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December 20, 2019

**VIA ELECTRONIC FILING**

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

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

Dear Secretary Chiavetta:

Attached please find the Reply 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**

<b>BRIAN A. HOEFT</b>	:	
	:	
<b>v.</b>	:	<b>DOCKET NO. C-2019-3011586</b>
	:	
<b>METROPOLITAN EDISON COMPANY</b>	:	

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

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Dated: December 20, 2019

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## **I. INTRODUCTION<sup>1</sup>**

In his Main Brief, Brian Hoeft (the “Complainant”) advances two primary arguments in support of his request that the Pennsylvania Public Utility Commission (“Commission”) prohibit Metropolitan Edison Company (“Met-Ed” or the “Company”) from installing a smart meter at his service location. Each argument lacks merit.

First, the Complainant argues that the mandatory installation of smart meters pursuant to Act 129 of 2008 (“Act 129”) violates his rights under the constitutions of the Commonwealth of Pennsylvania and the United States of America. For the reasons set forth in the Company’s Main Brief, the Commission lacks jurisdiction to consider such a facial challenge to the constitutionality of Act 129. Moreover, as also explained, Act 129 withstands a facial challenge to its constitutionality. Indeed, the Complainant’s arguments that Act 129 violates his rights rely entirely on purported facts that are unsupported by an evidentiary record (because there is none in this matter). Thus, the Complainant’s arguments must fail.

But even if the Commission had jurisdiction to consider the Complainant’s facial challenge to the constitutionality of Act 129 (which it does not), and even if there was an evidentiary record supporting the Complainant’s underlying factual claims (which there is not), applicable law does not support the Complainant’s arguments that Act 129 is unconstitutional. The Complainant has cited no authority invalidating a law providing for the installation of smart meters by a public utility. In fact, the authority cited by the Complainant supports the exact opposite conclusion – that the installation and use of smart meters by a public utility is constitutional. Again, the Complainant’s arguments must fail.

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<sup>1</sup> Met-Ed incorporates by reference the procedural history outlined in Section I of their Main Brief.

Second, the Complainant argues that Act 129 itself does not provide for the mandatory installation of smart meters by public utilities. The Complainant is incorrect. Commission precedent is uniform in holding that Act 129 requires the public utilities in Pennsylvania to install smart meters and that no customer opt-out is permitted. The Commission should refuse to revisit this decision based solely on the Complainant's incorrect assertions about the purported unconstitutionality of Act 129. Once again, the Complainant's arguments fail.

For the foregoing reasons, and those further detailed herein, Met-Ed respectfully requests that the Administrative Law Judge ("ALJ") and the Commission dismiss the Complaint, with prejudice.

## **II. ARGUMENT**

In his Main Brief,<sup>2</sup> the Complainant claims it "is not [his] intent to challenge the constitutionality of Act 129 of 2008 and Advanced Metering Infrastructure (AMI) as a whole."<sup>3</sup> Rather, the Complainant asserts that his intent is "to show that the *implementation* of Act 129 as *mandatory* through bureaucratic policy is a violation of: (1) the Spirit of the Law along with [his] constitutional rights; (2) the Letter of the Law of this Commonwealth; and (3) the expressed intent of the legislature in ratifying Act 129." (*Id.*) (emphasis in original). In effect, the Complainant seeks to present the ALJ and the Commission with a choice, either: (1) invalidate Act 129 because it purportedly violates his constitutional rights; or (2) overturn the Commission's long-standing precedent holding that Act 129 mandates the utilities like Met-Ed to install smart meters. But the Complainant has provided no persuasive authority or argument to support his contention that this choice must be made. As has consistently been done, the ALJ and the Commission should

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<sup>2</sup> The Complainant's Main Brief does not contain pagination; however, the "Introduction," "Argument," and "Conclusion" sections collectively cover six pages. For purposes of attribution to the Complainant's Main Brief herein, Met-Ed provides the page on which the cited material appears within those six pages.

<sup>3</sup> Complainant Brief at 1.

conclude and order that Act 129 mandates that Met-Ed install a smart meter at the Complainant's service location and that the Complainant's constitutional arguments are without merit.

**A. The Complainant's Constitutional Arguments Lack Merit.**

**1. The Commission lacks jurisdiction to consider the Complainant's facial constitutional challenges.**

The ALJ and the Commission should refuse to consider the Complainant's facial challenge to the constitutionality of Act 129. As detailed in the Company's Main Brief, 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.<sup>4</sup> The Commission has previously recognized this constraint on its authority.<sup>5</sup>

In his Main Brief, the Complainant asserts that the mandatory installation of smart meters by Met-Ed pursuant to Act 129 violates various constitutional rights provided for in the Constitutions of the Commonwealth of Pennsylvania and the United States of America.<sup>6</sup> These arguments have nothing to do with the Complainant's specific situation or the specific deployment approach, technology, or methodologies being used by Met-Ed in its deployment of smart meters. Indeed, they cannot rely on these things because there is no factual record in this proceeding establishing any of them. As such, the Complainant's constitutional arguments constitute a facial challenge to Act 129's constitutionality and are outside of the authority of the ALJ and the Commission to consider as part of this proceeding. The ALJ and the Commission should follow the uniform precedent established in Pennsylvania and refuse to consider these arguments.

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<sup>4</sup> 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).

<sup>5</sup> 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.").

<sup>6</sup> Complainant Brief at 2-6.

**2. Act 129 withstands a facial challenge.**

Act 129 also withstands a facial constitutional challenge to its validity. The Pennsylvania Supreme Court has adopted the “plainly legitimate sweep” standard in determining whether a statute withstands a facial constitutional challenge.<sup>7</sup> 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).

Act 129 clears this hurdle easily. Indeed, the Commission has considered “as-applied” constitutional challenges to the installation of smart meters pursuant to Act 129 on various occasions and has concluded that the installation of a smart meter did not violate a customer’s rights.<sup>8</sup> It cannot reasonably be concluded that any constitutional deficiency of Act 129 is “so evident that proof of actual unconstitutional application is unnecessary.” Accordingly, even if the ALJ and the Commission consider the Complainant’s facial constitutional challenge to Act 129 (which they should not), they should hold that Act 129 withstands such challenge under the standard articulated by the Pennsylvania Supreme Court.

**3. The Complainant’s arguments are premised on factual claims outside of any evidentiary record.**

In support of his arguments that the mandatory installation of smart meters under Act 129 is unconstitutional, the Complainant advances several arguments that rely on underlying factual

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<sup>7</sup> See *Clifton v. Allegheny County*, 600 Pa. 662, 703-06 (Apr. 29, 2009).

<sup>8</sup> 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).

premises that have not been established by a factual record. For example, the Complainant argues that his “inherent rights” would be violated by “compelling installation of any device which can regularly search private in-home activities.”<sup>9</sup> This argument relies on the Complainant’s general understanding of how he believes the smart meters used by Met-Ed operate. But there is no record in this proceeding actually establishing how the smart meters being deployed by Met-Ed actually operate, the information that is collected by them, or how Met-Ed uses that information. As a result, there is no evidentiary record that could be relied on to establish that Met-Ed’s meters “can regularly search private in-home activities.”

Similar factual deficiencies underly the remainder of the Complainant’s arguments about the constitutionality of Act 129 as well. The Complainant relies on various cases considering the use of technology by law enforcement to support his conclusion that the mandatory installation of a smart meter at his service location amounts to an unconstitutional search.<sup>10</sup> The Complainant also relies on a Seventh Circuit case considering the constitutionality of the use of smart meters by a municipal utility.<sup>11</sup> In these cases, though, the courts extensively considered the technology collecting the information, the type of information being collected, and the purpose for which the information was being used before reaching their determination regarding the constitutionality of the purported search.<sup>12</sup>

Here, there is no similar factual record for the ALJ or the Commission to consider and make a determination as to whether the technology being used, the data being gathered, and the purpose for which the data is being gathered give rise to the same concerns as in the proceedings

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<sup>9</sup> Complainant Brief at 2.

<sup>10</sup> See Complainant Brief at 3, citing to *Carpenter v. United States*, 138 S. Ct. 2206 (2018).

<sup>11</sup> See Complainant Brief at 3, citing to *Naperville Smart Meter Awareness v. City of Naperville*, 900 F.3d 521 (7th Cir. 2018).

<sup>12</sup> See, generally, *Carpenter*, 138 St. Ct. 2206; see also *Naperville Smart Meter Awareness*, 900 F.3d at 528-29.

cited by the Complainant. Rather, the Complainant asks that a decision be made based on his general assertions and belief that the installation of a smart meter at his service location gives rise to the same concerns analyzed in these matters. The ALJ and the Commission should decline the Complainant's offer to do so.

**4. The Complainant's arguments fail to provide any legal authority or rely on legal authority that is inapposite.**

In his Main Brief, the Complainant asserts what can be broadly categorized as four arguments related to the constitutionality of Act 129: (1) the mandatory installation of smart meters violates "inherent rights" protected by Article 1, Section 1 of the Constitution of the Commonwealth of Pennsylvania; (2) the mandatory installation of smart meters violates protections related to searches and seizures as set forth in Article 1, Section 8 of the Constitution of the Commonwealth of Pennsylvania and the Fourth Amendment of the Constitution of the United States of America; (3) the mandatory installation of smart meters violates civil rights protected by Section 1, Article 26 of the Constitution of the Commonwealth of Pennsylvania; and (4) as a private entity, Met-Ed is still obligated to comply with the above-referenced constitutional requirements under Article 10, Section 2 of the Constitution of the Commonwealth of Pennsylvania. With the exception of (2) above (related to searches and seizures), the Complainant has provided no legal authority supporting his arguments. The ALJ and the Commission should refuse to consider these arguments accordingly.<sup>13</sup>

Further, the language cited by the Complainant in support of his argument that the mandatory installation of smart meters constitutes an unconstitutional search does not actually

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<sup>13</sup> See *Commonwealth v. Miller*, 721 A.2d 1121, 1124 (Pa. Super. 1998) ("We decline to become appellant's counsel. When issues are not properly raised and developed in briefs, when briefs are wholly inadequate to present specific issues for review, a court will not consider the merits thereof.")

support his argument. The Complainant points to *Carpenter* and *Naperville Smart Meter Awareness*, for their discussions of the third-party doctrine.<sup>14</sup> While accurately quoted, these excerpts fail to capture a crucial portion of the analysis in these opinions – whether the use of the technology constitutes an unconstitutional search. Indeed, the court found in *Naperville Smart Meter Awareness* that the use of a smart meter by a municipal electric utility did not violate the Fourth Amendment of the United States Constitution.<sup>15</sup>

Perhaps recognizing that applicable case law does not support his argument that the use of a smart meter violates the Fourth Amendment, the Complainant cites two Pennsylvania cases that he argues extend Article 1, Section 8 of the Pennsylvania Constitution further than the Fourth Amendment.<sup>16</sup> Yet again, however, the Complainant ignores a crucial aspect of the relevant law. The protection against unreasonable searches and seizures found in both the Federal and Pennsylvania Constitutions extend to searches conducted by state actors only.<sup>17</sup> In this case, to the extent the use of a smart meter by Met-Ed could be considered an unreasonable search (which, notably, is the exact opposite of what was found by *Naperville Smart Meter Awareness*, relied on by the Complainant), such a search would be a private search and Article 1, Section 8 would thus be inapplicable. Accordingly, the Complainant’s argument that Met-Ed’s mandatory installation of a smart meter at his service location pursuant to Act 129 violates Article 1, Section 8 of the Pennsylvania Constitution is without merit.

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<sup>14</sup> Complainant Brief at 3.

<sup>15</sup> *Naperville Smart Meter Awareness*, 900 F.3d at 529.

<sup>16</sup> Complainant Brief at 3.

<sup>17</sup> See *Commonwealth v. Kean*, 382 Pa. Super. 587, 596 (Pa. Super. 1989) (“The federal courts have clearly established that the fourth amendment does not provide a remedy for the victims of unreasonable private searches. Similarly, we have held that article I, section 8 does not require the exclusion of evidence wrongfully obtained by a private party.”) (citations omitted).

**B. Act 129 mandates that Met-Ed install a smart meter at the Complainant's service location.**

To cure the alleged constitutional violations he asserts, the Complainant argues that the Commission should interpret Act 129 as not requiring the mandatory installation of smart meters. But, as detailed above, the Complainant has fallen far short of proving that the mandatory installation of smart meters pursuant to Act 129 violates any constitutional right. The ALJ and the Commission should refuse to reverse its long-standing precedent holding that Act 129 requires the mandatory installation of a smart meter at the Complainant's service location.

As explained in the Company's Main Brief, 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").<sup>18</sup> 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.<sup>19</sup> 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.<sup>20</sup>

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.<sup>21</sup> The Commission has also recently

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<sup>18</sup> 66 Pa.C.S. § 101, *et seq.*

<sup>19</sup> 66 Pa.C.S. § 2807(f).

<sup>20</sup> 66 Pa.C.S. § 2807(f)(2) (emphasis added).

<sup>21</sup> *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).

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; (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.<sup>22</sup> 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 the Complainant’s arguments to the contrary.

### **III. CONCLUSION**

The Complainant attempts to force the Commission into an interpretation of Act 129 that is inconsistent with its uniform precedent regarding the installation of smart meters. To do so, the Complainant argues that the mandatory installation of smart meters pursuant to Act 129 is unconstitutional. But the ALJ and the Commission lack authority to consider such a facial constitutional challenge to Act 129. Moreover, even if the Complainant’s arguments were proper to consider, they fall short of demonstrating that Act 129 fails such a challenge. As has consistently been done with prior challenges to the installation of smart meters pursuant to Act 129, the ALJ and the Commission should conclude that Act 129 mandates that Met-Ed install a smart meter at the Complainant’s service location and that the Complainant’s constitutional arguments lack merit.

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<sup>22</sup> See *Evangeline Hoffman-Lorah v. PPL Elec. Utilities Corp.*, 2019 Pa. PUC LEXIS 195, Docket No. C-2018-2644957 (Final Decision, May 23, 2019).

For the foregoing reasons and those set forth in its Main Brief, Met-Ed respectfully requests that the ALJ and the Commission issue an Order denying and dismissing the Complaint of Brian A. Hoeft, with prejudice.

Respectfully submitted,

Dated: December 20, 2019

Handwritten signature in blue ink: "Tori L. Giesler / KBW".

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**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

**BRIAN A. HOEFT**

v.

**METROPOLITAN EDISON COMPANY**

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**Docket No. C-2019-3011586**

**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served a true copy of the Reply 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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