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 BY LAWRENCE MCKNIGHT, MD and ALEXIA MCKNIGHT, DVM IN SUPPORT OF MARIA POVACZ, LAURA SUNSTEIN MURPHY, AND CYNTHIA AND PAUL ALBRECHT

Brief of Amicus Curiae Supporting Maria Povacz, Laura Sunstein Murphy, and Cynthia and Paul Albrecht's Appeal 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, affirming in part, reversing and remanding in part, and vacating and remanding 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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Introduction and Summary

The case at hand 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 decision in Povacz v. Pa. PUC, 241 A.3d 481 (Pa. Cmwlth. 2020) ("Povacz"). In *Povacz*, the Commonwealth Court held Act 129 of 2008 does not mandate electric distribution companies (EDCs) universally install smart meters. This ruling remanded the case back to the PUC for reconsideration of customers' requests for accommodations. The PUC appealed.

There are numerous other cases stayed in the Commonwealth Court pending this Court ruling. The outcome of this case will affect all smart meter cases in Pennsylvania. In the interest of judicial economy, the Court should appreciate nuances in these cases and obviate appeals proceeding forward.

We agree with the Commonwealth Court that the plain language of Act 129[1] shows the legislature never intended a universal smart meter mandate, and the PUC and PECO interpretations were wrong. We also agree with the Commonwealth Court that §1501[2] requires utility service be 'reasonable' and 'safe.' We disagree with the Commonwealth Court regarding remand to the PUC to determine reasonableness and possible accommodation.

Many of our case[3] details are beyond the scope of this amicus; however, we provide a brief review of our case facts for context. Dr. Alexia McKnight fell acutely ill after PECO installed an AMI (aka 'smart') meter in November 2015.

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[1] Omnibus Amendments Act of Oct. 15, 2008, P.L. 1592, NO. 129
[2] 66 Pa. C.S. §1501
[3] *McKnight v PUC,* 1253 C.D. 2019

Her complex range of debilitating symptoms coincided with PECO's AMI meter installation. Alexia saw several physicians who documented her complaints, signs, and symptoms. PECO was called to address a separate issue of stray voltage in our home. During that investigation a PECO technician took the AMI meter off the house in May 2016. Remarkably, Alexia's symptoms which were ongoing for months resolved within a few days of the AMI meter removal. This was noted in physician records. Then, unbeknownst to Alexia, PECO reinstalled its AMI meter in September 2016. Alexia's complex of symptoms returned and persisted until November 2016 when the meter was taken off again. After the November 2016 AMI meter removal, her symptoms disappeared, and symptoms have remained at bay while the smart meter remains off our residence.

Three physicians testified on Alexia's behalf. They noted the timing and wrote letters to PECO and PUC. One stated, "[It is my] unequivocal assertion that the installation of an AMI smart meter on Alexia McKnight's house is a strict medical contraindication." These physicians considered RF to be the major mechanism but recognized that other mechanisms such as electrical transients or secondary antenna mechanisms from the AMI meter might be contributing. But there was no alternative proximal explanation regarding the exact timing alignment of symptoms with the AMI meter presence. The statistical probability of random onset and resolution of symptoms in such close timing to the meter installations and de-installations occurring over a year long period is essentially zero.[4] No other explanation for Alexia's dramatic declines and recoveries has even been proposed.

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[4] Worst-case interpretations: Probability that PECO randomly picked the 4 exact weeks to install or remove the meter that correspond to Alexia's symptoms would be randomly choosing 4 cards (4 event weeks) from a shuffled deck (52 weeks in a year) and having all 4 cards turnout to be Aces. The probability of this occurring by chance without involving of the AMI meter is less

The unwitting experiment showed that AMI meter avoidance works for Alexia. ***Her physicians gave explicit instruction for her to avoid smart meters specifically and requested PECO install an analog meter.***[5] Her physicians not only advised avoidance of EMF and RF, but also from the AMI meter specifically -- inclusive of all possible intermediate mechanisms. They specifically advised an analog meter instead. Her physicians' recommendations were made after considering her history, physical examination, literature review, clinical experiences, ***and*** because the removal of the AMI meter successfully solved Alexia's symptoms.

Physicians similarly advised smart meter avoidance to the Complainants in *Povacz*. It is important for this Court to understand the importance of physician advice and testimony when adjudicating circumstances unique to patients. Specifically, if the Complainant's physician indicates an AMI meter is not safe for a Complainant, then it is not 'reasonable' for the utility to ignore the request for accommodation on grounds that they think they understand medical needs better.

Neither PECO nor the PUC has a medical license to make therapeutic decisions which override the therapy prescribed by licensed physicians.

<u>*one in several million*</u>. The most conservative interpretations of the long periods between symptomatology changes (177 days with symptoms, then 109 days without, then 54 days with) relative to sudden observed changes (witnessed by others and documented in physician notes within a few days) prove beyond any reasonable doubt the AMI meter was the proximal cause of Alexia's symptoms.

[5] Throughout this document the term 'analog meter' refers to an electro-mechanical meter. This device has no wireless or powerline data transmission capabilities, no wireless or powerline reception capabilities and no switched-mode power supply but does have surge protection. This is opposed to a 'digital meter' which may or may not contain an RF radio or AMI features but contains digital circuitry and power supplies that create additional electrical interference noise on household wiring.

The word ‘reasonable’ must be considered. It is ‘unreasonable’ to force a patient to ignore the advice of their trusted doctors in favor of those who have no medical training and have never examined patients.

We initially requested an accommodation from PECO under federal disabilities laws. These laws apply to the instant case too and dictate that public services must consider the physicians’ accommodation recommendations. Government offices are also required to modify policies and procedures to prevent disability discrimination. Even if the PUC interpreted Act 129 as a customer mandate, it had obligations under federal law to make exceptions.

Statement of Intent

We are Pro Se plaintiffs in a PA PUC administrative court case against PECO regarding a smart meter installation on our home in 2015.[6] We notified PECO by letter asking for relief under the Americans with Disability Amendments Act (ADAA)[7] and Section 504 of the Rehabilitation Act of 1973.[8] PECO dismissed our letter stating “[PECO] understands that customers may simply not want a new meter, but under Pennsylvania law Act 129[9] all Pennsylvania utilities are required to install a new metering technology for every customer in our service territory.” We challenge PECO’s and the PUC’s 129 interpretation and argued from the same safe and reasonable clause of §1501.[10] As with other smart meter cases, our case was stayed in the Commonwealth Court due to the instant case. We have a vested interest in the outcome of this case and file this brief in support of Complainants.

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[6] *McKnight v PUC,* 1253 CD 2019.
[7] The ADA Amendments Act of 2008. P.L. 110-325, ADAA.
[8] Rehabilitation Act of 1973, P.L. No. 93-112. 29 U.S.C. §794(a)
[9] Omnibus Amendments Act of Oct. 15, 2008, P.L. 1592, NO. 129
[10] 66 Pa. C.S. §1501

Argument

Act 129 never required customers to accept an AMI meter.

The PUC decided Act 129 mandated smart meter installation and without consideration of medical exceptions. We agree with the Commonwealth Court that Act 129 never included any mandate for AMI meters.

The PUC erroneously argues the mandate was implied by PA C.S. §2807(f)(2). The statutory language of this section is clear. It states "companies shall furnish" ***not*** "customers shall accept." To furnish means 'make available', not 'unconditionally force upon' as the PUC interprets. Customer acceptance is mentioned in §2807(f)(2)(i) which explicitly mentions "*Upon request* from a customer." This means when the customer opts-in.

The PUC's interpretation eliminates the possibility of medical exceptions. This implies that even when a licensed physician examines a patient and finds that smart meter exposure is harmful, patients are required to ignore their physician's advice. This is absurd. The General Assembly does not intend absurd interpretations.

Radio frequency (RF) is a red herring.

We are medically trained professionals, and both hold doctoral degrees. We are well-versed in medical literature relating to non-thermal dose EMF and health. The preponderance of evidence supports that the adverse effects seen in patients with electromagnetic sensitivities (EMS, sometimes referred to as EHS or IEI-EMF)[11] are rooted in basic cellular interactions directly induced by various forms

[11] All medical professionals agree that some patients experience a variety of severe symptoms when exposed to non-thermal dose EMF. Not all agree on how to describe the

of EMF (inclusive of, but not limited to RF). These mechanisms are complex. Each patient may present with a different set of symptoms. Some patients are more susceptible, others less so.

Although interesting as a topic, we advise this Court it does ***not*** need to make comprehensive assessment of science or how it relates to specific patient circumstances. Instead, that issue can be greatly simplified because this is the role of the physician. Physicians apply complexities of medical literature to specific patients. Courts and utilities should not arbitrarily second guess physician evaluations.

Yet the PUC has done just that. The PUC argues that smart meter cases involve a precedent set from the Woodbourne-Heaton line.[12] PECO and the PUC aver that the 1993 *Woodbourne-Heaton* ruling gives them the right to make their own assessments of this complex science and make their own interpretations to apply to patient-specific circumstances.

In *Woodbourne-Heaton*, overhead lines were set to be repurposed with higher voltage. Complainants raised concern this might generate higher magnetic fields associated with adverse health outcomes. Complainants averred that science implied potential harm from stronger magnetic fields, and an additional easement buffer was required. The utility counter-argued that science could not set a specific threshold of a safe boundary, and thus would be arbitrary in nature. After

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pathophysiology. Some prefer to call it hypersensitivity (EHS), others Idiopathic Environmental Intolerance to EMF (IEI-EMF) to emphasize that the nature of the pathology. Idiopathic does not imply biologic processes are not involved. Many diseases like Hypertension or Epilepsy are idiopathic. For this Amicus we refer to this as electromagnetic sensitivity (EMS) to align with federal agencies that use that term.

[12] *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*

long litigation and remand, the utility prevailed, and the higher voltage line was energized.

Commissioner Hanger opined:

> *"The ALJ found that the record does not provide a current scientific basis for a finding that the EMF exposures generated by the powerline are unsafe and that it is not possible at this time to set health-based standards for rights of way….*
>
> *This case is also very troubling, because the state of scientific knowledge and the resources of this agency, which do not include expertise about carcinogens or other public health threats make it very hard to resolve questions which the scientific community itself is just beginning to ask. Put simply, this Commission does not have environmental or health expertise. …*
>
> *… I reluctantly accept the recommendation of the ALJ in this case. …*
>
> *… I note that these issues are far from resolved…. As scientific evidence changes, it is possible that our sitting standards will change dramatically or that wider rights of way will be found to be useless. (Emphasis added.)*

The rational for *Woodbourne-Heaton* was based on science because the *only* evidence provided were from scientific studies circa 1993. The order did ***not*** conclude that scientific evidence had established that the higher voltage line would not cause health effects. Instead, the opinion makes it clear that the problem was scientific studies demonstrated an uncertainty and an appropriate easement distance would be arbitrary.

Woodbourne-Heaton was determination of general cause. Prudent avoidance discussed was generalized in nature and balanced the uncertainty in science against the choices and costs the utility would bear to offer reasonable alternatives. In *Woodbourne-Heaton* there were no reasonable alternatives to consider.

Reasonable alternatives to exchanging a utility meter are ***not*** the same reasonable alternatives to moving a powerline. And, not all cases are about general causality. ***In Woodbourne-Heaton there were no personal physicians testifying about specific patients and their unique medical susceptibility.*** In our case (and in *Povacz*) personal physicians testified that a *specific* patient had an exceptional need. Our case demonstrated ***actual*** harm. Nobody in *Woodbourne-Heaton* claimed actual or specific harm, only the *possibility* that someone might be harmed based on evidence from science. We claimed exceptional need because *harm was witnessed* and could not be explained 'but for' the AMI meter.

While in *Povacz* much of the debate concerned how RF might be mechanistically involved, we note RF involvement simply does not matter. We argued that 'but for the AMI meter' the observed harm would not have occurred and thus accommodation was required. Physicians advised a reasonable accommodation – specifically, to use an alternative analog meter. This is a meter that, in their medical expertise, is the best choice for specific patient needs.

Debate may arise over a physician's credible testimony and the Frye rule[13] may be considered. The Frye rule requires that experts use scientific *methods* that are sufficiently established and accepted. However, the Frye rule does not apply to the expert opinion itself.[14] Nor does it apply to the expert reliance on literature generally, use of statistical data, or reliance on epidemiology.[15] *Frye* was a consideration of "black-box" technology or novel *methods.* It was intended to limit the use of novel devices as a primary or sole basis for an opinion. *Frye* is ***not*** a reason to state that a physician is unreasonable as they consider additional supportive science or evaluate circumstances.

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[13] *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923)
[14] *People v. Ward*, (1999) 71 Cal.App. 4th 368, 373
[15] *People v. Bui,* (2001) 86 Cal.App.4th 1187, 1196.

This Court has opined on applying *Frye* stating:

> *"…[the Frye rule] does not mean, however, that the proponent must prove that the scientific community has also generally accepted the expert's conclusion."*[16]

The PUC has consistently erred in applying this. It has held that a Complainant's physician must first prove that the entire scientific community has agreed about the issue of 'conclusive cause' as it applies to a unique patient. Citing *Woodbourne-Heaton*, the PUC has repeatedly stated "a complainant must demonstrate by a preponderance of evidence a conclusive causal connection between the alleged harm to human health and the RF from the AMI meter in order to prevail."

This statement and others like it incorrectly conflate several issues. An individual's general risk of harm based on general scientific evidence (as discussed in *Woodburn-Heaton*) is not the same as actual harm or risk for a *specific* patient as determined by a licensed physician. For example, just because the FDA has ruled that a medication is 'safe' in general and thus can be marketed, it does not follow that the medication is 'safe' for all people. When a patient has a documented allergy, it is obvious that prudent avoidance be applied regardless of what the FDA might say about the safety of the medication in general.

Courts give wide deference to individual sovereignty in any decision that restricts a citizen's right to apply the avoidance principle for themself. But in the smart meter cases the PUC argues that uncertainty in the science implies that the prudent avoidance principle should be actively blocked! It requires Complainants to dispel all uncertainty in science before they are *allowed* to take any prudent

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[16] *Grady v. Frito-Lay, Inc*., (839 A.2d 1038, 1046 (2003). Majority Op. The footnote also states "To the extent that any decisions are to the contrary, they are wrongly decided. See *McKenzie v. Westinghouse Electric Corp*., (Pa Cmwlth. 1996)."

action on their own property. Safety is not only presumed based on the uncertainty about the science[17] but further used to force exposure against any right of Complainants to object.

The PUC's and PECO arguments also confuse the appropriate *methods* a physician might use when determining appropriate recommendations such as avoidance. The appropriate methods in this case involve the Complainant's physician taking relevant histories, performing physical examinations, and review of the medical literature. It doesn't take specialized testing to advise that a patient who gives a history of a trauma to avoid further conditions of that trauma. Often a simple history is sufficient to explain the most likely proximal cause or event. But the PUC holds the Complainant's physician's *conclusion* (any conclusion that RF might be mechanistically involved or a conclusion that avoidance is a good idea) is objectively incorrect. It gives as rationale that science has uncertainty. This directly contradicts this Court's prior understanding about *Frye* noted above.

In contrast to Commissioner Hanger who expressed concern that the Commission is ill-equipped to make such decisions, the more recent PUC holdings show confidence that smart meter exposure is certain to be safe. It is so certain of its decisions that it removes the Complainants rights to apply precautionary avoidance and forces them to ignore their physicians.

In other words, the questions at the heart of *Povacz* are not about RF nor about how science might be considered 'conclusive.' Instead, the question is when or if a utility or commission can ignore the request for accommodative relief from

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[17] Uncertainty cannot be used to assert truth. Conditions are not proven 'safe' because science hasn't studied them enough, or because of disagreement in the scientific community. Prudent avoidance principles still apply. Uncertainty about safety can suggest actions are allowed (not prohibited), but uncertainty cannot be used as an argument that conditions are certainly safe, or that prudent avoidance can be removed.

a licensed physician. The accommodative request in this case is to replace the AMI meter with an older analog unit that serves the metering purpose and resolves the patient's medical symptoms. This is reasonable and technically feasible since other utilities (and townships)[18] use these meters currently and find ways to read them.

The denial of such reasonable requests on grounds of the mandate interpretation, and that the complaint might state health effects from RF, is bizarre because it is unclear how utilities ever gained any rights to transmit RF from personal property in the first place. There is simply no part of Act 129 that even mentions RF. While most AMI meters do emit RF, and a physician may cite that RF is problematic for their patients, a smart meter *per se* is not required to emit RF. RF might be emitted by other meter types, and it is possible to have an AMI meter that does not emit RF. RF is just an implementation choice.

Instead, HB 2200 (Act 129) defines smart meters as:

> *(g) … technology, including metering technology and network communications technology capable of bidirectional communication, that records electricity usage on at least an hourly basis, including related electric distribution system upgrades to enable the technology. The technology shall provide customers with direct access to and use of price and consumption information. The technology shall also:*
>
> *(1) Directly provide customers with information on their hourly consumption.*
>
> *(2) Enable time-of-use rates and real-time price programs.*

[18] There are townships even in Pennsylvania where these analog units are being used. Act 129 had specific exemptions that apply to smaller utility providers which never needed to consider AMI metering choices.

> *(3) Effectively support the automatic control of the customer's electricity consumption by one or more of the following as selected by the customer:*
>
> *(i) the customer;*
>
> *(ii) the customer's utility; or*
>
> *(iii) a third party engaged by the customer or the customer's utility*

We are unable to find where utilities obtained permission to transmit RF from a customer's private property in the first place. The FCC licenses to broadcast in certain RF bands does ***not*** provide easement rights for a power company to transmit RF from personal property without payment to the owner of that property. This right was never even granted, much less mandated.

Physician recommendations to use analog alternatives is more nuanced than simply 'a meter that does not emit RF.' ***The recommendation for an analog meter is a recommendation for a meter that definitively resolves the patients' symptoms.*** Health complaints that result from AMI meter installations might also be related to additional componentry such as switched mode power supplies that emit conducted emissions. RF may be transmitted to household wiring, thus affecting distance-based accommodations. The physician's recommendation for an analog alternative is based on experience that use of these meters in other states has *solved* problems for similar patients.

Section 1501 requires service to be safe and reasonable.

We agree with the Commonwealth Court that the PUC erred in not considering the conjunction 'and' in construing §1501. The intent of this law is clear.

The word ‘safety,’ does not imply the PUC’s bizarre interpretation that science must always unequivocally establish a causal connection to harm or that harm should have occurred before any accommodation can be granted. It means simply that the utility must *prevent and avoid* situations where there is meaningful uncertainty about safety. This occurs *before* harm and where there is a reasonable option to prevent the *potential* for harm. A building does not have fire extinguishers because a fire is likely, but because if a fire ever occurs it would be useful to avoid a bigger fire. Fire prevention does not require randomized controlled studies to prove causal connections. It is common sense. Some safety issues like moving power-line easements must be carefully weighted against the expenses because to be absolutely safe is unreasonable. But, more commonly measures like prudent avoidance are taken only because they are common sense.

In this context, the PUC erred because it insists that ‘conclusively proven’ harm must occur first. Uncertainty about safety does not imply that no action is needed, or that we should wait for harm before any action is taken. Instead, it merits a precautionary approach.

In upholding its customer mandate interpretation, the PUC avers that without conclusive scientific proof of harm, the precautionary safety accommodation (prudent avoidance) is explicitly *prohibited*! The PUC’s holdings represent a failure to apply reasonable prudence.

Additionally, §1501 requires service to be *reasonable*. In the instant case, as in ours, patients were instructed by their Pennsylvania licensed physicians to avoid AMI meters and use an analog alternative instead. PECO and the PUC argue that Complainants must ignore their physician’s advice. This is not reasonable service. There is no evidence that the societal benefits of universal acceptance of smart meters outweigh the customers’ need to follow advice from their treating physicians. Above and beyond any safety considerations, the PUC entirely failed

to apply §1501's conjunctive word 'and' as well as the word 'reasonable.' If a patient attempts to follow their physicians' advice, their electricity gets disconnected. This cannot be considered reasonable.

The utilities and courts are not medical authorities.

The PUC mandate interpretation creates an internal conflict of interest. The PUC is the same body advising and approving EDC plans related to Act 129, judging if the EDC should be held responsible for some wrong, and a body responsible for protecting citizen safety under §1501. Because the PUC approved the EDC plans and holds that Act 129 requires universal deployment, it acts to force the EDCs to install AMI meters. If an AMI meter causes a safety issue, but the PUC itself was the root cause for requiring the AMI meter deployment in the first place, it causes the PUC to judge itself. This incentivizes the PUC to rule such that it does not hold the EDCs responsible by ruling that AMI meters are safe.

This is not simply judgement that Complainants don't have enough evidence to charge the utility with a wrong (e.g. the utility should pay a fine). The complaint system is not tort law. In this case the only possible gain for the Complainant is the meter swap itself. The customer mandate interpretation granted a positive right to an EDC (to force the exposure conditions on a private citizen's property) by removing a citizen's negative right (to be free from subjugation and protect themselves from harm). Since the PUC removed the citizens' right and capacity to apply prudent avoidance strategies on their own property, it assumes additional safety liability and acts as if it has medical authority.

Complaints have been required to undergo expensive legal proceedings and present testimony from their licensed treating physicians. These physicians testified they examined the unique medical situations of the Complainants and

gave their treatment advice to explicitly avoid AMI meters because of the harm unique to their medical circumstances.

If the treating physician's advice for the patient is correct, mandating contraindicated conditions requires the patient to be exposed to conditions of pain and suffering – in their own home sanctuary. Under mandated conditions, the Complainants have no reasonable escape except to go without electricity or leave Pennsylvania. In essence, if the physician is correct, then upholding the mandate under such conditions orders the Complainants' *torture*. Even a small doubt whether the treating physician is correct should favor the Complaint's protection. The bar for granting physician requests should therefore be quite low. Common sense dictates physician requests should be accepted by default and only overruled when there is extremely strong evidence of infeasibility.

A meter swap to an analog device is clearly feasible. Unlike *Woodbourne-Heaton*, there is no need to determine an RF easement boundary based on science. The costs do not involve a wholesale restructuring of the electrical grid.

PECO and the PUC aver that the Complainant's physicians are incorrect. They postulate uncertainty in the science the physician considered. But they use this uncertainty to conclude a patient's safety has been assured!

To rule the disabled Complainant's exposure is not only allowed but also explicitly mandated, against the customers' will, is absurd. The PUC has no medical authority or expertise in medical affairs. The PUC maintains it has absolute clarity understanding the exact nature of the customers' medical situations, knows with absolute certainty about the exposure safety, and completely understands the qualified and quantified suffering. The PUC claims it knows what to do for the Complainants' symptoms *better than the Complainants' treating physicians*.

The PUC cannot possibly have that clarity and most certainly does not have medical licensure to justify this kind of decision-making. The implication that any court might approve a state agency to interfere with the physician-patient relationship in this way and remove capacity for a patient to take precautionary avoidance advice from their physicians and on their own land is profoundly disturbing.

If the PUC could make that argument, it could only be predicated on the 'credible' testimony of another physician who established a physician-patient relationship with the Complainant, and who disagreed with the Complainant's physicians. PECO's presentation of Dr. Israel (in the instant case and in ours) was presumed to represent this kind of a medical expert disagreement.

However, it is notable that Dr. Israel's testimony never established a patient-physician relationship and never offered any therapeutic advice. Nor did Dr. Israel provide any statement that the customer's physician's therapeutic advice was incorrect. Instead, Israel testified that in his opinion the science supporting RF causality has uncertainty, and that perhaps a nocebo effect could be involved.

Dr. Israel clarified he is not an expert in patients suffering from EMS and has only passive interest in the topic of EMS. He admitted that he has never seen nor treated any patients with this condition. He testified that EMS patients do exist and stated that he had no doubt that these patients do indeed have real suffering. Dr. Israel did ***not*** state having a patient avoid smart meters is wrong. Instead, he admitted in our case he has never even given a single thought about how he might treat such a patient.[19]

It simply does not matter if the patient's suffering mechanistically stems from chemicals, physical forces like RF, or a nocebo effect. It matters that

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[19] *McKnight v PECO*, 1253 C.D. 2019 (Tr. 4/13) at 182, 190, 229-231,238-239.

suffering is objectively real and significant. PECO has agreed the symptoms are real, and the patients really do significantly suffer. Yet under the mandated condition, the PUC removed patients' rights to escape.

Even if Dr. Israel were correct and the mechanisms involve nocebo effects, patients cannot voluntarily control symptoms any more than they can voluntarily control symptoms from a chemical exposure except to take prudent avoidance. If symptoms involved a nocebo effect it would only make the customers' treating physicians MORE justified in prescribing the correct and only therapy for this - avoid the proximal cause of the AMI meter itself and replace it with an analog meter that does not trigger symptoms. The therapy would be unchanged.

Raising doubt a utility is responsible and accountable is different than establishing conditions are safe. The former holds PECO at fault because it had a duty to recognize the PUC smart meter mandate violated federal disability laws and required medical exceptions, and PECO failed its duty to implement exceptions. The latter involves a duty to ensure Complainant's safety and prove treating physician evaluations were objectively and *certainly* incorrect.

There is just no way to argue the societal benefits of universally mandating smart meters could ever outweigh causing any Complainant to suffer.

There are federal obligations to modify regulations.

The failure of the PUC to acknowledge the medical needs of patients in *Povacz* is discrimination against a subgroup of rate-payers based upon and despite their disabilities, and a violation of federal law.

The ADA, ADAA and the Rehab Act of 1973, §504[20] apply to the utilities and the PUC. The ADAA, Title II specifically addresses public services, and Title

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[20] Rehabilitation Act of 1973, Pub.L. No. 93-112. 29. U.S.C. §701 et. seq.

III specifically addresses private entities that offer public accommodations and services.

Disability is not determined by review of some exhaustive list of diagnoses and does not depend on consideration of any biophysical mechanism. Instead, the ADA states:

> *The term "disability" means, with respect to an individual (a) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (b) a record of such an impairment; or (c) being regarded as having such an impairment.*[21]

Where (c) is clarified

> *An individual meets the requirement of 'being regarded as having such an impairment' if the individual establishes that he or she has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.*[22] *(Emphasis added.)*

Major life activities are also defined as:

> *...functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working.*[23]

The law further clarifies:

> *The definition of disability in this Act shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act.*[24] *(Emphasis added.)*

And

> *A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to*

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[21] 10 C.F.S. §1040.62 (c) and 42 U.S.C. §12102 (a)(1).
[22] 42 U.S.C. §12102 (a)(3)(A)
[23] 10 C.F.S. §1040.62 (d)(2) and 42 U.S.C. §12102 (a)(2)(A)
[24] 42 U.S.C. §12102 (a)(4)

> *avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.*[25] *(Emphasis added.)*

These laws are uncompromisingly forthright. Put simply, disability does not depend on any "diagnosis" or specific lab testing. Arguments that RF is or is not involved or that nocebo effects might be involved are irrelevant because they do not change the nature of the disability. The law reads "*actual or perceived*." The law reads "*physical or mental impairment*." The law reads "*shall be construed in favor of broad coverage*."

Furthermore, there are precedents for the electrically sensitive being recognized under disability law. Federal agencies already require accommodation under these laws. For example, the U.S. Department of Labor Job Accommodation Network specifically recognizes EMS as a disability in its publication *Accommodation and Compliance Series: Employees with Electrical Sensitivity* and set forth reasonable accommodation's employers can offer their sensitive employees.[26]

The Rehab Act of 1973 also created the Architectural and Transportation Barriers Compliance Board ("the Access Board").[27] The Access Board similarly states[28]

> *"The Board recognizes that multiple chemical sensitivities and electromagnetic sensitivities may be considered disabilities under the ADA if they so severely impair the neurological, respiratory or other functions of an individual that it substantially limits one or more of the individual's major life activities. The Board plans to closely*

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[25] 28 C.F.R. §35.130(b)(7)(i)

[26] See https://askjan.org/disabilities/Electrical-Sensitivity.cfm

[27] Section 502 of the Rehab Act of 1973. 29. U.S.C §792.

[28] See https://www.access-board.gov/research/completed-research/indoor-environmental-quality/introduction

examine the needs of this population and undertake activities that address accessibility issues for these individuals.

The Board plans to develop technical assistance materials on best practices for accommodating individuals with multiple chemical sensitivities and electromagnetic sensitivities. ...[29]

And their interim recommendations adds:

For people who are electromagnetically sensitive, the presence of cell phones and towers, portable telephones, computers, fluorescent lighting, unshielded transformers and wiring, battery re-chargers, wireless devices, security and scanning equipment, microwave ovens, electric ranges and numerous other electrical appliances can make a building inaccessible.

The National Institute for Occupational Safety and Health (NIOSH) notes that scientific studies have raised questions about the possible health effects of EMF's. NIOSH recommends the following measures for those wanting to reduce EMF exposure – informing workers and employers about possible hazards of magnetic fields, increasing workers' distance from EMF sources, using low-EMF designs wherever possible (e.g., for layout of office power supplies), and reducing EMF exposure times.[30]

In short, the medical issues argued in *Povacz* are disabilities and are clearly recognized under federal disability laws. Under the ADAA, discrimination need not be intentional to be discrimination.

PECO is clearly subject to these federal laws because it accepted federal money to roll out its AMI meter program. The utility meter is the nexus point of the service they offer.[31] A customer cannot obtain electricity from the utility in any other way.

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[29] Access Board NIBS Indoor Environmental Quality Final Report 7/14/05 at 4,5

[30] Access Board NIBS Indoor Environmental Quality Final Report 7/14/05 at 11

[31] *National Federation of the Blind v. Target Corporation*, 452 F. Supp. 2d 946 (N.D. Cal. 2006)

Simple referral of such issues to a federal court is not sufficient. As a state government office, the PUC is also explicitly required under federal disabilities law to consider such disability issues in their interpretation of laws, ordinances, and regulations. Federal laws like the ADAA, Rehab Act and Fair Housing Act provide minimum thresholds for safety. States typically have substantial equivalencies in their own laws and can be more protective but ***not*** less so.

The ADA web page further clarifies this as a 'common problem.'

> *City governments are required to make reasonable modifications to policies, practices, or procedures to prevent discrimination on the basis of disability. Reasonable modifications can include modifications to local laws, ordinances, and regulations that adversely impact people with disabilities. For example, it may be a reasonable modification to grant a variance for zoning requirements and setbacks. In addition, city governments may consider granting exceptions to the enforcement of certain laws as a form of reasonable modification. For example, a municipal ordinance banning animals from city health clinics may need to be modified to allow a blind individual who uses a service animal to bring the animal to a mental health counseling session. 28 C.F.R. § 35.130(b)(7).[32] (Emphasis added.)*

A utility meter is an invoicing tool. Its purpose is to measure a quantity of product so a bill can be created. While AMI features such as time of use rates are *allowed* under Act 129, they clearly are not necessary nor *fundamental* to the nature of the utility service itself. Analog alternatives clearly exist that would not fundamentally alter this nature. Thus, the PUC was and is *required* by federal law to make modifications and exceptions to any interpretation of Act 129 as a customer mandate. They are obligated to ensure PECO makes reasonable accommodations.

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[32] See https://www.ada.gov/comprob.htm

The legislative intent of opt-in should be restored.

PECO may argue that without a state mandate requiring them to do so, AMI meter installation is their exclusive choice. But we clarify this is not the legislative intent. The intent was for customer opt-in, not default to accept nor opt-out. However, since history unfolded, utilities have installed AMI meter infrastructure. This creates secondary problems. Had customer choice intent been acknowledged earlier, utilities might have preferred not having to change out the customers' older meters to AMI meters. But now it requires rework to backtrack to an old meter style again.

The Complainants did not make this problem, the PUC interpretation did. But the effect is to turn the opt-in intent to an opt-out. The Complainants are unfairly penalized to need to request the change back. The PUC interpretation led to an outcome that unfairly usurped privilege of choice from the customer and gave it to utilities.

We believe this Court should therefore reaffirm the Commonwealth Court's ruling that no State mandate ever existed, but also clarify that this also applies retrospectively. That is, to the extent possible this Court should restore the legislative intent for a customer choice. Customers had an option at the time of the legislation. They were unfairly forced to accept the AMI meter – sometimes against their will. This was because of the PUC's misinterpretation. Customers should therefore have the right to return to the older model meter or an analog meter at their request -- regardless of any other condition.

Medical exceptions are still required.

Finally, we ask this Court to consider in its ruling the important distinction between the concepts 'consumer mandate', 'opt-in', and 'medical exception.' Regardless of mandate interpretations, this Court should clarify that where medical

issues apply and a physician has declared a specific patient need via written letter to the utility, §1501 requires that this accommodation be granted and denied only if the utility can prove technical impossibility.

We therefore request this Court ***not*** remand these cases back to the PUC for case redetermination, because the PUC has conflicted interests here. Instead, we request this Court give explicit guidance to the PUC it must consider the exceptional medical safety needs of patients, and utilities must deploy analog meters when requested by physicians. Without specific instructions regarding accommodations, we anticipate the plethora of related cases currently stayed to be remanded to the PUC and Commonwealth Court, will only return to this Court on evidential appeal.

Conclusion

There are many AMI meter cases currently stayed pending clarification of issues raised in *Povacz*. A statewide mandate was never intended by the legislature when it passed Act 129. Medical exceptions are inherently required by §1501 and by federal disability laws. Utilities should be instructed they were never mandated to install AMI meters unless by customer request, and customers may request to return to older style meters. This Court should clarify the utilities are obligated to replace the already installed AMI meters with analog meter alternatives if the customer's physician has stated the therapeutic need.

Respectfully submitted,

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