

9. The Complainant did not raise health or safety concerns regarding the installation of a smart meter. *See Complaint, generally*; Tr. 39.

10. The Complainant did not raise a Section 1501 claim regarding the installation of a smart meter. *See Complaint, generally*; Tr. 39.

11. The Complainant contends that Section 57.251(a) of the Commission's regulations, 52 Pa. Code § 57.251(a), does not require the public to participate in an advanced metering or smart meter program. Tr. 39-40.

12. As of the date of the December 19, 2024, hearing, Met-Ed has not terminated service at the Service Address nor installed a smart meter at the Service Address. Tr. 42.

DISCUSSION

Legal Standards

General burden of proof

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

The burden of proof is comprised of two distinct burdens: (1) the burden of production; and (2) the burden of persuasion. *Hurley v. Hurley*, 754 A.2d 1283 (Pa. Super. 2000). The burden of production, also called the burden of going forward with the evidence, determines which party must come forward with evidence to support a particular claim or defense. *Moore v. Nat'l Fuel Gas Distrib. Corp.*, Docket. No. C-2014-2458555 (Final Order entered Aug. 25, 2015) (*Moore*). The burden of production goes to the legal sufficiency of a party's claim or affirmative defense. *Id.* The burden of production may shift between the parties during a hearing. A complainant may establish a *prima facie* case with circumstantial evidence. *See Milkie v. Pa. Pub. Util. Comm'n*,

768 A.2d 1217 (Pa. Cmwlth. 2001) (*Milkie*). If a complainant introduces sufficient evidence to establish legal sufficiency of the claim, also called a *prima facie* case, the burden of production shifts to the utility to rebut the complainant's evidence. *See Moore*.

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

Having produced sufficient evidence to establish legal sufficiency of a claim, the party with the burden of proof must also carry the burden of persuasion to be entitled to a favorable ruling. *See Moore*. While the burden of production may shift back and forth during a proceeding, the burden of persuasion never shifts; it always remains on a complainant as the party seeking affirmative relief from the Commission. *See Milkie*, 768 A.2d at 1220; *see also*, *Riedel v. Cnty. of Allegheny*, 633 A.2d 1325 (Pa. Cmwlth. 1993); *Burleson*, 443 A.2d at 1375. It is entirely possible for a party to carry the burden of production but not be entitled to a favorable ruling because the party did not carry the burden of persuasion. *See Moore*. In determining whether a complainant has met the burden of persuasion, the fact-finder may engage in determinations of credibility, may accept or reject testimony of any witness in whole or in part, and may accept or reject inferences from the evidence. *Id.* (citing *Suber v. Pa. Comm'n on Crime & Delinquency*, 885 A.2d 678 (Pa. Cmwlth. 2005)).

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

explained, “opinions and conclusions cannot be relied upon as substantial evidence in a decision by this agency.” *Norman v. Phila. Gas Works*, Docket No. C-2018-2640719 at 30 (Opinion and Order entered Oct. 7, 2021) (*Norman*).

Smart meters

In *Povacz I*, the first of several appeals involving PECO Energy Company’s deployment of smart meter technology pursuant to Act 129, the Commonwealth Court partially affirmed, and partially reversed and remanded, the Commission’s March 28, 2019, and May 9, 2019, Orders in *Povacz* and related cases. *Povacz I* at 495. Specifically, the Commonwealth Court held that Act 129 does not mandate the installation of smart meters, and that the Commission had the authority to grant customers accommodations based on their health concerns. *Id.* at 490. However, the Commonwealth Court affirmed: (1) the Commission’s application of the preponderance of evidence standard; (2) the Commission’s finding that the customers in those cases failed to sustain their burden of proof; and (3) that the Commission’s findings of fact were supported by substantial evidence. *Id.* at 490, 491, 493-495. The Commonwealth Court also declined to find that the deployment of smart meters violated the customers’ Fourteenth Amendment liberty interests in bodily integrity. *Id.* at 487-488.

In *Povacz II*, the Supreme Court affirmed the Commission’s determinations in all respects and reversed the Commonwealth Court’s determination. In so doing, the Supreme Court concluded that Act 129 mandates smart meter deployment and requires the system-wide installation of smart meter technology by EDCs. *Id.* at 992. The Supreme Court found that Section 2807(f)(1), when read in conjunction with Section 2807(f)(2), provides instructions for furnishing smart meters to all customers. In short, the Supreme Court found that under Act 129, customers have no right to refuse smart meter installation. *Id.* at 997.

Analysis

At the hearing, Mr. Hoeft offered only his personal belief that Act 129 does not mandate installation of a smart meter at the Service Address. Tr. 39-40. Mr. Hoeft did not allege health or safety concerns. Tr. 39. Mr. Hoeft did not allege a Section 1501 violation. *See Complaint, generally; Tr., generally.* Additionally, Mr. Hoeft offered no exhibits.

Here, the burden of proof rested on the Complainant to produce a *prima facia* case that the utility violated the Code or a Commission order or regulation. Mr. Hoeft offered his personal belief that Act 129 does not mandate smart meter installation, but “opinions and conclusions cannot be relied upon as substantial evidence in a decision by this agency.” *Norman*. Similarly, while circumstantial evidence may carry a complainant’s burden of proof to demonstrate a *prima facia* case, Mr. Hoeft offered no circumstantial evidence. *See Milkie; Moore*. Thus, with the burden of proof on Complainant, who failed to demonstrate a *prima facia* case, the burden never shifted to the utility. *See Moore*.

Conclusion

In this proceeding, the burden of proof is on the Complainant to show by a preponderance of the evidence that Act 129 does not mandate the installation of a smart meter at his service address. Since the Complainant failed to meet his burden of proof, the Complaint will be dismissed in the Ordering paragraphs below.

CONCLUSIONS OF LAW

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

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

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

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

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

6. Act 129 does not provide customers with the right to opt-out of smart meter installation at their residence. *Povacz v. Pa. Pub. Util. Comm’n*, 280 A.3d 975 (Pa. 2022).

