POST & SCHELL PC
ATTORNEYS AT LAW

17 North Second Street
12th Floor
Harrisburg, PA 17101-1601
717-731-1970 Main
717-731-1985 Main Fax
www.postschell.com

Devin Ryan

dryan@postschell.com
717-612-6052 Direct
717-731-1985 Direct Fax
File #: 167945

July 9, 2018

VIA ELECTRONIC FILING

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor North
P.O. Box 3265
Harrisburg, PA 17105-3265

Re: John Kline v. PPL Electric Utilities Corporation
Docket No. C-2017-2621072

Dear Secretary Chiavetta:

Enclosed for filing is the Reply Brief of PPL Electric Utilities Corporation in the above-referenced proceeding. Copies will be provided as indicated on the Certificate of Service.

Respectfully submitted,

Devin Ryan

DTR/jl
Enclosures

cc: Honorable Elizabeth Barnes
Certificate of Service

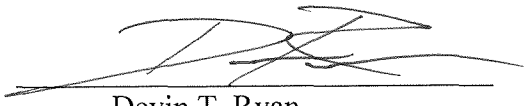
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served upon the following persons, in the manner indicated, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant).

VIA E-MAIL & FIRST CLASS MAIL

John Kline
5611 Stradford Drive
Harrisburg, PA 17112
Jack.Kline@ecolab.com

Date: July 9, 2018



Devin T. Ryan

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

John Kline,	:	
	:	
Complainant,	:	
	:	
v.	:	Docket No. C-2017-2621072
	:	
PPL Electric Utilities Corporation,	:	
	:	
Respondent.	:	

REPLY BRIEF OF PPL ELECTRIC UTILITIES CORPORATION

Kimberly A. Klock (ID # 89716)
Amy E. Hirakis (ID # 310094)
PPL Services Corporation
Two North Ninth Street
Allentown, PA 18101
Phone: 610-774-4254
Fax: 610-774-4102
E-mail: kklock@pplweb.com
aehirakis@pplweb.com

Devin T. Ryan (ID # 316602)
Garrett P. Lent (ID # 321566)
Post & Schell, P.C.
17 North Second Street, 12th Floor
Harrisburg, PA 17101-1601
Phone: 717-731-1970
Fax: 717-731-1985
E-mail: dryan@postschell.com
glent@postschell.com

Curtis S. Renner (DC ID # 446187)
Watson & Renner
1901 Pennsylvania Avenue, NW
Suite 1005 - ENS
Washington, DC 20006
Phone: 202-737 6302
E-mail: crenner@w-r.com

Date: July 9, 2018

Attorneys for PPL Electric Utilities Corporation

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I. INTRODUCTION

On August 24, 2017, PPL Electric Utilities Corporation ("PPL Electric" or the "Company") was served with the above-captioned Formal Complaint filed by John Kline ("Complainant") with the Pennsylvania Public Utility Commission ("Commission"). In his Complaint, the Complainant contests PPL Electric's planned installation of a new automated metering infrastructure ("AMI") meter at his property, 5611 Stradford Drive, Harrisburg, Pennsylvania.

On May 16, 2018, PPL Electric and the Complainant submitted their Main Briefs. Subsequently, the Complainant requested multiple extensions of the due date for Reply Briefs. Administrative Law Judge Elizabeth H. Barnes (the "ALJ") first extended the due date for Reply Briefs until July 2, 2018, and then extended it again until July 9, 2018.

As explained in PPL Electric's Main Brief, the Complaint should be denied in its entirety and with prejudice because the Complainant has failed to sustain his burden of proof that installing the new AMI meter would violate the Public Utility Code or any Commission regulation or order. The Company is legally required to install the new AMI meters for all customers, and installing the new AMI meter would not constitute unsafe or unreasonable service in violation of 66 Pa. C.S. § 1501.

Herein, PPL Electric submits its Reply Brief, which is limited to addressing any arguments or issues raised by the Complainant's Main Brief that were not previously addressed by the Company.

II. SUMMARY OF ARGUMENT

The Complainant's arguments in his Main Brief should be rejected. To begin, the Complainant's Main Brief introduces and relies upon, for the first time, excerpts of hearsay

documents and alleged facts that are not a part of the record. The Complainant has denied PPL Electric due process by waiting until his Main Brief to present these alleged facts and materials. The Complainant also never demonstrates any good cause or change in facts or law that would justify the submittal of this extra-record hearsay evidence. Therefore, none of this extra-record evidence can support any findings in this case.

In addition, the Complainant mischaracterizes the record and unreasonably relies upon certain exhibits and testimony. For example, the Complainant erroneously believes that this case hinges on which party claims to have the biggest number of studies that allegedly support its positions. In actuality, what matters is the expert evaluations of the body of scientific research, including the credibility of their assessments of the quality, relevance and reliability of the studies. Here, the Company has presented thorough, credible, and reliable expert evidence from Dr. Davis and Dr. Israel to rebut the Complainant's claims about the alleged adverse health effects of the new AMI meter. Their expert testimony is unrebutted by any other expert testimony. Furthermore, all of the Complainant's citations to studies are sourced from flawed and unreliable hearsay documents, to which PPL Electric made timely objections. The Complainant also makes unfounded accusations of bias against PPL Electric's expert witnesses. Dr. Israel and Dr. Davis are highly regarded experts in their fields of medicine and science, have decades of experience in research and teaching, and presented detailed and accurate evaluation of the scientific and medical merits of the Complainant's allegations about RF fields and health effects from AMI meters.

Moreover, the Complainant makes flawed legal arguments and relies upon irrelevant and inapplicable authorities in support of his requested opt-out of the new AMI meter installation.

First, contrary to the Complainant's allegation, there is no opt-out of the AMI meter installation under Act 129. The Complainant bases his argument on a few legislators' comments about interpreting the statute. However, under the Pennsylvania Statutory Construction Act, such comments should only be considered if the statute is ambiguous. Here, the plain language of Section 2807(f)(2) of the Public Utility Code unambiguously states that electric distribution companies ("EDCs"), like PPL Electric, "shall" install the new AMI meters. 66 Pa. C.S. § 2807(f)(2). Moreover, contrary to the Complainant's argument, the word "shall" has been held by Pennsylvania courts to mean "must"; it is not a discretionary term. Therefore, the Company must install the new AMI meters.

Second, the Company never violated Section 57.28(a) of the Commission's regulations because there is no "danger" or "hazards" with the new AMI meters that would warrant the Company to warn or protect the public.

Third, the Complainant's arguments about discrimination in service fail because the Company is installing new AMI meters for all 1.4 million customers in its service territory.

Fourth, the Commission has no jurisdiction to enforce the Federal Trade Commission Act ("FTCA"), the Electronic Communications Privacy Act ("ECPA"), the Stored Communications Act ("SCA"), or the Computer Fraud and Abuse Act ("CFAA").

Fifth, PPL Electric's installation of the new AMI meter cannot violate the Fourth and Fourteenth Amendments of the U.S. Constitution or Article 1, Section 8 of the Pennsylvania Constitution because the Company is not a "state actor."

Sixth, the Complainant does not have a legal right under 18 Pa. C.S. § 507(e) to lock his meter box. That is a criminal statute that concerns a justification defense when faced with a criminal prosecution and, therefore, has no applicability here.

Finally, the Complainant mistakenly believes that he can meet his burden by showing that there is a possibility of harm from the new AMI meter. In fact, the burden is on the Complainant to demonstrate that the new AMI meter will, not possibly, cause adverse health effects.

For these reasons, and as explained in more detail below, the arguments and extra-record evidence presented in the Complainant's Main Brief should be rejected.

III. REPLY ARGUMENT

A. THE COMPLAINANT INAPPROPRIATELY ATTEMPTS TO INTRODUCE AND RELY UPON EXTRA-RECORD EVIDENCE IN HIS MAIN BRIEF

In his Main Brief, the Complainant inappropriately attempts to introduce and rely upon evidence that was not admitted at the hearing and, therefore, is not a part of the record. Specifically, the Complainant's Main Brief presents, cites to or mentions the following materials and alleged facts, which are **not** in the record[1]:

1. Incorrect allegation that Dr. Israel and Dr. Davis "derive a significant portion of their total income from litigated matters." (Complainant's MB at 5)
2. Statement that "the financial impact for the utility companies could be huge" if utilities are forced to relocate meters for some consumers. (Complainant's MB at 6)
3. Statement that "after [the meter] reaches that threshold" of 80 degrees Celsius, "the temperature could continue to rise and could cause a fire before anyone is ever notified." (Complainant's MB at 7)
4. Quote from a press release issued by the activist group Environmental Health Trust and attributed to a Ronald Melnick about the draft National Toxicology Program ("NTP") Study. (Complainant's MB at 9)
5. Background information about the Congressional Research Service. (Complainant's MB at 13)
6. Statement that "there are thousands of citizens against the installation yet their needs are being ignored." (Complainant's MB at 21)

[1] PPL Electric compiled this list based upon its best efforts.

7. Averment that the new AMI meter will be installed less than 20 centimeters from the Complainant when he is sleeping. (Complainant's MB at 22)

8. Claim that the Complainant "typically sleep[s] with [his] head against the headboard and [his] hand between the headboard and the wall." (Complainant's MB at 22)

9. Excerpt from letter to "EHS Today" by Dr. Jan Wachter. (Complainant's MB at 23)

The Complainant's attempt to introduce and rely on this extra-record evidence should be rejected. It is well-established that parties cannot present new evidence at the briefing stage. *See, e.g., Pa. PUC v. Nat'l Fuel Gas Distrib. Corp.*, 1993 Pa. PUC LEXIS 95, at *7-10 (Order entered July 30, 1993); *Petition of the Borough of Cornwall for a Declaratory Order*, 2016 Pa. PUC LEXIS 3, at *24-26 (Jan. 6, 2016) (Recommended Decision), *adopted as modified*, Docket No. P-2015-2476211 (Order entered Aug. 11, 2016). "The Commission, as an administrative body, is bound by the due process provisions of constitutional law and by the principles of common fairness." *Hess v. Pa. PUC*, 107 A.3d 246, 266 (Pa. Cmwlth. 2014) (citations omitted). "Among the requirements of due process are notice and an opportunity to be heard on the issues, to be apprised of the evidence submitted, to cross-examine witnesses, to inspect documents, and to offer evidence in explanation or rebuttal." *Id.* (citations omitted).

Indeed, Section 332(c) of the Public Utility Code entitles every party to, among other things, "submit rebuttal evidence" and "conduct such cross-examination as may be required for a full and true disclosure of the facts." 66 Pa. C.S. § 332(c); *see Nat'l Fuel*, 1993 Pa. PUC LEXIS at *10 ("[S]uch material was outside the record and could be detrimental to the rights of other parties to confront such evidence."). Accordingly, extra-record evidence in briefs is commonly stricken[2] because including extra-record materials in a party's brief "brings up hearsay problems

[2] *See, e.g., Trucco v. PPL Elec. Utils. Corp.*, 2002 Pa. PUC LEXIS 21, at *5 (Order entered Mar. 29, 2002) (noting that ALJ Paist "struck those portions of the Complainants' Main Brief which referenced extra-record evidence, including those various exhibits attached to that Main Brief"); *Application of Kenneth Scott Cobb, t/a*

and problems associated with the right to respond to evidence." *Pa. PUC v. Pa. Power & Light Co.*, 1995 Pa. PUC LEXIS 190, at *232 (July 28, 1995) (Recommended Decision) ("*PP&L*").

Here, all of these facts and materials were introduced for the first time in the Complainant's Main Brief. By waiting until the briefing stage to present these new facts and materials, the Complainant denied PPL Electric an opportunity to review and inspect that evidence, to cross-examine the Complainant about that evidence, and to present evidence in rebuttal. Therefore, it would violate PPL Electric's due process rights for any findings of fact to be based upon or influenced by the Complainant's extra-record evidence.

In addition, Section 5.431 of the Commission's regulations prescribes that "[t]he record will be closed at the conclusion of the hearing unless otherwise directed by the presiding officer or the Commission." 52 Pa. Code § 5.431(a). Particularly relevant here, "[a]fter the record is closed, additional matter may not be relied upon or accepted into the record unless allowed for good cause shown by the presiding officer or the Commission upon motion." *Id.* § 5.431(b). Petitions to reopen the record can be granted "if there is reason to believe that conditions of factor or law have so changed as to requires, or that the public interest requires, the reopening of the record." 52 Pa. Code § 5.571.

Here, the record closed at the conclusion of the evidentiary hearing on March 29, 2018. The Complainant made no motion to keep the record open or to reopen the record so that his extra-record evidence could be admitted. Moreover, in his Main Brief, the Complainant never demonstrates good cause for introducing this extra-record evidence, nor does he show changes in

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Kennys Transp. Serv., 2012 Pa. PUC LEXIS 1802, at *24 (Nov. 16, 2012) (Initial Decision) (Barnes, J.) (granting motion to strike the applicant's brief "for attempting to introduce new facts and documents into evidence not previously offered or admitted into the record at the hearing of September 5, 2012"), *became final without further action*, Docket No. A-2011-2280175 (Order entered Jan. 7, 2013); *see also* 52 Pa. Code § 5.501(a)(2) (stating that briefs must contain "[r]eference to the pages of the record or exhibits where the evidence relied upon by the filing party appears").

fact or law that would warrant the reopening of the record to admit such evidence. As a result, the Complainant's extra-record evidence cannot be admitted into the record.

Thus, although PPL Electric has decided not to burden this court with the time and expense of ruling on a Motion to Strike the portions of the Complainant's Main Brief, the ALJ and Commission should not rely on the Complainant's extra-record materials to make any findings in this proceeding. *See PP&L*, 1995 Pa. PUC LEXIS at *232; *Petition of Pa. Power Co. for Approval of Interim POLR Supply Plan*, 2006 Pa. PUC LEXIS 56, at *3 (Order entered Apr. 28, 2006) (observing that "ALJ Gesoff ignored Reliant's Reply Brief, due to the extra-record evidence contained within").

Based on the foregoing, the Complainant's attempt to introduce and rely upon extra-record evidence in his Main Brief should be rejected.

B. THE COMPLAINANT MISCHARACTERIZES THE RECORD AND UNREASONABLY RELIES UPON CERTAIN EXHIBITS AND TESTIMONY

In his Main Brief, the Complainant mischaracterizes the record and unreasonably relies upon certain exhibits and testimony. First, the Complainant erroneously contends that the Company's expert witnesses, Dr. Israel and Dr. Davis, have offered biased opinions and lack credibility. (Complainant's MB at 5) Dr. Israel has over 40 years of experience in treating patients and conducting medical research, and 30 years teaching medicine and science to medical students, graduate students, interns, residents, and practicing physicians. He has published over 245 medical research studies in leading scientific journals such as the *New England Journal of Medicine, Cancer Research* and *Nature*, among others. (PPL Electric Statement No. 2, p. 3, lines 20-22) He has also written chapters in medical textbooks and is a co-Editor of the textbook The Molecular Basis of Cancer. (PPL Electric Statement No. 2, p. 3, line 22 to p. 4, line 2) Throughout his career, Dr. Israel has peer-reviewed scientific proposals for major research

organizations such as the U.S. National Cancer Institute, Cancer Research UK, and German Cancer Aid, among others. (PPL Electric Statement No. 2, at p. 4, lines 14-17) He has also served as an editor and peer reviewer for leading scientific journals, such as *Clinical Cancer Research, Neuro-Oncology, Cancer Research,* and others. (PPL Electric Statement No. 2, p. 4, lines 17-20) The high quality of Dr. Israel's scientific research and his outstanding contributions to medical science have been widely recognized by his peers in the scientific community. Dr. Israel is an elected Fellow of the American Association for the Advancement of Science, an elected member of the Association of American Physicians, and an elected member of the American Society for Clinical Investigation, each of which is recognition by his peers of the scientific merit of his work and his commitment to advancing medical science. (PPL Electric Statement No. 2, p. 5, lines 3-6) He has provided scientific advice and direction to a number of eminent organizations by serving on their advisory boards, such as the Science Advisory Board for the Yale Cancer Center, which he chaired for almost a decade, and the External Advisory Boards for the Children's Cancer Research Institute at the University of Texas Health Science Center, the University of Nebraska Eppley Cancer Center, the Carbone Cancer Center at the University of Wisconsin, and the National Brain Tumor Society, among others. He has also served on the Board of Scientific Counselors for the NCI. (PPL Electric Statement No. 2, p. 5, lines 6-13)

During his work at the NCI, Dr. Israel was awarded two U.S. Public Health Service commendation medals. In 1998, he received the Farber Award, which is awarded annually by the American Association of Neurological Surgeons for excellence in cancer research. In 2014, he received the C. Everett Koop Courage Award for the pursuit of evidence-based medicine. (PPL Electric Statement No. 2, p. 5, lines 13-18)

Dr. Davis is likewise an active and highly regarded scientific researcher with over 30 years of experience teaching Physics, Electrical Engineering, Electromagnetics, and Radio Frequency Electromagnetics. He has conducted many scientific studies in these fields and has published over 250 studies in peer-reviewed scientific journals. (PPL Electric Statement No. 1, p. 1, line 12 to p. 2, line 19) In particular, he has conducted a substantial amount of research on RF fields of the type produced by the AMI meters being used by the Company. (PPL Electric Statement No. 1, p. 3, lines 5-6) Furthermore, Dr. Davis has served on expert committees that have evaluated the scientific research on RF fields, including the Institute of Electrical and Electronic Engineers ("IEEE") Committee on Man and Radiation ("COMAR") and as chair of the Subcommittee on Radio Frequency Fields, which consists of experts who examine the scientific research on RF fields and evaluate the IEEE exposure guidelines. (PPL Electric Statement No. 1, p. 3, lines 9-12) Dr. Davis has received a number of honors and awards for his teaching and research and has provided expert advice on electromagnetic fields, including RF fields dosimetry and proposed mechanisms for biological effects other than heating, to the United Kingdom Health Protection Agency, the U.S. National Institutes of Health and the U.S. Food and Drug Administration's Center for Devices and Radiological Health. (PPL Electric Statement No. 1, p. 4, lines 14-22)

In this matter, Dr. Israel and Dr. Davis offered independent, balanced, and unbiased expert opinions about the scientific and medical merits of the RF exposure and health claims Complainant raised in this case. (*See* PPL Electric Statement No. 1, p. 13, line 11 to p. 14, line 7; PPL Electric Statement No. 2, p. 7, lines 3-5) Both Dr. Israel and Dr. Davis have unblemished records of having their expert opinions offered on behalf of many different parties and relied upon in many litigated proceedings, including before this Commission. *See, e.g., Newman v.*

Motorola, Inc., 218 F. Supp.2d 769 (D. Md. 2002), *affirmed*, 78 Fed. Appx. 292 (4th Cir. 2003); *Lakey v. Puget Sound Energy, Inc.*, 296 P.3d 860 (Wash. 2013); *Application of PPL Electric Utilities Corporation Filed Pursuant to 52 Pa. Code Chapter 57, Subchapter G, for Approval of the Siting and Construction of the Pennsylvania Portion of The Proposed Susquehanna-Roseland 500 kV Transmission Line in Portions of Lackawanna, Luzerne, Monroe, Pike and Wayne Counties, Pennsylvania*, Docket Nos. A-2009-2082652, *et al.* (Order entered Feb. 12, 2010); *Frompovich v. PECO Energy Co.*, Docket No. C-2015-2474602 (Order entered May 3, 2018). Therefore, the Complainant's allegations of bias and lack of credibility are entirely unfounded.

Second, the Complainant mistakenly believes that the scientific and medical issues in this case hinge on which party claims to have the highest tally of studies it believes support its positions. (Complainant's MB at 8-10, 23) From the Complainant's perspective, he believes he should prevail because he has "presented thousands of examples of studies" as well as "over 200 studies" in his Exhibit Q. (Complainant's MB at 10, 23) Many of Mr. Kline's "references" come from a bibliography prepared in 1971 for the Navy. (Complainant's Exhibit R) Dr. Israel reviewed this document and testified that it is not a scientific study published in a scientific journal. (Tr. 141) Rather, it is a bibliographic listing that does not include any substantive information. Of particular relevance is a disclaimer in the document that warns, "these effects are listed without comment or endorsement since the literature abound with conflicting reports." (Tr. 142) The author of the bibliography emphasizes that "in some cases the basis for reporting an effect was a single or a non-statistical observation which may have been drawn from a poorly conceived and poorly executed experiment." (Tr. 142) Dr. Israel found that Exhibit R does not provide a reliable scientific basis to conclude that RF fields would cause, contribute to or exacerbate any health effect. (Tr. 142)

Dr. Israel also evaluated Complainant's Exhibit Q, which is a printed list of studies and abstracts from an online database. (Tr. 138-39) He testified that as a medical expert he would not confine his evaluation of research to looking at abstracts, because they often do not provide sufficient information to actually understand what the study did and whether the conclusions that are drawn are actually supported by the data. (Tr. 139-40) For a scientist, it is not possible to reliably evaluate a group of scientific studies based on information provided in abstracts. (Tr. 140) As a result, Complainant's Exhibit Q does not provide a reliable scientific basis to reach conclusions about RF fields and health.

What matters, however, and what the ALJ's determinations should be based on, is the credibility of the expert evaluations of the body of scientific research. Here, the Company has offered thorough, credible, and reliable evidence to rebut the Complainant's claims about the alleged adverse health effects of the new AMI meter. (PPL MB at 13-24) The Company has presented overwhelming evidence that its expert witnesses, Dr. Christopher Davis and Dr. Mark Israel, possess exceptional qualifications and experience, that they are eminent and highly regarded in their scientific communities, and that their opinions are reliable and sound. (PPL MB at 14-15, 18-20) Dr. Davis and Dr. Israel testified at length about their thorough and detailed evaluations of the relevant scientific information on its merits. (*See* PPL Electric Statement Nos. 1 and 2) Their evaluations of the body of scientific research and their conclusions about the lack of established biological effects and the lack of adverse health effects from low-level non-thermal RF from AMI meters are consistent with the findings of mainstream public health entities such the World Health Organization, which has concluded that "[t]o date, no adverse health effects from low level, long-term exposure to radiofrequency or power frequency fields have been confirmed." Similar conclusions have been reached in recent years

by multiple expert groups around the globe, federal and public health agencies in the U.S., and state public utility commissions. (*See* PPL Electric Exhibits MI-1, MI-2, MI-3) Even if the total number of studies mattered, the Company rebutted the studies and other documents relied upon by the Complainant. (*See* PPL MB at 23, 26-31)

Third, the Complainant's reliance on an activist press release to characterize the findings of the NTP animal study is similarly unreliable. Dr. Davis testified that the NTP study is a Technical Report that is stamped "Draft" on its cover and "Not for Attribution" on every page of the report. (Tr. 106) The cover of the NTP report also declares that it "does not represent and should not be construed to represent NTP determination or policy." (Tr. 106) Moreover, Dr. Davis compared the RF exposure levels in the NTP study to those from the AMI meter being used by PPL Electric. The RF exposures used in the NTP study were 3.3 million times higher than the RF fields from an AMI meter. (Tr. 107)

Fourth, the Complainant misleadingly claims that there are only FCC "guidelines" in place about the exposure to RF fields. (Complainant's MB at 7-8) In actuality, the FCC has adopted exposure "standards" about RF field exposure, as confirmed by Dr. Davis at the evidentiary hearing. (Tr. 110-11) These standards provide the levels of RF fields that the FCC considers as being safe for human exposure. (Tr. 111) These standards were based on exposure limits recommended by expert groups from the U.S. National Council on Radiation Protection and Measurements (NCRP) and the American National Standards Institute (ANSI) after extensive reviews of the scientific research. (PPL Electric Statement No. 1, p. 8, lines 15-17; Tr. 109-10) Dr. Davis testified that the Complainant's attempt to characterize the FCC standards as "developed by industry" was "misleading." (Tr. 110) In adopting its national RF exposure limits, the FCC consulted with the U.S. Food and Drug Administration, the Environmental

Protection Agency, the Occupational Safety and Health Administration, and the National Institute of Occupational Safety and Health, and each supported the FCC setting its exposure limits based on the exposure guidelines issued by those expert organizations. (PPL Electric Statement No. 1, p. 8, line 22 to p. 9, line 3)

Fifth, the Complainant errs in stating that the FCC's standard is "based on decades old research." (Complainant's MB at 7) Dr. Davis explained that the FCC continues to consider whether new scientific research shows any adverse effects from RF fields. (PPL Electric Statement No. 1, p. 9, lines 3-6) Furthermore, the FCC continues to coordinate with a number of federal agencies, such as the Environmental Protection Agency (EPA), and the Food and Drug Administration (FDA), on RF safety issues. (PPL Electric Statement No. 1, p. 9, lines 21-23) Thus, contrary to the Complainant's allegation, the record demonstrates that the FCC's RF exposure standard is not outdated, the agency is involved in an ongoing evaluation of RF research, and the FCC has not found a reliable scientific basis to change the standard.

Sixth, the Complainant maintains that the FCC standard requires the new AMI meter to be "a minimum of 20 cm" away from a person. (Complainant's MB at 22) To be clear, there is no such "20 centimeter" standard. (Tr. 116) As Dr. Davis explained, this was an advisory statement in an installation manual for an AMI meter, not an actual standard. (Tr. 116, 119) Moreover, to determine whether a transmitter complies with the FCC standard from 20 centimeters away, a person would need to know how powerful the transmitter is. (Tr. 119) Here, "the power of the Smart Meter is so low that . . . [a]t 20 centimeters of Smart Meters, the exposure is about three times below the FCC Exposure Standard." (Tr. 120)

Moreover, Mr. Kline's concern about exposure to the extremely low RF fields from an AMI meter surprisingly does not extend to a concern about much higher exposures from using

his cell phone. Based on cell phone usage information from Mr. Kline, Dr. Davis found that the amount of RF exposure Mr. Kline received from using his cell phone over a 5-month period is more than 4,000 times higher than the RF from the meter over a 5-month period. (PPL Electric Statement No. 1, p. 12, lines 12-19) Based on the amount of Mr. Kline's cell phone use and assuming he held his cell phone at his head, Mr. Kline would have to stay within 1 meter of his AMI meter for 1,692 years to get an equivalent amount of RF exposure from the AMI meter. If Mr. Kline used his cell phone with a headset or earphones, he would need to stay within 1 meter of his AMI meter for 4.23 years to get a level of RF exposure equivalent to the RF exposure he got from his cell phone use over 5 months. (PPL Electric Statement No. 1, p. 13, lines 4-10) This and Dr. Davis' other testimony about Mr. Kline's RF exposures is unrebutted by any record evidence.

Seventh, the Complainant's fire safety allegations are not supported by any evidence. (Complainant's MB at 6-7) The Complainant contends in his Main Brief that within the two hours of the heat alarm in the new AMI meter being triggered, a house could catch on fire. (Complainant's MB at 6-7) However, the record demonstrates that the new AMI meter is better equipped and made of more resistant materials to prevent fires. (PPL MB at 32-33) Indeed, PPL Electric set stringent qualifications during its testing and selection of the available RF Mesh meters. (Tr. 88-89) Among those qualifications was a requirement that AMI meter's materials be able to withstand a thermal index of 160 degrees Celsius before breaking down. (Tr. 88-89) The AMI meter selected by PPL Electric was "the only meter that met and exceeded" the Company's qualifications. (Tr. 89) Further, the Company cannot currently monitor the temperature of the Complainant's current meter. (Tr. 91-92) Therefore, as PPL Electric witness Larson explained, the new AMI meter is better than what the Company has in place now because

"we actually monitor the temperature." (Tr. 91-92) Thus, as explained in PPL Electric's Main Brief, the new AMI meter is not a fire safety risk and can actually prevent fires. (PPL MB at 32-33)

Eighth, the Complainant continues to raise a concern about the new AMI meter collecting information about the use of specific appliances or other more detailed information. (Complainant's MB at pp. 7, 14, 18) Importantly, however, the Complainant concedes that the new AMI meters do not currently have that functionality. (Complainant's MB at 7) The new AMI meters only collect information on the total usage of the entire premises. (Tr. 98-99) Therefore, any claims that the new AMI meter will have that functionality in the future are speculative, premature, and not at issue in this proceeding.

For these reasons, the Complainant's arguments should be rejected because he mischaracterizes the record and unreasonably relies upon certain testimony and exhibits.

C. THE COMPLAINANT'S LEGAL ARGUMENTS ARE FLAWED AND BASED ON IRRELEVANT AND INAPPLICABLE AUTHORITIES

The Complainant also makes flawed legal arguments and relies upon irrelevant and inapplicable authorities in support of his requested opt-out of the new AMI meter installation. Specifically, the Complainant argues, among other things, that: (1) Act 129 is an opt-out bill based on comments by certain Pennsylvania legislators and his belief that when Act 129 states that EDCs "shall" install AMI meters, the statute means "may"; (2) PPL Electric violated 52 Pa. Code § 57.28(a) by not warning the public and protecting people from the "danger" and "hazards" posed by the new AMI meters; (3) the requirement of new AMI meter installations is discriminatory service in violation of 66 Pa. C.S. § 1502; (4) installation of the new AMI meter violates the Fourth and Fourteenth Amendments of the United States Constitution and Article I, Section 8 of the Pennsylvania Constitution; (5) installation of the new AMI meter violates

federal statutes, specifically the FTCA, ECPA, SCA, and CFAA; (6) the Complainant has a legal right under 18 Pa. C.S. § 507(e) to protect his property, so the Company cannot terminate his electric service for his placement of a lock on the meter box to prevent PPL Electric from replacing the meter; and (7) the Complainant's burden is only to show that there is a "possibility" of adverse health effects from the new AMI meter. (Complainant's MB at 11-12, 14-18, 22) All of these arguments wholly lack merit.

First, as explained in PPL Electric's Main Brief, there is no opt-out to the new AMI meter installation under Act 129. (PPL MB at 11-13) A few legislators' comments about the statute do not control the analysis of whether an opt-out is permitted under Act 129. Under the Pennsylvania Statutory Construction Act, "[w]hen the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit." 1 Pa. C.S. § 1921(b). Here, the plain language of Act 129 states that EDCs, like PPL Electric, "shall" install the new AMI meters. *See* 66 Pa. C.S. § 2807(f)(2) (emphasis added). Importantly, the word "shall" has been declared by Pennsylvania courts to mean "must." *See Whiteford v. Dep't of Transp.*, 728 A.2d 1127, 1131 (Pa. Cmwlth. 2001) ("[T]he word 'shall' denotes a mandatory, not discretionary instruction.") (citations omitted); *C.B. v. J.B.*, 65 A.3d 946, 952 (Pa. Super. 2013) (finding that "[t]he use of 'shall' means . . . must" and that to hold otherwise "would be to flout the legislative will"); *In re Canvass of Absentee Ballots of Nov. 4, 2003 Gen. Election*, 843 A.2d 1223, 1233 (Pa. 2004) ("[W]e are not compelled to pretend that 'shall' means 'may' under Section 3146.6(a)."); *Griesmer v.* Hill, 36 Pa. Super. 69 (Pa. Super. 1908) ("This provision is mandatory, and not directory merely. It means what it says. The word 'shall' means 'shall' . . . . [The defendant] not only may but 'must.'"). Therefore, the AMI meter installation is mandatory, and a few legislators' comments about the interpretation of the statute need not and

should not be considered. *See* 1 Pa. C.S. § 1921(c). Additionally, even if the statute were ambiguous, the "administrative interpretations of such statute" should be considered and given substantial weight. *Id.* § 1921(c)(8). Indeed, the Commission, which is the entity charged with implementing and enforcing Section 2807(f) of the Public Utility Code, has issued several orders holdings that there is no opt-out under the statute. (PPL MB at 11-12) Thus, there is no opt-out under Act 129, and PPL Electric must install the new AMI meters.

Second, the Company never violated 52 Pa. Code § 57.28(a) concerning the new AMI meters. Section 57.28(a) of the Commission's regulations states the following:

> (a) *Responsibilities.* The separation of responsibilities between an electric utility and a customer with respect to the facilities utilized for electric service shall be described in the electric utility's tariff that is filed with and approved by the Commission.
>
> (1) An electric utility shall use reasonable effort to properly warn and protect the public from danger, and shall exercise reasonable care to reduce the hazards to which employees, customers, the public and others may be subjected to by reason of its provision of electric utility service and its associated equipment and facilities.
>
> (2) An electric utility is not responsible for the ownership and maintenance of the customer's facilities beyond the service point.

52 Pa. Code § 57.28(a). Here, as explained previously, there are no dangers or hazards posed by the AMI meters. Consequently, there was no reason for the Company to warn the public or protect people from these meters. Moreover, when selecting which metering technology to adopt, PPL Electric set very stringent safety standards. (Tr. 88-89) PPL Electric witness Larson explained that the Company "utilized a third party to test all available meters that are on the market at the time," and the meter selected by PPL Electric "was the only meter that met and exceeded" the Company's stringent safety standards. (Tr. 89) Thus, to the extent there are any

concerns about the new AMI meters, the Company used reasonable efforts to reduce any potential issues.

Third, installation of the new AMI meters is not discriminatory service under Section 1502 of the Public Utility Code. The Complainant mistakenly assumes that installing the new AMI meter is discriminatory service because not every person in Pennsylvania is having one installed. (Complainant's MB at 11) In actuality, Section 1502 prohibits unreasonable discrimination of service "as between localities or as between classes of service" within a single public utility's service territory. 66 Pa. C.S. § 1502. Here, PPL Electric is installing new AMI meters for all of its 1.4 million customers, including the Complainant. (PPL Electric Exhibit No. 3, p. 1) Therefore, the Company is treating the Complainant no differently than its other customers. In fact, to grant the Complainant an exemption would arguably be granting him an unreasonable preference over similarly-situated customers in his rate class. *See* 66 Pa. C.S. § 1502.

Fourth, PPL Electric's installation of the new AMI meter will not violate the Fourth and Fourteenth Amendments of the U.S. Constitution and Article 1, Section 8 of the Pennsylvania Constitution because the Company is not a state actor. For there to be a deprivation of constitution rights, two elements must be met: (1) "the deprivation must be caused by the exercise of some right or privilege created by the state"; and (2) "the party charged with the deprivation must be a person who may fairly said to be a state actor." *Commonwealth v. Corley*, 491 A.2d 829, 832 (Pa. 1985) (emphasis added) (quoting *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 937 (1982)); *see Commonwealth v. Demor*, 942 A.2d 898, 899-900 (Pa. Super. 2008) (applying principles outlined in *Corley* to Fourth Amendment analysis); *W. Pa. Socialist Workers 1982 Campaign v. Conn. General Life Ins. Co.*, 485 A.2d 1, 5-6 (Pa. Super. 1984)

("[T]he search and seizure provisions of Article 1, section 8, have been held inapplicable to the conduct of private parties.") (citations omitted).

Here, PPL Electric is a utility corporation, not a state actor. In *Jackson v. Metropolitan Edison Co.*, the U.S. Supreme Court found that a fellow Pennsylvania electric utility, *i.e.*, Metropolitan Edison Company, was not a state actor, even though it arguably had "monopoly power" and "provided an essential public service required to be supplied on a reasonably continuous basis." *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351-53 (1974). Therefore, in keeping with the U.S. Supreme Court's holding in *Jackson*, PPL Electric similarly is not a state actor. Thus, PPL Electric cannot, by installing the new AMI meter, violate the Fourth and Fourteenth Amendments of the U.S. Constitution and Article I, Section 8 of the Pennsylvania Constitution.

Fifth, the Complainant's allegations that installing the new AMI meter violates various federal statutes are outside the Commission's jurisdictions. As a "creature of statute," the Commission "has only those powers which are expressly conferred upon it by the Legislature and those powers which arise by necessary implication." *Feingold v. Bell of Pa.*, 383 A.2d 791, 794 (Pa. 1977) (citing *Allegheny Cnty. Port Auth. v. Pa. PUC*, 237 A.2d 602 (Pa. 1967); *Del. River Port Auth. v. Pa. PUC*, 145 A.2d 172 (Pa. 1958)). The Commission cannot grant itself by regulation or order authority that was not conferred upon it by the Legislature. *See W. Pa. Water Co. v. Pa. PUC*, 370 A.2d 337, 339-40 (Pa. 1977) (citations omitted); *Fairview Water Co. v. Pa. PUC*, 502 A.2d 162, 165-66 (Pa. 1985) (citations omitted); *Fed. Deposit Ins. Corp. v. Bd. of Fin. & Revenue*, 84 A.2d 495, 499 (Pa. 1951) (citations omitted).

Here, nothing in the Public Utility Code grants the Commission jurisdiction to enforce these federal statutes. Moreover, the Federal Trade Commission is empowered to enforce the

FTCA through civil actions filed in a "United States district court or in any court of competent jurisdiction of a State." 15 U.S.C. §§ 45, 57b. No private right of action exists under the FTCA. *Carpenter v. Kloptoski*, 2010 U.S. Dist. LEXIS 22262, at *34-35 (M.D. Pa. 2010) (citations omitted); *Gachau v. RLS Cold Storage*, 2018 U.S. Dist. LEXIS 68552, at *6-7 (D.N.J. 2018) (citations omitted). Further, the ECPA, SCA, and CFAA are federal statutes within the jurisdiction of federal courts. *See* 18 U.S.C. §§ 2510, *et al.* (setting forth the ECPA); *id.* §§ 2701, *et al.* (setting forth the SCA); *id.* § 1030 (setting forth the CFAA). Thus, the Commission lacks jurisdiction over the Complainant's claims that installing the new AMI meter violates these federal statutes.

Sixth, the Complainant erroneously claims that he has a legal right to install a lock on the meter box to prevent the Company from replacing the existing meter. (Complainant's MB at 11) In attempted support, the Complainant cites 18 Pa. C.S. § 507(e) and contends that it allows him to use a "device" to protect his property. (Complainant's MB at 11) However, 18 Pa. C.S. § 507(e) is a criminal statute that sets forth a justification defense when facing criminal prosecution. *See* 18 Pa. C.S. § 507(e). Therefore, it has no applicability here. Furthermore, as explained in the Company's Main Brief, the Complainant fails to recognize that PPL Electric has a legal right to access the Complainant's property for the replacement of the meter and to terminate service if it is prevented from doing so. (PPL MB at 36-38)

Seventh, the Complainant incorrectly states that he only needs to demonstrate that there is a "possibility" that the new AMI meter will cause adverse health effects. (Complainant's MB at 22) As explained in PPL Electric's Main Brief, a person does not sustain his or her burden of proof in an electric and magnetic field exposure case when the record evidence, "taken as a whole, leads to the ultimate finding and conclusion that the scientific studies at present are

inconclusive." *Letter of Notification of Phila. Elec. Co. Relative to the Reconstructing and Rebuilding of the Existing 138 kV Line to Operate as the Woodbourne-Heaton 230 kV Line in Montgomery and Bucks Cntys.*, 1992 Pa. PUC Lexis 160, at *210-11 (June 29, 1992) (Initial Decision) ("*Woodbourne-Heaton*"). Rather, the person must demonstrate by a preponderance of the evidence that such exposure actually causes adverse health effects. *Id.* at *211. Specifically, in AMI meter-related matters, the Commission has held that "[t]he Complainant will have the burden of proof during the proceeding to demonstrate, by a preponderance of the evidence, that [the utility] is responsible or accountable for the problem described in the Complaint." *Kreider v. PECO Energy Co.*, Docket No. P-2015-2495064, p. 18 (Order entered Sept. 3, 2015); *see also Romeo v. Pa. PUC*, 154 A.3d 422, 429 (Pa. Cmwlth. 2017) (finding that the smart meter complainant should have a hearing to try to prove his claim through "the testimony of others as well as other evidence that goes to that issue").

Accordingly, the Complainant has the burden to prove that the new AMI meter will cause the adverse health effects he has alleged. This burden cannot be met by the Complainant simply contending that adverse health effects are a "possibility." Therefore, the Complainant's allegation that he should prevail by showing that adverse health effects are a "possibility" is without merit.

Based on the foregoing, the Complainant's legal arguments should be rejected because they are flawed and based on irrelevant and inapplicable authorities.

IV. CONCLUSION

WHEREFORE, as explained above and in PPL Electric Utilities Corporation's Main Brief, the Company respectfully requests that Administrative Law Judge Elizabeth H. Barnes recommend and the Pennsylvania Public Utility Commission issue an Order dismissing the Formal Complaint of John Kline with prejudice.

Respectfully submitted,

Kimberly A. Klock (ID # 89716)
Amy E. Hirakis (ID # 310094)
PPL Services Corporation
Two North Ninth Street
Allentown, PA 18101
Phone: 610-774-4254
Fax: 610-774-4102
E-mail: kklock@pplweb.com
aehirakis@pplweb.com

Devin T. Ryan (ID # 316602)
Garrett P. Lent (ID # 321566)
Post & Schell, P.C.
17 North Second Street, 12th Floor
Harrisburg, PA 17101-1601
Phone: 717-731-1970
Fax: 717-731-1985
E-mail: dryan@postschell.com
glent@postschell.com

Curtis S. Renner (DC ID # 446187)
Watson & Renner
1901 Pennsylvania Ave., NW
Suite 1005 - ENS
Washington, DC 20006
Phone: 202-737 6302
E-mail: crenner@w-r.com

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Attorneys for PPL Electric Utilities Corporation