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September 26, 2019

VIA OVERNIGHT DELIVERY

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: Richard N. Myers v. PPL Electric Utilities Corporation
Docket No. C-2017-2620710

Dear Secretary Chiavetta:

Enclosed for filing is the Answer of PPL Electric Utilities Corporation to Richard N. Myers's Petition for Supersedeas in the above-referenced proceeding. Copies will be provided as indicated on the Certificate of Service.

Respectfully submitted,

Devin Ryan

DTR/dmc
Enclosures

cc: Certificate of Service

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SECRETARY'S BUREAU

BEFORE THE
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PA PUBLIC UTILITY COMMISSION
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Richard N. Myers,

Complainant,

v.

PPL Electric Utilities Corporation,

Respondent.

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Docket No. C-2017-2620710

**ANSWER OF PPL ELECTRIC UTILITIES CORPORATION
TO RICHARD N. MYERS'S PETITION FOR SUPERSEDEAS**

TO PENNSYLVANIA PUBLIC UTILITY COMMISSION:

Pursuant to 52 Pa. Code § 5.61, PPL Electric Utilities Corporation ("PPL Electric" or the "Company") hereby files this Answer to Richard N. Myers's ("Complainant") Petition for Supersedeas ("Petition"), which seeks a stay of the Pennsylvania Public Utility Commission's ("Commission") Opinion and Order entered on August 29, 2019 ("*Final Order*"). The *Final Order* dismissed the Complainant's Formal Complaint challenging the Company's planned installation of a new automated metering infrastructure ("AMI") meter at the Complainant's service address as well as the installation of AMI meters for his tenants' electric service accounts. The Complainant's Petition requests a stay that would prevent PPL Electric from installing its new AMI meter and terminating the Complainant's electric service if he continues to refuse the AMI meter's installation while he pursues his appeal of the *Final Order*.

For the reasons explained herein, the Complainant's Petition fails to meet the high standard required for a stay pending appeal and, therefore, should be denied.

In support of its Answer, PPL Electric states as follows:

I. INTRODUCTION

1. On August 22, 2017, PPL Electric was served with the above-captioned Formal Complaint filed by the Complainant with the Commission. In his Complaint, the Complainant contests PPL Electric's planned installation of a new AMI meter at his residential property as well as the installation of AMI meters at his rental properties.

2. On August 16, 2018, Administrative Law Judge Elizabeth H. Barnes ("ALJ") issued the Initial Decision ("ID"). The ID dismissed the Complainant's Formal Complaint challenging the Company's planned installation of a new AMI meter at his premises and the installation of new AMI meters at his rental properties, because the Complainant failed to prove by a preponderance of evidence that the installation of the AMI meters constitutes unsafe or unreasonable service under 66 Pa. C.S. § 1501.

3. The Complainant filed Exceptions to the ID on September 4, 2018, and PPL Electric filed Replies to those Exceptions on September 17, 2018. PPL Electric also filed a limited Exception to the Initial Decision on September 5, 2018, regarding the ALJ's fire safety recommendations.

4. On August 29, 2019, the Commission issued its *Final Order* denying the Complainant's Exceptions, granting PPL Electric's Exception, adopting the ID as modified, and dismissing the Complaint.

5. On September 3, 2019, the Complainant filed a Petition for Supersedeas pending his appeal of the *Final Order* with the Commission, which was served by regular mail. Therein, the Complainant requests a stay of the *Final Order*, which, according to him, should prevent PPL Electric from installing its new AMI meters at his service address and terminating his electric service for refusal to permit the installation of the AMI meter while the Complainant pursues his appeal of the *Final Order*.

6. For the reasons stated below, PPL Electric respectfully requests that the Commission deny the Complainant's Petition for Supersedeas.

II. ANSWER TO PETITION FOR SUPERSEDEAS

7. The Commission should deny the Petition for Supersedeas because the Complainant has failed to meet the high standard required for a stay pending appeal.

8. The Pennsylvania Supreme Court has stated that a stay is warranted if: (1) the petitioner makes a strong showing that he is likely to prevail on the merits; (2) the petitioner has shown that without the requested relief, he will suffer irreparable injury; (3) the issuance of a stay will not substantially harm other interested parties in the proceedings; and (4) the issuance of a stay will not adversely affect the public interest. *Pa. PUC v. Process Gas Consumers Grp.*, 467 A.2d 805, 808-09 (Pa. 1983). For a stay pending appeal, the Court found that the petitioner must make a "strong showing" under these criteria to justify the issuance of a stay. *Id.* at 809.

9. As explained below, the Petition should be denied because the Complainant has failed to establish these four criteria.

A. **THE COMPLAINANT HAS FAILED TO DEMONSTRATE A STRONG LIKELIHOOD OF SUCCESS ON APPEAL**

10. The Complainant has failed to demonstrate a strong likelihood that he will prevail on the merits.

11. In his Petition, the Complainant reiterates many of the same arguments that he raised before the ALJ and the Commission about PPL Electric's AMI meter, none of which are grounds for appeal. (Petition, pp. 1-9.)

12. The Commonwealth Court will not substitute its judgment for that of the Commission, nor will it reweigh the evidence or resolve conflicting testimony. *See Philadelphia Elec. Co. v. Pa. PUC*, 433 A.2d 620, 624 (Pa. Cmwlth. 1981) (quotation omitted); *Popowsky v.*

Pa. PUC, 706 A.2d 1197, 1201 (Pa. 1997) (quotation omitted). Rather, the Commonwealth Court's standard of review in an appeal from a state agency is limited to a determination of whether constitutional rights were violated, whether an error of law was committed, or whether necessary findings of fact are supported by substantial competent evidence. 2 Pa.C.S. § 704; *see Leung v. Pa. PUC*, 582 A.2d 719, 721 (Pa. Cmwlth. 1990); *Teltron, Inc. v. Pa. PUC*, 477 A.2d 599, 600 (Pa. Cmwlth. 1984) (citation omitted).

13. Here, the Complainant fails to make a strong showing that the Commission violated his constitutional rights, committed an error of law, or made necessary findings of fact that are unsupported by substantial competent evidence.

14. As the Commission properly found, the evidence presented by the Complainant fail to meet his burden of proof. *Final Order* at 29-41. In so doing, the Commission weighed the evidence presented before it and found that the testimony offered by PPL Electric, including that of its two expert witnesses, Dr. Christopher Davis and Dr. Mark Israel, was more persuasive and credible than the testimony of the Complainant and his witness, Dr. David Carpenter. *See id.* Specifically, the Commission: (1) rejected the Complainant's arguments that his exhibits were inappropriately excluded or given insufficient weight; and (2) found that "it would be improper to give much weight to the testimony of Dr. Carpenter" because it was flawed and "unreliable." *Id.*

15. In addition, even if the Complainant established a *prima facie* case, the Commission found that PPL Electric's substantial evidence, including the testimony of its two expert witnesses, fully rebutted the Complainant's claims. *See id.* at 32-33.

16. Nevertheless, the Complainant avers that the Commission should have determined that the AMI meters will cause, contribute to, or exacerbate adverse health effects. (Petition at 1-

5.) It appears the Complainant believes that the Commonwealth Court can substitute its judgment for the Commission and reweigh the evidence to find in his favor. However, even though the Complainant may not like that the Commission rejected his evidence and found PPL Electric's evidence to be much more persuasive, the Commonwealth Court cannot reweigh the evidence. *See Philadelphia Elec. Co. v. Pa. PUC*, 433 A.2d 620, 624 (Pa. Cmwlth. 1981) (quotation omitted).

17. Furthermore, nothing in the Complainant's Petition establishes that he will likely demonstrate that the Commission committed an error of law.

18. 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). Importantly, the word "shall" has been held by Pennsylvania courts to mean "must"¹; it is not a discretionary term. Therefore, the Company must install the new AMI meters.

19. Moreover, even if the statutory language were unclear, the Commonwealth Court is "required to defer to the agency's interpretation of the statute." *Buffalo Twp. v. Jones*, 778 A.2d 1269, 1276 n.8 (Pa. Cmwlth. 2001) (citations omitted).

20. Here, the Commission has consistently held that nothing in Act 129 permits a customer to "opt-out" of a smart meter installation, as requested by the Complainant. *See, e.g., Starr v. PECO Energy Co.*, Docket No. C-2015-2516061, p. 11 (Order Entered Sept. 1, 2016) (footnote omitted). Specifically, in *Starr*, the Commission observed that it has "rejected similar

¹ *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.'").

claims that the installation of smart meters is not mandatory or that an opt-out is permissible under Act 129.” *Id.*; see *Frompovich v. PECO Energy Co.*, Docket No. C-2015-2474602, pp. 8-10 (Order entered May 3, 2018); *Povacz v. PECO Energy Co.*, Docket No. C-2015-2475023, p. 93 (Order entered Mar. 28, 2019); *Sunstein Murphy v. PECO Energy Co.*, Docket No. C-2015-2475726, p. 93 (Order entered May 9, 2019); *Randall & Albrecht v. PECO Energy Co.*, Docket No. C-2016-2537666, p. 88 (Order entered May 9, 2019).

21. Thus, under the currently-enacted law, PPL Electric must install the new AMI meters for all of its customers, including the Complainant.

22. In addition, the Complainant erroneously contends that the Company’s installation of AMI meters would violate his constitutional rights. (Petition, p. 7.)

23. 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).

24. 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.

25. Thus, PPL Electric cannot, by installing the AMI meters, violate the Complainant’s constitutional rights.

26. Furthermore, the Complainant tries to introduce and rely on, once again, several pieces of extra-record evidence, including the National Toxicology Program (“NTP”) Study, allegations raised by complainants in other proceedings, and allegations of other unnamed persons who, according to the Complainant, have experienced issues with AMI meters. (Petition, pp. 2-6.)

27. None of this “evidence” is in the record; therefore, it cannot be introduced and relied on in the Complainant’s appeal. *See, e.g., Kyu Son Yi v. State Bd. of Veterinary Med.*, 960 A.2d 864, 873 (Pa. Cmwlth. 2008) (citation omitted); *Hess v. Pa. PUC*, 107 A.3d 246, 265-67 (Pa. Cmwlth. 2014) (citations omitted).

28. For these reasons, the Complainant does not have a strong likelihood of prevailing on appeal.

B. THE COMPLAINANT HAS FAILED TO MAKE THE REQUISITE SHOWING OF HARM

29. The Complainant has failed to demonstrate that he will suffer irreparable injury absent a stay, that the issuance of a stay will not substantially harm other interested parties in the proceedings, and that the issuance of a stay will not adversely affect the public interest. *See Pa. PUC v. Process Gas Consumers Grp.*, 467 A.2d 805, 808-09 (Pa. 1983).

30. In trying to support his requested stay, the Complainant alleges that: (1) he will suffer adverse health effects from the AMI meter being installed; (2) PPL Electric will not be harmed by the stay; and (3) the parties will benefit financially from the stay. (Petition, pp. 7-8.)

31. Here, as correctly found by the Commission in this proceeding, the Complainant failed to demonstrate that the installation of the new AMI meter will cause, contribute to, or exacerbate any adverse health effects. *See Final Order* at 29-41.

32. Nothing in the Complainant's Petition, including the extra-record evidence he attempts to rely upon,² warrants disturbing that finding.

33. Further, PPL Electric has been delaying the installation of the AMI meter for his residence since the proceeding began on August 22, 2017.

34. Under PPL Electric's Commission-approved Smart Meter Plan, the Company is set to finish deploying its AMI meters in 2019. (PPL Electric Exhibit SL-1, p. 3.)

35. The Company needs to deploy the meters in 2019 so that it can focus on the "two-year system stabilization period from 2020-2021," which "will be used to optimize system performance and ensure all functionality is delivered." (PPL Electric Exhibit 3, pp. 3-4.)

36. However, it could take several months until the Commonwealth Court issues a ruling on the Complainant's appeal.

37. Therefore, if the AMI meter's installation is further delayed until the Complainant's appeal is resolved, PPL Electric likely will not be able to install the AMI meter in accordance with its AMI meter deployment schedule.

² As explained in Section II.D., *infra*, the Commission should completely disregard this extra-record evidence in the consideration of the Complainant's Petition.

38. Lastly, the Complainant contends that a stay will have a financial benefit to both parties because PPL Electric will not have to incur the financial cost of replacing the AMI meter if he ultimately prevails. (Petition, p. 8.)

39. The Complainant's argument should be rejected because the cost to install and later replace the new AMI meter is miniscule, *i.e.*, approximately under \$150.

40. Based on the foregoing, the Complainant has failed to establish the requisite showing of harm to warrant the Commission granting a stay pending appeal.

C. THE COMPLAINANT'S PETITION IMPROPERLY ATTEMPTS TO INTRODUCE EXTRA-RECORD EVIDENCE THAT SHOULD BE REJECTED

41. As with the Complainant's Main Brief and Reply Brief, the Complainant improperly attempts to introduce and rely upon extra-record evidence in his Petition.

42. As explained previously, this extra-record evidence includes references to the NTP Study, allegations raised by complainants in other proceedings, and allegations of other unnamed persons who, according to the Complainant, have experienced issues with AMI meters. (Petition, pp. 2-6.)

43. This is not evidence in the record.

44. Indeed, in its *Final Order*, the Commission affirmed the ALJ's decision to strike several pieces of extra-record evidence, including the draft NTP Study, from his Briefs. *See Final Order* at 49-50.

45. Thus, the Commission should not rely upon this extra-record evidence in its disposition of the Petition, or else PPL Electric's due process rights would be violated.³

³ *See Hess v. Pa. PUC*, 107 A.3d 246, 266 (Pa. Cmwlth. 2014) (citations omitted); *Pa. PUC v. Nat'l Fuel Gas Distrib. Corp.*, 1993 Pa. PUC LEXIS 95, at *10 (“[S]uch material was outside the record and could be detrimental to the rights of other parties to confront such evidence.”); 52 Pa. Code § 5.431 (stating that “[a]fter the record is closed, additional matter may not be relied upon or accepted into the record unless allowed for good cause

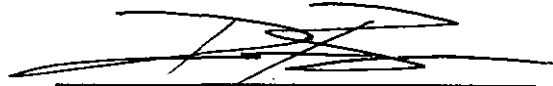
46. Based on the foregoing, the Complainant has failed to meet the high standard required for the Commission to grant a stay pending appeal. Accordingly, his Petition for Supersedeas should be denied.

shown by the presiding officer or the Commission upon motion”); 66 Pa. C.S. § 332(c) (stating that every party is entitled 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”).

III. CONCLUSION

For the reasons set forth above, PPL Electric Utilities Corporation respectfully requests that the Pennsylvania Public Utility Commission deny the Petition for Supersedeas filed by Richard N. Myers.

Respectfully submitted,



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Date: September 26, 2019

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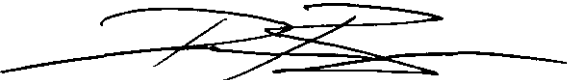
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I hereby certify that a true and correct copy of the foregoing has been served upon the following persons, in the manner indicated, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant).

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Date: September 26, 2019


Devin T. Ryan

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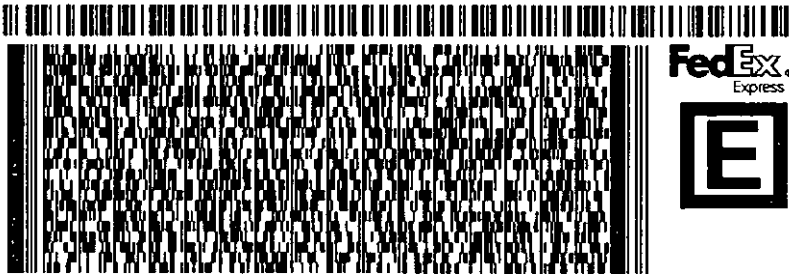
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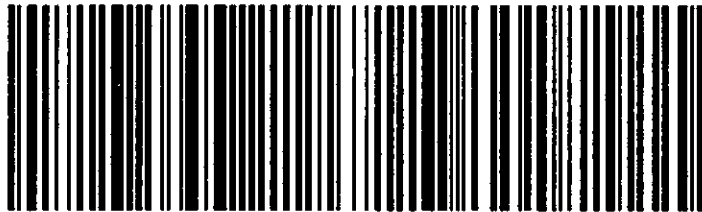
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