IN THE

Supreme Court of Pennsylvania

MIDDLE DISTRICT

No. 34 MAP 2021

MARIA POVACZ,

Appellee,

– v. –

PENNSYLVANIA PUBLIC UTILITY COMMISSION,

Appellant.

No. 35 MAP 2021

LAURA SUNSTEIN MURPHY,

Appellee,

– v. –

PENNSYLVANIA PUBLIC UTILITY COMMISSION,

Appellant.

(For Continuation of Caption See Inside Cover)

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

BRIEF OF APPELLEES CYNTHIA RANDALL AND PAUL ALBRECHT

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No. 36 MAP 2021

CYNTHIA RANDALL and PAUL ALBRECHT,

Appellees,

– v. –

PENNSYLVANIA PUBLIC UTILITY COMMISSION,

Appellant.

No. 37 MAP 2021

MARIA POVACZ,

– v. –

PENNSYLVANIA PUBLIC UTILITY COMMISSION,

Appeal of: PECO ENERGY COMPANY.

No. 38 MAP 2021

LAURA SUNSTEIN MURPHY,

– v. –

PENNSYLVANIA PUBLIC UTILITY COMMISSION,

Appeal of: PECO ENERGY COMPANY.

No. 39 MAP 2021

CYNTHIA RANDALL and PAUL ALBRECHT,

– v. –

PENNSYLVANIA PUBLIC UTILITY COMMISSION,

Appeal of: PECO ENERGY COMPANY.

No. 40 MAP 2021

MARIA POVACZ,

Cross-Appellant,

– v. –

PENNSYLVANIA PUBLIC UTILITY COMMISSION,

Appellee.

No. 41 MAP 2021

LAURA SUNSTEIN MURPHY,

Cross-Appellant,

– v. –

PENNSYLVANIA PUBLIC UTILITY COMMISSION,

Appellee.

No. 42 MAP 2021

CYNTHIA RANDALL and PAUL ALBRECHT,

Cross-Appellants,

– v. –

PENNSYLVANIA PUBLIC UTILITY COMMISSION,

Appellee.

No. 43 MAP 2021

MARIA POVACZ,

Cross-Appellant,

– v. –

PENNSYLVANIA PUBLIC UTILITY COMMISSION,

PECO ENERGY COMPANY.

No. 44 MAP 2021

LAURA SUNSTEIN MURPHY,

Cross-Appellant,

– v. –

PENNSYLVANIA PUBLIC UTILITY COMMISSION,

PECO ENERGY COMPANY

No. 45 MAP 2021

CYNTHIA RANDALL and PAUL ALBRECHT,

Cross-Appellants,

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INTRODUCTION

Appellees Cynthia Randall and Paul Albrecht, husband and wife, brought this case to prevent their electric utility, Appellant PECO Energy Company ("PECO"), from installing on their home an electronic device known as a "smart meter" that emits radio frequency electromagnetic energy ("RF"). Appellees are concerned about the possible health effects of RF exposure, particularly for Ms. Randall, who has had three separate cancer diagnoses. They admittedly cannot prove that RF exposure has caused or will cause her cancer, but they would like to be very cautious. Appellees are aware of the most recent federal research on the possible effects of RF. Ms. Randall has consulted with her treating doctor who supports her decision to avoid RF exposure as much as possible.

The Pennsylvania Public Utility Commission (the "Commission" or "PUC") had ruled that Act 129 of 2008, 66 Pa. C.S. § 2807(f) ("Act 129"), mandates that all Pennsylvania customers must accept installation of an RF-emitting smart meter installed on their property (on or near their homes) *without any possibility of an opt out or exception for any reason*, and that the PUC therefore lacked authority to grant Appellees the relief they sought in the underlying administrative proceedings, i.e., to not have RF-emitting smart meter installed on their property.

The Commonwealth Court rejected the PUC's reading of Act 129 as a matter of law and held that Act 129 does not mandate that every customer must receive a

smart meter even if they object and that the PUC therefore does not lack the authority to accommodate requests like those made by Appellees under Section 1501 of the Public Utility Code, 66 Pa. C.S. § 1501, on the grounds that it is either unreasonable or unsafe to force them to accept RF exposure in their own homes by means of an RF-emitting device installed on their property. The Commonwealth Court's decision on this issue is correct under the plain language of the applicable statutes, and should be affirmed by this Court.

In its Order, the Commonwealth Court remanded the cases of Appellees back to the PUC to be considered in light of the court's ruling that Act 129 did not limit the possible relief available to them—including an alternative to a wireless smart meter[SH1]. Commw. Ct. Dec., Order at 2. ("This matter is REMANDED to the PUC for consideration of Consumers' requests for accommodations and determinations of what, if any, accommodations are appropriate for each individual Consumer…. Because the PUC's determination was based on its conclusion that the 2008 amendment to the Public Utility Code, known as Act 129, Act of October 15, 2008, P.L. 1592, 66 Pa. C.S. § 2807, does not allow accommodations, this issue is REMANDED for further consideration."). The Commonwealth Court also correctly held that, "[o]n remand, Consumers need not prove that mandatory installation of smart meters is both unsafe and unreasonable; rather, Consumers need only prove that mandatory installation of smart meters is either unsafe or unreasonable." *Id.*

These rulings should be upheld by this Court. The Commonwealth Court's rulings on these issues were, contrary to the extravagant and inaccurate claims made by the PUC and PECO regarding the breadth and likely effect of the court's rulings, quite limited in scope. The court did not, as mistakenly suggested by the PUC and PECO, create an unlimited "opt-out" of smart meters or allow customers the option to remove wireless smart meters from their properties at their whim. Instead, the court merely allowed Appellees to go *back* to the PUC and, under a corrected legal standard regarding the type of relief available, make their cases *again* as to why forced installation of wireless smart meters is unreasonable or unsafe as to *them*. This modest result, based on a plain language reading of the applicable statutes, should be affirmed.

However, this Court should reverse the Commonwealth Court's ruling affirming the onerous, unprecedented burden imposed on Appellees to prevail in any proceeding before the PUC alleging unsafe service under Section 1501—to prove a "conclusive causal connection" between RF and exposure to RF and adverse human health effects. The lower court ruling imposed a requirement of at least tort-like proof of medical causation of harm on Appellees, which is a burden so high it would eviscerate PECO's duty to provide, and the PUC's duty to oversee, safe and reasonable electric service and facilities. This burden is unheard of in the law; it goes beyond the preponderance of the evidence standard applicable to nearly all other

civil and administrative proceedings. If left standing, this standard could, by imposing a burden on consumers that is practically impossible to *ever* meet, entirely eviscerate the Commonwealth Court's ruling that Act 129 does not, and should not, prevent electric consumers who object to RF from receiving reasonable accommodations in the basis of unsafe service. This Court should therefore reverse the lower court's ruling, so as to not render proceedings before the PUC futile and unwinnable for Appellees or other electric consumers seeking accommodations for unsafe electric service, not to mention the possibility of improper application of the standard by other agencies.

ORDER IN QUESTION

On October 8, 2020, the Commonwealth Court ordered as follows:

ORDER

AND NOW, this 8th day of October, 2020, the orders of the Pennsylvania Public Utility Commission (PUC) are AFFIRMED in part, REVERSED in part, and VACATED in part, as follows:

1. The PUC's rejection of the constitutional challenge of Maria Povacz, Laura Sunstein Murphy, Cynthia Randall, and Paul Albrecht (jointly, Consumers) is AFFIRMED.

2. The PUC's conclusion that it lacks authority to accommodate Consumers' desire to avoid radiofrequency (RF) emissions from smart meters is REVERSED. This matter is REMANDED to the PUC for consideration of Consumers' requests for accommodations and determinations of what, if any, accommodations are appropriate for each individual Consumer. The PUC on remand may consider all reasonable accommodations, including deactivation of the RF emitting functions of smart meters at Consumers' homes; or

installation of wired rather than wireless smart meters, if (as Consumers contend) such technology is available.

3. The PUC's determination that Consumers' requested accommodations would not be reasonable is VACATED, and this matter is REMANDED for application of the correct burden of proof. On remand, Consumers need not prove that mandatory installation of smart meters is both unsafe and unreasonable; rather, Consumers need only prove that mandatory installation of smart meters is either unsafe or unreasonable.

4. The PUC's determination that Consumers failed to meet their burden to prove unreasonableness is VACATED. Because the PUC's determination was based on its conclusion that the 2008 amendment to the Public Utility Code, known as Act 129, Act of October 15, 2008, P.L. 1592, 66 Pa. C.S. § 2807, does not allow accommodations, this issue is REMANDED for further consideration. Further, on remand, the PUC should balance the parties' interests and consider whether refusal of accommodations was unreasonable without proof of actual harm to Consumers.

5. The PUC's determination that in order to prove lack of safety of the smart meters (as opposed to lack of reasonableness in refusal of accommodations by PECO Energy Company (formerly the Philadelphia Electric Company)), Consumers had to show a conclusive causal connection between RF exposure and adverse health effects is AFFIRMED.

6. The PUC's findings of fact on the safety of smart meters are AFFIRMED.

Consumers' applications for relief in the form of motions to strike the PUC's letter notice of the Federal Communications Commission's November 27, 2019 order declining to propose amendment of its RF emission standards are DENIED as moot.

Jurisdiction is relinquished.

STATEMENT OF SCOPE AND STANDARD OF REVIEW

This appeal of the decision by the Commonwealth Court raises purely legal questions and the Court's scope of review is therefore plenary, and the standard of

review is *de novo*. *Commonwealth v. Petrick*, 217 A.3d 1217, 1224 (Pa. Supr. 2019); *Davis v. Berwind Corp.*, 690 A.2d 186, 189 (Pa. Supr. 1997).

STATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

1. Did the Commonwealth Court correctly hold that Section 2807(f) of the Pennsylvania Utility Code does not require universal installation of wireless smart meters on the properties of all customers of covered EDCs, without exception, such that the PUC incorrectly held that it lacked the authority under Section 1501 to grant as an accommodation to Appellees that they be exempted from forced installation of a wireless smart meter?

Suggested Answer: Yes.

[This question encompasses Issues (1) and (2) for which the Court granted review as to the PUC in 619-621 MAL 2020, and Issue (1) for which the Court granted review as to PECO in 622-624 MAL].

2. Did the Commonwealth Court correctly remand Appellees' case back to the PUC to determine whether the forced installation of a wireless smart meter on Appellees' home would, considering all of the circumstances, constitute "unreasonable" service under Section 1501?

Suggested Answer: Yes.

[This issue encompasses Issue (1) for which the Court granted review as to the PUC in 619-621 MAL 2020].

3. Did the lower court err as a matter of law by upholding the PUC's interpretation of Section 1501 of the Public Utility Code as requiring in challenges to the safety of electric service proof of a "conclusive causal connection" between RF exposure from smart meters and harm to Appellees, when this heavy and unprecedented burden is not compelled by the language of the statute, where the statutory and dictionary definition of the word "safe" includes protection from the possibility of harm, not just the conclusively proven certainty of harm, and where imposition of this burden would render it impossible for Appellees to obtain accommodations for unsafe service?

Suggested Answer: Yes.

[This issue encompasses Issue (1) for which the Court granted review as to Appellees in 663-665 MAL 2020 and 666-668 MAL 2020].

STATEMENT OF THE CASE

A. Summary of Procedural History

This case concerns the overarching issue of whether the Appellees are required to accept the installation on their homes of electric "smart meter" devices that emit RF without any right to seek an accommodation or exception under Section 1501 of the PUC Code on the grounds that forced exposure to RF is either unsafe or unreasonable as to them because of their decisions, made in consultation with their

doctors, that they do not wish to be exposed to any unavoidable RF at their homes.[1] Appellees' position has been that it is at the very least unreasonable for PECO or the Commission to force them to accept the installation of an RF-emitting smart meter at their home, given their specific facts indicating a sincerely held (and not objectively unreasonable) belief that there is a possibility that they could be harmed and they would prefer to avoid or at least minimize it, just as they generally avoid RF by not using cell phones or Wi-Fi devices. As further support for this position, Appellees relied on the testimony of expert witness Andrew Marino, Ph.D., including his testimony about a recent report of the federal National Toxicology Program demonstrating that the possibility for harm from RF exposure at the levels of smart meters and cell phones has not been disproved.

All Appellees are or were all electric customers of PECO. They claim that the installation by PECO of RF-emitting smart meters on their homes is, as to them, neither "reasonable" nor "safe," and is therefore a violation of Section 1501 of the Public Utility Code, 66 Pa. C.S. § 1501. They filed formal complaints before the

[1] There is no dispute that electromagnetic energy is one of the four physical forces in the universe, it falls across a spectrum by frequency or wavelength, and the spectrum includes RF as well as other ranges of frequencies of electromagnetic energy, such as infrared radiation, visible light, ultraviolet radiation, X-rays, and gamma rays. The electromagnetic energy emitted by a smart meter, a wireless device, is in the RF range, just like the energy emitted by a smart phone. As testified by Appellees' expert witness Andrew Marino, Ph.D., smart meters and cell phones emit a comparable level of RF, measured by the strength at the source. (JA000589).

Commission under Section 1501 in response to PECO's insistence that they acquiesce to its demand to install RF-emitting smart meters at their homes or be subject to imminent cutoff of all electrical service. The filing of a formal complaint with the Commission was the sole method by which they could retain electrical service while refusing to be exposed to RF emitted by PECO's installation of smart meters.[2]

Prior to the administrative hearing on these matters, the Commission issued rulings that narrowed the scope of the hearing to issues regarding the alleged harmful

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[2] These facts are undisputed. See PECO Br. at 3-4. However, PECO is incorrect to suggest that the Complaints filed by Appellees sought "an unqualified, blanket exemption from Section 2807(f)'s mandate of universal smart meter deployment." *Id*. at 4. As the Administrative Law Judge ("ALJ") who ruled on the preliminary objections noted:

> The Complainants aver that the Complaint does not plead an opt-out or request an opt-out order from the Commission. They contend that the Commission can fashion the appropriate remedy to address the violation, that the Complainants have included possible alternative relief in their complaint, and that the Commission can choose one of those options or craft any other solution it deems appropriate. They reiterate that they have not requested an "opt-out."

RR1976a. PECO is also incorrect to state that it offered a reasonable accommodation. PECO Br. at 5. As Appellees argued in vain to the PUC: "PECO makes no reference to any specific alternatives that do not involve exposure to RF. PECO suggests that it might be possible to install the smart meters elsewhere on Complainants' properties. This is unworkable for persons concerned about RF exposure, because wherever PECO placed the meter on their properties Complainants would have to avoid that part of their property …." Appellees' Reply Br. before the PUC (Nov. 6, 2017) at 38. PECO offered no alternative that did not involve RF exposure. 4

health effects of RF exposure. (RR1986a-1987a, 1979a, 1994a). The Commission also ruled prior to the hearing that the presiding ALJ lacked the authority to award the principal relief sought by Appellees, which was an order that precluded PECO from installing smart meters on Appellees' homes. (RR2001a). At the hearing, Appellees all presented individualized evidence, including as to their health conditions and histories, their dealings with PECO, and their efforts to avoid RF exposure in their everyday lives. By stipulation of the parties, common evidence, including expert testimony, relevant to the three matters also was introduced, and a Joint Appendix of all of the evidence was submitted to the ALJ.

Following completion of the hearing and briefing, the ALJ three decisions on March 20, 2018. In the case of Maria Povacz, the ALJ found that a smart meter attached to Ms. Povacz's home would exacerbate her health condition and ordered PECO to move the meter socket if Ms. Povacz paid the cost of moving it. Ms. Povacz filed Exceptions to the decision, and PECO filed Exceptions to the portion of the decision granting limited relief to Ms. Povacz. The Commission issued its Opinion and Order on March 28, 2019, wherein the Commission denied Ms. Povacz's Exceptions, granted PECO's Exceptions, and dismissed the Amended Complaint. The result is that Ms. Povacz was entirely denied relief.

In the other two cases, the ALJ issued her decision dated March 20, 2018, in which she denied all relief to Appellees Murphy and Randall/Albrecht. Those

Appellees filed Exceptions to the ALJ's decision and, on May 9, 2019, the Commission issued its Opinion and Order denying the Exceptions and dismissing the complaints.

Appeals to the Commonwealth Court followed, which were consolidated, and the court issued its decision on October 8, 2020. On May 12, 2021, this Court granted in part Petitions for Allowance of Appeal filed by the Commission, PECO, and Appellees, with designated issues.

B. Facts Specific to Appellee Cynthia Randall[3]

Appellee Randall has a Ph.D. in physical chemistry from the University of Michigan. (JA000925). She has worked for several different pharmaceutical companies in the Philadelphia area for approximately 30 years. (*Id.*).

[3] Undersigned counsel represented all Appellees until new counsel entered their appearances on July 26, 2021, on behalf of Appellees Laura Sunstein Murphy and Maria Povacz. Because of the separate representation, this brief will summarize only the facts specific to Appellees Randall and Albrecht. More specifically, it will address the facts relating to Ms. Randall that were presented as the basis for the claim under Section 1501. Appellee Paul Albrecht, who is the spouse of Appellee Cynthia Randall, was named as a complainant before the Commission and asserted his own right to be free from RF exposure, but to simplify the proceedings before the Commission he opted not to develop or argue the factual circumstances pertaining to himself because the medical circumstances of his wife are more serious and any relief granted for Dr. Randall will apply to Mr. Albrecht because they share a household.

She has a lengthy and complicated medical history including three separate cancer diagnoses.[4] (JA000927, 33-34). In 1989, she was diagnosed with breast cancer at the age of 32. (JA000929). She successfully underwent surgical intervention, chemotherapy, and radiation as treatment. (JA000934).

In 2006, she was diagnosed with skin cancer on her scalp. (JA000950). A surgical procedure was successful in removing the cancerous growths. (JA000934). Also in 2006, she was diagnosed with kidney cancer, and underwent a nephrectomy to have her left kidney removed. (JA000932).

Appellee Randall has had abnormal pap smears—suggestive of cervical dysplasia—since at least 1989. (JA007459). As her treating physician testified, Cervical Dysplasia is a pre-cancerous condition, and puts her at a higher risk of developing cervical cancer in the future. (JA000888, 935). Despite the foregoing treatments and procedures, Dr. Randall has continued to have abnormal pap smears indicating cervical dysplasia as recently as November 2010. (JA000931).

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[4] In the underlying proceedings before the Commission, Appellees wished to keep certain sensitive medical information out of the public record and, to that end, the parties agreed to a Stipulated Protective Agreement. Pursuant to it, the Commission in each case entered a "proprietary" ALJ decision, wherein sensitive medical information was included, but the decision was not publicly released in that form. Appellees later decided to waive confidentiality as to their medical conditions so that the courts can refer to it as necessary in these important proceedings, and because they recognized that it would be nearly impossible as a practical matter to present their cases as necessary on appeal without revealing this information.

Because of her numerous battles with cancer, Dr. Randall has regular follow-up appointments with her dermatologist and urologist. (JA000935). After her sister was later diagnosed with breast cancer, genetic testing showed the presence of the BRCA1 gene in Dr. Randall's family. (*Id.*). The BRCA1 gene is associated with higher incidence of breast cancer and ovarian cancer. (*Id.*). This predisposed genetic risk of cancer adds to the general feelings of anxiety and worry that Dr. Randall feels as a three-time cancer survivor. (JA000934).

Dr. Ann Honebrink at Penn Medicine has been Dr. Randall's gynecologist since at least 1989. (JA000929, 7457). Dr. Honebrink has monitored the pre-cancerous changes in Dr. Randall's cervix, and has regularly conducted cervical cancer screenings. (JA000888). Dr. Honebrink is intimately familiar with Dr. Randall's long and complex medical history and has assisted in her care for non-gynecological diseases. (*Id.*).

In April 2016, Dr. Honebrink wrote a letter on Dr. Randall's behalf, opining that it would be prudent for Dr. Randall to avoid any unnecessary radiation exposure. (JA000893). In other words, Dr. Honebrink recommends that Dr. Randall avoid any increase in radiation exposure if possible. (JA000913). This opinion is based on the medical knowledge that radiation is one of the factors that increases susceptibility to cancer and that installation of a smart meter on the Randall-Albrecht property would increase radiation levels in the home. (JA000913, 17-18). Dr. Honebrink also

expressed that Dr. Randall "should do what she can sensibly do to avoid any additional radiation exposure." (JA000914).

Although Dr. Honebrink is not an expert on radiation exposure and meters, she testified that "part of my job as Dr. Randall's physician is to support her in doing the best thing she can for her health." (JA000918). Since Dr. Randall believes that the installation of a smart meter in her home would be detrimental to her health, Dr. Honebrink supports Dr. Randall's position. (*Id.*).

C. Appellees' Scientific Evidence Before the PUC

Appellees presented a common position before the Commission based on the testimony of biophysicist Andrew Marino, Ph.D. (JA000564-66, 68-73). Dr. Marino testified that there is a basis in established science to conclude that Appellees *could* be exposed to harm from the RF radiation emitted by PECO smart meters. (JA000578). He based this testimony on numerous peer-reviewed animal studies proving biological effects from RF exposure at levels comparable to cell phones and smart meters (because human experimentation is illegal) (JA000594-602), plus numerous peer-reviewed epidemiological studies (JA000602-07), as well as his own peer-reviewed research on Electromagnetic Hypersensitivity ("EHS") (JA000607-15), and a potential mechanism for RF to cause harm to humans (JA000615-29).

As further support for his opinion that RF exposure could cause harm to humans, Dr. Marino relied on the 2011 finding of the International Agency for

Research on Cancer, a part of the World Health Organization, that RF exposure is a "possible" carcinogen. (JA000662).

Dr. Marino also relied for his opinion on the draft 2016 Report of the National Toxicology Program ("NPT"), an agency of the U.S. Department of Health and Human Services. (RR1887a-1973a) (JA002179-80). The draft 2016 NTP Report concluded that the RF energy that was studied caused cancer in rats, even at RF levels below the limits allowed by the Federal Communications Commission. (JA002181). Dr. Marino described it as "a major report and a crucially important finding." (JA002181).

As noted in the Report: "These findings appear to support the International Agency for Research on Cancer (IARC) conclusions regarding the *possible carcinogenic potential of RFR*." (JA007167-68) (emphasis added). The report also noted not just the need for further study, but also discussed specific plans for further study, including as to the possible health hazards from RF exposure. (JA007182-83).

Dr. Marino further testified that the report was published as a draft because "it has not yet been published in an archival scientific journal." (JA002180). He responded to PECO's claim, made through its expert Christopher David, Ph.D., that "until it has been peer reviewed and published, we can basically discount it," with the following statement:

> I think he's seriously mischaracterized the NTP report. It was carried out by the government's most highly qualified scientists over several

> years, three years, at the cost of millions of dollars, and was performed under extreme scrutiny by all parties that have an interest in the area. The government announced that the details of the study will be published in four pages, each dealing with a particular aspect of the study. The authors of those papers have been identified. The overall result of the study has been disclosed, mainly that the energy caused cancer in the test animals. This is all public knowledge. To suggest that the work is somehow not concrete or not peer-reviewed is highly inaccurate.

(JA002207-08).

The NTP Report was later finalized, just as Dr. Marino testified that it would be. There can be no mistake about this, because the NTP Report and extensive information about it is readily available on the website of the NTP. (JA007251-52). The website information that Appellees introduced into evidence has been updated and now leads to following link on the NTP website. https://ntp.niehs.nih.gov/results/areas/cellphones/. (Last visited September 15, 2021).

Among the documents readily available at that website is this fact sheet: https://www.niehs.nih.gov/health/materials/cell_phone_radiofrequency_radiation_studies_508.pdf. This publicly available government document dated November 2018 confirms Dr. Marino's testimony about the importance of the NTP Study. It says: "the studies *question the long-held assumption that radiofrequency radiation is of no concern as long as the energy level is low and does not significantly heat the tissues*." (*Id*. at 2) (emphasis added).

Thus, whatever the FCC concluded in 1996, there is now at least a "question" about the non-thermal health effects from RF exposure. This is confirmed by the following statement in the final Peer Review Report for the NTP Report:

> *The initial objectives were to test the null hypothesis—that cell phone RFR at non-thermal exposure intensities is incapable of inducing adverse health effects—and to provide dose-response data that could be used to assess potential human health risks for any detected adverse effects. The results described in the technical reports "show quite clearly" that the null hypothesis has been disproven, with many adverse effects identified.*

Draft NTP Technical Reports on Cell Phone Radiofrequency Radiation; TRPRP; March 26-28, 2018, at 20 (available at https://ntp.niehs.nih.gov/ntp/about_ntp/trpanel/2018/march/peerreview20180328_508.pdf) (emphasis added).

Dr. Marino testified that the FCC limits for RF exposure do not reflect a level that is safe for humans. (JA000654). The FCC adopted these limits in 1996 based upon a 1986 report prepared by the National Council on Radiation Protection ("NCRP") and a standard prepared by the American National Standards Institute (JA000655). The NCRP Report stated that the understanding of biological effects "is still evolving . . . and it's to be expected that the exposure criteria set out in this report will be evaluated periodically in the future and possibly reversed as new information becomes available." (JA001679-80). Since the NCRP made that

statement in 1986, there has been a great deal of research, none of which supports a finding of safety at or below FCC limits. (JA000657-58).

Dr. Marino testified that, while RF *could* cause harm to the Appellees, he could not testify that it necessarily *did* or *would* cause harm in each of their cases, because it is practically speaking impossible to isolate the harm from RF exposure in any single person and prove causation of harm. (JA000643-46). Dr. Marino testified that RF exposure as a past or possible future causal agent cannot be ruled out, but he acknowledged that specific causation cannot be proved. (JA000643-46). He testified that to even attempt that inquiry would require a controlled experiment of a type that he conducted in 2011 with colleagues at LSU that cost approximately $500,000. (JA000643-44).[5]

[5] There has been a significant legal development since the administrative and Commonwealth Court proceedings in this matter relating to the safety of RF exposure. Specifically, a United States Court of Appeals recently held that the FCC's failure to revise decades-old guidelines regarding the dangers of RF exposure in light of recent scientific evidence was arbitrary and capricious. *Environmental Health Tr. v. Federal Commun. Comm'n*, 2021 WL 3573769 at *4 (D.C. Cir. Aug. 13, 2021). The D.C. Circuit remanded to the FCC "to provide a reasoned explanation for its determination that its guidelines adequately protect against harmful effects of exposure to radiofrequency radiation unrelated to cancer." *Id*. at 12.

D. The Commission Never Gave Notice That It Interpreted Act 129 to Mandate Smart Meters for All with No Opt-Outs or Exceptions Until Commencement of this Litigation

Following the signing of Act 129 by the Governor on October 15, 2008, the Commission on June 24, 2009, issued its Smart Meter Implementation Order. See Docket No. M-2009-2092655. This is what the Commission said at that time about the supposed mandatory nature of smart meter installation in Pennsylvania:

> Each EDC smart meter plan must describe the smart meter technologies the EDC proposes to install, upon request from a customer at the customer's expense, in new construction and in accordance with a depreciation schedule not to exceed 15 years. 66 Pa.C.S. §§ 2807(f)(1) and (2).

Implementation Order at 2. It also says this, under the heading "System-Wide Deployment":

> The Commission believes that it was the intent of the General Assembly to require all covered EDCs to deploy smart meters system-wide when it included a requirement for smart meter deployment "in accordance with a depreciation schedule not to exceed 15 years." It is this system-wide deployment that will provide the foundation for the EDCs' smart meter installation plans. Therefore, it is crucial for the EDCs to develop a plan that will best meet the needs of their service territory, while at the same time operating in a manner that is both cost and time effective.
>
> The EDCs shall detail their system-wide deployment plans to the Commission, including any type of tiered rollout the company proposes, as well as the associated costs and benefits incurred from such a rollout. This system-wide plan should also incorporate a coordination element with the new construction deployment component. Furthermore, the Commission will require all EDCs to file a "Smart Meter Progress" report on an annual basis that will update the status of their installation plans, including the number of customers who received meters in the prior year, the estimated number of

> customers scheduled to receive meters in the coming year, and all costs associated with the meter plan incurred during the previous year.

Id. at 14.

There is no discussion in the Implementation Order or elsewhere that explains how the Commission reached this conclusion that Act 129 required "system-wide" deployment. Nor is there any discussion in this Implementation Order whether "system-wide," i.e., throughout the system, means with or without exceptions. It is silent on that point and simply does not speak, explicitly or implicitly, about the subject of mandating that all customers accept smart meters, nor does it anywhere address the subjects of exceptions, opt-ins, or opt-outs. It also does not address Section 1501, the safety of smart meters, or the rights of customers who object to forced exposure to smart meters based on health or other concerns. The proposal that preceded the Implementation Order (March 30, 2009, Secretarial Letter, Docket No. M-2009-2092655) was similarly silent on all these subjects. The comments submitted by multiple parties in response to the proposal (all available at the same public docket maintained by the Commission) are likewise silent on these subjects.

PECO implemented a phased approach to smart meters. The petition it filed with the Commission on August 14, 2009, for approval of Phase I contained nothing on any of these subjects. Docket No. M-2009-2123944. The PECO Phase I plan generated litigation, but nothing having to do with any of these subjects. See

Commission Opinion and Order of May 6, 2010 approving PECO's Phase I plan as modified by partial settlement of litigation.

PECO's Phase II plan filed on the same docket on January 18, 2013, likewise contained nothing addressing the subjects of exceptions, opt-ins, opt-outs, Section 1501, the safety of smart meters, or the rights of customers who object to forced exposure to smart meters based on health or other concerns. It also generated litigation, again having nothing to do with these subjects.

In short, it is apparent that the Commission, while it understood that Act 129 contemplated a "system-wide" deployment of smart meters, never at any time addressed the more specific question of whether Act 129 mandates universal deployment with no exceptions, precludes opt-outs, or overrides Section 1501 with respect to customer objections based on safety and reasonableness.

It also appears that the Commission never disclosed a position on any of these subjects until its decision of January 24, 2013, in a case involving Appellee Maria Povacz.

> Section 2807(f)(2) of the Code, *supra*, is controlling here, and the use of the word "shall" in the statute indicates the General Assembly's direction that all customers will receive a smart meter. I.D. at 6-7. The Complainant's smart meter was installed by PECO in accordance with a plan approved by this Commission. *Petition of PECO Energy Company for Approval of Smart Meter Technology Procurement and Installation Plan,* Docket No. M-2009-2123944 (Order entered May 6, 2010). Therefore, the installation of the smart meter was consistent with, rather than a violation of, the Code, a Commission Regulation or Order.

> Furthermore, 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, as the Complainant desires to do. Accordingly, unless and until House Bill 2188, *supra*, passes the General Assembly, or some other provision is put in place that specifically allows customers to opt out of smart meter installation, PECO has not violated any provision of the Code, any Commission Order or Regulation or any Commission-approved Company tariff by prohibiting the Complainant from opting out.

Docket No. C-2012-2317176, Order and Opinion at 10. Following that decision involving Appellee Maria Povacz in 2013, the Commission noted on August 16, 2016, in *Susan Kreider v. PECO Energy Corp*., that when it adopted the Implementation Order in 2010 "we did not address a utility's obligation to a customer raising Section 1501 claims concerning smart meter installation." Docket No. C-2015-2469655, Order and Opinion at 20. As PECO correctly notes in its brief (at 19-20), the Commission in *Kreider* continued to maintain that opts-outs are not permitted but ordered a hearing to determine if there were any reasonable accommodations short of removal or non-installation of a wireless smart meter, an approach it followed in subsequent cases before it, including Appellees' cases.

SUMMARY OF ARGUMENT

In considering this matter, this Court should reject the wildly exaggerated and incorrect statements about the scope and likely effects of the Commonwealth Court's ruling, and instead decide it with due regard to the narrow scope of the lower court's

actual ruling. The lower court's decision merely remanded three cases back to the PUC to allow those customers, including Appellees, to renew their claims for accommodations under Section 1501 under more correct legal standards. The Commonwealth Court's ruling will not, as urged by the PUC and PECO, result in an automatic "opt-out" of wireless smart meter installation, or an opt-in, or grant unfettered discretion to EDC customers to pick and choose the equipment and facilities of which they approve. (Indeed, the court's decision was issued nearly a year ago and *none* of those things have happened). The Commonwealth Court's narrow decision should be reviewed by this Court as such.

The Commonwealth Court correctly held that Act 129, and in particular Section 2807(f), does not mandate universal installation of wireless smart meters on the homes or properties of every customer of covered EDCs, with no possible exceptions, including in a proceeding seeking accommodations under Section 1501. Section 2807(f) states that EDCs shall "furnish smart meter technology" through three different methods. The specific subsection on which the PUC and PECO rely speaks only of furnishing smart meters in accordance with a 15-year "depreciation schedule," which is an accounting term that does not speak to the issue of a universal wireless smart meter mandate. The Commonwealth Court correctly found that the term "furnish" implies that customers need not necessarily accept what is "furnished." The term "smart meter technology" refers only to "metering

technology" and not individual smart meters in every home. The plain language of Section 2807(f) simply does not support the PUC's subjective "belief" that the legislature intended Section 2807(f) to mandate universal, no-exceptions installation of wireless smart meters. Moreover, nothing in Section 2807(f) supports the PUC's ruling that the statute deprives it of the authority to award in a customer proceeding brought under Section 1501 an alternative to a wireless smart meter as an appropriate accommodation for unreasonable or unsafe service. Therefore, the Commonwealth Court correctly remanded the cases of Appellees back to the PUC to be considered in light of the court's ruling that Act 129 did not limit the possible relief available to them—including an alternative to a wireless smart meter.

The Commonwealth Court also correctly found that the PUC, in Appellees' cases before it, improperly conflated the "safety" and "unreasonableness" prongs of Section 1501. Whether electrical service is "unsafe" and "unreasonable" are two separate inquiries, but the PUC clearly decided Appellees' case solely based on their supposed failure to prove that installation of wireless smart meters could cause them physical harm, i.e., would be unsafe, without consideration of whether, as to Appellees, considering the totality of the circumstances (including their medical conditions, recommendations of their doctors, their efforts to avoid RF exposure in their homes, and their sincere belief, based on objective evidence, that RF from wireless smart meters could cause them harm), forced installation of a wireless smart

meter in their home would constitute unreasonable service. The lower court therefore correctly remanded Appellees' case to the PUC for consideration under a properly-applied disjunctive (unsafe *or* unreasonable) standard.

This Court should reverse the Commonwealth Court's ruling affirming the evidentiary burden imposed on Appellees to prevail in any proceeding before the PUC involving safety under Section 1501, i.e., to prove a "conclusive causal connection" between RF and exposure to RF and adverse human health effects. This burden is nearly unprecedented and unheard of in the law; it goes *well* beyond the preponderance of the evidence standard applicable to nearly all other civil and administrative proceedings, and is especially improper in an administrative matter seeking not monetary damages, but only reasonable accommodations for unsafe electrical service. At the very least, the Court should clarify that this improper standard does *not* apply to consumers seeking relief under Section 1501 for unreasonable, as opposed to unsafe, service.

ARGUMENT

A. THE COMMONWEALTH COURT CORRECTLY HELD THAT ACT 129 DOES NOT MANDATE THE UNIVERSAL INSTALLATION OF WIRELESS SMART METERS, SO THAT THE PUC IS NOT, AS IT HAS REPEATEDLY HELD, PRECLUDED FROM ORDERING AN ALTERNATIVE TO A WIRELESS SMART METER AS AN APPROPRIATE ACCOMMODATION UNDER SECTION 1501.

The PUC and PECO desperately try to read into Act 129 language regarding mandatory, universal installation of wireless smart meters that simply is not there. If the General Assembly wished to require universal installation of wireless smart meters in every covered household, and intended that this requirement limited the relief available to customers under Section 1501, it would have been a simple matter to so state in clear, unambiguous language. It did not, and it is therefore clear that the Commonwealth Court was correct in holding that: (a) Act 129 does not require universal installation of wireless smart meters; and, therefore (b) the PUC did not, as it has repeatedly ruled, lack the authority to award as an accommodation to Appellees an alternative to a wireless smart meter.

In arguing otherwise, the PUC and PECO resort to distorting beyond recognition the limited scope of the Commonwealth Court's decision and its effects, painting an alarmist picture of anarchy unleashed, with EDC consumers now having sole discretion as to what services and equipment they will accept. This is, of course, ludicrous. The Commonwealth Court's decision does no more than allow Appellees to return to the PUC and renew their cases for accommodations under corrected legal

standards. That PUC and PECO would feel the need to try and stretch the court's holding so far from reality proves the weakness of their overall legal position.

1. The Commission and PECO Entirely Distort and Misstate the Commonwealth Court's Decision and Its Effects.

As will be fully explained below, the Commission and PECO consistently throughout their briefs distort and misstate both the Commonwealth Court's decision holding and reasoning regarding the statutory interpretation of Act 129, and the practical effects of its decision. The Commonwealth Court's decision most emphatically did *not* create a statutory opt-out, particularly one that gives unfettered discretion to EDC customers to refuse installation of a wireless smart meter at their whim, for any reason. It also did not create a statutory opt-*in* that allows EDCs to install a wireless smart meter only at the affirmative request of a customer.

Before the Commonwealth Court, Appellees did not even *argue* that the Court should find that Act 129 contains an automatic statutory opt-out; instead, they specifically argued that the Court find that, contrary to the Commission's rulings, the Commission has the power to order appropriate *relief* for a violation of Section 1501, including an order that Appellees not be forced to accept a wireless smart meter on their properties. This position could not have been stated more clearly: "Moreover, contrary to the Commission's statements in its rulings, [Appellees] ***are clearly not seeking a statutory 'opt-out***,"' which unquestionably does not exist, but only appropriate relief for proven violations of Section 1501.") Pet. Br. at 52

(RR1107a) (emphasis added). To reach the result it did—that Act 129 does not limit the types of accommodations available to consumers—it was not necessary for the Commonwealth Court to broadly find that Act 129 contains a statutory opt-out; it was only necessary for the Court to find that nothing in the language Act 129 *precludes* the Commission or PECO from accommodating a customer's request to avoid RF from wireless smart meters in a proceeding under Section 1501. That is *exactly* what the Commonwealth Court narrowly held:

> [W]e conclude that Act 129 does not preclude either PECO or the PUC from accommodating a customer's request to have RF emissions from the customer's meter turned off, to have a smart meter relocated to a point remote from the customer's house, or some other reasonable accommodation. We reverse that portion of the PUC's decisions finding it lacked authority for accommodations of customer's requests to avoid RF emissions. We remand to the PUC to allow consideration of Consumers' accommodations, and determination of what, if any, accommodations are appropriate, *in light of this Court's conclusion that Act 129 does not forbid such accommodations*.

Commw. Ct. Dec. at 13 (emphasis added).[6] Thus, the Commonwealth Court's ruling did *not* result in Appellees' being permitted, without more, to refuse installation of

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[6] The Commonwealth Court further stated:

> As discussed above, the PUC's position that Act 129 requires installation of wireless smart meters in all consumer residences is incorrect. Accordingly, the PUC is also incorrect in finding that PECO may or need not offer any accommodation to Consumers.
>
> Because this portion of the PUC's decision is dependent on its erroneous conclusion that Act 129 does not allow accommodations, we

wireless smart meters on their properties; instead, they were permitted to *go back* to the Commission on remand and renew their petitions under Section 1501 in light of the Commonwealth Court's holding that Act 129 does not limit the accommodations they can seek, and that the Commission can permissibly grant. The narrowness of the Commonwealth's ruling is made even more clear by the remainder of the court's decision, which sets forth issues that the Commission should consider on remand of Appellees' requests for accommodations pursuant to Section 1501, and the burden of proof that must be applied.[7]

The narrow scope of the Commonwealth Court's ruling is clear, as is its effect: Appellees are entitled to a remand of their requests for accommodations, and the

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> vacate this portion of the PUC's decision and remand for further consideration.

Commw. Ct. Dec. at 17.

[7] In this respect, the Court should not be persuaded by the statement in Judge Crompton's separate concurring and dissenting opinion that "smart meters are mandatory in the Commonwealth," obviously based on a signing statement by Governor Rendell, JAC-4 n. 3, and not based on the language of the statute, because he referred to no specific language and did not explain the basis for this statement or his reference to a "well-established intent." JAC-3. With all due respect, the signing statement, which itself does not answer the question whether there would be exceptions, is not the statute and cannot be used to supply an answer where the plain language of the statute is silent. It is well recognized that executive signing statements, like this, for a variety of reasons, should be given "no weight" by a court when interpreting the intent of the legislature. *See* Marc N. Garber, Kurt A. Wimmer, *Presidential Signing Statements as Interpretations of Legislative Intent: An Executive Aggrandizement of Power*, 24 Harv. J. Legis. 363, 367–68 (1987) (cited with approval in *Taylor v. Heckler*, 835 F.2d 1037, 1044 (3d Cir. 1987)).

court's guidelines governing those requests must be considered in future cases coming before the Commission. Yet, to read the briefs of the Commission and PECO, one would think that the Commonwealth Court issued a far broader ruling, one that gives EDC customers, through a statutory "opt-out" or even an "opt-in" the unfettered right to refuse installation of wireless smart meters (or to demand their removal), and one that will essentially cripple existing wireless smart meter systems.

Initially, the PUC directly misstates the Commonwealth Court's holding: "The majority's decision in *Povacz* effectively holds that smart meter deployment can only occur at the request of the customer…." PUC Br. at 27. The Commission then, based on this non-existent holding, sets forth the inevitable effects of this "holding." It repeatedly states that, under the Commonwealth Court's ruling, an EDC cannot install a wireless smart meter on the property of a customer unless the "customer requests and pays for" the meter. *Id.* at 29-30.[8] It further states that the result of the Commonwealth Court's decision is that wireless smart meter installation is now "voluntary" at the sole discretion of the customer, and that

[8] This "request" language describes not an "opt-out" from wireless smart meter installation but instead an "opt-in" situation where a customer can only have a wireless smart meter if she affirmatively requests it. Yet elsewhere the Commission describes the Commonwealth Court's ruling as creating a statutory "opt-out." PUC Br. at 44 ("[T]he Commonwealth Court's rationale for its conclusion that customers can 'opt-out' must be rejected."). The Commission appears unsure how to most alarmingly, and inaccurately, describe the Commonwealth Court's ruling.

"customers have no obligation to accept smart meter installation[.]"[9] *Id.* at 33, 37. The lower court's ruling, maintains the Commission, will "invariably result[] in higher costs for customers." *Id.* at 36.

PECO's description of the Commonwealth Court's decision, and its effects, is equally, if not more, overwrought and inaccurate than the PUC's:

> The Opinion reversed the PUC's determination that Section 2807(f) does not authorize ***a blanket opt-out based on customer preference***…." PECO Br. at 36 (emphasis added).
>
> [The Commonwealth Court's decision] only requires EDCs to make an "offer" to install smart meters that ***customers have an absolute right to refuse***. *Id.* at 39 (emphasis added; footnote omitted).
>
> [The Commonwealth Court's decision] inserts a ***blanket opt-out exemption based on customer preference*** that the Legislature did not put there." *Id.* at 40 (emphasis added).
>
> [Pursuant to the Commonwealth Court's decision], [c]ustomers may refuse what is "offered" and insist on receiving service through a different technology or other modality. *Id.* at 45.
>
> [The Commonwealth Court's decision] is a "validation of ***Complainants' extreme position that customers have the right to***

[9] The PUC obviously incorrectly misinterprets the Commonwealth Court's quotation and interlineation of Section 2807(g), which the court used to support its conclusion that Act 129 leaves the door open for accommodations under Section 1501, to claim that the court "Added Language Not Present In Act 129 To Craft An Opt-out To Smart Meter Installation." PUC Br. at 37. The Commonwealth Court did no such thing, and this Court should reject as simply false the PUC's argument that the court's "interpretation would have the EDCs offering a smorgasbord of meter options that customers would choose from based on what functions they want or don't want, similar to customers choosing trim levels and options when purchasing an automobile." *Id.* at 41. This statement (like others by the PUC about the lower court's holding) is unsupported by anything in the Commonwealth Court's decision.

> ***select the facilities that a utility must use to furnish their service and, therefore, can block the installation of any meter that uses wireless technology***. *Id.* at 49 (emphasis added).[10]

To be clear, *none* of what Appellants claim in the above passages regarding the nature and scope of the Commonwealth Court's decision is accurate. It is inexplicable why PECO and, especially, the Commission, which is specifically charged with protecting the rights of EDC customers and the public interest (particularly when those interests are in conflict with the interest of powerful utility companies), would build their entire argument around a point that is so easily disproved. This Court should disregard the PUC's and PECO's mischaracterizations regarding the Commonwealth Court's decision and instead base its analysis and consideration of the issues raised herein on the *actual* narrow rulings made by the Commonwealth Court.

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[10] *Amicus Curiae* Energy Association of Pennsylvania ("EAP") marches lockstep with the Commission and PECO in trumpeting both a clearly incorrect mischaracterization of the holding and an illogical "parade of horribles" that supposedly will result from the Commonwealth Court's ruling allowing *three* households to renew their requests for accommodations before the Commission. For example, EAP wants this Court to believe that the lower court's decision extends well beyond smart meters, and somehow shifts management of EDCs to their customers. It tells this Court that, under the lower court's ruling, "customers could restrict the installation of any kind of utility-owned facility that is used to provide them service, ***including meters, transformers, distribution lines, etc.***, simply because the customers have subjective and unfounded concerns…." EAP Br. at 19 (emphasis added). *See also id.* at 20 ("[I]f the *Povacz* decision stands, the utility's service territory could become balkanized beyond all reason, ***with each customer regulating the utility's service and facilities.***") (emphasis added).

2. The Commonwealth Court Was Correct in Holding that Section 2807(f) Neither on its Face nor by Implication Mandates Universal Installation of Wireless Smart Meters, with No Possible Exceptions.

The Commonwealth Court's holding that Act 129 does not on its face or by implication mandate universal installation of wireless smart meters is clearly correct. As the Court found, nothing in the clear language of Act 129 leads to the conclusion that the legislature intended that every single household within the purview of Act 129 *must* agree to "endure involuntary exposure to RF emissions from a smart meter." Commw. Ct. Dec. at 13. "Rather, the language of Act 129 seems calculated to support customer ***choice*** in the use of smart meter technology." *Id.* (emphasis in original).

a. The Commission's "belief" in what the legislature intended in enacting Section 2807(f) is entitled to no deference.

Both the Commission (PUC Br. at 6-7), and PECO (PECO Br. at 11-12), in arguing that the legislature intended, through enacting Act 129 and, in particular, Section 2807(f), to require universal installation of wireless smart meters with no possible exceptions, state that the Commission must show "deference" to its interpretation of the legislature's intent, in particular as it was set forth in the Commission's June 23, 2009 Smart Meter Implementation Order. PUC Br. at 7; PECO Br. at 27. This argument is entirely meritless because "the meaning of a statute is essentially a question of law for the court, and, when convinced that the

interpretative regulation adopted by an administrative agency is unwise or violative of legislative intent, courts disregard the regulation." *Girard School Dist. v. Pittenger*, 392 A.2d 261, 263 (Pa. Supr. 1978).

This Court in *Crown Castle NG East LLC v. Pennsylvania Public Utility Comm'n*, 234 A.3d 665 (Pa. Supr. 2020) explicitly rejected the PUC's argument that its interpretation of an unambiguous statute was entitled to *any* deference, much less the "great deference" argued by the PUC. *Id.* at 678. The Court noted that a "court does not defer to an administrative agency's interpretation of the plain meaning of an unambiguous statute because statutory interpretation is a question of law for the court." *Id.*at 677. The Court concluded:

> [A]n agency must follow the plain language of an unambiguous statute, and courts will not defer to its interpretation of a clear statute. This is true regardless of whether the agency's interpretation has changed over time; the touchstone is whether the agency's interpretation adheres to the clear meaning of the statute. As we have repeatedly admonished, "the meaning of the statute is ultimately a question of law for the reviewing court." *Borough of Pottstown v. Pa. Mun. Ret. Bd.*, 551 Pa. 605, 712 A.2d 741, 744 (1998). Accordingly, the Commonwealth Court did not err in concluding the PUC's interpretation of Section 102 was not entitled to deference.

Id. at 679-80. Here, the PUC itself argues that the language of Section 2807(f) is "clear and unambiguous."[11] PUC Br. at 17. Therefore, under *Crown Castle*, its interpretation of the statute is entitled to no deference.

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[11] For this same reason, there is no need for the Court to resort to legislative history to decide the meaning of the statutory language.

It is also notable that, contrary to what the PUC states in its brief, the PUC's June 23, 2009 Implementation Order does not, in fact, contain any interpretation by the Commission "that Act 129 mandated ***universal*** smart meter deployment." PUC Br. at 20 (emphasis added). Instead, the order instead states that the Commission "believes that it was the intent of the General Assembly to require all covered EDCs to deploy smart meters system-wide…." The PUC's term "system-wide" is, at best, ambiguous, and can clearly be read as providing for widespread, but not necessarily universal, no-exceptions deployment of smart meters throughout an EDC system. Neither in its Implementation Order, nor in any later pronouncements, did the PUC engage in any kind of analysis that specifically addressed or analyzed the issue of whether "system-wide" meant that every single customer of a covered EDC "system" is *required* without any possible exception, including as relief in a Section 1501 proceeding, to have a wireless smart meter installed on their homes or properties. *See supra* at 19-22. It was not until the PUC's June 30, 2015 order in *Povacz* did the PUC explicitly rule that "system-wide" means "universal, no exceptions" and that, according to PUC, this interpretation means that the PUC in a proceeding brought by an EDC customer under Section 1501 "cannot grant the relief of precluding PECO from installing a smart meter upon the service property as requested by the Complainant." (RR1996a-2006a). Thus, it is far from clear that the PUC in the 2009 Implementation Order interpreted the scope of Act 129 as

sweepingly as it later did in its 2015 order in *Povacz* and later similar pronouncements, and any claim by the PUC or PECO that this "universal, no exceptions" interpretation dates back to 2009 is highly suspect. However, even accepting that "system-wide" means "universal," the Commission's statement in the Implementation Order regarding as to what it subjectively "believe[d]" regarding the legislature's intent is entirely unexplained, and is unsupported by any analysis or reasoning. The Commission was, at best, *speculating* about the legislature's intent, and in no way using its agency expertise or specialized experience in engaging in such speculation. Further, there is no evidence that the Commission gave any thought to whether the system-wide deployment of smart meters meant that every single customer must receive one, even if they objected under Section 1501, and the Commission in 2016 in the *Kreider* case acknowledged as much in its decision. *See supra* at 22.

For these reasons, the cases cited by the Commission and PECO in support of its claim that this Court should give deference to the Commission's interpretation of Act 129 should be disregarded by this Court. All parties argue that this matter should be decided under the plain language of the statute, and so this Court should, as is true in all cases of statutory interpretation, review this matter *de novo*, according to standard canons of statutory interpretation. *Commonwealth v. Petrick*, 217 A.3d 1217, 1224 (Pa. Supr. 2019).

b. The Commonwealth Court correctly determined that nothing in the language of Section 2807(f) requires universal installation of wireless smart meters on the premises of all EDC customers.

As noted, the Commonwealth Court did *not* find, as the Commission and PECO loudly urge, that the language of Section 2807(f) provides for an automatic "opt-out" from forced installation of wireless smart meters. Rather, it found that there is nothing in its language that *requires* universal, no-exceptions installation of wireless smart meters in every household served by covered EDCs. Thus, the Commonwealth Court found, there is no support for the Commission's finding that it is precluded by Act 129 from accommodating EDC customers who wish to not have a wireless smart meter installed on their properties.[12]

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[12] Remarkably, PECO claims that the "Commission did not hold that it 'lacked authority' to grant 'accommodations[]'" to EDC customers requesting that a wireless smart meter not be installed on their homes or properties. PECO Br. at 50; *see also id.* at 8 ("[T]he court misreads the PUC's Orders as holding that the Commission lacks authority to consider reasonable accommodations[.]"). These statements are clearly incorrect, and contradicted by the PUC itself. On June 30, 2015, the Commission ruled in the *Povacz* case (which the Commission followed as to the *Murphy* and *Randall-Albrecht* matters as well), in as clear language as possible, that the Commission lacked any authority to order as relief that PECO not install a wireless smart meter. ("The Commission does not have the authority, absent a directive in the form of legislation, to prohibit the Respondent from installing a smart meter where a customer does not want one. Similarly, the Respondent would be in violation of law if it did not install a smart meter at the Complainant's residence. *The Commission cannot grant the relief of precluding PECO from installing a smart meter upon the service property as requested by the Complainant."*) (RR1996a-2006a) (emphasis added).

The Commonwealth Court's interpretation of Section 2807(f) is clearly correct. The plain wording of Section 2807(f), on its face, says *nothing* about requiring universal installation of wireless smart meters on the properties of *every single covered EDC customer, with no possible exceptions.* Indeed, certain of its provisions would be rendered redundant by such a construction.

The language in Act 129 relied upon by the Commission and PECO provides:

> (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)(2).

Both the Commission and PECO place great emphasis on the word "shall" in this language, arguing that that word alone is dispositive. It cannot be, however, because the things that the statute provides that EDCs "shall" do, on their face, do not include installing wireless smart meters on the homes or properties of every single EDC customer, without exception. Rather, the "shall" in this provision refers to the three *methods* by which "smart meter technology" shall be "furnish[ed.]" Therefore, unless one of the three methods contains a requirement that all EDCs must install wireless smart meters in all households, without exception, Appellants' interpretation must fail.

The first two methods, on their face, are inapplicable here, as none of the Appellees "request[ed]" a smart meter per subsection (i), and none of the properties involved is new construction under subsection (iii). Moreover, on their face, neither subsection requires universal installation of wireless smart meters (and, indeed, subsection (ii) does the opposite, as it only applies to new construction). Thus, the only conceivable basis for the Commission's finding regarding the mandatory nature of Act 129 is subsection (iii). But this language, on its face, refers only to the *mechanism* of a 15-year "depreciation schedule." Obviously, this language—referring only to an accounting term and saying nothing about universal installation of smart meters—provides no support for the Commission's conclusion that the legislature intended to require universal, mandatory installation of smart meters, with no exception for reasonableness or safety.[13] Very simply, no reasonable person reading subsection (iii) would understand, or even conceive, that its language in any way mandated that every single EDC customer must, without exception (including for a proven violation of Section 1501) have a wireless smart meter installed on their properties, because its language does not even address the subject matter.

[13] Appellants' interpretation of subsection (iii) would only make sense if the phrase, "[i]n accordance with a depreciation schedule not to exceed 15 years" were preceded by the phrase: "As to all remaining EDC customers, without exception…." or similar language.

Moreover, the presence of subsections (i) and (ii) makes clear that PUC's and PECO's interpretation of the statute is incorrect. If subsection (iii) mandated universal installation of wireless smart meters, than subsections (i) and (ii) would be redundant, the first because there would be no cause for an EDC customer to "request" a smart meter, and pay for it, if every customer is *required* to have one; and the second because, if the legislature required that all EDC customers accept a smart meter, then there would be no need to *additionally* specify that they be installed in new construction.

c. PECO'S arguments regarding the term "furnish" are beside the point and unavailing.

PECO (PECO Br. at 39-46) objects, at length, to the Commonwealth Court's interpretation of the word "furnish" in the above statute, wherein the court found that, with reference to the dictionary definition of the term ("to provide what is needed; … supply, give") (Dec. at 10 (quoting *Webster's Ninth New Collegiate Dictionary* 449 (1985)), the term "does not imply that the recipient is forced to accept that which is offered." (*Id.*). However, the Commonwealth Court did not, as PECO argues, somehow equate the term "furnish" with "offer" and thereby hold that "EDCs may 'offer' smart meters subject to a customer's absolute right of refusal." PECO Br. at 39. This is simply another example of PECO's distorting the Commonwealth Court's holding and reasoning for its own ends. Rather, the Commonwealth Court merely found that the term "furnish" in itself implies an

ability to refuse what is "furnished" and that the term "shall furnish" therefore does not support Appellants' argument that Section 2807(f) equates to a legislative command that wireless smart meters must be installed in each and every household. The Commonwealth Court emphatically did *not* find that the legislature's use of the term "furnish" means that EDC customers have an "absolute right of refusal" regarding wireless smart meters; it only held that the term "furnish" does not support the *Appellants'* interpretation of Section 2807(f) as mandating universal installation of wireless smart meters. PECO's arguments regarding the use of the word "furnish" therefore sets up a straw man that ignores the Commonwealth Court's *actual* reasoning.

PECO claims that the lower court should have looked not to the dictionary definition of "furnish," but rather exclusively to other instances of how the word is used in the Public Utility Code. PECO Br. at 42-45. PECO is entirely incorrect that the Commonwealth Court erred in looking to the dictionary definition of "furnish" when interpreting Section 2807(f). Courts have recognized that "the best indication of the General Assembly's intent may be found in its plain language" and that "[o]ne way to ascertain the plain meaning and ordinary usage of terms is *by reference to a dictionary definition*." *Branton* 159 A.3d. at 548 (citation omitted). *See also Cogan House Twp. v. Lenhart*, 197 A.3d 1264, 1268 (Pa. Commw. 2018) (in interpreting a statutory term, it is proper to look to a "'standard dictionary'")

(quoting *Sklar v. Dep't of Health*, 798 A.2d 268, 276 (Pa. Commw. 2002)). Thus, it is clear that courts may, and often do, look to dictionary definitions when interpreting the language of a statute.

Indeed, *many* courts, including at least one in Pennsylvania, have cited the dictionary definition of the term "furnish" in ascertaining the meaning of a statute, contract, or other written provision containing that term. *See, e.g., Nautilus Ins. Co. v. Gardner*, 2005 WL 664358 at *7 (E.D. Pa. March 21, 2005) (court looks to Black's Law Dictionary and Webster's in interpreting insurance contract term "furnish" under Pennsylvania law); *Northland Cas. Co. v. Meeks*, 540 F.3d 869, 875 (8th Cir. 2008) (same, under Arkansas law); *People v. Casler*, __ N.E.3d __, 2020 WL 125117 at *4 (Ill. Supr. Oct. 28, 2020) (interpreting "furnish" in criminal statute); *Troyer v. Vertlu Mgt. Co.*, 806 N.W.2d 17, 25 (Minn. Supr. 2011) (interpreting "furnish" in administrative rule); *Gavan v. Bituminous Cas. Corp.*, 242 S.W.23d 718, 721 (Miss. Supr. 2008) (interpreting "furnish" in insurance policy). Thus, the Commonwealth Court was entirely correct to look to the common dictionary definition of the word "furnish" in ascertaining whether the plain language of Section 2807(f) mandates universal installation of wireless smart meters.

PECO also objects to the Commonwealth Court's finding that the term "furnish," consistent with its dictionary definition, implies a consumer's ability to

not accept that which is offered. PECO Br. at 41. It does not dispute the dictionary definition, or offer another dictionary definition, but instead argues that the dictionary does not reflect the "ordinary meaning" of the statutory word "furnish," which is discernible from its use elsewhere in the PUC code as connoting "the installation or physical presence of utility plant used to provide service," but without connoting that customers have the "optionality" of being able to "refuse" and "insist on receiving service through a different technology or modality." PECO Br. at 41 & n.3, 44-55.

Initially, PECO's position is squarely rejected by its own supporting amicus, EAP, which candidly states: "In reality, the word 'furnish,' as used throughout the Public Utility Code, means that the public ability actually provides the services or facilities, and *the customer accepts such service or facilities.*" EAP Br. at 17 (emphasis added). Furthermore, none of the instances of the use of the word "furnish" in the Public Utility Code that PECO cites provide any support for its argument that the plain language of Section 2807(f) mandates universal installation of wireless smart meters.[14] For instance, PECO claims that the language in 66 Pa. C.S. § 1507 "leaves no doubt that when the Legislature used the word 'furnished' it

[14] Contrary to PECO's suggestion, the distinction between "offer" and "furnish" was not "central to this Court's decision" in *Bethlehem Steel Corp. v. Pa. P.U.C.*, 713 A.2d 1110 (1998). PECO Br. at 45. The discussion in the case has no discernible bearing on the issues before the Court.

was referring to meters physically installed at customers' premises[.]" PECO Br. at 43-44. This is nonsensical. Section 1507 governs "Testing of appliances for measurement of service." It no way commands, or purports to command, that wireless smart meters must be installed on the premises of every individual customer (or even addresses the subject), but merely provides that *when and if* a wireless smart meter is installed on a customers' property, it must be tested for accuracy upon customer request. This provision, which is applicable to meters that *already have been installed*, has nothing to do with the issue before the Court. PECO's argument that other references to the use of the word "furnished" to mean "physically installed" simply does not advance the ball for PECO, which would be to prove that the language also connotes "whether the customer agrees or not." It is every bit as silent on that issue as the language of Act 129 itself.

The Commonwealth Court's reasoning that the term "furnish smart meter technology" in Section 2807(f) does not support finding a universal smart meter mandate is reinforced by examining the definition of "smart meter technology" at 66 Pa. C.S. § 2807(g). Note that the definition does not refer to individual smart meters on customers' properties but, rather, "metering technology" and "network communications technology." This clearly refers to a smart meter *system* that individual EDCs must "furnish," i.e., make available and deploy on a widespread basis throughout the territory in which the covered EDC serves. Through this

definition, EDCs are not required to "furnish" individual smart meters, but instead to furnish a smart meter *system* that their customers can widely access. It is in no way incompatible that Section 2807(f) would require covered EDCs to implement and install smart meters on a widespread basis, but at the same time *not* command that every single household, without possible exception, receive one, especially in response to a customer complaint of unsafe or unreasonable service under Section 1501.

d. Nothing in the language of Section 2807(f) requires that installed smart meters must be wireless smart meters emitting RF.

Even putting aside whether Act 129 is mandatory in nature, nothing in Act 129 provides that a smart meter must in all circumstances be a *wireless* smart meter emitting RF. The Commission's orders in these matters make clear that it makes no distinction between a "smart meter" and a smart meter *that uses wireless technology*, and that it ruled that, pursuant to Act 129, it was powerless to order as relief in these proceedings the use or installation of a non-wireless smart meter. This compounded the statutory interpretation error, as clearly there is no statutory language supporting the misguided notion that, even if the installation and use of a smart meters is mandatory with no exceptions, such smart meters must be wireless RF-emitting devices, as opposed to smart meters that do not emit RF because they are wired, not wireless.

The definition of "smart meter technology" in Section 2807(g) in no way supports any finding that all smart meters must communicate using wireless technology because "bidirectional communication" is clearly possible without using wireless RF technology. For instance, the meter could be hard-wired to communicate bidirectionally, without the use of RF. Moreover, according to the above definition, the communications technology must only be "capable" of bidirectional communication. This certainly would allow installation of a smart meter that could be deactivated so that the meter would be "capable" of such communication, but also could be ordered turned off in a particular case where the forced use of wireless technology would be unreasonable. *See Naperville Smart Meter Awareness v. City of Naperville*, 114 F.Supp.3d 606, 609 (N.D. Ill. 2015) ("These 'non-wireless meter alternatives' are essentially smart meters with their radio transmitters deactivated so that they emit no radio-frequency waves and must be read manually by a reader meter each month."). Thus, Act 129, by its clear terms, does not even conceivably mandate that "smart meter technology" include active wireless communication in all instances.

The Commonwealth Court therefore correctly held that Section 2807(f) does not mandate universal installation of wireless smart meters.

e. Whatever the interpretation of Section 2807(f), it does not limit, or purport to limit, the relief, i.e., accommodations, available for EDC customers who demonstrate under Section 1501 that the installation of a wireless smart meter on their property constitutes unreasonable or unsafe service.

Perhaps more fundamentally in the present proceedings, nothing in Act 129—whatever the extent to which it addresses the uniform installation and use of wireless smart meters as a general matter—purports to limit the *relief* that the Commission can order under Sections 1501 and 1505 of the PUC Code resulting from a finding of a statutory violation by PECO, e.g., a finding that mandatory installation of a wireless smart meter would be unreasonable or unsafe under Section 1501 following a customer complaint and a hearing. Nothing in either the wording or legislative history supports the Commission's ruling—overturned by the Commonwealth Court—that Section 129 somehow supplants and overrides the jurisdiction of the Commission to order any and all appropriate *relief* in response to a finding that an electrical supplier's technology is unsafe *or* unreasonable pursuant to Sections 1501 and 1505, including the installation of an alternative to a wireless smart meter. Thus, the Commonwealth Court correctly "reverse[d] that portion of the PUC's decisions finding that it lacked authority for accommodations for customer requests to avoid RF emissions." Commw. Ct. Dec. at 13.

Section 1505 provides clear authority for the Commission, by order, to "prescribe" safe and reasonable service and facilities, including "changes, alterations

[and] substitutions" in response to a customer "complaint" and hearing, including for violations of Section 1501. The language of Act 129 (including the at-best vague "depreciation schedule" language) does not even *address*, much less purport to diminish or eliminate, this broad authority of the Commission to "determine and prescribe" a remedy that includes a change, alteration, or substitution of facilities. Thus, the Commission was clearly incorrect when it effectively found that the passage of Act 129 somehow, by implication, circumscribed its broad authority under Section 1505 to "determine and prescribe," *id.*, an alternative to a smart meter in response to a finding, following a complaint and hearing, that the forced installation and use of such technology would be unsafe or unreasonable. *Povacz* June 30, 2015 Order at 6 (RR2001a) ("The Commission cannot grant the relief of precluding PECO from installing a smart meter upon the service property as requested by the Complainant.").

As Courts of this Commonwealth have recognized, repeal or amendment by implication is disfavored. *See, e.g., EMC Mortg. Corp. v. Lentz*, 972 A.2d 112, 118 (Pa. Commw. 2009) (repeals by implication are not favored and will not be permitted "'if the two [statutes] may be operative without repugnance to each other'") (quoting *Hulsizer v. Labor Day Committee, Inc.*, 734 A.2d 848, 853 (Pa. Supr. 1999)). Here, where nothing in the wording of Section 2807(f) even arguably purports to restrict the types of accommodations available in response to customer complaints under

Section 1501, the PUC's conclusion that Section 2807(f) by implication partially repealed its own authority to award appropriate accommodations under Section 1505—including an alternative to a wireless smart meter—cannot stand. The Commonwealth Court's reversal of this ruling was entirely correct, and should be upheld by this Court.

f. The PUC is wrong to suggest that the Commonwealth Court's decision "produces an absurd result" that "inappropriately favors private interests over public interests."

The PUC's argument that the lower court's decision produces an absurd result and inappropriately favors private over public interests, PUC Br. at 26-36, is wrong and should be rejected. Initially, the premise of the argument is wrong, as previously noted. The PUC is simply wrong to claim that the decision "effectively holds that smart meter deployment under Act 129 can only occur at the request of the customer…." *Id*. at 27. From that mistaken starting point, the PUC goes on a veritable flight of fancy, speculating that EDCs would have had to invest hundreds of millions of dollars in infrastructure "with no guarantee that any existing customer would request and offer to pay for smart meter installation." *Id*. at 28. This is wrong and has nothing to do with the issues before the Court. It is wrong, obviously, because the money has already been spent and the PUC is obviously just speculating on what might have happened in some alternative scenario. Similarly misplaced is the suggestion that the supposed "reverse presumption" discussed by the PUC, *id*. at

29, which is based on a section of the Implementation Order addressing smart meter deployment upon "Customer Request," RR 427a-430a, and not the applicable section of the Order addressing "System Wide Deployment," RR 423a-433a, has anything to do with the issues before the Court.

Likewise, there is no proper basis for the PUC to suggest, or for this Court to accept, that the overall effectiveness of the smart meter program in Pennsylvania will be negatively affected at all by the Commonwealth Court's decision, which merely requires the PUC to consider customer objections under Section 1501 to forced smart meter installation *without* the legal incorrect premise that the PUC is powerless to do anything about it because of the supposed mandate of Section 1501 that all customers must accept RF-emitting smart meters. For one thing, as noted above, the money is already spent and the meters have been deployed. Appellees have lived without the new AMI smart meters throughout this process, as have others who objected under Section 1501 and did not receive meters while their cases wended through the administrative and legal system over the past five years. So the reality is that nothing drastic has happened so far and this is unlikely to change, particularly since the next step should be a remand to the Commission. Even then, the number of people objecting and submitting actual proof like the Appellees have done is limited to the Appellees, a few others, and those who may come in the future with similar claims. As long as the accommodations are limited to consumers like

Appellees, who amply proved that they are sincerely concerned based on their medical histories and the objective evidence, and who provide evidence of their sincerity for example by demonstrating the various efforts they make to avoid RF exposure, it is hard to see how this could ever be a large group of consumers or threaten the effectiveness of the overall program.

The PUC is wrong to state that the Commonwealth Court's decision "inappropriately places the interests of individuals above that of the public interest." PECO Br. at 30. The Court, not the PUC, is the ultimate arbiter of the public interest in this matter, based on the law, specifically the plain language of the statute, which does not support the PUC's argument. Further, there is no record evidence to establish that accommodating Appellees' requests for electric service without RF-emitting smart meters installed at their home could not be accomplished except at great cost, and common sense suggests otherwise.

Finally, it is not the fault of Appellees that the subject of the mandatory nature of RF exposure did not come to their attention until litigation. But the fact that the smart meters have already been deployed and that no one saw this issue coming and addressed it—like they did in all the other states—should not be used as a reason to prevent Appellees from prevailing under Section 1501 and receiving an order from the PUC that PECO must accommodate their request for metering by means other than an RF-emitting smart meter.

B. THE COMMONWEALTH COURT CORRECTLY REMANDED THIS MATTER TO THE COMMISSION TO DETERMINE WHETHER THE FORCED INSTALLATION OF A WIRELESS SMART METER ON APPELLEES' HOME WOULD CONSTITUTE "UNREASONABLE" SERVICE UNDER SECTION 1501.

The Commission erred as a matter of law when it concluded that, to prove a violation under Section 1501, Appellees were required to demonstrate that the forced use of a wireless smart meter would be both unsafe *and* unreasonable. *See, e.g.*, *Randall/Albrecht* Comm. Dec. at 5 (RR237a) (requiring Appellees to prove that forced installation of wireless smart meters constituted "unsafe ***and*** unreasonable service in violation of 66 Pa. C.S. § 1501") (emphasis added). The PUC's ruling imposed a conjunctive burden to prove both unsafe *and* unreasonable service, when these are clearly *separate* statutory bases for obtaining relief, and had the clear effect of foreclosing Appellees from obtaining relief on the statutorily-prescribed base that the forced installation and use of wireless smart meters is, separate from "safety" concerns, *unreasonable* under all of the circumstances of these cases. The Commonwealth Court therefore correctly remanded this matter "for reconsideration expressly applying the subjunctive burden of proof." Commw. Ct. Dec. at 15.

Appellees argued in the ALJ proceedings that: (a) they could legally establish a violation of Section 1501 through proving that forced installation and use of a wireless smart meter constituted "unreasonable" service, without having to prove that the service is "unsafe"; and (b) they proved that, under all of the circumstances

of the cases, such service was indeed unreasonable, in violation of Section 1501. In their Exceptions to the ALJ decisions before the Commission, they reiterated these positions, arguing strongly that the ALJ erred by denying relief based solely on Appellees' purported to failure to prove that forced acceptance of PECO's wireless smart meters would "conclusive[ly]" cause medical harm, while failing to adequately consider whether the forced service was unreasonable under all of the circumstances. *See* Exceptions filed March 20, 2018, Docket No. C-2016-2537666, at 25-26.

The Commission rejected Appellees' arguments. The Commission stated that Appellees were required to prove that health concerns rendered forced use of a wireless smart meter both "unsafe *and* unreasonable service in violation of 66 Pa. C.S. § 1501," rather than unsafe *or* unreasonable. *See, e.g.*, *Randall/Albrecht* Comm. Dec. at 5, 26 (RR237a, 258a) (emphasis added). Furthermore, the Commission in its discussion of Appellees' sixth exception (PECO acted unreasonably) denied the exception because "we have concluded that [Ms. Randall] did not meet her burden of proof in demonstrating that she is in fact a customer with medical sensitivities to RF fields or that RF exposure from a PECO AMR meter has or an AMI meter will adversely affect her health." *See, e.g.*, *Randall/Albrecht* Comm. Dec. at 88 (RR320a). The Commission in that same discussion said that "we reiterate that [Dr. Randall] has failed to demonstrate that the RF exposure from a PECO smart meter

is unsafe." *Id*. The Commission obviously denied Appellees' argument that mandatory RF exposure is not reasonable on the grounds that they did not prove that it will adversely affect Dr. Randall's health and therefore is unsafe.

The clear language of Section 1501 provides that electric service and facilities must be "safe, *and* reasonable" (emphasis added). In turn, Section 1505 grants the Commission broad authority to order service providers such as PECO to make reasonable accommodations and changes to service to customers on a variety of bases, including that the service is "unreasonable," *not* just on the basis of "safety." 66 Pa. C.S. § 1505. Under the clear words of this statute, the Commission may order "changes, alterations, [or] substitutions" on the *sole* basis that they are "unreasonable" and may order changes, alterations, or substitutions as shall "be reasonably necessary and proper for the "accommodation[] and convenience of the public." *Id.* Thus, the Commission's authority to order a utility to make changes or alterations in service goes *well* beyond issues of "safety" alone. Indeed, the Commission is empowered to order such changes or alterations on the *sole* basis that the utility's services or proposed services are "unreasonable."

The Commission, ignoring the clear statutory language, essentially read out of the statute Appellees' ability to establish a violation of Section 1501 by establishing that the service was unreasonable alone, instead requiring them to prove that the service is both unreasonable and unsafe, which according to PECO and the

PUC requires proof of conclusive causal connection as if Appellees sought money damages proof but with a heightened standard. These are two separate, but related, valid bases to establish a violation of Section 1501. The distinction between unsafe and unreasonable may not make a difference in most cases, but it does in this case, because of the unprecedented nature of what the PUC and PECO seek to do—force customers to accept exposure to RF against their will—and the unsettled nature of the science on the subject. *See supra* at 15-17. In other words, it could be very difficult for Appellees on remand to prove that RF exposure from smart meters is "unsafe"—as under existing caselaw (including the Commonwealth Court's decision in this case) this would require proof of harm that was or will be caused by RF by at least a preponderance of the evidence, as in a claim for money damages, which is simply not possible under the current state of the science because the matter is unsettled and requires further research, as the federal government agency tasked with studying the risk of exposure to levels of RF below the FCC limits has advised.

But just because Appellees cannot prove harm caused as if this were a tort claim for money damages, and not a request to an administrative agency charged with ensuring that utility service is both safe and reasonable, that does not and should not mean that Appellees cannot prevail nonetheless. On the contrary, they should be able to prevail on remand by proving that, whether or not RF exposure is safe or not by the standard of the PUC, there is reasonable ground for difference of opinion on

the matter, as evidenced by the report of the NTP. Given that publicly available information, it is patently unreasonable to subject customers who are concerned about RF exposure based on this information to accept it in their homes, over their considered decisions, made in consultation with their doctors, that they wish to avoid or minimize RF exposure at home. Appellees are not expecting this Court to decide those issues, as they are not part of this appeal, but instead offer this preview of their argument to demonstrate that they have a perfectly logical and reasonable argument that they should be entitled to develop on remand, whether or not they can prove the safety prong and its causation element.

This is not to suggest that utility customers can establish claims under Section 1501 based solely on their sincere beliefs. The existence of sincere beliefs goes to proof of harm. Specifically, Appellees maintain that, whether or not medical causation can be proved, forced exposure to RF by means of a device installed on a person's home obviously could be highly disruptive of peace of mind, particularly for people like Appellees who go to great lengths to avoid RF exposure. In considering whether Appellees are entitled to an accommodation under Section 1501, the PUC should take this into consideration.

However, sincere belief of harm or potential harm alone should not be enough to establish a claim under Section 1501, which should also require objective evidence of harm or potential for harm, because where there is objective evidence

of harm or potential for harm from something it would be obviously unreasonable to subject any person to it against their will absent some compelling (and lawful) reason. Appellees have already provided that objective evidence of potential for harm, specifically the report of the National Toxicology Program, plus all of the testimony of Ms. Randall and her doctor and husband about her condition and their efforts to avoid RF exposure. This evidence presented by Appellees clearly indicates that, whether or not they would be medically harmed by RF exposure, they would be harmed by being forced to do something that they decided is not in their best interest. Just as a trespasser to land may be evicted even without proof that their presence on land is harmful, a person claiming the right to be free from RF exposure satisfies the requirement of harm sufficient to bring the claim by showing that they have been or will be subjected to RF. Appellees have amply satisfied this standard.

In short, the Commission has the authority under Section 1501 to accommodate the requests of customers like Appellees who file objections under Section 1501 and support their claim of unreasonable service as fully as these Appellees have done without requiring proof of unsafety beyond that. It is the only reasonable way to implement smart meters without trampling the rights of customers like Appellees, who make every effort to avoid cell phones and Wi-Fi devices, based on their concerns about possible health effects. Accommodating the very real and not objectively unreasonable concerns of this small minority will not threaten the

success of the smart meter program overall. PECO itself says that by 2017 it had "completed universal AMI deployment (Phase II of its plan), except where a few customers, including Complainants, refused to allow the Company to install the required smart meters." PECO Br. at 3. These "few customers" other than Appellees are presumably the customers with claims under Section 1501 stayed at the Commonwealth Court and the Commission pending resolution of this appeal. It will be up to the PUC on remand to decide whether to accommodate the requests of Appellees and those customers under Section 1501, based on their particular circumstances. It is impossible to accept at face value the suggestion made by PECO and the PUC that accommodating some or even all of these few customers would in any way jeopardize the success of PECO's smart meter plan or the implementation of Act 129, particularly since PECO has already successfully deployed all meters but a few.

Thus, it was clear legal error to deny relief to Appellees based on a perceived failure to establish the unsafety of PECO's wireless smart meters, without considering whether the forced installation and use of those meters would be unreasonable under all the circumstances, and the totality of the evidence. The Commonwealth Court's remand order should therefore be affirmed.

C. THIS COURT SHOULD REVERSE THE COMMONWEALTH COURT'S IMPOSITION OF A LEGALLY UNJUSTIFIED "CONCLUSIVE CAUSAL CONNECTION" BURDEN OF PROOF TO PROVE APPELLEES' CLAIMS ON REMAND, WHICH IS AN IMPOSSIBLE BURDEN THAT WILL PREVENT APPELLEES AND FUTURE CONSUMERS FROM PREVAILING BEFORE THE PUC ON ANY CLAIM THAT SMART METERS ARE UNSAFE.

The Commonwealth Court, while correctly remanding this case back to the PUC for additional proceedings, erred by imposing on Appellees, and all future smart meter litigants before the PUC, an impossible burden of proof to establish their claims that forced RF exposure is unsafe under Section 1501. The Commonwealth Court upheld the PUC's decision imposing on Appellees the burden to prove a "conclusive causal connection" between their health problems and PECO's smart meters. This is an impossible burden utterly unknown in the law, and certainly never imposed or even discussed in any previous appellate decision in this Commonwealth, and would, if imposed upon any remand, entirely eviscerate any real ability for Appellees to obtain relief before the PUC on issues of safety. It is doubly wrong because, as explained below, Section 1501 is designed to protect consumers from the risk of harm, not just proven harm, which means that they should not have to suffer harm to obtain relief from the PUC under Section 1501.

The lower court affirmed the PUC's ruling that, to prove that wireless smart meters are "unsafe," Appellees were required to establish a "conclusive causal connection" between exposure to RF and adverse human health effects. *See, e.g.,*

Randall/*Albrecht* Comm. Dec. at 27-28 (RR259a-260a). This ruling essentially imposed, at the least, a requirement of tort-like proof of medical causation, which is a burden so high it eviscerates PECO's duty to provide, and the Commission's duty to oversee, safe service.[15] In determining the "safety" of wireless smart meters under Section 1501, the Commission properly should have considered the *potential for harm*, rather than requiring Appellees to prove causation under a uniquely—and unworkably—stringent standard that has no basis anywhere in Pennsylvania law.

Merriam-Webster defines "safe" as "free from harm or risk." *See* www.merriam-webster.com/dictionary/safe. "Harm" is defined as "physical or mental damage." https://www.merriam-webster.com/dictionary/harm. "Risk" is defined as "possibility of loss or injury." https://www.merriam-webster.com/dictionary/risk. Numerous other dictionaries also define "safe" to include "*the absence of risk including the possibility of harm*" as well as actual harm.

Nothing in the plain language of Section 1501 supports the PUC's and the lower court's legal conclusion that the Appellees, to prove that mandatory RF exposure is unsafe, must "conclusive[ly]" prove that medical harm *was or will* be

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[15] Indeed, the lower court's burden of proof on causation is even more onerous than the substantial factor test widely used under Pennsylvania law in tort cases. Appellees are aware of no other instances where causation of harm must be proven "conclusive[ly]," as opposed to by a preponderance of the evidence. The burden of proof of a "conclusive causal connection" is, very simply, virtually unheard of in the law.

caused to the Appellees. This interpretation should also be rejected because it violates the principle that statutory construction or interpretation must be reasonable and not absurd. *See* 1 Pa. C.S.A. § 1922(1) (the General Assembly "does not intend a result that is absurd, impossible of execution, or unreasonable"). The lower court's burden of proof is all three, as it is impossible to, even with expert testimony presented at great expense, "conclusively" prove the connection between Appellees' health conditions and RF from smart meters, as opposed to proving that RF *could have* harmed Appellees or could harm them in the future following continuing exposure.

Further, there is not a single suggestion or even a hint in the language of Section 1501 (or elsewhere) that a customer must prove causation of harm as required in a tort claim for damages. This is unsurprising, as Section 1501 does not allow an electric consumer to obtain monetary damages, as opposed to mere administrative relief from unreasonable or unsafe service, so a tort-like burden of proof, or higher, would be highly inappropriate given the modest relief sought.

An administrative agency charged with ensuring safety and reasonableness should not require even tort law proof of causation, much less the lower court's enhanced burden of proof. Persuasive authority recognizes that the standard of proof required by an agency charged with ensuring safety "is reasonably lower than that appropriate in tort law, which traditionally makes more particularized inquiries into

cause and effect and requires a plaintiff to prove that it is more likely than not that another individual has caused him or her harm." *Allen v. Pennsylvania Engin. Corp*, 102 F.3d 194, 198 (5th Cir. 1996) (citing *Wright v. Willamette Indus. Inc.,* 91 F.3d 1105, 1107 (5th Cir. 1996)).

There is a real question about whether the PUC is the right agency to decide, as a matter of science and public health, whether RF exposure at levels below the FCC limits is safe. This is a subject of great complexity with national and international implications that, as explained *supra*, continues to bedevil the FCC, NTP, and other federal agencies that have far greater resources dedicated to studying and reviewing the science than the PUC. But if the PUC is going to make decisions about safety based on the science, it should apply an appropriate standard of proof, and not one favors industry at the expense of consumer safety, because the application of the enhanced tort-style causation inquiry urged by PECO will mean that all objections will be denied.

The lower court clearly erred as a matter of law in its interpretation of Section 1501 as requiring *greater than* tort law proof of causation of harm, as opposed to proof by a preponderance of the evidence of the *risk* of harm. The Court should reverse the Commonwealth Court's decision in this regard to impost a correct standard of proof of a claim before the PUC under Section 1501 alleging that electric utility service is unsafe.

In its decision, the lower court relied extensively on the federal court's decision in *Naperville Smart Meter Awareness v. City of Naperville*, 2013 WL 1196580 (N.D. Ill. 2013). The Commonwealth Court's reliance on this decision is clear error. First, the *Naperville* decision is not authoritative before this Court, particularly on a question of Pennsylvania evidence law. Perhaps more fundamentally, the *Naperville* court did not even purport to address the issue before the Commonwealth Court and this Court: whether a regulatory agency can require a litigant before it to meet an *enhanced* burden of proof to be entitled to *administrative relief*. The *Naperville* court considered, on a motion to dismiss a complaint for failure to state a claim under Fed. R. Civ. P. 12(b)(6), what was required to *plead* a *constitutional* claim of the deprivation of a liberty interest pursuant to 42 U.S.C. § 1983. *Id.* at *10. The court held that, for purposes of pleading a *constitutional deprivation of liberty*, it was insufficient for a consortium of electric customers to plead that smart meters had the potential to cause harm. *Id.* The court was not considering any issue regarding the *evidentiary burden of proof* before a state administrative agency, but rather an issue regarding *pleading* requirements under a federal statute and the United States Constitution. Thus, the Commonwealth Court's statement that "[t]he reasoning of *Naperville I* concerning the applicable burden of proof is persuasive" (Commw. Ct. Dec. at 21) is entirely misguided, as the *Naperville* court did not even *consider* any issue regarding the "burden of proof,"

particularly in the context of a state administrative proceeding. Therefore, the Commonwealth Court's reliance on *Naperville* on this issue is clearly incorrect and its reasoning should be rejected by this Court.

At the very least, this Court should make clear that the "conclusive causal connection" language used by the PUC does *not* apply to any claim by Appellees on remand, or future litigants before the PUC, on the separate issue whether forced installation of a wireless smart meter constitutes *unreasonable*, as distinct from unsafe, service.[16] While the "safety" and "unreasonableness" concepts can clearly overlap to some degree, they are, as the Commonwealth Court correctly found, separate issues that the PUC is required to consider in the disjunctive. It is well-settled that, in an action considering whether something is "reasonable," a court or agency must consider the totality of the circumstances. *See, e.g.*, *Zarlenga & Seltzer, Inc. v. Unemployment Comp. Bd. of Rev.*, 2010 WL 9509776 at *3 (Pa. Commw. Aug. 18, 2010).

That necessarily means that the PUC should, on remand, consider *all* relevant factors in determining whether forced installation of a wireless smart meter on Appellees' premises constitutes unreasonable service under Section 1501, and that

[16] The Commonwealth Court in its order in this matter made explicit that it was not imposing the "conclusive causal connection" standard on future proceedings regarding the reasonableness of PECO's service, as opposed to the safety of smart meters. Commw. Ct. Dec., Order at 2.

Appellees should not have to "conclusively," or under *any* burden of proof, demonstrate that the meter will harm them, so long as they otherwise demonstrate unreasonableness of service.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 2135, I certify the following:

This brief complies with the type-volume limitation of Rule 2135; this brief contains 16,281 words excluding the parts of the brief exempted by this rule.

/s/ Stephen G. Harvey
Stephen G. Harvey

AFFIDAVIT OF SERVICE

DOCKET NO 34-45 MAP 2021

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MARIA POVACZ

v.

PENNSYLVANIA PUBLIC UTILITY COMMISSION

----------X

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

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Sworn to before me on September 15, 2021

/s/ Robyn Cocho
_____

Robyn Cocho
Notary Public State of New Jersey
No. 2193491
Commission Expires January 8, 2022

/s/ Elissa Diaz

Job # 307418