IN THE

Supreme Court of Pennsylvania

MIDDLE DISTRICT

No. 34 MAP 2021

MARIA POVACZ,

Appellee,

– v. –

PENNSYLVANIA PUBLIC UTILITY COMMISSION,

Appellant.

No. 35 MAP 2021

LAURA SUNSTEIN MURPHY,

Appellee,

– v. –

PENNSYLVANIA PUBLIC UTILITY COMMISSION,

Appellant.

(For Continuation of Caption See Inside Cover)

On Appeal from the Order, dated October 8, 2020, in the Commonwealth Court of Pennsylvania at No. 492 CD 2019, which Affirmed/Reversed/Remanded the Order, dated March 28, 2019, in the PUC at No. C-2015-2475023

REPLY BRIEF OF APPELLEES CYNTHIA RANDALL AND PAUL ALBRECHT

DESIGNATED APPELLEES' REPLY BRIEF FOR Nos. 36, 39, 42 & 45 MAP 2021

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No. 36 MAP 2021

CYNTHIA RANDALL and PAUL ALBRECHT,

Appellees,

– v. –

PENNSYLVANIA PUBLIC UTILITY COMMISSION,

Appellant.

No. 37 MAP 2021

MARIA POVACZ,

– v. –

PENNSYLVANIA PUBLIC UTILITY COMMISSION,

Appeal of: PECO ENERGY COMPANY.

No. 38 MAP 2021

LAURA SUNSTEIN MURPHY,

– v. –

PENNSYLVANIA PUBLIC UTILITY COMMISSION,

Appeal of: PECO ENERGY COMPANY.

No. 39 MAP 2021

CYNTHIA RANDALL and PAUL ALBRECHT,

– v. –

PENNSYLVANIA PUBLIC UTILITY COMMISSION,

Appeal of: PECO ENERGY COMPANY.

No. 40 MAP 2021

MARIA POVACZ,

Cross-Appellant,

– v. –

PENNSYLVANIA PUBLIC UTILITY COMMISSION,

Appellee.

No. 41 MAP 2021

LAURA SUNSTEIN MURPHY,

Cross-Appellant,

– v. –

PENNSYLVANIA PUBLIC UTILITY COMMISSION,

Appellee.

No. 42 MAP 2021

CYNTHIA RANDALL and PAUL ALBRECHT,

Cross-Appellants,

– v. –

PENNSYLVANIA PUBLIC UTILITY COMMISSION,

Appellee.

No. 43 MAP 2021

MARIA POVACZ,

Cross-Appellant,

– v. –

PENNSYLVANIA PUBLIC UTILITY COMMISSION,

PECO ENERGY COMPANY.

No. 44 MAP 2021

LAURA SUNSTEIN MURPHY,

Cross-Appellant,

– v. –

PENNSYLVANIA PUBLIC UTILITY COMMISSION,

PECO ENERGY COMPANY

No. 45 MAP 2021

CYNTHIA RANDALL and PAUL ALBRECHT,

Cross-Appellants,

– v. –

PENNSYLVANIA PUBLIC UTILITY COMMISSION,

PECO ENERGY COMPANY.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

Other Authorities:

INTRODUCTION

Appellees Cynthia Randall and Paul Albrecht hereby submit this reply on the issue on which the Court granted Appellees leave to appeal, i.e., whether the lower court erred as a matter of law by upholding the PUC's interpretation of Section 1501 of the Public Utility Code as requiring in challenges to the safety of electric service proof of a "conclusive causal connection" between RF exposure from smart meters and harm to Appellees.

This issue is important because the Commonwealth Court ordered that Appellees' case be remanded to the PUC to determine whether the forced installation of a wireless smart meter on Appellees' home would, considering all the circumstances, constitute either "unsafe" or "unreasonable" service under Section 1501, with a conclusive causal connection required only for the safety analysis. While both PUC and PECO argue that Appellees did not meet the "conclusive causal connection" standard in their case before the PUC, that is not the issue before the Court. The issue is what burden of proof the PUC should apply *on remand* for consumers challenging the safety of electric service, i.e., whether the PUC can continue to require electric consumers to prove a "conclusive causal connection" between RF exposure and health effects to obtain relief from the PUC.

As argued previously and below, PUC's "conclusive causal connection" standard is legally indefensible, and PUC and PECO barely attempt to defend it, but instead ignore or deflect the arguments Appellees raised in their opening brief.

ARGUMENT

A. APPELLANTS' ARGUMENTS THAT THE COMMONWEALTH COURT CORRECTLY APPLIED AN IMPOSSIBLE, UNWORKABLE, AND UNFAIR "CONCLUSIVE CAUSAL CONNECTION" BURDEN OF PROOF TO PROVE APPELLEES' SAFETY CLAIMS ON REMAND ARE MERITLESS AND SHOULD BE REJECTED.

As argued in Appellees' initial brief, the Commonwealth Court, while correctly remanding this case back to the PUC for additional proceedings, erred by imposing on Appellees, and all future smart meter litigants before the PUC, an impossible burden of proof to establish their claims that forced RF exposure is unsafe under Section 1501. The lower court affirmed the PUC's ruling that, to prove that forced installation of wireless smart meters constitutes "unsafe" service, Appellees were required to establish a "conclusive causal connection" between exposure to RF and adverse human health effects. *See, e.g., Randall*/*Albrecht* Comm. Dec. at 27-28 (RR259a-260a). This ruling imposed a burden of proof on causation that is utterly unheard of in the law, and is so high it eviscerates PECO's duty to provide, and the Commission's duty to oversee, safe service. The Commonwealth Court was clearly incorrect in imposing such an onerous standard

on persons who merely seek to be free from unsafe electric service, where no such burden is imposed even on persons seeking monetary damages in tort cases.

Neither PUC nor PECO responds directly to Appellees' argument in their briefs. Instead, they attempt to misdirect or deflect in various ways, by "responding" to arguments that Appellees did not in fact raise in their opening brief; by arguing that the lower court's "conclusive causal connection" burden is not, in fact, what the court said it is; and by arguing that Appellees on the issue of the safety of PECO's service did not meet the "conclusive casual connection" burden of proof (which Appellees do not contest, and which is not at issue). The Court should not be fooled. Appellants do not try to directly defend and justify the lower court's "conclusive causal connection" burden of proof because they cannot. It has no basis in the law—no Pennsylvania court has ever *articulated* such a standard, much less applied it. On its face, it goes well beyond the "preponderance of the evidence" standard applicable to nearly all civil proceedings, and indeed steps up to or surpasses the "beyond a reasonable doubt" standard applied in criminal cases.

In their opening brief, Appellees argued that nothing in the plain language of Section 1501 supports the PUC's and the lower court's legal conclusion that the Appellees, to prove that mandatory RF exposure is unsafe, must "conclusive[ly]" prove that medical harm *was or will* be caused. Further, Appellees argued that there is not a single suggestion or even a hint in the language of Section 1501 (or

elsewhere) that a customer must prove causation of harm as required beyond that required in a tort claim for damages. Appellees further argued that an administrative agency charged with ensuring safety and reasonableness should not require even tort law proof of causation, much less the lower court's enhanced burden of proof. Finally, Appellees pointed out that the lower court's reliance on the federal court's decision in *Naperville Smart Meter Awareness v. City of Naperville*, 2013 WL 1196580 (N.D. Ill. 2013), was clear error.

In their response briefs, PUC and PECO respond to *none* of these arguments, demonstrating that they have no reasoned counter to them. Instead, they have "responded" to arguments that Appellees *never made*. For instance, PUC claims that Appellees "seek to reduce their burden of proof to simply proving their own 'sincerely held beliefs' that wireless smart meters cause them harm." PUC Second Br. at 23. PECO claims that "the standard that Randall/Albrecht ask this Court to impose on remand is entirely subjective…." PECO Second Br. at 42. But Appellees made no such arguments. Indeed, they argued the *opposite*: "This is not to suggest that utility customers can establish claims under Section 1501 based solely on their sincere beliefs…. Sincere belief of harm or potential harm alone *should not be*

enough to establish a claim under Section 1501." App. Opening Br. at 56 (emphasis added).[1]

PUC and PECO are simply setting up a straw man to knock down.[2] They do so because they cannot defend the Commonwealth Court's imposing an impossible "conclusive causal connection" burden of proof on consumers who seek nothing more than to be free from forced exposure to RF by means of a device installed against their will in their own homes when the safety of RF is unproven, as demonstrated by the recent reports of a federal government agency tasked with studying the subject, which found that the hypothesis "that cell phone [RF] is incapable of inducing adverse health effects" has been "disproven." (Smart meters

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[1] Co-appellees Povacz and Murphy also do not argue that they can sustain their burden of proof on safety based only on their "sincerely held beliefs." From Appellees' examination of the Povacz/Murphy brief, that phrase never appears, not once, in their brief. It also never appears in the Randall/Albrecht opening brief. Povacz and Murphy instead argue that proper inquiry is whether proposed electrical service "'pose[s] a risk of harm.'" Povacz/Murphy Opening Br. at 39 (quoting *West Penn Power v. Pennsylvania Pub. Util. Comm'n,* 1548 C.D. 2018 (Sept. 9, 2019)).

[2] PECO claims that Appellees argue that "upon remand…*all they need to show* is that exposure to RF fields from PECO's smart meters 'could be highly disruptive of peace of mind' for those, like Complainants, 'who go to great lengths to avoid RF exposure.'" PECO Second Br. at 41 (emphasis added). Appellees never so argued. They specifically stated that Appellees' sincere belief in the potential for harm from RF exposure is a *factor* that "the PUC should take into …consideration" on remand, but made clear that an accommodation under Section 1501 on the issue of safety would "*also* require objective evidence of harm or potential for harm…." App. Opening Br. at 64.

and cell phones emit a comparable level of RF.) Under the state of the science it is impossible to prove the safety of RF exposure and, concomitantly, impossible to prove the propensity for harm from RF exposure, except that it cannot be ruled out. This necessarily means that requiring consumers who object to forced RF exposure to prove conclusively that harm will result is to rig the proceedings from the outset—the consumers will never prevail and will be subject to forced RF exposure after playing an expensive and burdensome game of charades at the PUC.

To be sure, PUC correctly describes the preponderance standard: "To establish a fact or claim by a preponderance of the evidence means to offer the greater weight of the evidence, or evidence that outweighs, or is more convincing than, *by even the smallest amount*, the probative value of the evidence presented by the other party." PUC Opening Br. at 24 (emphasis added). PUC claims that this standard is the proper one, but this is utterly incompatible with the "conclusive causal connection" standard *that it itself imposed on Appellees at an earlier point in these proceedings*.

The standard that PUC imposed is the same one adopted by the Commonwealth Court, based on the PUC's 1993 *Woodbourne-Heaton* order. While purporting to disavow that standard, PUC inconsistently argues that Appellees "failed to meet" that standard. PUC Second Br. at 25-27. But that is not the issue raised by Appellees in their appeal. The issue is whether the *Woodbourne-Heaton* "conclusive causal connection" standard is *correct* and should therefore be applied

on remand, *not* whether Appellees failed to meet it in the initial hearing. Appellees *admit* they did not meet this standard, because, due to the nature of scientific evidence, it is *impossible to do so*. Indeed, nowhere else in the law, including in toxic tort cases, is it required that causation be proven "conclusive[ly]."[3] That is *exactly* why this enhanced, unknown-in-the-law standard is legally indefensible, especially in the present context, where ordinary consumers merely seek a reasonable accommodation in their homes, and should not, on the issue of the safety of PECO's proposed service, be required to "conclusively" prove that they will be harmed where, even with expensive expert testimony, it is impossible to do so, because there will always be room for scientific difference on issues such as the present one.

PECO similarly fails to meaningfully address this issue. Like PUC, PECO states that the "conclusive causal connection" originated in the *Woodbourne-Heaton* case in 1993 and has been imposed by the PUC since that time. PECO Second Br. at 45-47. Also similar to PUC, PECO, having stated the obvious about the *existence* of the standard, fails to even *attempt* to provide any legal support for that standard.

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[3] The Merriam-Webster dictionary defines "conclusive" as "putting an end to debate or question especially by reason of irrefutability." https://www.merriam-webster.com/dictionary/conclusive#synonyms. The Cambridge Dictionary defines "conclusive" as "proving that something is true, or ending any doubt." https://dictionary.cambridge.org/us/dictionary/english/conclusive. Neither of these definitions is even conceivably consistent with the preponderance of the evidence standard used in tort cases, which is "'defined as the greater weight of the evidence, i.e., [enough] to tip a scale slightly.'" *E.K. v. J.R.A.*, 237 A.3d 509, 519 (Pa. Super. 2020) (quoting *Raker v. Raker*, 847 A.2d 720, 724 (Pa. Super. 2004)).

To the contrary, PECO claims that the "conclusive causal connection" evidentiary standard is not in fact a real standard at all, but merely a "short-hand expression" and a "naming convention." *Id.* at 47. In other words, PECO says, "conclusive causal connection" does not in fact *mean* "conclusive causal connection," but something else for which the term is merely a "short-hand expression" or a "naming convention." But that is not what the Commonwealth Court held. It affirmed PUC's application of the "conclusive causal connection" burden of proof, not some other standard. Commw. Ct. Dec. at 18, 21 ("Consumers' next theory of recovery asserts that the PUC erred in requiring them to prove a 'conclusive causal connection' between RF exposure and adverse human health effects."; We…affirm the burden applied by the PUC concerning proof of harm from RF emissions."). To the extent that PECO is arguing that the PUC's "conclusive causal connection" standard is, in fact, correct, it provides no support for any such argument. PECO merely claims that Appellees' position is "contrary to the standard of proof has used since 1993 to adjudicate claims of adverse health effects…." PECO Second Br. at 45. *See also id.* at 46 n.118 ("For over twenty-five years, the Commission has relied on *Woodbourne*-Heaton in determining that customers must prove a [conclusive] 'causal connection' between EMF/RF emissions and their health claims to prove their cases."). But stating that a standard of proof has been applied by PUC for a lengthy period of time says nothing about whether that standard is *correct* and

legally defensible. To Appellees' knowledge, the correctness of PUC's *Woodbourne-Heaton* "conclusive causal connection" has, until this case, never been addressed or decided by any appellate court. That the PUC's standard has not yet been addressed on appeal provides no basis to argue that it is correct and should *continue* to be applied in this and future cases.

Notably, the lower court largely based its holding on this issue on the federal court's decision in *Naperville Smart Meter Awareness v. City of Naperville*, 2013 WL 1196580 (N.D. Ill. 2013), which, as Appellees argued in their opening brief (at 71-73), was clear error for several reasons (including that the decision is not authoritative on issues of Pennsylvania administrative law; and that it failed to address *any* evidentiary issue, but instead addressed the *pleading* requirements to state a claim under a federal statute and the United States Constitution). Yet neither PUC nor PECO, in the respective portions of their briefs addressing this issue (or anywhere), even *cites* the *Naperville* case, much less addresses Appellees' argument that it has no relevance or applicability on the burden of proof issue, or that the lower court's reliance on it was clear error. Thus, even Appellants recognize that the lower court's reasoning on this issue is indefensible, and so they avoid addressing it.

Most importantly, neither PUC nor PECO meaningfully address Appellees' argument that an administrative agency charged with ensuring safety and reasonableness should not require even tort law proof of causation, much less the

lower court's enhanced burden of proof. This is most important because, if the conclusive causal connection standard is wrong, which seems clear from Appellees' argument and the failure of PECO and PUC to defend the standard, then the logical question is what standard should apply. PECO and PUC simply assume that the preponderance standard would apply by default, but that is wrong because it assumes that PUC when acting in its adjudicatory function is just like a court deciding claims for monetary or injunctive relief. But, as Appellees have shown, that is clearly not the function of PUC under the statute.

The standard of proof required by an agency charged with ensuring safety "is reasonably lower than that appropriate in tort law, which traditionally makes more particularized inquiries into cause and effect and requires a plaintiff to prove that it is more likely than not that another individual has caused him or her harm." *Allen v. Pennsylvania Engin. Corp*, 102 F.3d 194, 198 (5th Cir. 1996) (citing *Wright v. Willamette Indus. Inc.*, 91 F.3d 1105, 1107 (5th Cir. 1996)). In the present case, as in other cases before the PUC on this and similar issues where consumers request an accommodation for safety reasons, the consumers are not attempting to prove *past* harm and seeking monetary damages for it; they are seeking the prevention of potential *future* harm. In such a case, where the potential for future harm has (as here) an objective evidentiary basis but is not, and may never be, "conclusively" proven, there is *zero* justification for requiring consumers like Appellees to be

subject to an even *greater* burden of proof on causation than they would if they were suing for monetary damages, and there is similarly no justification for requiring them to prove either that harm has befallen them or will befall them by a preponderance of the evidence.[4] Neither PUC or PECO explain why consumers seeking an accommodation in their electric service should be subject to an evidentiary standard that virtually ensures that their claims will be denied.[5]

Finally, neither PUC nor PECO address Appellees' argument that this Court should clarify that the "conclusive causal connection" language used by the PUC does *not* apply to any claim by Appellees on remand, or future litigants before the PUC, on the separate issue whether forced installation of a wireless smart meter

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[4] In a footnote, PECO argues that "public health agencies" are "not obliged to set [evidentiary] standards *below those* for tort liability." PECO Second Br. at 48-49 n.124 (emphasis added). What PECO fails to acknowledge, obviously, is that the "conclusive causal connection" standard imposed by the PUC is in fact considerably *higher* than a tort law burden of proof, and it cites no cases that allow a public utility to establish burdens of proof in administrative matters that, as here, are *more* onerous than in tort cases involving monetary damages. Further, the wording of Section 1501 unquestionably does suggest a standard for causation lower than employed by courts in tort cases, and neither PECO nor PUC have any response to this compelling argument.

[5] PECO bafflingly argues that "the 'substantial factor' test that Randall/Albrecht attempt to rely upon does not apply in this case." PECO Second Br. at 48. But Appellees Randall and Albrecht do *not* argue that the "substantial factor" test applies here. The only time Appellees even *mention* the substantial factor test is in footnote 15 of their brief (at page 60), where they note that the "conclusive causal connection" standard applied by the lower court is "even more onerous" than the substantial factor test. Appellees do not "rely upon" that test in any way.

would constitute *unreasonable*, as distinct from unsafe, service. While the "safety" and "unreasonableness" concepts can clearly overlap to some degree, they are, as the Commonwealth Court correctly found, separate issues that the PUC is required to consider in the disjunctive. It is well-settled that, in an action considering whether something is "reasonable," a court or agency must consider the totality of the circumstances. *See, e.g., Zarlenga & Seltzer, Inc. v. Unemployment Comp. Bd. of Rev.*, 2010 WL 9509776 at *3 (Pa. Commw. Aug. 18, 2010); *Rice v. W.C.A.B. (PPL Corp.)*, 2016 WL 379801 at *2 (Pa. Commw. Jan. 28, 2016); *Chestnut Ridge Grp., L.P. v. Progressive Plastics, Inc*., 2017 WL 6014956 at *7 (Pa. Super. Dec. 5, 2017).

In the present case, that necessarily means that the PUC should, on remand, consider *all* relevant factors in determining whether forced installation of a wireless smart meter on Appellees' premises constitutes unreasonable service under Section 1501, and that Appellees should not have to "conclusively," or under *any* burden of proof, demonstrate that the meter will harm them, so long as they otherwise demonstrate unreasonableness of service. The Court should therefore make clear that "conclusive" or any other proof of resulting harm, as opposed to the potential for harm, is not required to establish a right to relief under either the "safety" or "reasonableness" inquiry of Section 1501.

CONCLUSION

For the foregoing reasons, and the reasons set forth in their opening brief, Appellees respectfully request that the Court reverse the Commonwealth Court's ruling upholding the PUC's imposition of a "conclusive causal connection" burden of proof regarding on the issue of the safety of a wireless smart meter on Appellees' premises. Appellees further request that the Court affirm the rulings of the Commonwealth Court: (a) holding that Section 2807(f) does not mandate universal wireless smart meter installation; and (b) remanding this case back to the PUC to consider the issue of the reasonableness, in addition to the safety, of PECO's proposed installation of a wireless smart meter on Appellees' premises.

Respectfully submitted,

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Dated: November 12, 2021

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 2135, I certify the following:

This brief complies with the type-volume limitation of Rule 2135; this brief contains 3,221 words excluding the parts of the brief exempted by this rule.

/s/ Stephen G. Harvey
Stephen G. Harvey

AFFIDAVIT OF SERVICE

DOCKET NO 34-45 MAP 2021

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MARIA POVACZ

v.

PENNSYLVANIA PUBLIC UTILITY COMMISSION

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I, Elissa Diaz, swear under the pain and penalty of perjury, that according to law and being over the age of 18, upon my oath depose and say that:

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