[J-77A-2021, J-77B-2021, J-77C-2021, J-77D-2021, J-77E-2021, J-77F-2021, J-77G-2021, J-77H-2021, J-77I-2021, J-77J-2021, J-77K-2021 and J-77L-2021]
[MO:Donohue, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

MARIA POVACZ,	:	No. 34 MAP 2021
	:	
Appellee	:	Appeal from the Order of the
	:	Commonwealth Court at No. 492 CD
	:	2019 dated October 8, 2020 which
v.	:	Affirmed/Reversed/Remanded the
	:	Order of the PUC at No. C-2015-
	:	2475023 dated March 28, 2019.
PENNSYLVANIA PUBLIC UTILITY	:	
COMMISSION,	:	ARGUED: December 7, 2021
	:	
Appellant	:	
LAURA SUNSTEIN MURPHY,	:	No. 35 MAP 2021
	:	
Appellee	:	Appeal from the Order of the
	:	Commonwealth Court at No. 606 CD
	:	2019 dated October 8, 2020 which
v.	:	Affirmed/Reversed/Remanded the
	:	Order of the PUC at No. C-2015-
	:	2475726 dated May 9, 2019.
PENNSYLVANIA PUBLIC UTILITY	:	
COMMISSION,	:	ARGUED: December 7, 2021
	:	
Appellant	:	
CYNTHIA RANDALL AND PAUL	:	No. 36 MAP 2021
ALBRECHT,	:	
	:	Appeal from the Order of the
Appellees	:	Commonwealth Court at No. 607 CD
	:	2019 dated October 8, 2020 which
	:	Affirmed/Reversed/Remanded the
v.	:	Order of the PUC at No. C-2016-
	:	2537666 dated May 9, 2019.
	:	
PENNSYLVANIA PUBLIC UTILITY	:	ARGUED: December 7, 2021
COMMISSION,	:	
	:	
Appellant	:	

MARIA POVACZ	:	No. 37 MAP 2021
	:	
	:	Appeal from the Order of the
v.	:	Commonwealth Court at No. 492 CD
	:	2019 dated October 8, 2020 which
	:	Affirmed/Reversed/Remanded the
PENNSYLVANIA PUBLIC UTILITY	:	Order of the PUC at No. C-2015-
COMMISSION	:	2475023 dated March 28, 2019.
	:	
	:	ARGUED: December 7, 2021
APPEAL OF: PECO ENERGY	:	
COMPANY	:	
LAURA SUNSTEIN MURPHY	:	No. 38 MAP 2021
	:	
	:	Appeal from the Order of the
v.	:	Commonwealth Court at No. 606 CD
	:	2019 dated October 8, 2020 which
	:	Affirmed/Reversed/Remanded the
PENNSYLVANIA PUBLIC UTILITY	:	Order of the PUC at No. C-2015-
COMMISSION	:	2475726 dated May 9, 2019.
	:	
	:	ARGUED: December 7, 2021
APPEAL OF: PECO ENERGY	:	
COMPANY	:	
CYNTHIA RANDALL AND PAUL	:	No. 39 MAP 2021
ALBRECHT	:	
	:	Appeal from the Order of the
	:	Commonwealth Court at No. 607 CD
v.	:	2019 dated October 8, 2020 which
	:	Affirmed/Reversed/Remanded the
	:	Order of the PUC at No. C-2016-
PENNSYLVANIA PUBLIC UTILITY	:	2537666 dated March 28, 2019.
COMMISSION	:	
	:	ARGUED: December 7, 2021
	:	
APPEAL OF: PECO ENERGY COMPANY	:	
MARIA POVACZ,	:	No. 40 MAP 2021
	:	
Cross Appellant	:	Appeal from the Order of the
	:	Commonwealth Court at No. 492 CD
	:	2019 dated October 8, 2020 which

v.	:	Affirmed/Reversed/Remanded the Order of the PUC at No. C-2015-2475023 dated March 28, 2019.
PENNSYLVANIA PUBLIC UTILITY COMMISSION,	:	ARGUED: December 7, 2021
Appellee	:	
LAURA SUNSTEIN MURPHY,	:	No. 41 MAP 2021
Cross Appellant	:	Appeal from the Order of the Commonwealth Court at No. 606 CD 2019 dated October 8, 2020 which
v.	:	Affirmed/Reversed/Remanded the Order of the PUC at No. C-2015-2475726 dated May 9, 2019.
PENNSYLVANIA PUBLIC UTILITY COMMISSION,	:	ARGUED: December 7, 2021
Appellee	:	
CYNTHIA RANDALL AND PAUL ALBRECHT,	:	No. 42 MAP 2021
Cross Appellants	:	Appeal from the Order of the Commonwealth Court at No. 607 CD 2019 dated October 8, 2020 which
v.	:	Affirmed/Reversed/Remanded the Order of the PUC at No. C-2016-2537666 dated May 9, 2019.
PENNSYLVANIA PUBLIC UTILITY COMMISSION,	:	ARGUED: December 7, 2021
Appellee	:	
MARIA POVACZ,	:	No. 43 MAP 2021
Cross Appellant	:	Appeal from the Order of the Commonwealth Court at No. 492 CD 2019 dated October 8, 2020 which
v.	:	Affirmed/Reversed/Remanded the Order of the PUC at No. C-2015-2475023 dated March 28, 2019.
	:	ARGUED: December 7, 2021

PENNSYLVANIA PUBLIC UTILITY COMMISSION, PECO ENERGY COMPANY	:	
LAURA SUNSTEIN MURPHY,	:	No. 44 MAP 2021
Cross Appellant	:	Appeal from the Order of the Commonwealth Court at No. 606 CD 2019 dated October 8, 2020 which Affirmed/Reversed/Remanded the Order of the PUC at No. C-2015-2475726 dated May 9, 2019.
v.	:	
PENNSYLVANIA PUBLIC UTILITY COMMISSION, PECO ENERGY COMPANY	:	ARGUED: December 7, 2021
CYNTHIA RANDALL AND PAUL ALBRECHT,	:	No. 45 MAP 2021
Cross Appellants	:	Appeal from the Order of the Commonwealth Court at No. 607 CD 2019 dated October 8, 2020 which Affirmed/Reversed/Remanded the Order of the PUC at No. C-2016-2537666 dated May 9, 2019.
v.	:	
PENNSYLVANIA PUBLIC UTILITY COMMISSION, PECO ENERGY COMPANY	:	ARGUED: December 7, 2021

CONCURRING AND DISSENTING OPINION

JUSTICE DOUGHERTY **DECIDED: August 16, 2022**

I join the Majority's analysis and conclusion that Act 129 mandates the system-wide installation of smart meters. As the Majority correctly notes, the "plain language" of 66 Pa.C.S. §2807(f)(2) dictates this result. Majority Opinion at 35. Section 2807(f)(2) provides: "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). The "shall furnish" language requires electric companies to provide smart meters to all customers. *See Lorino v. Workers' Compensation Appeal Board*, 266 A.3d 487, 493 (Pa. 2021) ("The term 'shall' establishes a mandatory duty[.]"). And subsections (i) through (iii) specify the timing of the mandatory, system-wide installation, *i.e.*, smart meters are to be installed when there are customer requests for them, when there is new construction, or when existing legacy meters reach the end of their useful lives up to fifteen years.

I also join the Majority Opinion insofar as it determines that, although electric customers are not entitled to opt out of having smart meters installed at their homes, individual customers may be able to demonstrate their entitlement to accommodations under 66 Pa.C.S. §1501 ("Every public utility shall furnish and maintain adequate, efficient, safe, and reasonable service and facilities, and shall make all such repairs, changes, alterations, substitutions, extensions, and improvements in or to such service and facilities as shall be necessary or proper for the accommodation, convenience, and safety of its patrons, employees, and the public."). While Act 129 mandated system-wide installation of smart meters, it did not nullify Section 1501.

I respectfully disagree, however, with the Majority's ruling regarding a customer's burden to demonstrate electric service is unsafe or unreasonable under Section 1501. The Majority holds a customer must establish a "conclusive causal connection" between the service and adverse human health effects. Majority Opinion at 64 ("We affirm the Commonwealth Court's conclusion that the PUC did not err in finding that Customers failed to meet their burden of proving, with a preponderance of the evidence, a conclusive

causal connection between RF emissions from smart meters and adverse human health effects."); *see also id.* at 50 ("[U]se of the evidentiary standard of 'conclusive causal connection' to assess the evidence is correct."). Yet, as the Majority itself correctly notes, "the burden of proof in PUC cases is preponderance of the evidence[.]" *Id.* at 47; *see also Popowsky v. Pennsylvania Public Utility Comm'n*, 937 A.2d 1040, 1057 (Pa. 2007) ("[T]he PUC properly applies a preponderance of the evidence standard to make factually-based determinations[.]"); *Samuel J. Lansberry, Inc. v. Pennsylvania Public Utility Comm'n*, 578 A.2d 600, 602 (Pa. Cmwlth. 1990), *alloc. denied*, 602 A.2d 863 (Pa. 1992) ("It is clear . . . that the degree of proof required to establish a case before an administrative tribunal is the same degree of proof used in most civil proceedings, *i.e.*, a preponderance of the evidence."). "[P]roof by 'a preponderance of the evidence' is the lowest degree of proof recognized in the administration of justice[.]" *Se-Ling Hosiery v. Margulies*, 70 A.2d 854, 856 (Pa. 1950); *accord Commonwealth v. Ehredt*, 401 A.2d 358, 360 (Pa. 1979) ("[T]he preponderance standard is the least burdensome standard of proof known to the law[.]"). "This Court has characterized a preponderance of the evidence as tantamount to a 'more likely than not' inquiry[.]" *Popowsky*, 937 A.2d at 1055 n.18.

The meaning of "conclusive," on the other hand, is "[s]erving to put an end to doubt, question, or uncertainty; decisive[.]" Conclusive, The American Heritage Dictionary of the English Language (5th ed. 2022) (accessed at https://ahdictionary.com/word/search.html?q=conclusive [last visited August 10, 2022]). A party's evidence does not have to remove all doubt, question, and uncertainty in order to make a fact or legal conclusion more likely than not. In other words, conclusive proof is not required under the preponderance of the evidence standard. *See Barrett v. Otis Elevator Co.*, 246 A.2d 668,

673 (Pa. 1968) ("If for no other reason than the quantity of evidence, it certainly is more difficult to prove [c]onclusively that no jobs are available than to prove [c]onclusively that a job is available, but conclusive proof is not required on this issue. Given that a preponderance of the evidence is all that is required, the proof of a negative does not appear so difficult that the burden of proof should be placed on the party who wishes to establish the affirmative."); *see also Moberly ex rel. Moberly v. Secretary of Health and Human Services*, 592 F.3d 1315, 1325 (Fed. Cir. 2010) ("To be sure, it is not necessary for a Vaccine Act petitioner to point to conclusive evidence in the medical literature linking the DPT vaccine to a child's injury . . . , as the legal standard is a preponderance of the evidence[.]") (internal quotation and citations omitted); *Hennessy v. Schmidt*, 521 F.2d 1282, 1285 (7th Cir. 1975) ("At the outset, it is manifest from a reading of the conclusion of law numbered 6 that the District Court ignored the proper and valid rule or test for viewing and weighing Hennessy's evidence and making findings of fact in accordance with the 'preponderance of the evidence' as recited in conclusion of law numbered 3, and erroneously viewed and weighed Hennessy's evidence and made its finding of fact under the non-applicable stricter rule or test of conclusive proof. The District Court by applying the stricter improper conclusive proof rule or test in this case placed a higher burden of proof upon Hennessy than is lawfully required."); *City of Sunland Park v. Santa Teresa Concerned Citizens Ass'n, Inc.*, 792 P.2d 1138, 1141 (N.M. 1990) ("Whatever 'conclusive proof' means, it obviously is a much higher standard of proof than 'a preponderance of the evidence.'"); *Edwards v. Shreveport Creosoting Co.*, 21 So.2d 878, 879-80 (La. 1945) ("The law is clear that the plaintiff in a compensation case bears the burden of proving his case with reasonable certainty, by a preponderance of the evidence. He is not obliged to

furnish conclusive proof."); *Matter of N.L.B.*, 1993 WL 13965712 at *3 (Kan. App. Feb. 26, 1993) (*per curiam*) (unpublished memorandum opinion) ("Because paternity actions are civil in nature, the burden of proof is by a preponderance of the evidence and conclusive proof is not required.").

The Majority notes "the PUC has used the evidentiary standard of 'conclusive causal connection' for scientific evidence proffered to establish that RF emissions result in adverse human health effects for almost three decades[,]" beginning with *Letter of Notification of Philadelphia Electric Company Relative to the Reconstructing and Rebuilding of the Existing 138kV Line to Operate as the Woodbourne-Heaton 230 kV Line in Montgomery and Bucks Counties*, Docket No. A-110550F055, 1993 WL 855896 (Nov. 12, 1993) (*Woodbourne-Heaton II*). Majority Opinion at 45-46. However, as customers Cynthia Randall and Paul Albrecht persuasively argue, "stating that a standard of proof has been applied by PUC for a lengthy period of time says nothing about whether that standard is **correct** and legally defensible." Reply Brief of Appellees Cynthia Randall and Paul Albrecht at 8-9 (emphasis in original). The PUC in *Woodbourne-Heaton II* did not cite any legal authority for a conclusive causal connection standard. Moreover, apart from the Commonwealth Court's decision below, the Majority does not identify any appellate court decision approving this test. Indeed, Randall and Albrecht represent that, to their knowledge, there is no such precedent. *See id.* at 9. To the contrary, as discussed, requiring a party to demonstrate a fact or legal conclusion "conclusively" when its burden of proof is merely preponderance of the evidence is inconsistent with precedent of this Court and many others. *See Barrett*, 246 A.2d at 673; *Moberly*, 592 F.3d at 1325;

Hennessy, 521 F.2d at 1285; *City of Sunland Park*, 792 P.2d at 1141; *Edwards*, 21 So.2d at 879-80; *Matter of N.L.B.*, 1993 WL 13965712 at *3.

The Majority contends "neither fear nor inconclusive scientific research is sufficient to prove that smart meter technology constitutes unsafe service under Section 1501." Majority Opinion at 47. I agree proof of fear alone is insufficient to carry a customer's burden to demonstrate entitlement to an accommodation under Section 1501. Subjective fears, no matter how sincerely felt, do not establish service is inadequate, inefficient, unsafe, or objectively unreasonable. In fact, as the Majority notes, *see id.* at 47 n.31, customers Randall and Albrecht appear to concede as much. *See* Brief of Appellees Cynthia Randall and Paul Albrecht at 56 ("This is not to suggest that utility customers can establish claims under Section 1501 based solely on their sincere beliefs."); *id.* ("[S]incere belief of harm or potential harm alone should not be enough to establish a claim under Section 1501[.]"). But I cannot concur that inconclusive scientific research may never be sufficient to demonstrate a lack of safety under Section 1501. The preponderance of the evidence standard does not require a customer to prove unsafety with scientific certainty. *See Sharpe v. Secretary of Health and Human Services*, 964 F.3d 1072, 1078 (Fed. Cir. 2020) ("Notably, the preponderance of the evidence standard for off-table claims does not require a petitioner to prove causation with scientific certainty."); *Moberly*, 592 F.3d at 1325 ("[T]he legal standard is a preponderance of the evidence, not scientific certainty.").

The Majority insists "'[c]onclusive causal connection' means that the proffered evidence must support the conclusion that a causal connection existed between a service or facility and the alleged harm." Majority Opinion at 49. But "conclusive" does not mean simply supporting a conclusion. Indeed, if it did, the phrase "conclusive evidence," used

ubiquitously in the law, would be a redundant expression, as "evidence" alone, by definition, is something that supports a conclusion. *See* Black's Law Dictionary (11th ed. 2019) (defining "evidence" as "[s]omething (including testimony, documents, and tangible objects) that tends to prove or disprove the existence of an alleged fact; anything presented to the senses and offered to prove the existence or nonexistence of a fact"). Rather, as noted, "conclusive" is defined as eliminating all doubt, question, or uncertainty. *See supra* at 6. Thus, the phrase "conclusive causal connection" does not merely require evidence of a causal nexus; it mandates proof of a **definite** causal link, which is well beyond what the modest preponderance of the evidence standard demands.

Similarly, the Majority argues "[i]t is not possible for evidence that is inconclusive to be sufficient to meet the preponderance of the evidence standard" because "[i]nconclusive means that the evidence does not lead to a conclusion of a definite result one way or the other." Majority Opinion at 49-50. Actually, "inconclusive" does not mean merely not leading to a conclusion. The definition of "inconclusive" is "not leading to a **firm** conclusion; not ending doubt or dispute." Google Dictionary, https://www.google.com/search?q=inconclusive+definition&source (last visited August 10, 2022) (emphasis added). Evidence does not have to dictate a definitive conclusion and end all doubt and dispute in order to clear the low hurdle of the preponderance of the evidence standard. In other words, inconclusive proof – evidence that does not lead to a "firm" conclusion as to an issue – may nonetheless satisfy the minimal preponderance standard. *See Software Publishers Ass'n v. Scott & Scott, LLP*, 2007 WL 92391 at *4 (N.D. Tx. 2007) ("Though not conclusive on the issue of assignment (as the certificates are not signed by the purported author of the works described therein), the court finds

that under the preponderance standard, these writings are sufficient to satisfy the court's jurisdictional inquiry that such a written assignment exists in this case.").

The majority emphasizes "evidence of a mere possibility that harm could result is never sufficient to meet a preponderance of the evidence standard." Majority Opinion at 50. This is indisputable; a bare possibility does not rise to the level of a more-likely-than-not showing. However, the discordant and unprecedented conclusive causal connection standard is not necessary to keep a utility from having to defend against the "mere possibility" of harm. The traditional preponderance of the evidence standard protects against this concern. *See Commonwealth v. $301,360.00 U.S. Currency*, 182 A.3d 1091, 1097 (Pa. Cmwlth. 2018) ("In a forfeiture proceeding involving either money or a vehicle, the Commonwealth bears the initial burden of establishing, by a preponderance of the evidence, that a substantial nexus exists between the property subject to forfeiture and a violation of the Drug Act. . . . However, the Commonwealth must establish more than the possibility or a mere suspicion of a nexus.") (emphasis omitted); *Huddell v. Levin*, 537 F.2d 726, 740 (3d Cir. 1976) ("A plaintiff must prove his case by a preponderance of the evidence; proof of a 'substantial possibility' of survival does not comport with that affirmative burden."). In sum, because I view the Majority's endorsement of a conclusive causal connection standard for proving adverse human health effects under Section 1501 to be both internally inconsistent with its recognition of the governing preponderance of the evidence standard and contrary to law, I respectfully cannot join this aspect of the Majority's opinion.

Finally, in light of my disagreement with the conclusive causal connection standard, I must dissent from the Majority's determination to "reverse the Commonwealth

Court's remand to the PUC[.]" Majority Opinion at 64. The PUC applied the conclusive causal connection standard in denying relief to the customers. *See Povacz*, No. C-2015-2475023, at 28 ("[T]he Complainant must demonstrate by a preponderance of the evidence a 'conclusive causal connection' between the low-level RF exposure from a PECO smart meter and the alleged adverse human health effects."); *Murphy*, No. C-2015-2475023, at 31 (same); *Randall & Albrecht*, No. C-2016-2537666, at 27 (same). As discussed, I believe this was error. Consequently, in my view, the case should be remanded to the PUC for consideration of the customers' claims to accommodations pursuant to Section 1501 under the proper preponderance of the evidence standard, which would require the customers to demonstrate their entitlement to relief by a fair preponderance of the evidence, but would not include the incongruous and tougher burden of establishing a conclusive causal connection between RF emissions and adverse human health effects.