

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

MICHELE HRIADIL and
FRANCIS HRIADIL,

Complainants,

No: C-2016-2571726

v.

DUQUESNE LIGHT COMPANY,

Respondent.

**BRIEF IN SUPPORT OF MOTION FOR
SUMMARY JUDGMENT**

Served on Behalf of Respondent
Duquesne Light Company

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TABLE OF CONTENTS

I. INTRODUCTION	1
II. STATEMENT OF THE CASE	3
A. Pennsylvania law requires that Duquesne Light install smart meters for all its customers.	3
B. The Commission approved Duquesne Light's smart meter implementation plan, and the smart meters being deployed by Duquesne Light comply with the applicable FCC regulations, ANSI Standards, and are UL certified	4
C. Duquesne Light employs various industry-recognized cybersecurity measures to protect its assets, including its smart meter network, and customer information.	7
D. Duquesne Light installs its meters in a safe manner	7
E. Complainants have not offered any medical evidence that they will suffer any adverse health effects if Duquesne Light installs a smart meter at their property	8
III. SUMMARY JUDGMENT STANDARD	9
IV. LAW & ARGUMENT	10
A. Installing a smart meter at Complainants' residence does not violate the Code	10
B. It is uncontested that Duquesne Light's smart meters comply with all applicable industry and regulatory standards	11
C. Complainants offered no evidence suggesting that Duquesne Light's smart meters or Duquesne Light's smart meter program is unsafe, unreasonable, or inadequate	12
1. <i>Complainants' personal belief that smart meters are unsafe, and the arguments that stem from those beliefs, do not constitute evidence through which they can sustain their burden of proof</i>	12
2. <i>The publications Complainants produced throughout these proceedings are irrelevant because they do not relate to Duquesne Light's smart meter program and are hearsay, which cannot sustain Complainants' burden of proof</i>	17
3. <i>Dr. Carpenter, whose theories about RF emissions have already been rejected by the Commission, does not claim that Duquesne Light's smart meters are unsafe or violate any applicable standard or that Complainants would suffer adverse health effects from the installation of a smart meter</i>	18
D. Complainants have offered no medical evidence demonstrating that the installation of a smart meter at their home will cause them to suffer adverse health effects	19
E. The Commonwealth Court's <i>Romeo</i> decision does not allow Complainants to evade summary judgment where they marshaled no evidence in support of their claims	20
V. CONCLUSION	21

TABLE OF CITATIONS

Cases

<u>Anderson v. Pa. Department of Public Welfare</u> , 468 A.2d 1167, 1169 n.5 (Pa. Cmwlth. 1983).....	19
<u>Centre Park Historic District, Inc. v. UGI Utilities, Inc. – Gas Div. City of Reading</u> , Docket No. C-2015-2516051, 2017 WL 4119754	10
<u>Cominsky v. Donovan</u> , 846 A.2d 1256, 1259 (Pa. Super. Ct. 2004)	21
<u>Dierolf v. Slade</u> , 581 A.2d 649 (Pa. Super. Ct. 1990)	15, 18
<u>Fisher v. Sexauer</u> , 53 A.3d 771, 779-80 (Pa. Super. Ct. 2012).....	17
<u>Frompovich v. PECO Energy Co.</u> , Docket No. C-2015-2474602, 2017 WL 2406620, at *10-14 (Pa. P.U.C. May 11, 2017).....	12
<u>InfoSAGE, Inc. v. Mellon Ventures, L.P.</u> , 896 A.2d 616, 639 (Pa. Super. Ct. 2006).....	17
<u>Iro-Nwokeukwu v. Phila. Gas Works</u> , C-2011-2247079, 2015 WL 1291552	18
<u>Karen Pace v. PECO Energy Co.</u> , Docket No. F-2016-2538084, 2016 WL 7336588, at *8 (Pa. P.U.C. Nov. 16, 2016)	19
<u>Kish v. West Penn Power Co.</u> , Docket No. F-2017-2619183, 2017 WL 6018113 (Pa. P.U.C. November 7, 2017).....	23
<u>Kovalev v. Sowell</u> , 839 A.2d 359, 364 (Pa. Super. Ct. 2003).....	15, 18
<u>Kremer v. PPL Elec. Utilities Corp.</u> , F-2016-2523765, 2016 WL 4162588	18
<u>Kursis v. Baldwin-Lima-Hamilton Corp.</u> , 319 A.2d 914, 924 (Pa. 1974).....	14
<u>Laura Sunstein Murphy v. PECO Energy Company</u> , C-2015-2475726, 2018 WL 1745254, at *21 (Pa. P.U.C. Feb. 21, 2018)	12
<u>Lehigh Valley Power Comm. v. Pa. Pub. Util. Comm'n</u>	9
<u>Matt Bernardini v. Penn. Electric Co.</u> , C-2017-2605686, 2017 WL 6508766, at *6 (Pa. P.U.C. Nov. 7, 2017).....	14
<u>McCarthy v. Dan Depore & Sons Co., Inc.</u> , 724 A.2d 938, 940 (Pa. Super. Ct. 1998)	10
<u>Ottaviano v. PECO Energy Co.</u> , Docket No. F-2016-2542081, 2018 WL 937069, at *9-10 (Pa. P.U.C. Jan. 17, 2018)	11, 20
<u>PA Bureau of Corrections v. City of Pittsburgh</u> , 532 A.2d 12, 14 (Pa. 1987).....	14
<u>Paul v. PECO Energy Co.</u> , Docket No. C-2015-2475355, 2017 WL 2861405 (Pa. P.U.C. June 19, 2017).....	3, 22
<u>Raintree Homes, Inc. v. Birkbeck</u> , No. 2643 EDA 2011, 2013 WL 5234255, at *11 (Pa. Super. Ct. Aug. 7, 2013)	19
<u>Romeo v. Pa. Public Util. Comm'n</u> , 154 A.3d 422 (Pa. Commw. Ct. 2017).....	20, 21

<u>Scott Luellen v. Maroadi Transfer & Storage, Inc.</u> , C-2016-2539599, 2017 WL 876281, at *5 (Pa. P.U.C. Feb. 6, 2017).....	9
<u>Tina Featherston v. Penn. Power Co.</u> , F-2016-2576019, 2017 WL 6508784, at *8 (Pa. P.U.C. Nov. 7, 2017).....	14
<u>Yacoub v. Lehigh Valley Med. Associates</u> , 805 A.2d 579 (Pa. Super. Ct. 2002).....	15, 18

Statutes & Regulations

52 Pa. Code § 5.102(c).....	12
66 Pa. C.S. § 1501.....	13
66 Pa. C.S. § 2807.....	6, 12
66 Pa. C.S. § 332(a).....	13
66 Pa. C.S. § 701.....	13
66 Pa. C.S. § 703(a).....	11

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BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Respondent Duquesne Light Company ("Duquesne Light" or the "Company"), by and through its attorneys, Tucker Arensberg, P.C., submits this Brief in Support of Motion for Summary Judgment:

I. INTRODUCTION

In ruling on this motion, the Commission faces the following issue: can a complainant who does not want a smart meter, but at whose property the utility is required to install one, survive summary judgment if he or she merely objects to smart meter technology in general but produces no evidence in discovery showing that their utility's smart meter practices are unsafe, unreasonable, or inadequate? The answer must be no.

Pennsylvania law requires that Duquesne Light install smart meters throughout its service territory, including at Complainants' residence. But Complainants do not want a smart meter on their property. They generally distrust the technology, and their complaint variously asserts that a smart meter will harm their health by emitting excessive levels of radiofrequency ("RF"), damage their home's wiring or electrical equipment, pose a risk of catching fire, pose a data privacy or security risk, and be installed in an unsafe manner. But Complainants produced no evidence during discovery that supports their allegations, or even that more generally

suggests that Duquesne Light or its smart meter program somehow violates the Public Utility Code (the "Code"), its associated regulations, or the Company's tariff.

To the contrary, the undisputed evidence establishes that Complainants cannot satisfy their burden of proof in this case. The Commission has approved Duquesne Light's smart meter procurement and installation plan, which is prima facie evidence that the plan is reasonable. The smart meters being deployed by Duquesne Light comply with the applicable limits for RF emissions established by the Federal Communications Commission ("FCC") by a wide margin. Duquesne Light's smart meters also meet the standards set by the American National Standards Institute ("ANSI") and have been approved for public use by the Underwriters Laboratory ("UL").

During several rounds of discovery, Duquesne Light specifically requested that Complainants produce evidence to support their claim that Duquesne Light's smart meter program is unsafe. Complainants offered plenty of arguments, personal beliefs, and internet articles having nothing to do with Duquesne Light, but offered no competent evidence to either contradict the above facts or suggest that Duquesne Light's practices violates any regulatory or industry standard.

Complainants have likewise produced no evidence from which they could carry their burden of proving that they will suffer adverse health effects if Duquesne Light installs one of its smart meters at their residence. All they offer is more argument, personal belief, and a purported expert "report" that does not even mention Complainants let alone opine that Complainants will suffer an adverse health effect when a smart meter is installed at their residence. Also absent from the record is any competent evidence that Duquesne Light's smart meters have caused property damage or harm to any customers, that the Company installs meters unsafely, that the Company's privacy and cybersecurity measures are deficient, or that its smart meters have been, or are vulnerable to being, hacked.

As the Presiding Administrative Law Judge has already ruled, Complainants cannot prevail in this case unless they prove that Duquesne Light has violated the Code, an associated regulation, or a tariff provision. Prehearing Order, Dec. 15, 2017, Tab 1.¹ Based upon all evidence produced in this proceeding, Complainants can do no such thing. All Complainants have shown is that Duquesne Light plans to install a smart meter -- a technology they distrust -- at their property. But that does not violate the Code; it complies with it. And since there is no evidence demonstrating that the manner in which Duquesne Light is deploying its smart meter network violates any provision of the Code, any regulation, or any tariff provision, Complainants' claims fail as a matter of law.

II. STATEMENT OF THE CASE

A. Pennsylvania law requires that Duquesne Light install smart meters for all of its customers.

On October 15, 2008, Pennsylvania enacted Act 129 of 2008 ("Act 129"), which in relevant part requires electric distribution companies with more than 100,000 customers to deploy smart meter technology, including smart meters, throughout their service territories. 66 Pa. C.S. § 2807. As the Commission has noted repeatedly, Act 129 does not contain an "opt out" provision; in other words, Duquesne Light must install a smart meter for all customers in its service territory. See Evans v. PECO Energy Co., Docket No. C-2017-2628542, 2017 WL 6766256, at *4 (Pa. P.U.C. Dec. 12, 2017) (Heep, ALJ) (the Commission determined in 2013 that there is no provision in the Code, the Commission's Regulations or Orders that allows a customer to "opt out" of smart installation); Francis v. PECO Energy Co., Docket No. C-2014-2451351, 2015 WL 5011620, at *6 (Pa. P.U.C. Aug. 20, 2015) (Act 129 and the Commission's Orders do not allow a customer to opt out of having a smart meter installed).

¹ The exhibits referenced in this Brief are collected in the attached Appendix.

- B. The Commission approved Duquesne Light's smart meter implementation plan, and the smart meters being deployed by Duquesne Light comply with the applicable FCC regulations and ANSI Standards and are UL certified.

Act 129 required all electric distribution companies with more than 100,000 customers, including Duquesne Light, to file a smart meter technology procurement and installation plan with the Commission for approval. See 66 Pa. C.S. § 2807(f)(1). Duquesne Light filed such a plan, and the Commission approved it. Duquesne Light Company Final Smart Meter Technology Procurement and Installation Plan, June 29, 2012, Tab 2; Opinion and Order, May 6, 2013, Tab 3. The Commission subsequently approved the Company's amended smart meter plan, which provides that the Company shall complete deployment of residential smart meters by 2018. Opinion and Order, Apr. 7, 2017, Tab 13.

Duquesne Light is installing Itron smart meters throughout its service territory.² Respondent's Responses to Set #1 Discovery Requests at ¶ 1(a), Tab 4. The Company provided Complainants with advance notice of its intent to install a smart meter and have temporarily delayed installing a smart meter at Complainants' residence. Formal Complaint at p.3, Tab 5; Answer and New Matter to Formal Complaint at ¶ 18, Tab 6.

Duquesne Light's smart meters collect hourly and daily electric consumption data to assist in customer billing; they also collect certain data for utility grid operations like meter tampering events, power outage or restoration events, and voltage thresholds. Respondent's Responses to Set #1 Discovery Requests at ¶ 18, Tab 4. Duquesne Light's smart meters contain two radios -- a 900MHz LAN radio (the "LAN Radio") and a 2.4GHz Zigbee radio (the "Zigbee Radio") -- both of which fall under Federal Communications Commission ID SK9AMI7. Id. at ¶ 1(b); Respondent's Third Supplemental Responses to Set #1 of Discovery Requests at ¶ 1(f), Tab 7.

² The model of residential smart meter installed at most residential premises, and to be installed at the Complainants' residence, is the Itron HW 3.1 OpenWay CENTRON singlephase smart meter, model SK9AMI7. For the sake of simplicity, Duquesne Light will refer to this meter as "Duquesne Light's smart meter" throughout this Brief.

Complainants offered no evidence that Duquesne Light's smart meters fail to satisfy an applicable safety standard, such as the FCC or ANSI. Instead, Complainants generically claim, among other things, that smart meter technology is immature and that smart meters are composed of materials that can overheat, have fragile components, do not warn of fires or overheating, do not provide circuit breaker protection to homeowners, and can be hacked.³ Response to Respondent's First Set of Discovery Requests Directed to Complainants at ¶ 5, Tab 9. Complainants, however, offer no evidence that Duquesne Light's meters actually caused a fire, were hacked, or that not offering a specific sort of circuit breaker protection to the customer violates an applicable regulation or industry standard. Response to Respondent's Second Set of Discovery Requests Directed to Complainants at ¶¶ 14, 16, Tab 10.

Furthermore, the unrefuted evidence shows that Duquesne Light's smart meters transmit for a very small portion of the day.⁴ Based on a representative sample of 7,000 smart meters that have been deployed by Duquesne Light, the LAN Radio transmits between .02 and .058 percent of the day, while the Zigbee Radio transmits between .01 and .15 percent of the day.⁵ Respondent's Third Supplemental Responses to Set #1 of Discovery Requests at ¶ 1(f), Tab 7.

The unrefuted evidence also shows that Duquesne Light's smart meters comply with the applicable FCC regulations for both intentional and unintentional radiation. Respondent's Responses to Set #1 Discovery Requests at ¶ 3, Tab 4; Affidavit of Benjamin Cotts, PhD., P.E. in Support of Motion for Summary Judgment at ¶¶ 8-11, Tab 8. In fact, using the average duty cycle for a typical Duquesne Light smart meter (identified as 0.06 percent in Respondent's Third Supplemental Responses to Set #1 of Discovery Requests at ¶ 1(f), Tab 7), the RF exposure for

³ Complainants do not claim that there are incorrect charges on their bills or that they have experienced billing problems related to Duquesne Light's smart meters. Indeed, Complainants could not have raised such claims because Duquesne Light has not installed a smart meter at their residence yet.

⁴ Since there is not yet a smart meter at Complainants' residence, Duquesne Light discusses the operation of a typical smart meter deployed by the Company.

⁵ The portion of the day during which the radio transmits is sometimes referred to as the "duty cycle."

the LAN Radio (which emits more frequently than the Zigbee Radio) at one yard directly in front of the smart meter outside is 0.0029 percent (1/35,000th) of the FCC limit; one yard behind the smart meter inside is only 0.00013 percent (1/780,000th) of the FCC limit.⁶ Affidavit of Benjamin Cotts, PhD., P.E. in Support of Motion for Summary Judgment at ¶¶ 9-11, Tab 8.

In addition to the FCC standards, the unrefuted evidence establishes that Duquesne Light's smart meters also meet the applicable ANSI standards (ANSI C12.1 and C12.20). Respondent's Responses to Set #1 Discovery Requests at ¶¶ 1(o), 6(i), Tab 4; Respondent's Third Supplemental Responses to Set #1 Discovery Requests at ¶ 1(t), Tab 7. When meters satisfy FCC and ANSI standards, they are approved for customer consumption. Respondent's Third Supplemental Responses to Set #1 Discovery Requests at ¶ 1(t), Tab 7.

The UL also tested and approved Duquesne Light's smart meters in May 2015. Respondent's Responses to Set #1 Discovery Requests at ¶¶ 1(t)(ii), 3(b), Tab 4. Even Complainants acknowledge that UL certification is the preferred safety certification in the United States. Response to Respondent's First Set of Discovery Requests Directed to Complainants at p.5, Tab 9.

Further, the unrefuted evidence shows that the voltages, harmonics, and loads introduced by Duquesne Light's smart meters are similar to the meter currently in use at Complainants' residence (which Complainants want to keep). Respondent's Third Supplemental Responses to Set #1 Discovery Requests at ¶ 1(t), Tab 7.

Despite extensive discovery, Complainants produced no evidence to dispute that Duquesne Light's smart meters comply with FCC and ANSI standards, that they are UL

⁶ In fact, Duquesne Light's smart meters would still be well below the FCC's exposure limits even if they transmitted all day long (which is impossible) or transmitted for the theoretical maximum amount of time they could transmit (which is approximately 67 percent of the day). Respondent's Third Supplemental Responses to Set #1 Discovery Requests at ¶ 1(f), Tab 7. Specifically, if the theoretical maximum transmit duty cycle of 67 percent is applied, the exposure from Duquesne Light's smart meters would represent only 25 percent of the FCC limits; if the meter transmitted all day long, the resulting exposure would represent only 38 percent of the FCC limits. Id.; Affidavit of Benjamin Cotts, PhD., P.E. in Support of Motion for Summary Judgment at ¶ 10, Tab 8.

certified, or that the voltages, harmonics, and loads introduced by Duquesne Light's smart meters are different than the analog meter currently in use at their residence.

C. Duquesne Light employs various industry-recognized cybersecurity measures to protect its assets, including its smart meter network, and customer information.

To protect the privacy of the data collected by Duquesne Light's smart meters, the Company utilizes a centralized Chief Information Security Officer and dedicated staff responsible for providing cybersecurity operations, risk management, and governance for the protection of Duquesne Light's assets and information. Respondent's Responses to Set #1 Discovery Requests at ¶ 18(b), Tab 4. Duquesne Light's security controls include end-point protection systems, advance malware protection systems, network security segmentation, intrusion detection/prevention systems, security incident and event monitoring, threat intelligence and vulnerability management as well as recovery and response measures. Id. Additionally, Duquesne Light's smart meter system uses advanced and open standard data encryption and authentication techniques that have been approved by international bodies like the National Institute of Standards and Technology and the National Security Agency. Id.

Complainants do not contest any of the above and instead merely argue that Duquesne Light's security features are "no better than" other security systems used throughout the United States and, therefore, are vulnerable to hacking. Response to Respondent's Second Set of Discovery Requests Directed to Complainants at ¶ 16, Tab 10. There is no evidence that Duquesne Light's smart meters have been hacked. Id.

D. Duquesne Light installs its meters in a safe manner.

Duquesne Light has not installed a smart meter at Complainants' residence. Complainants are not certified electricians. Id. at ¶¶ 24-25. Complainants have never installed, or participated in the installation of, a Duquesne Light smart meter at a residential or commercial structure. Id. at ¶¶ 4, 6. Michele Hriadil has never witnessed the installation of Duquesne Light's smart meters. Id. at ¶ 10. Francis Hriadil observed the installation of Duquesne Light's

smart meters once when they were installed at other residences in his neighborhood. Id. at ¶ 8. He believes they are exchanged too quickly by non-electricians who do not check the condition of the customer's electrical system, wiring, and meter box. Response to Respondent's First Set of Discovery Requests Directed to Complainants at ¶ 7, Tab 9. Complainants cite no regulation or industry standard suggesting that such practices are impermissible or unsafe.

E. Complainants have not offered any medical evidence that they will suffer any adverse health effects if Duquesne Light installs a smart meter at their property.

Michele Hriadil acknowledges CONFIDENTIAL HEALTH INFORMATION
REDACTED

Response to Respondent's First Set of Discovery Requests Directed to Complainants at ¶¶ 1-2, Tab 9; Confidential Medical/Health Documents in Response to Respondent's Discovery Requests Directed to Complainants at p. 3, Tab 12. Francis Hriadil stated

CONFIDENTIAL HEALTH INFORMATION REDACTED . Response to Respondent's First Set of Discovery Requests Directed to Complainants at ¶¶ 3-4, Tab 9.

Complainants, however, are not doctors or medical professionals (See Response to Respondent's Second Set of Discovery Requests Directed to Complainants at ¶¶ 16-21, Tab 10), and Dr. David Carpenter -- who Complainants intend to call to testify at trial on medical issues -- makes no claim in his purported expert report that Francis Hriadil has any medical condition that would be adversely affected by a smart meter. Letter from Dr. David O. Carpenter Dated October 22, 2017, Tab 11. In fact, Dr. Carpenter's correspondence does not reference Francis or Michele Hriadil at all. Id. Furthermore, the few pages of medical records that Francis Hriadil produced in discovery do not state that the installation of a smart meter at his residence would aggravate any of his symptoms or negatively affect his health. See

Confidential Medical/Health Documents in Response to Respondent's Discovery Requests Directed to Complainants, Tab 12.⁷

III. SUMMARY JUDGMENT STANDARD

The summary judgment process challenges the sufficiency of the evidence that the non-moving party has to support its claim. Scott Luellen v. Maroadi Transfer & Storage, Inc., C-2016-2539599, 2017 WL 876281, at *5 (Pa. P.U.C. Feb. 6, 2017) (Haas, ALJ). It saves judicial resources by avoiding a hearing when no factual dispute exists. 66 Pa. C.S. § 703(a); Lehigh Valley Power Comm. v. Pa. Pub. Util. Comm'n., 563 A.2d 557, 564 (Pa. Cmwlth. 1989) (a hearing is necessary only to resolve disputed questions of fact and is not required to decide questions of law, policy, or discretion).

Under 52 Pa. Code § 5.102(c), the Commission must grant a motion for summary judgment if the applicable pleadings, depositions, answers to interrogatories and admissions, and affidavits show that there is no genuine issue as to a material fact and that the moving party is entitled to a judgment as a matter of law. Further, the Commission has interpreted its summary judgment rules in conformity with the Pennsylvania Rule of Civil Procedure 1035 (now Rule 1035.1). Centre Park Historic District, Inc. v. UGI Utilities, Inc. – Gas Div. City of Reading, Docket No. C-2015-2516051, 2017 WL 4119754, at *4 (Pa. P.U.C. Aug. 28, 2017) (Long, ALJ). Under this rule, summary judgment should be granted if, after the completion of discovery, the evidentiary record (1) shows the material facts are undisputed, or (2) contains insufficient evidence of facts to make out a *prima facie* cause of action. Pa.R.C.P. 1035; McCarthy v. Dan Depore & Sons Co., Inc., 724 A.2d 938, 940 (Pa. Super. Ct. 1998). Both alternatives are present here.

⁷ The parties entered into a confidentiality agreement to protect Complainants' health information. Duquesne Light has therefore redacted Complainants' health information from this Brief. Duquesne Light has not produced the parties' confidentiality agreement because it is irrelevant to the merits of its Motion for Summary Judgment. Duquesne Light can produce the agreement if the Commission requests it.

IV. LAW & ARGUMENT

Duquesne Light's Motion for Summary Judgment should be granted because the evidentiary record establishes that Duquesne Light's smart meters are safe and reliable, and contains no evidence that Duquesne Light has violated the Code, an associated regulation, or a tariff provision.

A. Installing a smart meter at Complainants' residence does not violate the Code.

It is important to note at the outset that Act 129 requires that Duquesne Light install smart meters across its service territory. 66 Pa. C.S. § 2807(f)(2). Act 129 does not contain an "opt out" provision; in other words, Duquesne Light is required by law install a smart meter at each service address in its territory, including Complainants' residence. See Evans, 2017 WL 6766256 at *4. That is significant because it demonstrates that Complainants must show more than that Duquesne Light intends to install a smart meter at their residence to prevail in this case. Since Duquesne Light has not yet installed a smart meter at Complainants' residence, they must show that the manner in which Duquesne Light is deploying its smart meter at Complainants' residence violates the Code, an associated regulation, or the tariff. 66 Pa. C.S. § 701.⁸

Section 1501 of the Code generally requires that a utility maintain safe, adequate, and reasonable service and facilities. 66 Pa. C.S. § 1501. Complainants identified no other Code or tariff provision they contend Duquesne Light violated. As explained below, there is insufficient evidence in the record through which Complainants could demonstrate that Duquesne Light has failed to provide safe, adequate, or reasonable service to Complainants. The undisputed facts actually establish otherwise.

⁸ As the party seeking relief from the Commission, Complainants have the burden of proof. 66 Pa. C.S. § 332(a). To prevail, Complainants must show by a preponderance of the evidence that Duquesne Light is responsible or accountable for the problem described in the complaint. Moore v. Nat'l Fuel Gas Distribution, Docket No. C-2014-2458555, 2015 WL 4464734, at *3 (Pa. P.U.C. May 11, 2015) (Colwell, ALJ).

- B. It is uncontested that Duquesne Light's smart meters comply with all applicable industry and regulatory standards.

Duquesne Light's smart meters comply with all applicable standards for RF emission, and there is no evidence to the contrary. The meters operate on a low duty cycle, meaning they rarely transmit RF. The undisputed evidence shows that Duquesne Light's LAN Radio only transmits from .02 to .058 percent of the day, and the Zigbee Radio transmits between .01 to .15 percent of the day. Respondent's Third Supplemental Responses to Set #1 of Discovery Requests at ¶ 1(f), Tab 7. At the average duty cycle for a typical Duquesne Light smart meter, which is what will be installed at Complainants' residence, the RF exposure for the LAN Radio (which is the higher-powered of the two radios in the meter) at one yard directly in front of the smart meter in an outdoor setting is just 0.0029 percent of the FCC limit, and at one yard indoors behind the meter the exposure is just 0.00013 percent of the FCC limit. Affidavit of Benjamin Cotts, PhD., P.E. in Support of Motion for Summary Judgment at ¶¶ 9-11, Tab 8. That is clear evidence that it is reasonable for Duquesne Light to install one of its smart meters at Complainants' residence. Unsurprisingly, the Commission has already held that it is reasonable to install smart meters that comply with the FCC limits. Laura Sunstein Murphy v. PECO Energy Company, C-2015-2475726, 2018 WL 1745254, at *21 (Pa. P.U.C. Feb. 21, 2018) (Heep, ALJ).⁹

⁹ The Commission has repeatedly held that a complainant cannot meet his or her burden of proof simply by proclaiming that a smart meter emits unsafe amounts of RF without refuting evidence that the meter's RF emissions comply with FCC safety standards. See, e.g., Frompovich v. PECO Energy Co., Docket No. C-2015-2474602, 2017 WL 2406620, at *10-14 (Pa. P.U.C. May 11, 2017) (dismissing Formal Complaint, in part, because complainant offered no evidence other than her opinion to refute the utility's expert testimony, which established that RF emissions from its smart meters complied with FCC exposure limits.); Ottaviano v. PECO Energy Co., Docket No. F-2016-2542081, 2018 WL 937069, at *9-10 (Pa. P.U.C. Jan. 17, 2018) (dismissing Formal Complaint because, among other reasons, the complainant presented no evidence to refute expert testimony showing that RF exposure from the utility's smart meters was well below FCC limits). While the Frompovich and Ottaviano cases went to hearing, the respondent did not move for summary judgment in those cases. Therefore, while inapposite to this case's procedural posture, the ultimate holdings of those cases -- both of which were affirmed by the Commission -- support the dismissal of Complainants' Formal Complaint.

The undisputed evidence also establishes that Duquesne Light's smart meters have been approved for public use by the relevant regulatory agencies and industry groups. UL approved Duquesne Light's smart meters for public use, the Company's smart meters satisfy ANSI's standards, and the Commission has approved Duquesne Light's smart meter procurement and installation plan. These certifications are undisputed and demonstrate that Duquesne Light's smart meters are safe for public use. Respondent's Responses to Complainants' Set #1 Discovery Requests at ¶¶ 1(o), 1(t)(ii), 3(b), 6(i), Tab 4; Respondent's Third Supplemental Responses to Set #1 of Discovery Requests at ¶ 1(t), Tab 7; Opinion and Order, May 6, 2013, Tab 3.

C. Complainants offered no evidence suggesting that Duquesne Light's smart meters or Duquesne Light's smart meter program is unsafe, unreasonable, or inadequate.

The foregoing facts are uncontradicted, and Complainants have otherwise produced no evidence from which they could carry their burden of proof that Duquesne Light violated the Code, a Commission regulation or order, or its tariff. Complainants do not contend that Duquesne Light's smart meters violate any particular regulatory or industry standard. Complainants offered no expert reports or other evidence indicating that Duquesne Light's smart meters are unsafe, unreasonable, or inadequate. Instead, Complainants have made a series of flawed arguments, unsupported by evidence relating to Duquesne Light's smart meter program, which is insufficient to evade summary judgment as a matter of law.

1. *Complainants' personal belief that smart meters are unsafe, and the arguments that stem from those beliefs, do not constitute evidence through which they can sustain their burden of proof.*

Complainants made various arguments throughout discovery about the dangers they believe come with the use of smart meters. But those beliefs, and Complainants' arguments that flow from them, are not evidence from which they can carry their burden of proof. As an initial matter, Complainants have no education or professional experience relating to smart meters or radio frequency or low frequency radiation (see Response to Respondent's Second

Set of Discovery Requests Directed to Complainants at ¶¶ 20, 22, Tab 10), and their personal opinions about the supposed dangers of smart meters do not constitute evidence under Pennsylvania law and Commission precedent. See PA Bureau of Corrections v. City of Pittsburgh, 532 A.2d 12, 14 (Pa. 1987) ("bald assertions, personal opinions, and perceptions" did not constitute evidence). As one Administrative Law Judge recently explained:

These assertions, regardless of how honest or strong, cannot form the basis of a finding in his favor. Assertions, personal opinions or perceptions do not constitute factual evidence. Even pro se complainants must provide relevant and necessary information. The Complainant in this case proceeded pro se by choice and bore the risk of doing so.

Matt Bernardini v. Penn. Electric Co., C-2017-2605686, 2017 WL 6508766, at *6 (Pa. P.U.C. Nov. 7, 2017) (Salapa, ALJ) (internal citations omitted); see also, Tina Featherston v. Penn. Power Co., F-2016-2576019, 2017 WL 6508784, at *8 (Pa. P.U.C. Nov. 7, 2017) (Calvelli, ALJ) ("Regardless of how earnestly Complainant believes the Complaint allegations to be true, personal opinions or perceptions do not constitute substantial evidence sufficient to permit him to sustain his burden of proof") (citing authority).

It should also be noted that Complainants cannot offer expert opinions in their own right because they do not qualify as experts,¹⁰ have produced no expert report, and even if their

¹⁰ Under Pennsylvania law, a person qualifies as an expert witness if, through education, occupation or practical experience, the witness has a reasonable pretension to specialized knowledge on the matter at issue. Ruzzi v. Butler Petroleum Co., 588 A.2d 1, 10 (Pa. 1991); Kursis v. Baldwin-Lima-Hamilton Corp., 319 A.2d 914, 924 (Pa. 1974). An expert witness may testify about in the form of an opinion about scientific or technical matters. Pa.R.E. 702. A lay witness, by contrast, cannot offer opinion testimony about scientific, technical, or other specialized knowledge. Pa.R.E. 701. Complainants appear to believe that they can testify as expert witnesses because they have a background in mechanical engineering (Francis Hriadil) or computer science (Michele Hriadil). Pennsylvania courts, however, repeatedly have held that a witness does not qualify as an expert merely because they possess general knowledge about a topic. For instance, courts have found that although a doctor has a general knowledge of the human body, an ophthalmologist is not qualified to testify about the causes and treatment of heart disease. Kovalev v. Sowell, 839 A.2d 359, 364 (Pa. Super. Ct. 2003); see also Dierolf v. Slade, 581 A.2d 649 (Pa. Super. Ct. 1990) (upholding trial court's refusal to qualify orthodontist as an expert witness on oral surgery); Yacoub v. Lehigh Valley Med. Associates, 805 A.2d 579 (Pa. Super. Ct. 2002) (neurosurgeon not qualified to give opinion on internal medicine or nursing). As a result, two individuals without experience or education in smart meters cannot testify as expert witnesses about a smart meter program.

discovery responses or prior pleadings were considered to be expert reports (and they should not be), as explained above, Complainants do not identify anything about Duquesne Light's smart meter program that violates the Code.

For example, the support Complainants offer for their argument that Duquesne Light's smart meters will endanger their health is that the meters use pulsed transmissions¹¹ and an AC/DC circuit to draw power from the homeowners' interior electrical wiring.¹² Response to Respondent's First Set of Discovery Requests Directed to Complainants at ¶¶ 1, 3, Tab 9. But that is merely a description of how smart meters work. In other words, Complainants make the circular argument that Duquesne Light's smart meters are unsafe because they operate like a smart meter. But since installing a smart meter is not a violation of the Code, Complainants must prove more than that; they must prove that there is something about Duquesne Light's smart meter program in particular that violates the Code. Complainants, however, identified no legal or industry standard that there is something inadequate or unsafe about the manner in which Duquesne Light's smart meters operate.

In discovery, Complainants offered arguments based on their personal beliefs in challenging Duquesne Light's smart meter program rather than evidence. Many of their arguments assume what Complainants have failed to prove (that Duquesne Light's smart meters are dangerous) and then argue that Duquesne Light should have taken additional steps to minimize the risks Complainants believe are posed by smart meters. In other words,

¹¹ For example, Complainants state that the SK9AMI7 smart meter produces 1,000s - 10,000s of pulsed transmission on a regular basis. Response to Respondents' First Set of Discovery Requests at ¶¶ 1,3, Tab 9. But Complainants do not, and cannot, argue that such an operational style violates any recognized legal or industry standard. Nor do Complainants offer any evidence disputing the very low duty cycles provided by Duquesne Light discussed above.

¹² Duquesne Light does not dispute that its smart meters use an AC/DC switch (see Respondent's Responses to Set #1 of Discovery Requests at ¶ 1(t), Tab 4), but that does not mean the meter is unsafe. Additionally, the undisputed evidence is that the voltage and harmonics introduced by the smart meter are not different than the meter currently at use at Complainants' property, which Complainants want to keep. Respondent's Third Supplemental Responses to Set #1 Discovery Requests at ¶ 1(t), Tab 7.

Complainants argue that Duquesne Light is acting unsafely by not reducing a risk Complainants have not shown to exist. For example, Complainants point out that Duquesne Light does not take into account the “uncertainties about the existing RF environment that exist at a location” or warn about fires or overheating. Response to Respondent’s First Set of Discovery Requests Directed to Complainants at ¶ 5, Tab 9. But those arguments make sense only if Duquesne Light’s smart meter poses some appreciable risk to the existing RF environment or of overheating. As established above, the contribution of Duquesne Light’s smart meter to the RF environment is negligible, smaller even than the RF devices already in Complainants’ home. Affidavit of Benjamin Cotts, PhD., P.E. in Support of Motion for Summary Judgment at ¶¶ 9-12, Tab 8. And there is no evidence suggesting that Duquesne Light’s smart meters are prone to overheating or have caught fire; the undisputed evidence actually shows the contrary. Response to Respondent’s Second Set of Discovery Requests Directed to Complainants at ¶ 14, Tab 10.

Along similar lines, Complainants argue that Duquesne Light’s manner of installing smart meters is unsafe because the Company does not use certified electricians and because Francis Hriadil, based on a few installations he watched in his neighborhood, believes that the Company values speed over safety. See Response to Respondent’s First Set of Discovery Requests Directed to Complainants at ¶ 7, Tab 9. But Complainants cite no legal or industry standard suggesting that a certified electrician must install a smart meter in order for the installation to be safe. Furthermore, neither Francis nor Michele Hriadil are certified electricians or have ever installed a smart meter, so their personal perception about the process by which Duquesne Light installs a smart meter is not evidence through which they can carry their burden. Id. Additionally, since Duquesne Light has not installed a smart meter at Complainants’ residence, Complainants are litigating this question in the air based on pure speculation as to how a meter might eventually be installed at their property. A party cannot evade summary judgment with speculation, however. See InfoSAGE, Inc. v. Mellon Ventures, L.P., 896 A.2d 616, 639 (Pa.

Super. Ct. 2006) (affirming grant of summary judgment because evidence adduced by plaintiff to support claims was based on speculation and conjecture); Fisher v. Sexauer, 53 A.3d 771, 779-80 (Pa. Super. Ct. 2012) (affirming grant of summary judgment because plaintiff's claims relied on speculation and guesswork).

Complainants also make a number of generic claims that smart meter technology is immature, is composed of fragile materials that can overheat, and could potentially be hacked. Response to Respondents' First Set of Discovery Requests Directed to Complainants at ¶ 5, Tab 9. But, as noted above, Complainants do not contest that Duquesne Light's smart meters are FCC and ANSI compliant or that they have been tested and approved by UL. Their claims thus amount to nothing more than argument and speculation, which are insufficient to survive summary judgment as a matter of law.

Similarly, Complainants offer no evidence that Duquesne Light's smart meters actually caused a fire or have been hacked. Response to Respondent's Second Set of Discovery Requests Directed to Complainants at ¶¶ 14, 16, Tab 10. Instead, with respect to Duquesne Light's cyber-security protections, Complainants merely allege that Duquesne Light's security features are "no better than" other security systems used throughout the country and, therefore, are vulnerable. Id. at ¶ 16. Complainants argue, in essence, that Duquesne Light must install a smart meter that cannot possibly be hacked; otherwise, the Company is failing to provide proper service. But that is asking to Duquesne Light to provide perfect service. Duquesne Light, however, is not required by the Code to provide perfect or flawless service; rather, it must provide safe, adequate, and reasonable service. See Kremer v. PPL Elec. Utilities Corp., F-2016-2523765, 2016 WL 4162588, at *3 (July 5, 2016) (Long, ALJ) (utility is not required to provide perfect service or the best possible service); Iro-Nwokeukwu v. Phila. Gas Works, C-2011-2247079, 2015 WL 1291552, at *1 (Jan. 20, 2015) (Johnson, ALJ) (Section 1501 does not mandate perfect service nor must a public utility provide the best possible service).

Complainants provide no evidence that Duquesne Light has failed to provide reasonable and adequate cybersecurity measures for its smart meters. Complainants have offered no expert or documentary evidence to establish that Duquesne Light's smart meters lack adequate cybersecurity protections or violate some sort of recognized standard.¹³

In short, Complainants' personal perceptions and beliefs, regardless of how sincerely or strongly they hold them, are not evidence that Duquesne Light violated the Code, a Commission regulation, or the Company's tariff. Complainants failed to produce any evidence to support their claims, even though Duquesne Light repeatedly requested during discovery that Complainants produce evidence demonstrating that the Company's smart meters violate some applicable law, regulation, or safety standard. They produced no such evidence and failed to challenge other evidence showing that Duquesne Light's smart meters are safe.

2. *The publications Complainants produced throughout these proceedings are irrelevant because they do not relate to Duquesne Light's smart meter program and are hearsay, which cannot sustain Complainants' burden of proof.*

While Complainants identified various publications they contend support their argument that smart meters are dangerous and subject to hacking, those publications do not relate to Duquesne Light or its smart meter program and, therefore, cannot constitute evidence that Duquesne Light has done something in violation of the Code.¹⁴ Moreover, the publications are

¹³ To the extent that Complainants suggest that Michele Hriadil qualifies as an expert on cybersecurity issues because she works in the computer science field (see Response to Respondent's Second Set of Discovery Requests Directed to Complainants at ¶ 25, Tab 10) and (Response to Respondent's First Set of Discovery Requests Directed to Complainants at ¶¶ 18-20, Tab 9), such suggestion must be rejected. As noted above, it is well-established that a witness does not qualify as an expert merely because they possess general knowledge about a topic. See Kovalev, 839 A.2d at 364; Dierolf, 581 A.2d at 651; Yacoub, 805 A.2d at 591-92. There is no evidence in the record that Michele Hriadil has any specialized knowledge pertaining to cybersecurity matters, especially those relating to Duquesne Light's smart meters. And even if she did (which she has not established), she offered no expert report detailing any inadequacies in Duquesne Light's cybersecurity protections.

¹⁴ Rather, the publications echo Complainants' general concerns about smart meter technology, which were clearly rejected by the legislature and the Commission given Act 129's universal mandate.

hearsay,¹⁵ which, under well-established Commission precedent is insufficient to support a finding in an administrative hearing absent corroborative evidence. Anderson v. Pa. Department of Public Welfare, 468 A.2d 1167, 1169 n.5 (Pa. Cmwlth. 1983); Larson v. PECO Energy Co., C-2014-2451754, 2015 WL 3763836, at *1 (Pa. P.U.C. June 11, 2015); Karen Pace v. PECO Energy Co., Docket No. F-2016-2538084, 2016 WL 7336588, at *8 (Pa. P.U.C. Nov. 16, 2016) (a finding of fact based solely on hearsay will not stand). As noted at length throughout this Brief, there is no such corroborative evidence here.

3. *Dr. Carpenter, whose theories about RF emissions have already been rejected by the Commission, does not claim that Duquesne Light's smart meters are unsafe or violate any applicable standard or that Complainants would suffer adverse health effects from the installation of a smart meter.*

Complainants intend to call Dr. David Carpenter to testify at hearing about the contents of the letter he mailed to the Commission on Complainants' behalf. Letter from Dr. David O. Carpenter Dated October 22, 2017, Tab 11. But that letter merely echoes Complainants' concerns about smart meters in general. Dr. Carpenter did not even reference Duquesne Light (or, as discussed infra, Complainants), let alone offer any opinion that the Company's smart meter program is in some way unsafe, unreasonable, or inadequate. Id. Since Dr. Carpenter's report is not specific to Duquesne Light, it obviously cannot constitute evidence that Duquesne Light violated the Code.

Furthermore, the Commission in the Susquehanna-Roseland transmission line sitting case (Docket No. A-2009-2082652), explicitly found that Dr. Carpenter's scientific approach and opinions about the dangers of RF exposure are deeply flawed:

¹⁵ Internet articles and stories like those produced by Complainants in discovery are "classic examples" of hearsay and are inadmissible. See Larson, 2015 WL at *1 (newspaper articles and website printouts are generally inadmissible at a hearing and, even if admitted, would be insufficient to support a finding of fact unless corroborated by competent evidence); Raintree Homes, Inc. v. Birkbeck, No. 2643 EDA 2011, 2013 WL 5234255, at *11 (Pa. Super. Ct. Aug. 7, 2013) (internet articles are classic example of hearsay).

[The ALJ found that] [t]he record evidence shows that Dr. Carpenter's opinions were flawed and were not based on a reliable and objective review of the scientific research. . . . In light of this overwhelming evidence, there is no good basis to give **any weight** to Dr. Carpenter's extreme views.

We agree with the ALJ regarding the testimony of the SCECA witness Dr. Carpenter. When the record is viewed in its entirety it is clear that Dr. Carpenter's testimony is his largely unsubstantiated (albeit heartfelt) opinion that EMF poses a health threat at any level.

(Jan. 14, 2010 Order, pp. 111-14) (emphasis added).

Like Complainants, Dr. Carpenter merely distrusts smart meters and therefore assumes that any utility that uses them is acting unsafely. But, as noted throughout this Brief, using smart meters is required by the Code, not a violation of it. Dr. Carpenter's letter, therefore, is not evidence that supports Complainants' claims and is insufficient to allow Complainants' to evade summary judgment.

D. Complainants have offered no medical evidence demonstrating that the installation of a smart meter at their home will cause them to suffer adverse health effects.

Complainants have presented no medical evidence that their health would be negatively affected by the installation of Duquesne Light's smart meters at their residence. Complainants do not claim to be doctors or medical professionals. Michele Hriadil does not claim to suffer any health condition that makes her uniquely susceptible to RF exposure. Response to Respondent's First Set of Discovery Requests Directed to Complainants at ¶¶ 1-2, Tab 9; Complainants' Medical Records at p. 3, Tab 12. Francis Hriadil claims

CONFIDENTIAL HEALTH INFORMATION REDACTED, but he is not a doctor and could not offer evidence to that effect. See Cominsky v. Donovan, 846 A.2d 1256, 1259 (Pa. Super. Ct. 2004) (a lay witness may not testify about the existence or non-existence of a disease because such diagnosis requires medical training). Moreover, just as he did not reference Duquesne Light in his letter to the Commission, Dr. Carpenter also did not reference Complainants or any of Francis Hriadil's medical conditions, let alone offer an opinion that either

Complainant suffers from a condition that would be exacerbated by the installation of a smart meter. Finally, the few pages of medical records Francis Hriadil has produced contain no suggestion that he would be adversely affected by the installation of a smart meter. See Complainants' Medical Records, Tab 12.

In short, even after discovery, Complainants have produced no actual evidence that they have a condition that would be exacerbated by the installation of a Duquesne Light smart meter. As such, their health effects claims fail as a matter of law. See, e.g., Paul v. PECO Energy Co., Docket No. C-2015-2475355, 2017 WL 2861405 (Pa. P.U.C. June 19, 2017) (Heep, ALJ) (denying complaint where "there was no showing that the concerns that [Complainant and her expert] have about Smart Meters in general pertain to the Smart Meters utilized by PECO in particular."); Ottaviano, 2018 WL 937069, at *11 (denying health effects claim where complainant was concerned about that smart meters would cause health problems based on articles he read but offered no evidence in support of his belief). Those decisions demonstrate that a hearing here would be fruitless since Complainants have no medical evidence they could offer at a hearing from which they could sustain their burden of proof.¹⁶

- E. The Commonwealth Court's *Romeo* decision does not allow Complainants to evade summary judgment where they marshaled no evidence in support of their claims.

Finally, it bears noting that the Commonwealth Court's decision in Romeo v. Pa. Public Util. Comm'n, 154 A.3d 422 (Pa. Commw. Ct. 2017) does not allow Complainants to survive summary judgment where they garnered no evidence in discovery to support their claims. In Romeo, the Commonwealth Court simply held that a complaint could survive the pleadings stage if the complainant alleged that the installation of a smart meter at their property could harm because the complainants could conceivably marshal evidence in discovery to carry their

¹⁶ Unlike this case, the respondents in Paul and Ottaviano did not move for summary judgment. The Commission thus did not have the opportunity to address whether those cases should have been dismissed at the summary judgment stage.

burden of proof. Here, however, Complainants received voluminous discovery, but failed to produce any evidence suggesting that Duquesne Light violated the Code, a Commission Order or Regulation, or its tariff.

Romeo did not relieve Complainants of their obligation to obtain the evidence necessary to carry their burden of proof, it did not create an opt out provision in Act 129, nor did it reverse well-established Commission precedent that a hearing is not required where it would be fruitless. See, e.g., 66 Pa. C.S. § 703(b) (the Commission "may dismiss any complaint without a hearing if, in its opinion, a hearing is not necessary in the public interest"); Kish v. West Penn Power Co., Docket No. F-2017-2619183, 2017 WL 6018113 (Pa. P.U.C. November 7, 2017) (Cheskis, ALJ) (granting respondent's dispositive motion where there was "no genuine issue as to a material fact and [the respondent] is entitled to judgment as a matter of law because a hearing would be a fruitless exercise since the record shows no facts are at issue and the law is clear"). Since there is no dispute about the material facts relating to Duquesne Light's smart meter program, and because the law is clear that Complainants cannot prevail absent evidence that Duquesne Light violated the Code, this case is appropriately dismissed at summary judgment. A hearing would be fruitless.

V. CONCLUSION

It is clear that the answer to the question presented by this Motion -- whether Complainants can survive summary judgment where they object to smart meter technology but do not produce evidence showing that Duquesne Light's smart meter practices are unsafe or unreasonable -- is no. Complainants are required by law to produced sufficient evidence to establish a *prima facie* case, and they have simply produced no such evidence here. It is undisputed that Duquesne Light's smart meters comply with all applicable industry standards. Complainants offer no evidence or expert opinion suggesting that Duquesne Light's smart meter program is unsafe, unreasonable, or inadequate. Nor have Complainants offered any medical

evidence or opinion that they will be adversely affected by the installation of one of Duquesne Light's smart meters at their property. Accordingly, Duquesne Light's Motion for Summary Judgment should be granted and the Formal Complaint dismissed in its entirety with prejudice.

Alternatively, if the Motion for Summary Judgment is not granted in full, Duquesne Light respectfully requests that the Presiding Administrative Law Judge grant the Company's Motion for Summary Judgment and dismiss all parts of Complainants' claims found to be legally deficient so that the hearing is appropriately narrowed to only to the cognizable, disputed issues (of which Duquesne Light submits there are none, making dismissal in full appropriate).

Respectfully submitted,

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

MICHELE HRIADIL and
FRANCIS HRIADIL,

Complainants,

vs.

No: C-2016-2571726

DUQUESNE LIGHT COMPANY,

Respondent.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing Brief in Support of Motion for Summary Judgment and accompanying Appendix to Brief upon the participant listed below in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant):

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