

Tori L. Giesler, Esq.  
(610) 921-6658  
(330) 315-9263 (Fax)

April 6, 2020

**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: Judith D. Hendin v. Metropolitan Edison Company**  
**Docket No. C-2018-3003324**

Dear Secretary Chiavetta:

Enclosed please find the Motion of Metropolitan Edison Company to Strike Certain Portions of the Complainant's Main Brief with regard to the above-captioned matter. This document has been served on the Complainant as shown in the Certificate of Service.

Please contact me if you have any questions regarding this matter.

Very truly yours,



Tori L. Giesler

Enclosures

c: As Per Certificate of Service

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

**JUDITH D. HENDIN**

v.

**METROPOLITAN EDISON COMPANY**

:  
:  
:  
:  
:

**Docket No. C-2018-3003324**

---

**NOTICE TO PLEAD**

---

YOU ARE HEREBY ADVISED THAT, PURSUANT TO 52 PA. CODE § 5.103(c), ANSWERS TO MOTIONS ARE DUE WITHIN TWENTY (20) DAYS AFTER THE DATE OF SERVICE. YOUR ANSWERS SHOULD BE FILED WITH THE SECRETARY OF THE PENNSYLVANIA PUBLIC UTILITY COMMISSION, P.O. BOX 3265, HARRISBURG, PA 17105-3265. A COPY SHOULD ALSO BE SERVED ON THE UNDERSIGNED COUNSEL.



---

Lauren M. Lepkoski  
Attorney No. 94800  
Tori L. Giesler  
Attorney No. 207742  
FirstEnergy Service Company  
2800 Pottsville Pike  
P.O. Box 16001  
Reading, Pennsylvania 19612-6001  
(610) 921-6203  
(610) 921-6658  
[llepkoski@firstenergycorp.com](mailto:llepkoski@firstenergycorp.com)  
[tgiesler@firstenergycorp.com](mailto:tgiesler@firstenergycorp.com)

Date: April 6, 2020

Counsel for Metropolitan Edison Company

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

<b>JUDITH D. HENDIN</b>	:	
	:	
v.	:	<b>Docket No. C-2018-3003324</b>
	:	
<b>METROPOLITAN EDISON COMPANY</b>	:	

---

**MOTION OF METROPOLITAN EDISON COMPANY TO  
STRIKE CERTAIN PORTIONS OF  
THE COMPLAINANT’S MAIN BRIEF**

---

TO THE DEPUTY CHIEF ADMINISTRATIVE LAW JUDGE JOEL H. CHESKIS:

Metropolitan Edison Company (“Met-Ed” or the “Company”) files, pursuant to the Pennsylvania Public Utility Commission’s (“Commission”) regulations at 52 Pa. Code § 5.103, this motion to strike certain portions of Judith D. Hendin’s (“Complainant”) Main Brief. Throughout the Main Brief, the Complainant attempts to present and rely upon extra-record evidence. In addition, the Complainant’s Main Brief introduces new claims and allegations for the first time and violates the length requirements of the Commission’s regulations. Therefore, and for the reasons more fully explained below, Met-Ed respectfully requests that the Deputy Chief Administrative Law Judge Joel H. Cheskis strike the portions of the Complainant’s Main Brief that are identified in this Motion. In support thereof, Met-Ed states as follows:

**I. BACKGROUND**

1. On August 22, On or about June 29, 2018, Judith Hendin (the “Complainant”) filed the above-captioned Formal Complaint against Metropolitan Edison Company (“Met-Ed” or the “Company”) with the Pennsylvania Public Utility Commission (“Commission”) regarding 402 Woodland Road, Easton, PA 18042 (“Service Location”) under Account No. 100017185438 (“Account”), which was electronically served on the Company on July 11, 2018.

2. On July 31, 2018, the Company filed its Answer and New Matter denying the material allegations. On the same day, the Company also filed Preliminary Objections to the Formal Complaint.

3. On August 21, 2018, the Complainant filed a Request for Extension of Time to File Reply to Answer, New Matter and Preliminary Objections. The Complainant also filed a Letter Addendum to her Request for Extension of Time on August 22, 2018.

4. On August 23, 2018, Administrative Law Judge (“ALJ”) Jeffrey A. Watson was assigned as the Presiding Officer in the above-captioned proceeding.

5. On August 24, 2018, ALJ Watson issued an Interim Order, which granted the Complainant’s request for an extension of time to file responses to the Preliminary Objections and New Matter until September 12, 2018.

6. On September 14, 2018, in accordance with 52 Pa. Code § 5.341, the Company forwarded to the Complainant interrogatories and document requests (“Company’s Discovery Requests, Set I”) via first class mail. In its Discovery Requests, the Company sought information and documents related to the Complainant’s allegations regarding the Company’s smart meters.

7. On October 2, 2018, the Complainant filed a letter requesting a continuance of the proceeding until December 15, 2018.

8. On October 2, 2018, the Complainant filed a letter indicating she had provided responses to the Company’s Discovery Requests, Set I.

9. On October 18, 2018, ALJ Watson issued an Interim Order, which denied the Company’s Preliminary Objections. ALJ Watson also issued an Interim Order Establishing an Initial Litigation Schedule.

10. On October 25, 2018, ALJ Watson issued a letter returning certain documents, sent to him by the Complainant, to the Complainant.

11. On October 29, 2018, the Complainant filed her response to the Company's Preliminary Objections.

12. On November 1, 2018, Joanna Waldron entered a Notice of Appearance on behalf of the Complainant.

13. On January 17, 2019, the Complainant served certain interrogatories and document requests ("Complainant's Discovery Requests, Set I").

14. On January 18, 2019, Met-Ed filed a letter identifying the witnesses it intended to offer, consistent with the Interim Order issued by ALJ Watson on October 18, 2018.

15. On January 29, 2019, the Complainant filed a letter identifying the fact and expert witnesses she intended to call.

16. On February 11, 2019, the Company served its responses to the Complainant's Discover Requests, Set I.

17. On May 9, 2019, the Complainant filed a letter providing the ALJ with a status update, which inter alia indicated that the Complainant wished to discuss possible meter relocation options with the Company.

18. On May 10, 2019, the Company filed a letter providing the ALJ with a status update, which inter alia requested a prehearing conference be scheduled to facilitate the parties' discussion regarding meter relocation as well as to make certain revisions to the procedural schedule.

19. On May 23, 2019, ALJ Watson issued an Interim Order Requiring Proposed Prehearing Conference and Hearing Dates, which set a date for a prehearing conference and established dates for the submission of written testimony.

20. On July 16, 2019, the parties each submitted their second status update.

21. On July 26, 2019, the Complainant filed a Motion to Extend the Schedule Pending Prehearing Conference.

22. On August 13, 2019, ALJ Watson issued an Interim Order, which granted the Complainant's Motion to Extend.

23. On August 21, 2019, the Company filed a Motion in Limine which requested that the ALJ: (a) exclude evidence; (b) preclude the Complainant from presenting the expert testimony of David O. Carpenter; and (c) preclude the Complainant from presenting testimony related to her Formal Complaint. Therein, Met-Ed averred that the Complainant had failed to serve her own testimony and failed to timely serve the direct testimony of Dr. David O. Carpenter.

24. On August 29, 2019, the Complainant filed an additional status report.

25. On September 3, 2019, Met-Ed filed an additional status report.

26. On September 5, 2019, the Complainant filed a letter indicating service of her witness statement upon the Company had been made.

27. Also on September 5, 2019, the Commission issued a Hearing Notice scheduling evidentiary hearings before Deputy Chief Administrative Law Judge Joel H. Cheskis (the "Presiding Officer") for December 19-20, 2019.

28. On September 10, 2019, the Complainant filed an Answer to Met-Ed's Motion in Limine.

29. On September 13, 2019, the Presiding Officer issued a Prehearing Order.
30. On September 19, 2019, the Complainant served an Amended Witness Statement on behalf of Judith Hendin (Confidential and Public versions).
31. On October 21, 2019, the Company served written rebuttal testimony of Dr. Christopher C. Davis, Ph.D., Dr. Mark Israel, M.D., and John Ahr on behalf of the Company.
32. On December 11, 2019, Attorney Curtis Renner filed an Entry of Appearance and Motion for Admission Pro Hac Vice on behalf of the Company.
33. Evidentiary hearings were held as scheduled on December 19 and 20, 2020. An additional day of hearings was scheduled for January 24, 2020.
34. A Protective Order was issued on December 26, 2019.
35. On January 17, 2020, the Company served copies of an additional exhibit to John Ahr's Direct Testimony. Also on January 17, 2020, the Company resubmitted Confidential and Non-Confidential versions of the testimony and exhibits of Dr. Mark Israel, M.D.
36. On January 20, 2020, the Complainant resubmitted Confidential and Non-Confidential versions of the Complainant's Amended Witness Statement, Plaintiff's Supplement and the Witness Statement of Dr. Kracht.
37. On January 22, 2020, the Complainant filed a Motion for Extension of Time and Motion for Leave to file Surrebuttal Testimony.
38. On January 24, 2020, the additional day of evidentiary hearings was held.
39. On February 10, 2020, Met-Ed filed its Answer to the Complainant's Motion for Extension of Time and Motion for Leave to file Surrebuttal Testimony.

40. On February 14, 2020, the Complainant submitted a Motion for Late Filed Exhibits, and sought the admission of Cross Examination Exhibits X1-X19 and also Exhibits 23-41.

41. On February 19, 2020 the Presiding Officer issued an Order Denying Motion for Extension of Time and Leave to File Surrebuttal Testimony. The Presiding Officer also issued a Briefing Order, which specifically advised the parties “not to include any extra-record evidence in their briefs.” Briefing Order, Ordering Paragraph 6.

42. On March 9, 2020, the Company filed Objections to the Complainant’s Late Filed Exhibits. Therein, the Company properly objected to Cross Examination Exhibits X1-X19 and Exhibits 23-41. Among other things, the Company explained that these exhibits should have been entered into the record as a part of the Complainant’s direct case, were inadmissible hearsay on scientific and medical issues, hearsay within hearsay, were irrelevant to Met-Ed’s AMI meters, lacked foundation, could not be properly authenticated by the Complainant, and/or were inherently unreliable and biased advocacy pieces.

43. On March 16, 2020, the parties submitted Main Briefs. Complainant’s Main Brief relies in substantial part upon the exhibits that were subject to the Motion for Late Filed Exhibits, which were properly objected to by the Company and have not been admitted into the record.

**II. MOTION TO STRIKE**

**A. THE REFERENCES AND CITATIONS TO EXTRA-RECORD EVIDENCE IN THE COMPLAINANT’S MAIN BRIEF SHOULD BE STRUCK.**

44. In her Main Brief, the Complainant inappropriately attempts to introduce and rely upon evidence that is not a part of the record.

45. Specifically, the Complainant's Main Brief presents or mentions the following facts, materials, and testimony, which are **not** in the record<sup>1</sup>:

- a. Cross Examination Exhibits X1-X19 (made reference to in Attachment 1 "Hendin – Master List of Cross Examination Exhibits)
- b. Hendin Exhibits 23-41 (made reference to in Attachment 1 "Hendin – December Hearing List of Exhibits)
- c. Proposed Finding of Fact 28, based upon Complainant's Cross Examination Exhibit X11 (Complainant's MB at 6)
- d. Proposed Finding of Fact 30, based upon Complainant's Cross Examination Exhibit X17 (Complainant's MB at 6)
- e. Proposed Finding of Fact 31, based upon Complainant's Cross Examination Exhibit X33 (Complainant's MB at 6)<sup>2</sup>
- f. Proposed Finding of Fact 33, based upon Complainant's Exhibits 37 and 40 (Complainant's MB at 6)
- g. Proposed Finding of Fact 40, based upon Complainant's Exhibit 40 (Complainant's MB at 6)
- h. References to and argument based upon Complainant's Cross Examination Exhibits X17, X18 and X19, *i.e.* Section III.B. of the Complainant's MB (Complainant's MB at 22-24)
- i. Reference to and argument based upon Complainant's Cross Examination Exhibits X33 and X17 (Complainant's MB at 25)
- j. Reference to and argument based upon Complainant's Cross Examination Exhibit s32 and X1 (Complainant's MB at 25)
- k. Reference to and argument based upon Complainant's Cross Examination Exhibit X17 (Complainant's MB at 26)
- l. Reference to and argument based upon Complainant's Cross Examination Exhibit X17 (Complainant's MB at 27)
- m. Reference to and argument based upon Complainant's Cross Examination Exhibit X11 (Complainant's MB at 27-28)
- n. Reference to and argument based upon Complainant's Cross Examination Exhibit X40<sup>3</sup> (Complainant's MB at 29)

---

<sup>1</sup> A true and correct copy of the Complainant's Main Brief with the extra-record evidence and any references to such materials deleted is attached as **Appendix A**. Importantly, the legal authorities appended to Complainant's Main Brief (pages 84-197 of the submitted PDF) are not included in **Appendix A**.

<sup>2</sup> No Complainant's Exhibit X33 has been identified in this proceeding. Regardless of whether this reference is to a previously unidentified cross examination exhibit, or Hendin Exhibit 33, the Exhibit is not in the record and cannot be relied upon.

- o. Reference to and argument based upon Complainant's Cross Examination Exhibits X11, X14, X15, X16, X17, X18, X19 (Complainant's MB at 31)
- p. Reference to and argument based upon Exhibit X40<sup>4</sup> (Complainant's MB at 29)
- q. Reference to Complainant's Exhibits 30 and 40, and Cross Examination Exhibits X1, X2 , X13 and X17 (Complainant's MB at 31)
- r. Reference to and argument based upon Complainant's Exhibit 41 (Complainant's MB at 50)
- s. Reference to and argument based upon Complainant's Exhibit 41 (Complainant's MB at 51)
- t. Reference to and argument based upon Complainant's Exhibit 25 (Complainant's MB at 51-52)
- u. Reference to Complainant's Cross Examination Exhibit X3 (Complainant's MB at 52)
- v. Reference to Complainant's Cross Examination Exhibits X5 and X14 (Complainant's MB at 54)
- w. Reference to and argument based upon Complainant's Cross Examination Exhibit X14 (Complainant's MB at 55)
- x. Reference to and argument based upon Complainant's Cross Examination Exhibit X6 (Complainant's MB at 56)
- y. Reference to and argument based upon Complainant's Cross Examination Exhibits X7, X9 and X10 (Complainant's MB at 56)
- z. Reference to and argument based upon Complainant's Cross Examination Exhibit X12 and "Exhibit ++"<sup>5</sup> (Complainant's MB at 57)
- aa. Reference to and argument based upon Complainant's Exhibit 27 (Complainant's MB at 57-58)
- bb. Reference to and argument based upon Complainant's Cross Examination Exhibit X16 (Complainant's MB at 58)
- cc. Reference to and argument based upon Complainant's Exhibits 24, 31 and 39 (Complainant's MB at 58-59)
- dd. Reference to and argument based upon Complainant's Exhibit 38 (Complainant's MB at 59)

---

<sup>3</sup> No Complainant's Exhibit X40 has been identified in this proceeding. Regardless of whether this reference is to a previously unidentified cross examination exhibit, or Hendin Exhibit 40, the Exhibit is not in the record and cannot be relied upon.

<sup>4</sup> See note 3 *supra*.

<sup>5</sup> It is not clear what "Exhibit ++" refers to, and appears to have been inadvertently left incomplete in the Complainant's Main Brief. Regardless of whether this is a reference to a previously identified Exhibit (*i.e.*, Cross Examination Exhibits X12), or some other exhibit, it appears to refer to extra-record evidence and should be stricken.

- ee. Reference to and argument based upon Complainant's Exhibits 37 and 38 (Complainant's MB at 60)
- ff. Reference to Complainant's Exhibit 38 (Complainant's MB at 60)
- gg. Reference to and argument based upon Complainant's Cross Examination Exhibit X13 (Complainant's MB at 60)
- hh. Reference to and argument based upon Complainant's Exhibit 38 (Complainant's MB at 60-61)
- ii. Reference to and argument based upon Complainant's Exhibit 38 (Complainant's MB at 61)

46. The Complainant's attempt to introduce and rely upon all of this extra-record evidence should be rejected. It is well-established that parties cannot present new evidence at the briefing stage. *See, e.g., Pa. PUC v. Nat'l Fuel Gas Distrib. Corp.*, 1993 Pa. PUC LEXIS 95, at \*7-10 (Order entered July 30, 1993); *Petition of the Borough of Cornwall for a Declaratory Order*, 2016 Pa. PUC LEXIS 3, at \*24-26 (Jan. 6, 2016) (Recommended Decision), *adopted as modified*, Docket No. P-2015-2476211 (Order entered Aug. 11, 2016). "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 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).

47. 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 Nat'l Fuel*, 1993 Pa. PUC LEXIS at \*10 ("[S]uch material was outside the record and could be detrimental to the rights of other parties to confront such evidence."). Accordingly, extra-record evidence in briefs

is commonly stricken<sup>6</sup> because including extra-record materials in a party's brief "brings up hearsay problems and problems associated with the right to respond to evidence." *Pa. PUC v. Pa. Power & Light Co.*, 1995 Pa. PUC LEXIS 190, at \*232 (July 28, 1995) (Recommended Decision) ("PP&L").

48. Here, all of these materials and testimony were either introduced for the first time in the Complainant's Motion for Late Filed Exhibits and Main Brief. By waiting until the briefing stage present any of this new evidence, the Complainant denied Met-Ed an opportunity to review and inspect those materials, to conduct discovery, to cross-examine the Complainant or other witnesses about them, and to present evidence in rebuttal. Therefore, it would violate Met-Ed's due process rights for any findings of fact to be based upon or influenced by the Complainant's extra-record evidence.

49. 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 fact or law have so changed as to requires, or that the public interest requires, the reopening of the record." 52 Pa. Code § 5.571.

---

<sup>6</sup> See, e.g., *Trucco v. PPL Elec. Utils. Corp.*, 2002 Pa. PUC LEXIS 21, at \*5 (Order entered Mar. 29, 2002) (noting that ALJ Paist "struck those portions of the Complainants' Main Brief which referenced extra-record evidence, including those various exhibits attached to that Main Brief"); *Application of Kenneth Scott Cobb, t/a Kennys Transp. Serv.*, 2012 Pa. PUC LEXIS 1802, at \*24 (Nov. 16, 2012) (Initial Decision) (Barnes, J.) (granting motion to strike the applicant's brief "for attempting to introduce new facts and documents into evidence not previously offered or admitted into the record at the hearing of September 5, 2012"), *became final without further action*, Docket No. A-2011-2280175 (Order entered Jan. 7, 2013); see also 52 Pa. Code § 5.501(a)(2) (stating that briefs must contain "[r]eference to the pages of the record or exhibits where the evidence relied upon by the filing party appears").

50. Although the Complainant has made a motion to admit cross examination exhibits X1-X19 and Exhibits 23-41 into the record, this Motion has not been ruled upon and was properly objected to. Moreover, in the Main Brief, the Complainant never demonstrates good cause for introducing this extra-record evidence, nor does she show changes in fact or law that would warrant the admission of such evidence. As a result, the Complainant's extra-record evidence cannot be admitted into the record.

51. In conclusion, the Complainant's Main Brief is not an opportunity for the Complainant to try to remedy her case by presenting new evidence. The Complainant's opportunity to present these materials, if at all, was before the evidentiary hearing ended. After receiving the Complainant's Main Brief, Met-Ed has no means to conduct discovery or cross examine possible witnesses regarding this information. Thus, the Complainant's actions have denied the Company of due process.

52. Based on the foregoing, the extra-record evidence and arguments relying upon this extra-record evidence in the Complainant's Main Brief should be stricken and disregarded by the ALJ.

**B. THE COMPLAINANT IMPROPERLY INJECTS NEW CLAIMS INTO THIS PROCEEDING IN HER MAIN BRIEF.**

53. For the first time in this proceeding, Complainant raises claims regarding violations of federal law, specifically Section 504 of the Rehabilitation Act of 1973 and the Fair Housing Act Amendments, as well as the Americans with Disabilities Act ("ADA"). *See* Complainant's MB at 8, 66-67, and Proposed Conclusion of Law 9. Complainant did not raise these claims in her Formal Complaint, or otherwise amend her Formal Complaint to provide Met-Ed notice of these allegations.

54. As noted above, “Among the requirements of due process are notice 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.” *Hess v. Pa. PUC*, 107 A.3d 246, 266 (citations omitted) (emphasis added). In addition, Reasonable notice is a basic requirement of due process, enabling parties to present responses and objections accurately. See *ARIPPA v. Pa. Pub. Util. Comm’n*, 792 A.2d 636, 660 n.35 (Pa. Commw. 2002), *appeal denied*, 815 A.2d 634 (Pa. 2003). Generally, claims or evidence that is introduced at such a time when the opposing party would not have an adequate opportunity to respond must be rejected on due process grounds. See, e.g., *Application of PPL Electric Utilities Corp.*, 2009 Pa. PUC LEXIS 2323, \*225-227 (Recommended Decision November 12, 2009) (rejecting a claim raised for the first time in reply briefs), *adopted with certain modifications*, 2010 Pa. PUC LEXIS 434 (Order Entered Feb. 12, 2010).

55. By raising these federal law claims for the first time in her Main Brief the Complainant has deprived Met-Ed of an adequate opportunity to object or otherwise respond to the claims. Therefore, they should be stricken.

56. Moreover, even if the Complainant had properly raised these claims, the Commission lack jurisdiction over them. It is well-established that the Commission lacks subject matter jurisdiction to interpret and enforce the Americans with Disabilities Act (“ADA”). See *Frompovich v. PECO Energy Co.*, 2018 Pa. PUC LEXIS 160, at \*69 (Order entered May 3, 2018). As the Commission, held in *Frompovich*:

[I]t is beyond the jurisdiction of Commission to determine whether the Complainant has a disability or a cause of action under the American with Disabilities Act. See I.D. at 18. If Ms. Frompovich believes that she has a valid ADA claim against PECO, she must work through the federal courts or one of the federal enforcement agencies, which include the Department of Labor, the Equal

Employment Opportunity Commission, the Department of Transportation, the Federal Communications Commission or the Department of Justice, but not this Commission.

*Frompovich*, 2018 Pa. PUC LEXIS at \*69.

57. Moreover, the Commission has not been granted the authority to litigate claims under the Rehabilitation Act of 1973 and the Fair Housing Act Amendments. The Commission is a “creature of statute” and, therefore, “has only those powers which are expressly conferred upon it by the Legislature” through the Code, 66 Pa.C.S. Section 101 et seq. and related statutes and “those powers which arise by necessary implication.” *Feingold v. Bell of Pa.*, 383 A.2d 791, 794 (Pa. 1977) (citing *Allegheny Cnty. Port Auth. v. Pa. PUC*, 237 A.2d 602 (Pa. 1967); *Del. River Port Auth. v. Pa. PUC*, 145 A.2d 172 (Pa. 1958)). The Commission’s jurisdiction includes rates, rules of service, hazards to public safety from utility facilities, and installation and location of utility facilities. *County of Chester v. Philadelphia Electric Company*, 420 Pa. 422, 425-26, 218 A.2d 331, 333 (Pa. 1966). The Complainant further appears to concede this principle in her Main Brief. *See* Complainants MB, Proposed Conclusion of Law 9.

58. For these reasons, the Complainant’s new claims regarding violations of federal law should be struck from her Main Brief.

**C. THE COMPLAINANT’S BRIEF VIOLATES THE LENGTH REQUIREMENTS OF THE COMMISSION’S REGULATIONS.**

59. Section 5.101(e) of the Commission’s regulations states that “Briefs must be as concise as possible and, except for briefs in rate cases, be limited to 60 pages in length, unless some other limitation is imposed or allowed by the presiding officer.” 52 Pa. Code § 5.101(e).

60. The Briefing Order issued on February 19, 2020, does not modify this requirement. Rather, it affirms brief must be filed “in conformance with the Commission’s

regulations at 52 Pa.Code §§ 5.501, et seq. unless otherwise modified by the Presiding Officer.”  
Briefing Order, Ordering Paragraph 1.

61. The Complainant’s Main Brief contains sixty-seven (67) pages of argument, in direction violation of Section 5.101(e) of the Commission’s regulations. Complainant cannot point to a modification of this requirement in the ALJ’s orders, and the Complainant cannot demonstrate good cause exists from her failure to comply with this requirement. Therefore, Met-Ed respectfully requests that pages 61-67 of the Complainant’s Main Brief be stricken in their entirety.<sup>7</sup>

---

<sup>7</sup> For purposes of clarity, Met-Ed’s proposed redactions in pages 61-67 contained in **Appendix A** are based upon its arguments that striking this information is proper under the arguments set forth in Sections II.A. and II.B. of this Motion.

### III. CONCLUSION

WHEREFORE, Metropolitan Edison Company respectfully requests that Deputy Chief Administrative Law Judge Joel H. Cheskis: (1) strike the extra-record evidence and arguments relying upon this extra-record evidence in the Main Brief of Judith D. Hendin; and (2) disregard said portions of the Main Brief in the disposition of the above-captioned matter.

Respectfully submitted,



---

Lauren M. Lepkoski  
Attorney No. 94800  
Tori L. Giesler  
Attorney No. 207742  
FirstEnergy Service Company  
2800 Pottsville Pike  
P.O. Box 16001  
Reading, Pennsylvania 19612-6001  
(610) 921-6203  
(610) 921-6658  
[llepkoski@firstenergycorp.com](mailto:llepkoski@firstenergycorp.com)  
[tgiesler@firstenergycorp.com](mailto:tgiesler@firstenergycorp.com)

Date: April 6, 2020

Counsel for Metropolitan Edison Company

**C&H**  
**Curtin & Heefner** LLP  
ATTORNEYS AT LAW

2005 S. EASTON ROAD • SUITE 100 • DOYLESTOWN, PA 18901

(267) 898.0570 • (800) 773.0680 • FAX (215) 340.3929

WWW.CURTINHEEFNER.COM

CELEBRATING OVER 80 YEARS

JOANNA A. WALDRON  
JAW@curtinheefner.com

March 16, 2020

**Via Electronic Filing**

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

**Re: Judith D. Hendin v. Metropolitan Edison Company  
Docket No. C-2018-3003324**

Dear Secretary Chiavetta:

Enclosed please find Judith Hendin's Brief of Complainant Judith Hendin and the applicable Certificate of Service with regard to the above-captioned matter. Please note that the Briefs contains Confidential Information not suitable for the public docket.

Please contact me if you have any questions regarding this matter.

Respectfully submitted,



Joanna A. Waldron, Esquire  
CURTIN & HEEFNER LLP

cc: Per Certificate of Service

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Judith D. Hendin

V.

Metropolitan Edison Company

:  
:  
:  
:  
:

C-2018-3003324

**BRIEF OF COMPLAINANT JUDITH HENDIN**

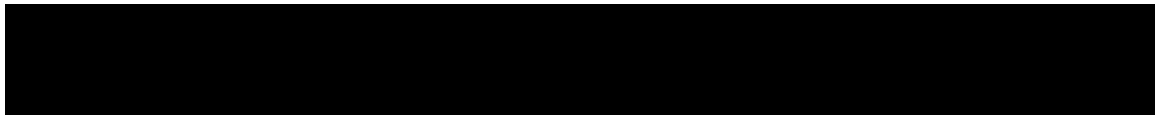
Dated: March 16, 2020

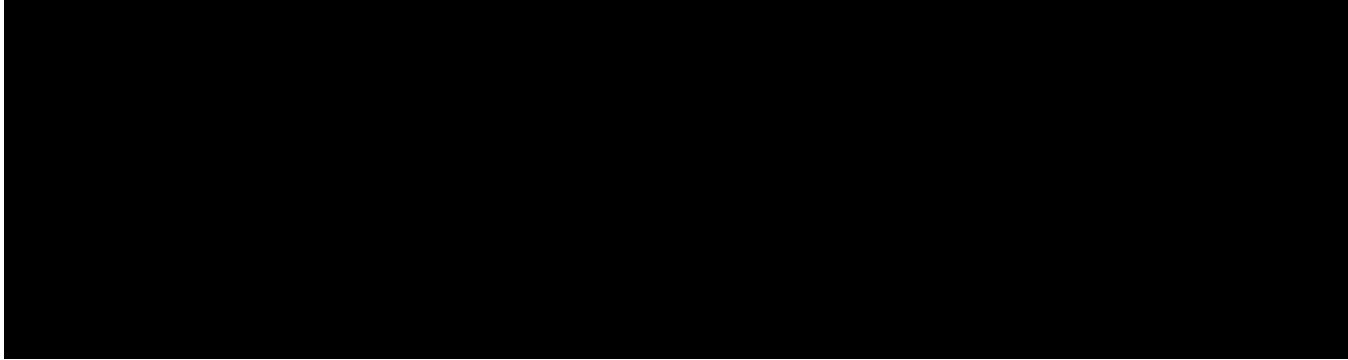
s/Joanna A. Waldron  
Joanna A. Waldron, Esquire  
Pa. ID # 84768  
CURTIN & HEEFNER LLP  
Doylestown Commerce Center  
2005 South Easton Road, Suite 100  
Doylestown, PA 18901  
jaw@curtinheefner.com  
*Attorney for the Complainant*

TABLE OF CONTENTS

	Page
Statement of the Case .....	1
Procedural Background .....	1
Proposed Findings of Fact .....	2
Summary of the Argument .....	7
I.    Legal Argument .....	8
A. The Public Utility Code Requires Safe, Reasonable and Adequate Service and Facilities for All Customers .....	8
B. In an Administrative Proceeding Ms. Hendin Need Only Prove The Weight of The Evidence, Not Medical Causation .....	9
C. The Precautionary Principle Requires the Commission to Shift the Burden of Proof for the Environmental Harm Consistent with Environmental and Regulatory Practice .....	14
D. The Code and The Act 129 Must Be Considered Together In Light Of The Precautionary Principle As Safe and Reasonable .....	18
II.   Smart Meters Are An Unsafe Utility Service That Violates Section 1501 Of The Public Utility Code .....	19
A. Pennsylvania Is The Only State In The United States that fails to offer an opt out .....	20
III.  Ms. Hendin’s Bases for Concern Are Evidence That Med-Ed’s Proposed Smart Meter Installation is Unreasonable .....	21
A. Smart Meters emit electromagnetic frequency radiation, which affects human health .....	21
B. The BioInitiative Reports Support the Conclusion That Electromagnetic Frequencies have tangible adverse effects on health and are therefore, unsafe ....	22
C. Smart meters emit radiation differently than other radio frequency devices .....	24
D. Evidence of Similar Symptoms .....	27
E. Ms. Hendin is sensitive to EMFS .....	28
F. Previous symptoms from smart meters .....	30

- G. Met-Ed’s Lack of Evidence for the Safety Makes it Unreasonable for Met-Ed to Force Her to Accept A Smart Meter .....31
- H. The International Consensus Makes It Unreasonable for Med-Ed to Force Ms. Hendin to Accept a Smart Meter .....31
- IV. Med Ed’s Response to the Request to Refuse Installation of a Smart Meter is Wrong ...32
  - A. Med-Ed Fails to Provide Safe Service or to Warn Customers such as Ms. Hendin of Hazards .....32
  - B. The Commission’s Interpretation of Act 129 Violates the Plain Meaning of The Act .....32
  - C. Act 129 Permits Opt Outs .....34
- V. The Utility’s Witnesses Chris Davis and Mark Israel Are Not Credible .....48
  - A. The Israel exhibits show he is out of touch with states’ approach to smart meter opt outs .....49
  - B. His exhibits demonstrate a lack of credibility he does not have expert knowledge .....50
  - C. Exhibit MI-4, criticisms of the BioInitiative Report, is the most glaring example .....50
  - D. He chooses or modifies quotations to suit his position, without presenting the complexity of the truth .....51
  - E. Mark Israel’s Did Not Conduct A Medical Evaluation of Ms. Hendin. ....52
  - F. Mark Israel Incorrectly Claims that Smart Meters Are Safe .....53
  - G. Heart Studies cited by Israel .....54
  - H. Studies on the Long Term Effects of Exposure for RF Fields Suggest Effect on The Heart .....56
  - I. IARC classification of RF as a 2B carcinogen .....56
  - J. EMFs affect animals, contrary to Israel’s claim .....58
  - K. Scientific Studies Suggest that EMFs Affect Children .....59
  - L. Domestic and International Legislation Recognizes Health Effects of EMFs .....59
  - M. Respected Medial Societies Have Called for Caution .....60





Proposed Conclusions of Law .....68  
Proposed Order .....71

## **STATEMENT OF THE CASE**

Ms. Hendin demonstrated that Met-Ed's smart meter presents a risk of harm to her, and that it is not safe, nor reasonable, for Ms. Hendin to be forced to accept this unreasonable risk.

Ms. Hendin has been informed that electric service to her residence can only be provided with an installation of a smart meter facility that emits RF and that the facility can only be installed at a location within four feet of her main living space. Ms. Hendin suffers medical symptoms ranging from dizziness to insomnia, when exposed to RF-emitting devices. She controls her condition by limiting her exposure. The utility unreasonably insists that she cannot have electricity unless she accepts the RF-emitting smart meter facility, and must reduce her exposure to all electromagnetic frequencies ("EMFs"), a treatment prescribed by her doctor. Met-Ed's position that there is no potential for harm from installation of the facility is not credible. At the very least, the scientific disagreement between the parties suggests that Ms. Hendin is potentially harmed by RF exposure, and which constitutes unreasonable and unsafe service to Ms. Hendin in violation of the Code.

The Commission incorrectly concludes that Act 129 creates a state-wide mandate of smart meters for the covered EDCs by misinterpreting unambiguous legislative intent and misinterpreting plain, unambiguous legislative language.

## **PROCEDURAL BACKGROUND**

Ms. Hendin filed her Complaint on June 29, 2018. On October 18, 2018, Met-Ed's preliminary objections were denied. A hearing notice was issued on September 5, 2019 establishing an initial in-person hearing for this matter for December 19, 2019 and December 20, 2019, reassessing the case Administrative Law Judge Joel Cheskis. Further, a prehearing order dated September 13, 2019. On December 19, 2019, Judge Cheskis held an evidentiary hearing.

An additional partial day of evidentiary hearings was held on December 20, 2019. A second partial day of evidentiary hearings was held on January 24, 2020. Witnesses testifying at the hearing were Ms. Hendin, Dr. William Kracht for Ms. Hendin, and for Defendant Utility -First Energy employee John Ahr, Dr. Christopher Davis, and Dr. Mark Israel. At the conclusion of the hearings, a briefing schedule was issued on February 19 , 2020] setting briefs due on March 16, 2020 and reply brief on April 6, 2020.

Ms. Hendin filed a request for surrebuttal testimony and a stay to permit the determination of several cases on appeal at the Commonwealth Court. Ms. Hendin filed a Motion for late filed exhibits on February 14, 2020.

### **PROPOSED FINDINGS OF FACT**

1. Ms. Hendin is a somatic therapist, author and lecturer in the field of bodypsyche consciousness, who works out of her home. *Amended St. of Hendin* at 1: 5-6, 11-12 (hereinafter “St. of Hendin”).

2. Met-Ed proposes to install an Advanced Meter Infrastructure (“AMI”) or “smart meter” 6 inches from the only door in and out of her home, which is also her workplace. The smart meter would be less than 4 feet from the kitchen, only 8 feet from the office and less than 20 feet from where Ms. Hendin sleeps. *Id.* at 2: 24-28.

3. Met-Ed does not have an alternative placement for the smart meter at Ms. Hendin’s home, and only permits Ms. Hendin to move the location of the meter at her own expense if she accepts the financial responsibility for the wires. *Ahr Cross, December 19, 2019 Transcript* at 166:11-13.

4. Ms. Hendin has been diagnosed with electromagnetic hypersensitivity and co-morbid chemical intolerance syndrome. *St. of Hendin* at 2, l. 30-1.

5. Ms. Hendin has lived at her residence for many years and does not want to move to comply with her doctor's advice to avoid RF exposure and therefore, needs an analog meter as an accommodation. *St. of Hendin* at 6:115-118.

6. Ms. Hendin has underlying conditions, including a heart murmur, and mitral valve prolapse, that contribute to her need to avoid RF exposure, and indicate a potential for harm from RF exposure. *St. of Hendin* at l. 33-34; 182-184.

7. Dr. William Kracht is a practicing physician with a Doctor of Osteopathy degree from Philadelphia College of Osteopathic Medicine. He has over 29 years of experience in family medicine with areas of special competence in integrative and environmental medicine. *St. of Kracht*, 8-13; WK-1.

8. Dr. Kracht diagnosed Ms. Hendin with electromagnetic hypersensitivity ("EHS") and co-morbid chemical intolerance syndrome.

9. Dr. Kracht has been an active member of the American Academy of Environmental Medicine since 1986, and is well acquainted with the diagnosis and management of these syndromes, having treated dozens of patients with electromagnetic hypersensitivity. *St. of Kracht* at 2: 9-13; Ex. WK-1; *Kracht Direct, December 19, 2019, transcript* at 96:24-25; 97:1-5.

10. Dr. Kracht has treated Ms. Hendin for almost 18 consecutive years as her primary physician attending to both her health maintenance care and illness management. *St. of Kracht* at 3:33-34.

11. Ms. Hendin and Dr. Kracht confirm that Ms. Hendin's symptoms experienced when she had a digital smart meter for gas service prior to 2015, were similar to symptoms experienced by other people when exposed to smart meters.

12. Dr. Kracht has prescribed limiting EMF exposure. *St. of Kracht* at 5:82-91.

13. Dr. Kracht advised Ms. Hendin to avoid EMFs as much as possible, as well as volatile organic chemicals and to take other chemical avoidance measures. *Id.*

14. Ms. Hendin has taken steps to eliminate almost all exposure to sources of EMF at her residence, for example she has no television, microwave, wireless devices or wifi. *St. of Hendin* at 3:49-90. She has created many protections:

- The house does not have wifi or any wireless devices.
- The computer is hard-wired (no wifi) with an external, wired keyboard and wired mouse.
- A no-EMF earphone is used.
- The desk chair is positioned at least 30 inches away from the laptop screen.
- A landline is used, rather than a cellular telephone.
- There is no television or microwave oven.
- A low-EMF hair dryer is used on occasion.
- Lamps are unplugged when not in use.
- Almost everything in the house is unplugged at night to create a nearly EMF-free zone for sleeping.
- Before purchasing any electrical item, she uses a gaussemeter, and now also an RF meter, to measure EMFs.

*Hendin St.* 49-83; *Hendin Direct*, Dec. 19, 2109 Transcript, at 47:16-25; 48:1-16; 49:16-20.

15. Judith Hendin's health was seriously impacted when a smart meter was previously installed on the house where she lives on in 2012 (*St. of Hendin* at 92-131).

16. Dr. Kracht said that Ms. Hendin reported "that she was experiencing symptoms after a UGI smart meter was installed." (*St. of Kracht* at 3:36-37)

17. Research by Lamech demonstrated that symptoms experienced by people after exposure to a smart meter were almost exactly the same as symptoms experience by Ms. Hendin after exposure to a smart meter.

18. Ms. Hendin spent “considerable time working with UGI to determine when they installed a smart meter, [but] they were unable to confirm” the date that the smart meter was installed. (*Hendin Written testimony* at 5:95-101).

19. UGI removed the smart meter on September 16, 2012, but UGI was unable to confirm when the smart meter was installed. (*Hendin Written testimony* at 5:95-101).

20. Ms. Hendin had been away in Europe from March 21 through April 26, 2012 and when returned home, continued to have symptoms. (*Hendin Written testimony* at 5:95-101).

21. Ms. Hendin learned of the health effects of smart meters in mid-August, and contacted Dr. Kracht. (*Hendin Written testimony* at 5:100-101).

22. Dr. Kracht issued a Letter of Medical Necessity to UGI and the smart meter was removed sometime in September 2012. *Hendin Written testimony* at l. 102-104; St. Hendin Exhibit 2.

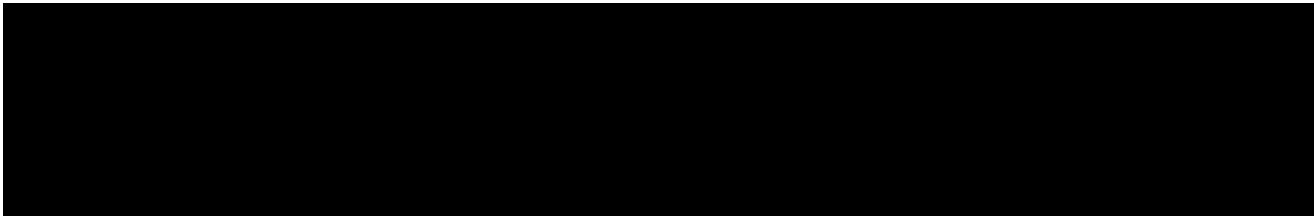
23. Ms. Hendin reported and was suffering dizziness, insomnia, dyspepsia, nausea, headaches, cognitive dissonance, gastrointestinal distress, tinnitus, weakness, difficulty breathing, and joint swelling and pain. (Exhibit 1 (Conf.); Exhibit 9 (Conf.); *Kracht Written testimony* at 5:69).

24. Dr. Kracht diagnosed Ms. Hendin with “Chemical Intolerance Syndrome with EMF Sensitivity overlap...EMF dominant (2012) – stable and controlled with strict avoidance measures, especially EMF avoidance.” (*Kracht Cross* at 86:5-10) (Kracht Exhibit 9)

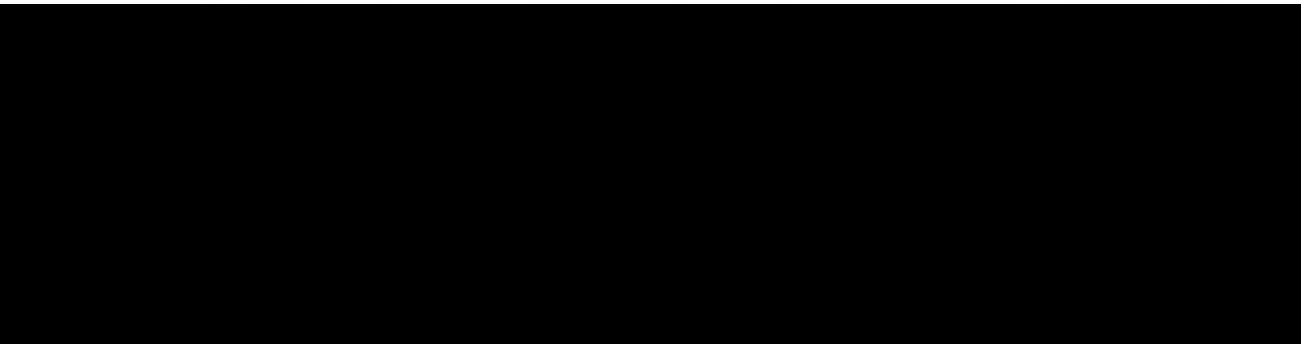
25. Dr. Kracht’s examination of Ms. Hendin revealed that Ms. Hendin’s health had improved, and that some symptoms were gone, such as shortness of breath, change in appetite (*St. of Kracht*, at 5:68-76).

26. Further supporting Dr. Kracht's eventual diagnosis, Ms. Hendin's health improved in 2012 when the meter was removed. Her heart palpitations, dyspepsia, nausea, headaches, dizziness, imbalance, difficulty breathing, weakness cognitive dissonance, and gastrointestinal distress all normalized. *Id.*

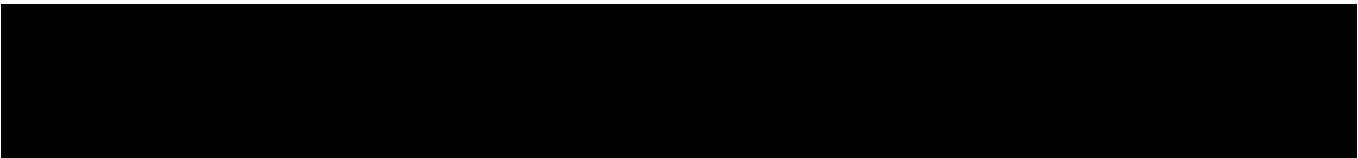
27. Ms. Hendin also suffered hand pain and insomnia, which Dr. Kracht originally noted as "unrelated hand pain and insomnia." but became part of his differential diagnosis. ((*Kracht Written testimony* at 5:70-72; *Kracht Direct* at 93:13).



29. Smart meters and the associated communication network, including "Met-Ed's Itron advanced metering and communication system" produce radio frequency fields. *St. of Davis* at 3:13-15.



32. Need this: Met-Ed's sheet {→ get from Tania; says min. of 1200 bursts/day}



34. Ms. Hendin has observed RF exposure at her neighbors and has used her meters to measure exposure. *St. of Hendin* at 145-151; Exhibit 3.

35. Met-Ed's meters operate on a mesh system. *Ahr Cross Dec. 19, 2019 Transcript* at 148:3-7; 17.

36. Met-Ed's witnesses never visited Ms. Hendin's residence, nor tested Ms. Hendin's residence. *Israel Cross* at 86:1-13; *Ahr Cross* at 164:8-11; *Davis Cross, Dec. 19, 2019 Transcript* at 182:25; 183:1; 189:15

37. Met-Ed's medical witness, Mark Israel, conducted no examination of Ms. Hendin, yet claims to have performed a "medical evaluation" of her. *St. of Israel* at 6:2-4.

38. Met-Ed's witness Dr. Israel has testified in dozens of smart meter cases on behalf of utilities, each time arguing in contravention to the treatment of the individual's physicians, and in support of the utility's position that the individual is not entitled to an opt out for any reason. *Israel Cross*, p. 224:15-20.

39. Met-Ed did not provide any scientific studies showing the effects of smart meters on consumers.



### SUMMARY OF THE ARGUMENT

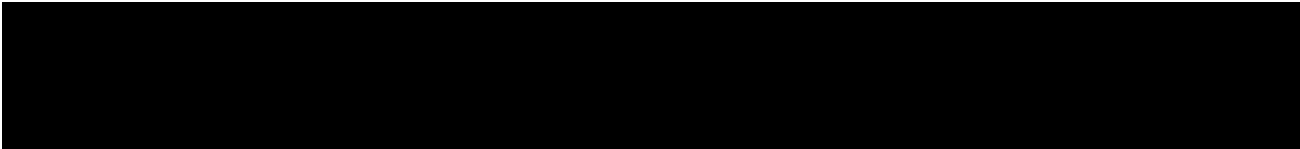
Ms. Hendin seeks to convince the Commission that she should not be forced to endure a smart meter at her home. The Public Utility Code requires that Met-Ed provide Ms. Hendin with safe and reasonable service. Ms. Hendin's only recourse to challenge Met-Ed is this proceeding.

As a regulatory proceeding involving review of Ms. Hendin's course of treatment from her physician, and the ways in which a smart meter installation will compel her to go against her physician's advice, the Commission should not require Ms. Hendin to prove medical causation.

Rather, the precautionary principle should be applied as is customary where the science is uncertain.

The Commission's interpretation of Act 129 of 2008 is wrong, and unreasonable. The plain language of the statute and the legislative history make it clear that the General Assembly did not intend to prohibit opt outs.

The evidence presented by Met-Ed is not convincing that smart meters and their associated networks are safe. Met-Ed's witnesses lack credibility, and failed to consider vital, new scientific studies that demonstrate a link between exposure and health effects.



## **I. LEGAL ARGUMENT**

### **A. The Public Utility Code Requires Safe, Reasonable and Adequate Service and Facilities for All Customers**

Section 1501 of the Code requires utilities to provide safe service and facilities. 66 Pa. C.S. § 1501. Further, the Commission regulations require electric utilities to properly warn and protect the public from danger, and to exercise reasonable care to reduce the hazards to which customers may be subjected because of the utilities provision of electric service and associated facilities such as smart meters. 52 Pa. Code § 57.28(a)(1). Moreover, the Code requires that electric utilities companies are subject to steep civil penalties that accrue daily for violations of the Code, such as failure to provide safe service. 66 Pa.C.S. § 330 1(a)-(b).

The Commission has exclusive jurisdiction to adjudicate “issues involving the reasonableness, adequacy, and sufficiency” of a public utility's facilities and services. *See Elkin v. Bell of Pa.*, 420 A.2d 371, 374 (Pa. 1980) (citations omitted). Section 701 of the Public Utility Code provides that “any person ... having an interest in the subject matter ... may complain in

writing, setting forth any act or thing done or omitted to be done by any public utility in violation, or claimed violation, of any law which the commission has jurisdiction to administer, or of any regulation or order of the commission.” 66 Pa.C.S. § 701. Therefore, a complainant must generally demonstrate that the public utility violated the Public Utility Code or a Commission regulation or order.

Accordingly, Ms. Hendin, as an individual consumer, must bring her complaint before the Commission as the sole option to prevent installation of a smart meter in her home. As set forth below, all Ms. Hendin need demonstrate is that Met-Ed is responsible for the problem identified in her complaint, i.e, the demand to install a smart meter and associated communication network (which neither party contests) will cause unavoidable RF and EMF exposure, and that in Ms. Hendin’s particular instance, Met-Ed’s installation is going to cause her to suffer the numerous symptoms from her EHS. Outside of erroneous Commission determinations, there is no precedent to require Ms. Hendin to prove to a medical certainty, or to demonstrate a causal connection between undisputed RF exposure from the smart meter and her medical suffering.

**B. In an Administrative Proceeding Ms. Hendin Need Only Prove the Weight of the Evidence, Not Medical Causation**

Complainants in a smart meter case bear the burden of proving evidence “by a preponderance of the evidence,” and that the utility “is responsible or accountable for the problem described in the complaint.” *Kreider v. PECO Energy Co.*, Pa.P.U.C. Docket No. P-2015-2495064, (Sept. 3, 2015). Section 332(a) of the Public Utility Code (Code) provides that a complainant, as the party seeking affirmative relief from the Commission, has the burden of proof. 66 Pa. C.S. § 332(a). The burden of proof for actions before the Commission is the “preponderance of the evidence” standard. *Suber v. Pennsylvania Com’n on Crime and*

*Delinquency*, 885 A. 2d 678, 682 (Pa. Cmwlth. 2005) (*Suber*); *Samuel J. Lansberry, Inc. v. Pa. PUC*, 578 A.2d 600 (Pa. Cmwlth. 1990), *alloc. denied*, 529 Pa. 654, 602 A.2d 863 (1992) (*Lansberry*); *see also North American Coal Corp. v. Air Pollution Commission*, 279 A.2d 356 (Pa. Cmwlth. 1971).

Pennsylvania law defines a preponderance of the evidence as “a more likely than not inquiry.” *Crocco v. Pennsylvania Department of Health*, 214 A.3d 316, 321 (Pa. Commw. 2019); (*citing Borough of Pottstown v. Suber-Aponte*, 202 A.3d 173, 180 n.11 (Pa. Commw. 2019)). Therefore, to establish a fact or claim by a preponderance of the evidence means to offer the greater weight of the evidence, or evidence that outweighs, or is more convincing than, *by even the smallest amount*, the probative value of the evidence presented by the other party. *See Se-Ling Hosiery, Inc. v. Margulies*, 364 Pa. 45, 48-49, 70 A.2d 854, 855 (1950) (emphasis added).

The existence of contrary evidence does not require the Commission to find against a complainant for lack of substantial evidence. The Commission requires facts to support an adjudication to be based on “substantial evidence.” *Met-Ed Indus. Users Grp. v. Pa.P.U.C.*, 960 A.2d 189, 193 n.2 (Pa. Commw. 2008) (*citing 2 Pa.C.S. § 704*). Substantial evidence need only be such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Borough of E. McKeesport v. Special/Temporary Civil Serv. Comm’n*, 942 A.2d 274, 281 n.9 (Pa. Commw. Ct. 2008) (citation omitted). The “presence of conflicting evidence in the record does not mean that substantial evidence is lacking.” *Allied Mech. and Elec., Inc. v. Pa. Prevailing Wage Appeals Bd.*, 923 A.2d 1220, 1228 (Pa. Commw. Ct. 2007) (citation omitted).

The Commission is a regulatory agency, and its role in administrative hearings differs from that used in a court of law, where a plaintiff is seeking damages for an injury. Here, the Commission, and other agencies use a threshold of proof “reasonably lower than that appropriate

in tort law.” *Allen v. Pennsylvania Engineering Corp.*, 102 F.3d 194, 198 (5<sup>th</sup> Cir. 1996). In *Allen*, the Fifth Circuit explained that this “preventative perspective” or precautionary approach, results from the agency’s consideration of public exposure to harm:

Regulatory and advisory bodies such as IARC, OSHA and EPA utilize a “weight of the evidence” method to assess the carcinogenicity of various substances in human beings and suggest or make prophylactic rules governing human exposure. This methodology results from the *preventive perspective that the agencies adopt in order to reduce public exposure to harmful substances*. The agencies’ threshold of proof is reasonably lower than that appropriate in tort law, which “traditionally make [s] more particularized inquiries into cause and effect” and requires a plaintiff to prove “that it is more likely than not that another individual has caused him or her harm.”

*Allen v. Pennsylvania Engineering Corp.*, 102 F.3d 194 (5<sup>th</sup> Cir. 1996) (emphasis added) (*citing Wright v. Willamette Industries, Inc.*, 91 F.3d 115, 1107 (8<sup>th</sup> Cir. 1996).

In smart meter related matters, the Commission has held that “[t]he Complainant will have the burden of proof during the proceeding to demonstrate, by a preponderance of the evidence, that [the utility] is responsible or accountable for the problem described in the Complaint.” *Kreider v. PECO Energy Co.*, Docket No. P-2015-2495064, p. 18 (Order entered Sept. 3, 2015); *see also Romeo v. Pa. P.U.C.*, 154 A.3d 422, 429 (Pa. Commw. 2017) (finding that the smart meter complainant should have a hearing to try to prove his claim through “the testimony of others as well as other evidence that goes to that issue”). In considering what the burden of proof is in smart meter cases, the Commonwealth Court in *Romeo v. PaPUC*, 154 A.3d 422 (Pa. Commw. 2017) (*Romeo*), “did not discuss the meaning in Section 1501 of the words ‘safe’ and ‘reasonable’” and nor does the Commonwealth Court require *Romeo* to prove causation of harm, in the tort law sense.

When presented with an individual challenging an AMI meter installation in his or her home, the Commission’s determination must be based on the facts of the case, including the particular proposed placement of the meter and the individual. “The ALJ’s role ... will be to determine *based on the record in this particular case*, whether there is sufficient evidence to support a finding that Complainant was adversely affected by the smart meter or whether [the utility’s] use of a smart meter will constitute unsafe or unreasonable service in violation of Section 1501 under the circumstances in this case.” *Kreider v. PECO Energy Co.*, Docket No. P-2015-2495064 at 23 (Order entered Jan. 28, 2016) (emphasis added) (citing *Woodbourne-Heaton*, 1992 Pa. PUC Lexis 160, at \*12-13); *Frompovich v. PECO Energy Co.*, Docket No. C-2015-2474602, (Opinion and Order entered May 3, 2018 at 10). Although the Commission continually relies on the decades-old *Woodbourne Heaton* determination, that determination is inapposite to the smart meter proceedings. First, the *Woodbourne Heaton* involved a transmission line, which exists only in a limited location, not attached to a residence, and from which individuals could remove themselves, unlike smart meters, which are inescapable and attached to one’s residence. Further, *Woodbourne Heaton* was not tested at the appellate level.<sup>1</sup>

The Commission’s standard should address the universally-accepted “thin skull” or “eggshell plaintiff” doctrine, because “[t]here is almost universal agreement upon liability beyond the risk, for quite unforeseeable consequences, when they follow an impact upon the person of the plaintiff.

It is as if a magic circle were drawn about the person, and one who breaks it, even by so much as a cut on the finger, becomes liable for all resulting harm to the person, although it may be death.

---

<sup>1</sup> The issue of *Woodbourne-Heaton*’s applicability in smart meter proceedings is currently before the Commonwealth Court on the consolidated cases in the *Povacz et al.* appeal, and as such is not discussed at length here.

W. Page Keeton et al., PROSSER AND KEETON ON THE LAW OF TORTS § 43 at 291 (5th ed.1984).

The defendant takes the victim as found, even where the resulting harm suffered might be unforeseeable.<sup>2</sup>

Responsibility lies for the full extent of damages where the “physical condition of the other ... preexisting condition makes injury suffered greater than that which the actor as a reasonable man should have foreseen as a probable result of his conduct.” RESTATEMENT (SECOND) OF TORTS § 461 (1965); *see also, Rardin v. T & D Mach. Handling, Inc.*, 890 F.2d 24, 28 (7th Cir.1989) (Once the individual establishes some injury, including aggravation of a preexisting condition, “the injurer takes his victim as he finds him and is therefore liable for the full extent of the injury even if unforeseeable ... even if ... [the victim], because of a preexisting injury sustains a much greater loss than the average victim would have....” *Figueroa-Torres v. Toledo-Davila*, 232 F.3d 270, 276 (1st Cir. 2000) (a defendant is responsible even where the injuries suffered were not foreseeable for the defendant). (“The negligent actor is subject to liability for harm to another although a physical condition of the other ... makes the injury greater than that which the actor as a reasonable man should have foreseen as a probable result of his conduct.”).

In *Povacz*,<sup>3</sup> the Commission rejected the Complainant’s argument that the correct standard is “potential for harm” or “capable of causing harm,” because the Commission concluded it was a logical fallacy to equate any hazard with exposure to harm. *Povacz*, Docket

---

<sup>2</sup> One of the illustrations which runs through the English cases is that of the plaintiff with the “eggshell skull,” who suffers death where a normal person would have had only a bump on the head;.... The defendant takes the plaintiff as he finds him. *See, e. g., Evans v. S. J. Groves & Sons Co.*, 315 F.2d 335, 347-48 (2d Cir. 1963) (Friendly, J.); *United States Fidelity & Guaranty Co. v. United States*, 152 F.2d 46, 49 (2d Cir. 1945) (L. Hand, J.); *The Jefferson Myers*, 45 F.2d 162 (2d Cir. 1930) (*per curiam*).

<sup>3</sup> The *Povacz* case is currently pending appeal in the Pennsylvania Commonwealth Court, with the consolidated smart meter cases in the briefing stage. *See*,

No. C-2015-2475023 (Opinion and Order, March 28, 2019). The Commission worries that the standard would place the utility in a position where no design, installation operation, use or maintenance of an energized facility would reduce the “potential” for that facility to cause “harm.” The Commission is concerned that this standard “would have dire consequences to the daily functioning and operation of public utilities and the provision of utility services within the Commonwealth.” *Id.* The Commission need not be concerned. Here, the standard of proof applies only in the smart meter context, and only to particular individuals, such as Ms. Hendin for whom exposure to the AMI meter is deleterious because of her existing EMF sensitivity and its treatment. The Commission can easily protect Ms. Hendin from the danger by allowing an accommodation or “opt out” of the smart meter installation, and the use an analog meter. Accordingly, the Commission need not fear overreach.

Ms. Hendin has met the burden of proof of establishing by a preponderance of evidence that she will be adversely affected by the installation of a smart meter on her place of residence: her medical records show that she got sick when a smart meter was placed on her residence previously and that she recovered when it was removed.

**C. The Precautionary Principle Requires the Commission to Shift the Burden of Proof for the Environmental Harm Consistent with Environmental and Regulatory Practice**

Even if Ms. Hendin had not met the burden of proof of showing that EMFs from a smart meter installed on her home would cause her harm, the Precautionary Principle compels that the Commission require Met-Ed err on the side of precaution.

The Precautionary Principle provides a specific burden of proof to address fairness in situations where scientific studies can be cited on both sides of a controversy. As observed in the National Research Council’s report on the *The Age of Expert Testimony: Science in the*

*Courtroom* (NCR)(2002): “In toxic tort cases, the plaintiff has the burden of proof, and *a court may question the fairness of asking a plaintiff to suffer because of scientific uncertainty.*” (emphasis added).<sup>4</sup>

The Precautionary Principle provides that where a cause-and-effect relationship are not fully established scientifically, and an activity raises threats of harm to human health or the environment, precautionary measures should be taken,. This Principle is the basis for environmental law and regulatory decision-making in many countries, including the United States. *See, e.g., Benner Township Water Authority v. Comm. of Pa., DEP, and Borough of Bellefonte*, 2017 EHB Docket No. 2016-042-M (Sept. 19, 2019)<sup>5</sup> at WL 4464395 at \*11 (“ [T]he existence of an unacceptable risk must be assumed when there is evidence of exposure to harmful materials and there is not enough information to rule out the likelihood of harmful effect ... this precautionary principle allows a regulatory authority to act where complete scientific inquiry is unavailable if the risk of not acting may lead to serious or irreversible consequences.); *Coolspring Twp. et. al. v. DER*, 1983 EHB 151; *quoting Defense Personnel Support Center v. DEP et al.*, 1998 EHB 512, 531-32.

“The Precautionary Principle encourages transparency of the risk assessment process on health risk of substances, both for public health and the environment. For example, in the environmental law arena, especially where the exposures involve individual consumers and children, burden shifting has been embraced (*see, e.g., California’s Prop 65 and the Food Quality Protection Act of 1996 (“FQPA”)*).

---

<sup>4</sup> THE AGE OF EXPERT TESTIMONY: SCIENCE IN THE COURTROOM (NCR)(2002) (Chapter 3, “The Nature of Expert Evidence,” p. 11), available at <https://www.nap.edu/read/10272/chapter/4>

<sup>5</sup> WL 4464395 at \*11 Attachment 1, and Available for download at <http://ehb.courtapps.com/efile/documentViewer.php?documentID=39139&opinion=true>,

The European Union's landmark regulatory scheme for toxic substances, the Registration, Evaluation, Authorization and Restriction on Chemicals, "REACH" espouses the precautionary principle, shifting the responsibility from authorities to industry, to ensure a high level of protection for human health and the environment.

The precautionary principle requires a recognition that the party attempting to alter the status quo must bear the evidentiary burden. James M. Olson, *Shifting the Burden of Proof*, 20 *Envtl. Law* p. 891 at 898 (1990).

The burden of proof is traditionally placed on those attempting to alter the status quo but has been misapplied in environmental cases. As recognized in *Barton*, in instances where parties are seeking relief from a nuisance or an injunction, the burden of proof should be shifted from the plaintiff to the defendant. *Barton, Charmian, "The Status of the Precautionary Principle in Australia Its Emergence In Legislation and as a Common Law Doctrine"* 22 *Harv. Env. L.Rev.* 509 at 549 (1998).

This test was applied in *Reserve Mining Co. v. EPA*, 514 F.2d 492, 520 (8<sup>th</sup> Cir. 1975). *See also TVA v. Hill*, 437 U.S. 153 (1978)(applying the Endangered Species Act); *Lead Indust. Ass'n v. EPA*, 647 F.2d 1184, (cert denied) 449 U.S. 1042 (1980)(applying the Clean Air Act and required regulatory review); *Beanal v. Freeport-McMoran Inc.*, 969 F. Supp. 362 (E.D. La. 1997); Daniel Bodansky, *The Precautionary Principle in US Environmental Law*, in *INTERPRETING THE PRECAUTIONARY PRINCIPLE*, (Timothy O'Riordan & James Cameron eds.) 1994, at 203-28, and Gregory D. Fullem, *The Precautionary Principle: Environmental Protection in the Face of Scientific Uncertainty*, 31 *Willamette L. Rev.* 495, 508-13 (1995).

According to the Precautionary Principle, Met-Ed should carry the burden of proof in this case, to prove unequivocally that smart meters are safe for long-term human health. Met Ed

concedes that Dr. Israel did not base his opinion on any smart meter studies, Further, the regulatory standard from the FCC is woefully out of date, and the ANSI standards do not address smart meter emissions of any kind. Therefore, no such proof exists.

The precautionary principle requires that, if there is a strong suspicion that a certain activity may have environmentally harmful consequences, it is better to control that activity now rather than to wait for incontrovertible scientific evidence.

The Commission is not charged with expertise in the field of medical causation, nor should Ms. Hendin be. It is beyond the jurisdiction of the PUC to make a determination about an individual's disability under the ADA. *Mindy Jaye Zied & Binnie A. Zied*, No. P-2015-2520474, 2016 WL 1689644, at \*6 fn. 4 (Apr. 21, 2016) (Commission does not have jurisdiction a determination of a violation or appeal rights under the ADA). The use of expert witnesses presents a fundamental paradox, where judges may possess less knowledge of the specialized subject matter than the experts they are evaluating. *See, e.g., Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311,1316, (9<sup>th</sup> Cir. 1995)(“[W]e are largely untrained in science and certainly no match for any of the witnesses whose testimony we are reviewing.”).<sup>6</sup> This problem persists here, where the Commission is not charged with the technical knowledge of effects on human health.

Ms. Hendin's testimony satisfies the burden of proof for an administrative proceeding by showing that if Met-Ed installs an RF-emitting smart meter in her home, it will cause unsafe, and unreasonable service. Ms. Hendin showed that the weight of the evidence, including the

---

<sup>6</sup> *See also, Daedalus: Journal of the American Academy of Arts & Sciences*, “Science and the Legal System.” (Fall 2018), a book Ms. Hendin brought to the in-person evidentiary hearing, and which contains relevant essays on law and science: “Improving Judge & Jury Evaluation of Scientific Evidence,” by Valerie P. Hans and Michael J. Saks, p. 164; “Science, Common Sense & Judicial Power in U.S. Courts,” by Sheila Jasanoff, p. 15; “The Supreme Court & Science: A Case in Point,” by Linda Greenhouse, p. 28

thousands of studies from the BioInitiative Report, and the most recent U.S. studies from the National Toxicology Program show, contrary to Mr. Israel's outdated testimony, that levels of RF exposure, have not been proven to be safe.

There has been much discussion about whether the EMFs emitted by a smart meter are the cause of the adverse health effects. However, the *Povacz* case makes it clear that the claimant need not prove that EMFs that emanate from smart meters are unsafe to her, only that the installation of a smart meter attached to her home would cause or exacerbate ill health effects.

It is impossible for a complainant to prove her EHS because there is no available diagnostic testing; rather, treating physicians use differential diagnosis to identify the ailment. If there were an available diagnostic test, Ms. Hendin would have done it—just as she has done other tests to monitor a number of health conditions, such as heavy metal toxicity, environmental pollutants, and mycotoxins. (*St. of Hendin* at 10:215-227). Ms. Hendin searched for a diagnostic test for electromagnetic sensitivity and the effects of EMFs on health; however, Great Plains Laboratory indicated that nothing is currently in research and development in this area, and that they knew of no other companies that were developing such testing at this time. (*Id.* at 11:230-236).

#### **D. The Code and the Act 129 Must Be Considered Together In Light of The Precautionary Principle As Safe and Reasonable**

Act 129 is about providing options to the consumer, not imposing smart meters on every consumer in direct contravention to a doctor's order. The Commission's interpretation of Act 129, (discussed in Section IV.B.) is antithetical to that. Act 129 opens with the following public policy declaration: "The health, safety and prosperity of all citizens of this Commonwealth are inherently dependent upon the availability of adequate, reliable, affordable, efficient and environmentally sustainable electric service at the least cost, taking into account any benefits of price

stability over time and the impact on the environment.”

Second, looking at the cost benefit analysis, in the context of opt outs, where the statute is silent; and the utility’s implementation plan is silent, it does not make sense to interpret the statute as making installation mandatory.

Where, as here, an individual has a demonstrated medical reason for RF avoidance, coupled with a physical limitation in the home that would elevate the typical RF exposure, the Commission must permit an opt out.

## **II. Smart Meters Are An Unsafe Utility Service That Violates Section 1501 of the Public Utility Code**

When the Commission has addressed violations of Section 1501 and a utility’s failure to provide safe, reasonable and adequate service, the agency has investigated fully and ruled in favor of the Complainant. *See, e.g., Young v. National Fuel Gas Distribution Corp.*, Docket No. C-2008-2059233, Pa. PUC (2009) (Commission ordered utility to remedy unsafe condition resulting from installation of a gas meter at individual consumer’s residence under Section 1501 of the Public Utility Code “Code.”); *BIE v. West Penn Power Co.*, Docket No. C-2012-2307244 (Jan. 9, 2014) (Utility fined \$86,000 for failure to provide safe and reasonable service in accordance with Section 1501 of the Code, where consumer was killed when a high voltage line fell on her yard after several complaints about unsafe conditions at her property).

Nothing in Act 129 compels the Commission to violate Section 1501 to accomplish the goals of Act 129. The Commission concedes that it must read the two statutes in tandem. *See, e.g., Implementation Order (Default Service and Retail Electric Markets*, Docket No. L-2009-2095604 (Order issued Oct. 4, 2011) (the Commission promulgates its Act 129 regulations in accordance with, inter alia, Section 1501 of the Public Utility Code). The Commission also required that smart meter have the ability to disconnect and reconnect remotely because that

functionality provides “safety, efficiency and cost benefits.” *See*, Docket No. M-2009-2092655(Implementation Order issued Jan. 24, 2009) at 18.

**A. Pennsylvania is the only state in the United States that fails to offer an opt out.**

Pennsylvania is the only state in the nation that has heard cases about smart meters causing harm and has still not ruled to allow an opt out.<sup>7</sup> Over 40 states offer consumers the ability to opt out of smart meter installation.<sup>8</sup> States that offer opt-out programs with various utilities<sup>9</sup> and in various locales

The Commission in *Povacz* acknowledged that the Act 129 and Section 1501 must be read *in pari materia* (as if they were one law):

If the General Assembly intended for ECDs to invest and maintain two separate sets of meter systems based on customer preference – an analog system separate from an AMI system as part of furnishing “adequate, efficient, safe, and reasonable service and facilities”<sup>10</sup> at “just and reasonable” rates charged to customers, it would have plainly stated as much in Act 129, but it did not.

*Povacz v. PECO Energy Company*, Docket No. C-2015-2475023 (Opinion and Order entered January 24, 2013), pp. 94-95. The Commission suggested that the legislature’s silence in Act 129 about prohibited it from recognizing an opt out for safety reasons, even though utilities are

---

<sup>7</sup> Complainant was permitted only an initial inquiry to Mr. Ahr about opt-out offerings in various other states in which he testified that he worked. Cross of Ahr, at p. 156-157. Ms. Hendin had worked with the National Conference of State Legislatures in Washington, D.C., to compile a comprehensive list of states that offer smart meter opt outs and provides here the docket information for judicial notice. See 52 Pa. Code § 5.408; See e.g. 20 V. S.A. §2811 (Vermont); see also Attachment 1.

<sup>9</sup> Official notice may be taken of obvious and notorious facts, and a broader spectrum facts, not simply those obvious to an average person. *See Ramos v. Pennsylvania Board of Probation and Parole*, 954 A.2d 107, 110 (Pa. Cmwlth. Ct. 2008) (quoting *Falasco v. Pennsylvania Board of Probation and Parole*, 521 A.2d 991, 995, n.6 (Pa. Cmwlth. Ct. 1987) (““Official notice” is the administrative counterpart of judicial notice and is the most significant exception to the exclusiveness of the record principle, allowing an agency to take official notice of facts which are obvious and notorious to an expert in the agency’s field and those facts contained in reports and records in the agency’s files, in addition to those facts which are obvious and notorious to the average person; thus, official notice is a broader doctrine than is judicial notice and recognizes the special competence of the administrative agency in its particular field and also recognizes that the agency is a storehouse of information on that field consisting of reports, case files, statistics and other data relevant to its work.”)

<sup>10</sup> 66 Pa.C.S. § 1501.

offering opt outs in in nearly every other state. And it's already being done by Med-Ed, in Ohio<sup>11</sup> and Maryland. MD PSC Order No. 86200<sup>12</sup>.

The North Carolina PUC's decision provides that anyone with a physician's letter can opt out with no fee, and other may opt out with payment of a fee.<sup>13</sup> It is also similar to Ms. Hendin prior experience with UGI gas company when she was allowed to opt out when her treating physician sent UGI a Letter of Medical Necessity. (*St. of Hendin*, Hendin Exhibit 2).

While the Commission suggests that maintaining "two sets" of meters for customer preference, and allegedly contrary to the legislative intent, it's the practice of nearly all of utilities in other states are doing so, and Met-Ed's parent company is doing so.

### **III. Ms. Hendin's Bases for Concern Are Evidence That Med-Ed's Proposed Smart Meter Installation is Unreasonable.**

The installation of a smart meter at Ms. Hendin's home is unsafe and unreasonable because EMF emissions from a smart meter will adversely affect her health.

#### **A. Smart Meters emit electromagnetic frequency radiation, which affects human health.**

Smart meters emit short bursts of high frequency electromagnetic radiation. Years ago, researchers thought that the effects of electromagnetic fields (EMFs) were purely "thermal," that

---

<sup>11</sup> *Ohio*: FirstEnergy's website says:

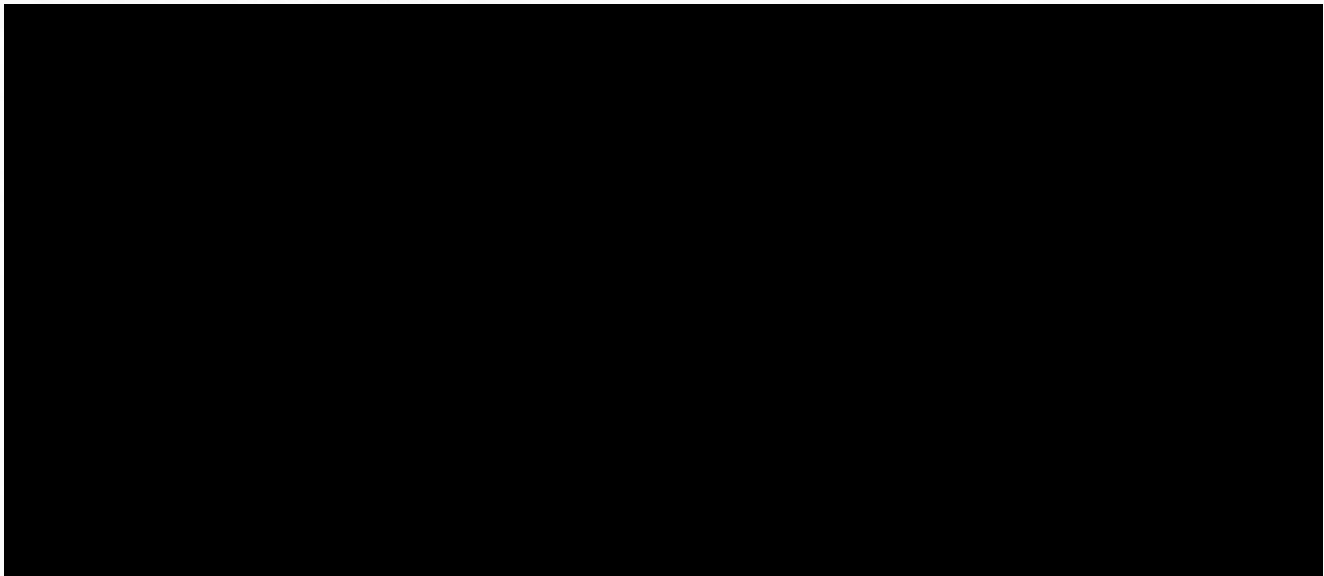
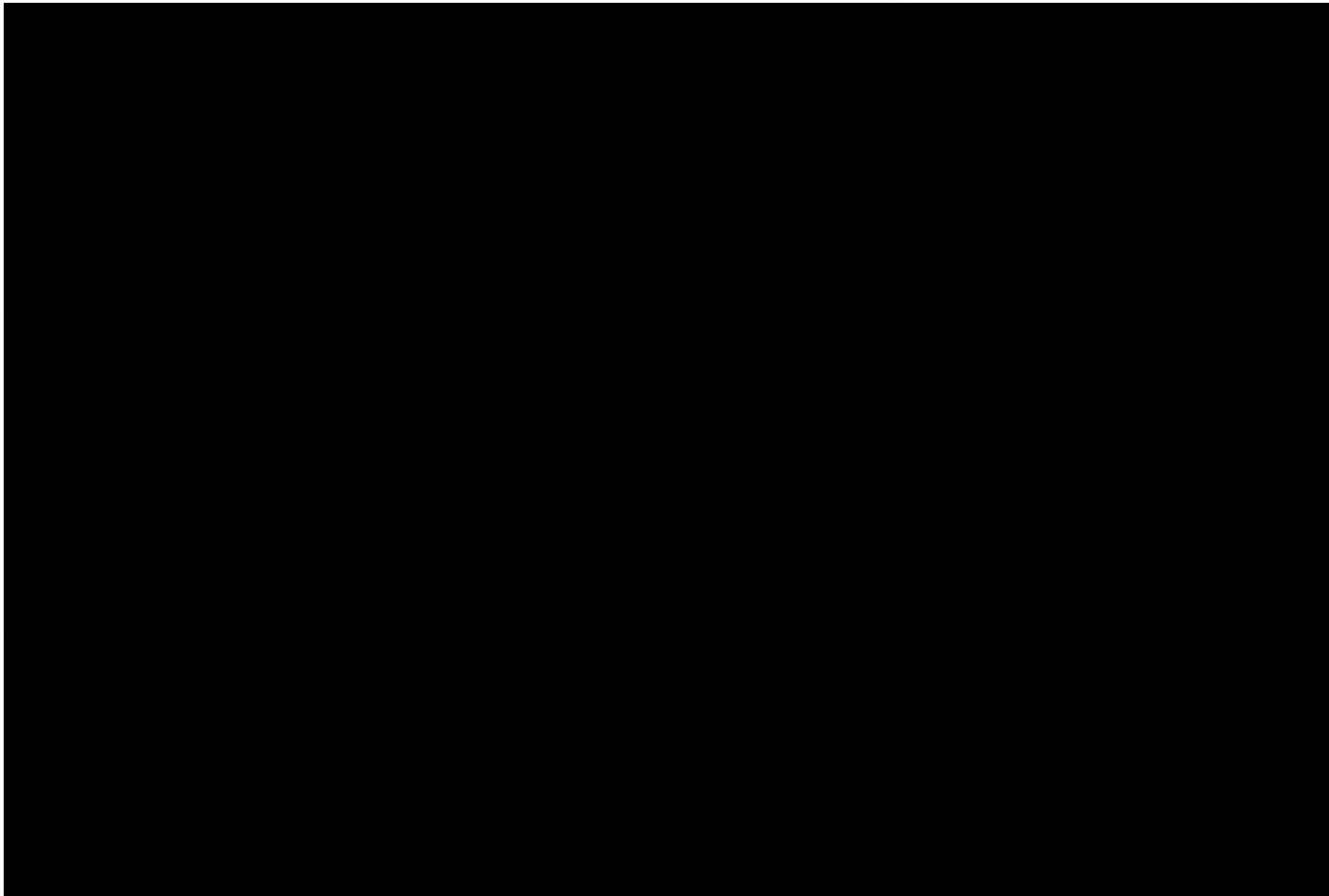
"FirstEnergy's [smart meter] program in Ohio remains voluntary. Though authorized by PUCO to recoup the cost of meters from customers, FirstEnergy has not yet (as of December, 2017) submitted any plans."  
"What if you don't want a smart meter? You can refuse the upgrade to a smart meter, but that decision comes with a \$24/month charge, approved by the Public Utility Commission of Ohio to cover costs associated with meter readers. If your meter has already been upgraded, you can have an analog meter re-installed for a one-time fee of \$43."

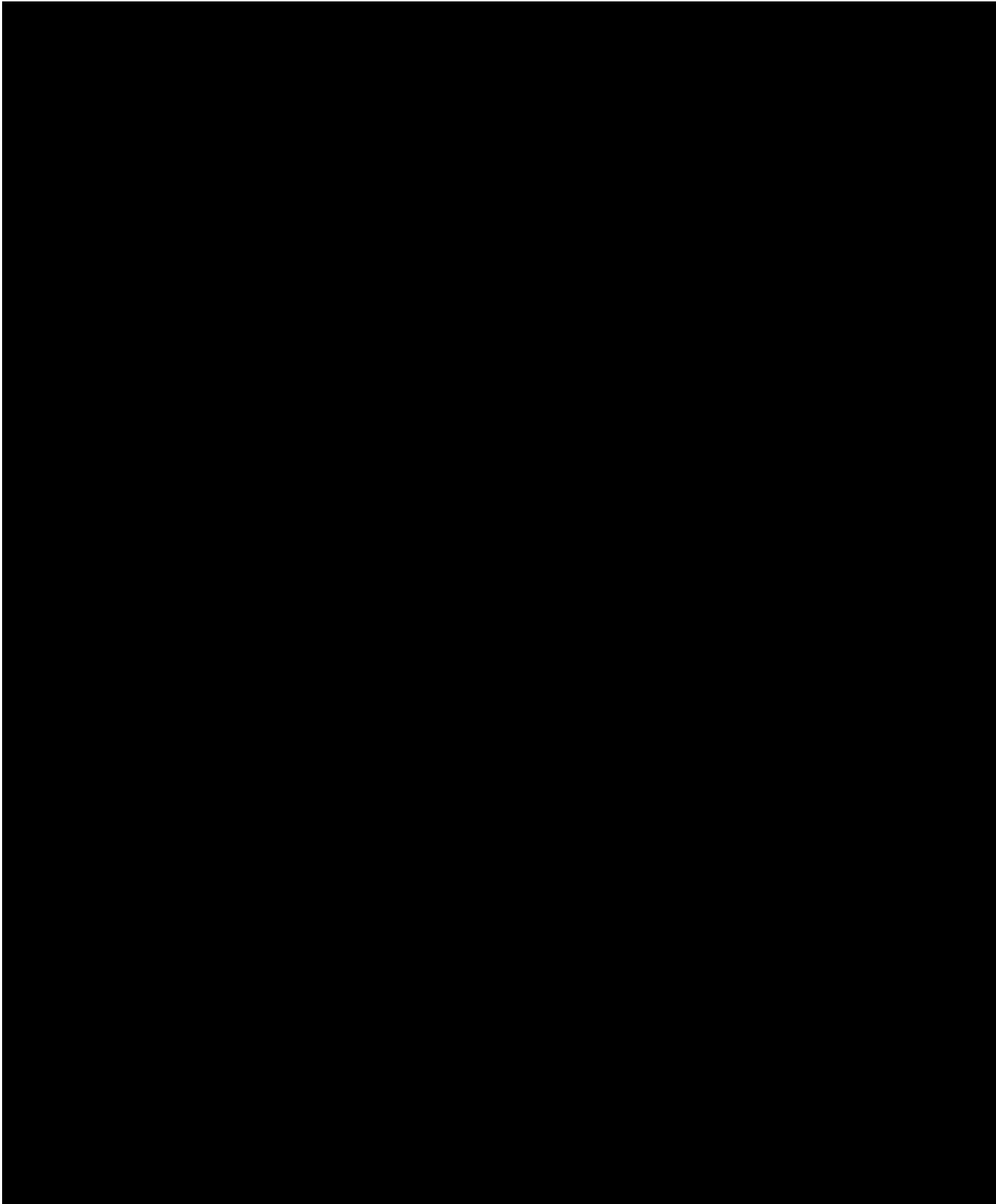
Available online from: <https://www.ohenergyratings.com/blog/2018/06/14/smart-meter-rules-ohio/>

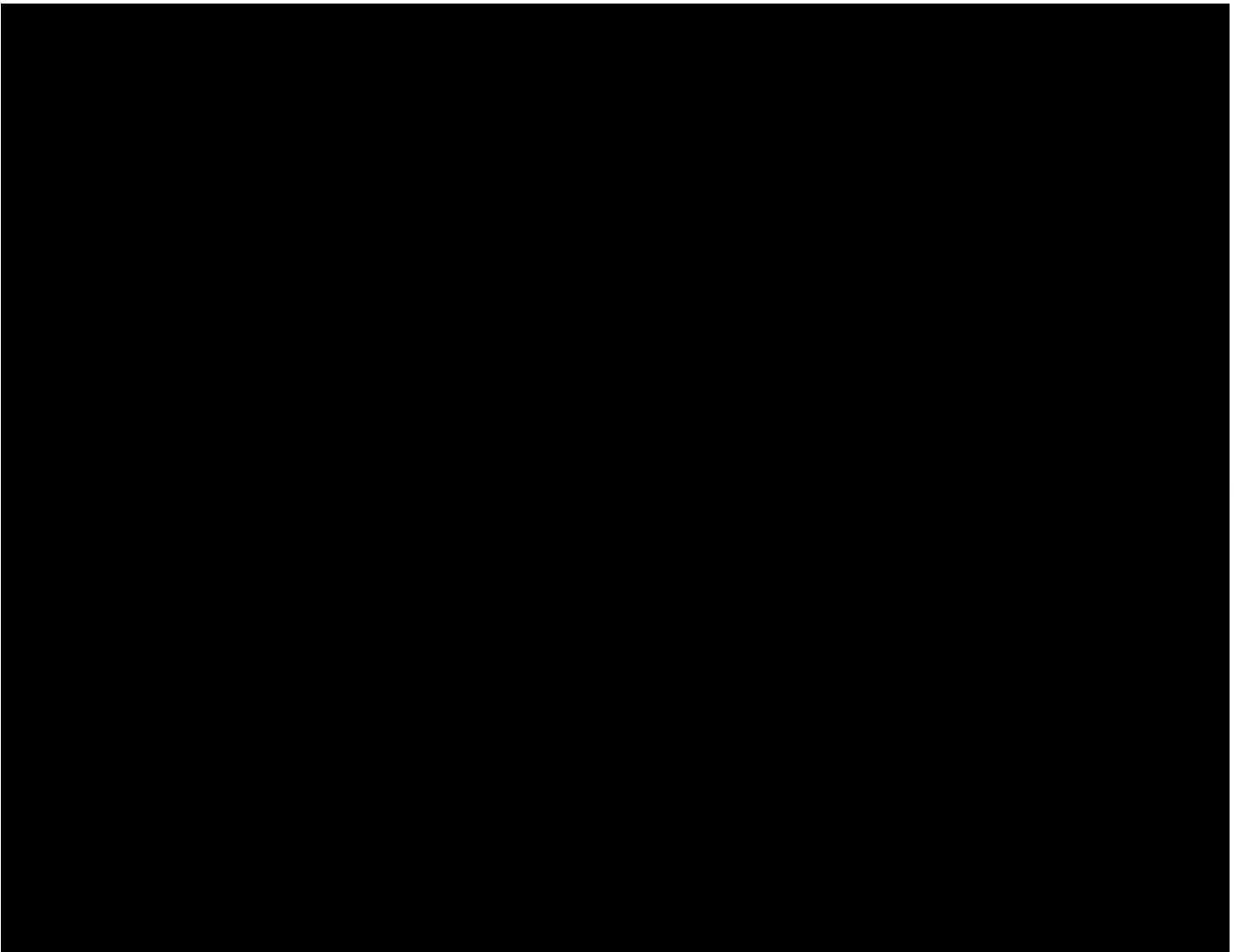
<sup>12</sup> In the Matter of Potomac Electric Power Co. and Delmarva Power and Light Co. Request for Deployment of Advanced Meter Infrastructure, Maryland P.S.C. Case No. 9206, Order 86200 (Fed. 26, 2014).

<sup>13</sup> *In the Matter of Application of Duke Energy Carolinas, LLC for Approval of Advanced Metering Infrastructure Opt-Out Tariff*, North Carolina Utilities Commission, Docket No. 100, Sub 147, (Order) (June 22, 2018).

is, they heated body tissues. But studies<sup>14</sup> now show that “non-thermal” effects cause biological harm far beyond that.





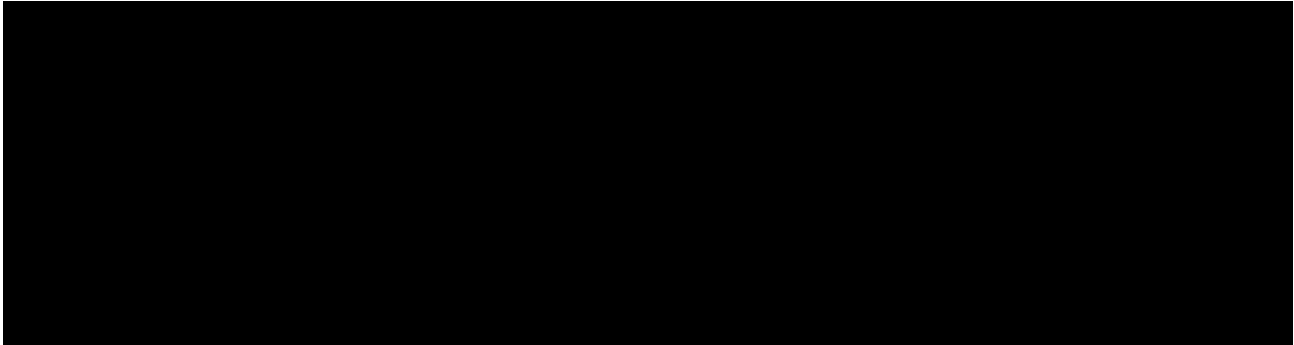


**C. Smart meters emit radiation differently than other radio frequency devices**

This legal case focuses on “radio frequency radiation (RF),” the kind of electromagnetic frequency (EMF) that is emitted by wireless devices such as cell phones, wifi, cell towers, and smart meters. But smart meters are different: although they emit very high intensity radiation like these other wireless devices, the radiation is emitted frequently and in very brief bursts.

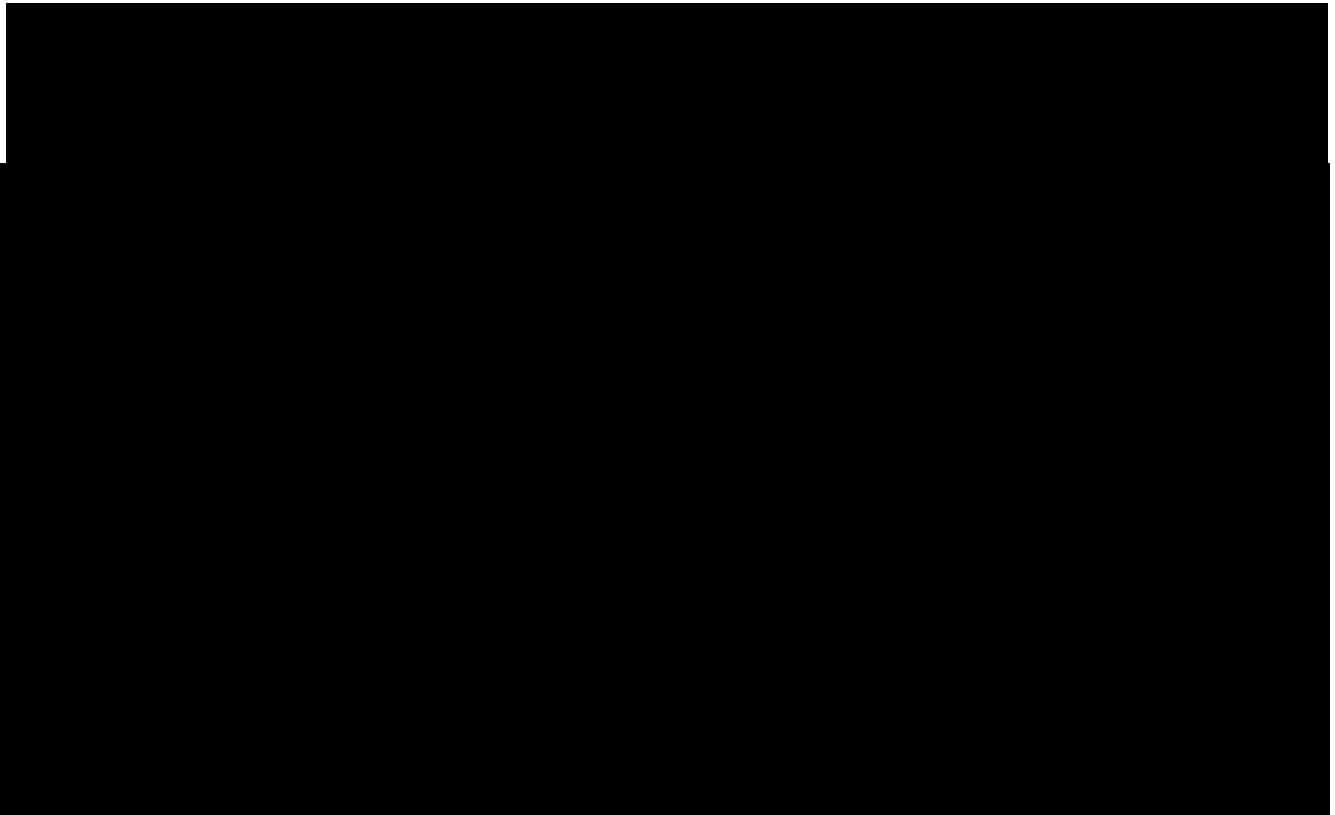
Ms. Hendin measured two minutes of radiation from her neighbor’s smart meter (*St. of Hendin*, Exhibit 3), and estimated an average of 2,880 emissions per day. To take these measurements, she used a Cornet ED88T meter, “one of the most highly recommended meters” for the general public. *Davis Cross* at 73:21-22. As Davis admits, this reading might not be

totally accurate because “most of these...meters don’t really have the capability to capture those very small emissions.” (*Davis Direct* at 175:21-22). In other words, the number of emissions per day that Ms. Hendin measured could actually be much higher.

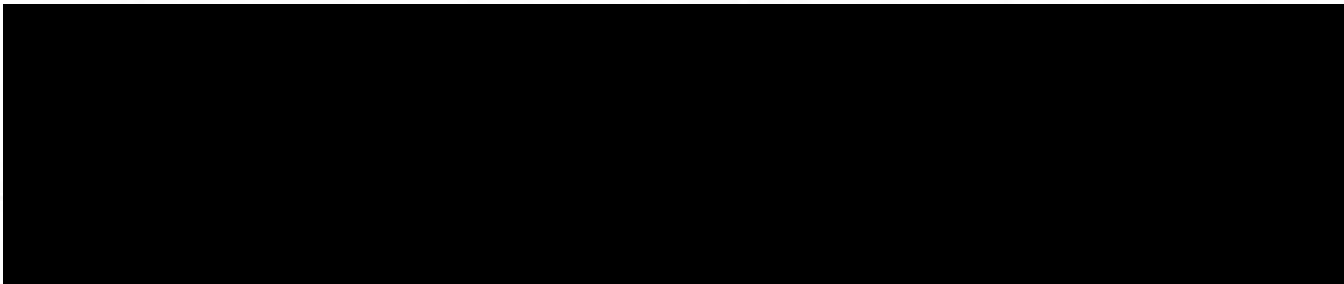


These numbers can be used to determine yearly exposure: 9,600 daily bursts amounts to 3 ½ million hits a year, while 190,000 daily bursts amounts to more than 69 million hits a year.

These cannot be described as “infrequent.” *See also St. of Hendin*, Exhibit 3.



Because the bursts of radiation are short (just a millisecond long), if one were to look only at the length of time for which RFs are being emitted, the average is indeed low; however, the high intensity of these emissions, as well as the fact that they are continually on and off, causes smart meter radiation to be particularly harmful to the body.



Most research has been done on radio frequencies in general, not on smart meters specifically, which means that the distinctive characteristic of smart meters, namely high intensity bursts at frequent intervals, has not been factored into the understanding of the effects of smart meters on health. Dr. Israel agreed, stating, “There are no studies addressing the effect of radio frequency fields from smart meters on heart rate.” *Israel Rebuttal* at 16:1-2. The lack of such studies means that human beings are like guinea pigs being subjected to an untested technology.

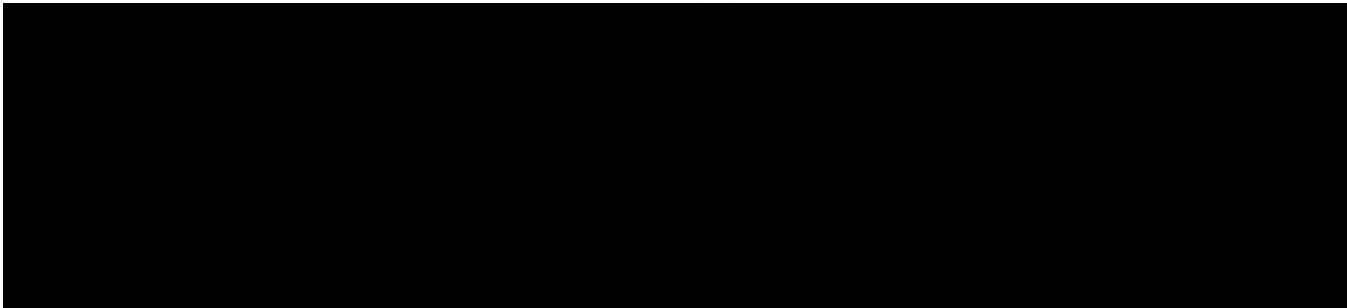
One study is particularly relevant. At the Commission level, in the *Povacz* case now pending at the Commonwealth Court, considerable attention was given to the anticipated results of a study being conducted by the National Toxicology Program<sup>16</sup> on the effects of cell phone radiation on health. *Maria Povacz vs. PECO Energy Company, C-2015-2475023 Order, page 54*. Dr. Davis argued at the time that because the NTP report was unpublished it should be given “little or no weight” and that once published “results will need to be analyzed and integrated in the context of all other existing research on RF exposure and cancer endpoints.” *Id.*

---

<sup>16</sup> NTP is an inter-agency program run by the United States Department of Health and Human Services, and is headquartered at the National Institute of Environmental Health Sciences (NIEHS).

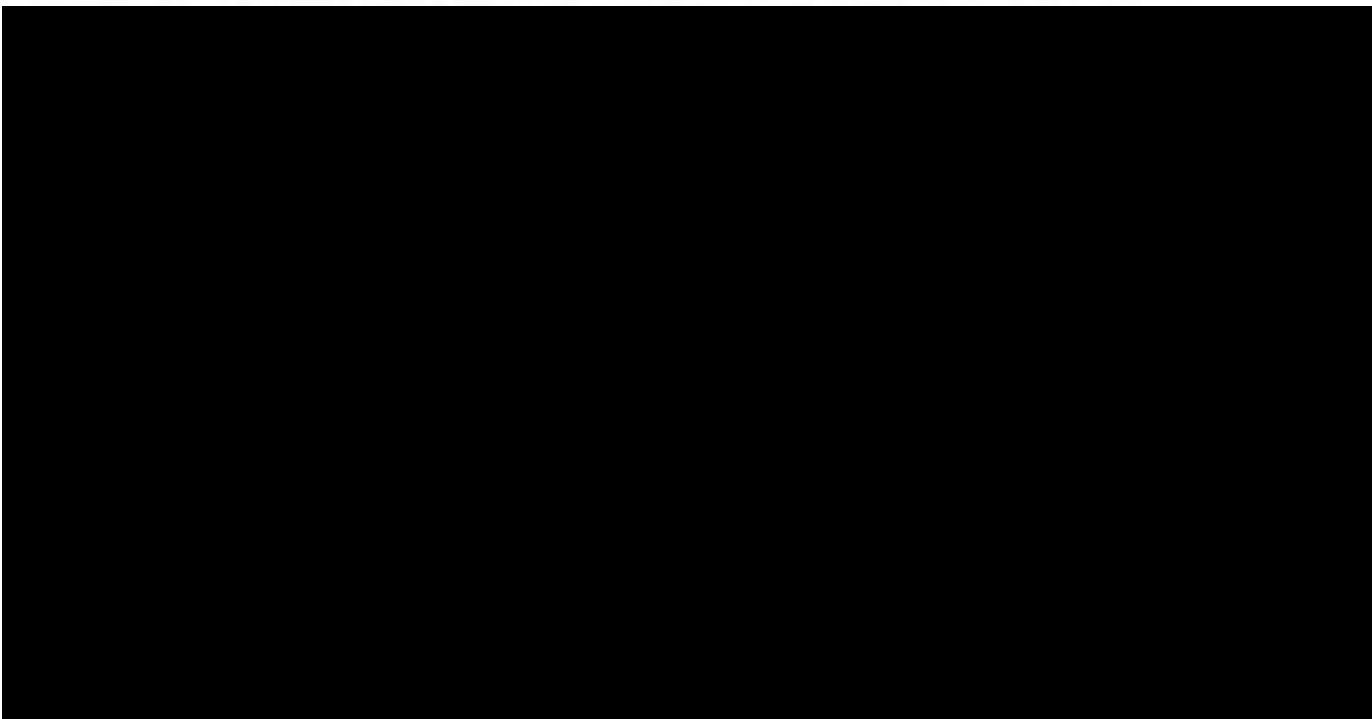
The NTP study, conducted over two years, exposed rats to real GSM and CDMA cell phone radiation signals in the same frequency band (900 MHz) as that used by the ITRON meters commonly being deployed in Pennsylvania. The results of the study are in. The November 2018, NPT Report concluded that there is:

- **Clear evidence of tumors in the hearts of male rats.** The tumors were malignant schwannomas. (*Israel Cross, January 24, 2020, Transcript at p. 279:3-6*).



#### **D. Evidence of similar symptoms**

Despite the lack of specific studies measuring the effects of smart meters on health, there is a large body of evidence showing that people often experience similar symptoms when exposed to smart meters.



██████████ Studies also show that these symptoms persisted several months after the removal of the smart meter. One explanation is that radio frequency exposure causes the generation of free radicals and oxidative stress, causing cellular damage, and that damage accumulates over time. (Exhibit 17) ██████████

#### **E. Ms. Hendin is sensitive to EMFs**

Ms. Hendin is sensitive to EMFs in general, and her treating physician has diagnosed her as having electromagnetic hypersensitivity, also known as Idiopathic Environment Intolerance (IEI). (*Israel Rebuttal* at 10:1 and 20-21). Ms. Hendin specific experiences reveal her sensitivities to EMFs. For example:

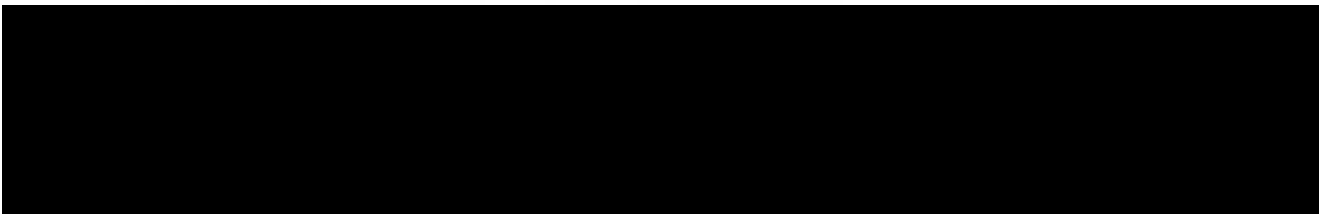
- (1) She is sensitive to airport security scanners and carries a letter from her doctor allowing her to skip these. Once at Newark Airport when the manual pat-down was delayed and she had to stand between two x-ray machines and next to the security scanner, she became ill and faint. *Hendin St.* at 9:194-206; 10:207-213; *Hendin Direct* at 44:11-25; 4:1-10.
- (2) In her kitchen, she sensed a “buzz,” which gaussmeter readings showed to be EMFs coming from the stove clock. When an electrician disconnected the clock, she felt no more buzz, and the gaussmeter confirmed EMFs had gone to zero. (*Hendin Direc, Dec. 19, 2020 Transcript, at 43:23-25; 44:1-8; Hendin St.* at 2:38-45; 3:1)
- (3) On a recent trip, the United Airlines waiting area was newly filled with computer stations, and Ms. Hendin became dizzy and disoriented. *Hendin Cross* at 72:11-14.
- (4) On recent teaching trips, she had no choice but to take the trans-Atlantic flights on planes newly equipped with wifi. She was unable to sleep, whereas for years on previous trips she had been able to sleep. *Id.* at 75:15-22.

Ms. Hendin proactively takes many precautions to avoid exposure to electromagnetic frequencies, and has been doing this for 20 years. “[I]n fact, my whole house office is a no-EMF zone as much as is humanly possible.” (*Hendin Direct, Dec. 19, 2019 Transcript* at 47:22-25). Ms.

Hendin travels a great deal, primarily for teaching, and takes precautions to protect herself from EMFs. Her treating physician wrote her a letter on June 29, 2013, stating that she is not to be exposed to airline security screening machines, which emit EMFs. *Hendin Direct* at 44:11-16.

For her computer, she carries various wired devices, as well as an Ethernet cable to connect to the internet in order to avoid using wifi. (*Hendin Direct* at 48:24-25; 49:1-15) In hotels, she unplugs devices such as clock radios, microwaves, coffee machines, and televisions. (*St. of Hendin* at 4:85-90)

Dr. Davis guessed incorrectly at how much time Ms. Hendin uses her cell phone: "...if I estimate that she used her phone for ten minutes every day..." (*Davis Direct* at 174:16-17); or one minute a day. (*Id.* at 25; 175:1) As Ms. Hendin explained, her cell phone is for emergency use only (*Id.* at 3:57), and she uses it so infrequently that her Virgin Mobile account accumulated eleven quarters (the equivalent of almost 3 years) of credit due to lack of use. (*Id.* at 3:61-68; and *Hendin Direct* at 50:2-7). Davis suggested that the RFs emitted by Ms. Hendin's cell phone are comparable to those emitted by a smart meter; however, he gave no evidence to support this claim.



Ms. Hendin already suffered previous symptoms from a previous smart meter After UGI Utilities, Inc. installed a smart meter on Ms. Hendin's residence, she developed physical symptoms that she had never experienced before. These were recorded by Dr. Kracht, her treating physician, and included frequent irregular heartbeats / palpitations, neurologic symptom of dizziness, and gastro-intestinal symptoms of constipation and abnormal stools. (Exhibits 9, 10,

11, *St. Hendin* 180-182, *Hendin Direct* at 29:11-18) She also experienced cognitive dissonance, or “brain fog” (*St. Hendin* at 188-189; *Hendin Direct* at 29:14-17) and joint swelling in both hands, with decreased mobility, joint pain, joint stiffness, aches, stinging, and pinching. (*Hendin Direct* at 34:12-25) “I’d never had anything like this in my life,” she said. (*Hendin Direct* at 34:19). Ms. Hendin also suffered insomnia and fatigue. (Exhibit 12, *St. Hendin* at 182, *Hendin Direct* at 35:14) Most of the symptoms, except the joint pain and insomnia, subsided once the smart meter was removed. The joint pain and insomnia subsided several weeks later. (*Hendin Cross, December 19, 2019 Transcript* at 35:24-25; 36:1-8)

#### **F. Previous symptoms from smart meter**

It is not coincidental that Ms. Hendin experienced the same symptoms as those most frequently reported by people exposed to smart meters in the Lamech study: insomnia, headaches, fatigue, cognitive disturbances, dysesthesias (abnormal sensation), and dizziness. At the time, she did not report tinnitus to her physician because it was not a new symptom: she had already had it previously. (*Hendin St. of* at 8:181), and in the hearing. (*Hendin Direct, December 19, 2019 Transcript* at 29:17) The appearance of these symptoms, along with the fact that they cleared up once the smart meter was removed, makes it clear that Ms. Hendin’s health was affected by the installation of a smart meter on her home. Ms. Hendin has been able to turn off other sources of RF radiation in her home, such as her computer and cell phone. But a smart meter has no turn-off option, and would emit this high intensity, incredibly frequent radiation, every single day, all day and all night, causing her harm.

**G. Met-Ed's Lack of Evidence for the Safety Makes it Unreasonable for Met-Ed to Force Her to Accept A Smart Meter**

[REDACTED]

[REDACTED] Met-

Ed has a moral, ethical, and legal obligation to be sure that any new technological device it brings to people's homes, without their consent, is completely safe. Met-Ed relies on the Federal Communications Commission ("FCC") guidelines from as proof that the smart meters are safe. Organizations and physicians worldwide have said that smart meters exceed healthy radiation limits, and have repeatedly urged the FCC to reassess the guidelines. (Exhibits 5, 7, [REDACTED])

[REDACTED] The American Academy of Environmental Medicine pointed out that "existing FCC guidelines for RF safety that have been used to justify installation of smart meters...are obsolete.... The FCC guidelines are therefore inadequate for use in establishing public health standards." See Exhibit 6; [REDACTED]

[REDACTED]

**H. The International Consensus Makes it Unreasonable for Met-Ed to Force Ms. Hendin to Accept a Smart Meter**

International organizations have concluded that there is a basis to conclude that there is a health risk to Ms. Hendin because of the numerous peer reviewed experimental and epidemiological studies. There is widespread national and international concern about the deleterious effects of EMFs and smart meters on human health. [REDACTED]

[REDACTED]

[REDACTED] The world has been

aware for a long time of the damaging effects of smart meters, and the suffering many people endure with exposure to electromagnetic frequencies. In 2016, the European Academy of Environmental Medicine (EUROPAEM) published “Guidelines for the Prevention, Diagnosis and Treatment of EMF-Related Health Problems and Illnesses. As explained in those guidelines:

New exposures like electromagnetic fields (EMF) studies, empirical observations, and patient reports clearly indicate interactions between EMF exposure and health problems. Individual susceptibility and environmental factors are frequently neglected. New wireless technologies and applications have been introduced without investigation of their health effects, raising new challenges for medicine and society.

*(Hendin Written testimony at 11:243-251).*

#### **IV. Met Ed’s Response to the Request to Refuse Installation of a Smart Meter is Wrong**

##### **A. Met-Ed Fails to Provide Safe Service or to Warn Customers such as Ms. Hendin of Hazards**

Section 1501 of the Code requires utilities to provide safe service and facilities. 66 Pa. C.S. § 1501. Further, the Commission regulations require electric utilities to properly warn and protect the public from danger, and to exercise reasonable care to reduce the hazards to which customers may be subjected because of the utilities provision of electric service and associated facilities such as smart meters. 52 Pa. Code § 57.28(a)(1). Moreover, the Code requires that electric utilities companies are subject to steep civil penalties that accrue daily for violations of the Code, such as failure to provide safe service. 66 Pa.C.S. §330 1(a)-(b).

##### **B. The Commission’s Interpretation of Act 129 Violates the Plain Meaning Of The Act**

The Commission’s interpretation of Act 129 and Section 1501 of the Code violates the plain meaning of the statutes, the basic rules of statutory construction because it results in an absurd, unreasonable and impossible interpretation.

The rules of statutory construction set forth under the Statutory Construction Act. *See* 1 Pa. C.S. § 1921 (“The object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly”); *see also* 1 Pa. C.S. § 1922(1) (it is presumed “[t]hat the General Assembly does not intend a result that is absurd, impossible of execution or unreasonable”). The Commission is an independent administrative commission with the “general administrative power and authority to supervise and regulate all public utilities doing business in the Commonwealth” and is empowered by the Pennsylvania General Assembly to “make regulations, not inconsistent with law, as may be necessary or proper in the exercise of its power or performance of its duties.” 66 Pa.C.S. § 501(b).

In 2008, the General Assembly enacted Act 129, 66 Pa.C.S. Omnibus Amendments Act of October 15, 2008, P.L. 1592, (“Act 129”) which provides:

- (f)(2) Electric distribution companies shall furnish smart meter technology as follows:
  - (i) Upon request from a customer that agrees to pay the cost of the smart meter at the time of request.
  - (ii) In new building construction.
  - (iii) In accordance with a depreciation schedule not to exceed 15 years.

66 Pa.C.S. 2807(f)(2). On June 24, 2009, the Commission outlined the standards each smart meter plan must meet and provided guidance on the procedures to be followed for submittal, review, and approval of all aspects of each smart meter plan. Smart Meter Procurement and Installation, Docket No. M-2009 2092655 (hereinafter “Implementation Order”). The Commission incorrectly interpreted the intent of the General Assembly to require all covered electric distribution companies (“EDCs”) to deploy smart meter systemwide within 15 years, by engaging in a tortured reading of Act 129, and the phrase “in accordance with a depreciation scheduled not to exceed 15 years.”

On March 3, 2011, *Negley v. Metropolitan Edison Company*, Docket No. C-2010-2205305 (Order Adopted December 15, 2010, Initial Decision issued January 3, 2011), the Commission approved the Administrative Law Judge recommendation to dismiss a complaint opposing installation of smart meters for legal insufficiency. ALJ Colwell concluded that Act 129 of 2008 authorized the installation of smart meters by electric distribution companies (“EDCs”) without exemptions for customers for installation or charges. In addition, ALJ Colwell found that Act 129 of 2008 did not empower the Commission to allow customers to opt out of having smart meters installed at their residences. The Commission has continued with this tortured reading of Act 129 requiring consumers to accept smart meters regardless of “the record in this particular case” or any harm they identify.

### **C. Act 129 Permits Opt Outs**

Act 129 of 2008 requires EDCs to file smart meter technology procurement and installation plans with the Commission for approval. 66 Pa.C.S. § 2807(f). The Commission’s Implementation Order of June 2009,<sup>17</sup> Met-Ed’s Smart Meter Deployment Plan,<sup>18</sup> Pennsylvania’s legislative history and accounting and tax authorities and definitions demonstrate the opt outs are permitted, and that the Commission’s present interpretation of the plain language to contrary is not correct.

Nothing in Act 129 addresses opt outs or prohibits EDCs from allowing opt out from its smart meter deployment plans. The only section of Act 129 that discusses how technology “shall be furnished” is Section 2807(f). Although other parts of Act 129 include definitions of smart

---

<sup>17</sup> Docket No. M-2009-2092655

<sup>18</sup> Docket No. M-2013-2341990; Met-Ed’s Smart Meter Deployment Plan is a joint deployment plan with Pennsylvania Electric Company (Docket No. M-2013-2341994), Pennsylvania Power Company (Docket No. 2013-2341993) and West Penn Power Company (Docket No. 2013-2341991). For purposes of this document, it will be referred to as Met-Ed’s Deployment Plan.

meter technology, including that it shall enable time-of-use rates,<sup>19</sup> there is nothing concerning opt outs.

The Commission, however, interprets the plain language of Section 2807(f)(2)(iii) as a smart-meter mandate, and has aided and abetted most EDCs to force smart meters on all customers, even those who object for medical reasons based on his or her doctor's advice. Commission's Implementation Order of June 2009 ("Implementation Order"). The Implementation Order<sup>20</sup> states:

The Commission believes that it was the intent of the General Assembly to require all covered EDCs to deploy smart meters systemwide when it included a requirement for smart meter deployment "in accordance with a depreciation schedule not to exceed 15 years."

Pa. PUC Docket No. M-2009-2092655 at p 14. The Implementation Order also explains that balance is the goal of Act 129:

It should also be noted that Act 129 uses the language "not to exceed 15 years." An EDC is encouraged to expedite the deployment process if it will provide increased customer benefits in a cost-effective manner. Again, the *primary goal* of the EDC deployment plan should be to implement a deployment and installation schedule that best *balances* the overall efficiency and timeliness of the smart meter installations *with the costs incurred*.

*Id.* The Commission, and now the EDCs override the plain statutory language of § 2807(f)(2)(iii) by excluding the possibility of opt outs from smart meter deployment where the statute had merely imposed a depreciation schedule on deployment. The Commission interprets furnishing of smart meters "in accordance with a depreciation schedule not to exceed 15 years" to mean covered EDCs must force smart meters on all customers within 15 years. In addition,

---

<sup>19</sup> As smart meters are provided to those who request one, and in new building construction, time of use rate requirements are honored.

<sup>20</sup> Docket No. M-2009-2092655

the Commission conflates furnishing smart meters with removal of analog meters, when, in fact, the Act is silent on currently deployed analog meters.

Depreciation Is an Accounting Term That Means An Allowance for Wear and Tear, Obsolescence, or Exhaustion, Not Mandatory Installation

Act 129, Section 2807, subparagraph (f)(2)(iii) states:

Electric distribution companies shall furnish smart meter technology as follows ...in accordance with a depreciation schedule not to exceed 15 years.

The Commission has interpreted this as a mandatory roll-out of smart meters within 15 years; however, this interpretation not only lacks common sense, but also ignores a key term found in the law – “depreciation.” Since “depreciation” is an accounting or tax term, it is necessary to consider how applicable authorities define the term “depreciation.”

The term depreciation is not ambiguous. BLACK’S LAW DICTIONARY defines depreciation as “spreading out the cost of a capital asset over the estimate useful life.” BLACK’S LAW DICTIONARY, Sixth Ed. 1990). The Federal Energy Regulatory Commission (“FERC”)<sup>21</sup> defines the term “depreciation” similarly. “Depreciation” under FERC’s Uniform System of Accounts for electric utilities is “the loss of an asset’s service value not restored by current maintenance.” 18 C.F.R. § 101(12). In establishing standards for depreciation for accounting purposes, FERC wanted to ensure that electric utilities charge proper amounts of depreciation to expense in each financial reporting period for the purpose of allocating in a systematic and rational manner the cost of utility property to the periods which the property is used in utility operations (over its estimated useful service life). 64 Fed. Register 42304-01 (August 4, 1999). Depreciation is an accounting term tied to the expenditure of the cost of an asset (such as a smart meter) over its

---

<sup>21</sup> The Federal Energy Regulatory Commission (FERC) is an agency that regulates the interstate transmission of electricity, natural gas, and oil. FERC also administers accounting and financial reporting regulations of regulated companies – such as electric distribution companies (EDCs).

period of use, or useful life. FERC does not interpret “depreciation” to mean deployment, nor does any other accounting or tax authority. “Deprecation” never means “deployment.”

Both the Internal Revenue Code (“IRC”) § 167(a) (26 U.S.C.A § 167) and Treasury Regulation §1.167(a)-1(a) mirror this and define depreciation as an allowance (or deduction) for the exhaustion, wear and tear, and obsolescence of property used in a trade or business or property held for the production of income. 26 C.F.R. Treas. Reg. §1.167(a)-1(a). requires that depreciation deductions are allocated over an asset’s useful life.

These definitions show that the Commission’s interpretation is at odds with the plain meaning of the term depreciation. Depreciation means wear and tear, exhaustion, or obsolescence are synonymous with the term depreciation.

Based on the definition of “depreciation” and “useful life” as used in legal and accounting contexts, the plain statutory language of § 2807(f)(2)(iii) must be interpreted using terms synonymous with depreciation to aid in interpretation:

Electric distribution companies shall furnish smart meter technology as follows ... in accordance *with a wear and tear, exhaustion, or obsolescence schedule* not to exceed 15 years.

In other words, subparagraph 2807(f)(2)(iii) establishes the maximum service life of smart meters. This paragraph of the Act makes no reference to a mandatory roll-out of smart meters by all EDCs (regardless of their number of customers - which shall be addressed further below). It does not explicitly state, nor can it be inferred in any way, that there is a required system-wide deployment of smart meters on a schedule of no longer than 15 years, as stated in the Commission’s 2009 Implementation Order. Act 129 does not refer to replacing AMR meters or analog meters here; rather it plainly spells out that AMI (smart meters) service periods are not to exceed 15 years. Met-Ed’s Smart Meter Deployment Plan (discussed, *infra*) confirms this.

*The General Assembly's Prior Use of "Depreciation" to Specify the Useful Life of an Asset.*

The General Assembly has consistently used the term "depreciation" in other enacted laws including in the Public Utility Code. A reading that would lead to a conflict between different statutes or between individual parts of a single statute violates rules of statutory construction. *Housing Authority of the County of Chester v. Pennsylvania State Civil Service Commission*, 556 Pa. 621, 730 A.2d 935, 946 (1999). The General Assembly is presumed to have intended to favor the public interest as against any private interest. *E.D.B. ex rel. D.B. v. Clair*, 987 A.2d 681, 684 (Pa. 2009)(citing *Vitac Corporation v. Workers' Compensation Appeal Board (Rozanc)*, 578 Pa.574, 854 A.2d 481, 485 (2004) (citing 1 Pa.C.S. § 1922(5)). The General Assembly's prior uses of depreciation are consistent with defining the useful life of an asset, and do not involve mandatory deployment. Section 1703 of Title 66 states:

§1703. Depreciation accounts; reports.

(a) Accounts.--Every public utility shall carry on its books or records of account, proper and reasonable sums representing the annual depreciation on its property used or useful in the public service, which sums shall be based upon the average estimated life of each of the several units or classes of depreciable property.

66 Pa. C.S. § 1703(a) (emphasis added). Similarly, public utilities are required to file statements with the Commission that show annual depreciation, again without any reference to mandatory deployment.<sup>22</sup>

---

<sup>22</sup>Title 66 Pa. C.S. §1703 (b) provides in part:

(b) Statements.--Every public utility shall file with the commission, at such times and in such form as the commission may prescribe, statements setting forth the details supporting its computation of annual depreciation, as recorded on the books or records of accounts of the public utility.

Clearly the General Assembly was familiar with the term “depreciation” when it made a policy decision for Act 129 to use “depreciation” to specify the “useful life” for depreciation purposes relative to smart meters.

Paragraph 2807(f)(2) in its entirety as written by the General Assembly means that the only way homeowners would be furnished their first smart meter was to request one and pay for its cost at time of such request, if the homeowner is living in existing construction. In new construction, smart meters “shall be furnished” or provided. Thereafter, the smart meter that was furnished must be replaced with a new smart meter over a period not to exceed 15 years.<sup>23</sup>

The Commission incorrectly interprets the statutory subparagraph (f)(2)(iii) as a requirement for system-wide smart meter deployment within 15 years with no exceptions. The Commission has substituted “deployment and installation schedule” for the statutory terms “depreciation schedule.” Nowhere does any statute or other regulatory agency define or use the terms “deployment” or “installation” as synonymous with the term “depreciation.”

The Commission’s interpretation is not saved by the statute’s use of “furnish.” BLACK’S LAW DICTIONARY states: “Definition of “furnish”: To supply; provide; provide for use.” Section 2807(f)(2) of the Act requires EDC’s to *furnish* smart meter technology under three conditions only. It does not require the EDCs to install or deploy smart meter technology everywhere in their territories with no exceptions. Thus, neither “furnish” nor “depreciation schedule” can be reasonably construed to mean “install” or “deploy,” much less connote “mandatory deployment and installation.”

---

<sup>23</sup> It should be noted, there does not appear to be any prohibition from an EDC asking a customer if they would want to consent to the installation of a smart meter if a customer would not fall under 2807(f)(2)(i) or (ii). Instead, covered EDCs have been forcing smart meters on customers not falling under 2807(f)(2)(i) or (ii).

Act 129's reference to the size of EDC's further supports the conclusion that Act 129 does not require mandatory deployment, but instead made concessions for smaller EDC's. Section 2807(f)(6) of Act 129 states that subsection (f) does not apply to EDCs with 100,000 or fewer customers. This does not mean that customers of all EDCs with 100,001 or more customers must accept a smart meter, rather it means that (f)(2)(i), (f)(2)(ii), and (f)(2)(iii) do not apply to EDCs with 100,000 or fewer customers. An EDC with 100,000 or fewer customers does not have to furnish a smart meter upon request from a customer and that a smart meter does not have to be furnished in new construction. It excuses smaller EDCs from the requirements, it does not mandate smart meters on customers of EDCs with 100,001 or more customers.

*The Legislative History Reveals that the General Assembly Rejected A Mandatory Deployment Scheme In Act 129*

The Pennsylvania House rejected an explicit reference to Additional clarity is afforded by reviewing language that the General Assembly removed during the legislative process. The General Assembly removed language from the third clauses of Section 2807(f)(2) in the final version of Act 129 which was passed into law that would have provided for a mandatory deployment. Printer's Numbers (PNs) 3218 and 3233 of House Bill 2200 (February 11 and 12, respectively, 2008)<sup>24</sup> both stated, "Electric distribution companies shall furnish smart meter technology to: ...(C) One hundred percent of its customers within ten years after the effective date of this paragraph." The *House Journal* records numerous dissenting comments about the mandatory nature of the deployment.

- House Journal, February 11, 2008, pages 386-403 [p. 390 Mr. Hutchinson; 390-391 Mr. Godshall; p. 392 Mr McCall; p.393 Rep. Smith and Mr. Saylor; p. 395 Mr. Benninghoff; p.397 Mr. Gabig]
- House Journal, February 12, 2008, pages 430-432 [p. 431: Mr. Hutchinson]

---

<sup>24</sup> See Attachment 1 for copies of PN Bills.

A third version of HB2200, PN 4429, which was not passed into law, would have required covered EDCs to replace fully depreciated existing meters that had exceeded their useful life with smart meters. However, this language in PN 4429 was changed, and is in sharp contrast to the language that was passed into law.<sup>25</sup>

The General Assembly rejected the versions of Act 129 that explicated mandatory smart meters for customers (PNs 3218 and 3233), and also rejected the version that suggested retiring meters from service and replacing existing (mostly analog) meters ( House Bill 2200 PN 4429).<sup>26</sup>

It's erroneous for the Commission to interpret Subparagraph 2807(f)(2)(iii) of Act 129, as mandating smart meters for all customers or to conclude that subparagraph (f) referring at all to existing analog meters, because the General Assembly considered and rejected those versions. Instead, the General Assembly removed the mandate from Act 129. The Commission cannot rely on prior PNs of the Act that were not passed into law as the basis for the Implementation Order, to support rulings against every single smart meter formal complaint to date.

The legislative history from the Pennsylvania Senate explains that the legislature considered and rejected a mandate for Act 129. Senate Journal records of PN 4526.

On October 8, 2008, the Senate recorded the following comments for PN 4526<sup>27</sup>, pertinent to smart meters and concerns about customers. Discussion of PN 4526 in the Senate is recorded in the Senate Journal on October 8, 2008, pages 2626-2631.

Senator TOMLINSON stated:

It [PN4526] also contains language in there that we will have smart meters. **It is not mandated**, but it allows for the deployment of

---

<sup>25</sup> The House Bill 2200 PN 4429 (September 23, 2008) stated, "Electric distribution companies shall furnish smart meter technology as follows:... (III) in accordance with a schedule of replacement of full depreciation of existing meters."

<sup>26</sup> It is also worth noting that there would be no way to logically think "depreciation" could be synonymous with "deployment" in the paragraph above from PN 4429. It simply makes no sense.

<sup>27</sup> The Senate Journal is available at: (<https://www.legis.state.pa.us/WU01/LI/SJ/2008/0/Sj20081008.pdf#page=13>)

smart meters through a depreciation process, through new home construction process, and through the depreciation of 15 years, and **for anyone who wants to purchase a smart meter which they feel will help them manage their electric load better.**

p. 2627 (emphasis added). Senator Boscola, also confirmed that Act 129 did not mandate smart meters: **“We also made sure that smart meters would not be mandated for every single ratepayer.”** Senator Boscola explained that avoiding a mandate was not only “a smarter approach,” but that it would also “save electric customers hundreds of millions of dollars paying for something that will not provide a real benefit in their own households.” October 8, 2008, p. 2629. Senator Fumo also confirms that Act 129 did not contain a mandate **“In addition, we did not mandate smart meters, but we made them optional.** We did say in new construction, where they really are practical, they will be put in. (emphasis added).

*The Commission’s Own Use of the Word “Depreciation” In 2009 Contradicts its Current Interpretation*

In 2009, the Commission used the terms “depreciation” and “useful life” consistent with Act 129 when discussing meters (including smart meters) and related those terms to the meter’s cost over its useful life. The Implementation Order illustrates that the Commission recognizes that “depreciation” is, in fact, an accounting term that relates to an expenditure for exhaustion, wear and tear, and obsolescence allocated over an asset’s useful life. Here, the Commission does not claim that depreciation means or has nothing to do with “mandatory deployment.”

Depreciation is a result of deployment of an asset: “As with all equipment, meters have a useful life. EDCs determine how much to invest in meter equipment based on its useful life and have an opportunity to depreciate that investment over the useful life of the meter. In addition, EDCs have an opportunity to recover the cost of the meter from ratepayers.” Implementation Order at p. 12.

The Commission offers no explanation for its belief that “it was the intent of the General Assembly to require all covered EDCs to deploy smart meters systemwide when it included a requirement for smart meter deployment ‘in accordance with a depreciation schedule not to exceed 15 years.’” Implementation Order at p. 14. In the years following the Implementation Order, as the EDCs have submitted and implemented smart meter deployment plans, the Commission instead interpreted that provision to mean that there can be no exception for any homeowner who objects to a smart meter on their property for any reason, including but not limited to adverse medical or health effects. The Commission simply has no basis for this position.

The Commission ascribes legislative intent which is entirely absent from actual wording and contradicts legislative discussion just prior to passage of the Act. The Implementation Order discusses recovery of costs of “deployment and installation” of smart meter technology, stating “these costs would include both capital and expense items relating to all plan elements, equipment and facilities, as well as an analysis of all administrative costs. Implementation Order, p. 29. Once again – the Commission uses the term “depreciation” correctly as an accounting term as a cost *resulting from* the deployment of smart meters. The Commission does not use “depreciation” as synonymous with the term “deployment.”

The Commission’s discussion of the recovery of costs in the paragraph above comes from Section 2807(f)(7) of Act 129 of 2008. Section 2807(f)(7) provides that part of the recoverable costs include annual depreciation and capital costs over the life of smart meter technology. In Section 2807(f)(7), depreciation is clearly an expense for the exhaustion, wear and tear, and obsolescence of a smart meter. In the Implementation Order, the Commission appears to understand the correct meaning and usage of the term “depreciation” discussed above.

This use of depreciation in accordance with its plain meaning suggests that “depreciation” cannot be interpreted completely differently by the Commission solely for purposes of Section 2807(f)(2)(iii).

The Commission’s recent decisions confirm its understanding of “depreciation” and contradict the Commission’s current interpretation of Act 129. Moreover, the Commission recognized the importance of the 15-year limit of a useful life, rather than any mandatory nature. As recently as December 19, 2019, the Commission correlates useful life with cost of a technology – providing additional evidence that Commission understands the meaning of 129’s Total Resource Cost (“TRC”) Test for 2021<sup>28</sup> Docket No. M-2019-3006868 (Order, Dec. 19, 2019), page 21.

*Met-Ed’s Use of the Word Depreciation*

Like the Commission, Met-Ed concedes that depreciation is inherently a tax and accounting term that stands for an expense tied to the wear and tear of an asset over its useful life. Met-Ed’s Smart Meter Deployment Plan, Pa. P.U.C., Docket No. M-2013-2341990, at 52. Met-Ed’s Smart Meter Deployment Plan states that it wants to “retire the meters out of stock, continue their existing *depreciation schedule* unaltered over their *remaining lives* as a regulatory asset, and continue *cost recovery* through base rates.” Deployment Plan at 76. (emphasis added).

Met-Ed’s Deployment Plan shows that Met-Ed uses the term depreciation in its plain accounting term meaning. Met-Ed proposes to continue depreciating existing meters using the existing meters’ regular depreciation schedules over their remaining lives to recover the full costs of those meters through base rates if they were taken out of service prior to the end of their

---

<sup>28</sup> Act 129 discusses the TRC test being a standard test that is met if, over the effective life of each plan not to exceed 15 years, the net present value of the avoided monetary cost of supplying electricity is greater than the net present value of the monetary cost of energy efficiency conservation measures. Reference to the TRC is only made here to show the Commission’s correlation of cost to the useful life of technology.

useful life after forced deployment of smart meters resulting from the Commission's erroneous interpretation of the Act. In other words, Met-Ed wants to continue charging customers for meters that are taken out of service until their full cost is recovered from the customer. Again, depreciation is an accounting term tied to the cost of an asset and allocation of that cost over the useful life of the asset.

The Commission and Met-Ed appear to understand what depreciation means, and that Act 129 § 2807(f)(2)(iii) imposes a maximum 15 year limit on the service life of smart meters; yet both state repeatedly that Act 129 §2807(f)(2)(iii) imposes a mandated deployment of smart meters to all customers of covered EDCs. In the absence of any statutory or legislative history to support the erroneous interpretation of a mandate, the Commission relies on this "depreciation schedule" to support their position. The Commission and Met-Ed thus are clearly capable of understanding and using the correct interpretation of the words "depreciation schedule", but instead misinterpret legislative intent and the Implementation Order to require deployment.

*The Legislature Considers Opt-Out Legislative Proposals*

Time and time again in the Commission's formal complaint administrative process, ALJ and the Commission have rendered decisions against smart meter complainants stating that the Act does not allow for opt outs. The Act does not explicitly address any legislative opt outs, because it was solely an "opt in" statute. Opt outs are not necessary where the consumer has the option to opt in.<sup>29</sup> It is solely the Commission's misinterpretation of the legislative intent and meaning of the words "in accordance with a depreciation schedule not to exceed 15 years" that turned the Act into a mandatory, "no opt" out smart meter deployment law; otherwise, if the

---

<sup>29</sup>The absence of a plainly stated opt-out provision does not preclude a utility customer from declining a meter based on various unsafe conditions (including medical implications and negative health effects) that could be caused or exacerbated by smart meter radiofrequency emissions in accordance with 66 Pa. C.S. § 1501.

Commission had not attempt to change the meaning of the law by ignoring the plain meaning and the legislative intent, Act 129 would not need an opt out.

Act 129 does not require a small volume EDCs, i.e. one with 100,000 or fewer customers, to furnish smart meters to its customers. That is, if a customer is served by a small volume EDC, that EDC does not have to furnish a smart meter to a customer upon the customer's request for a smart meter or in new construction.

In response to the revisionist history of Act 129 through the Commission's interpretations, opt out bills began to be introduced in the legislature.<sup>30</sup> The Legislature introduced opt out proposals only in response to the Commission's flawed Implementation Order and the Commission's refusal to change its flawed interpretation of the Act, and not because of any wording or plain language of Act 129 itself. The first smart meter Opt-Out bill was proposed in 2012 by State Rep. Mike Reese (House Bills 2186 and 2188 most recently reintroduced as four bills - House Bills 310, 311, 312 and 313). The initial Bills were introduced approximately three years *after* the Implementation Order, and only one year after the Commission started to dismiss all smart meter formal complaints filed by Pennsylvania residents.

The first opt out bill was not introduced until years after the passing of the Act and the Commission's June 2009 Implementation Order, when the EDCs were starting their smart meter roll outs pursuant to the PUC's implementation orders, but not before then. Timing is key here and speaks volumes. *See*, for example, the long string of formal complaint cases that the PUC had dismissed on the pleadings starting in 2011, cited by PECO in *Kreider v PECO* PUC Docket

---

<sup>30</sup> The Commission, Met-Ed and other utilities have either stated or insinuated that the existence of various smart meter opt-out bills proposed by the PA state legislature proves that the legislative intent of the Act was mandatory system-wide deployment; however, the timing belies that claim.

No.: C-2015-2469655, *PECO Energy's Petition for Reconsideration of the Commission's September 3, 2015 Order*, citing *Gavin v. PECO*, Docket No. C-2012-2325258 (Final Order entered, Jan. 24, 2012).

Legislators clearly remarked as to the non-mandatory intent of PN 4526, and any subsequent effort by anyone to reach out to the PUC to remark about such intent fell on deaf ears as evidenced by complaint after complaint. As shown by a letter written by Commission counsel dated March 20, 2018 related to docket number C-2018-3000222, the Commission has taken the posture that the only way it would change its implementation order was if there was a ruling from a higher court or the Act was amended. At the same time, In the PA PUC's Public Meeting held April 15, 2010,<sup>31</sup> in discussing the deployment process of smart meters and related timeframes, it states that the PUC Administrative Law Judge (ALJ) "found that the *Implementation Order* is not a regulation and does not have the full force and effect of law. Instead, it acts as a policy to provide guidelines to EDCs regarding the Commission's expectations about smart meter plans." Docket No. M-2009-2123950, at 10.

The Commission does not need a ruling from a higher court or a legislative action to amend Act 129 for the Commission to permit opt outs. Because the Implementation Order does not have the full force and effect of law, it can be changed. The Commission itself states that its Implementation Order is a policy not having the full force and effect of law, yet it refuses to re-address its erroneous policy in the face of overwhelming evidence (well beyond a preponderance of the evidence) that it has misinterpreted the plain language of the Act, the legislative intent of the Act and the constitutionality of its Implementation Order. The Commission can change its

---

<sup>31</sup> Docket No. M-2009-2123950

erroneous policy and align its conclusions with the plain meaning of the statute; and does not need an appellate court or the PA state legislature to do so.

Act 129 § 2807(f)(2)(iii), as per the definition of depreciation based on the authorities discussed herein, as used repeatedly in the PA Public Utilities Code, and mirrored by the PUC's Implementation Order and Met-Ed's Smart Meter Deployment Plan, sets a cap on the service period of smart meters, dictating their service life not exceed 15 years. Even Met-Ed's deployment plan agrees. The final version of Section 2807 passed into law contains nothing about replacing electromechanical analog meters, nor anything about universal forced deployment of smart meters. Moreover, the legislative history clearly indicates that smart meter installation were not mandatory. The changes to the Bill wording through each Printer's Number show that the legislature considered and rejected efforts to make the installation of smart meters mandatory, culminating with the final version (PN 4526) passed into law.

The Commission cannot justify its mandate of universal forced deployment of smart meters in their Implementation Order of June 2009. Met-Ed has no statutory basis on which to force smart meters on all of their customers.

**V. The Utility's Witnesses Chris Davis and Mark Israel Are not Credible**

Testimony of Dr. Israel is irrelevant as he concedes that he has no experience in the smart meters, other than as a witness for utility companies. Mark Israel claims that smart meters are safe. This is not true. First, the studies that Mark Israel cites in his testimony do not involve smart meters, and are ten years old. Second Mark Israel never evaluated Ms. Hendin, nor has any direct knowledge about the proposed location of the smart meter at her residence, having never visited. Given the lack of relevance to Ms. Hendin's situation, Mark Israel's testimony should be given little weight.

His claim to being an “expert” in the field of radio frequencies and health is specious.

Mark Israel shows a startling lack of experience in the subject matter of this case—electromagnetic frequencies in general, and smart meters in particular. In response to the question, “What are your fields of expertise that are relevant to this proceeding?” (*Israel Rebuttal* at 5:4), he replied, “Medicine and medical research, including particularly radio frequency fields and health.” (5:5-6)

Though there was not time to ask him more about this at the hearing, from his Curriculum Vitae, there is no evidence of this expertise. None of the courses he has taught were on this subject. (*St. of Israel CV* at 7-8). Even more important, not one of the 250 papers he has published is on the subject of electromagnetic fields and their effect on health.

So, while Mark Israel has an impressive list of credentials in certain areas, he has no credentials at all in the particular field of radiofrequency fields and health, except for reading papers. He is claiming to be an expert by reading, even though many of the studies he cites are woefully out of date.

**A. The Israel exhibits show he is out of touch with states’ approach to smart meter opt outs**


Israel cited several state public health authorities as having concluded that radio frequency fields from smart meters do not pose any health hazard—Maine Center for Disease Control; Vermont Department of Health; Arizona Department of Health; and North Carolina Department of Health and Human Services.” (*St. of Israel* at 10:1-4) The quotations he cited are from 2010 to 2015.

Since these quotations were written, three of the states—Maine, Vermont, and North Carolina—have recognized that smart meters do pose a health hazard, and they ruled to

offer smart meter opt outs state-wide. The fourth, Arizona, offers opt outs in parts of the state. In particular, in June 2018, the North Carolina Public Utilities Commission ruled to waive opt-out fees for customers who presented notarized doctors' letters that confirmed the customers had health issues related to smart meters. *In the Matter of Application of Duke Energy Carolinas, LLC for Approval of Advanced Metering Infrastructure Opt-Out Tariff*, North Carolina Utilities Commission, Docket No. 100, Sub 147, (Order) (June 22, 2018).

Further, in his Exhibit MI-2, Israel provided quotations from additional states against smart meters. But Massachusetts and Texas now offer smart meter opt outs state-wide, and Michigan allows opt outs in some parts of the state. So this exhibit holds no weight.

**B. His exhibits demonstrate a lack of credibility.**

Mark Israel's Exhibits MI-1, MI-3, and MI-4 offer quotations from various organizations. The international reach of these quotations would seem to imply Israel's broad familiarity with this issue. 



**C. Exhibit MI-4, criticisms of the BioInitiative Report, is the most glaring example.**

A webpage called "EMF Explained 2.0: Review of the BioInitiative Report" is such a close match to Exhibit MI-4 that we believe it was Israel's source. The quotations in Exhibit MI-4 are exactly the same as on this webpage, with the exception of Germany, which Israel chose to

---

<sup>32</sup> Complainant had planned to ask him about all his exhibits in cross-examination but were not permitted to continue testimony.

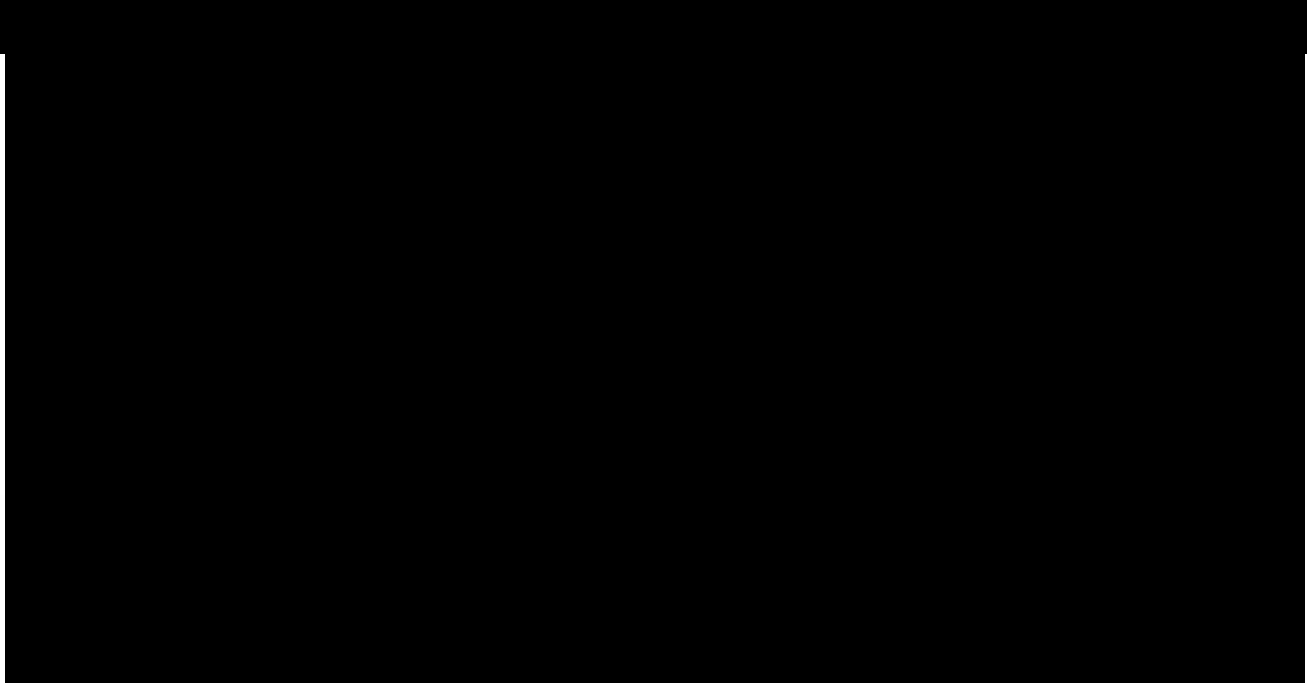
omit. It is easy to insert each quotation into Google and then find the full statement, then select a few additional paragraphs from the full document, which is what Israel seems to have done. [REDACTED]

[REDACTED]

It took a paragraph directly from the Wikipedia page, and then followed the link to the full document, and added several more paragraphs from that. Mark Israel used either of these online sources—EMF 2.0 or Wikipedia—for his Exhibit MI-4. This is hardly an indicator of professional expertise.

**D. He chooses or modifies quotations to suit his position, without presenting the complexity of the truth.**

Exhibit MI-1, “Public Health Authorities Reports on Radio Frequency Fields and Claimed Health Effects,” cites nine (9) international sources. The first organization cited is the World Health Organization (“WHO”), which is quoted twice. [REDACTED]



In sum, both these quotations from WHO show that Israel himself manipulated their meaning and intent. However, Dr. Israel himself cautioned against this when he said, referring to a letter from the American Academy of Environmental Medicine that Ms. Hendin submitted as an exhibit, “It only cites studies that support its position and ignores the great many other studies that do not. That reveals a lack of balanced consideration of the relevant scientific studies.” (*St. of Israel Rebuttal* at 14:7-9) Further, Dr. Israel repeats this same comment in reference to the European Academy of Environmental Medicine. (*Rebuttal* at 14:16-22)

Dr. Israel used WHO statements out of context in a way that drastically misrepresented the broader thrust of WHO’s treatment of this complex subject.

**E. Mark Israel’s Did Not Conduct A Medical Evaluation of Ms. Hendin**

When asked, “Did you conduct a medical examination of Ms. Hendin’s health claims related to smart meters?” Israel answered, “Yes.” (*Rebuttal Testimony of Mark Israel* at 6:2-4) But, in fact, he never met with Ms. Hendin, did not learn her medical history, and did not examine her. To call what he did a “medical examination” is completely misleading. Instead, he

followed his 5-step method (*Id.* at 6:6), which was a literature review that solely involved reading materials. This is the approach of an academic, not a treating physician. It is certainly not a medical examination by any stretch of the imagination.

#### **F. Mark Israel Incorrectly Claims that Smart Meters Are Safe**

Mark Israel claims that smart meters are safe. This is not true. To back his claim, Israel cited three epidemiological studies by Ogawa, Sommer, and Takahashi, stating that they “provide a reliable basis for determining whether radio frequency fields have the capability to cause or contribute to adverse health effects in animals”, (*Israel Rebuttal* at 7:16-18) and are “quite remarkable.” (*Id.* at 234:23-24) [REDACTED] These studies, however, are not relevant for several reasons.

Firstly, these studies are more than a decade old: the Ogawa and Sommer studies are from 2009, and the Takahashi study is from 2010. They no longer represent the current thinking on the safety of EMFs. Thousands of studies questioning the safety of radio frequency fields have been published since these were conducted.

Secondly, the studies were performed on small numbers of rats, not “hundreds, many hundreds of animals” as described by Israel. (*Israel Cross-examination* at 235:1-7) The study by Ogawa (*Israel Rebuttal* at 8:2-6) contained four groups of 20 pregnant rats, totaling 80 rats and their fetuses, while the study by Takahashi involved just 36 rats and their fetuses. These studies were also not extended over generations of rats; rather, they involved only pregnant rats and their fetuses.

Although Israel stated that these studies represented an “entire lifetime of exposure.” (*Israel Rebuttal* at 235:1-7), the pregnant rats were actually only exposed to the cell phone radiation for 11 days in the Ogawa study. Since the life expectancy for a rat is one to three years,

this short exposure does not represent an “entire lifetime of exposure”. Similarly, exposure in the Takahashi study totaled only about four weeks, a far cry from an entire lifetime. This short duration of exposure is in sharp contrast to what Ms. Hendin would be subjected to if a smart meter were to be installed on her house. She would be exposed continually to EFMs for as long as she would remain in this residence. Furthermore, the rats were killed at gestational day 20 in the Ogawa study, and a few weeks later in the Takahashi study. The rats were not allowed to live long enough to determine if there were any long-term effects of the radiation.

The three studies looked at how radio frequency fields affected rat embryos. The studies found that the EMF exposure did not affect reproductive or embryotoxic parameters (weight of the placenta, sex of the fetus, or fetal weight, organs, or skeletons) or the fertility and development of the fetuses. They did not, however, look at the effects on human tissue, or on the heart, brain, or nervous system. In addition, they did not measure the type of symptoms suffered by Ms. Hendin due to exposure to a smart meter, such as joint pain, insomnia, heart palpitations, dizziness, cognitive dissonance, or gastrointestinal distress.

Mark Israel has extrapolated from the narrow findings of these studies on rat reproduction to claim that EMFs from smart meters do not affect humans. This is not a valid conclusion. Clearly, these studies are irrelevant to the current case.

### **G. Heart studies cited by Israel**

Ms. Hendin expressed concern about the effect of smart meters on the heart (*St. of Israel* at 2:33-36). To back his claim that smart meters are safe for the heart, Israel cited four studies Tahvanainen, Nam (2006)<sup>34</sup>, Nam (2009), and Choi. [REDACTED] stating that they

---

<sup>34</sup> It is noteworthy that, in Nam 2006, another element, skin resistance, was examined, and it did, indeed change with RF exposure. Skin resistance is the opposition of the skin to the passage of an electric current. This shows that the study actually did show a response to exposure to radio frequencies, in a way that was related to the electrical nature of the body. The BioInitiative Report confirms this:

“examined whether radio frequency fields at the frequencies used by cell phones affect heart rates.” (*Israel Rebuttal* at 15:12-13) These studies, however, are not relevant for several reasons. First, three of these studies are more than a decade old: the Tahvanainen study is from 2004, the Nam studies are from 2006 and 2009, and as such, they no longer represent current thinking on the safety of EMFs. Secondly, the studies were performed on small numbers of rats. No human subjects were used. (*Id.* at 15:10-20)

In addition, the duration of exposure to radio frequencies was short: Tahvanainen, 35 minutes; Nam 2006, 30 minutes; and Nam 2009, 30 minutes. [REDACTED]

The studies measured variables such as blood pressure and heart rate. Tahvanainen concluded that neither of these parameters were affected, (*Israel Rebuttal* at 15:18). The Nam and Choi studies similarly found no effects.

None of these studies specifically addressed the type of RFs emitted by smart meters, as confirmed by Israel when he said, “There are no studies addressing the effect of radio frequency fields from smart meters on heart rate.” (*Israel Rebuttal.* at 16:1-2). Duration of exposure, ranging from 30 minutes to one hour total, is not equivalent to exposure to smart meter radiation that would occur 24 hours a day, for months and years on end. To extrapolate from these limited studies and make any claims about the effects of smart meters on the heart is a huge and unscientific jump. Clearly, these studies also are irrelevant to the current case.

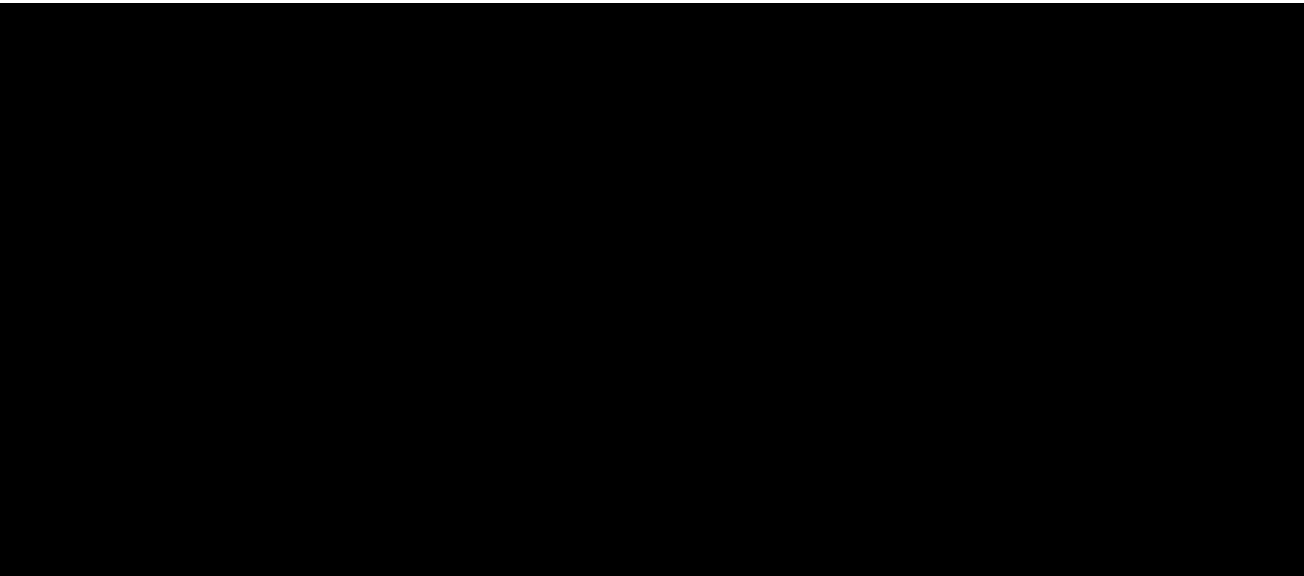
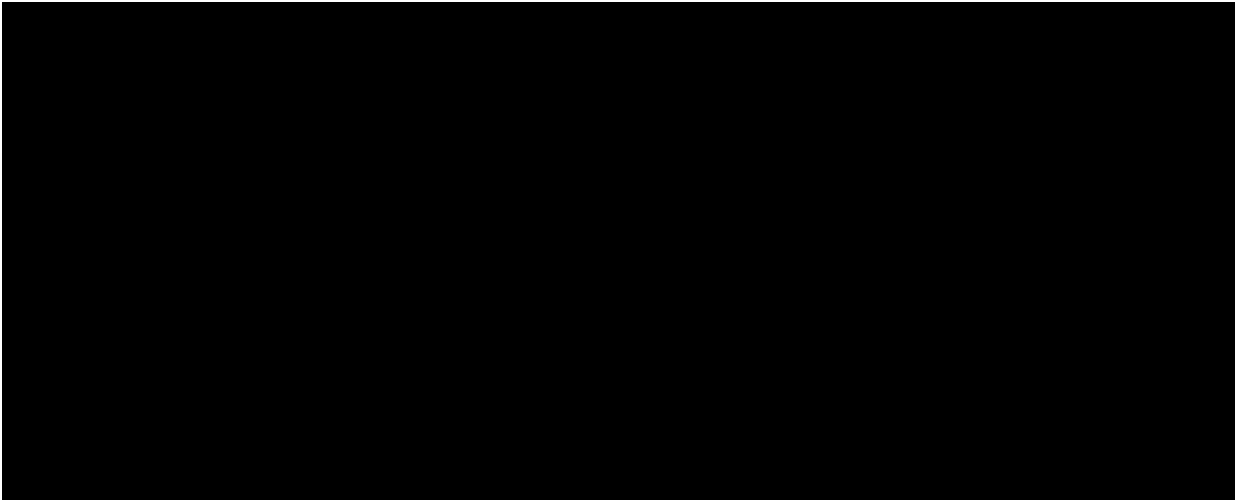
---

There is very clear evidence that exposures to ELF and RF at levels associated with cell phone use, computers, video display terminals, televisions, and other sources can cause these skin reactions. Changes in skin sensitivity have been measured by skin biopsy, and the findings are remarkable.

(Exhibit X17, “Summary for the Public,” p. 18; p. 33 of pdf).

## **H. Studies on the Long Term Effects of Exposure for RF Fields Suggest Effect on The Heart**

Other studies show distinctly different results from those submitted by Israel. This may be because Dr. Israel did not include any studies that attempted to look at the *long-term effects* of exposure to radio frequency fields from cell phones. [REDACTED]



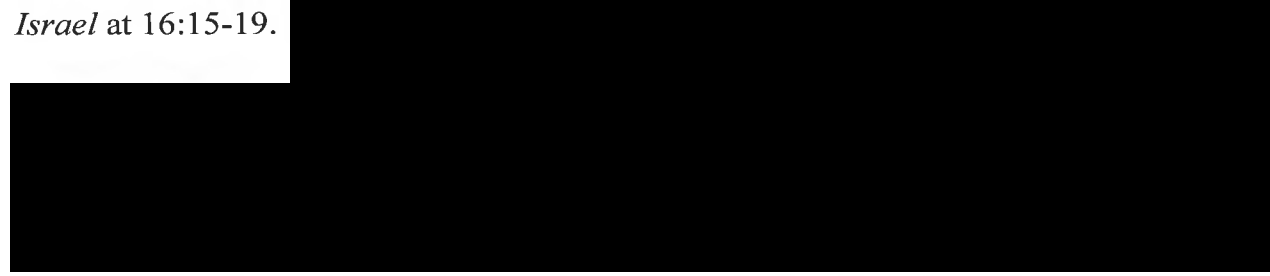
### **I. IARC classification of RF as a 2B carcinogen.**

Israel minimized the IARC classification of radio frequency radiation as a Group 2B carcinogen. He cited the definition of Group 2B substances as “possibly carcinogenic.” (*Israel*

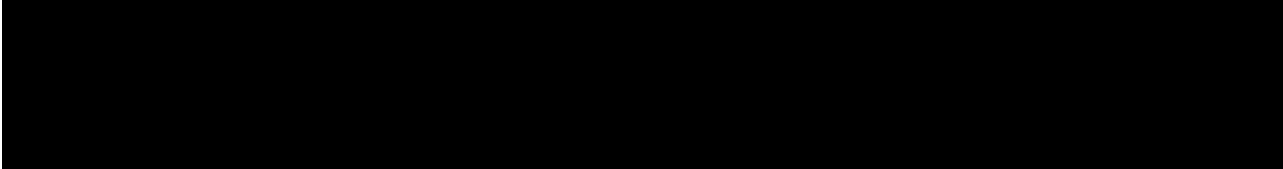
*Rebuttal* at [] :14-16). But then, Israel completely dismissed its significance. (*Id.* at :17-19).

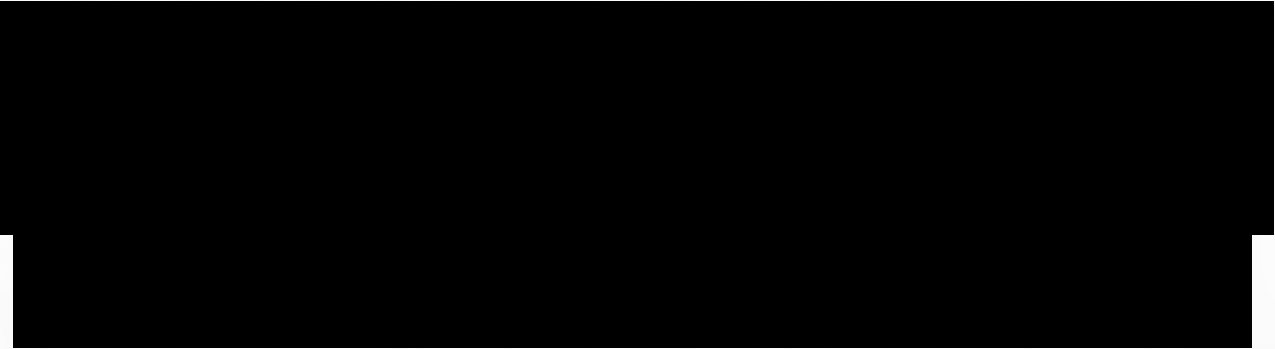


Israel claimed that the 2B classification is based on “limited evidence.” *St. of Israel* at 16:15-19.



Israel quoted WHO as saying there are no adverse health effects from cell phones. (*Id.* at 17 :4-7) Again, he both oversimplified WHO’s full presentation and failed to acknowledge that some of his quotations are out-of-date. The WHO statement that Israel cited from 2014 was based on the outmoded understanding that, “Tissue heating is the principal mechanism of interaction between radiofrequency energy and the human body....” Current research has conclusively shown that non-thermal effects cause many adverse health conditions.

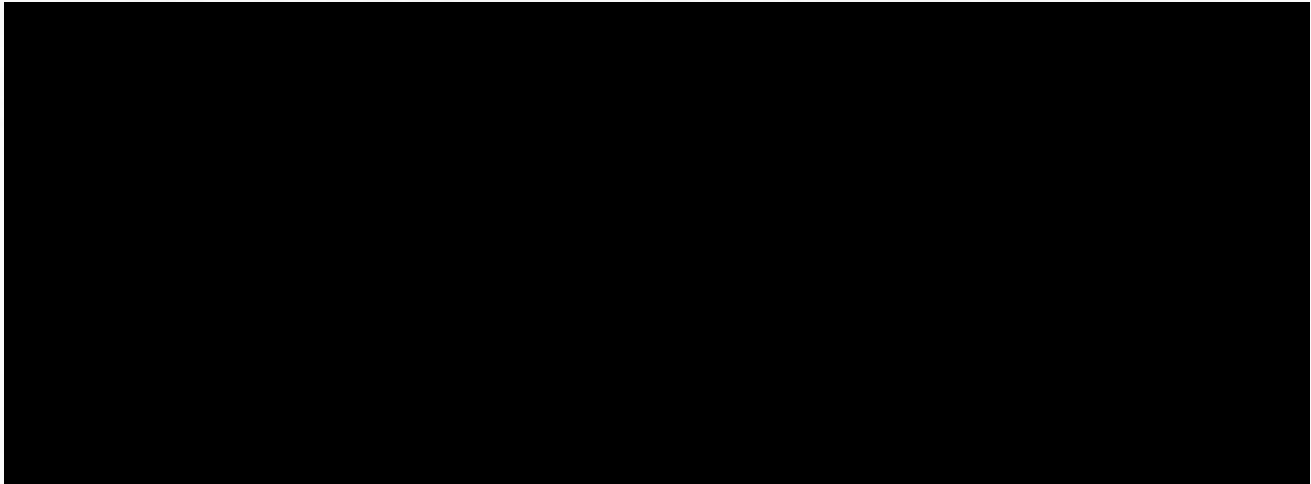




**J. EMFs affect animals, contrary to Israel's claim.**

After discussing the above-mentioned animal studies, Israel said, "In sum, these studies of fundamental biological functions that are very sensitive to any disruption do not show that radio frequency fields have the capability to cause or contribute to adverse health effects in animals."

*(Israel Rebuttal at 8:20; 9:1-3)*

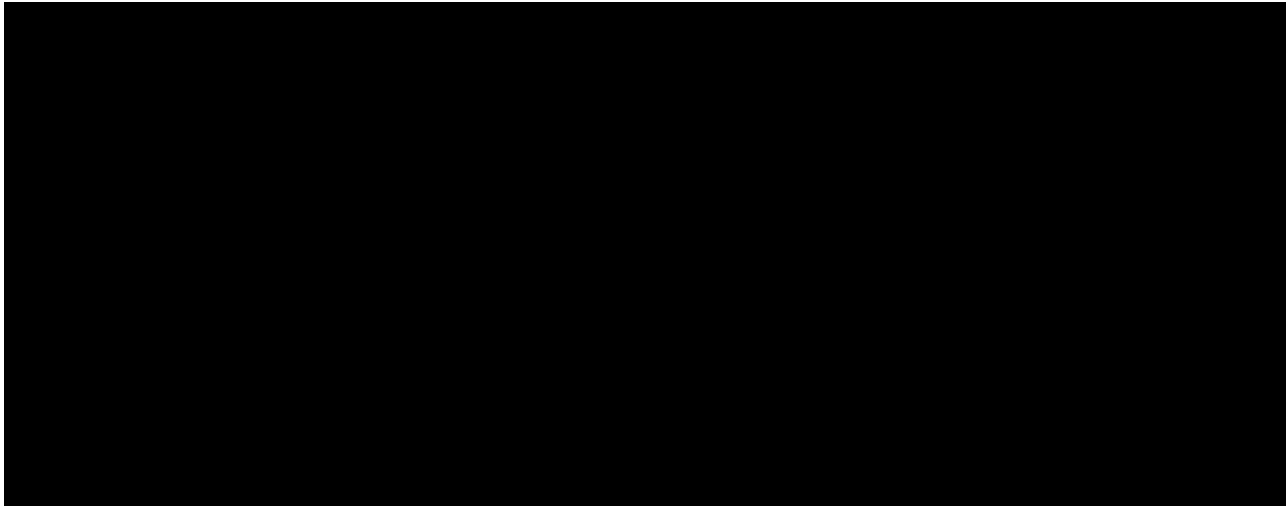




In addition, one other study is noteworthy—not about animals, but about other living things. In a long-term study (2006-2015), Waldmann-Selsam looked at unusual or unexplainable tree damage around mobile phone masts, revealing significant differences between the damaged side facing a phone mast and the opposite side, with the damage extending to the whole tree over time. (Exhibit 39) Such long-term RF radiation from a smart meter would certainly affect Ms. Hendin.

**K. Scientific Studies Suggest that EMFs Affect Children**

Israel claims RFs have no effect on health; however, studies show that children are especially susceptible to EMFs.



**L. Domestic and International Legislation Recognizes Health Effects of EMFs**

The state of Oregon passed SB 283 on June 13, 2019, a bill relating to exposure to radiation in schools, and declaring an emergency. The bill passed unanimously in the Oregon

state senate and with a 50-8 vote in the house. [REDACTED]

[REDACTED]

**M. Respected Medical Societies Have Called For Caution**

In 2012, the American Academy of Environmental Medicine sent a letter to the California PUC, stating there is mounting evidence that inescapable electro-magnetic fields exposure from smart meters places children at particular risk for altered brain development and for impaired learning and behavior. (Exhibits 6, [REDACTED])

[REDACTED]

[REDACTED]

---

[REDACTED]

[REDACTED]

The National Education Association (NEA), which represents public school teachers and other support personnel, faculty and staffers at colleges and universities, retired educators, and college students preparing to become teachers, is the largest professional interest group in the United States, with 3 million members. [REDACTED]

[REDACTED]

**N. The Integrity and Credibility of Mark Israel Has Been Questioned Before**

Mark Israel admitted he was not familiar with the publication from Smith-Roe coming out of the NTP study. 238:21-24. Mark Israel's credibility has been questioned before in *Laura Sunstein Murphy v. PECO Energy Company*:

Dr. Israel [has] limited knowledge and experience regarding the specific issues that are the focus of these proceedings.... Dr. Israel has never published any research on EE and has never done any research on the effects of EE. *Cross Examination of Dr. Mark Israel, December 9, 2016 Hearing Transcript*, at 1580:7-9; (JA001905).

This, taken with his unfamiliarity with the NTP Report and the IARC classification as discussed *infra* at 71 demonstrate that Israel's knowledge and his understanding of the issues before the Commission are limited and that he is not a reliable source of scientific information about any of the issues before the Commission in these cases.... Dr. Israel's testimony was also troubling. He did not—and could not—take into consideration the results of the recent NTP study because he is not even aware of the results. *Cross Examination of Dr. Mark Israel, December 9, 2016 Hearing Transcript*, at 1601:20-25; (JA001926).... More troubling still was Dr. Israel's testimony about the IARC

classification. IARC, which is part of WHO, clearly identifies RF exposure as a “possible cause” of cancer. *Id.* at 1629:23-1631:14; (JA001954-001956).

In *Kreider*, Dr. Israel told the PUC judges that IARC gave RF exposure a “clean bill of health” and he sticks with that in the cases at hand. *Id.* at 1632:11-21; (JA001957). In *Kreider*, he told the PUC judges that the IARC classification means “essentially there’s no evidence.” *Id.* at 1633:2-6; (JA001958). The IARC defines “possible carcinogen” as “limited evidence of carcinogenicity in humans.” *Id.* at 1636:20- 1637:10; (JA001961-001962). His view is that there is no evidence. *Id.*; (JA001961-001962). He has “no idea how IARC uses it.” *Id.* at 1637:21-1638:7; (JA001962- 001963). This is pure sophistry. IARC essentially says it could go either way. Dr. Israel treats that as a clean bill of health because in the absence of evidence either way, he thinks there is no problem. He is confused. There is no evidence of safety....”

*Laura Sunstein Murphy v. PECO Energy Company, Docket No. C-2015-2475726, September 25, 2017, pp. 68-71)*

Mark Israel’s conclusions must be viewed in the light of the obvious industry bias.

**O. Dr. Davis’s statements about UHF are inaccurate and must be questioned**

Dr. Davis rightly noted that UHF TV towers send radio frequency radiation to the vicinity of Ms. Hendin’s home in Easton, PA, which he claimed would be greater than RF radiation emitted by a smart meter. (*Davis Rebuttal* at 15:1-6).. In fact, the nearest tower is 8 miles away, and some of the towers included in Davis’ survey are as far away as Philadelphia, Wilkes-Barre, and towns near New York City. Yet he wants to compare this to a smart meter which would be 6 inches from the front door.

Davis admitted he had never actually been to the property (*Davis Cross* at 189:15), and that topographic features could reduce UHF radiation. “And it is a fact that, if Ms. Hendin’s home was built inside a ravine, she would have lower UHF TV exposure.” (*Id.* at 189:23-25). In fact, Ms. Hendin’s home is on the south side of a hill, which is composed of Eastonite, a rock as hard as granite. [cite general web?] The nearest TV tower, 8 miles away, is to the north. [is this in davis

testimony or cite to the website he says he used]. So the rocky hill shields the home from UHF waves. Also, the home is surrounded by big trees, some of them as high as 80 feet, and as large as two feet in diameter. It is known that large trees shield radio waves from TV transmitters. Besides, Ms. Hendin does not have a TV.

**P. The Credibility of Dr. Davis is Likewise in Question.**

It has already been shown that Dr. Davis' assessments of smart meter radiation, Ms. Hendin's cell phone, and her home's exposure to UHF, were inaccurate.<sup>37</sup> Even the FCC, which Davis relies, contend that it is "generally agreed" that "further research is needed" to determine whether "effects of smart meters constitute a human health hazard." RF Safety FAQ website, cited in *St. of Davis* at 12:20-22. Davis quoted only part of the FCC's statement about RF Safety FAQ, ignoring that it was "generally agreed" that "further research is needed." *St. of Davis* at 12:20-22. Davis quotes the FCC stating "... [S]ince much of the research is not done on whole bodies (in vivo), there has been no determination that such effects constitute a human health hazard." (*St. of Davis* at 12:20-22, footnote 2). He ends the quote there to suggest there's been "no determination;" however, the FCC's FAQ continues: "It is generally agreed that further research is needed to determine the generality of such effects and their possible relevance...to human health." The very entity that Met Ed is relying for safety standards also claims that further research is required to determine whether a human health hazard exists.

Dr. Davis freely admitted that he had never published a single paper on exposure from smart meters, nor did he cite to one in his testimony: "I have not published specific papers on the exposure from Smart Meters...." *Davis Cross* at 184:9-10. Dr. Davis, like Mark Israel, has testified for multiple utility companies dozens of times. *Davis Cross* at 186:8; 184:13).

---

<sup>37</sup> Ms. Hendin's request for surrebuttal testimony was denied; and therefore, she was not permitted to introduce Dr. Tania Slawecki as a surrebuttal witness to testify on this subject.

## **VI. The Proposed Location of the Smart Meter Is Unreasonable**

In the event that the court finds that despite evidence that the installation of a smart meter at Ms. Hendin's home will adversely affect her health, a smart meter is to be placed on Ms. Hendin's property, the meter should be installed away from Ms. Hendin's home in order to minimize health adversity.

Currently, the proposed location of the smart meter is only 6 inches from the only door in and out of Ms. Hendin's residence and workplace, less than 4 feet from the kitchen, 8 feet from the desk where she works much of the day, and less than 20 feet from where she sleeps. An ideal recommended distance from a smart meter would be 50 feet. (*Hendin Written testimony* at 7:158)

Met-Ed/FirstEnergy admits that proximity to a smart meter is important to health. Its "Smart Meter Radio Frequency Fact Sheet" states, "RF exposure depends partly on the proximity of the RF source to a person. Smart meters are usually located on the outside of your house in a metal box, away from your daily routine activity." (Exhibit #) Clearly, in Ms. Hendin's situation, the smart meter would be dangerously close to her daily routine activity.

Met-Ed offered the possibility of relocating the meter away from her living and working spaces, and Ms. Hendin "was very open to the option." (*Hendin Direct* at 52:16) She met with employees of Met-Ed twice, but no way forward was found because of the topography of the land and Met-Ed's insurance policy regarding a relocated wire.

## **VII. Installation of a Smart Meter At Ms. Hendin's Residence Would Violate Due Process**

Article 1, Section 11 of the Pennsylvania Constitution and the 14<sup>th</sup> Amendment of the United States Constitution, requires that "[i]ndividuals have a right to be free of state-sponsored invasion of a person's bodily integrity." *Phillips v. County of Allegheny*, 515 F.3d 224, 235 (3d Cir. 2008); *see also in re Cincinnati Radiation Litig.*, 874 F. Supp. 796, 810-811 (S.D. Ohio

1995)(The right to be free of state-sponsored invasion of a person’s bodily integrity is protected by the Fourteenth Amendment guarantee of due process.”). The Commission’s tortured interpretation of Act 129, which requires then to deny Pennsylvania citizens constitutionally-protected rights, must fail. As such, Ms. Hendin cannot be forced to accept a smart meter at residence in violation of her due process rights to protect her bodily integrity.

**VIII. The Commission’s Interpretation of Act 129 and Application of the Standard of Proof Illegally Supplant The Treatment Recommendations From Ms. Hendin’s Physician**

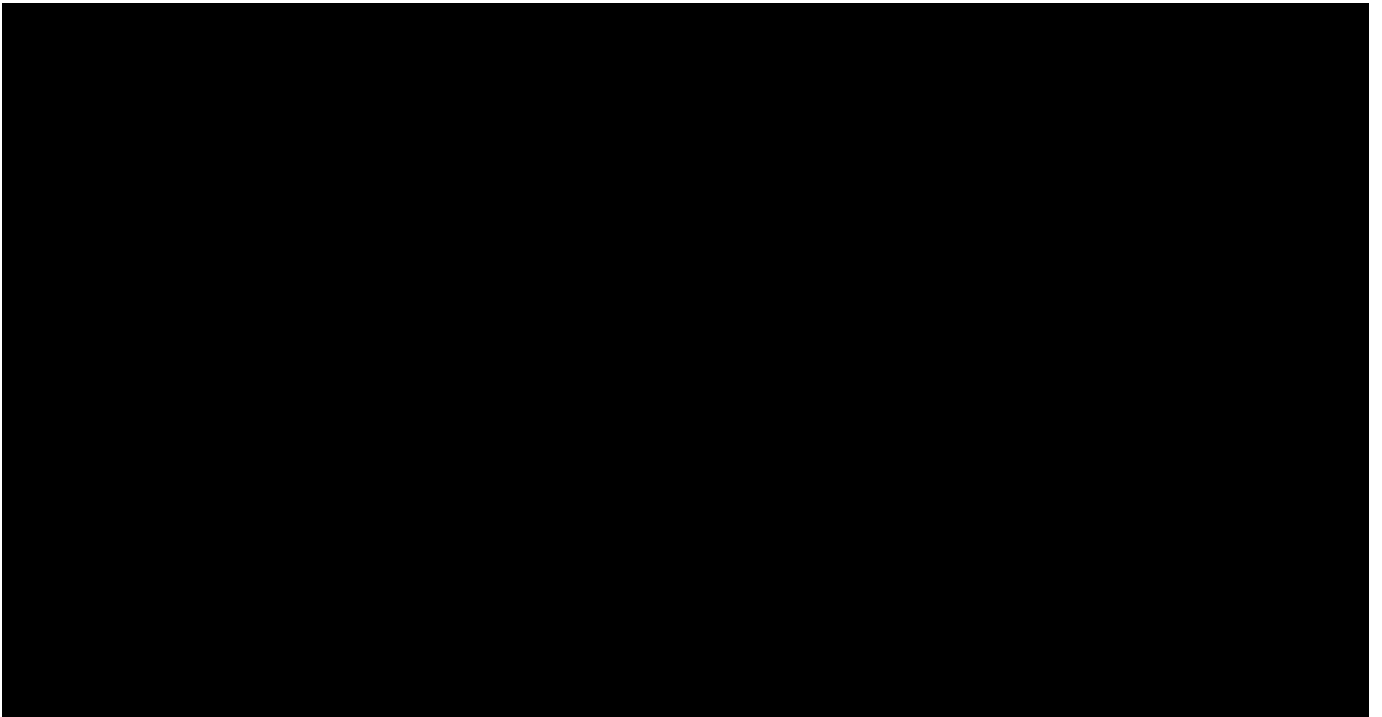
Ms. Hendin’s has been advised by her physician, Dr. Kracht, to avoid smart meters on her property. Ms. Hendin has the right to rely on her physician’s opinion and recommended treatment. The Commission is not a medical provider, a health care facility, nor an institution of medical instruction. Neither the Commission nor Met-Ed have examined or treated Ms. Hendin. Rather, the Commission is charged only with the “general administrative power and authority to supervise and regulate all public utilities doing business within this Commonwealth.” 66 Pa. C.S. 501(b). Under the Commission’s own regulations, the Commission is required to rely on the expertise of outside medical professionals with direct experience with individual customers. *See* 52 Pa. Code § 56.113 (permitting a written medical certification for validity of requests to prevent termination of service). The Commission’s conclusion in earlier smart meter proceedings that the statute requires the Commission to prohibit opt outs requires a tortured analysis of legislative intent, and imputes a harmful interpretation of Act 129 to the General Assembly. It is fiction that the Commission has no other option but to force individuals to accept smart meters in their homes ignores and directly contradict an individual’s rights to make individual decisions regarding his or her own well-being, within the sanctity of their own residences.

In Ms. Hendin’s proceeding, Met-Ed seeks to rely on expert testimony of Mark Israel who violates the Hippocratic oath by ignoring a diagnosed condition because is “idiopathic” and relies a “medical evaluation” that never occurred.

Since the time he graduated from medical school in 1973, physician Mark Israel has been duty bound to operate under the Hippocratic oath<sup>38</sup>, which includes the pledge to Do No Harm. His repeated collusion with utility companies in dozens of cases to force smart meters on individuals regardless of the individual’s recommended course of treatment or medical condition, based on misrepresentations of the science and of himself, violates the Hippocratic Oath by causing these individuals to suffer harm. For example, Israel testified in the proceedings of Catherine Frompovich (*Frompovich v. PECO Energy Company*, C-2015-2474602 (Op. and Order May 3, 2018)). Although Ms. Frompovich had no other wireless exposure in her house, her utility sought to place a smart meter outside her kitchen where she spent a great deal of time. Op. and Order at 22. The Commission dismissed her case, based in part of Mark Israel’s testimony. . Mark Israel does not deny that certain individuals, such as Ms. Hendin suffer symptoms: “headaches, dizziness, body aches, -concentration problems, buzzing in ears, eye floaters, discomfort, difficulty concentrating, difficulty breathing, memory loss, insomnia, nausea, stomach distress, palpitations, nervousness, fatigue, weakness, and lethargy, among others”. *Rebuttal St. of Israel*, p 10. Idiopathic means “cause unknown” *Id.*

---

<sup>38</sup> The Hippocratic Oath provides, *inter alia*, that “I will keep [the sick] from harm and injustice.” K.H. ex rel H.S. v. Kumar, 122 A.3d 1080 (Pa. Super. 2015 (citing Bioethics, Johns Hopkins and For all quotations, see Bioethics, Johns Hopkins Sheridan Libraries & University Museums, available at guides.library.jhu.edu/c.php?g=202502&p=1335752 (last reviewed June 26, 2015))).



### PROPOSED CONCLUSIONS OF LAW

1. Pennsylvania law requires Met-Ed as a certificated electric utility to service and facilities that are safe, reasonable, adequate and efficient service to each customer.

2. Pennsylvania law requires Met-Ed to make accommodations and changes to its service and to any facilities, including meters, for the safety and convenience of its patrons and the public.

3. The Commission has the authority to require electric utilities to accommodate individual consumers who demonstrate that the installation of the smart meters at their homes, will cause unsafe and unreasonable service.

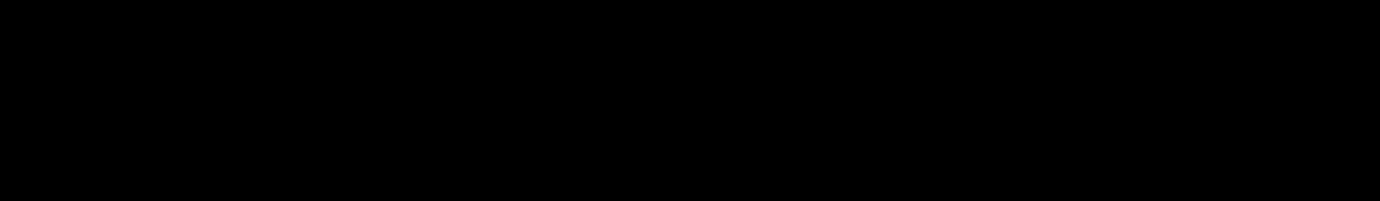
4. Ms. Hendin has demonstrated that the installation of a smart meter at her residence will expose her to RF in contravention to her doctor's orders, and therefore will cause an unsafe condition that requires an accommodation and change in the meter facility.

5. The Commission's standard for determining whether an electric utility is providing service or facilities that are "reasonable" and or "safe" is lower than the standard for causation as found in toxic tort cases in courts of law. 5<sup>th</sup> Circuit cite *Allen v. Pennsylvania Engineering Corp.*, 102 F.3d 194, 198 (5<sup>th</sup> Cir. 1996).

6. Ms. Hendin has met her burden to show that the installation of a smart meter, and the continued use of any digital (non-analog) meter at her residence is unsafe given her medical symptoms, her doctor's recommended course of treatment for those symptoms.

7. Ms. Hendin has also met her burden to show that installation of a smart meter and the continued use of any digital (non-analog) meter at her residence is unreasonable because of Met-Ed's single proposed installation location option.

8. Title 66 P.S. 1501 and Act 129 permit the Commission to order utilities to accommodate patrons requiring individual medical opt-outs from the installation of smart meter facilities, upon the recommendation of treating physicians to limit exposure to RF-emitting devices, such as smart meters, at individual residences.



10. Ms. Hendin has demonstrated that her physician recommends that she avoid RF exposure.

11. Ms. Hendin has demonstrated that she have engaged in RF exposure avoidance and has alleviated symptoms.

12. The evidence presented by Ms. Hendin with respect to her personal history, symptoms and prior experience with a smart meter at her residence, present a situation appropriate for an opt out accommodation to allow Ms. Hendin to continue her course of treatment in EMF avoidance.

13. Refusing to permit Ms. Hendin to opt out of the installation of a smart meter at her residence violates her due process rights.

14. The Commission cannot endorse the unreasonable service of Met-Ed at Ms. Hendin's residence by imposing an unsafe smart meter facility that forces Ms. Hendin to be exposed to RF, contrary to her physician's directions.

15. Ms. Hendin has shown by a preponderance of the evidence that the Met-Ed is proposing the unreasonable and unsafe as described in Ms. Hendin's complaint, and that she was and will be again adversely affected by Met-Ed's smart meter, and that the Met-Ed's smart

meter facility at Ms. Hendin's residence will constitute an unsafe and unreasonable service in violation of 66 Pa. C.S. § 1501 in this case.

**PROPOSED ORDER**

For the reasons set forth above, Complainant Ms. Hendin respectfully requests that the Commission issue an order in the proceeding requiring:

1. That Defendant Met-Ed provide accommodation under Section 1501 to opt-out of smart meter installation due to the unsafe nature of operation of the smart meter at Ms. Hendin's residence.
2. That Defendant MetEd shall provide electric service to Ms. Hendin without requiring a digital meter of any kind that emits radio frequency energy.
3. That Ms. Hendin is entitled to compensation, refund or other relief as may be determined in this proceeding.

Respectfully Submitted,

Dated: March 16, 2020

s/Joanna A. Waldron  
Joanna A. Waldron, Esquire  
Pa. ID # 84768  
CURTIN & HEEFNER LLP  
Doylestown Commerce Center  
2005 South Easton Road, Suite 100  
Doylestown, PA 18901  
jaw@curtinheefner.com  
*Attorney for the Complainant*

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Judith D. Hendin :  
 :  
 V. : C-2018-3003324  
 :  
 Metropolitan Edison Company :

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing Brief of Complainant Judith Hendin 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 U.S. MAIL**

Lauren M. Lepkoski, Esquire  
Tori L. Giesler, Esquire  
FirstEnergy Service Company  
2800 Pottsville Pike  
P.O. Box 16001  
Reading, Pennsylvania 19612-6001

**Via U.S. Mail**

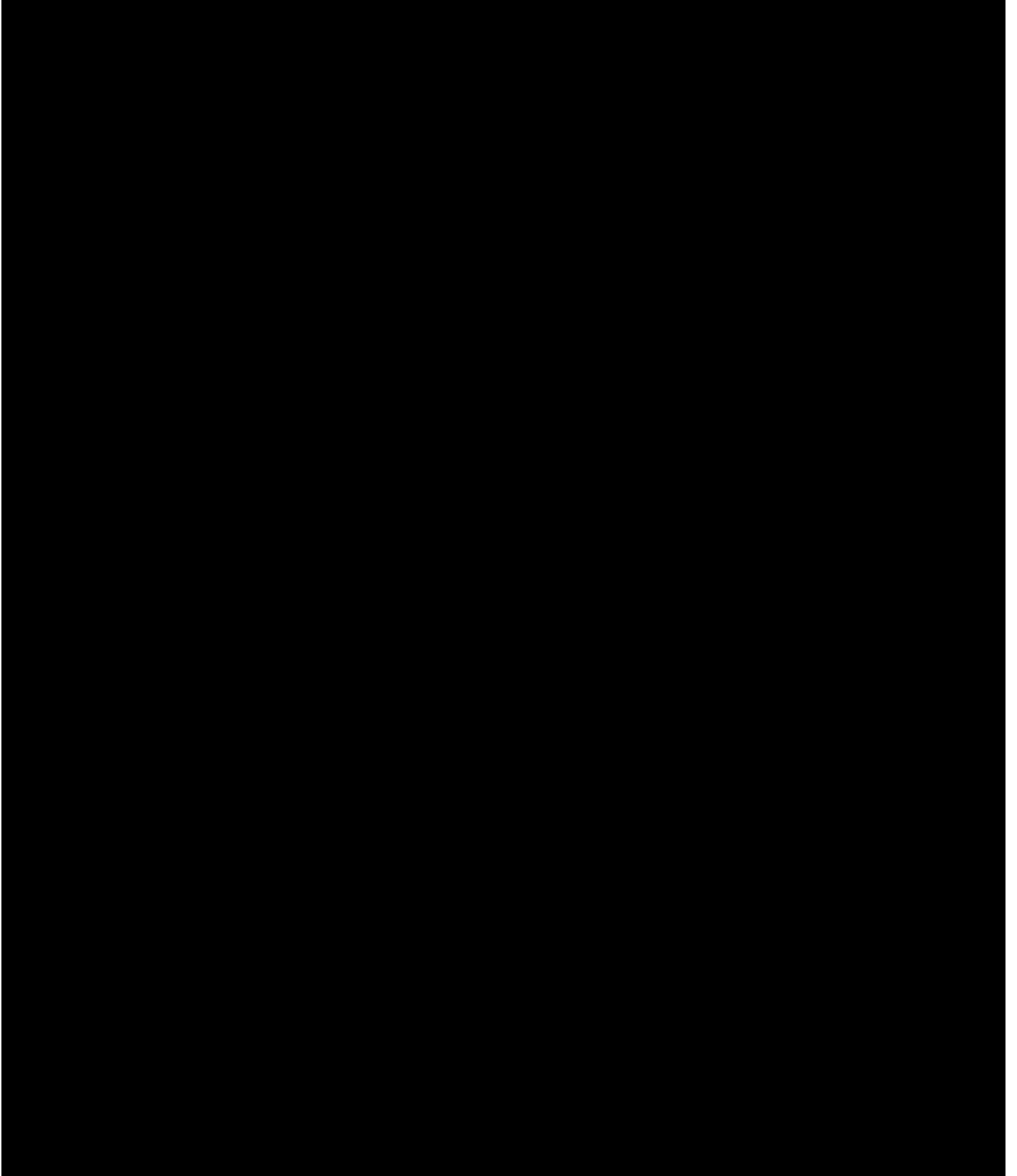
Administrative Law Judge Joel H. Cheskis  
Pennsylvania Public Utility Commission  
Office of Administrative Law Judge  
400 North Street, 2<sup>nd</sup> Floor West  
Harrisburg, PA 17120

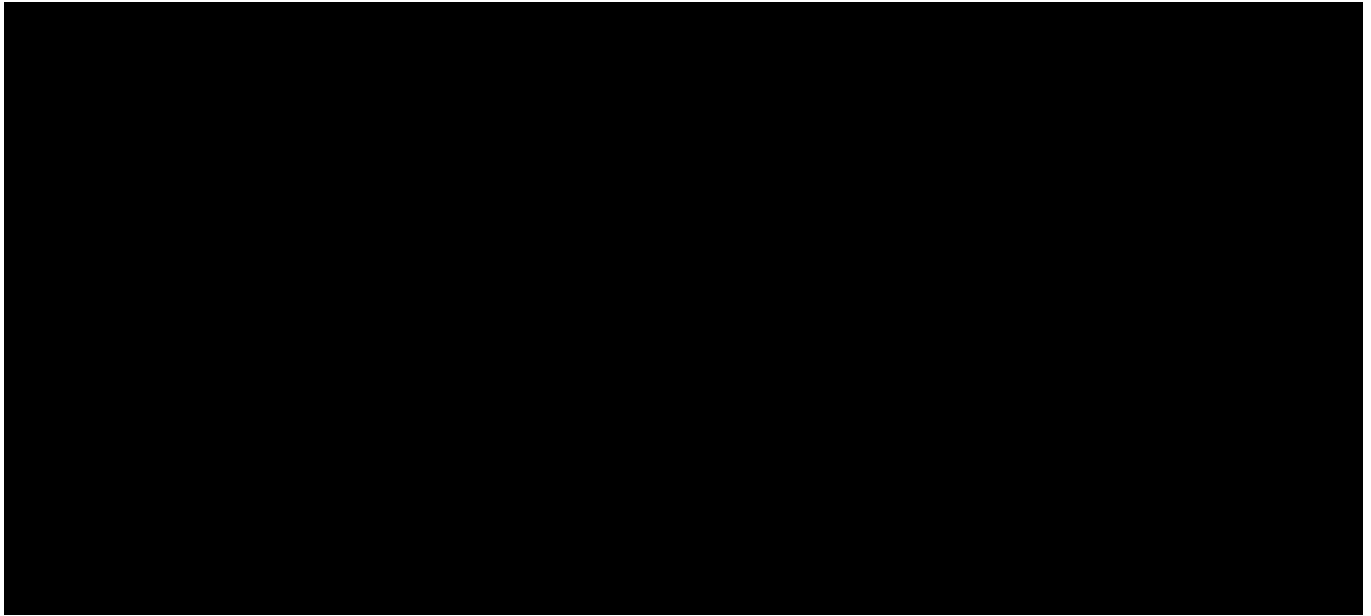
Dated: March 16, 2020

s/Joanna A. Waldron  
Joanna A. Waldron, Esquire  
Pa. ID # 84768  
CURTIN & HEEFNER LLP  
Doylestown Commerce Center  
2005 South Easton Road, Suite 100  
Doylestown, PA 18901  
jaw@curtinheefner.com  
*Attorney for the Complainant*

*Attachment "1"*

**HENDIN - MASTER LIST OF CROSS EXHIBITS**

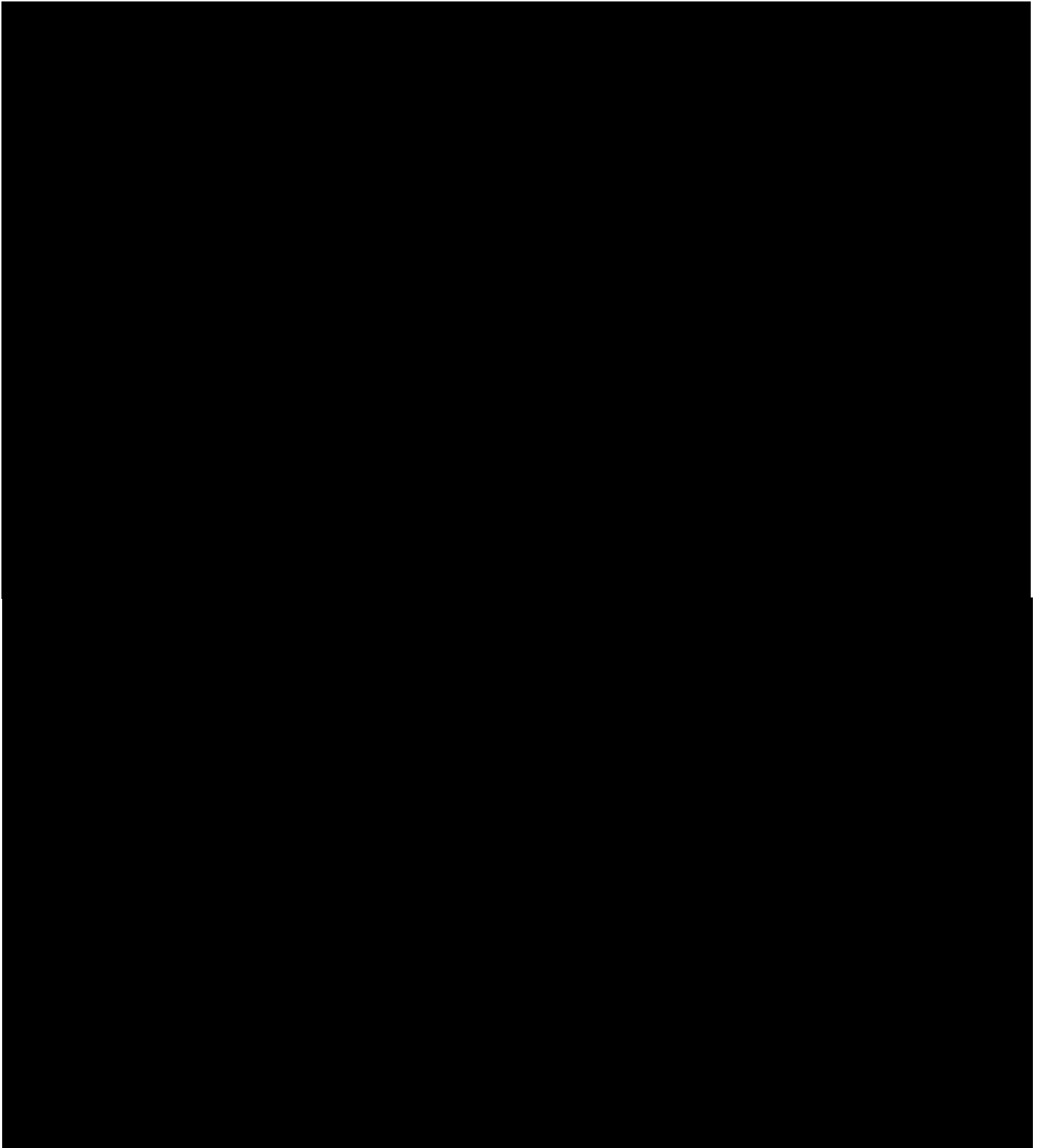


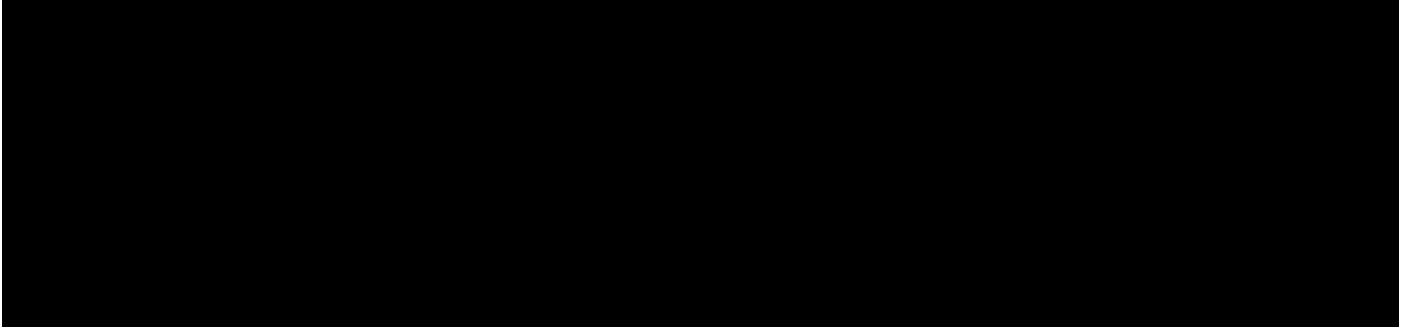


**HENDIN – DECEMBER HEARING LIST OF EXHIBITS**

- 9 9/16/19 Medical Record
- 10 2/13/12 Medical Record
- 11 2/28/12 Medical Record
- 12 12/18/12 Medical Record
- 13 2/13/12 Special Study Order Requisition
- 14 Holter Monitor Report
- 15 Echocardiogram Report
- 16 Abstract: 9/2017 by G. Heuser and SA Heuser
- 17 9/25/14 EnviroHealth Consulting Report
- 18 Hendin Interrogatory 1 and Answer
- 19 Hendin Interrogatory 3 and Answer
- 20 Hendin Interrogatory 5 and Answer
- 21 Hendin Interrogatory 8 and Answer
- 22 Hendin Interrogatory 18 and Answer

**HENDIN – U.S. and WORLD HEALTH ORGANIZATION**





**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

**JUDITH D. HENDIN**

v.

**METROPOLITAN EDISON COMPANY**

:  
:  
:  
:  
:

**Docket No. C-2018-3003324**

**CERTIFICATE OF SERVICE**

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

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

Joanna A. Waldron, Esquire  
[jaw@curtinheefner.com](mailto:jaw@curtinheefner.com)

Administrative Law Judge Joel H. Cheskis  
[jcheskis@pa.gov](mailto:jcheskis@pa.gov)

Judith D. Hendin  
[judith@consciousbody.com](mailto:judith@consciousbody.com)

Dated: April 6, 2020



---

Lauren M. Lepkoski  
Tori L. Giesler  
FirstEnergy Service Company  
2800 Pottsville Pike  
P.O. Box 16001  
Reading, Pennsylvania 19612-6001  
(610) 921-6203  
(610) 921-6658  
[llepkoski@firstenergycorp.com](mailto:llepkoski@firstenergycorp.com)  
[tgiesler@firstenergycorp.com](mailto:tgiesler@firstenergycorp.com)