

November 5, 2018

**Via Electronic Filing**

Rosemary Chiavetta, Esquire  
PA Public Utility Commission  
Secretary  
P.O. Box 3265  
Harrisburg, PA 17105-3265

**Re: Docket No. C-2017-2610125  
Joanne M. Fiorito v. Pennsylvania Electric Company  
Reply Exceptions of Pennsylvania Electric Company**

Dear Secretary Chiavetta:

Attached for filing is the Reply Exceptions of Pennsylvania Electric Company (Respondent) has to the Exceptions of Joanne M. Fiorito (Complainant).

A copy of the attached Reply Exceptions has been provided to the Complainant in the manner indicated on the attached Certificate of Service.

If there are any questions, please do not hesitate to contact me.

Very truly yours,

Reger Rizzo & Darnall LLP



Margaret A. Morris

MAM/lm  
Attachment

cc: The Honorable Jeffrey A. Watson, PA Public Utility Commission [w/enc.]  
[ra-OSA@pa.gov](mailto:ra-OSA@pa.gov) [w/enc.]  
Teresa K. Harrold, Esquire, FirstEnergy Service Company [w/enc.]  
Joanne M. Fiorito [w/enc.]

**Re: Docket No. C-2017-2610125  
Joanne M. Fiorito v. Pennsylvania Electric Company  
Reply Exceptions of Pennsylvania Electric Company**


**CERTIFICATE OF SERVICE**

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

**Via Electronic and First Class Mail**

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Dated: November 5, 2018

  
Margaret A. Morris, Esq.

BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

JOANNE FIORITO

v.

PENNSYLVANIA ELECTRIC COMPANY

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Docket No. C-2017-2610125

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**REPLY EXCEPTIONS  
OF PENNSYLVANIA ELECTRIC COMPANY  
TO THE EXCEPTIONS OF  
JOANNE FIORITO**

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Dated: November 5, 2018

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**Table of Contents**

Tables of Authorities ..... ii  
Statues/Regulations ..... iv  
Introduction ..... 1  
Relevant History Of Proceedings ..... 1  
Initial Decision ..... 1  
Discussion..... 2  
    Penelec’s Response to Complainant’s Exception #1..... 2  
    Penelec’s Response to Complainant’s Exception #2..... 4  
    Penelec’s Response to Procedural Exceptions ..... 5  
Conclusion..... 7

## **Table of Authorities**

### **Cases**

<i>Allegheny County Port Authority v. Pa. P.U.C.</i> , 427 Pa. 562, 237 A.2d 602 (1967) .....	4
<i>Behrend v. Bell of Pa.</i> , 257 Pa. Superior Ct. 35, 390 A.2d 233 (1978) .....	4
<i>City of Erie v. Pa. Electric Co.</i> , 383 A.2d 575 (Pa. Cmwlth. 1978) .....	4
<i>Commonwealth v. Barud</i> , 681 A.2d 162, 165 (Pa. Super. 1996) .....	4,5
<i>Commonwealth v. Blystone</i> , 549 A.2d 81, 87 (Pa. Super. 1988), affirmed, 494 U.S. 299, 110 S. Ct. 1078, 108 L. Ed. 2d 255 (1990) .....	5
<i>Commonwealth v. Chilcote</i> , 578 A.2d 429, 435 (Pa. Super. 1990) ) .....	5
<i>Commonwealth v. Elia</i> , 83 A.3d 254, 267 (2012) .....	5
<i>Erie &amp; N.E. R.R. Co. v. Casey</i> , 26 Pa. 287, 300 (1856) .....	5
<i>Erie Resistor Corp. v. Unemployment Compensation Bd. of Review</i> , 194 Pa. Super. 278, 166 A.2d 96 (1960).....	3
<i>Feingold v. Bell of Pa.</i> , 477 Pa. 1, 383 A.2d 791 (1977) .....	4
<i>Glancey v. Casey</i> , 288 A.2d 812, 818 (Pa. Super. 1972) .....	5
<i>Groch v. Unemployment Comp. Bd. of Review</i> , 472 A.2d 286 (Pa. Cmwlth. 1984).....	3
<i>Harrisburg Taxicab &amp; Baggage Co. v. Pa. P.U.C.</i> , 786 A.2d 288 (Pa. Cmwlth. 2001) .....	4
<i>Lutherschmidt v. Metropolitan Edison Company</i> , Docket No. C-2010 2200353 (Final Order entered March 25, 2011) .....	3
<i>Murphy v. Commonwealth, Dept. of Public Welfare, White Haven Center</i> , 85 Pa. Cmwlth. 23, 480 A.2d 382 (1984).....	3
<i>Negley v. Metropolitan Edison Company</i> , Docket No. C-2010-2205305 (Final Order entered March 3, 2011). .....	3
<i>Norfolk and Western Ry. v. PA Public Utility Comm'n</i> , 489 Pa. 109, 413 A.2d 1037 (1980).....	3
<i>Pennsylvania Bureau of Corrections v. City of Pittsburgh</i> , 532 A.2d 12 (Pa. 1987).....	3
<i>Pennsylvania School Boards Ass'n., Inc. et al. v. Commonwealth Ass'n. of School Administrators</i> , 805 A.2d 476, 479 (Pa. Super. 2002) .....	5
<i>Vann v. Unemployment Comp. Bd. of Review</i> , 494 A.2d 1081 (Pa. 1985) .....	3

*Statutes/Regulations*

Pa.R.E. 702 .....	7
Pa.R.E. 802 .....	6
52 Pa. Code § 5.403 .....	6
52 Pa. Code § 5.411 .....	6
52 Pa. Code § 5.483 .....	6
52 Pa. Code § 5.485 .....	6
52 Pa. Code § 5.535 .....	1
66 Pa.C.S. § 101 .....	4
66 Pa.C.S. § 1501 .....	1
66 Pa.C.S. § 2806.1 .....	2
66 Pa.C.S. § 304 .....	6

## **Introduction**

In accordance with the Commission's directive and Section 5.535 of the Commission's Regulation, 52 Pa. Code § 5.535, Pennsylvania Electric Company (Penelec or the Company) submits its Reply to the Exceptions of Joanne Fiorito (Complainant) and supports the adoption of the Initial Decision (ID) of Administrative Law Judge Jeffrey A. Watson (Judge Watson). The Commission should deny the Exceptions, affirm the ID in its entirety and sustain the dismissal of the Formal Complaint. The findings of facts and conclusions of law set forth in the well-reasoned ID are based on the record evidence and sustain the dismissal of the Formal Complaint.

## **Relevant History of Proceedings**

In her Formal Complaint, filed on June 8, 2017, the Complainant alleged that smart meters are not mandated and she objects to the installation of one at her residence. On July 10, 2017, Penelec filed an Answer and New Matter denying the material averments and asserting that service may be lawfully terminated for refusing to permit the meter exchange.

A telephonic hearing was held on May 30 and 31, 2018. The Complainant appeared *pro se*. She offered her testimony and six of her exhibits were admitted into the record. The Company offered the testimony of three witness; two witnesses were qualified as experts in their field. All 27 of the Company exhibits were admitted into the record.

Judge Watson issued the Interim Order Setting Briefing Schedule on June 6 2018. The Complainant chose not to file a Main Brief. Penelec filed its Main Brief on August 1, 2018.

## **Initial Decision**

The ID was issued on October 4, 2018 and dismissed the Formal Complaint concluding that the Complainant failed to prove by a preponderance of the evidence that the proposed meter installation violates a Commission order, rule or regulation or constitutes unsafe or unreasonable service under 66 Pa. C.S § 1501. *ID* at 1. Specifically, Judge Watson found,

based on the Complainant's unsubstantiated testimony, that she did not make a *prima facie* case that Penelec's installation of a smart meter is not mandated by Act 129<sup>1</sup>, codified in Chapter 28<sup>2</sup> of the Public Utility Code (Code). *ID* at 29.

### Discussion

At the hearing, Judge Watson advised the parties that they could request to submit a brief or present legal argument on the record. Tr. 9. Judge Watson granted both parties' request, noting that the Complainant wanted to submit a brief because there are some legal arguments that she wanted to address at length. Tr. 436. The Complainant chose not to file a brief. Rather she makes her legal argument, for the first time, in her Exceptions.

The Complainant lists two Exceptions<sup>3</sup> to the Initial Decision, to wit: (1) Judge Watson erred by concluding there is no opt out in Act 129; and (2) Judge Watson did not answer her questions regarding jurisdictional authority and legislative power. Within that Exception, the Complainant challenges the validity of the hearing and Judge Watson's procedural ruling excluding hearsay testimony and not qualifying her as an expert witness.

#### **Penelec's Response to Complainant's Exception #1: The ALJ erred by concluding that there is No Opt Outs in Act 129.**

The Complainant argues that Judge Watson "presumed there are No Opt Outs based on his own opinion and that of the Respondent's response." She contends that the only place where the words "Mandatory and No Opt Outs exists in on the Company's Smart Meter Deployment Plan (SMDP), in a box called Assumptions." Exceptions at 3. In support of her position, she simply argues, "the word shall means either may or must."

Penelec incorporates the argument sets forth in its Main Brief at pages 9-14. The Complainant's position is without merit. There is no record evidence to support that there is an

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<sup>1</sup> Act 129 of 2008.

<sup>2</sup> 66 Pa.C.S. § 2806.1 *et seq.*

<sup>3</sup> By not filing exceptions to the other issues raised at hearing, the Complainant has waived her right to later object to those findings.

opt-out provision contained in Code. The language of the Code is clear and unambiguous.<sup>4</sup> Commission precedent is well-settled: the Commission cannot grant exceptions to the statutory directive that smart meters be installed by allowing customers to “opt-out.”<sup>5</sup> Furthermore, the Commission has ruled that neither the Companies’ Commission-approved Revised Deployment Plan nor Act 129 permit such opt-outs to occur and dismissed formal complaints on that basis.<sup>6</sup>

Other than her opinion testimony, the Complainant presented no evidence that Act 129 does not mandate the installation of smart meters. The Complainant’s assertions, personal opinions or perceptions do not constitute evidence. Personal opinion, no matter how strongly held, does not constitute evidence. *Pennsylvania Bureau of Corrections v. City of Pittsburgh*, 532 A.2d 12 (Pa. 1987). Even a *pro se* complainant must provide relevant and necessary information. *Groch v. Unemployment Comp. Bd. of Review*, 472 A.2d 286 (Pa. Cmwlth. 1984); *Vann v. Unemployment Comp. Bd. of Review*, 494 A.2d 1081 (Pa. 1985). Other than her opinion she presented no evidence. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk and Western Ry. v. PA Public Utility Comm’n*, 489 Pa. 109, 413 A.2d 1037 (1980); *Erie Resistor Corp. v. Unemployment Compensation Bd. of Review*, 194 Pa. Super. 278, 166 A.2d 96 (1960); *Murphy v. Commonwealth, Dept. of Public Welfare, White Haven Center*, 85 Pa. Cmwlth. 23, 480 A.2d 382 (1984).

The record evidence supports Judge Watson’s analysis and disposition that the Complainant did not carry her burden of proof that smart meters are not mandated under Act 129. The Complainant’s Exceptions regarding this issue should be denied based on the record evidence and legal precedent.

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<sup>4</sup> Tr. 218, 283-87; Complainant Exhibit A; Respondent Exhibit 1.

<sup>5</sup> *Lutherschmidt v. Metropolitan Edison Company*, Docket No. C-2010 2200353 (Final Order entered March 25, 2011); *Negley v. Metropolitan Edison Company*, Docket No. C-2010-2205305 (Final Order entered March 3, 2011).

<sup>6</sup> Tr. 284-285. Respondent Exhibit 23.

**Penelec's Response to Complainant's Exception #2: The ALJ did not answer question concerning jurisdictional authority and legislative power.**

The Complainant appears to challenge the validity of Act 129 based on her conclusion that “the House and Senate handed off their powers illegally to the Commission” and the Commission is “supposed to be protecting the public.” Exceptions at 4.

For whatever reason, the Complainant chose not to present her legal argument in a brief, which would have permitted Judge Watson to consider and rule on her arguments. It is outrageous that the Complainant contends that Judge Watson did not give her “a straight answer” when the Complainant provided inconsistent responses during the hearing to two direct questions from Judge Watson.<sup>7</sup>

The Commission's jurisdiction must arise from the express language of the pertinent enabling legislation or by strong and necessary implication therefrom. *Feingold v. Bell of Pa.*, 477 Pa. 1, 383 A.2d 791 (1977); *Allegheny County Port Authority v. Pa. P.U.C.*, 427 Pa. 562, 237 A.2d 602 (1967); *Behrend v. Bell of Pa.*, 257 Pa. Superior Ct. 35, 390 A.2d 233 (1978); *Harrisburg Taxicab & Baggage Co. v. Pa. P.U.C.*, 786 A.2d 288 (Pa. Cmwlth. 2001); and *City of Erie v. Pa. Electric Co.*, 383 A.2d 575 (Pa. Cmwlth. 1978). The Commission has the jurisdiction to entertain complaints regarding any aspect of the Code. Act 129 was codified in Chapter 28 of the Code. The Commission clearly has the authority to entertain and rule on the Complainant's Formal Complaint. The Commission balances the needs of consumers and utilities; ensures safe and reliable utility service at reasonable rates; protects the public interest; educates consumers to make independent and informed utility choices; furthers economic development; and fosters new technologies and competitive markets in an environmentally sound manner. 66 Pa.C.S. § 101 *et seq.*

To the extent that the Complainant is alleging that Act 129 is unconstitutional, the Pennsylvania Supreme Court has consistently held that enactments of the General Assembly enjoy a strong presumption of constitutionality. *Commonwealth v. Barud*, 681 A.2d 162, 165

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<sup>7</sup> The questions were (1) was the Complainant recording the hearing?; and (2) identify the individual(s) present with the Complainant. Tr. 10-33.

(Pa. Super. 1996); *Pennsylvania School Boards Ass'n., Inc. et al. v. Commonwealth Ass'n. of School Administrators*, 805 A.2d 476, 479 (Pa. Super. 2002). All doubts are to be resolved in favor of sustaining the constitutionality of the legislation. *Commonwealth v. Blystone*, 549 A.2d 81, 87 (Pa. Super. 1988), affirmed, 494 U.S. 299, 110 S. Ct. 1078, 108 L. Ed. 2d 255 (1990). "[N]othing but a clear violation of the Constitution—a clear usurpation of power prohibited—will justify the judicial department in pronouncing an act of the legislative department unconstitutional and void." *Glancey v. Casey*, 288 A.2d 812, 818 (Pa. Super. 1972). In other words, the court is "obliged to exercise every reasonable attempt to vindicate the constitutionality of a statute and uphold its provisions." *Commonwealth v. Chilcote*, 578 A.2d 429, 435 (Pa. Super. 1990). "The right of the judiciary to declare a statute void, and to arrest its execution, is one which, in the opinion of all courts, is coupled with responsibilities so grave that it is never to be exercised except in very clear cases." *Erie & N.E. R.R. Co. v. Casey*, 26 Pa. 287, 300 (1856). Thus, there is a very heavy burden of persuasion upon one who challenges the constitutionality of a statute. *Barud, supra.* at 165. Moreover, one of the most firmly established principles of law is that the challenging party must prove the act "clearly, palpably and plainly" violates the constitution. *Barud*, at 165. The power of judicial review must not be used as a means by which the courts might substitute its judgment as to public policy for that of the legislature. The role of the judiciary is not to question the wisdom of the action of the legislative body, but only to see that it passes constitutional muster. *Commonwealth v. Elia*, 83 A.3d 254, 267 (2012).

Pursuant to the Code, the Commission clearly has the authority to rule on her Formal Complaint. The Complainant's Exception should be denied.

### **Penelec's Response to Procedural Exceptions**

The Complainant also raises three procedural Exceptions, which are addressed seriatim.

*Administrative hearing was not a court since the transcript "lacks the section where [the Complainant] was sworn in, no mention at all."*

Section 304 of the Code<sup>8</sup> established the Office of Administrative Law Judge. Pursuant to Commission regulations,<sup>9</sup> Judge Watson was designated to preside over the proceeding. Rule 5.411<sup>10</sup> of the Commission regulations requires witness testimony to be sworn or affirmed, before the testimony is deemed as evidence. Judge Watson had the Complainant sworn before testifying as reflected in the transcript: “Joanne Fiorito, called as a witness in the following proceeding, and having first been duly sworn, testified and said as follows.” Tr. 35.

The Complainant’s Exception, which is contrary to the certified transcript, is without merit and should be denied.

*Complainant’s “prima facie evidence was thrown out based solely on the fact” that Judge Watson “claimed the evidence was hearsay.”*

In support of her argument, the Complainant merely provides links to the United States Constitution and definitions from Black’s Law Dictionary. She provides no argument why Judge Watson’s ruling excluding opinions/articles written by others are not hearsay and properly excluded. The Complainant’s hearsay testimony is not admissible under Rule 802<sup>11</sup> of the Pennsylvania Rules of Evidence. Commission regulations<sup>12</sup> provide Judge Watson all necessary authority to control the receipt of evidence, including ruling on the admissibility of evidence. Judge Watson conducted a fair and impartial hearing consistent with Commission regulations.<sup>13</sup>

The Complainant’s allegation to the contrary is without merit and the Exception should be denied.

*Complainant was denied the right of being considered as an expert.*

In support of her argument that she is qualified to provide expert testimony, the Complainant merely provides links and definitions from Black’s Law Dictionary. She provides

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<sup>8</sup> 66 Pa.C.S. § 304.

<sup>9</sup> 52 Pa. Code § 5.483.

<sup>10</sup> 52 Pa. Code § 5.411.

<sup>11</sup> Pa.R.E. 802.

<sup>12</sup> 52 Pa. Code §§ 5.403 and 5.483.

<sup>13</sup> 52 Pa. Code § 5.485.

no argument why Judge Watson's ruling based on the record evidence was incorrect. The Complainant did not file a brief disputing Judge Watson's ruling on this issue. She provides no legal argument in her Exceptions why his ruling should be reversed.

Judge Watson conducted the appropriate examination of the Complainant's knowledge, skill, experience, training, and education and found that she did not possess scientific, technical, or other specialized knowledge beyond that possessed by the average layperson or that her testimony would assist him, as the trier of facts, to understand the evidence or to determine any facts in issue. Tr. 144-171. Judge Watson's ruling is consistent with the Pennsylvania Rules of Evidence.<sup>14</sup>

The Complainant's Exception that she was not properly qualified as an expert is not based on the record evidence. Judge Watson's ruling should be affirmed and the Exception denied.

### **Conclusion**

The Complainant's Exceptions do not present legal arguments that support the reversal or modification of the Judge Watson's well-reasoned ID. The substantial record evidence supports a finding that the Complainant failed to carry her burden of proof that Penelec violated the Code, Commission regulation or order in mandating the installation of a smart meter at her residence. The findings of facts and conclusions of law in the ID are based on substantial record evidence.

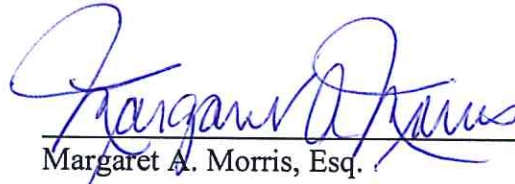
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<sup>14</sup> Pa.R.E. 702.

For the reasons set forth above, Pennsylvania Electric Company respectfully requests that the Commission adopt the Initial Decision of the Honorable Jeffrey A. Watson without modification and dismiss the Formal Complaint of Joanne Fiorito.

Respectfully submitted,

Dated: November 5, 2018



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