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December 19, 2019

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: Paula and Charles Hughes v. PPL Electric Utilities Corporation
Docket No. C-2019-3007631

Dear Secretary Chiavetta:

Enclosed please find the Replies of PPL Electric Utilities Corporation to the Exceptions of Paula and Charles Hughes for filing in the above-referenced proceeding. Copies will be provided as indicated on the Certificate of Service.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Devin Ryan', is written over a horizontal line.

Devin Ryan

DTR/dmc
Enclosures

cc: Honorable Elizabeth Barnes
Office of Special Assistants (*via E-mail*)
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 & REGULAR MAIL

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Date: December 19, 2019

A handwritten signature in black ink, appearing to read "Devin T. Ryan", written over a horizontal line.

Devin T. Ryan

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Paula and Charles Hughes,	:
	:
Complainants,	:
	:
v.	:
	:
PPL Electric Utilities Corporation,	:
	:
Respondent.	:

Docket No. C-2019-3007631

**REPLIES OF PPL ELECTRIC UTILITIES CORPORATION TO THE
EXCEPTIONS OF PAULA AND CHARLES HUGHES**

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Date: December 19, 2019

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I. INTRODUCTION

PPL Electric Utilities Corporation (“PPL Electric” or the “Company”), pursuant to 52 Pa. Code § 5.535, hereby respectfully submits these Replies to the Exceptions of Paula and Charles Hughes (“Complainants”). In the Initial Decision (“ID”), Administrative Law Judge Elizabeth H. Barnes (the “ALJ”) dismissed the Complainants’ Formal Complaint challenging the Company’s planned installation of a new advanced metering infrastructure (“AMI”) meter at their property. The ALJ correctly held that the Complainants failed to prove by a preponderance of evidence that the installation of the AMI meter constitutes unsafe or unreasonable service under 66 Pa. C.S. § 1501. The ALJ also correctly held that there is no provision to “opt-out” of a smart meter installation under Pennsylvania law.

On December 4, 2019, the Complainants filed Exceptions to the ID.¹

As explained herein, the Complainants’ Exceptions are without merit and should be denied. Accordingly, the Company respectfully requests that the Pennsylvania Public Utility Commission (“Commission”) deny the Complainants’ Exceptions and adopt the ID without modification.²

¹ PPL Electric notes that the Complainants’ Exceptions were not due until December 9, 2019, *i.e.*, 20 days after the ID was issued on November 19, 2019. Therefore, the Company’s Replies to the Exceptions are timely filed because they are due 10 days after the December 9, 2019 due date for the Complainants’ Exceptions. *See* Secretarial Letter Serving the Initial Decision; 52 Pa. Code § 5.535(a).

² The Complainants failed to number each of their Exceptions as required by the Commission’s regulations. *See* 52 Pa. Code § 5.533(b) (stating “[e]ach exception must be numbered”). Therefore, PPL Electric treats every “EXCEPTION” heading to be an individual Exception, of which there are 12 in total. Moreover, there is substantial overlap in the Complainants’ Exceptions. Accordingly, PPL Electric responds to the Complainants’ Exceptions by subject matter rather than individually by the number of the Exception.

II. REPLIES TO EXCEPTIONS

A. **REPLIES TO EXCEPTIONS NOS. 1-8, 10 AND 12 – THE ALJ PROPERLY FOUND THAT THE COMPLAINANTS FAILED TO SUSTAIN THEIR BURDEN OF PROOF THAT INSTALLING THE NEW AMI METER WOULD VIOLATE SECTION 1501 OF THE PUBLIC UTILITY CODE**

The Complainants dispute the ALJ's finding that they failed to meet their burden of proof that installing the new AMI meter would violate Section 1501 of the Public Utility Code. (Exceptions, pp. 1-6.) According to the Complainants, the installation of the new AMI meter could cause adverse health effects, based on their own experiences. (Exceptions, pp. 1-3, 5-6.) The Complainants also contend that the AMI meter raises privacy concerns. (Exceptions, pp. 4-5.) As explained herein, the Complainants' Exceptions are without merit and should be denied.

1. **The ALJ Correctly Determined that There Is No Reliable Medical or Scientific Basis to Conclude that the New AMI Meter Will Cause, Contribute to, or Exacerbate Any Adverse Health Effects**

The ALJ properly held that there is no reliable medical or scientific basis to conclude that the new AMI meter will cause, contribute to, or exacerbate any adverse health effects. (ID at 11-14.) As the ALJ found, “[t]here is no reliable medical basis to conclude that RF fields from the AMI meter being used by PPL Electric will cause or contribute to the development of illness or disease.” (ID at 13.)

In reaching that determination, the ALJ relied on PPL Electric's credible and reliable expert testimony refuting the Complainants' bald assertions that the AMI meter could cause adverse health effects. (PPL St. No. 1, pp. 5-16; PPL Exhibits CD-1 through CD-5; PPL St. No. 2, pp. 7-20; PPL Exhibits MI-1 through MI-3.) First, Dr. Davis testified that the Federal Communications Commission (“FCC”) has determined safe public exposure levels for RF fields from devices that transmit RF signals, such as the AMI meters. (PPL St. No. 1, p. 9.) The FCC safe public exposure limits are based on evaluations of the body of scientific research on RF

fields and were adopted in consultation with other federal agencies, including the Food and Drug Administration (“FDA”) and the Environmental Protection Agency (“EPA”). (PPL St. No. 1, p. 9.) The FCC continues to coordinate with the agencies and to consider whether new scientific research shows any adverse effects from RF fields. (PPL St. No. 1, pp. 9-10.)

Based on the engineering specifications for the Landis + Gyr AMI meter being deployed by the Company, Dr. Davis calculated that the levels of RF fields from the AMI meters are **98,000 times lower** than the RF exposure safety limits established by the FCC. (PPL St. No. 1, p. 13; PPL Exhibit CD-2.) As a result, Dr. Davis found that “the RF field levels from the AMI meters being used by PPL Electric more than comply with the applicable FCC RF exposure limit.” (PPL St. No. 1, p. 13.) Moreover, the RF signals from the AMI meter are of very short duration and will occur for only a total of 84 seconds over a 24-hour period. (PPL St. No. 1, p. 7.)

Dr. Davis also testified that there are many sources of RF signals in the everyday environment and the RF fields from the AMI meter are much lower than from other typical sources. (PPL St. No. 1, p. 14.) For example, RF fields from using cell phones can be over 260,000 times higher than the RF fields from the AMI meter, and RF exposures from microwave ovens can be over 820,000 times higher. (PPL St. No. 1, p. 14.) Even 30 feet away from a person using a cell phone, the RF fields are 3 times higher than from the AMI meter. (PPL St. No. 1, p. 14.)

Furthermore, the existing background levels of RF fields at the Complainants’ residence are many times higher than the fields from the AMI meter. (PPL St. No. 1, p. 15.) Dr. Davis testified that there are 10 television broadcast towers within a 50-mile radius of the Complainants’ location. (PPL St. No. 1, p. 15.) Based on the locations of each tower and their

RF power outputs, the RF fields at three meters from the AMI meter being used by PPL Electric are 12.5 times smaller than the background RF exposure at the Complainants' residence. (PPL St. No. 1, p. 15; PPL Exhibit CD-5.) Thus, considering the AMI meter's RF fields are substantially lower than the FCC standard and many everyday sources, there is no reliable scientific basis to conclude very low levels of RF fields from the AMI meters being deployed by the Company can or will cause any adverse thermal or non-thermal biological effects in people. (PPL St. No. 1, pp. 15-16.) Notably, Dr. Davis's expert testimony on these points was not contradicted by any other expert testimony.

Second, Dr. Israel – the only medical expert to present testimony in this case – evaluated the scientific research on RF fields and adverse health effects. (PPL St. No. 2, p. 8.) He testified that he has been systematically examining this research over the past several decades and that many hundreds of studies have been published. (PPL St. No. 2, p. 6.) Dr. Israel stated that the three groups of controlled laboratory studies on animals “are particularly informative because they address fundamental biological functions that are very sensitive to any disruption: genetics, reproduction, and growth and development.” (PPL St. No. 2, pp. 8-9.) Dr. Israel described a number of the studies in these areas which he considered good examples of well-designed and well-conducted studies, which found no adverse effects on genetics, fertility, reproduction, growth, or development in the animals exposed to RF fields. (PPL St. No. 2, p. 9.) Further, Dr. Israel provided examples of well-conducted animal studies on RF fields and cancer. (PPL St. No. 2, pp. 9-10.) These studies also did not find any increased incidence in cancer in the RF exposed animals compared to non-exposed animals. (PPL St. No. 2, pp. 9-10.)

Based on the body of scientific research showing no consistent and reproducible effects from RF fields on cancer and other adverse health effects, the World Health Organization

(“WHO”) has concluded that “no adverse health effects have been established as being caused by mobile phone use.” (PPL St. No. 2, p. 10.) Many other public health authorities, including agencies in Canada, the U.K., Sweden, Norway, the Netherlands, and New Zealand, among others, have recently reached similar conclusions. (PPL St. No. 2, pp. 10-11.) Further, several U.S. state public health authorities and public utility commissions have investigated claims about health effects from smart meters, all of which have found that RF fields from smart meters do not pose any public health risk. (PPL St. No. 2, p. 11.)

In addition, Dr. Israel reviewed the published scientific research on electromagnetic hypersensitivity (“EHS”) from the perspective of a medical doctor. (PPL St. No. 2, pp. 12-15.) He was the only medical doctor to provide expert testimony in this case. Dr. Israel testified that claimed symptoms related to EHS are more accurately described as “Idiopathic Environmental Intolerance” (“IEI”), in which “idiopathic” means “cause unknown,” rather than electromagnetic hypersensitivity. (PPL St. No. 2, pp. 12-13.) This is consistent with a recommendation from the WHO. (PPL St. No. 2, pp. 12-13.) Dr. Israel evaluated the scientific research on IEI and found that “[r]eliable studies dating back to at least 2002 and also recent reviews of the studies by experts and reviews by expert panels of public health authorities have found IEI and the variety of symptoms attributed to it are not caused by exposure to RF fields.” (PPL St. No. 2, p. 13.) For example, a systematic review of 46 studies involving 1,175 individuals who claimed IEI symptoms found that people claiming IEI symptoms from RF fields could not replicate the claimed effect under controlled laboratory conditions. (PPL St. No. 2, p. 14.) Another recent study found that people who claimed IEI symptoms from RF fields reported lower levels of well-being when they knew they were exposed to RF fields, but when they did not know if they were being exposed, their reports of symptoms were not associated with RF fields. (PPL St. No. 2, p.

14.) That study concluded that “it is IEI-EMF individuals’ belief that exposure to RF EMFs will cause harm, rather than actual exposure itself, that results in the presence of symptoms in IEI-EMF individuals.” (PPL St. No. 2, p. 14.) Moreover, the research on IEI has been evaluated by credible public health entities and expert groups, including the United Kingdom Health Protection Agency (2012), the Royal Society of Canada (2013), the New Zealand Ministry of Health (2015), and the European Commission’s Scientific Committee on Emerging and Newly Identified Health Risks (2015). (PPL St. No. 2, p. 15.) Based on their reviews of the scientific research, these entities concluded there is no reliable scientific evidence that exposure to RF fields causes claimed IEI symptoms. (PPL St. No. 2, p. 15.)

Based on the evidence presented, the ALJ correctly concluded that the “Complainants have failed to show any health concerns . . . are likely to be caused, contributed to, or exacerbated by the AMI meter installed at their service property.” (ID at 11.) The Company presented overwhelming evidence through its scientific and medical expert witnesses, Dr. Christopher Davis and Dr. Mark Israel, to support the ALJ’s finding that there is no reliable basis to conclude that the new AMI meter will cause or contribute to any adverse health effects. Nevertheless, the Complainants contend that the ALJ erred in finding that they failed to sustain their burden of proof. The Commission should reject the Complainants’ arguments because they mischaracterize the record evidence and applicable law.

To begin, The Complainants fail to recognize the burden of proof applied by the Commission in this proceeding. It is well-established that “[p]roof of causation is required in order to prevail under Section 1501.” *Hoffman-Lorah v. PPL Elec. Utils. Corp.*, 2019 Pa. PUC LEXIS 195, at *62 (Order entered May 23, 2019), *appeal pending*, 712 C.D. 2019; *see, e.g., Sunstein Murphy v. PECO Energy Co.*, 2019 Pa. PUC LEXIS 159, at *51-52 (Order entered May

9, 2019), *appeal pending*, 606 C.D. 2019. It is not sufficient to merely demonstrate “a potential for harm.” *Hoffman-Lorah*, 2019 Pa. PUC LEXIS at 62. Therefore, 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*”).

Here, the Complainants merely have alleged they experience symptoms when exposed to RF fields and assert that there needs to be more long-term testing of RF fields from the AMI meters.³ (Exceptions, pp. 1-3.) Such bald assertions, personal opinions or perceptions do not constitute evidence. *See Mid-Atlantic Power Supply Ass’n v. Pa. PUC*, 746 A.2d 1196, 1200 (Pa. Cmwlth. 2000) (citation omitted). Further, testimony consisting of guesses, conjecture or speculation cannot prove a party’s claims. *Cuthbert v. City of Philadelphia*, 417 Pa. 610, 209 A.2d 261 (1965); *B & K Inc. v. Commonwealth Dep’t of Highways*, 398 Pa. 518, 159 A.2d 206 (1960). Thus, the ALJ correctly held that the Complainants did not sustain their burden of proof that the AMI meter’s installation could cause, contribute to, or exacerbate adverse health effects.

Moreover, the Complainants argue that they do not need to be experts to testify as to their personal experiences and that the ALJ erred by not finding their personal opinions persuasive. (Exceptions, p. 1.) According to the Complainants, their opinions regarding the health and safety of RF meters should be accepted by the Commission. (Exceptions, p. 1.) While the Complainants may be able to testify as to their own experiences, that does not qualify them to

³ As explained previously, PPL Electric’s expert witnesses presented credible, thorough, and reliable testimony establishing that there is no reliable medical or scientific basis to conclude that the AMI meters will cause, contribute to, or exacerbate adverse health effects.

render expert opinions in the medical or engineering fields. The ALJ properly concluded that the Complainants are neither engineers nor medical professionals and that their lay opinions as to the health effects of an RF meter are not persuasive. (ID at 11.) In contrast, PPL Electric presented expert testimony completely rebutting the Complainants' claims that the new AMI meters cause, contribute to, or exacerbate adverse health effects.

The Complainants also contend that the ALJ erred by concluding that the medical letters offered by the Complainants did not demonstrate that their claimed medical conditions would be caused or exacerbated by an AMI meter. (Exceptions, p. 2.) However, as the ALJ explained, the medical letters simply stated some health conditions that the Complainants may be experiencing or have been experiencing. (ID at 11.) The Complainants completely failed to present evidence showing that any of those health conditions would be caused or exacerbated by the AMI meter installation. (ID at 11.)

Lastly, the Complainants assert that the "conditions of anxiety and asthma are considered disabilities under the American[s] [with] Disabilities Act" ("ADA") and that they should be granted an AMI meter opt-out as an accommodation under that statute. (Exceptions, p. 2.) They also aver that installing the AMI meter would allegedly violate the Federal Trade Commission Act ("FTC Act") provisions on unfair or deceptive acts or practices by causing them harm. (Exceptions, pp. 2-3.) However, 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*, 383 A.2d 791, 794 (Pa. 1977) (citations omitted). Nothing in the Pennsylvania Public Utility Code grants the Commission the ability to interpret and enforce these federal statutes. In fact, the Commission has consistently held that it lacks jurisdiction to determine whether a person has a disability defined by the ADA and to enforce the

ADA's provisions. See *Frompovich v. PECO Energy Co.*, Docket No. C-2015-2474602, p. 43 (Order entered May 3, 2018). Thus, the Commission should disregard these claims entirely.

2. The ALJ Correctly Held that the Complainants Failed to Prove that the New AMI Meter Is a Privacy Risk

The Complainants also contest the ALJ's finding that "there is no evidence in the instant case that PPL is making its data easily accessible to law enforcement or other third parties." (Exception, p. 4.) In their Exceptions, the Complainants point to extra-record evidence, specifically a document prepared by the Congressional Research Service, and allege that PPL Electric must release "private personal information to law enforcement" under the Electronic Communications Privacy Act ("ECPA"), the Stored Communications Act ("SCA"), the Computer Fraud and Abuse Act ("CFAA"), and the FTC Act. (Exceptions, p. 4; Excerpt B.) The Complainants' argument is without merit.

First, the ALJ properly found that the Complainants failed to prove that the new AMI meter is a privacy risk. (ID at 15-16.) PPL Electric presented overwhelming evidence that its AMI meter does not present privacy or cybersecurity concerns. PPL Electric witness Vinciguerra testified that "[c]ybersecurity was one of the cornerstones" of its Smart Meter Plan filing and that the Company takes several steps to protect the data it receives from the new AMI meters, including the use of technologies such as firewalls, encryption, digital signatures, authentication and access controls. (PPL St. No. 4, pp. 7-8.) Data collected within the meters is protected through proprietary-based applications and five levels of password protection. (PPL St. No. 4, p. 7.) Prior to transmission, the data is highly encrypted utilizing advanced security appliances. (PPL St. No. 4, p. 7.) Once the data reaches the Company's head systems, the data is further protected through means of firewalls and user role functions. (PPL St. No. 4, p. 7.) These user role functions limit the availability of data and functions to only what the user's job

requires, and even within these roles, the user is only granted a security key that allows access for that day. (PPL St. No. 4, pp. 7-8.) All of these cybersecurity policies and practices are consistent with the national standard for the industry. (PPL St. No. 4, p. 8.)

As a part of its Smart Meter Plan proceeding, PPL Electric filed a detailed AMI Customer Privacy Policy, which sets forth the data PPL Electric will collect through the new smart meter, the steps the Company will take to protect the data, and the ways in which PPL Electric will use the data. (PPL St. No. 3, p. 6; PPL Exhibit KD-3.) Consistent with that policy, the Company will collect data on the total amount of electricity used at the premises as well as significant event information, such as outages, voltage, heat alarms, and meter tampering alerts. (PPL St. No. 3, p. 7; PPL Exhibit KD-3, Section 1.2.) Moreover, as the ALJ stated, if the Complainants are concerned about the AMI Meter's connection to smart appliances in their home, they can choose not to have the ZigBee radio activated. (ID at 15.)

Second, the ALJ correctly found that “there is no evidence in the instant case that PPL is making its data easily accessible to law enforcement or other third parties.” (ID at 15.) The Complainants completely overlook the evidence presented in this proceeding. PPL Electric witness Kevin Durkin specifically testified that the Company does not share AMI Data, except as required or permitted by law, regulatory agencies, or governmental authorities. (PPL St. No. 3, p. 8.) Nothing in the record establishes how often or in what circumstances the Company is legally required to share AMI Data with law enforcement. And even if such evidence were in the record, the Company's compliance with the law certainly cannot establish a violation of Section 1501 of the Public Utility Code. Therefore, nothing in the record supports the Complainants' contention that the Company's AMI meter raises privacy concerns.

Third, the Complainants fail to recognize that the Commission lacks jurisdiction to interpret the federal statutes they cite, namely the ECPA, SCA, CFAA, and FTC Act. As explained previously, the Commission is a creature of statute and “has only those powers which are expressly conferred upon it by the Legislature and those powers which arise by necessary implication.” *Feingold v. Bell*, 383 A.2d 791, 794 (Pa. 1977) (citations omitted). Nothing in the Pennsylvania Public Utility Code grants the Commission the ability to interpret and enforce these federal statutes. Thus, the Complainants’ argument regarding the privacy risk of the AMI meter is without merit.

3. The Commission Should Reject the Complainants’ Attempt to Introduce and Rely on Extra-Record Evidence in Their Exceptions

In their Exceptions, the Complainants improperly attempt to introduce and rely upon evidence that was not admitted at the hearing and, therefore, is not a part of the record. Specifically, the Complainants present, cite to, or mention the following materials, which are **not** in the record:

- Excerpt A – A section about the Federal Trade Commission Act from a “Consumer Compliance Handbook”; and
- Excerpt B – Selected pages from a Congressional Research Service Report titled *Smart Meter Data: Privacy and Cybersecurity* dated February 3, 2012.

(Exceptions, pp. 2-5.; Excerpts A and B.) The Commission should completely disregard the Complainants’ extra-record evidence and their arguments based on that extra-record evidence. It is well-established that parties cannot introduce evidence for the first time at the exceptions stage.⁴ “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

⁴ See, e.g., *Application of Apollo Gas Co.*, 1994 Pa. PUC LEXIS 45, at *8-9 (Order entered Feb. 10, 1994) (denying party’s attempt to introduce extra-record evidence in its exceptions).

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 Pa. PUC v. Nat’l Fuel Gas Distrib. Corp.*, 1993 Pa. PUC LEXIS 95, at *10 (Order entered July 30, 1993) (“[S]uch material was outside the record and could be detrimental to the rights of other parties to confront such evidence.”).

Here, these documents were introduced for the first time in the Complainants’ Exceptions. By waiting until their Exceptions to present these new alleged facts and materials, the Complainants denied PPL Electric an opportunity to review and inspect that evidence, to cross-examine the Complainants about that evidence, and to present evidence in rebuttal. Therefore, it would violate PPL Electric’s due process rights for any of the Commission’s findings to be based upon or influenced by the Complainants’ 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 on October 11, 2019. (ID at 2.) The Complainants made no motion to keep the record open or to reopen the record so that their extra-record evidence could be admitted. Moreover, in their Exceptions, the Complainants never demonstrate good cause for introducing this extra-record evidence, nor do they show changes in fact or law that would warrant the reopening of the record to admit such evidence. As a result, the Complainants' extra-record evidence cannot be admitted into the record.

Thus, although PPL Electric has decided not to burden the Commission with ruling on a Motion to Strike these portions of the Complainants' Exceptions, the Commission should not rely on the Complainants' extra-record evidence to make any findings in this proceeding. *See, e.g., 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").

For these reasons, the Complainants' Exceptions Nos. 1-8, 10, and 12 should be denied.

B. REPLIES TO EXCEPTIONS NOS. 9 AND 11: THE ALJ CORRECTLY REJECTED THE COMPLAINANTS' ARGUMENT THAT THEY SHOULD BE ABLE TO "OPT OUT" OF HAVING THE AMI METER INSTALLED

In their Exceptions, the Complainants argue that they should be able to "opt out" of having the AMI meter installed. (Exceptions, pp. 4-5.) The Complainants contend that the Company can only install a new AMI meter "upon request by a customer." (Exceptions, p. 4.) As alleged support, the Complainants selectively quote a portion of the Commission's *Smart Meter Implementation Order*, where the Commission stated that "each covered EDC must supply a smart meter upon request by a customer, per Act 129." (Exceptions, p. 4) (citing *Smart Meter Procurement and Installation*, Docket No. M-2009-2092655, p. 14 (Order entered June 24, 2009) ("*Smart Meter Implementation Order*"). The Complainants also allege that there is a

typographical error on page 16 of the ID, where it stated “PECO” instead of “PPL Electric.” (Exceptions, p. 5.) The Complainants’ arguments should be completely rejected.

The ALJ properly held that the installation of the new AMI meter is required by law. (ID at 16-19.) Section 2807(f) of the Public Utility Code prescribes that EDCs, like PPL Electric, must file smart meter plans and “**shall** furnish smart meter technology” in any of the following situations: (1) “[u]pon request from a customer that agrees to pay the cost of the smart meter at the time of the request”; (2) “[i]n new building construction”; and (3) “[i]n accordance with a depreciation schedule not to exceed 15 years.” 66 Pa. C.S. § 2807(f)(1)-(2) (emphasis added). In interpreting the smart meter provisions of Act 129, the Commission declared that EDCs must “deploy smart meters system-wide” because of the requirement that smart meters be deployed “in accordance with a depreciation schedule not to exceed 15 years.” *Smart Meter Implementation Order*, p. 14. The Commission also “recognize[d] that deployment of smart meters on a piecemeal or individual basis could involve greater costs than a systematic system-wide deployment.” *Id.*, pp. 9, 14.⁵ Therefore, PPL Electric must install the new smart meters for every customer in its service territory, including the Complainants.

In addition, nothing in Act 129 permits a customer to “opt-out” of a smart meter installation. In fact, the Commission has repeatedly held that PPL Electric must install the new AMI meters for all of its customers. *See Hoffman-Lorah v. PPL Electric Utilities Corp.*, 2019 Pa. PUC LEXIS 195, at *72-73; *Schmukler v. PPL Electric Utilities Corp.*, Docket No. C-2017-2621285, pp. 73-74 (Order entered July 23, 2019), *appeal pending*, 1102 C.D. 2019. Similarly,

⁵ *See also Springirth v. Nat’l Fuel Gas Distrib. Corp.*, 1991 Pa. PUC LEXIS 44, at *1-3, 6, 16-17 (Order entered Apr. 12, 1991) (dismissing complaint of customer seeking to make installation of automated meter reading devices optional, noting that the Commission previously found in another case that “[t]he customer should not be given the option of refusing installation of equipment” because “[t]o permit customer discretion in this area would be inefficient and uneconomical”) (quoting *Stenker v. The York Water Co.*, Docket No. C-871318 (Order entered July 27, 1987)).

the Commission found in several other cases that Act 129 contains no such opt-out language. *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 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.*, 2019 Pa. PUC LEXIS 102, at *156-59 (Order entered Mar. 28, 2019), *appeal pending*, 492 C.D. 2019; *Sunstein Murphy v. PECO Energy Co.*, 2019 Pa. PUC LEXIS 159, at *157-59; *Randall & Albrecht v. PECO Energy Co.*, 2019 Pa. PUC LEXIS 160, at *145-48 (Order entered May 9, 2019), *appeal pending*, 607 C.D. 2019. Although the Complainants question why there is not an opt-out provision in the statute, that inquiry is irrelevant to the issues before the Commission. (Exceptions, p. 5.) Only the General Assembly can amend Act 129 to add an opt-out provision. Notably, although bills have been proposed in the General Assembly to add such an opt-out (see, e.g., House Bill 1564 of 2017-2018 Session), they have never been enacted. Thus, a customer cannot opt-out of the AMI meter installation under Act 129.

Moreover, PPL Electric must comply with the relevant Commission orders directing the Company to deploy the new AMI meters. As mentioned previously, the Commission determined that the Company’s existing PLC meters are not compliant with Act 129 and the Commission’s *Smart Meter Implementation Order*. *See Petition of PPL Electric Utilities Corporation for Approval of Smart Meter Technology Procurement and Installation Plan*, Docket No. M-2009-2123945, p. 24 (Order entered June 24, 2010) (“2010 Smart Meter Order”). Under the Company’s Commission-approved Smart Meter Plan, PPL Electric must replace all of the PLC meters with the RF Mesh meters, which the Commission declared as meeting all of the

requirements of Act 129 and the Commission's *Smart Meter Implementation Order*. See *Petition of PPL Electric Utilities Corp. for Approval of Its Smart Meter Technology Procurement and Installation Plan*, Docket No. M-2014-2430781, p. 24 (Order Entered Sept. 3, 2015) ("2015 Smart Meter Order"). PPL Electric is not permitted to install any other type of meter under its Smart Meter Plan and cannot leave the existing, non-compliant PLC meter in place. (See PPL St. No. 4, p. 6.) Therefore, if the Company does not install the new RF Mesh meter on the Complainants' residence in accordance with the Commission-approved deployment schedule,⁶ PPL Electric may violate the Commission's *2010 Smart Meter Order*, *2015 Smart Meter Order*, and *Smart Meter Implementation Order*.

In addition, the Complainants' argument that the AMI meters can only be installed "upon customer request" is without merit. The Complainants focus entirely on Section 2807(f)(2)(i), which states that EDCs shall furnish smart meter technology "[u]pon request from a customer that agrees to pay the cost of the smart meter at the time of the request." 66 Pa. C.S. § 2807(f)(2)(i). Indeed, the portion of the *Smart Meter Implementation Order* that the Complainants cite deals entirely with Section 2807(f)(2)(i). (See *Exceptions*, p. 4) (citing *Smart Meter Implementation Order*, p. 9.) However, the Complainants fail to recognize that Section 2807(f)(2)(iii) directs EDCs to deploy smart meters "[i]n accordance with a depreciation schedule not to exceed 15 years." *Id.* § 2807(f)(2)(iii). The Commission has correctly interpreted this provision as mandating EDCs to deploy AMI meters system-wide for all of the

⁶ In the *Smart Meter Implementation Order*, the Commission encouraged EDCs "to expedite the deployment process if it will provide increased customer benefits in a cost effective manner." *Smart Meter Implementation Order*, p. 14. The Commission also recognized that system-wide deployment of smart meters would involve "more than just the meter hardware attached to the customer's premises." *Id.*, p. 6. EDCs would need time to select the technology, train personnel, and deploy the entire AMI network, including any associated hardware and software. *Id.* For PPL Electric, the Company's Commission-approved Smart Meter Plan states that the smart meters are to be deployed system-wide from 2017 through 2019 with additional actions beyond 2019 to get the full network up and running. (PPL Electric Exhibit DV-1, pp. 3, 32; PPL Electric Statement No. 4, p. 6.) Notably, in approving the Company's Smart Meter Plan, the Commission found that the deployment of PPL Electric's new RF Mesh meters "should be done sooner rather than later." *2015 Smart Meter Order*, p. 36.

customers in their service territories. *See Smart Meter Implementation Order*, p. 14. Therefore, the Complainants' argument that they should be permitted to "opt out" of the AMI meter installation should be rejected.

Finally, the alleged typographical error cited by the Complainants has no bearing on the merits of the ID. It is evidently clear throughout the ID that this adjudication pertains to PPL Electric, not PECO Energy Company ("PECO"). Moreover, as written, the sentence is entirely accurate. The Commission has ruled that there is nothing permitting a "PECO customer to 'opt-out' of a smart meter installation," as demonstrated by the cases cited by the ALJ. (ID at 16-17.) Whether the EDC involved is PECO or PPL Electric, the fact remains that there is no opt-out under Act 129.

Based on the foregoing, the Commission should deny the Complainants' Exceptions Nos. 9 and 11.

C. REPLY TO EXCEPTION NO. 10 – THE ALJ PROPERLY DENIED THE COMPLAINANTS' CONSTITUTIONAL ARGUMENTS

The Complainants also contend that the ALJ erred in finding that the installation of the AMI meter would not violate their constitutional rights. (Exceptions, pp. 4-5.) The Complainants aver that PPL Electric's collection of data through the AMI meter would violate their constitutional rights under the Fourth Amendment of the U.S. Constitution. (Exceptions, pp. 4-5.) According to the Complainants, PPL Electric has been "deputized" by the Commonwealth to "enforce the law" by collecting their personal information without a warrant on behalf of the government. (Exceptions, p. 5.) As alleged support for their claims, the Complainants heavily rely on their Excerpt B, which, as mentioned previously, contains selected pages from a Congressional Research Service Report titled *Smart Meter Data: Privacy and*

Cybersecurity dated February 3, 2012. (Exceptions, pp. 5-6.) The Complainants' constitutional claims are entirely without merit.

The ALJ properly rejected the Complainants' claim that the new AMI meter would violate their constitutional rights. (ID at 15-16.) For there to be a deprivation of constitutional 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, the ALJ correctly found that PPL Electric is not a "state actor"; rather, the Company is a "private, regulated utility company not constrained by the Fourth Amendment." (ID at 15.) 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. Moreover, even if the Company were a state actor, the Seventh Circuit Court of Appeals found that the collection of smart meter data by a city-owned public utility was a reasonable warrantless search. See *Naperville Smart Meter Awareness v.*

City of Naperville, 900 F.3d 521, 527-29 (7th Cir. 2018). Thus, as the ALJ held, PPL Electric cannot violate the Complainants’ constitutional rights by installing the new AMI meter.

In addition, as explained in Section II.A.3, *supra*, the Commission should completely disregard the Complainants’ extra-record evidence, including the Congressional Research Service report, and any arguments based thereon. However, even if the Complainants’ extra-record evidence is considered, the Congressional Research Service report undercuts Complainants’ argument. On page 10 of that report, it states, “If the utility is accessing this information ‘independent of the government’s intent to collect evidence for use in a criminal prosecution, the utility will not be considered an agent of the government for Fourth Amendment purposes.” (Exceptions, Excerpt B, p. 10) (emphasis added).

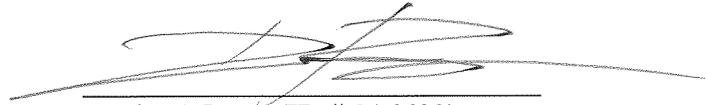
In this case, the Company is not collecting information through the AMI meters as part of a criminal prosecution or investigation. Rather, the Company is collecting the information required under its Commission-approved Smart Meter Plan so that it can, among other things, bill its customers for electric service and provide its customers with more detailed information about their electric usage.

For these reasons, the Commission should deny the Complainants’ Exception No. 10.

III. CONCLUSION

WHEREFORE, for all the foregoing reasons, as well as those more fully explained in the Initial Decision of Administrative Law Judge Elizabeth H. Barnes, the Company respectfully requests that the Pennsylvania Public Utility Commission deny the Exceptions filed by Paula and Charles Hughes and adopt the Initial Decision without modification.

Respectfully submitted,



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