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November 15, 2019

VIA ELECTRONIC FILING

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor
Harrisburg, PA 17120

Re: Brian A. Hoeft v. Metropolitan Edison Company
Docket No. C-2019-3011586

Dear Secretary Chiavetta:

Attached please find the Main Brief on behalf of Metropolitan Edison Company regarding the above-referenced matter. This document has been served on the all parties as shown in the Certificate of Service.

Please contact me if you have any questions.

Very truly yours,



Tori L. Giesler

Enclosures

c: As Per Certificate of Service

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

BRIAN A. HOEFT	:	
	:	
v.	:	Docket No. C-2019-3011586
	:	
METROPOLITAN EDISON COMPANY	:	

**MAIN BRIEF
ON BEHALF OF
METROPOLITAN EDISON COMPANY**

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Dated: November 15, 2019

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I. PROCEDURAL HISTORY

On July 15, 2019, Brian A. Hoeft (“Complainant”) filed a Formal Complaint with the Pennsylvania Public Utilities Commission (“Commission”), challenging the authority of Metropolitan Edison Company (“Met-Ed” or the “Company”) to install a smart meter at his service location, 760 White Oaks Manor, Drive, East Stroudsburg, Pennsylvania 18301 (the “Service Location”).

On August 6, 2019, Met-Ed filed its Answer and New Matter of Metropolitan Edison Company to the Complaint of Brian A. Hoeft, denying the material allegations in the Formal Complaint. On that same date, Met-Ed also filed Preliminary Objections seeking dismissal of the Formal Complaint on the grounds that it is legally insufficient because it fails to state a claim upon which the Commission can grant relief.

On August 26, 2019, the Complainant filed a Reply to Answer and Reply to Preliminary Objections. In these replies, the Complainant argued for the first time that Act 129 of 2008 (“Act 129”) is unconstitutional because it allegedly violates Pa. Const. Art. 1 §1, §8, and Art. 10 §2.

On September 30, 2019, an In-Person Prehearing Conference was held before Administrative Law Judge (“ALJ”) Dennis J. Buckley. At this conference, ALJ Buckley set a briefing schedule for the parties to provide arguments on two issues related to Act 129. More specifically, the parties were ordered to submit briefs regarding: (1) whether Act 129 requires the installation of a smart meter for all customers; and (2) whether Act 129 is constitutional under the provisions of the Pennsylvania Constitution. The briefing schedule required the parties to file Main Briefs by November 15, 2019 and Reply Briefs by December 20, 2019.

Met-Ed hereby submits its Main Brief in accordance with ALJ Buckley's instructions at the September 30, 2019 In-Person Prehearing Conference.

II. LEGAL ARGUMENT

~~A. Act 129 mandates the installation of smart meters for all customers.~~

Met-Ed has an absolute obligation under Act 129 to install smart meters at all of its customers' service locations. On October 15, 2008, Act 129 was signed into law and codified as part of the Public Utility Code ("Code").¹ Act 129 required electric distribution companies ("EDCs") with at least 100,000 customers, such as Met-Ed, to file a smart meter technology procurement and installation plan ("SMP Plan") with the Commission for approval.² Specifically, Section 2807(f)(2) of the Code directed EDCs to furnish smart meter technology as follows: 1) upon request from a customer that agrees to pay the cost of the smart meter at the time of the request; 2) in new building construction; and 3) in accordance with a depreciation schedule not to exceed fifteen years.³

Commission precedent is uniform in holding that Act 129 requires the installation of a smart meter for all customers and that the Commission cannot grant exceptions to this statutory directive by allowing customers to "opt-out" of installation. *See, e.g., Lutherschmidt v. Metropolitan Edison Company*, Docket No. C-2010-2200353 (Final Order, March 25, 2011); *Negley v. Metropolitan Edison Company*, Docket No. C-2010-2205305 (Initial Decision, Jan. 3, 2011, adopted without action Mar. 3, 2011). The Commission has also recently reaffirmed this conclusion, holding in a complaint proceeding that (1) there is no provision in the Code, Commission regulations or Orders that allows a customer to "opt-out" of smart meter installation;

¹ 66 Pa.C.S. § 101, *et seq.*

² 66 Pa.C.S. § 2807(f).

³ 66 Pa.C.S. § 2807(f)(2) (emphasis added).

(2) there is Commission precedent that no opt-out provision exists in current Pennsylvania law; and (3) the EDC is legally required to install smart meters by Act 129 and Commission Orders. *See Evangeline Hoffman-Lorah v. PPL Elec. Utilities Corp.*, 2019 Pa. PUC LEXIS 195, Docket No. C-2018-2644957 (Final Decision, May 23, 2019). As set forth in these numerous decisions, Act 129 requires that Met-Ed install a smart meter at all of its customers' service locations. The Commission should reject any argument made by the Complainant to the contrary.

B. The Commission lacks authority to consider a facial constitutional challenge to Act 129.

The Commission should refuse to consider the Complainant's arguments regarding the constitutionality of Act 129 because the Commission lacks authority to consider facial challenges to the constitutionality of a statute. Pennsylvania law is uniform in holding that administrative agencies lack authority to invalidate a statute based on a facial challenge to the statute's constitutionality. *See Lehman v. Pa. State Police*, 576 Pa. 365, 379 (Dec. 30, 2003); *see also EUR Sys., Inc. v. Commonwealth*, 965 A.2d 319, 322 (Commw. Ct. Jan. 9, 2009); *see also Bacon v. Pa. State Police*, 164 A.3d 563, 574 (Commw. Ct. June 13, 2017); *see also Funk v. Commonwealth*, 71 A.3d 1097, 1102 (Commw. Ct. July 3, 2013). As the Court in *Lehman* explained, "[t]o allow administrative agencies to invalidate their organic statute would be tantamount to allowing them to repeal the statute or judge its constitutionality, functions vested in the General Assembly and the courts, respectively." *Lehman*, 576 Pa. at 379-80. Thus, consistent with constitutional restraints on the delegation of legislative power, an administrative agency lacks authority to rule on issues that concern the validity of a statute it is administering. *See id.*, at 379. The Commission has recognized this constraint on its authority. *See In re Application of PECO Energy Co.*, 87 Pa. PUC 184, *20, Docket Nos. R-00973877, R-00973877C0001, R-00973877C002 (Opinion, May 22, 1997) (refusing to rule on constitutional challenges to a statute based upon allegations about

the statute's enactment because "the determination of the constitutionality of enabling legislation is not a function of the administrative agencies thus enabled.").

Here, the Complainant asks the Commission to adjudge the constitutionality of Act 129, arguing in his Reply to Answer and Reply to Preliminary Objections that installation of a smart meter (as required by Act 129) violates Pa. Const. Art. 1 §1, §8, and Art. 10 §2. But the Commission is not responsible for determining the constitutionality of the statutes it is charged with administering. *See id.* Indeed, the Commission lacks authority to do so. *See id.* And, while the Commission has authority to consider "as applied" challenges to a statute's constitutionality, there is no factual record in this proceeding on which to argue such a challenge. *See id.*, at 382. As such, the Commission should refuse to consider the Complainant's arguments regarding the constitutionality of Act 129.

C. Act 129 withstands a facial constitutional challenge.

Even if the Commission were to consider the Complainant's facial challenges to the constitutionality of Act 129 (which it should not), such challenge must fail because Act 129 withstands a facial constitutional challenge under the "plainly legitimate sweep" standard articulated by the Pennsylvania Supreme Court. *See Clifton v. Allegheny County*, 600 Pa. 662, 703-06 (Apr. 29, 2009). In *Clifton*, the Pennsylvania Supreme Court explained that:

[A] statute is only facially invalid when its invalid applications are so real and substantial that they outweigh the statute's "plainly legitimate sweep." Stated differently, a statute is facially invalid when its constitutional deficiency is so evident that proof of actual unconstitutional application is unnecessary. For this reason (as well as others), facial challenges are generally disfavored.

Id. at 706, fn. 37 (citations omitted).

Here, the facial validity of Act 129 under the “plainly legitimate sweep” standard is apparent. In his Reply to Answer, the Complainant asserts that:

Met-Ed must respect my rights protected by our state Constitution including, but not limited to, protection of property, protection of liberty and pursuit of happiness enumerated under Article 1 §1. Met-Ed must also respect my rights to privacy as enumerated in Article 1 §8 which can be compromised by advanced metering technology.

Reply to Answer at ¶5.

But the Complainant has not attempted to explain how Act 129’s requirement that a smart meter be installed for all customers violates any of these rights. Indeed, in various proceedings related to the implementation of Act 129, the Commission has received evidence related to the impact the installation of a smart meter has on customer privacy and has concluded that such installation does not represent a privacy risk. *See, e.g., Evangeline Hoffman-Lorah v. PPL Elec. Utilities Corp.*, 2019 Pa. PUC LEXIS 195, Docket No. C-2018-2644957 (Final Decision, May 23, 2019). Accordingly, it cannot be said that any constitutional deficiency related to Act 129 is “so evident that proof of actual unconstitutional application is unnecessary.”

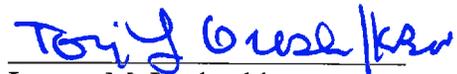
As a result, even if the Commission considers the Complainant’s facial challenge to the constitutionality of Act 129 (which it should not), Act 129 withstands a facial constitutional challenge under the standard articulated by the Pennsylvania Supreme Court.

III. CONCLUSION

WHEREFORE, Metropolitan Edison Company respectfully requests that Administrative Law Judge Dennis J. Buckley recommend that the Pennsylvania Public Utility Commission dismiss the Formal Complaint of Brian Hoeft with prejudice.

Respectfully submitted,

Dated: November 15, 2019



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APPENDIX A

PROPOSED CONCLUSIONS OF LAW

1. Commission precedent is uniform in holding that utilities covered by Act 129 are required to install smart meters for all of their customers. *See, e.g., Lutherschmidt v. Metropolitan Edison Company*, Docket No. C-2010-2200353 (Final Order, March 25, 2011); *Negley v. Metropolitan Edison Company*, Docket No. C-2010-2205305 (Initial Decision, Jan. 3, 2011, adopted without action Mar. 3, 2011); *Evangeline Hoffman-Lorah v. PPL Elec. Utilities Corp.*, 2019 Pa. PUC LEXIS 195, Docket No. C-2018-2644957 (Final Decision, May 23, 2019).

2. Act 129 mandates that Metropolitan Edison install a smart meter at all of its customers' service locations.

3. Administrative agencies lack authority to invalidate a statute based on a facial challenge to the statute's constitutionality. *See Lehman v. Pa. State Police*, 576 Pa. 365, 379 (Dec. 30, 2003); *see also EUR Sys., Inc. v. Commonwealth*, 965 A.2d 319, 322 (Commw. Ct. Jan. 9, 2009); *see also Bacon v. Pa. State Police*, 164 A.3d 563, 574 (Commw. Ct. June 13, 2017); *see also Funk v. Commonwealth*, 71 A.3d 1097, 1102 (Commw. Ct. July 3, 2013).

4. The Commission lacks authority to invalidate Act 129 based on a facial challenge to its constitutionality.

5. The Complainant's arguments regarding the constitutionality of Act 129, as set forth in the Complainant's Reply to Answer and Reply to Preliminary Objections, constitute a facial challenge to the constitutionality of Act 129.

6. The Commission does not have authority to rule on Complainant's arguments, as set forth in his Reply to Answer and Reply to Preliminary Objections, regarding the constitutionality of Act 129.

7. The “plainly legitimate sweep” standard applies to facial challenges to a statute’s constitutionality. *See Clifton v. Allegheny County*, 600 Pa. 662, 703-06 (Apr. 29, 2009).

8. Under the “plainly legitimate sweep” standard, a statute may be declared unconstitutional as a result of a facial challenge only if its “constitutional deficiency is so evident that proof of actual unconstitutional application is unnecessary.” *Clifton*, 600 Pa. At 706, fn. 37.

9. The Commission has previously found that the installation of a smart meter, as mandated by Act 129, does not present a privacy risk. *See, e.g., Evangeline Hoffman-Lorah v. PPL Elec. Utilities Corp.*, 2019 Pa. PUC LEXIS 195, Docket No. C-2018-2644957 (Final Decision, May 23, 2019).

10. Act 129’s mandate that utilities install smart meters at all of its customers’ service locations does not result in Act 129 having a “constitutional deficiency [] so evident that proof of actual unconstitutional application is unnecessary.”

11. The Complainant has failed to meet his burden of proof to demonstrate that Met-Ed’s installation of a smart meter at his residence violates any provision of the Code, regulation, or Commission Order, or otherwise constitutes unsafe or unreasonable service.

APPENDIX B

PROPOSED ORDERING PARAGRAPHS

1. The formal complaint of Brian Hoeft filed against Metropolitan Edison Company
~~at the above-referenced docket is dismissed with prejudice.~~

2. This matter shall be marked as closed.

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

BRIAN A. HOEFT	:	
	:	
v.	:	Docket No. C-2019-3011586
	:	
METROPOLITAN EDISON COMPANY	:	

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the Main Brief of Metropolitan Edison Company upon the individuals listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant).

Service by electronic and First Class Mail, postage prepaid, as follows:

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Dated: November 15, 2019



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