

IN THE SUPREME COURT OF PENNSYLVANIA

Docket Nos. 34-36 MAP 2021

37-39 MAP 2021

40-45 MAP 2021

MARIA POVACZ

LAURA SUNSTEIN MURPHY

CYNTHIA RANDALL AND PAUL ALBRECHT

v.

PENNSYLVANIA PUBLIC UTILITY COMMISSION

**BRIEF FOR AMICUS CURIAE
ENERGY ASSOCIATION OF PENNSYLVANIA IN
SUPPORT OF THE PENNSYLVANIA PUBLIC UTILITY
COMMISSION AND PECO ENERGY COMPANY**

Brief of Amicus Curiae Supporting the Pennsylvania Public Utility Commission's and PECO Energy Company's Appeals from the Commonwealth Court's October 8, 2020 Order at Docket Nos. 492 C.D. 2019, 606 C.D. 2019, and 607 C.D. 2019, which affirmed in part, reversed and remanded in part, and vacated and remanded in part the Pennsylvania Public Utility Commission's Opinion and Orders entered at Docket Nos. C-2015-2475023, C-2015-2475726, and C-2016-2537666

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I. INTRODUCTION

The instant case concerns the appeals of the Pennsylvania Public Utility Commission (“PUC”), PECO Energy Company (“PECO”), and customer complainants Maria Povacz, Laura Sunstein Murphy, and Cynthia Randall and Paul Albrecht (“Complainants”) challenging the Commonwealth Court’s split decision in *Povacz v. Pa. PUC*, 241 A.3d 481 (Pa. Cmwlth. 2020) (“*Povacz*”). In *Povacz*, the Commonwealth Court held, among other things, that Act 129 of 2008 (“Act 129”) does not mandate that electric distribution companies (“EDCs”), like PECO, install smart meters.

Smart meters are critical to modernizing the electric distribution systems of PECO and other EDCs subject to Act 129. Both EDCs and their customers receive substantial benefits when smart meters are universally deployed.¹ The meters wirelessly transmit critical data to the EDCs, such as outages, voltage, heat alarms, and meter tampering alerts,² which significantly improve the safety and reliability of the EDCs’ electric service. EDCs also can leverage the meters’ wireless communications systems to interconnect an increased number of distributed

¹ See ADAM COOPER, ET AL., ELECTRIC COMPANY SMART METER DEPLOYMENTS: FOUNDATION FOR A SMART GRID 1-12 (Apr. 2021) (“*Edison Foundation Report*”), available at https://www.edisonfoundation.net/-/media/Files/IEI/publications/IEI_Smart_Meter_Report_April_2021.ashx.

² See, e.g., *Hughes v. PPL Elec. Utils. Corp.*, 2020 Pa. PUC LEXIS 238, at *15 (Order entered July 26, 2020), *appeal pending*, No. 827 C.D. 2020.

generation systems, such as solar and wind, safely and efficiently.³ Further, the smart meters provide more detailed information to the individual customers about their electric usage, which empowers them to make informed decisions about how they can conserve electricity and reduce their electric bills.⁴ Moreover, when all customers have smart meters installed, EDCs can monitor their electric distribution systems and timely respond to outages and other issues affecting the distribution systems and individual customers in a more efficient and cost-effective manner.⁵

Based on the plain language of Act 129 and the sound policy reasons supporting system-wide deployment, the PUC directed PECO and the other EDCs subject to Act 129 to install smart meters throughout their service territories. Accordingly, pursuant to their PUC-approved Smart Meter Technology and Procurement Plans (“Smart Meter Plans”), the major EDCs in Pennsylvania invested approximately \$2.16 billion to install smart meters for all of their approximately 5.8 million customers in Pennsylvania. As of July 28, 2021, only a very small number of the EDCs’ approximately 5.8 million customers in Pennsylvania do not have smart meters installed. Such system-wide deployment of smart meters is commonplace. Across the country, “58 investor-owned electric

³ See *Edison Foundation Report* at 2, 12; *Petition of PPL Elec. Utils. Corp. for Approval of Tariff Modifications and Waivers of Regulations Necessary to Implement its Distributed Energy Res. Mgmt. Plan*, Docket No. P-2019-3010128 (Nov. 17, 2020), *adopted without modification*, 2020 Pa. PUC LEXIS 663 (Order entered Dec. 17, 2020).

⁴ See *Edison Foundation Report* at 2-9.

⁵ See *id.* at 2, 9-12.

companies have fully deployed smart meters.”⁶ Also, an estimated 107 million smart meters were deployed by the end of 2020, “covering 75 percent of U.S. households.”⁷

Certain customers, like the Complainants, dislike smart meters and believe, without any credible evidentiary support or factual basis, that the meters present health and safety concerns. Therefore, they filed formal complaints challenging PECO’s installation of smart meters on the grounds that such installation would constitute unsafe and unreasonable service under Section 1501 of the Public Utility Code. The PUC thoroughly analyzed and ultimately rejected their arguments, finding that Act 129 requires system-wide deployment of smart meters and that their alleged Section 1501 violations were completely unfounded.

On appeal, the Commonwealth Court: (1) rejected the Complainants’ constitutional argument that the smart meters would violate their rights to bodily integrity; and (2) affirmed the PUC’s findings on the safety of smart meters as well as the PUC’s determination that the Complainants failed to prove, by a preponderance of the evidence, that a conclusive causal connection between radio frequency (“RF”) field exposure and adverse health effects existed.

However, the Commonwealth Court also found that Act 129 does not mandate the installation of wireless smart meters for all customers, nor does Act

⁶ *See id.* at 2, 26.

⁷ *See id.* at 2.

129 preclude the PUC from granting accommodations to customers, “without proof of harm” from the smart meters. Therefore, the Court vacated the relevant portions of the PUC’s Orders and remanded the matter to the PUC, so that the PUC can determine what, if any, reasonable and appropriate accommodations should be provided to the Complainants.

The Pennsylvania Supreme Court exercised discretionary review to determine: (1) whether the Commonwealth Court erred in finding that Act 129 does not mandate the universal deployment of smart meters; (2) whether the Commonwealth Court erred by articulating a burden of proof that could result in utilities being found in violation of Section 1501 of the Public Utility Code without evidence of harm; and (3) whether the Commonwealth Court properly rejected the Complainants’ argument that the PUC applied an incorrect burden of proof when evaluating their safety claims.

Based on the foregoing, and as explained in greater detail in this Amicus Curiae Brief,⁸ the Energy Association of Pennsylvania (“EAP”) respectfully requests that the Supreme Court: (1) reverse the Commonwealth Court’s findings that Act 129 does not mandate the universal deployment of smart meters and that the Complainants can be granted relief without proving a regulatory violation; and

⁸ The brief is being filed in accordance with the provisions of Pennsylvania Rule of Appellate Procedure (“Pa.R.A.P.”) 531(b)(1)(i). EAP also notes that on May 12, 2021, the Supreme Court granted EAP leave to file an amicus curiae brief in support of the PUC’s and PECO’s Petitions for Allowance of Appeal.

(2) affirm the Commonwealth Court’s ruling that the PUC applied the correct burden of proof in the proceedings below.

II. IDENTIFICATION AND STATEMENT OF INTEREST OF AMICUS CURIAE⁹

EAP is a trade association whose members include the natural gas and electric public utilities operating in the Commonwealth of Pennsylvania.¹⁰ Collectively, EAP’s members deliver energy to more than 8.3 million residential, commercial, and industrial customers within the Commonwealth. EAP is an advocate for its members on policy issues before the General Assembly, the PUC, and various other state governmental agencies. In addition to its advocacy role, EAP helps its members better serve their customers by acting as a clearinghouse for information on best practices within the utility industry.

EAP and its members have a unique and substantial interest in the pending appeals. EDC members of EAP have installed smart meters for nearly all of their customers since their Smart Meter Plans were filed pursuant to Act 129 and approved by the PUC. In compliance with those Smart Meter Plans, these EDCs

⁹ No person or entity other than EAP, its members or counsel has (i) paid in whole or in part for the preparation of this brief; or (ii) authored in whole or in part this brief.

¹⁰ EAP’s members include: Citizens’ Electric Company; Columbia Gas of Pennsylvania, Inc.; Duquesne Light Company; Metropolitan Edison Co.; Pike County Light & Power Company; Pennsylvania Electric Company; Pennsylvania Power Company; National Fuel Gas Distribution Corporation.; PECO Energy Company; Peoples Natural Gas Company LLC; Peoples Gas Company LLC; Philadelphia Gas Works; PPL Electric Utilities Corporation; UGI Utilities, Inc.; Valley Energy, Inc.; Wellsboro Electric Company; and West Penn Power Company.

have invested approximately \$2.16 billion in deploying the smart meters, developing and installing the networks needed to communicate with the smart meters, and updating their billing processes and procedures to facilitate the use of the smart meters. Moreover, since the smart meters and their communications networks enable the EDCs to conduct their meter readings wirelessly and remotely connect service, several of the EDCs have realized cost savings that are passed onto ratepayers.¹¹

The *Povacz* decision threatens to upend the significant benefits of and substantial investments in system-wide deployment of smart meters, by enabling complainants to argue that they should receive their requested accommodations without having to prove that the smart meters would cause them harm. Furthermore, the decision could be read as empowering the PUC to grant relief to complainants even when they do not establish a regulatory violation, which would contravene the law and would fundamentally transform the PUC's complaint process for all utilities.¹²

¹¹ Even though Act 129 only requires the major EDCs to install smart meters, EAP's natural gas members and smaller EDC members are concerned about the impact of the Court's decision because the PUC long has held that system-wide deployment of metering technologies is sound.

¹² All of EAP's utility members, not only the EDCs subject to Act 129, are concerned about this issue due to the substantial effect the ruling would have on the PUC's complaint process and authority to grant relief.

III. STATEMENT OF SCOPE AND STANDARD OF REVIEW

The standard of review in an appeal from a PUC order is limited to determining whether constitutional rights were violated, whether an error of law was committed, or whether necessary findings of fact were supported by substantial competent evidence. 2 Pa.C.S. § 704; *see Rohrbaugh v. Pa. PUC*, 727 A.2d 1080, 1084 (Pa. 1999).

A. STATUTORY INTERPRETATION

“Because issues of statutory interpretation are questions of law,” the Pennsylvania Supreme Court’s “standard of review is *de novo* and [its] scope of review is plenary.” *Snyder Bros., Inc. v. Pa. PUC*, 198 A.3d 1056, 1071 (Pa. 2018) (“*Snyder Bros.*”) (quotation omitted). When conducting such an analysis, Pennsylvania courts are guided by the Statutory Construction Act. *See* 1 Pa.C.S. § 1501-1991. Under the Statutory Construction Act, the “overriding object of all statutory interpretation and construction ‘is to ascertain and effectuate the intention of the General Assembly’ in enacting the statute under review.” *Snyder Bros.*, 198 A.3d at 1071 (quoting 1 Pa.C.S. § 1921(a)).

If the statute is “clear and free from all ambiguity,” the court cannot disregard the letter of the statute “under the pretext of pursuing its spirit.” 1 Pa.C.S. § 1921(b). However, ambiguity exists “[i]f a statutory term, when read in context with the overall statutory framework in which it appears, has at least two

reasonable interpretations.” *Snyder Bros.*, 198 A.3d at 1073. Indeed, “the ‘not explicit’ prerequisite of [1 Pa.C.S. 1921(c)] logically applies where . . . *any* reading of the statute’s plain text raises non-trivial interpretive difficulties.” *Id.* (citation and quotation omitted) (emphasis in original). In such situations, Section 1921(c) sets forth factors that can be considered to ascertain the General Assembly’s intent. *Id.* § 1921(c).

One of those factors is the “[l]egislative and administrative interpretations of such statute.” *Id.* § 1921(c)(8). Indeed, the Pennsylvania Supreme Court has explained that:

The proper place to begin the appropriate inquiry is . . . due deference to the views of the regulatory agency directly involved in administering the statute in question. . . . An administrative agency’s expert interpretation of a statute for which it has enforcement responsibility is entitled to great deference and will not be reversed unless clearly erroneous.

Popowsky v. Pa. PUC, 706 A.2d 1197, 1203 (Pa. 1997) (citation omitted). Thus, upon review of the PUC’s interpretation of statutory requirements for smart meters, the Supreme Court should give deference to the PUC’s interpretation and not reverse it unless clearly erroneous.

B. SUBSTANTIAL EVIDENCE

With respect to the issue of whether the PUC’s findings and conclusions are supported by substantial evidence, substantial evidence has been defined as “that

quantum of evidence which reasonable minds might accept as adequate to support a conclusion.” *Nat’l Fuel Gas Distrib. Corp. v. Pa. PUC*, 677 A.2d 861, 863-64 (Pa. Cmwlth. 1996) (quoting *Norfolk & Western Ry. Co. v. Pa. PUC*, 413 A.2d 1037, 1046 (Pa. 1980)); see *Pa. PUC v. Dep’t of Transp.*, 346 A.2d 376, 378 (Pa. Cmwlth. 1975) (quotation omitted). However, the “presence of conflicting evidence in the record does not mean that substantial evidence is lacking.” *Allied Mech. & Elec., Inc. v. Pa. Prevailing Wage Appeals Bd.*, 923 A.2d 1220, 1228 (Pa. Cmwlth. 2007) (citation omitted). Further, the Pennsylvania Supreme Court has explained that the Court’s duty “is to determine only whether or not the PUC’s findings are supported by substantial evidence; we may not substitute our judgment for that of the PUC, nor may we ‘indulge in the processes of weighing evidence and resolving conflicting testimony.’” *Popowsky v. Pa. PUC*, 706 A.2d at 1201 (quoting *Johnstown-Pittsburgh Express, Inc. v. Pa. PUC*, 291 A.2d 545, 547 (Pa. Cmwlth. 1972)).

In addition, mere bald assertions, personal opinions or perceptions, when not substantiated by facts, do not constitute evidence. See *Commonwealth v. City of Pittsburgh*, 532 A.2d 12, 14 (Pa. 1987). Further, testimony consisting of guesses, conjecture, or speculation cannot prove a party’s claims. See *Cuthbert v. City of Philadelphia*, 209 A.2d 261, 264 (Pa. 1965).

IV. STATEMENT OF QUESTIONS PRESENTED

EAP hereby adopts the Statements of Questions Presented set forth in the PUC's and PECO's Briefs.

V. SUMMARY OF ARGUMENT

The Supreme Court should grant the PUC's and PECO's appeals of the Commonwealth Court's *Povacz* decision and deny the Complainants' appeal. Although the Commonwealth Court correctly affirmed the PUC's burden of proof, it committed fundamental errors and made critical oversights in interpreting Act 129 of 2008.

On the principal issue of whether Section 2807(f)(2) of the Public Utility Code requires EDCs to deploy smart meters system-wide, the Commonwealth Court overlooked the statute's plain language stating that EDCs "shall furnish" smart meters to their customers. Instead, the Commonwealth Court reviewed a select definition of the word "furnish" from a 1985 edition of a dictionary and determined that the word means "supply" or "give" and "does not imply that the recipient is forced to accept that which is offered." *Povacz*, 241 A.3d 481, 488.

The Commonwealth Court's interpretation of Section 2807(f)(2) demands reversal by the Supreme Court. The interpretation conflicts with the statute's plain language and other provisions in the Public Utility Code that use the words

“furnish,” “offer,” and “supply” as distinct terms. Moreover, if upheld, the Commonwealth Court’s ruling would lead to absurd and unreasonable results, such as: (1) enabling customers to dictate the terms under which EDCs are required to “furnish” safe, reliable, and reasonable service under Section 1501 of the Public Utility Code; and (2) jeopardizing the EDCs’ and their customers’ ability to realize all of the benefits of smart meters, in which the EDCs have invested \$2.16 billion.

In addition, the Commonwealth Court incorrectly found that the PUC can grant relief to complainants even when they fail to establish a regulatory violation. In *Povacz*, the Commonwealth Court remanded the case to the PUC to “balance the parties’ interests and consider whether refusal of accommodations was unreasonable without proof of actual harm to Consumers.” *Povacz*, 241 A.3d at 495. It is well-established that the PUC lacks authority to grant relief to complainants when they fail to sustain their burden of proof. Therefore, for the Complainants to receive any relief, they must establish, by a preponderance of the evidence, that the installation of the smart meters would violate the Public Utility Code, a Commission order, or a Commission regulation. They failed to do so and, therefore, cannot receive any relief.

Furthermore, the Supreme Court should reject the Complainants’ arguments about the burden of proof applied by the PUC. The Complainants contend that establishing a “possibility of harm” should be sufficient to meet their burden of

proof. However, the preponderance of the evidence standard requires a party prove their claims by a greater weight of the evidence. Thus, the PUC correctly required the Complainants to prove, by a preponderance of the evidence, that a conclusive causal connection between the smart meters' RF emissions and the alleged adverse health effects existed. The Complainants' evidence of a "possible" harm, however, constitutes bare allegations and speculation that cannot be considered substantial evidence.

For these reasons and as explained in more detail below, the Supreme Court should grant the PUC's and PECO's appeals and deny the Complainants' appeal.

VI. ARGUMENT

A. THE COMMONWEALTH COURT ERRED IN FINDING THAT ACT 129 DOES NOT DIRECT UNIVERSAL DEPLOYMENT OF SMART METERS

Despite the statute stating that EDCs "shall furnish" the smart meters to customers,¹³ the Commonwealth Court found that smart meters are not required. *Povacz*, 241 A.3d 481, 488-90. The alleged support for this finding is tenuous at best. The Commonwealth Court based its decision on: (1) a select definition of the word "furnish" from the 1985-edition of Webster's Ninth College Dictionary; and (2) language in provisions of Act 129 and the PUC's website that have nothing to do with smart meters. *See id.* The Commonwealth Court's interpretation is

¹³ 66 Pa.C.S. § 2807(f)(2) (emphasis added).

completely unsupported and would lead to unreasonable and unintended results. Thus, on this issue of first impression, the Supreme Court should reverse the Commonwealth Court’s determination.

1. The Commonwealth Court’s Interpretation Conflicts with the Statute’s Plain Language

Under the Statutory Construction Act, the “overriding object of all statutory interpretation and construction ‘is to ascertain and effectuate the intention of the General Assembly’ in enacting the statute under review.” *Snyder Bros., Inc. v. Pa. PUC*, 198 A.3d 1056, 1071 (Pa. 2018) (quoting 1 Pa.C.S. § 1921(a)). If the statute is “clear and free from all ambiguity,” the court cannot disregard the letter of the statute “under the pretext of pursuing its spirit.” 1 Pa.C.S. § 1921(b). Further, only “[w]hen the words of a statute are not explicit” may a court examine the factors set forth in Section 1921(c) to ascertain the General Assembly’s intent. 1 Pa.C.S. § 1921(c).

Here, the statute’s plain language requires EDCs to install smart meters for their customers. Specifically, Section 2807(f) of the Public Utility Code prescribes that the major EDCs¹⁴ must file Smart Meter Plans and “shall furnish smart meter technology” in any of the following situations: (1) “[u]pon request from a customer that agrees to pay the cost of the smart meter at the time of the request”; (2) “[i]n

¹⁴ Act 129’s smart meter provisions only apply to the EDCs operating in Pennsylvania who have more than 100,000 customers. *See* 66 Pa.C.S. § 2807(f)(6).

new building construction”; and (3) “[i]n accordance with a depreciation schedule not to exceed 15 years.” 66 Pa.C.S. § 2807(f)(1)-(2) (emphasis added). Importantly, Pennsylvania courts have held in several cases that the word “shall” means “must” and is not discretionary.¹⁵ Therefore, the PUC correctly declared that EDCs must “deploy smart meters system-wide” because of the requirement that smart meters be deployed “in accordance with a depreciation schedule not to exceed 15 years.” *Smart Meter Procurement and Installation*, 2009 Pa. PUC LEXIS 265, at *21 (Order entered June 24, 2009) (“*Implementation Order*”).

Also, nothing in Act 129 grants the customer a right to “opt-out” of a smart meter installation. In the proceedings below, the Complainants repeatedly noted how other jurisdictions provide customers with the ability to opt-out of the smart meter installations. (R.R. 640a, 741a, 846a.) The General Assembly easily could have added a similar opt-out provision to Section 2807(f) of the Public Utility Code when it originally enacted Act 129. It refused to do so. Moreover, since the statute’s passage, several bills have been introduced to add such an opt-out to the statute. *See, e.g.*, H.B. 1564 (Pa. 2017-2018 Session). None of those bills ever

¹⁵ *See Whiteford v. Dep’t of Transp.*, 728 A.2d 1127, 1131 (Pa. Cmwlth. 2001) (“[T]he word ‘shall’ denotes a mandatory, not discretionary instruction.”) (citations omitted); *C.B. v. J.B.*, 65 A.3d 946, 952 (Pa. Super. 2013) (finding that “[t]he use of ‘shall’ means . . . must” and that to hold otherwise “would be to flout the legislative will”); *In re Canvass of Absentee Ballots of Nov. 4, 2003 Gen. Election*, 843 A.2d 1223, 1233 (Pa. 2004) (“[W]e are not compelled to pretend that ‘shall’ means ‘may’ under Section 3146.6(a).”); *Griesmer v. Hill*, 36 Pa. Super. 69 (Pa. Super. 1908) (“This provision is mandatory, and not directory merely. It means what it says. The word ‘shall’ means ‘shall’ [The defendant] not only may but ‘must.’”).

passed. These incontrovertible facts reinforce that the General Assembly intended for system-wide deployment of smart meters. It is not a court's role to read in an opt-out where none is provided in the statute and where the General Assembly has repeatedly declined to add one to the law.

2. Even if Section 2807(f)(2) of the Public Utility Code Is Ambiguous, the Rules of Statutory Construction Demonstrate that the Statute Directs System-Wide Deployment of Smart Meters

Instead of focusing on Section 2807(f)(2)'s mandatory language, the Commonwealth Court examined the definition of the word "furnish" in the 1985 edition of Webster's Ninth New Collegiate Dictionary. The Court found that "[t]o 'furnish' means 'to provide with what is needed; . . . supply, give'" and "does not imply that the recipient is forced to accept that which is offered." *Povacz*, 241 A.3d 481, 488.

The Commonwealth Court's fundamental error was relying on this single dictionary definition, rather than employing the factors and presumptions set forth in the Pennsylvania Statutory Construction Act. Had the Commonwealth Court properly applied that Act, it would have found that Section 2807(f)(2) of the Public Utility Code directs the EDCs to deploy smart meters for all their customers. Therefore, even if the Supreme Court finds that Section 2807(f)(2) of the Public Utility Code is ambiguous, the Supreme Court should still find that the statute directs the EDCs to deploy smart meters system-wide.

a. The Commonwealth Court’s Interpretation of “Furnish” Conflicts with the Use of the Term Elsewhere in the Public Utility Code¹⁶

Although the word “furnish” is not defined in the Public Utility Code, other provisions in the Public Utility Code explicitly distinguish the word from the meaning attributed to it by the Commonwealth Court, *i.e.*, supply, offer, give. For example:

1. Section 102 defines “rate” as compensation for any service “offered, rendered, or furnished” by the utility. 66 Pa.C.S. § 102 (emphasis added).
2. Section 102 defines “service” as including “all things” and “all facilities” that are “furnished or supplied” by the utility. 66 Pa.C.S. § 102 (emphasis added).
3. Section 1101 states that “[u]pon the application of any proposed public utility and the approval of such application by the commission evidenced by its certificate of public convenience first had and obtained, it shall be lawful for any such proposed public utility to begin to offer, render, furnish, or supply service within this Commonwealth.” 66 Pa.C.S. § 1101.
4. Section 1101 states that a PUC-issued certificate of public convenience must “include a description of the nature of the service and of the territory in which it may be offered, rendered, furnished or supplied.” 66 Pa.C.S. § 1101.
5. Section 1102(a)(1) requires a public utility to obtain a certificate of public convenience before it “begin[s] to offer, render, furnish or supply within this Commonwealth service of a different nature or to a different territory than that authorized by” a certificate of public convenience granted under the former Public Service Company Law or Public Utility Law or the

¹⁶ See 1 Pa.C.S. §§ 1921(c)(6), 1922(1)-(2)

utility's grandfathered rights under Section 103 of the Public Utility Code. 66 Pa.C.S. § 1102(a)(1) (emphasis added).

If the word “furnish” means “supply” or “give” as determined by the Commonwealth Court, no reason exists to separately use these terms in the Public Utility Code. In reality, the word “furnish,” as used throughout the Public Utility Code, means that the public utility actually provides the service or facilities, and the customer accepts such service or facilities. It does not mean that EDCs are required to provide service under the terms and conditions acceptable to each customer. Therefore, the Court's interpretation of Section 2807(f)(2) is absurd and unreasonable on its face and conflicts with the use of the term “furnish” elsewhere in the Public Utility Code.

b. The Commonwealth Court's Interpretation of the Word “Furnish” Would Lead to Unreasonable and Unintended Results¹⁷

Section 1501 of the Public Utility Code states that “[e]very public utility shall furnish and maintain adequate, efficient, safe, and reasonable service and facilities.” 66 Pa.C.S. § 1501 (emphasis added). As the entities with a statutory duty to provide safe, reliable, adequate, and reasonable service, EDCs must be permitted to establish the conditions under which they provide service to customers, including the meters they use.

¹⁷ See 1 Pa.C.S. §§ 1921(6), 1922(1).

Here, EDCs selected, procured, and installed RF-transmitting smart meters for their customers consistent with their duty under Section 1501 and pursuant to Act 129 and the PUC's related Orders. Not every EDC uses the same smart meter. When developing their Smart Meter Plans, each EDC evaluated the available technologies and selected the smart meters that: (1) were best suited for its specific electric distribution system; (2) met the requirements under Act 129 and the PUC's related Orders; and (3) provided safety and reliability benefits to their electric service. Ultimately, these Smart Meter Plans were litigated before the PUC with a wide variety of stakeholders, and the PUC approved the Smart Meter Plans.

The *Povacz* decision, however, opens the door for individual customers to dictate the terms under which the EDC provides them with service, including the meters the EDC uses. Although the Court affirmed the PUC's rejection of the Complainants' arguments that the smart meters could cause them harm, the Court held that the word "furnish" allows customers to refuse that which is offered. *Povacz*, 241 A.3d 481, 488. However, the word "furnish" is used in Section 1501 of the Public Utility Code when describing the EDCs' obligation to "furnish" safe, reliable, adequate, and reasonable service. 66 Pa.C.S. § 1501. Therefore, if the Commonwealth Court's interpretation of "furnish" is correct, then customers do not need to accept what is offered under Section 1501 of the Public Utility Code, *i.e.*, the provision of adequate, efficient, safe, and reasonable service and facilities.

Thus, customers could condition the terms under which the utilities provide service and comply with their statutory duty under Section 1501. Such an absurd result cannot and should not be permitted to happen.

For example, customers could restrict the installation of any kind of utility-owned facility that is used to provide them service, including meters, transformers, distribution lines, etc., simply because the customers have subjective and unfounded concerns. This problem would not be limited to customers' allegations of harm due to exposure to RF fields from smart meters or other electrical facilities. Any subjective concern would be grounds for individual customers to control how the utility's service is provided, including which facilities are installed and where, even though the customers have no credible evidence to support their claims. Effectively, each customer could regulate the utility's service and facilities. This would force the EDCs to incur additional capital costs and expenses in order to accommodate the customer's demands. Under general ratemaking practices, those added capital costs and expenses would be recovered from all customers in the individual customers' customer classes.

Such regulation by individual customers flatly conflicts with Section 1501 of the Public Utility Code and the EDCs' PUC-approved tariffs, which are legally

binding on both the EDCs and their customers.¹⁸ Section 1501 expressly provides that “[s]ubject to the provisions of this part and the regulations or orders of the commission, every public utility may have reasonable rules and regulations governing the conditions under which it shall be required to render service.” 66 Pa.C.S. § 1501 (emphasis added). Consistent with that provision, the EDCs have PUC-approved and legally binding tariffs that set forth the terms and conditions under which they provide service to customers.

Furthermore, if the *Povacz* decision stands, the utility’s service territory could become balkanized beyond all reason, with each customer regulating the utility’s service and facilities. However, Pennsylvania courts have long recognized “[t]he importance of ‘conformity in the regulation and control of public utilities’,” along with “the risks associated with allowing various local authorities to impose municipality-specific burdens upon utilities.” *PPL Elec. Utils. Corp. v. City of Lancaster*, 214 A.3d 639, 652 (Pa. 2019). For that reason, “the General Assembly has, for a century and through three incarnations of the public utility code,” vested the PUC with exclusive jurisdiction to regulate utilities. *Id.* Because individual municipalities cannot impose specific “burdens upon utilities” and regulate their service and facilities, individual customers cannot either.

¹⁸ See, e.g., *Brockway Glass Co. v. Pa. PUC*, 437 A.2d 1067, 1070 (Pa. Cmwlt. 1981) (citation omitted); *Kossmann v. Pa. PUC*, 694 A.2d 1147, 1151 (Pa. Cmwlt. 1997) (citation omitted); *Strunk v. Pa. PUC*, 531 A.2d 881, 883 (Pa. Cmwlt. 1987) (citation omitted); *Di Santo v. Dauphin Consol. Water Supply Co.*, 436 A.2d 197, 201 (Pa. Super. 1980) (citations omitted).

In addition, the PUC has long held that system-wide deployment of meters and metering infrastructure, including smart meters, is a reasonable condition of service because deployment on a piecemeal basis would be inefficient and uneconomical.¹⁹ Without system-wide deployment, EDCs would have to consult with individual customers about the meter to be installed, procure and keep in stock several different kinds of meters (many of which may never be placed in service), potentially have multiple meter reading networks set up, and develop and implement different meter reading policies and procedures to address every different accommodation provided to customers. From a practical standpoint, the EDCs have the expertise in determining the safest and most reasonable ways to provide service and face potential civil and criminal penalties if they violate Section 1501 of the Public Utility Code. *See* 66 Pa.C.S. §§ 3301-3302.

Thus, the EDCs must control the terms under which they provide electric service, not individual customers with unsupported subjective concerns.

¹⁹ *Implementation Order*, 2009 Pa. PUC LEXIS 265, at *14, 21; *see also Springirth v. Nat'l Fuel Gas Distrib. Corp.*, 1991 Pa. PUC LEXIS 44, at *1-3, 6, 16-17 (Order entered Apr. 12, 1991) (dismissing complaint of customer seeking to make installation of automated meter reading devices optional, noting that the Commission previously found in another case that “[t]he customer should not be given the option of refusing installation of equipment” because “[t]o permit customer discretion in this area would be inefficient and uneconomical”) (quoting *Stenker v. The York Water Co.*, Docket No. C-871318 (Order entered July 27, 1987)).

c. System-Wide Deployment of Smart Meters Aligns with the Purpose of Act 129 of 2008²⁰

Act 129 was a sweeping piece of legislation aimed at modernizing the major EDCs' electric distribution systems and conserving electric usage and demand.²¹ Act 129 required most EDCs to install smart meters pursuant to PUC-approved Smart Meter Plans (66 Pa.C.S. § 2807(f)(2)), offer time-of-use rates to customers (66 Pa.C.S. § 2807(f)(5)), and reduce electric consumption and demand through PUC-approved Energy Efficiency and Conservation (“EE&C”) Plans, which offer EE&C measures and incentives to help customers reduce their electric usage and demand (66 Pa.C.S. § 2806.1).

As explained previously, smart meters are critical to modernizing the electric distribution systems of PECO and other EDCs subject to Act 129. These meters provide substantial benefits to both EDCs and customers when they are universally deployed, such as improving the safety and reliability of electric distribution service and enabling customers to make more informed choices about their electric usage. Those benefits are lost if any individual customer can refuse a smart meter without having to prove that such installation would violate Section 1501 of the Public Utility Code.

²⁰ See 1 Pa.C.S. § 1921(c)(1)-(4).

²¹ See Act of October 15, 2008, P.L. 1592, 2007 Pa. HB 2200.

d. When Interpreting Section 2807(f)(2) of the Public Utility Code, the Commonwealth Court Erred by Relying on Irrelevant Provisions in Act 129 and the PUC’s Website

The Commonwealth Court erred by looking to irrelevant provisions in Act 129 and the PUC’s website as support for its interpretation that Section 2807(f)(2) of the Public Utility Code does not mandate the installation of smart meters. The critical flaw with the Commonwealth Court’s analysis is that those other provisions in Act 129 and the PUC’s website have nothing to do with the statute’s smart meter provisions. And, to the extent that the Commonwealth Court wanted to evaluate the PUC’s administrative interpretations of the statute,²² it should have looked at the PUC’s actual orders on the subject, such as the *Implementation Order*. Notably, since Act 129 was passed, the PUC has consistently held in every order, across many proceedings, that Section 2807(f)(2) requires system-wide deployment of smart meters.²³ Therefore, the Court’s interpretation of “furnish” would enable customers to control the terms under which the EDCs comply with their statutory duty in direct conflict with final PUC orders.

Based on the foregoing, the Supreme Court should reverse the Commonwealth Court’s determination that Section 2807(f)(2) of the Public Utility Code does not require universal deployment of smart meters.

²² See 1 Pa.C.S. § 1921(c)(8).

²³ See, e.g., *Frompovich v. PECO Energy Co.*, 2018 Pa. PUC LEXIS 160, at *13 (Order entered May 3, 2018).

B. THE PUC CANNOT GRANT RELIEF OR DIRECT THE UTILITY TO TAKE ANY ACTION IN COMPLAINT PROCEEDINGS ABSENT FINDING THAT THE UTILITY VIOLATED THE PUBLIC UTILITY CODE, A PUC REGULATION, OR A PUC ORDER

The Commonwealth Court also erred by remanding for the PUC to: (1) “balance the parties’ interests” when determining if PECO’s refusal to grant the complainants’ requested opt-out was “unreasonable”; and (2) “consider all reasonable accommodations.” *Povacz*, 241 A.3d 481, 495.

The PUC only has the power to grant the Complainants relief or to “require any action by the utility” if they establish that installing the smart meters violates Section 1501 of the Public Utility Code. *West Penn Power Co. v. Pa. PUC*, 478 A.2d 947, 949-50 (Pa. Cmwlth. 1984); *see e.g., Phila. Suburban Water Co. v. Feinstein*, 383 A.2d 997, 998-99 (Pa. Cmwlth. 1978) (holding that the Commission may not allocate the amount of a disputed water bill between the utility and the customer where the complainant had not met the burden of proof). Formal complaints filed with the PUC are limited in scope to “any act or thing done or omitted to be done by any public utility in violation, or claimed violation, of any law which the commission has jurisdiction to administer, or of any regulation or order of the commission.” 66 Pa.C.S. § 701. Therefore, no “balancing of the parties’ interests” should occur. The Complainants must establish that the smart

meters' installation would violate Section 1501 of the Public Utility Code, or else the PUC cannot grant them relief.

Moreover, in the absence of any such regulatory violation, the EDC's decision to install a particular smart meter is a business or managerial decision that is within its sole discretion and is outside the PUC's authority. *See Peoples Cab Co. v. Pa. PUC*, 137 A.2d 873, 878-79 (Pa. Super. 1958) (holding that the PUC cannot regulate or control the utility's management decision without finding that such decision would adversely affect the public). The Commonwealth Court has explained that "[a]dministrative agencies do not have the authority to order a regulated company to change lawful conduct on the theory that it is in the best interest of their customers." *Phila. Suburban Water Co. v. Pa. PUC*, 808 A.2d 1044, 1056 (Pa. Cmwlth. 2002) (citation omitted).

Here, the EDCs soundly exercised their discretion and decided to install the smart meters they selected, given: (1) the benefits they provide over traditional, non-bidirectional meters; (2) the sheer lack of evidence that the smart meters constitute unsafe, unreasonable, or inadequate service; and (3) the inefficiencies and increased costs associated with deploying smart meters on a piecemeal or individual basis. Therefore, neither the courts nor the PUC should interfere with this "internal management" decision by the EDCs. *Metro. Edison Co. v. Pa. PUC*, 437 A.2d 76, 80 (Pa. Cmwlth. 1981) (citations omitted).

For these reasons, the Supreme Court should reverse the Commonwealth Court’s finding that the PUC can grant relief to the Complainants even though they failed to establish a regulatory violation.

C. THE COMPLAINANTS’ ARGUMENTS ABOUT THE BURDEN OF PROOF APPLIED BY THE PUC SHOULD BE REJECTED

The Complainants’ only issue before this Court is whether the PUC applied an “impossible” burden of proof in the proceedings below. *Povacz v. Pa. PUC*, 2021 Pa. LEXIS 2142, at *3 (Pa. 2021) (per curiam). As explained in the following sections, the Complainants’ arguments about the burden of proof should be denied.

1. Evidence of the “Possibility of Harm” Cannot Meet the Preponderance of the Evidence Standard

The Complainants contend that the Supreme Court should reverse the Commonwealth Court’s affirmance of the PUC’s burden of proof applied in the proceedings below. That is, they believe that the PUC’s requirement that they establish a “conclusive causal connection” between the smart meters and adverse health effects is an “impossible” standard. *Id.* Instead, the Complainants aver that they should only be required to prove a “possibility of harm” in order to meet their burden of proof. *Id.*

The Commonwealth Court correctly rejected the Complainants’ arguments. *See Povacz*, 241 A.3d 481, 493-94. It is well-established that “[a] litigant’s burden

of proof before administrative tribunals as well as before most civil proceedings is satisfied by establishing a preponderance of evidence which is substantial and legally credible.” *Samuel J. Lansberry, Inc. v. Pa. PUC*, 578 A.2d 600, 602 (Pa. Cmwlth. 1990). The preponderance of the evidence standard “has been classified as ‘a more likely than not inquiry,’ supported by the greater weight of the evidence; something a reasonable person would accept as sufficient to support a decision.” *In re Vencil*, 152 A.3d 235, 246 (Pa. 2017) (citations omitted).

Here, the Complainants cannot reasonably dispute that the PUC applied the preponderance of the evidence standard. *See Povacz*, 241 A.3d at 493-94. The PUC, sitting as the ultimate factfinder, determined that a preponderance of evidence (*i.e.*, greater weight of the evidence) would be found in the Complainants favor if they were able to establish a conclusive causal connection between the RF emissions and the alleged adverse health effects. *See id.* The Complainants completely failed to do so. Instead, they introduced evidence that the smart meters could possibly cause them harm, which PECO thoroughly and substantially rebutted through expert testimony. (R.R. 57a-79a, 164a-186a, 263a-286a.) Thus, the PUC properly found that the Complainants’ speculative evidence did not satisfy the preponderance of the evidence standard.

In fact, the Complainants’ evidence was more akin to the evidence presented in *Commonwealth v. City of Pittsburgh*, 532 A.2d 12, 13 (Pa. 1987), where a party

argued that the “placement of a pre-release center for state prisoners in a Pittsburgh neighborhood would pose a substantial threat to the community.” The Pennsylvania Supreme Court held there was no substantial evidence supporting that allegation. *Id.* at 13-15. Specifically, the Court stated:

The testimony showed that many of the residents perceived that the addition of the center to the neighborhood would ruin the neighborhood for various reasons. . . . The testimony of the neighborhood’s residents, however, was not substantiated by facts but was no more than their bald assertions, personal opinions, and perceptions of the pre-release center and the area. They did not present any studies, police records, property valuations or any type of substantive evidence upon which their fears were based, which would lead a reasonable mind to conclude that the facility would be detrimental to the community’s general welfare.

Id. at 14 (emphasis added). As in *City of Pittsburgh*, the Complainants here assert that they should be able to meet their burden of proof by establishing the “possibility of harm.” However, the PUC properly required them to prove, by a preponderance of the evidence, that the RF emissions from the smart meters “would be detrimental,” *i.e.*, cause the alleged adverse health effects. *Id.*; *see Povacz*, 241 A.3d at 493-94. Anything short of such evidence is wholly insufficient.

2. Even if the PUC Applied an Incorrect Burden of Proof, Such Error Does Not Warrant Reversal When, as Here, Substantial Evidence Supports the PUC's Findings

Even assuming *arguendo* that the PUC applied an incorrect burden of proof, the burden of proof applied by the PUC is largely immaterial when the issues are on appeal. *See Milkie v. Pa. PUC*, 768 A.2 1217, 1220-21 (Pa. Cmwlth. 2001). In *Milkie*, the Commonwealth Court found that when the PUC reviews and evaluates “the weight and probative value of all the evidence,” the burden of proof standard that was applied “is of no consequence” on appeal. *Id.* at 1220. Rather, “the proper focus of [the Court’s] review is whether the Commission’s decision is supported by substantial evidence.” *Id.*

In the proceedings below, the PUC reviewed and evaluated all of the evidence presented by PECO and the Complainants. (R.R. 57a-79a, 164a-186a, 263a-286a.) Even though the PUC found that the Complainants failed to establish a *prima facie* case, the PUC still evaluated all of the evidence. (R.R. 84a-91a, 192a-199a, 290a-297a.) Therefore, the proper scope of the Supreme Court’s review is whether the PUC’s decision is supported by substantial evidence.

In this case, the PUC’s findings are supported by substantial evidence, including testimony by PECO’s expert witnesses directly refuting the Complainants’ claims that the smart meters will cause, contribute to, or exacerbate adverse health effects. (R.R. 57a-79a, 84a-91a, 164a-186a, 192a-199a, 263a-286a,

290a-297a.) These factual determinations “are the sole province of the Commission as fact-finder,” and the Supreme Court should not “disturb them on appeal.” *Milkie*, 768 A.2d at 1221.

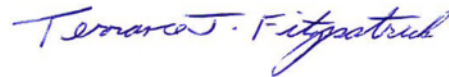
Based on the foregoing, the Supreme Court should affirm the Commonwealth Court’s ruling on the burden of proof applied by the PUC.

VII. CONCLUSION

Wherefore, for the reasons set forth above and in the Briefs filed by the Pennsylvania Public Utility Commission and PECO Energy Company, the Supreme Court of Pennsylvania should grant the appeals of the Pennsylvania Public Utility Commission and PECO Energy Company and deny the appeal of Maria Povacz, et al.

Respectfully submitted,





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CERTIFICATE OF WORD COUNT

Counsel for the Amicus Curiae Energy Association of Pennsylvania hereby certifies that, pursuant to Pa. R.A.P. No. 2135(d), the preceding Amicus Curiae Brief is produced using 14-point font in the text and 12-point in the footnotes and contains 6,905 words, excluding the cover page, Table of Contents, Table of Authorities, this Certificate of Word Count, the Certificate of Compliance, and the Proof of Service. This word count relies on the word count of the computer program used to prepare this Brief. The word count is less than the total words permitted under Pa. R.A.P. No. 531(b)(3).

Date: July 28, 2021



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CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania* that require filing confidential information and documents differently than non-confidential information and documents.



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PROOF OF SERVICE

I, David B. MacGregor, Esquire, hereby certify that on the date set forth below, I have served the foregoing document to the persons on the date and in the manners stated below, which service satisfies the requirements of Pa. R.A.P. 121:

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