

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Maria Povacz

v.

PECO Energy Company

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:

C-2015-2475023

INITIAL DECISION

(NON-PROPRIETARY)

Before
Darlene D. Heep
Administrative Law Judge

INTRODUCTION

Maria Povacz filed a Complaint against PECO Energy Company wherein she states that she received a shut off notice after refusing installation of an AMI¹ meter, also known as a smart meter, and that she does not want a smart meter installed because of health and safety concerns. She also argues that this constitutes forced exposure to a smart meter in violation of the due process clause of the 14th Amendment of the United States Constitution and Article 1, Section 11 of the Pennsylvania State Constitution.

This decision grants the complaint in part and denies it in part. It finds that a smart meter attached to her home would exacerbate her health condition. Given that the location of the meter socket is determined by the customer, it will be ordered that PECO bear its costs of connecting to the new location if Ms. Povacz chooses to move her meter. It denies her claim that

¹ AMI is an acronym for “advanced metering infrastructure.”

the due process clause of the 14th Amendment of the United State Constitution and Article 1, Section 11 of the Pennsylvania State Constitution would be violated.

HISTORY OF THE PROCEEDING

On March 28, 2015, Maria Povacz (Complainant) filed a formal Complaint against PECO Energy Company (PECO or respondent) with the Pennsylvania Public Utility Commission (Commission). In the Complaint, the Complainant placed a checkmark in the box next to the statement “[t]he utility is threatening to shut off my service or has already shut off my service” and also that she has a "reliability, safety or quality problem with my utility service" She further averred that there are fire safety and health risks associated with the smart meter, that there are biological effects from radiation exposure emitted by the meters, that people become ill after having meters installed and that there are privacy issues. She also contended that the meters make the grid more vulnerable to hacking.

On April 9, 2015, PECO filed an Answer and New Matter and Preliminary Objections.

On April 18, 2015, the Complainant filed a Reply to PECO’s New Matter and an Answer to PECO’s Preliminary Objections.

On April 28, 2015 by Motion Judge Assignment, the Preliminary Objections were assigned to Administrative Law Judge Elizabeth H. Barnes.

On June 2, 2015, ALJ Barnes issued an order that the Answer to Preliminary Objections filed by the Complainant would be treated as an Amended Complaint and that the Preliminary Objections filed by PECO were dismissed as moot.

On June 18, 2015, PECO filed an Answer to the Amended Complaint.

Also, on June 18, 2015, PECO filed Preliminary Objections to the Amended Complaint, contending that the matter should be dismissed because Act 129 does not allow a customer to opt out of smart meter installation and, therefore, the Complainant failed to state a claim upon which relief could be granted.

On July 1, 2015, ALJ Barnes granted in part and denied in part the Preliminary Objections. She determined:

The Amended Complaint is essentially the same cause of action filed previously on July 13, 2012, *Maria Povacz v. PECO Energy Company*, Docket No. C-2012-2317176, Opinion and Order entered January 23, 2014. The Commission dismissed Complainant's complaint with prejudice on January 23, 2014, finding that PECO's installation of smart meters was consistent with, rather than a violation of, the Public Utility Code, a Commission Regulation or Order. *Id.* at 10. In the instant case, Complainant again requests permission to opt out of a smart meter installation at her residence for health, privacy, and safety reasons. The only difference in the instant Complaint is that Complainant offers evidence of a signed medical certificate showing she is sensitive to electromagnetic waves emitted by smart meters.

ALJ Barnes referred the following issues to the Commission's Office of Administrative Law Judge's Mediation Unit: a) whether Complainant is entitled to a stay of termination based upon a medical certificate; b) whether PECO Energy Company followed the Commission's regulations and the statutory provisions of Chapter 14 of the Public Utility Code regarding Complainant's medical certificate; and c) whether Respondent's service is reasonable and in compliance with 66 Pa.C.S. §1501.

On July 21, 2015, a telephonic hearing before ALJ Barnes was set for October 5, 2015.

On July 30, 2015, ALJ Barnes issued a Prehearing Order.

On September 22, 2015, Edward Lanza, Esq., filed a Notice of Appearance as counsel of record for Complainant.

On September 30, 2015, Ward Smith, Esq., PECO's Assistant General Counsel, filed a Notice of Appearance with the Commission's Secretary.

Also, on September 30, 2015, ALJ Barnes issued an order indicating that the hearing was cancelled and would be rescheduled.

On October 1, 2015, the Complainant filed a request for change of venue for an in person hearing and a continuance of the hearing date.

On October 23, 2015, the matter was transferred to Administrative Law Judge Eranda Vero in Philadelphia for an in-person hearing.

On December 15, 2015, an in-person prehearing conference convened as scheduled. During that prehearing conference, ALJ Vero informed the parties that, since the Complainant was going to file a Second Amended Complaint, she would not issue a ruling on Complainant's outstanding Motion to Dismiss Objections to Interrogatories and Compel Answers.

On February 9, 2016, this matter was reassigned to Administrative Law Judges Darlene D. Heep and Christopher P. Pell, jointly.

On February 11, 2016, a Prehearing Conference Order was issued setting a telephonic Prehearing Conference for March 15, 2016.

On February 24, 2016, PECO filed a Motion to admit Thomas Carl Watson, Esq. Pro Hac Vice.

A telephonic pre-hearing conference was held on March 15, 2016.

On March 16, 2016, a Hearing Notice set the hearing for June 7 and June 8, 2016.

On April 7, 2016, a Pre-Hearing Order was issued, setting forth the procedure for this matter.

On April 8, 2016, Complainant filed a Second Amended Formal Complaint.

The Second Amended Complaint alleges that the Complainant did not request a new meter and did not agree to the installation of a new meter at her premises in New Hope, Pennsylvania but that on February 25, 2015, PECO sent a letter to Complainant advising that the Company intended to install a new meter at Complainant's property. The Second Amended Complaint also states that the Complainant initiated this matter on March 28, 2015 after she received a 10-day shut off notice on March 26, 2015. The Second Amended Complaint also states that Complainant suffers from severe sensitivity to electromagnetic fields and experiences a number of symptoms when exposed to electromagnetic fields, including but not limited to, **[Begin Confidential]**

[End Confidential]. The Second Amended Complaint also states that Complainant's electromagnetic sensitivity makes her uniquely susceptible to Electro Magnetic Field (EMF) and Radio Frequency (RF) radiation and that on April 9, 2015, Dr. Hanoch Talmor wrote a letter to PECO stating that a smart meter should not be installed on or near Complainant's home because she suffers from "severe sensitivity to electromagnetic fields." As relief, the Complainant seeks an order that PECO cease and desist efforts to install a smart meter at the Complainant's home and that PECO install only an analog meter or a similar device that does not produce EMF or RF emissions, or EFs², at or near Complainant's residence.

On April 11, 2016, Respondent filed PECO Energy Company's Objections to Complainant's Interrogatories and Requests for Production of Documents, Set I.

Two days of hearing began on June 7, 2016 as scheduled.

² The experts testifying used the terms "electromagnetic fields" and "Radio Frequency" interchangeably to address the emissions concerns of the Complainants. EF will be used to reference these emissions.

On August 8, 2016, Stephen A. Harvey, Esq. filed an Entry of Appearance on behalf of Complainant.

On August 16, 2016, PECO Energy Company filed with the Commission a Joint Motion for An Omnibus Schedule Revision in the following proceedings:

Povacz v. PECO Energy Company, Docket No. C-2015-2475023
Randall and Albrecht v. PECO Energy Company, Docket No. C-2016-2537666
Van Schoyk v. PECO Energy Company, Docket No. C-2015-2478239
Murphy v. PECO Energy Company, Docket No. C-2015-2475726.

The Complainants employed the same counsel and shared experts. PECO intended to present the same experts in each matter. The Complainants and PECO offered that it is their joint belief that the proposed omnibus schedule would save substantial time and resources (as many as nine hearing days) for the Commission and the parties if there was not duplicative expert testimony.

The Motion for Omnibus Schedule was granted, and a revised Pre-Hearing Order was issued on August 26, 2016. Unless there is reference to a specific complainant, expert testimony is considered common testimony between and among all Complainants and admitted in accordance with 52 Pa. Code § 5.407.

On August 25, 2016, Complainants Murphy and Povacz each filed a Motion for Reasonable Accommodation of Disability under the Americans with Disabilities Act (ADA). The parties sought to move the hearing to Harrisburg due to their concerns about exposure to electromagnetic fields in the hearing room in Philadelphia. On September 9, 2016, the Motion was denied in part and granted in part and an Order issued allowing the Complainants Murphy and Povacz to participate by telephone or videoconference.

Further Omnibus Hearings were held September 14-16, 2016, December 5-8, 2016 and January 25, 2017.

On October 17, 2016, Complainants Stephen and Diane Van Schoyck (Docket No. C-2015-2478239) filed a Petition to Withdraw, stating that they were removing their home from the electric grid.

On October 20, 2016, PECO filed an Objection to the Petition.

On October 24, 2016, the Van Schoycks filed an Amended Petition to Withdraw.

On October 25, 2016, the Van Schoycks filed a Second Amended Petition to Withdraw, PECO did not object to the granting of the Second Amended Petition to Withdraw.

The Van Schoycks did not participate in the Omnibus hearings.

To accommodate the averred health issues of Complainant Murphy, further Omnibus hearings were delayed and held on December 5-8, 2016 and January 25, 2017.

Witnesses appeared for the Omnibus Hearing as follows: September 15, 2016, Dr. Andrew Marino; September 16, 2016, Dr. Andrew Marino; September 27, 2016, Dr. Ann Honebrink, Cynthia Randall, and Paul Albrecht; December 5, 2016, Laura Sunstein Murphy, Dr. Peter J. Prociuk, and Brenda Eison; December 6, 2016, Brenda Eison, Glenn Pritchard and Dr. Christopher Davis; December 7, 2016, Dr. Christopher Davis; December 8, 2016, Dr. Christopher Davis and Dr. Mark Israel; December 9, 2016, Dr. Mark Israel January 25, 2017, Dr. Mark Israel and Dr. Andrew Marino (rebuttal).

The final Omnibus transcript was received on February 14, 2017.

In March of 2017, the Commission was notified that the Van Schoycks had completely removed their home from PECO service and the power grid and installed solar power and a generator.

The Van Schoycks' Second Amended Petition to Withdraw was granted on March 13, 2017.

On February 22, 2017, a Briefing Order was issued instructing the parties to file and serve main briefs on April 21, 2017, and reply briefs on May 19, 2017.

On March 24, 2017, a Judge Change Order was issued assigning this matter solely to Administrative Law Judge Darlene Heep. The parties requested an extension of time to file briefs and an Order requiring reply briefs by June 19, 2017 was issued on March 28, 2017.

Due to unforeseen circumstances and medical reasons, the Complainants requested further extensions of time. PECO did not object to the extensions and the requests for extensions of time to file briefs were granted and new deadlines set. The final Reply Brief was filed on November 13, 2017.

The record closed on November 13, 2017, upon receipt of the final Reply Brief. The matter is ready for a decision.

During the hearing, counsel for the Omnibus Complainants requested that all medical information and testimony be marked and kept confidential. PECO did not object, agreed to maintain the confidentiality of such information and the request was granted. Accordingly, Proprietary and Non-Proprietary Initial Decisions will be issued in each matter. A Protective Order regarding medical information of the Complainant was issued on March 13, 2018.

FINDINGS OF FACT

1. The Complainant in this matter is Maria Povacz, who resides and receives PECO service at 533 Tori Court, New Hope, Pennsylvania (service address).
2. Respondent is PECO Energy Company.

3. An AMR³ meter is currently installed at the home of Ms. Povacz. *Direct Testimony of Maria Povacz*, Transcript at 32.

4. On June 4, 2012, PECO sent a letter to Ms. Povacz seeking to install a smart meter on her property. *Direct Testimony of Maria Povacz*, at 3:7-9; (JA002407).⁴

5. On June 14, 2012, Ms. Povacz called PECO and explained that she did not want a smart meter installed on her property. *Id.* at 3:11-19; (JA002407).

6. On June 18, 2012, Ms. Povacz sent a letter to PECO President Craig Adams stating that she refuses to have a smart meter installed on her property, and that she was concerned about the smart meter's safety regarding human health. *Id.* at 6:2-7; (JA002410).

7. The next day Ms. Povacz received a letter from Linda Lamberson, a PECO employee working with the smart meter installation group, regarding the PECO smart meter installation team. *Id.* at 6:9-16; (JA002410).

8. PECO sent a letter from Brenda Eison, a PECO Customer Care Manager addressing smart meter deployment matters, to Ms. Povacz on June 29, 2012, stating that installation of the smart meter is required, in addition to claiming that the radio frequency levels emitted by smart meters are safe. *Rebuttal Testimony of Brenda Eison*, at 7:7-11; (JA002717).

9. On March 26, 2015, Ms. Povacz received a notice from PECO informing her that PECO was planning to terminate her electricity if she did not allow installation of the smart meter. *Id.* at 23:1-2; (JA002427).

³ AMR is an acronym for "automatic meter reading."

⁴ The JA numbers are references to briefing outlines, testimony and exhibits contained in a Joint Appendix for the Omnibus cases agreed to by the parties and filed in *Murphy v. PECO Energy Company*, Docket No. C-2015-2475726

10. In response to the ten-day shut off notice, Ms. Povacz filed a second formal complaint with the PUC on March 28, 2015, seeking to halt the installation of the smart meter. *Id.* at 23:8-13; (JA002427).

11. PECO halted the termination of the Povacz account and has not shut off electricity to the Povacz residence. *Rebuttal Testimony of Brenda Eison*, at 10:5-6; (JA002720).

12. PECO sent Ms. Povacz a letter informing her that PECO must install a smart meter on her property to comply with Act 129. *Surrebuttal Testimony of Maria Povacz*, at 5:5-12; (JA003134).

13. On April 9, 2015, Dr. Hanoch Talmor, one of Ms. Povacz's treating physicians, sent a letter to PECO stating that the company should not install a smart meter on the Povacz property because such a device would negatively impact the health of Ms. Povacz. *Direct Testimony of Hanoch Talmor, M.D.*, at 4:10-16; (JA002656).

14. On February 25, 2016, Brenda Eison and PECO Field Supervisor Al Ludwick met with Ms. Povacz at her home to investigate the possibility of relocating the meter. *Direct Testimony of Maria Povacz*, at 31:9-11; (JA002435).

15. PECO is willing to relocate the smart meter to accommodate Ms. Povacz. *Rebuttal Testimony of Brenda Eison*, at 11:20-23; (JA002721).

16. Beginning in 2012, Ms. Povacz began to take steps to reduce EMF exposure in her house by purchasing window films, eliminating cordless phones and purchasing hardwired internet routers instead of using Wi-Fi. *Direct Testimony of Maria Povacz*, at 20:2-8; (JA002424).

17. Ms. Povacz also purchased surge filters for the entire house, in addition to EMF pads and filtering fabric that shields her from radiation given off from her computer. *Id.* (JA002424).

18. Although Ms. Povacz must use a laptop for work occasionally, she now opts to use her hardwired computer whenever possible. *Id.* at 20:6-9; (JA002424).

19. Prior to September 2012, Ms. Povacz possessed good physical and mental health, and slept soundly for eight to ten hours each night. *Id.* at 2:17-21; (JA002415).

20. Beginning in the summer months of 2012, smart meter installation began in Ms. Povacz's neighborhood. *Id.* at 8:13-21; (JA002412).

21. In early September 2012, immediately after the smart meters were installed in Ms. Povacz's neighborhood, Ms. Povacz began to hear constant **[Begin Confidential]** . **[End Confidential]** *Id.* at 10:16-18; (JA002414).

22. The constant **[Begin Confidential]**

[End Confidential] *Id.* at 11:19-20; (JA002415).

23. The **[Begin Confidential]**
[End Confidential] nearly every day. *Id.*(JA002415).

24. Seeking an explanation of the **[Begin Confidential]**
[End Confidential]

25. In January 2014, Ms. Povacz began to consult with Dr. Hanoch Talmor, M.D., who specializes in treating individuals with exceptional sensitivities. *Id.* at 22:2-3; (JA002426).

26. After several consultations with Ms. Povacz, Dr. Talmor diagnosed her with electromagnetic hypersensitivity disorder. *Id.* at 23:15-22; (JA002427); *see also Direct Testimony of Dr. Hanoch Talmor M.D.*, at 3:16-17; (JA002654).

27. In April 2015, Ms. Povacz had **[Begin Confidential]**

[End Confidential] *Direct Testimony of Maria Povacz* at 24:7-14; (JA002428).

28. Due to her newly developed health problems and inability to sleep soundly, Ms. Povacz received a negative performance review at work for the first time in her twenty-year career in 2015. *Id.* at 27:18-28:21; (JA002431).

29. While traveling, Ms. Povacz’s symptoms, including the **[Begin Confidential]** **[End Confidential]** all subsided. *Id.* at 30:12-22; (JA002434).

30. The AMR meter system utilized radio frequency communications to transmit meter information from each customer’s meter to a network of “cell masters.” *Murphy Rebuttal Testimony of Glenn Pritchard*, at 4:8-16; (JA004258); *see also Povacz Rebuttal Testimony of Glenn Pritchard*, at 4:13-22; (JA002811).

31. The information was then sent to PECO from the “cell masters” over a fiber optic system and phone lines. *Murphy Rebuttal Testimony of Glenn Pritchard*, at 4:8-16; (JA004258); *see also Povacz Rebuttal Testimony of Glenn Pritchard*, at 4:13-22; (JA002811).

32. The AMR meters send information via radio frequency transmissions from the meter assembly to the utility once every five minutes for a 20-millisecond duration. *Murphy Rebuttal Testimony of Glenn Pritchard*, at 4:18-21; (JA004258); *see also Povacz Rebuttal Testimony of Glenn Pritchard*, at 5:1-2; (JA002812).

33. This AMR transmission utilizes a maximum of one watt of power. *Murphy Rebuttal Testimony of Glenn Pritchard*, at 4:18-21; (JA004258); *see also Povacz Rebuttal Testimony of Glenn Pritchard*, at 5:2-3; (JA002812).

34. The new AMI smart meter system also utilizes radio frequency communication. *Murphy Rebuttal Testimony of Glenn Pritchard*, at 5:6-14; (JA004259); *see also Povacz Rebuttal Testimony of Glenn Pritchard*, at 5:11-19; (JA002812).

35. With the AMI smart meter system, the wireless communications from the smart meters are received by technology known as “tower gateway base stations.” *Murphy Rebuttal Testimony of Glenn Pritchard*, at 5:6-14; (JA004259); *see also Povacz Rebuttal Testimony of Glenn Pritchard*, at 5:11-19; (JA002812).

36. The “tower gateway base stations” then transfer the information to PECO via a fiber optic network or over phone lines. *Murphy Rebuttal Testimony of Glenn Pritchard*, at 5:6-14; (JA004259); *see also Povacz Rebuttal Testimony of Glenn Pritchard*, at 5:11-19; (JA002812).

37. The AMI meters also include a second transmitter called a “ZigBee Radio.” *Murphy Rebuttal Testimony of Glenn Pritchard*, at 5:15-17; (JA004259); *see also Povacz Rebuttal Testimony of Glenn Pritchard*, at 5:20-22; (JA002812).

38. The ZigBee Radio utilizes radio frequency transmissions to communicate with smart devices within the home. *Murphy Rebuttal Testimony of Glenn Pritchard*, at 5:15-17; (JA004259); *see also Povacz Rebuttal Testimony of Glenn Pritchard*, at 5:20-22; (JA002812).

39. The smart meters utilize two-way wireless EF transmissions, allowing communication from the smart meter to the tower gateway base stations, and from the tower gateway base stations to the smart meter. *Murphy Rebuttal Testimony of Glenn Pritchard*, at 5:19-20; (JA004259); *see also Povacz Rebuttal Testimony of Glenn Pritchard*, at 6:1-2; (JA002813).

40. Initially, the smart meters are programmed to transmit information once every ninety minutes for a 70-millisecond duration at a maximum of two watts of power. *Murphy*

Rebuttal Testimony of Glenn Pritchard, at 5:20-6:1; (JA004259); *see also Povacz Rebuttal Testimony of Glenn Pritchard*, at 6:2-6; (JA002813).

41. After installation, PECO readjusts the transmission frequency to the lowest number of transmissions that still allows the smart meter to effectively communicate with the PECO system. *Murphy Rebuttal Testimony of Glenn Pritchard*, at 5:20-6:1; (JA004259- JA004260); *see also Povacz Rebuttal Testimony of Glenn Pritchard*, at 6:2-6; (JA002813).

42. In Ms. Povacz' s neighborhood, the Flexnet components of the smart meters have been tuned to transmit six to seven times each day. *Povacz Rebuttal Testimony of Glenn Pritchard*, at 6:6-7; (JA002813).

43. The ZigBee Radio component of the smart meter is initially programmed to transmit every 30 seconds until it acquires a connection with a device within the home, and then its transmission frequency is decreased to a level that allows the meter to effectively communicate with the device. *Testimony of Glenn Pritchard, December 6, 2016 Hearing Transcript*, at 942:6-14; (JA001201).

44. The ZigBee Radio transmits at approximately 1/10th of a watt, and each transmission is less than one microsecond. *Murphy Rebuttal Testimony of Glenn Pritchard*, at 6:6-8; (JA004260); *see also Povacz Rebuttal Testimony of Glenn Pritchard*, at 6:11-12; (JA002813).

45. PECO's smart meters communicate on reserved, private frequency bands, allowing the meters to communicate with PECO without using a "mesh" system. *Murphy Rebuttal Testimony of Glenn Pritchard*, at 6:11-7:6; (JA004260); *see also Povacz Rebuttal Testimony of Glenn Pritchard*, at 6:16-7:11; (JA002813).

46. PECO did not perform any tests on humans to evaluate the safety of smart meters. *Cross Examination of Glenn Pritchard, December 6, 2016 Hearing*, at 1031:25-1032:20; (JA001290-001291).

47. The Federal Communications Commission (FCC) has promulgated limits for the maximum permissible exposure to radiofrequency fields emitted by a Smart Meter as 0.6 mW/cm², calculated as an average exposure over time. *Murphy Rebuttal Testimony of Christopher Davis* at 13; *Povacz Rebuttal Testimony of Christopher Davis* at 13-14.

48. PECO ensured that the smart meters were FCC compliant. *Cross Examination of Glenn Pritchard, December 6, 2016 Hearing*, at 1031:25-1032:20; (JA001290-001291).

49. The electric AMI meter will emit 83% fewer radiofrequency fields than the electric AMR meter currently installed at Ms. Povacz's residence. *Murphy Rebuttal Testimony of Christopher Davis* at 18; *Povacz Rebuttal Testimony of Christopher Davis* at 18-19; PECO Exh. CD-8.

DISCUSSION

The Pennsylvania Public Utility Code requires each public utility to provide the following:

Every public utility shall furnish and maintain adequate, efficient, safe, and reasonable service and facilities, . . . Such service and facilities shall be in conformity with the regulations and orders of the commission.

66 Pa.C.S. § 1501.

The statutory definition of "service" is to be broadly construed. *Country Place Waste Treatment Co., Inc. v. Pa. Pub. Util. Comm'n*, 654 A.2d 72 (Pa.Cmwlt. 1995).

"Service, used in its broadest and most inclusive sense, includes any and all acts done, rendered, or performed, and any and all things furnished or supplied, and any and all facilities used, furnished, or supplied by public utilities, or contract carriers by motor vehicle, in the performance of their duties under this part to

their patrons, employees, other public utilities, and the public, as well as the interchange of facilities between two or more of them.” 6 Pa.C.S.A. § 102.

In the Second Amended Complaint, Ms. Povacz contends that she has severe sensitivity to electromagnetic fields and that installation of a smart meter at her home would be unreasonable because smart meters emit EFs.

Section 332(a) of the Public Utility Code, 66 Pa.C.S. § 332(a), provides that the party seeking relief from the Commission has the burden of proof. The Complainant seeks relief from the Commission, and, therefore, has the burden of proof in this proceeding.

“Burden of proof” means a duty to establish a fact by a preponderance of the evidence, or evidence more convincing, by even the smallest degree, than the evidence presented by the other party. *Se-Ling Hosiery v. Margulies*, 364 Pa. 54, 70 A.2d 854 (1950).

If a complainant establishes a *prima facie* case, the burden of going forward with the evidence shifts to the utility. If a utility does not rebut that evidence, a complainant will prevail. If the utility rebuts complainant’s evidence, the burden of going forward with the evidence shifts back to a complainant, who must rebut the utility’s evidence by a preponderance of the evidence. The burden of going forward with the evidence may shift from one party to another, but the burden of proof never shifts; it always remains on a complainant. *Replogle v. Pennsylvania Electric Company*, 54 Pa. PUC 528 (1980), and *Waldron v. Philadelphia Electric Company*, 54 Pa. PUC 98 (1980).

If a respondent submits evidence of “co-equal” weight to counter a complainant’s evidence, the complainant has not satisfied the burden of proof unless additional evidence opposing the respondent’s evidence is presented. *Morrissey v. PA Dept. of Highways*, 424 Pa. 87, 225 A.2d 895 (1967), and *Burleson v. Pa. Pub. Util. Comm’n.* 66 Pa.Cmwlt. Ct. 282, 443 A.2d 1373 (1982), *aff’d.* 501 Pa. 443, 461 A.2d 1234.

The parties offered differing views regarding the standard of proof applicable to this issue. The Complainant contends:

PECO proceeds from the absolutely incorrect premise that in order to prevail in these proceedings, the Complainants must prove medical causation, *i.e.*, that PECO's AMR or AMI smart meter caused health conditions for them or will interfere with their health. To be sure, as the Commission recognized in the *Kreider* case, Complainants bear the burden of proving "by a preponderance of the evidence, that PECO is responsible or accountable for the problem described in the complaint," and this includes proof "that the complainant was adversely affected by the smart meter" and that PECO's use of a smart meter "will constitute unsafe or unreasonable services in violation of Section 1501 under the circumstances in this case." *Susan Kreider v. PECO Energy Company*, No. P-2015-2495064, Opinion and Order (September 3, 2015) (JA007462-7481).

See Povacz Main Brief, p. 73.

PECO contends that *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*, 1992 Pa. PUC Lexis 160, controls, arguing as follows:

Woodbourne-Heaton thus provides a dispositive framework for the burden and standard of proof in the instant proceeding: If the Complainants prove that there is a body of conflicting and inconclusive science, or that the science is "undecided," then the Complainants have failed to meet their burden of proof, and cannot prevail. And that is what the Complainants claim to have demonstrated. Moving on from the implications of *Woodbourne-Heaton*, the *Kreider Order* provides a separate, independent basis for concluding that, in order to prevail, the Complainants must prove that PECO's AMI meters will cause, contribute to, or exacerbate their adverse health conditions. The *Kreider Order* states (emphasis added) that the Complainants "will have the burden of proof during the proceeding to demonstrate, by a preponderance of the evidence, that PECO is responsible or accountable *for the problem described in the Complaint*" – and each of these Complainants alleged in their respective Complaint that PECO's AMI would cause, contribute to, or exacerbate their specific health conditions.

PECO Main Povacz Brief at 18.

The burden of the Complainant is clear. As the Commission held, in smart meter matters, “[t]he ALJ’s role in the proceedings will be to determine based on the record in this particular case, whether there is sufficient evidence to support a finding that the Complainant was adversely affected by the smart meter or whether PECO’s use of a smart meter will constitute unsafe or unreasonable service in violation of Section 1501 under the circumstances in this case.” *Kreider v. PECO Energy Company*, Docket No. P-2015-2495064 (Opinion and Order, January 28, 2016) at 23. While the Commission also stated that a complainant “may” be required to present evidence in the form of medical documentation and/or expert testimony, such evidence is not the sole means. As the Commonwealth Court has recognized, a customer may establish a *prima facie* case with circumstantial evidence. See *Milkie v. Pa. Pub. Util. Comm’n*, 768 A.2d 1217 (Pa. Cmwlth. 2001).

Under 66 Pa.C.S. § 1501 and 52 Pa. Code § 57.194, PECO must provide adequate, efficient, safe and reasonable service and facilities. The Complainant contends that installing AMR and AMI meters is unsafe and unreasonable. As the Commonwealth Court held in *Romeo v. Pa. PUC*, 154 A.3d 422, 430 (2017), a Complainant can make out his or her claim through the testimony of others as well as other evidence that goes to the issue of safety and reasonableness. To prevail, the Complainant must prove this by a preponderance of the evidence.

Any decision of the Commission must be supported by substantial evidence. See, e.g., Section 704 of the Administrative Agency Law, 2 Pa.C.S. § 704. “Substantial evidence” is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion. 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. Pub. Util. Comm’n*, 489 Pa. 109, 413 A.2d 1037 (1980); *Erie Resistor Corp. v. Unemployment Comp. Bd. of Review*, 194 Pa. Superior Ct. 278, 166 A.2d 96 (1961); and *Murphy v. Comm., Dept. of Public Welfare, White Haven Center*, 85 Pa. Commonwealth Ct. 23, 480 A.2d 382 (1984).

Due Process

Although not presented as a claim in the Complaint, the Complainant asserts in briefs that a government actor does not have the authority to expose a person to electromagnetic energy against her wishes and against the recommendation of her physician and to do so would violate the due process clause of the 14th Amendment of the Federal Constitution as well as the due process protections in Article 1, Section 11 of the Pennsylvania State Constitution. She contends that installation of a smart meter will force exposure to EFs on the Complainants' residential properties, which violates due process. There is no support for a finding that the Complainant was not provided due process here.

Act 129 of 2008 (“the Act” or “Act 129”) directed electric distribution companies (“EDCs”) to file Smart Meter technology procurement and installation plans with the Commission for approval. The Act provided:

(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 Act requires that any smart meter technology utilized have bidirectional or two-way communication technology. 66 Pa.C.S. § 2807(g).

The Commission ordered EDCs with greater than 100,000 customers to adhere to the guidelines established for smart meter technology procurement and installation on June 18, 2009. EDCs were required to file a Smart Meter technology procurement and installation plan.⁵ The Commission approved the smart meter installation plan developed by PECO.⁶ Under that plan, PECO is replacing AMR meters with AMI or “smart meters.”

In 2013, the Commission concluded that there is no provision in the Code or the Commission’s Regulations or Orders that allows a PECO customer to “opt out” of smart meter installation. *See Maria Povacz v. PECO Energy Company*, Docket No. C-2012-2317176 (Order and Opinion entered January 24, 2013). By seeking to install a smart meter at the service address, including sending a shut off notice for failure to allow access (*Direct Testimony of Laura Sunstein Murphy* at 42:16-18; (JA003990)), PECO was and is attempting to comply with Act 129, the orders of the Commission and its tariff. A public utility’s Commission-approved tariff is *prima facie* reasonable, has the full force of law, and is binding on the utility and the customer. 66 Pa.C.S. § 316; *Kossmann v. Pa. Pub. Util. Comm’n*, 694 A.2d 1147 (Pa.Cmwlth. 1997); and *Stiteler v. Bell Telephone Co. of Pennsylvania*, 379 A.2d 339 (Pa.Cmwlth. 1977).

PECO Tariff Electric Section 6.4 provides that the company owns and maintains the meters. Section 14.5 provides that the company will select the type and make of the metering equipment to be used for meters supplied by the company and may from time to time change or alter the equipment.

Section 10.1 of PECO's Commission-approved tariff provides that the Company shall keep in repair and maintain its own property installed on the premises of the customer. Section 10.5 states that PECO employees shall have access to the premises of the customer at all reasonable times for the purpose of reading meters, and for installing, testing, inspecting, repairing, removing or changing any or all equipment belonging to the Company.

⁵ *See Smart Meter Procurement and Installation*, Docket No. M-2009-2092655 (Implementation Order entered June 24, 2009) (*Smart Meter Procurement and Installation Order*).

⁶ *See Petition of PECO Energy Company for Approval of its Smart Meter Technology Procurement and Installation Plan*, Docket No. M-2009-2123944 (Smart Meter Plan).

Section 18.3 provides that the Company may terminate on reasonable notice if entry to the meter is refused, or if access to the meter is obstructed or hazardous. Specifically, PECO's tariff provides:

The Company may terminate on reasonable notice if entry to the meter or meters is refused or if access thereto is obstructed or hazardous; or if utility service is taken without the knowledge or approval of the Company; or for other violation of these Rules and Regulations and/or applicable Commission rules, including those found at Pennsylvania Public Utility Code or the Commission's regulations.

By refusing to allow PECO access to her meter and by removing the PECO meter and replacing it with an analog meter the Complainant acted contrary to the PECO Tariff Electric and PECO proceeded to terminate the Complainant's service in accordance with its tariff.

"The due process requirements of the Pennsylvania Constitution are indistinguishable from the 14th Amendment to the Federal Constitution, and therefore, the same analysis applies to both provisions." *Caba v. Weaknecht*, 64 A.3d 39 (2013), citing *Turk v. Dep't of Transp.*, 983 A.2d 805, 818 (Pa. Cmwlth. 2009). The U.S. Constitution requires that administrative agencies, like the Public Utility Commission, are required to provide due process to the parties appearing before them. This requirement is satisfied when the parties are afforded notice and the opportunity to appear and be heard. *Schneider v. Pa. Pub. Util. Comm'n.*, 479 A.2d 10 (Pa.Cmwlth. 1984).

The Commission has specifically recognized the right of customers to be heard regarding smart meters. In *Kreider v. PECO Energy Company*, Docket No. P-2015-2495064 (Order entered September 3, 2015), the Commission held that customers "should have the opportunity to be heard on [] averments regarding the 'deleterious health symptoms' related to the smart meter." *Id.* at 18.

There is no dispute that the Complainant refused PECO access to install a smart meter. A review of the history in this matter shows that the Complainant has had the opportunity

to be heard during several weeks of administrative procedures and hearings spread over a year. That opportunity continued with briefs submitted on her behalf and the instant review addressing her concerns about PECO meters. There is no violation of Complainant's due process rights here.

Installation of a Smart Meter

In the Second Amended Complaint, Ms. Povacz avers that she has severe electromagnetic sensitivity that makes her uniquely susceptible to EFs. She further contends that as a result of her severe sensitivity to EFs, she has physical symptoms, including, but not limited to, **[Begin Confidential]**

[End Confidential] She asserts that the EFs that emanate from smart meters will exacerbate her condition. Therefore, she contends, installation of a smart meter at her home would violate the Public Utility Code and Commission regulations.

In particular, it is Ms. Povacz's contention that installation of a smart meter would violate the Public Utility Code and the Commission's regulation that require utilities to "furnish and maintain adequate, efficient, safe, and reasonable service and facilities." 66 Pa. C.S. § 1501; 52 Pa. Code § 57.194. She further asserts that the Public Utility Code and the Commission's regulations further require that PECO make all "repairs, changes, alterations, substitutions, extensions, and improvements in or to such service and facilities as shall be necessary or proper for the accommodation, convenience, and safety of its patrons, employees, and the public." 66 Pa. C.S. § 1501; 52 Pa. Code § 57.194. Therefore, installation of a wireless smart meter in Complainant's home would constitute a violation of Section 1501 of the Public Utility Code and Section 57.194 of the Commission's regulations because it would create unsafe and unreasonable service. She further asserts that PECO's installation of a wireless smart meter in her home would constitute a violation of Section 1501 of the Public Utility Code and Section 57.194 of the Commission's regulations because change or alteration of PECO's meter is not necessary or proper for the accommodation, convenience and safety of Complainant.

Ms. Povacz testified in support of her claim. She testified that until 2012, she slept soundly and was in good health. She states that after the installation of smart meters in her neighborhood, **[Begin Confidential]**

[End

Confidential] She testified that she was previously rarely ill. *Direct Testimony of Maria Povacz* at 1-5, 17-21; (JA002415).

Efforts by Ms. Povacz to reduce EF exposure in her house include purchasing window films, eliminating cordless phones and purchasing hardwired internet routers instead of using Wi-Fi. She has also purchased and uses various shields to protect against EF exposure.

Ms. Povacz eventually consulted physicians about **[Begin Confidential]**

[End Confidential] *Direct Testimony of Maria Povacz*, at 10-12; (JA002412 - JA002415). One of the physicians was Dr. Hanoch Talmor, M.D., who testified as an expert witness on her behalf. Dr. Talmor had sent a letter to PECO stating that a smart meter should not be installed at the Complainant's home because it would worsen her condition. According to Dr. Talmor, Ms. Povacz's symptoms are fully consistent with electromagnetic hypersensitivity syndrome and that her symptoms are worse when she is exposed to electromagnetic and radio frequency wave radiation. Dr. Talmor stated that Ms. Povacz exemplifies a "classic case" of electromagnetic hypersensitivity and that "she is extremely sensitive to electromagnetic and radiofrequency radiation." *Direct Testimony of Hanoch Talmor, M.D.*, at 3:16-4:14; (JA002655-002656). Dr. Talmor recommended that Ms. Povacz avoid all sources of electromagnetic radiation that she can, and he recommends that PECO "abstain from installing a smart meter in her home because of the negative health effects such a device would have on [Ms. Povacz]." *Id.* at 5:10-13; (JA002656).

Also presented in support of the Complainant's case was the testimony of expert witness Andrew Marino, PhD. Dr. Marino was a professor at the Louisiana State University Medical School for approximately 33 years. At the time of the hearing, he was retired from the medical school and worked developing software intended to diagnose neurological and neuropsychiatric diseases. During his career, he focused on the biological effects of

electromagnetic energy and the electrical properties of tissue as they are influenced by that energy. *Testimony of Dr. Andrew Marino Hearing Transcript* at 565-566. His Ph.D. is in biophysics. It is Dr. Marino's opinion that there is a clear basis in established science for the conclusion that Ms. Povacz could be in danger if exposed to the radiation admitted by the PECO AMI meter. *Id.* at 578.

According to Dr. Marino, the AMI meter radiation is similar to that of a cell phone. *Id.* at 589. He referenced several studies that he avers show that there are biological effects from such energy. *Id.* at 590-612. He also designed and conducted a study which he testified further established that there is a "bonafide neurological condition called electromagnetic hypersensitivity." *Id.* at 609. It was his opinion that electromagnetic energy from PECO smart meters could cause the symptoms reported by Ms. Povacz. (*Id.* at 645).⁷ The Complainant established a *prima facie* case.

In effective rebuttal, however, PECO presented Dr. Christopher Davis, who was recognized as an expert and is a professor of electrical and computer engineering at the University of Maryland in College Park who studies, researches, teaches, and serves on national and international panels related to physics, biophysics, electrical engineering, electromagnetics, radiofrequency exposure and dosimetry. *Murphy Rebuttal Testimony of Christopher Davis* at 1-7; *Povacz Rebuttal Testimony of Christopher Davis* at 1-7. According to the calculations of Dr. Davis, the average exposure from PECO's electric AMI meters is millions of times less than the FCC maximum permissible exposure levels and the peak exposure from PECO's electric AMI meters is approximately 40 times smaller than the FCC limit for 30-minute average exposure. *Murphy Rebuttal Testimony of Christopher Davis* at 15-16; *Povacz Rebuttal Testimony of Christopher Davis* at 16; PECO Exh. CD-2. Dr. Davis also testified that the exposure from PECO's electric AMI meters is also millions of times less than the guidelines published by the International Commission on Non-Ionizing Radiation Protection. *Murphy Rebuttal Testimony of*

⁷ The Complainant also presented the testimony of Martin Pall, Ph. D. The parties did not discuss the testimony of Dr. Pall in its briefs. According to the parties, Dr. Pall testified primarily regarding the mechanism for harm from EF exposure and that his testimony is not relevant to the burden of proof here. Dr. Pall's testimony will not be discussed here.

Christopher Davis at 16-17; *Povacz Rebuttal Testimony of Christopher Davis* at 17; PECO Exh. CD-4.

Dr. Davis testified, to a reasonable degree of scientific certainty, that there is no reliable scientific basis upon which to conclude that exposure to EFs from PECO's AMI meters is capable of causing any adverse biological effects in people, including the Complainant. *Murphy Rebuttal Testimony of Christopher Davis Hearing Transcript* at 24-25; *Povacz Rebuttal Testimony of Christopher Davis Hearing Transcript* at 24-25.

PECO also presented the testimony of Dr. Mark Israel, M.D. Dr. Israel attended the Albert Einstein College of Medicine. Dr. Israel completed an internship and residency at Harvard Medical School, has worked at the National Institutes of Health and has been a professor of medicine and medical research at numerous medical schools. He has studied radiofrequency fields and health effects. Dr. Israel began to examine the research on electromagnetic fields, including radiofrequency fields, and health effects during his tenure at the National Cancer Institute more than 25 years ago. He has continued to follow the research literature on this subject since that time. *Murphy Rebuttal Testimony of Mark Israel Hearing Transcript* at 3-6; *Povacz Rebuttal Testimony of Mark Israel Hearing Transcript* at 3-6.

Dr. Israel conducted an evaluation of whether exposure to radiofrequency fields from PECO's AMI meters can cause, contribute to, or exacerbate the conditions described by Ms. Povacz. In that evaluation, he used the same methodology that he uses in the usual course of his medical work, which included searching medical and scientific databases, analyzing studies identified through that research, evaluating as a whole all of the studies that he determined were relevant to the claimed symptoms, including both studies that showed an effect and studies that did not show an effect, and reviewing the findings of public health agencies and organizations to see if they provided any insights Dr. Israel missed and to see if their conclusions were inconsistent with his initial determinations. He then made his final medical evaluation. *Murphy Rebuttal Testimony of Mark Israel Hearing Transcript* at 7; *Povacz Rebuttal Testimony of Mark Israel Hearing Transcript* at 6-7.

Dr. Israel conducted the above-described evaluation for each of the symptoms or conditions identified by the Complainant and concluded, for each such symptom, that there is no reliable medical basis to conclude that radiofrequency fields from PECO's electric AMI meters caused, contributed to, or exacerbated, or will cause, contribute to, or exacerbate, any of the symptoms identified by Complainant. *Murphy Rebuttal Testimony of Mark Israel Hearing Transcript* at 11-31; *Povacz Rebuttal Testimony of Mark Israel Hearing Transcript* at 11-26; *December 8, 2016 Povacz Hearing Transcript* at 1470-1516. It is Dr. Israel's overall medical opinion that exposure to electromagnetic fields from PECO's smart meters has not been and will not be harmful to Complainant's health. He holds both his symptom-specific and overall medical opinions to a reasonable degree of medical certainty. *Murphy Rebuttal Testimony of Mark Israel Hearing Transcript* at 31-32; *Povacz Rebuttal Testimony of Mark Israel Hearing Transcript* at 26.

The burden is then upon the Complainant to rebut the utility's evidence by a preponderance of the evidence. *Replogle v. Pennsylvania Electric Company*, 54 Pa. PUC 528 (1980). To prevail, the Complainant must "demonstrate adverse health effects by a preponderance of the evidence." *Re Philadelphia Electric Company*, 78 Pa. PUC 486, WL 383052 (Pa. PUC), Docket No. A-110550F055 (March 26, 1993) (slip op., pp. 7-8).

The Complainant argues that "PECO places far too much reliance on meeting FCC limits for safety as to everyone, even the medically vulnerable Complainants; the FCC limits reflect badly out of date irrelevant science in the context of these cases." (Povacz Main Brief at 65). PECO meters meet the FCC limits, and in fact emit EFs less than that limit. The company's reliance on limits set by this federal agency that regulates radio communications was not unreasonable. It was reasonable of PECO to conclude that emissions that comply with or are less than FCC limits are safe for the public and begin to install such meters. While these proceedings provide an opportunity for the Complainant to establish that she is an exception, it does not negate the reasonableness of PECO's selection of its meters given the FCC standards and the emissions of the meters selected.

The Complainant also offered a challenge by Dr. Marino to the testimony of Dr. Davis, stating that his calculations were in error because he compared a daily average of PECO smart meter emissions to a 30-minute average FCC standard. Rebuttal Testimony of Dr. Andrew Marino, January 25, 2017 Hearing Transcript at 1876:6-1877:11 (JA002201-002202). According to Dr. Davis, however, the radiofrequency fields from an electric AMI meter even at *peak* exposure are 40 times smaller than the FCC *average-exposure* standards and are not a safety risk. *Murphy Rebuttal Testimony of Christopher Davis* at 16; *Povacz Rebuttal Testimony of Christopher Davis* at 17; PECO Exh. CD-3. Most pertinent to this matter however, is the comparison made by Dr. Davis between the EFs from an AMR meter and the EFs from an AMI meter.

Ms. Povacz testified that she was in good health prior to the installation of the smart meters in her area in 2012. She currently has an AMR meter, which is located at the meter socket on the right side of her house, diagonally below her bedroom. (*Testimony of Maria Povacz Hearing Transcript* at 31). There was no dispute regarding the description of PECO's smart meter system - each meter containing a ZigBee Radio that communicates with appliances in the home and a Flexnet radio that communicates usage information to PECO using a tower gateway base stations system. (PECO Exhibit CD2-CD5). There was also no evidence rebutting the testimony of Dr. Davis that the AMI meter will provide 83% less radiofrequency exposure than the electric AMR meter that is currently installed at the Complainant's residence. *Murphy Rebuttal Testimony of Christopher Davis* at 18; *Povacz Rebuttal Testimony of Christopher Davis* at 18-19. PECO Exh CD-8. Given that, if EFs were the source of Ms. Povacz's travails, they should have manifested themselves prior to 2012, with the AMR meters.⁸ The Complainant has not established that electromagnetic fields that may emanate from the smart meters are unsafe to her. 66 Pa.C.S. § 332(a).

However, Ms. Povacz credibly testified that she has experienced an **[Begin Confidential]**

[End Confidential] since installation of AMI meters in her area. (Testimony of

⁸ Since the hearing, PECO has changed the type of meter that it is installing at residences and that meter, the Aclara, does not have a ZigBee radio and consequently, the ZigBee radio EF emissions. See *Ottaviano v PECO*, Docket Number F-2016-2542081 hearing transcript at 120-124.

Maria Povacz Hearing Transcript at 10). This also negatively impacted her work. (*Id.* at 27). She credibly testified that in the summer of 2013, she experienced **[Begin Confidential]**

[End Confidential] Ms. Povacz also testified that she moved to other rooms in her house, and, when that provided no relief, she left her house, got in her car, and drove down the street. *Id.*; (JA002424). *Id.* 20:20-23; (JA002424). Because she experienced some relief, Ms. Povacz spent the night sleeping in her car. *Id.* at 20:22-23; (JA002424). She also testified that she particularly experiences ill sensations when in her yard near the smart meters of her neighbors. (*Id.* at 129-131).

While there is no showing that EFs from smart meters are causing this problem, and PECO successfully rebutted any such claim, the preponderance of the evidence does suggest that some other aspect of the PECO smart meters is inimitably perceptible by and contrary to the health and well-being of the individual Ms. Povacz. This conclusion is supported by medical and circumstantial evidence which included her credible testimony regarding the **[Begin Confidential]**, **[End Confidential]** her testimony that her ill health is worse when in her yard near the smart meters of her neighbors, her consultation with physicians, including Dr. Talmor, who specializes in treating patients with exceptional sensitivities, and her relief when moving away from smart meters or traveling. *Testimony of Maria Povacz Hearing Transcript* at. 22-27; *Direct Testimony of Hanoch Talmor, M.D.* Although not EFs, Dr. Talmor recognized that some aspect of the smart meters causes Ms. Povacz health problems and recommended that she not install a meter in her home. *Direct Testimony of Hanoch Talmor* at 5:10-13; (JA002656).

Ms. Povacz' current meter is attached to her home, meter socket located on the right side of her house, diagonally below her bedroom. She credibly testified that proximity to the smart meters installed by PECO adversely affects her health. While Ms. Povacz will inevitably otherwise be exposed to smart meters when leaving her residence, attaching such a

device to her home at the current location of her meter socket would exacerbate her problems with them.

The remedy sought by the Complainant- installation of an analog meter- is not available given the determination by the Commission that there is no provision in the Code, the Commission's Regulations or Orders that allows a PECO customer to "opt out" of smart meter installation. (*See Maria Povacz v. PECO Energy Company*, Docket No. C-2012-2317176 (Order and Opinion entered January 24, 2013). However, the PECO meter can be moved away from the Complainant's home structure. The Commission has recognized the possibility of such a remedy, stating that "it may be possible, for example, for the Respondent to install the smart meter in a different location other than outside of the Complainant's bedroom or to use a different type of smart meter."⁹ *Kreider* at 23.

PECO expert witness Glenn Pritchard testified that the customer decides where to put the meter socket, as long as that location meets the guidelines established in PECO's Electric Service Tariff and that PECO would install an AMI meter in a relocated meter socket if the Complainant chose to relocate her meter socket. *Testimony of Glenn Pritchard* at 115-16, PECO Exh. GP-3. See PECO Tariff Electric, Rules 3.2 and 3.4. Ms. Povacz can move her meter away from her home at her cost to a location that meets tariff guidelines. *Id.*

Testimony revealed that PECO and the Complainant had considered relocation of her meter and that PECO representatives viewed possible relocation areas when visiting the service address. *Written Rebuttal Testimony of Brenda Eisen* at 11-12; (JA002721-JA002722) When asked about possible relocation during the hearing, the Complainant testified, "I have never heard any options. So again, if I would have indeed had an open mind to the relocation, that would have been an assumption and I didn't want to make any assumptions." *Testimony of Maria Povacz* at 17-18; (JA000017- JA000018).

⁹ At the time of the hearing, there was one type of meter commercially available. The PECO Electric Tariff provides that an Advanced Meter Service Provider (AMSP) may also supply a meter. Mr. Pritchard testified that no AMSP has come forward to seek Commission authorization. *See Written Rebuttal Testimony of Glenn Pritchard* at 8-11, 16; (JA002815- JA002823).

Mr. Pritchard testified that it is PECO's position that if moving the meter socket causes PECO to incur costs to extend its system to the new location, then the customer is responsible for those costs under PECO's tariff. *Murphy Rebuttal Testimony of Glenn Pritchard at 10; Povacz Rebuttal Testimony of Glenn Pritchard at 16*; PECO Exh. GP-3. PECO notes that its Tariff Rule 6.2 provides that, "Changes related to a service-supply line or a meter owned by the Company, including the installation of protective devices or visual markers to denote safe operating distance from the Company's facilities, for the accommodation of the customer, shall be at the expense of the customer." The change here is not for cosmetic or aesthetic reasons, nor does it involve devices or markers to safeguard the company's equipment. Here, it is an issue of the Complainant's health and safety under Section 1501.

While the location of the meter socket is the choice of the customer, it would be unreasonable to require a customer to pay PECO's expenses related to the customer moving a PECO facility that is detrimental to the customer's health. Requiring a utility to move its facilities under such circumstances in compliance with 66 Pa.C.S. § 1501 is not unprecedented and was acknowledged by the Commission as an option in *Kreider*. *See, Marie Young v. National Fuel Gas Distribution Corp.*, Docket No. C-2008-2059233 (Final Order entered July 28, 2009) (considering testimony regarding the unsafe location of a gas meter inside a customer's home and directing the company to relocate the meter pursuant to Section 1501 of the Code) *referenced in Kreider v. PECO Energy Company*, Docket No. P-2015-2495064 (Order entered September 3, 2015) at 17. Also, "It is well settled that a utility must bear the expense for the repairs and improvements based upon the statutory requirement that a utility provide reasonable and adequate service" and "participation by the customer may reasonably be expected." *Robert Loar, Sr. v. Pennsylvania-American Water Company*, 2013 Pa. PUC LEXIS 781 (Pa. PUC Dec. 3, 2013) *quoting Huntingdon, Inc. v. Pa. Pub. Util. Comm'n*, 76 Pa.Commonwealth Ct. 387, 464 A.2d 601 (1983). *Id.* Therefore, it will be ordered that if Ms. Povacz moves her meter at her cost, PECO shall absorb the costs to PECO, if any, of connecting to the new location.

Finally, the installation of smart meters by PECO presents an exceptional situation, given Act 129, the Commission's interpretation of its provisions that an opt out of a smart meter is not available, and the condition of the individual Complainant. PECO's actions

thus far were part of an effort to comply with its tariff, Act 129 and the Orders of the Commission. Therefore, a penalty would not be appropriate and will not be considered. 52 Pa. Code § 69.1201.

CONCLUSIONS OF LAW

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

2. Due Process is satisfied when administrative agencies, like the Public Utility Commission, provide notice and the opportunity to appear and be heard to the parties appearing before them. *Schneider v. Pa. Pub. Util. Comm'n.*, 479 A.2d 10 (Pa.Cmwlth. 1984).

3. The Complainant must establish her case by a preponderance of the evidence. *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm'n.*, 578 A.2d 600 (Pa.Cmwlth. 1990), alloc. den., 602 A.2d 863 (Pa. 1992).

4. A public utility's Commission-approved tariff is *prima facie* reasonable, has the full force of law and is binding on the utility and the customer. *Pennsylvania Electric Co. v. Pa. Pub. Util. Comm'n.*, 663 A.2d 281 (Pa.Cmwlth. 1995); *Respond Power, LLC v. Pennsylvania Electric Company; Respond Power LLC v. West Penn Power Company*, Docket Numbers C-2016-2576287; C-2016-2576292 (Order Entered July 13, 2017).

5. Utility companies are required to furnish and maintain adequate, efficient, safe, and reasonable service and facilities. 66 Pa.C.S. § 1501, 52 Pa. Code § 57.194.

6. The Complainant has not established that electromagnetic fields that may emanate from the smart meters are unsafe to her. 66 Pa.C.S. § 332(a).

7. The Complainant has established that installation of a smart meter attached to her home would exacerbate ill health effects. 66 Pa.C.S. § 701; 66 Pa.C.S. § 1501; 52 Pa. Code § 57.194.

8. A utility must bear the expense for the repairs and improvements based upon the statutory requirement that a utility provide reasonable and adequate service" and "participation by the customer may reasonably be expected." *Robert Loar, Sr. v. Pennsylvania-American Water Company*, 2013 Pa. PUC LEXIS 781 (Pa. PUC Dec. 3, 2013).

9. Given that PECO efforts were to comply with applicable laws and Orders of the Commission, a fine is not appropriate here. *See* 52 Pa. Code § 69.1201.

ORDER

THEREFORE,

IT IS ORDERED:

1. That the claims of the Complainant in *Maria Povacz v. PECO Energy Company* at Docket Number C-2015-2475023 are granted in part and denied in part.
2. That Maria Povacz's claim that her health would be adversely affected by the installation of a smart meter attached to her home is granted.
3. That Maria Povacz's claim that the due process clause of the 14th Amendment of the United States Constitution and Article 1, Section 11 of the Pennsylvania State Constitution were or would be violated is denied.
4. That within 20 days of the Final Order in this matter, Maria Povacz will notify PECO Energy Company whether she will relocate the meter socket at the service address.
5. That Maria Povacz will complete all work and pay all costs necessary to move her meter socket to a new location.

6. If within 20 days of the Final Order Maria Povacz does not notify PECO that she will relocate her meter socket, PECO may install its meter at the current location of the meter socket at the service address.

7. That within 10 days of the notice issued in ordering paragraph 4, Maria Povacz and PECO Energy Company will meet to discuss relocation of the meter socket of Maria Povacz to a location meeting Commission requirements.

8. That if the relocation of the meter socket is not completed within 90 days of the Final Order in this matter, PECO Energy Company may install the meter at the current location of the meter socket unless an extension of time to relocate the meter socket is agreed to by the parties.

9. That PECO Energy Company will bear the costs of PECO Energy Company associated with connecting its service to the new location of the meter socket.

10. That this matter shall be marked closed.

Date: January 26, 2018

/s/
Darlene Heep
Administrative Law Judge