

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

Public Meeting held September 25, 2025

Commissioners Present:

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

Terry and Betty Bente

C-2025-3054387

v.

FirstEnergy Pennsylvania Electric Company

**OPINION AND ORDER**

**BY THE COMMISSION:**

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition are the Exceptions, filed by Terry and Betty Bente (collectively, the Complainants or the Bentes) on August 12, 2025, in response to the Initial Decision (Initial Decision or I.D.) of Administrative Law Judge (ALJ) Erin L. Gannon, which was issued on July 23, 2025, in the above-captioned proceeding. FirstEnergy Pennsylvania Electric Company (FirstEnergy or the Company) filed Replies to Exceptions on August 22, 2025. In the Initial Decision, ALJ Gannon recommended

that the Commission dismiss the Formal Complaint (Complaint or 2025 Complaint), filed by the Complainants on March 17, 2025.

Also before us for consideration is a document entitled “Motion to Reopen Evidentiary Record” (Motion),<sup>1</sup> filed by the Complainants on August 12, 2025. FirstEnergy addressed the Motion in its Reply Exceptions filed on August 22, 2025.

On August 28, 2025, the Complainants filed a document entitled “Supplemental Motion for Leave to File Sur-Reply” (Supplemental Motion). The Complainants state in this document that its purpose is, as follows:

This Motion is necessary to correct misstatements of fact and law in Respondent’s Replies to Exceptions and to preserve Complainants’ constitutional and statutory claims.

Supplemental Motion at 3.

These replies to FirstEnergy’s Reply Exceptions do not constitute permissible pleadings before the Commission and will be considered as improper filings. Section 5.535 of the Commission’s Regulations, 52 Pa. Code § 5.535, does not permit a party to file a reply to Reply Exceptions. 52 Pa. Code § 5.535(a).

For the reasons discussed below, we shall: (1) deny the Complainants’ Exceptions; (2) deny the Complainants’ Motion; (3) adopt the Initial Decision of ALJ Gannon; and (4) dismiss the 2025 Complaint, consistent with this Opinion and Order.

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<sup>1</sup> As a matter within our discretion under Section 1.2 of the Commission’s regulations (Regulations), 52 Pa. Code § 1.2, in view of the fact that the Complainants are appearing *pro se*, we shall construe the Motion as a Petition to Reopen the Proceeding for the Purpose of Taking Additional Evidence, pursuant to 52 Pa. Code § 5.571.

## I. Background

This case involves a second complaint concerning, *inter alia*, the installation of the advanced metering infrastructure (AMI), or smart meter, that FirstEnergy proposes to install at the Complainants' residence and use in the ordinary course of business to measure the Complainants' electricity consumption.

Initially, the Complainants filed a formal complaint (2017 Complaint) against Metropolitan Edison Company (Met-Ed)<sup>2</sup> on July 12, 2017, at Docket No. C-2017-2614219 in which they alleged that Met-Ed was threatening to shut off their electric service. The Complainants stated that they suffer from "significant radiation exposure" and any further exposure would exacerbate their existing health conditions. As relief, the Complainants requested to opt-out of the smart meter installation and to keep the analog meter currently installed on their home. 2017 Complaint at 2-3.

On August 3, 2017, Met-Ed filed an Answer and New Matter to the Complaint (Answer), denying the material allegations in the 2017 Complaint. Met-Ed admitted that the Company provides residential electric service to the Complainants and issued service termination notices to the Complainants because they refused to allow the Company access to its meter for replacement with a smart meter. Met-Ed contended that the Company is required by Act 129 of 2008 (Act 129 or Act) to deploy smart meters,

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<sup>2</sup> At the time the 2017 Complaint was filed, FirstEnergy consisted of four separate companies: Met-Ed, Pennsylvania Electric Company, Pennsylvania Power Company, and West Penn Power Company. However, these companies have since been merged into a single entity, known as FirstEnergy Pennsylvania Electric Company. *See Joint Application of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company, West Penn Power Company, Keystone Appalachian Transmission Company, Mid- Atlantic Interstate Transmission, LLC, and FirstEnergy Pennsylvania Electric Company, et al.*, Docket Nos. A-2023-3038771, *et al.* (Final Order entered December 7, 2023). Thus, the 2017 Complaint was filed against Met-Ed. The Complainants' service address is in the Met-Ed rate district of FirstEnergy.

consistent with 66 Pa.C.S. § 2807. Met-Ed argued that neither the Company's Commission-approved Smart Meter Deployment Plan nor Act 129 permit the Company to refrain from the smart meter installation requirement or allow an opt-out of smart meter installation. Answer to 2017 Complaint at 2-4.

A hearing addressing the 2017 Complaint was held, as scheduled, on July 13, 2020. The Complainants appeared *pro se* and testified on their own behalf. One exhibit from the Complainants was admitted into the record and the ALJ took official notice of another Complainant exhibit and several public documents. The Company was represented by counsel, presented the testimony of one witness, and offered one exhibit.

In the Initial Decision of the 2017 Complaint, issued on April 10, 2024, the ALJ dismissed the 2017 Complaint, finding that the Complainants failed to meet their burden of proof. The Complainants filed Exceptions on April 24, 2024 and Met-Ed filed Reply Exceptions on May 10, 2024. On November 7, 2024, the Commission issued an Opinion and Order at Docket No. C-2017-2614219 denying the Exceptions in the 2017 Complaint proceeding, adopting the Initial Decision, and dismissing the 2017 Complaint (*First Complaint Order or Bente*). The Complainants did not file a petition for reconsideration of the *First Complaint Order* with the Commission or a petition for review with the Commonwealth Court.

Currently before the Commission is the Complainants' second complaint (*i.e.*, the 2025 Complaint), filed on March 17, 2025. Therein, Complainants explained that they refused to have a smart meter installed at their service address for, *inter alia*, safety and health reasons. The Complainants requested that the Commission direct FirstEnergy to allow the Complainants to retain the analog meter presently at the service address and to refrain from terminating the electric service. 2025 Complaint at 10-13.

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

Act 129, *inter alia*, amended Chapter 28 of the Public Utility Code (Code) and required EDCs with more than 100,000 customers to file smart meter technology procurement and installation plans for Commission approval and required each EDC to furnish smart meter technology within its service territory in accordance with the provisions of the Act. Section 2807(f) of the Code provides as follows:

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

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

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

- (i) Upon request from a customer that agrees to pay the cost of the Smart Meter at the time of the request.
- (ii) In new building construction.
- (iii) In accordance with a depreciation schedule not to exceed 15 years.

66 Pa.C.S. § 2807(f).

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

By Order entered in 2009, the Commission directed all EDCs subject to Act 129’s smart meter requirements, including FirstEnergy, to universally deploy smart meter technology within their respective service territories in the Commonwealth in accordance with a depreciation schedule not to exceed fifteen years, and in accordance with other guidelines established therein. *See Smart Meter Procurement and Installation*, Docket No. M-2009-2092655 (Implementation Order entered June 24, 2009) (*Smart Meter Installation Order*). FirstEnergy sought and obtained the Commission’s approval to complete the installation of AMI meters for substantially all customers within its service territory by mid-2019. *See Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company, and West Penn Power Company for Approval of their Smart Meter Deployment Plan*, Docket No. M-2013-2341990 (Opinion and Order entered March 6, 2014) (*2014 Smart Meter Order*).

## **II. History of the Proceeding<sup>3</sup>**

On March 17, 2025, the Complainants filed the 2025 Complaint with the Commission against FirstEnergy, seeking to prevent the Company from terminating their electric service or installing a smart meter at the service address. 2025 Complaint at 13.

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<sup>3</sup> The History of the Proceeding is summarized here. A more extensive History of the Proceeding can be found in the Initial Decision at 2-6.

The Complainants stated that, in light of the dismissal of their 2017 Complaint in the *First Complaint Order*, they filed the instant Complaint to protect themselves from the installation of a smart meter. They argued that installing a smart meter is not mandatory and that, by installing a smart meter on their property, FirstEnergy would violate state and federal law, specifically: Act 129, 66 Pa.C.S. § 2807(f)(2);<sup>4</sup> their rights under the Ninth and Fourteenth Amendments of the United States Constitution; and the Pennsylvania Unfair Trade Practices and Consumer Protection Law (UTPCPL). The Complainants further alleged that utilities have not met their burden under 66 Pa.C.S. § 315(c) to prove that smart meters are safe and that, by installing a smart meter, FirstEnergy would violate other provisions of the Code regarding terminations, safe and reasonable service, and altering the definition of electric service in ways not approved by statute. 66 Pa.C.S. §§ 102, 1406(a)(4). The Complainants also contended that installing a smart meter would violate several Commission regulations related to advanced metering programs. 52 Pa. Code §§ 57.28(a)(1), 57.251, 57.255, 57.259(b), (c). I.D. at 2. As relief, the Complainants requested that they be allowed to retain their analog meter and that FirstEnergy be prevented from terminating service to the Complainants. 2025 Complaint at 13.

The 2025 Complaint was served on FirstEnergy on April 3, 2025. I.D. at 2.

On April 23, 2025, FirstEnergy filed a timely Answer with New Matter to the Complaint. Citing to the decision in *Povacz v. Pa. PUC*, 280 A.3d 975 (Pa. 2022) (*Povacz II*), FirstEnergy denied that the Complainants are permitted to “opt-out” of smart meter installation at the service address. In its New Matter, FirstEnergy asserted that the Complainants already challenged FirstEnergy’s installation of a smart meter at the service address in the 2017 Complaint. FirstEnergy alleged that the 2025 Complaint

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<sup>4</sup> This section of the Code is part of what is commonly referred to as “Act 129.” This particular provision directs EDCs to “furnish” smart electric technology to their customers. 66 Pa.C.S. § 2807(f)(2). I.D. at 2, n. 3.

concerns electric service at the same property and under the same customer account that was the subject of the 2017 Complaint. FirstEnergy asserted that the 2017 Complaint was dismissed by the Commission, with prejudice. Therefore, FirstEnergy argued that the Complainants are barred from filing a new formal complaint with the Commission regarding the same issues of fact and law by Section 316 of the Code, 66 Pa.C.S. § 316, and the doctrines of *res judicata* and collateral estoppel. FirstEnergy also averred that the Complaint is moot, in that the relief requested – opting out of smart meter installation – is not available. For relief, FirstEnergy requested that the 2025 Complaint be dismissed in its entirety and with prejudice. I.D. at 3.

The Answer and New Matter were properly endorsed with a Notice to Plead, informing the Complainants that they had twenty (20) days from the date of service of the New Matter (until May 13, 2025) to file an answer to the New Matter. I.D. at 3.

Also on April 23, 2025, FirstEnergy filed Preliminary Objections. FirstEnergy argued that this was the second complaint that the Complainants filed disputing the utility's planned smart meter installation and that Complainants are seeking to re-litigate the same factual and legal issues related to the same account holder, service location, and service account, which were raised or could have been raised in the first complaint (*i.e.*, the 2017 Complaint). FirstEnergy argued that the Complainants' claims and issues are barred by the Commission's prior *First Complaint Order* dismissing the 2017 Complaint, pursuant to 66 Pa.C.S. § 316. FirstEnergy also argued that the Complainants' requested relief (effectively, to opt-out of smart meter installation) cannot be granted by the Commission because FirstEnergy is legally required to install smart meters and customers are not permitted to opt-out of installation, citing *Povacz II, supra*. Thus, FirstEnergy argued, the 2025 Complaint is legally insufficient, pursuant to 52 Pa. Code § 5.101(a)(4). I.D. at 3-4.

The Preliminary Objections were properly endorsed with a Notice to Plead, which informed the Complainants that they had ten days from the date of service of the Preliminary Objections (until May 5, 2025) to file a response to the Preliminary Objections. I.D. at 4.

On April 28, 2025, the Complainants filed a request for extension of time to reply to FirstEnergy's Answer and New Matter and Preliminary Objections (Extension Request). FirstEnergy did not file any response or objection to the request. I.D. at 4.

On May 2, 2025, the Complainants filed a timely response to the Preliminary Objections of FirstEnergy. On May 12, 2025, the Complainants filed an amended response to the Preliminary Objections. In their responses, the Complainants insisted that their 2017 Complaint was not dismissed, with prejudice, as FirstEnergy claimed. Amended Answer to Preliminary Objections at ¶ 1. The Complainants further contended that the instant Complaint is not barred by 66 Pa.C.S. § 316 because they raised new and materially different facts and legal theories and constitutional claims that were not previously adjudicated in *Povacz II* and their 2017 Complaint. I.D. at 4 (citing *Id.* at ¶¶ 1-5).

On May 13, 2025, the Complainants filed a timely response to the New Matter, in which they denied FirstEnergy's assertion that Act 129 mandates installation of smart meter technology. Response to New Matter at ¶¶ 3, 5. The Complainants restated that the 2025 Complaint raises entirely new legal claims not previously adjudicated in their 2017 Complaint or *Povacz II*, and that the relief sought in the instant Complaint is "new and distinct" from the relief sought in the 2017 Complaint. I.D. at 4-5 (citing *Id.* at ¶¶ 2, 4, 5).

On May 16, 2025, the Commission issued an Initial Telephonic Hearing Notice assigning this matter to ALJ Gannon and scheduling an evidentiary hearing for July 23, 2025. I.D. at 5.

On May 28, 2025, the Complainants filed a Motion to Open Discovery (Discovery Motion). The Discovery Motion did not contain a notice to plead, as required by 52 Pa. Code § 5.103(b). I.D. at 5.

On June 17, 2025, ALJ Gannon issued an Interim Order granting the Complainants' unopposed Extension Request. The ALJ deemed the Complainants' initial responses to both the New Matter and Preliminary Objections, and their amended response to the preliminary objections, as timely. Regarding the Discovery Motion, because it did not include a Notice to Plead, the ALJ provided FirstEnergy an additional ten (10) days to file a response to the Discovery Motion. I.D. at 5.

In the Interim Order, ALJ Gannon also advised the Parties that the Preliminary Objections and Discovery Motion would be considered together and a ruling would be drafted after FirstEnergy filed a response to the Discovery Motion or the time expired for FirstEnergy's response to the Discovery Motion. Recognizing that the ruling would impact the need, scope and timing of hearings and discovery, the ALJ cancelled the hearing scheduled in this matter for July 23, 2025 until the Parties' outstanding Preliminary Objections and Discovery Motion were resolved. I.D. at 5.

On June 27, 2025, FirstEnergy timely filed an answer to the Discovery Motion (Discovery Answer), arguing that the Discovery Motion should be denied because discovery would be moot if the Preliminary Objections are granted and the Complaint is dismissed in its entirety. Further, FirstEnergy contended that if, on the other hand, the Preliminary Objections are denied, the Complainants would still have ample opportunity to engage in further permissible and relevant discovery.

Discovery Answer at ¶¶ 10, 11, 13, 16-18. In any event, FirstEnergy requested for the Preliminary Objections to be decided first because the outcome would directly impact the proper scope of the issues to be addressed and, in turn, the scope of what discovery is relevant to the surviving issues. I.D. at 5-6 (citing *Id.* at ¶¶ 12, 14-15).

On July 1, 2025, the Complainants filed an Answer to FirstEnergy’s Answer Opposing Complainants’ Motion to Open Discovery and Request for Judicial Clarification (Reply to Discovery Answer). In this pleading, the Complainants agreed that it was proper for the Preliminary Objections to be ruled on before proceeding with discovery and requested such ruling. Reply to Discovery Answer at ¶¶ 3-4. The Complainants further requested that FirstEnergy’s Preliminary Objections and request for dismissal of the 2025 Complaint should be denied, and discovery should be opened and proceed in accordance with a new litigation schedule. I.D. at 6 (citing *Id.* at 3-4 (Conclusion)).

On July 23, 2025, the Commission issued the Initial Decision of ALJ Gannon. Therein, the ALJ granted the Preliminary Objections, in part, dismissed the 2025 Complaint, and denied the Discovery Motion as moot. I.D. at 1, 6.

As noted, *supra*, the Complainants timely filed Exceptions<sup>5</sup> on August 12, 2025. FirstEnergy timely filed Replies to Exceptions on August 22, 2025. Also, on August 12, 2025, the Complainants filed a Motion to Reopen the Record. FirstEnergy addressed the Motion in its Reply Exceptions.

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<sup>5</sup> Along with their Exceptions, the Complainants filed with the Commission an 8-page document titled “Exhibit Packet in Support of Exceptions” and a 412-page document titled “Supplemental Information to Exceptions” on August 12, 2025.

### III. Discussion

#### A. Legal Standards

##### 1. Preliminary Objections

Section 5.101(a) of our Rules of Practice and Procedure states that preliminary objections are available to parties and may be filed in response to a pleading. 52 Pa. Code § 5.101(a). Preliminary objections must be accompanied by a notice to plead, must state specifically the legal and factual grounds relied upon, and be limited to the following:

1. Lack of Commission jurisdiction or improper service of the pleading initiating the proceeding.
2. Failure of a pleading to conform to this chapter or the inclusion of scandalous or impertinent matter.
3. Insufficient specificity of a pleading.
4. Legal insufficiency of a pleading.
5. Lack of capacity to sue, nonjoinder of a necessary party or misjoinder of a cause of action.
6. Pendency of a prior proceeding or agreement for alternative dispute resolution.
7. Standing of a party to participate in the proceeding.

52 Pa. Code § 5.101(a).

The Commission's preliminary objection practice is analogous to Pennsylvania civil practice regarding preliminary objections. *Equitable Small Transportation Intervenors v. Equitable Gas Company*, 1994 Pa. PUC Lexis 69,

Docket No. C-00935435 (July 18, 1994) (*Equitable Small*). Preliminary objections in civil practice requesting dismissal of a pleading will be granted only where the right to relief is clearly warranted and free from doubt. *Interstate Traveller Services, Inc. v. Pa. Department of Environmental Resources*, 406 A.2d 1020 (Pa. 1979); *Rivera v. Philadelphia Theological Seminary of St. Charles Borromeo, Inc.*, 595 A.2d 172 (Pa. Super. 1991). The Commission follows this standard. *Montague v. Philadelphia Electric Company*, 66 Pa. PUC 24 (1988).

The Commission may not rely upon the factual assertions of the moving party but must accept as true for purposes of disposing the motion, all well-pleaded, material facts of the non-moving party, as well as every inference from those facts. *County of Allegheny v. Commonwealth of Pennsylvania*, 490 A.2d 402 (Pa. 1985); *Commonwealth of Pennsylvania v. Bell Telephone Company of Pa.*, 551 A.2d 602 (Pa. Cmwlth. 1988). Thus, the Commission must view a complaint only in the light most favorable to the complainant and should dismiss the complaint only if it appears that the complainant would not be entitled to relief under any circumstances as a matter of law. *Equitable Small*.

Here, FirstEnergy, in its Preliminary Objection, asserted that the Complaint is legally insufficient pursuant to 52 Pa. Code § 5.101(a)(4), based upon the prior complaint predicated upon the same issues and set of facts which the Commission ultimately dismissed.

The provision at 52 Pa. Code § 5.101(a)(4): (1) permits the filing of a preliminary objection to dismiss a pleading for legal insufficiency; and (2) serves judicial economy by avoiding a hearing where no factual dispute exists, and the matter in dispute is purely a legal question. If no factual issue pertinent to the resolution of a cases exists, a hearing is unnecessary. 66 Pa.C.S. § 703(a); *Lehigh Valley Power Committee v. Pa. PUC*, 563 A.2d 557, 564 (Pa. Cmwlth. 1989); *S.M.E. Bessemer Cement, Inc. v.*

*Pa. PUC*, 540 A.2d 1006, 1008-9 (Pa. Cmwlth. 1988); *White Oak Borough Authority v. Pa. PUC*, 103 A.2d 502, 507 (Pa. Super. 1954).

## **2. Res Judicata**

*Res judicata* is appropriately raised as a defense if all the issues between the parties in the current proceeding have been previously decided in a prior proceeding, where the parties had an opportunity to appear and be heard. *Day v. Volkswagenwerk Aktiengesellschaft*, 464 A.2d 1313 (Pa. Super. 1983) (Day).

## **3. Collateral Estoppel**

The doctrine of collateral estoppel is similar to the doctrine of *res judicata*; however, it is a broader concept. Collateral estoppel prevents a question of law or an issue of fact that has been once litigated and adjudicated finally in a court of competent jurisdiction from being relitigated in a subsequent suit. The four requirements for a plea of collateral estoppel to prevail are: (1) the issue decided in the prior adjudication is identical with the one presented in the later action; (2) there was a final judgment on the merits; (3) the party against whom the plea is asserted was a party or in privity with the party to the prior adjudication; and (4) the party against whom the plea is asserted has had a full and fair opportunity to litigate the issues in question in the prior action.

*Day*, 464 A.2d at 1318-19. Collateral estoppel is a doctrine of issue preclusion that seeks to prevent the relitigation of a finally litigated issue in a subsequent proceeding between the same parties. *Baker v. Pa. Human Rels. Comm'n*, 462 A.2d 881 (Pa. Cmwlth. 1983).

## **4. Section 316**

Section 316 of the Code provides, in pertinent part, that “[w]henver the commission shall make any rule, regulation, finding, determination or order, the same

shall be *prima facie* evidence of the facts found and shall remain conclusive upon all parties affected thereby, unless set aside, annulled or modified on judicial review.” 66 Pa.C.S. § 316.

## 5. General Burden of Proof for Complaint Proceeding

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

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

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

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

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

Having produced sufficient evidence to establish legal sufficiency of a claim, the party with the burden of proof must also carry the burden of persuasion to be entitled to a favorable ruling. *See Moore*. While the burden of production may shift back and forth during a proceeding, the burden of persuasion never shifts; it always remains on a complainant as the party seeking affirmative relief from the Commission. *See Milkie*, 768 A.2d at 1220; *see also Riedel v. County of Allegheny*, 633 A.2d 1325, 1328, n.11 (Pa. Cmwlth. 1993); *see also Burlison*, 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<sup>6</sup> may engage in determinations of credibility, may accept or reject testimony of any witness in whole or in part, and may accept or reject inferences from the evidence. *See Id.* (citing *Suber v. Pennsylvania Com'n on Crime and Delinquency*, 885 A.2d 678, 682 (Pa. Cmwlth. 2005) (*Suber*)).

## **6. Burden of Proof Applied to Section 1501<sup>7</sup> Complaint Challenging Smart Meter Installation**

In *Povacz II*, which dealt with consolidated appeals involving the deployment of smart meters by PECO Energy Company, the Supreme Court of Pennsylvania (Supreme Court) reversed the Commonwealth Court's October 8, 2020 decision in *Povacz v. Pa. PUC* (241 A.3d 481) (*Povacz I*), and thereby affirmed the Commission's March 28, 2019 and May 9, 2019 Orders in *Maria Povacz v. PECO Energy Company*, C-2015-2475023 (*Povacz 2019 Order*); *Laura Sunstein Murphy v. PECO Energy Company*, C-2015-2475726 (*Laura Sunstein Murphy*); and *Cynthia Randall and Paul Albrecht v. PECO Energy Company*, C-2016-2537666 (*Cynthia Randall*). By *Povacz II*, the Supreme Court affirmatively established that there is no "opt-out" provision for installation of a smart meter pursuant to Act 129 and that to

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<sup>6</sup> In formal complaint proceedings, the Commission, not the ALJ, is the ultimate fact-finder; it weighs the evidence and resolves conflicts in testimony. When reviewing the initial decision of an ALJ, the Commission has all the powers that it would have had in making the initial decision except as to any limits that it may impose by notice or by rule. *Milkie*, 768 A.2d at 1220, n. 7 (citing, *inter alia*, 66 Pa.C.S. § 335(a)).

<sup>7</sup> The applicable Commission Regulation governing an EDC's provision of safe service is codified at 52 Pa. Code § 57.28(a)(1). Pursuant to Section 57.28(a)(1), an EDC must use reasonable efforts to properly warn and protect the public from danger and to exercise reasonable care to reduce the hazards to which customers may be subjected to by reason of the EDC's provision of electric utility service and its associated equipment and facilities. *See* 52 Pa. Code § 57.28(a)(1). *See Final Rulemaking Order, Rulemaking Re: Electric Safety Regulations, 52 Pa. Code Chapter 57, Docket No. L-2015-2500632* (Order entered April 20, 2017) (*Electric Safety Final Rulemaking Order*).

raise a viable challenge to smart meter installation, a customer must satisfy the preponderance of evidence standard for a violation of Section 1501 of the Code. *Povacz II*, 280 A. 3d at 983-84.

Pursuant to Section 1501 of the Code, all public utilities have a duty to maintain “adequate, efficient, safe, and reasonable service and facilities”<sup>8</sup> and to make repairs, changes, and improvements that are necessary or proper for the accommodation, convenience, and safety of its patrons, employees, and the public. *See* 66 Pa.C.S. § 1501. Section 1501 of the Code provides, in pertinent part, as follows:

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

66 Pa.C.S. § 1501.

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

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<sup>8</sup> The term “service” is defined broadly under Section 102 of the Code to include any and all acts done or rendered or performed and any and all things furnished or supplied and any and all facilities, used, furnished or supplied by public utilities. *See* 66 Pa. C.S. § 102. The statutory definition of “service” is also to be broadly construed by the Commission and the courts. *Country Place Waste Treatment Co., Inc. v. Pa. PUC*, 654 A.2d 72 (Pa. Cmwlth. 1995).

confirmed that challenges to smart meter installation, other than an “opt-out,” may arise under Section 1501<sup>9</sup> of the Code. Therein, the Supreme Court stated:

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

*Povacz II*, at 983-84; see *Povacz v. PECO Energy Company*, Docket No. C-2012-2317176 (Opinion and Order entered January 24, 2013) (*Povacz 2013 Order*); see also *Frompovich v. PECO Energy Co.*, Docket No. C-2015-2474602 (Opinion and Order entered May 3, 2018) (*Frompovich*).

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

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

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<sup>9</sup> The Commission has also determined that if a customer’s formal complaint raises a claim under Section 1501, related to the safety of a utility’s installation and use of a smart meter at the customer’s residence, such a claim is legally sufficient to proceed to an evidentiary hearing before an ALJ. To satisfy the burden of proof a complainant may be required to present medical documentation and/or expert testimony demonstrating that the installation of a smart meter constitutes unsafe or unreasonable service. *Povacz II* at 1000, citing *Susan Kreider v. PECO Energy Company*, P-2015-2495064, 2016 WL 406549, at \*14 (Pa. P.U.C. January 28, 2016) (*Kreider*).

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

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

. . . .

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

*Povacz II*, 280 A.3d at 999-1000 (emphasis added; footnote omitted).<sup>10</sup>

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

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<sup>10</sup> With respect to the evidence necessary to support a challenge to smart meter installation under Section 1501, the Commonwealth Court has held that at the hearing, a complainant may prove his/her claim through the complainant's own personal testimony and/or "the testimony of others as well as other evidence that goes to that issue." *Romeo v. Pa. PUC*, 154 A.3d 422, 430 (Pa. Cmwlth. 2017) (*Romeo*).

by a preponderance of the evidence a “conclusive causal connection” between the harm to human health and the radio frequency fields (RFs)<sup>11</sup> from the AMI meter.<sup>12</sup>

## 7. Other Relevant Legal Standards

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

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

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

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<sup>11</sup> RF is an abbreviation for radio frequency and is also used here to denote RF fields or RF signals.

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

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

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

## **B. ALJ's Initial Decision**

In the Initial Decision, ALJ Gannon made sixteen Findings of Fact (FOF) and reached ten Conclusions of Law (COL). I.D. at 6-9, 17-19. The Findings of Fact and Conclusions of Law are incorporated herein by reference and are adopted without comment unless they are either expressly or by necessary implication rejected or modified by this Opinion and Order.

In her disposition, ALJ Gannon addressed, *inter alia*, the preliminary objections, Section 316 of the Code, and the Discovery Motion filed on May 28, 2025. I.D. at 9-17.

The ALJ noted that the Complainants are seeking to prevent the installation of a smart meter at the service address. The Complainants stated that mandatory

installation of a smart meter would violate Act 129, Constitutional amendments, and additional Pennsylvania statutes and Commission regulations. I.D. at 11.

In its Preliminary Objections, FirstEnergy sought to dismiss the 2025 Complaint in its entirety, with prejudice, on the grounds that it is legally insufficient because (1) it is barred by Section 316 of the Code, 66 Pa.C.S. § 316; and (2) the requested relief cannot be granted by the Commission. I.D. at 11 (citing 52 Pa. Code § 5.101(a)(4)).

The ALJ provided that FirstEnergy raised the associated doctrines of *res judicata* and collateral estoppel as bars to the 2025 Complaint in its New Matter, but not in its Preliminary Objections. Therefore, the ALJ did not address those affirmative defenses in the Initial Decision. I.D. at 11, n. 5.

FirstEnergy raised Section 316 in its New Matter to the 2025 Complaint and asked that, to the extent the Commission finds Section 316 to be an affirmative defense more appropriately addressed in a motion for judgment on the pleadings, that its Preliminary Objection be treated as a Motion for Judgment on the Pleadings “in the interest of administrative and judicial efficiency.” I.D. at 11 (citing Preliminary Objection ¶ 21, n.3, *Raintree Farm Solar v. PPL Elec. Utils. Corp.*, Docket No. C-2017-2621826 (Initial Decision issued November 9, 2017), (Final Order entered January 16, 2018) (*Raintree*)).

ALJ Gannon explained that in *Raintree*, the presiding ALJ found that *res judicata* was an affirmative defense not properly raised in a preliminary objection and treated it as a motion for judgment on the pleadings. The ALJ in *Raintree* found that *res judicata* was not an appropriate ground for dismissal because the prior case was resolved through a certificate of satisfaction rather than a final judgement on the merits, but found that Section 316 barred the Complaint. I.D. at 12, n. 6.

The ALJ provided that the Commission found that *res judicata* can be raised as a preliminary objection in certain circumstances. I.D. at 12 (citing *Stillwater Lakes Coal. of Indep. Owners v. Stillwater Sewer Corp.*, Docket No. C-2022-3031532 (Opinion and Order entered December 22, 2022) (*Stillwater*)).

In *Stillwater*, the Commission stated:

It is permissible, from a procedural standpoint, to raise a Preliminary Objection to the legal sufficiency of the Complaint on the ground of *res judicata* where, as here, the Complaint references a prior proceeding and/or asserts the same facts and issues raised in that prior proceeding. *See Kelly v. Kelly*, 887 A.2d 788 (Pa. Super. 2005); *Del Turco v. Peoples Homes Sav. Ass'n.*, 478 A.2d 456 (Pa. Super. 1984). Further, where an answer is filed to a preliminary objection raising an affirmative defense of *res judicata* or collateral estoppel, the party filing the answer waives any challenge to the preliminary objects [sic] on the ground of procedural defect. *Button v. Button*, 548 A.2d 316 (Pa. Super. 1988).

*Stillwater* at 11.

ALJ Gannon applied the same reasoning to Section 316 of the Code, 66 Pa.C.S. § 316, finding that the circumstances in *Stillwater* are present here: the 2025 Complaint specifically references the 2017 Complaint, and the Complainants filed an answer to the preliminary objection raising Section 316 as a bar to the 2025 Complaint. I.D. at 12 (citing 2025 Complaint at ¶ 4; Amended Answer to Preliminary Objections at ¶¶ 2, 4(b), 5).

ALJ Gannon found Section 316 to be permissible grounds for a preliminary objection to the legal sufficiency of the 2025 Complaint. The ALJ did not elect to treat the preliminary objection as a motion on the pleadings. I.D. at 13.

The ALJ noted that Section 316 of the Code provides, in pertinent part, that “[w]henver the commission shall make any rule, regulation, finding, determination or order, the same shall be prima facie evidence of the facts found and shall remain conclusive upon all parties affected thereby, unless set aside, annulled or modified on judicial review.” 66 Pa C.S. § 316. The ALJ continued that Section 316 precludes a collateral attack upon a Commission order that has not been reversed upon appeal. I.D. at 13 (citing *Lehigh Valley Power Comm. v. Pa. PUC*, 563 A.2d 548 (Pa. Cmwlth. 1989) (*Lehigh*)).

FirstEnergy averred that in the 2017 Complaint, the Bentes argued against the installation of a smart meter for the same customer service location and the same service account. I.D. at 13 (citing Preliminary Objections ¶¶ 17, 18). FirstEnergy highlighted that in both Complaints, the Complainants sought the same relief – to maintain electric service at their property without having a smart meter installed. I.D. at 13 (citing Preliminary Objections at ¶ 19). FirstEnergy further stressed that on November 7, 2024, the Commission issued a Final Order (*i.e.* the *First Complaint Order*) dismissing the 2017 Complaint on the merits. The Complainants did not file a petition for review with the Commonwealth Court. I.D. at 13.

The ALJ noted that the Complainants acknowledged the finality of the Commission’s action on the 2017 Complaint but argued that the 2025 Complaint is not barred by Section 316 because the specific violations of statutes, Constitutional amendments, and Commission regulations they raised in the instant Complaint were not adjudicated in the 2017 proceeding. I.D. at 13-14 (citing 2025 Complaint, Attachment at ¶ 4; Amended Answer to Preliminary Objections ¶ 5).

The ALJ disagreed with the Complainants, noting that the 2025 Complaint concerns the same property under the same account. The ALJ continued that the issues and cause of action are the same. The Complainants argued in both complaints that the

law does not mandate smart meter installation and request the same relief – to maintain electric service with an analog meter. The ALJ reasoned that the alleged violations in the 2025 Complaint hinge on the Complainants’ interpretation of Act 129 and the health, safety, privacy, and constitutional challenges heard in the 2017 Complaint. The ALJ concluded that the alleged violations cannot be proven without relitigating whether installation of smart meters is mandatory and poses health and safety hazards. I.D. at 13.

The ALJ observed that contrary to the Complainants’ assertions, the issues raised in the instant Complaint are not distinguished from those already decided by virtue of any intervening change in law. I.D. at 15. The ALJ explained that while the first complaint was filed in 2017, the Commission’s Opinion and Order disposing of the 2017 Complaint was issued in November 2024, well after the August 2022 decision in *Povacz II*. After *Povacz II*, the ALJ reopened the evidentiary record, and the Complainants had an opportunity to file briefs or to supplement briefs previously filed. I.D. at 15 (citing Initial Decision in *Bente*). According to the ALJ, the Complainants made no additional filings before the record was reclosed in March 2024.

The ALJ explained that the Complainants filed Exceptions to the Initial Decision in the 2017 Complaint proceeding that were considered by the Commission in rendering its *First Complaint Order*. The ALJ reasoned that to the extent that there have been changes in the application of Act 129 since the Complainants filed their first complaint in 2017, they had the opportunity to address them during the 2017 Complaint proceeding. I.D. at 15-16.

The ALJ provided:

[B]ased on a fully-developed record that included Complainants’ testimony, exhibits, and arguments made on the record and in briefs and exceptions, the Commission entered its judgment on the merits of the case in an

Opinion and Order that affirmed the ALJ's Initial Decision, which dismissed the First Complaint for failing to prove by a preponderance of the evidence that (1) smart meter installation is not mandatory or (2) the installation of a smart meter constitutes unsafe or unreasonable service under Section 1501 of the Code, or violates any other provision of the Code, Commission regulation, Commission Order, or Met-Ed's Commission-approved tariff. *See Bente; Bente I.D.* The Commission's order in the 2017 complaint proceeding was not appealed or otherwise set aside, annulled or overturned and, thus, bars any future suit between the same parties on the same cause of action. 66 Pa.C.S. § 316; *see also Smiles v. PPL Elec. Utils. Corp.*, Docket No. C-2021-3026268 (Opinion and Order issued Dec. 19, 2024); *Gorash III v. West Penn Power Co.*, Docket No. C-2022-3037338 (Opinion and Order entered Sept. 12, 2024).

I.D. at 16.

The ALJ determined that when accepting as true all well pleaded material facts in the Complaint as well as every reasonable inference from those facts, and viewing the Complaint in the light most favorable to the Complainants, the Complainants were not entitled to relief from the Commission for claims which have already been decided on the merits by the Commission in its Opinion and Order on the 2017 Complaint. The ALJ granted FirstEnergy's Preliminary Objection regarding 66 Pa.C.S. § 316. I.D. at 16.

The ALJ found that a hearing in this matter was not necessary. The ALJ reasoned that the Complainants are barred from bringing the Complaint by the Commission's final action in the 2017 Complaint proceeding. I.D. at 17.

Therefore, the ALJ dismissed the Complaint. The ALJ denied the Discovery Motion filed by the Complainants on July 1, 2025. Namely, the ALJ found that because she was dismissing the Complaint, the Discovery Motion is moot. For this same

reason, the ALJ did not address FirstEnergy’s second ground for seeking dismissal of the Complaint. I.D. at 17.

### C. Exceptions, Replies, and Dispositions

The Complainants’ Exceptions<sup>13</sup> consist of an introduction, a summary, eight numbered Exceptions, and two un-numbered Exceptions.<sup>14</sup> Along with their Exceptions, the Complainants also filed an 8-page document titled “Exhibit Packet in Support of Exceptions” and a 412-page “Supplemental Information to Exceptions.” The 8-page document appears to be a table of contents for the 412-page document, which includes regulations, legal case descriptions, full opinions, and extra-record materials. The Complainants provide that they are aware of the 40-page limit for Exceptions, as follows:

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

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<sup>13</sup> We acknowledge that the format of the Complainants’ Exceptions does not strictly comply with Section 5.533(b) of our Regulations, 52 Pa. Code § 5.533(b), which requires that exceptions be numbered, identify the finding of fact and conclusions of law to which exception is taken, and cite to the relevant pages of the Initial Decision. Nevertheless, particularly because the Complainants are appearing *pro se*, we will accept the Exceptions as filed pursuant to Section 1.2(a) of our Regulations, 52 Pa. Code § 1.2(a), in order to secure a just, speedy, and economical determination. Additionally, we will reject extra-record materials and materials in excess of the 40-page limit, specifically the 8-page “Exhibit Packet in Support of Exceptions” and the 412-page “Supplemental Information to Exceptions” filed by the Complainants on August 12, 2025. 52 Pa. Code § 5.431; 52 Pa. Code § 5.533(c).

<sup>14</sup> We will number the last two Exceptions as follows: Exception [Religious Analogy – COVID Vaccine] on page 14 of the Exceptions will be notated as Exception No. 9; Exception [Fire Safety] on page 15 will be notated as Exception No. 10.

§ 5.533(b) to avoid affecting the Exceptions page limit, but are expressly incorporated by reference into the Exceptions.

Exhibit Packet in Support of Exceptions at 3.

The Exception document is sixteen pages long, and along with the supplemental filings, well exceeds the 40-page limit for Exceptions of 52 Pa. Code § 5.533(c). All of the regulations and legal opinions in the supplemental filings were available to the Complainants prior to the closing of the record in the 2017 Complaint.<sup>15</sup> The extra-record materials in the 8-page and 412-page documents are not relevant to the case and will not be considered. These supplemental materials are an improper filing and will not be considered. 52 Pa. Code § 1.4(e).

In their Exception No. 1, the Complainants aver that the ALJ “incorrectly concluded that Complainants’ claims are barred by *res judicata* and § 316 based on the prior proceeding at Docket No. C-2017-2614219.” Exc. at 9. The Complainants’ remaining Exceptions reference the following: (1) existing regulations; (2) court case citations that pre-date the closing of the record in the 2017 Complaint proceeding; and (3) extra-record materials. Exc. at 10-16.

It is well-established that parties cannot introduce new evidence following the close of the record. *Application of Apollo Gas Co.*, 1994 Pa. PUC Lexis, at \*8-14

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<sup>15</sup> The Exceptions cite to *Povacz II*; *Romeo*; the U.S. Constitution, the Pennsylvania Constitution; the Pennsylvania Unfair Trade Practices and Consumer Protection Law; *Union Pacific Railway Co. v. Botsford*, 141 U.S. 250 (1891); *Tandon v. Newson*, 141 S.Ct. 1294 (2021); *Pennsylvania Environmental Defense Foundation v. Commonwealth (PEDF IV)*, 255 A.3d 289 (Pa. 2021); *Denoncourt v. State Ethics Comm’n*, 47- A.2d 945 (Pas. 1983); *Henion v. PUC*, 856 A.2d 95, 100 (Pa. Cmwlth. 2004); *City of Pittsburgh v. Pa. PUC*, 43 A.2d 348 (Pa. 1945); *Robinson Twp. v. Commonwealth*, 83 A.3d 901 (Pa. 2013); *Mathews v. Eldridge*, 424 U.S. 319 (1976) and several Commission regulations.

(Order entered February 10, 1994) (*Apollo Gas*). Any extra-record information the Complainants used in their Exceptions will not be considered. *Apollo Gas*.

**1. Exception No. 1, Replies and Disposition – *Res Judicata* and Section 316**

**a. Exceptions and Replies**

In their Exception No. 1, the Complainants argue that the ALJ erred by finding that the 2025 Complaint is barred by *res judicata* and Section 316 of the Code, 66 Pa.C.S. § 316, based on the 2017 Complaint. Exc. at 9.

In its Replies, FirstEnergy provides that the ALJ properly held that the 2025 Complaint is barred by Section 316 of the Code. FirstEnergy explains that under Section 316, a complainant is prohibited from raising issues that were previously decided. R. Exc. at 2 (citing *Moore, Jr. v. PECO Energy Co.*, Docket No. C-2012-2309932, 2012 Pa. PUC LEXIS 1251, at \*12 (Initial Decision dated July 18, 2019), *adopted without modification*, Docket No. C-2012-2309932 (Final Order entered October 24, 2012); *Denlinger v. PPL Elec. Utils. Corp.*, Docket No. C-2019-3014786 (Initial Decision issued February 24, 2020), *adopted without modification*, Docket No. C-2019-3014786 (Final Order entered May 21, 2020)). FirstEnergy further asserts that Section 316 precludes a collateral attack upon a Commission order which has not been reversed upon appeal. R. Exc. at 2 (citing *Lehigh Valley Power Comm. v. Pa. PUC*, 563 A.2d 548, 556 (Pa. Cmwlth. 1989)). FirstEnergy maintains that the *First Complaint Order* rejecting the Complainants' arguments relating to the Company's installation of a smart meter at the Service Address has not been set aside, annulled, or otherwise overturned. R. Exc. at 2.

FirstEnergy argues that the Commission should reject the Complainants' flawed claim that Section 316 of the Code does not apply. R. Exc. at 2 (citing Exc. at 10). FirstEnergy notes that the Complainants rely on legal authorities that bear no relevance, nor explicitly discuss Section 316. R. Exc. at 2 (citing *City of Pittsburgh v. Pa. PUC*, 43 A.2d 348 (Pa. 1945); *Povacz II*; *Romeo*).

FirstEnergy avers that if the Complainants wanted to challenge the Commission's *First Complaint Order*, they should have appealed the decision to the Commonwealth Court. However, FirstEnergy contends that the Complainants cannot collaterally attack the Commission's *First Complaint Order* through another Formal Complaint. R. Exc. at 3. FirstEnergy insists that the Complainants' arguments regarding *res judicata* should be rejected. According to FirstEnergy, all the requirements for *res judicata* apply here, but the ALJ did not reach a finding on whether *res judicata* barred the Bentes' 2025 Complaint. R. Exc. at 3.

While the Complainants contend that they are now applying new laws to an identical set of facts, FirstEnergy argues that the ALJ properly found that:

The statutes, constitutional provisions and regulations that Complainants allege are violated by mandatory installation of smart meters in their Complaint hinge on the Complainants' interpretation of Act 129 and the health, safety, privacy and constitutional challenges that were already heard in the 2017 complaint proceeding.

R. Exc. at 3 (citing I.D. at 10).

FirstEnergy concludes that the ALJ's findings and dismissal of the 2025 Complaint pursuant to Section 316 should be adopted without modification. R. Exc. at 3.

**b. Disposition**

Upon review, we reject the Complainants' argument that Section 316 of the Code, 66 Pa.C.S. § 316, does not apply here. We agree with the ALJ that the 2025 Complaint is effectively a repeat of the 2017 Complaint. The Complainants are seeking an opt-out of smart meter installation at the same service address. The Complainants had a hearing in the 2017 Complaint proceeding. The Complainants had the opportunity to present expert witnesses and submit evidence, briefs and testimony. Additionally, the Complainants were given the opportunity to be heard regarding their argument that they should be exempted from the installation of a smart meter at the service address. We agree with the ALJ that all of the arguments in the 2025 Complaint "hinge on Complainants' interpretation of Act 129 and the health, safety, privacy and constitutional challenges heard in the 2017 complaint proceeding." I.D. at 14. The record in the 2017 Complaint proceeding did not close until March 2024. The Complainants had the opportunity to address any changes in the application of Act 129 that occurred in the time period between when they filed the 2017 Complaint and the close of the record in the 2017 Complaint proceeding. Moreover, the Complainants did not file a petition for reconsideration of the Commission's *First Complaint Order*, nor did they file a petition for review with the Commonwealth Court. *See* I.D. at 8, FOF 8. As such, we agree with the ALJ that Section 316 bars the 2025 Complaint.

Finally, we note that contrary to the Complainants' arguments in their Exception No. 1, the ALJ did not provide a finding on *res judicata* in the Initial Decision. In the Initial Decision, the ALJ explained that "FirstEnergy raised the associated doctrines of *res judicata* and collateral estoppel as bars to the Complaint in its New Matter but not in its Preliminary Objections. For that reason, I do not address those affirmative defenses in this ruling." I.D. at 11, n.5. Given our finding above, that the

Complaint is barred under Section 316 of the Code, we find that, likewise, we need not address whether the Complaint is barred by *res judicata* in this Opinion and Order.

Based on the above, the Complainants' Exception No. 1 is denied.

## **2. Exception No. 2-6, 9, 10, Replies and Disposition**

### **a. Exceptions and Replies**

In their Exception Nos. 2-6, 9, and 10, the Complainants submit new claims and new evidence to support their efforts to opt-out of the installation of a smart meter. The Complainants cite to state and federal laws and cases that were all available to the Complainants before the close of the record in the 2017 Complaint proceeding. As noted above, we agree with the ALJ that the current Complaint is barred by Section 316 and we will not address the legal citations in Exception Nos. 2-6, 9, and 10. In addition we note that such arguments have been made by the Complainants for the first time at the Exceptions stage of this proceeding. Moreover, Exception Nos. 2-6, 9, and 10 also include other extra-record materials. As stated *supra*, any extra-record information cited to by the Complainants used in their Exceptions will not be considered. *Apollo Gas*.

In its Replies, FirstEnergy contends that the Complainants attempt to introduce and rely on various items of extra-record evidence in their Exceptions. FirstEnergy notes that the Complainants separately filed an "Exhibit Packet in Support of Exceptions to Initial Decision" along with their Exceptions. FirstEnergy avers that it is well-established that parties cannot introduce and rely on extra-record evidence at the Exceptions stage. R. Exc. at 8 (citing *Apollo Gas*).

Additionally, FirstEnergy provides that the Commission's Regulations do not allow a party to circumvent the 40-page limit on Exceptions by filing a separate document. R. Exc. at 9 (citing 52 Pa. Code § 5.533(c)).

**b. Disposition**

As noted above, Exception Nos. 2-6, 9 and 10 detail new arguments by the Complainants in attempt to justify their request to opt-out of the installation of a smart meter. The extra-record materials will not be considered. The legal citations and cases consist of material that was available to the Complainants before the close of the record in the 2017 Complaint proceeding. There are no changes in law or application of law that have occurred since the close of the record in the 2017 Complaint proceeding. We are not persuaded that the Complainants have demonstrated that their arguments in the current Complaint indicate that the 2017 Complaint should be re-litigated at this stage. Therefore, the Complainant's Exception Nos. 2-6, 9, and 10 are denied.

**3. Exception No. 7, Replies and Disposition – Due Process**

**a. Exceptions and Replies**

In their Exception No. 7, the Complainants argue that they have not been afforded due process, given that the ALJ found that a hearing in the current Complaint was not necessary and not in the public interest. Exc. at 13.

In its Replies, FirstEnergy argues that the ALJ properly found that a hearing was not required, as follows:

8. The Commission is granted discretion to dismiss any complaint without a hearing if, in its opinion, a hearing is not

necessary in the public interest. 66 Pa.C.S. § 703(b), 52 Pa. Code § 5.21(d).

9. A hearing is necessary only to resolve disputed questions of fact, and when the question presented is one of law, the Commission need not hold a hearing. *Lehigh Valley Power Comm. v. Pa. Pub. Util. Comm'n*, 563 A.2d 548 (Pa. Cmwlth. 1989); *Edan Transp. Corp. v. Pa. Pub. Util. Comm'n*, 623 A.2d 6 (Pa. Cmwlth 1993).

R. Exc. at 6 (citing I.D. at 18-19).

According to FirstEnergy, the ALJ correctly applied the law to the instant proceeding. Further, FirstEnergy provides that “evidentiary hearings are not an absolute right, and the Commission has discretion under the [Code] to dismiss complaints not in the public interest.” R. Exc. at 6-7 (citing 66 Pa.C.S. § 703(b)). According to FirstEnergy, the ALJ correctly relied on longstanding legal authority that Commission need not hold a hearing where the question presented is one of law. R. Exc. at 7 (citing *Lehigh Valley Power Comm*, 563 A.2d 548). FirstEnergy avers that the question at issue in the Initial Decision, *i.e.* whether to grant the Company’s Preliminary Objections, was one of law. FirstEnergy contends that the ALJ properly granted the Company’s Preliminary Objection and dismissed the Complaint without an evidentiary hearing.

#### **b. Disposition**

We find that contrary to the Complainants’ contention in their Exception No. 7, there was no violation of due process. In our view, the ALJ was correct in her finding that a hearing was not needed and not in the public interest. I.D. at 18-19. The question at issue was one of law. As such, a hearing was not needed to rule on FirstEnergy’s Preliminary Objections. As we determined above, the ALJ correctly found that the Complaint was barred by Section 316 and dismissed the Complaint. Accordingly, the Complainants’ Exception No. 7 is denied.

#### **4. Exception No. 8, Motion to Reopen Record, Replies, and Disposition**

##### **a. Exceptions, Motion to Reopen Record, and Replies**

In their Exception No. 8, the Complainants argue that there is a “need for limited discovery and record reopening.” Exc. at 14. The Complainants make similar arguments in their Motion. Motion at 1-4.

As noted, *supra*, in its Replies to Exceptions, FirstEnergy addresses the Complainants’ request, both their Exception No.8 and in their Motion filed on August 12, 2025, to reopen the Record. FirstEnergy avers that the ALJ correctly denied the Complainants’ May 28, 2025 Discovery Motion as moot, due to the dismissal of the Complaint. R. Exc.at 7 (citing I.D. at 17; Exc. at 14). According to FirstEnergy, it is consistent with Commission practice not to conduct discovery where a case has been dismissed. Similarly, FirstEnergy argues that the Complainants’ request to reopen the record has no merit. FirstEnergy avers that there is no need to reopen the evidentiary record because the ALJ granted FirstEnergy’s Preliminary Objections and dismissed the Complaint on the basis that the Complaint was barred by Section 316 of the Code, 66 Pa.C.S. § 316. R. Exc. at 7 (citing I.D. at 19-20).

According to FirstEnergy, the Complainants cannot introduce and rely on extra-record evidence in support of their Exceptions, nor can they, as set forth in their Motion, have their evidence admitted into the record without providing the Company with an opportunity to object, present evidence in rebuttal, and cross-examine the Complainants. R. Exc. at 8 (citing *Hess v. Pa. PUC*, 107 A.3d 246, 266 (Pa. Cmwlth. 2014) (stating that “[a]mong the requirements of due process are notice and an opportunity to be heard on the issues, to be apprised of the evidence submitted, to cross-examine witnesses, to inspect documents, and to offer evidence in explanation or rebuttal”), *appeal denied*, 2015 Pa. LEXIS 1457 (Pa. 2015)).

**b. Disposition**

Upon review, we shall deny the Complainants' Exception No. 8 and shall also deny their Motion, filed on August 12, 2025. Further, we find no error in the ALJ's conclusion to deny the May 28, 2025 Discovery Motion as Moot.

52 Pa. Code § 5.571(b) provides: A petition to reopen must set forth clearly the facts claimed to constitute grounds requiring reopening of the proceeding, including material changes of fact or of law alleged to have occurred since the conclusion of the hearing.

52 Pa. Code § 5.571 (d) provides: The record may be reopened upon notification to the parties in a proceeding for the reception of further evidence if there is reason to believe that conditions of fact or of law have so changed as to require, or that the public interest requires, the reopening of the proceeding.

The Complainants' Discovery Motion filed May 28, 2025, their Motion, filed August 12, 2025, and the Complainants' Exception No. 8 regarding the reopening of the record do not include material changes of fact, or of law alleged to have occurred since the closing of the record in the 2017 Complaint proceeding. The statutes and regulations cited to by the Bentes were in existence before the closing of the record in the 2017 Complaint Proceeding. The Complainants have not demonstrated that conditions of fact or of law have so changed as to require, or that the public interest requires, the reopening of the proceeding at this stage. 52 Pa. Code § 5.571.

The Complainants' Motion simply repeats their arguments from their Complaints and their Exceptions. In our view, the Complainants have not presented any material changes of fact or law or shown good cause such that the record developed in this proceeding should be re-opened. The information the Complainants are seeking to

add to the record in this current Complaint proceeding was available to the Complainants prior to the close of the record in the 2017 Complaint proceeding. Consequently, this information does not constitute either new or persuasive evidence sufficient to warrant reopening the record. In addition, we are not persuaded by the Complainants' assertion that reopening the record is in the public interest. The Complainants had the opportunity to present their case at the evidentiary hearing in the 2017 Complaint proceeding and through their Exceptions in that proceeding. They did not meet their burden of proof in the 2017 Complaint proceeding that FirstEnergy has violated a statute, regulation, Commission order or tariff. Further, we have established above that the current Complaint is barred by Section 316. Accordingly, as we find no good cause shown to reopen the record, we shall deny the Complainants' Exception No. 8 and shall also deny the Complainants' Motion.

#### **IV. Conclusion**

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

**THEREFORE,**

#### **IT IS ORDERED:**

1. That the Exceptions filed by Terry and Betty Bente on August 12, 2025, to the Initial Decision of Administrative Law Judge Erin L. Gannon, issued on July 23, 2025, at Docket No. C-2025-3054387, are denied, consistent with this Opinion and Order.


2. That the Initial Decision of Administrative Law Judge Erin L. Gannon, issued on July 23, 2025, at Docket No. C-2025-3054387, is adopted, consistent with this Opinion and Order.

3. That the Motion to Reopen the Record, filed on August 12, 2025, by Terry and Betty Bente, at Docket No. C-2025-3054387, is denied.

4. That the Formal Complaint, filed by Terry and Betty Bente, on March 17, 2025, at Docket No. C-2025-3054387, is dismissed.

5. That this proceeding be marked closed.

**BY THE COMMISSION,**

A handwritten signature in black ink, appearing to read "Matthew L. Homsher". The signature is written in a cursive style with a large initial "M".

Matthew L. Homsher  
Secretary

(SEAL)

ORDER ADOPTED: September 25, 2025

ORDER ENTERED: September 25, 2025