FirstEnergy

2800 Pottsville Pike
PO Box 16001
Reading, PA 19612-6001

PUBLIC VERSION – PROTECTED INFORMATION REDACTED

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

April 6, 2020

VIA E-MAIL AND ELECTRONIC FILING

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

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

Dear Secretary Chiavetta:

Attached please find the Reply Brief on behalf of Metropolitan Edison Company ("Met-Ed" or the "Company") regarding the above-referenced matter. This document has been served on the all parties as shown in the Certificate of Service.

Please note that a CONFIDENTIAL version of this Reply Brief has been filed with the Pennsylvania Public Utility Commission ("Commission"), pursuant to the Protective Order issued in this proceeding on December 26, 2019, and the Commission's additional guidance regarding the filing of CONFIDENTIAL materials during the COVID-19 pandemic. The Company requests that the copy of the Reply Brief that has been CONFIDENTIAL be given the appropriate, non-public treatment by the Commission. That is, Met-Ed requests that these materials be excluded from the public documents folder and that such copies not be disclosed to the public.

Please contact me if you have any questions.

Very truly yours,

Tori L. Giesler

krak
Enclosures

c: As Per Certificate of Service

20128721v3

PUBLIC VERSION – PROTECTED INFORMATION REDACTED

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

JUDITH HENDIN	:	
	:	
v.	:	**DOCKET NO. C-2018-3003324**
	:	
METROPOLITAN EDISON COMPANY	:	

REPLY BRIEF ON BEHALF OF METROPOLITAN EDISON COMPANY

Tori L. Giesler, Attorney No. 207742
Lauren M. Lepkoski, Attorney No. 94800
2800 Pottsville Pike
P.O. Box 16001
Reading, Pennsylvania 19612-6001

Counsel for Metropolitan Edison Company

Dated: April 6, 2020

PUBLIC VERSION – PROTECTED INFORMATION REDACTED

Table of Contents

PUBLIC VERSION – PROTECTED INFORMATION REDACTED

TABLE OF AUTHORITIES

Cases

Statutes

PUBLIC VERSION – PROTECTED INFORMATION REDACTED

I. INTRODUCTION

Metropolitan Edison Company ("Met-Ed" or the "Company") hereby submits this Reply Brief in response to the Main Brief of Judith Hendin, which was filed with the Pennsylvania Public Utility Commission ("Commission") on March 16, 2020, pursuant to the Briefing Order issued by the Deputy Chief Administrative Law Judge Joel H. Cheskis (the "ALJ"). As more fully explained herein and in the Company's Main Brief, the Formal Complaint should be dismissed with prejudice because the Complainant wholly failed to meet her burden of proof that the installation of a smart meter at her Service Location would constitute unreasonable service in violation of Section 1501 of the Public Utility Code or would otherwise violate the Public Utility Code, a Commission regulation or order.

In her Main Brief, the Complainant attempts to shift the burden of proof in this proceeding (contrary to the Public Utility Code and Pennsylvania law), and repeatedly relies on extra-record evidence to argue her case. Contrary to the Complainant's assertions, the record evidence in this proceeding demonstrates that she has failed to carry her burden of proof. Rather, the expert testimony of Met-Ed's witnesses demonstrate that the testimony of Dr. Kracht is flawed and lacks credibility, and that the Complainant's own non-expert opinions carry no scientific or medical weight, as a matter of law and as a matter of fact. Indeed, the record evidence shows that the Complainant's claims have no credible scientific or medical basis.

Therefore, and for the reasons more fully explained below and in Met-Ed's Main Brief, the Formal Complaint of Judith Hendin should be dismissed with prejudice.

II. HISTORY OF THE PROCEEDING

A detailed history of the proceeding was previously provided in the Met-Ed's Main Brief. Main Briefs were filed on March 16, 2020. Met-Ed also filed a Motion to Strike Portions of the Complainant's Main Brief on April 6, 2020. Reply Briefs are due April 6, 2020.

III. REPLY TO THE COMPLAINANT'S ASSERTED LEGAL STANDARDS

The Complaint spends a substantial portion of her Main Brief misconstruing the legal standards applicable to the burden of proof in this proceeding.[1] First, the Complainant argues that she need not demonstrate "medical causation" under the Public Utility Code; rather, the Complainant attempts to inject principles inapplicable before the Commission and/or under Pennsylvania law (e.g., the "precautionary principle") to attempt to diminish the burden she must carry.[2] Then, the Complainant seeks to shift the burden of proof using these inapplicable principles and argues that Met-Ed must demonstrate "unequivocally that smart meters are safe for long-term human health."[3] Thereafter, the Complainant argues that the Commission must interpret the Public Utility Code, Act 129 and Met-Ed's smart meter technology procurement and installation plan ("SMP Plan")[4] in light of the precautionary principle. The Complainant's attempts to misstate and then incorrectly shift the burden of proof in this proceeding should be rejected.

Under Section 332(a) of the Public Utility Code, the Complainant bears the burden of proof in this proceeding.[5] In order for the Commission to sustain a formal complaint, the

[1] *See* Complainant MB at Section I.B.-D.
[2] *See* Complainant MB at Section I.B.
[3] Complainant MB at 16.
[4] *See* Met-Ed Exh. JCA 1.
[5] 66 Pa.C.S. § 332(a); *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm'n*, 578 A.2d 600 (Pa. Commw. 1990), alloc. den., 602 A.2d 863 (Pa. 1992).

Complainant must demonstrate that an "act or thing done or omitted to be done by any public utility [is] in violation, or claimed violation, of any law which the Commission has jurisdiction to administer, or of any regulation or order of the commission."[6] In complaint proceedings similar to the instant proceeding, the Commission has held that the relevant legal standard is whether the installation of a smart meter constitutes unsafe or unreasonable service in violation of Section 1501 of the Public Utility Code.[7]

Furthermore, the Complainant's assertion that she need not prove medical causation to prevail in her Formal Complaint is incorrect. The Commission has declared previously that "[p]roof of causation is required in order to prevail under Section 1501."[8] It is not sufficient to merely demonstrate "a potential for harm."[9]

The Complainant's reliance on the precautionary principle should similarly be rejected. Neither the Commission nor Pennsylvania appellate courts recognize the precautionary principle. In *Richard N. Myers v. PPL Electric Utilities Corporation*, Docket No. C-2017-262070, 2019 Pa. PUC LEXIS 261 (Order entered Aug. 29, 2019) ("*Myers*"), the Commission specifically rejected the complainant's arguments that the precautionary principle should be applied to his AMI-meter complaint and explained:[10]

> that the principle is not appropriate here. Rather, the ALJ identified the correct burden of proof as the preponderance of evidence in this quasi-judicial proceeding. The Complainant has the burden of proof in this type of proceeding. Adopting the Precautionary

[6] 66 Pa.C.S. § 701.
[7] *Frompovich v. PECO Energy Co.*, 2018 Pa. PUC LEXIS 160 (Opinion and Order entered May 3, 2018); *Susan Kreider v. PECO Energy Co.*, Docket No. C-2015-2469655 (Order on Reconsideration entered January 28, 2016).
[8] *Hoffman-Lorah v. PPL Elec. Utils. Corp.*, 2019 Pa. PUC LEXIS 195, at *62 (Order entered May 23, 2019), *appeal pending*, 712 C.D. 2019; *see, e.g., Sunstein Murphy v. PECO Energy Co.*, 2019 Pa. PUC LEXIS 159, at *51-52 (Order entered May 9, 2019), *appeal pending*, 606 C.D. 2019.
[9] *Hoffman-Lorah*, 2019 Pa. PUC LEXIS at *62.
[10] *Richard N. Myers v. PPL Electric Utilities Corporation*, Docket No. C-2017-262070, 2019 Pa. PUC LEXIS 261 at *18 (Order entered Aug. 29, 2019) ("*Myers*").

Principle here would be a reversal of the burden of proof, requiring PPL to prove a negative.

In rejecting the precautionary principle in *Myers*, the Commission recognized that adopting the principle would require a respondent utility to prove a negative. Pennsylvania law generally concludes that the party with the burden of proof cannot be required to prove a negative in order to prevail.[11] In the rare circumstances where a party is required to affirmatively prove a negative, a statute or regulation expressly states this burden and defines what the party must prove.[12] No provision of the Public Utility Code requires Met-Ed to prove its proposed installation of a smart meter will not result in any harm.

In addition to the Commission's explicit rejection of this principle, no Pennsylvania court has recognized or adopted the principle. Indeed, the Complainant cites to no Pennsylvania case adopting this principle, and her attempted reliance upon the law of other jurisdictions that review agency decisions under their respective unique statutory schemes should be rejected.[13]

---

[11] *Tincher v. Omega Flex*, 104 A.3d 328, 409, 628 Pa. 296, 431 (Pa. 2014) ("proving a negative is generally not desirable as a jurisprudential matter because of fairness concerns related to anticipating and rebutting allegations"); *Fazio v. Pittsburgh Rys. Co.*, 321 Pa. 7, 182 A. 696, 698 (Pa. 1936) ("[i]t is a well-recognized principle of evidence that he who has the positive of any proposition is the party called upon to offer proof of it. It is seldom, if ever, the duty of a litigant to prove a negative until his opponent has come forward to prove the opposing positive").

[12] *See, e.g., Commonwealth v. 1997 Chevrolet*, 106 A.3d 836 (Pa. Cmwlth. 2014) (noting that the Pennsylvania Forfeiture Act places the burden on a property owner to prove a negative, *i.e.* a lack of knowledge that is reasonable under the circumstances); *DOT v. Agric. Lands Condemnation Bd.*, 5 A.3d 821, 826 (Pa. Cmwlth. 2010) (noting that the Pennsylvania Agricultural Land Preservation Policy requires an applicant-condemnor to prove a negative, *i.e.* that no reasonable and prudent alternative to condemning lands within an agricultural security area exists under 71 P.S. § 106(b)).

[13] *See, e.g., Petition of Columbia Gas of Pennsylvania, Inc. for Approval of its Long-Term Infrastructure Improvement Plant; Petition of Columbia Gas of Pennsylvania, Inc. for Approval of a Distribution System Improvement Charge*¸ Docket No. P-2012-2338282, 2014 Pa. PUC LEXIS 93, at *34-35 (Recommended Decision Feb. 25, 2014) ("Although the OCA points to the practice of utilities in other states to support its argument to include ADIT in the DSIC, the jurisdictions that the OCA has identified in this proceeding have mechanisms that are dissimilar from the Pennsylvania mechanism. In the instant case, even if a review of the practices of other states in interpreting the Pennsylvania statute was appropriate, the mechanisms in the other states vary significantly from the Pennsylvania DSIC such that that they provide no relevant guidance in judging the reasonableness of the proposed ADIT adjustment."), *adopted*, Docket Nos. P-2012-2338282, et al. (Order entered May 22, 2014); *Performance Metrics & Remedies (PMO III F0013) 2008 Guidelines Updates*, 2008 Pa. PUC LEXIS 1105, at *19-20 (Order entered July 22, 2008) ("[W]hether the NY PSC has adopted a particular change for use in NY (or whether other

Moreover, even if the case law of other jurisdictions is relevant, and it is not, the D.C. Circuit Court of Appeals has previously observed the substantial criticisms of applying the precautionary principle in a regulatory context:[14]

> [The precautionary principle] approach to regulation has been criticized. The precautionary principle "imposes a burden of proof on those who create potential risks, and it requires regulation of activities even if it cannot be shown that those activities are likely to produce significant harms. Taken in this strong form, the precautionary principle should be rejected, not because it leads in bad directions, but because it leads in no direction at all. The principle is literally paralyzing — forbidding inaction, stringent regulation, and everything in between. The reason is that in the relevant cases, every step, including inaction, creates a risk to health, the environment, or both." Cass R. Sunstein, Beyond the Precautionary Principle, 151 U. Pa. L. Rev. 1003, 1003 (2003).

Finally, the Complainant argues that the Public Utility Code, Act 129 of 2008 ("Act 129"),[15] and Met-Ed's SMP must be interpreted in light of the precautionary principle. Met-Ed explained above why this principle is inapplicable and should not be applied in this proceeding. In addition, Complainant's additional arguments regarding the interpretation of Act 129 and Met-Ed's SMP should be rejected.

---

states in the footprint have adopted a particular change) does not control Pennsylvania's decision to adopt or reject a particular change for use in Pennsylvania. . . . We shall not, however, adopt changes or refrain from adopting changes for use in Pennsylvania based solely on what happens in NY or any other jurisdiction."); *Petition for Declaratory Order Regarding Ownership of Alt. Energy Credits, Associated with Non-Utility Generating Facilities Under Contract to Pa. Elec. Co. and Metro. Edison Co.*, 2007 Pa. PUC LEXIS 7, at *26-27 (Order entered Feb. 12, 2007) (stating that neither the ALJ nor the Commission grounded their decisions on the analysis of the decisions of foreign jurisdictions); *see also Elder v. Orlucky*, 515 A.2d 517, 522 (Pa. 1986) (noting that it was not appropriate to consider another jurisdiction's statute where there was no indication that the General Assembly based Pennsylvania legislation on legislation adopted in other jurisdictions).

[14] *Competitive Enter. Inst. v. United States*, 863 F.3d 911, 918-19 (D.C. Cir. 2017) (finding that the U.S. Department of Transportation's e-cigarette regulation was not arbitrary because the regulation's benefits justified the costs and the regulation was not simply based on a "precautionary approach").

[15] 66 Pa.C.S. § 2806.1, *et seq.*

Complainant's cost-benefit argument ignores the Commission's prior cost-benefit analysis,[16] and the plain language of Act 129 and Met-Ed's SMP. Neither Act 129 nor subsequent Commission orders related to smart meter installation and deployment permit customers to "opt-out" from smart meter installation. Indeed, Commission precedent is uniform that the Commission cannot grant exceptions to the statutory directive that smart meters be installed by allowing customers to "opt-out." Furthermore, Met-Ed's Smart Meter Deployment Plan, approved by the Commission, also explicitly states that no opt-out option is available;[17] it is not silent on this issue. Finally, Complainant asserts that "where…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."[18] However, Complainant has made no such showing and candidly admits it is impossible for her to prove she suffers from electromagnetic hypersensitivity syndrome ("EHS").[19]

For these reasons, the Complainant's proposed application of the precautionary principle should be rejected and the Commission should not shift the burden of proof in this proceeding. The appropriate legal standards to be applied are set forth in Met-Ed's Main Brief.[20]

IV. REPLY ARGUMENT

A. Smart Meters Are Not An Unsafe Utility Service That Violates The Public Utility Code, A Commission Regulation, Or An Order.

[16] *Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company For Approval of Their Smart Meter Deployment Plan*, Docket Nos. M-2013-2341990, M-2013-2341991, M-2013-2341993, M-2013-2341994 (Opinion and Order entered June 25, 2014 at 16).
[17] *Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company For Approval of Their Smart Meter Deployment Plan*, Docket Nos. M-2013-2341990, M-2013-2341991, M-2013-2341993, and M-2013-2341994 (Sec. Letter dated June 20, 2014).(hereinafter, "Smart Meter Deployment Plan" or "SMDP").
[18] Complainant MB at 19.
[19] *See* Complainant MB at 18.
[20] Met-Ed MB, Section II.

Complainant argues that the Commission's interpretation of Act 129 in various prior smart meter complaint proceedings violates Section 1501 of the Public Utility Code.[21] Although she acknowledges that the Commission must read Act 129 and Section 1501 *in pari materia*, the Complainant argues that the failure to provide an opt-out violates Section 1501.[22] This argument should be denied.

As explained in Met-Ed's Main Brief, under Act 129, Met-Ed has an absolute obligation to install smart meters at all of its customers' service locations.[23] Neither Act 129 nor subsequent Commission orders related to smart meter installation and deployment permit customers to "opt-out" from smart meter installation.

Moreover, the plain language of Act 129 states that EDCs, like Met-Ed, "shall" install the new AMI meters.[24] Importantly, the word "shall" has been declared by Pennsylvania courts to mean "must."[25] Additionally, even if the statute were silent or ambiguous on this issue, which it is not, the "administrative interpretations of such statute" should be considered and given substantial weight.[26] Indeed, the Commission, which is the entity charged with implementing and enforcing Section 2807(f) of the Public Utility Code, has issued uniform precedent holding

[21] Complainant MB at 19.
[22] Met-Ed MB at 10-16.
[23] Met-Ed MB at 10-16.
[24] *See* 66 Pa.C.S. § 2807(f)(2) (emphasis added).
[25] *See Whiteford v. Dep't of Transp.*, 728 A.2d 1127, 1131 (Pa. Cmwlth. 2001) ("[T]he word 'shall' denotes a mandatory, not discretionary instruction.") (citations omitted); *C.B. v. J.B.*, 65 A.3d 946, 952 (Pa. Super. 2013) (finding that "[t]he use of 'shall' means . . . must" and that to hold otherwise "would be to flout the legislative will"); *In re Canvass of Absentee Ballots of Nov. 4, 2003 Gen. Election*, 843 A.2d 1223, 1233 (Pa. 2004) ("[W]e are not compelled to pretend that 'shall' means 'may' under Section 3146.6(a)."); *Griesmer v.* Hill, 36 Pa. Super. 69 (Pa. Super. 1908) ("This provision is mandatory, and not directory merely. It means what it says. The word 'shall' means 'shall' . . . . [The defendant] not only may but 'must.'").
[26] 1 Pa.C.S. § 1921(c)(8).

that there is no opt-out under the statute. In addition, the Commission specifically noted the issues that could arise from non-uniform deployment of smart meters.[27]

Furthermore, Complainant's attempted reliance on other jurisdictions to support her request for an opt-out for service rendered in Pennsylvania is irrelevant and should be rejected. As noted in Met-Ed's Main Brief, Commission and Pennsylvania courts have made clear the practices and policies of other jurisdictions have little if any relevance for Pennsylvania.[28] Indeed, the irrelevance of other jurisdictions' requirements on this issue is made apparent by the Complainant's failure to attempt to compare the statutory and regulatory regimes of other states to Pennsylvania's.

For these reasons and those more fully explained in Met-Ed's Main Brief, Act 129 does not allow the Complainant to opt-out of the installation of a smart meter at her residence. Such installation is mandatory and required by law. Therefore, the Complainant's claim that Met-Ed has violated Section 1501 of the Public Utility by not offering her an opt out is incorrect and should be denied.

B. The Complainant Failed To Carry Her Burden To Prove Met-Ed's Smart Meters Constitute Unsafe Or Unreasonable Service.

The Complainant next asserts that smart meters constitute unsafe utility service that violates Section 1501 of the Public Utility Code, "because EMF emissions will adversely affect

[27] *See Smart Meter Procurement and Installation*, Docket No. M-2009-2092655, at p. 14 (Order entered June 24, 2009 ("*Smart Meter Implementation Order*") (stating it "recognize[d] that deployment of smart meters on a piecemeal or individual basis could involve greater costs than a systematic system-wide deployment."); *see also Springirth v. Nat'l Fuel Gas Distrib. Corp.*, 1991 Pa. PUC LEXIS 44, at *1-3, 6, 16-17 (Order entered Apr. 12, 1991) (dismissing complaint of customer seeking to make installation of automated meter reading devices optional, noting that the Commission previously found in another case that "[t]he customer should not be given the option of refusing installation of equipment" because "[t]o permit customer discretion in this area would be inefficient and uneconomical") (quoting *Stenker v. The York Water Co.*, Docket No. C-871318 (Order entered July 27, 1987)).

[28] Met-Ed MB at 14, n.30 (citing multiple Commission and Pennsylvania appellate court authorities).

her health."[29] Contrary to the Complainant's assertions, smart meters do not emit electromagnetic frequency radiation that negatively affects human health.[30] Importantly, the testimony of Met-Ed's expert witness, Dr. Davis, is unrebutted. The levels of radio frequency ("RF") fields from Met-Ed's meters are extremely low and many times lower than the levels of RF fields the Complainant encounters from everyday sources.[31] As such, there is no reliable scientific basis in physics, biophysics, bioelectromagnetics, or RF bioelectromagnetics to conclude that the very low levels of RF fields from Met-Ed's Itron meters can or will cause any adverse health effects.

1. The Complainant's Reliance on the BioInitiative Report Is Flawed.

The Complainant bases her allegations about health risks from RF fields largely on a document known as the BioInitiative Report, which she mistakenly characterizes as a "landmark" for understanding the science. Based on her non-expert views, the Complainant relies on the BioInitiative Report as the principal source and justification for her numerous statements about alleged health effects from RF fields, despite being contradicted by the expert testimony in this case and the findings by numerous credible regulatory and public health entities that have addressed this issue.[32] The Complainant's reliance upon the BioInitiative Report should be rejected.[33] The report is extra-record evidence, is hearsay, and is an inherently unreliable piece of advocacy.[34] The BioInitiave Report is not a part of the record in this

[29] Complainant MB at 19.
[30] Met-Ed MB at 17-18.
[31] Met-Ed MB at 17.
[32] Met-Ed St. 3-R at 9-10, 13; Met-Ed Exhibits MI-1, MI-2 and MI-3.
[33] Complainant MB at 22-24 (citing extra-record Cross Examination Exhibits X17, X18 and X19).
[34] Pennsylvania law recognizes that evidence may be properly excluded where it is so flawed as to render it unreliable. *See Blum v. Merrell Dow Pharms., Inc.*, 705 A.2d 1314, 1325 (Pa. Super. 1997) (excluding expert testimony because the "analysis was so flawed as to render [the expert's] conclusions unreliable and therefore inadmissible"), *affirmed*, 764 A.2d 1 (Pa. 2000).

proceeding, and Met-Ed properly objected to it as inadmissible hearsay. Dr. Israel – the only expert who addressed the BioInitiative Report – testified that the Complainant's characterization of the report as a "meta-analysis" was incorrect,[35] and, in fact, that the report is not a scientific study but rather "advocacy, almost a newsletter, of opinion pieces."[36] Significantly, in the *Myers* case previously decided by this Commission, the co-editor of the BioInitiative Report revealed that the document is not at all a consensus scientific review by an expert panel.[37] Indeed, he admitted that the authors of the various chapters in the document were hand-picked based on their known positions about alleged RF health effects.[38]

In the instant case, Dr. Israel explained that, while the BioInitiative Report includes lists of many studies, the Report consists of chapters written by individuals are advocating for a particular viewpoint.[39] Dr. Israel went on to explain that the BioInitiative Report is not a reliable scientific source and, therefore, would not provide a reliable scientific basis upon which to form an expert opinion.[40] The conclusion that the BioInitiative Report is neither objective nor a balanced review of the science has been reached by many national and international groups, including this Commission.[41] As such, this extra-record evidence is inherently unreliable, and cannot serve as the basis for an informed decision by the Commission in this proceeding.

2. The Complainant's Criticisms of Dr. Israel Are Gratuitous and Without Scientific Merit.

[35] Tr. 263.
[36] Tr. 264-265.
[37] Met-Ed St. 3-R at 18.
[38] Met-Ed St. 3-R at 18.
[39] Tr. 266.
[40] *See* Tr. 265.
[41] *Myers*, at *31 (concluding, "the BioInitiative Report is an advocacy document"); *see also* Met-Ed St. 3-R at 18 and Met-Ed Exhibit MI-4.

Among the Complainant's scattershot ad hominem attacks on Dr. Israel, her argument that he should have conducted an in-person examination of the Complainant is particularly egregious.[42] Despite the Company's longstanding discovery requests for her medical records, the Complainant steadfastly refused to produce any until the day of the hearing itself. Even at that late date, she provided only limited records in which a majority of the information was blacked-out. Given her recalcitrance in providing information about her medical situation, the suggestion that she would have submitted to an in-person examination by Dr. Israel is implausible. **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** [43] The Complainant didn't objection to that approach by Dr. Kracht and has no credible basis to complain about Dr. Israel's evaluation.

The Complainant claims that Dr. Israel lacks the requisite experience to be an expert on RF health issues,[44] despite the fact that Dr. Israel is an eminent medical doctor and researcher who has been analyzing and evaluating the scientific and medical research on these issues for more than 30 years.[45] Additionally, Dr. Israel has been recognized by the Commission as an expert in "medicine and medical research, including particularly radio frequency fields and health" in numerous AMI meter cases over the past 3 years.[46] Complainant's further statement

[42] Complainant MB at 52-53.
[43] Tr. at 116-120.
[44] Complainant MB at 49.
[45] Met-Ed St. 3-R at 4.
[46] *See, e.g., Myers*, at *28 ("Dr. Israel also is a qualified expert on the issues in this proceeding. Based on his medical education, training and experience, and his evaluation of the scientific research, Dr. Israel's expert opinion

that Dr. Israel's testimony should be disregarded because the studies he cites "are ten years old"[47] is similarly meritless; Dr. Israel's testimony cites studies and reports published from 2004 to 2018. Complainant's misplaced argument appears to be that scientific studies are like bananas that need to be replaced on a regular basis. For Dr. Israel, however, his expert medical evaluation is based not just on the date of any particular study but on numerous qualitative factors such as the quality of study design and protocol, what the study can and cannot demonstrate, the performance of the study, and the data reporting and analysis, among others.[48]

A pattern of over-interpretation and mischaracterization runs through Complainant's arguments about the scientific research on RF fields. For example, the Complainant argues that Dr. Israel's testimony is incorrect because Maine, Vermont and North Carolina "have recognized that smart meters do pose a health hazard…."[49] This is a claim without record support.[50] At best, it is a reckless over-interpretation of state opt-out decisions. At worst, it is a deliberate attempt to mislead the Commission about public health findings from other states. In another instance, the Complainant quotes from the 2010 President's Cancer Panel Report 2010, but fails to mention that the President's Cancer Panel found no consistent or conclusive scientific evidence of cancer from RF fields.[51]

The Complainant makes various other meritless claims about Dr. Israel's evaluation of the scientific research. These claims are not based on testimony of an expert witness, but on the

---

is that there is no reliable medical basis to conclude that RF fields from the AMI meter being used by PPL will cause or contribute to the development of illness or disease.").

[47] Complainant MB at 48.

[48] Met-Ed St. 3-R at 5-6.

[49] Complainant MB at 49.

[50] The North Carolina PUC decision cited by the Complainant is an extra-record hearsay document. Even if it were admissible, which it is not, it contains no statement that the PUC concluded there is a health hazard from smart meters.

[51] Complainant MB at 60.

Complainant's own non-expert misinterpretation of hearsay scientific articles. For example, the Complainant mistakenly claims that certain animal studies did not involve hundreds of animals as stated by Dr. Israel.[52] Even a cursory review of these studies however shows that they did involve hundreds of animal subjects. For example, the Complainant claims that the Ogawa study involved only "four groups of 20 pregnant rats, totaling 80 rats and their fetuses."[53] What she fails to mention is that the fetuses numbered in the many hundreds and they were subjects of the study. This information is available in the study, but may have been overlooked by the Complainant, who does not have expertise in how to evaluate medical or scientific research.

The Complainant further claims – without record support – that the "heart studies" cited by Dr. Israel "were performed on small numbers of rats" and "[n]o human subjects were used."[54] However, Dr. Israel's unrebutted testimony is that the studies involved human subjects.[55] The Complainant could have confirmed this either by asking Dr. Israel about the studies or even just reading their titles, which refer to human subjects. Instead, based on her non-expert interpretation of an inadmissible hearsay document (Complainant's proposed late-filed Cross Examination Exhibit X-6), the Complainant argues that a study from the Anatolian Journal of Cardiology reports there "may" be heart effects. This is a misinterpretation that overlooks the study's principal conclusion of no statistically significant effects from RF exposures. Once again, however, the Complainant did not offer any expert testimony about this study and did not ask Dr. Israel about it. Her uninformed and unreliable arguments based on her selective post-hearing reading of hearsay documents should not be afforded any weight.

[52] Complainant MB at 53.
[53] Complainant MB at 53.
[54] Complainant MB at 54-55.
[55] Met-Ed St. 3-R at 15-16.

The Complainant is also mistaken about the findings of the International Agency for Research on Cancer ("IARC"). Dr. Israel testified unequivocally that the IARC finding for environmental sources of RF exposure, including smart meters, was that the scientific evidence of any association with cancer was "**inadequate**", and not possible, probable or known.[56] The Complainant either missed or is attempting to avoid this most relevant result of the IARC evaluation. Similarly, the Complainant is wrong about the World Health Organization's ("WHO") position on RF fields and health. There is no ambiguity or lack of clarity in the WHO position, which is, as Dr. Israel testified, there are no established adverse health effects from RF fields.[57] Complainant's criticisms of Dr. Israel's testimony about IARC and the WHO are based on ill-founded and erroneous presumptions, and are without merit.

Complainant's closing shot at Dr. Israel is to repeat some statements from a brief from a different complainant in a different AMI meter case against a different utility.[58] As in this case, the attempts to undermine Dr. Israel's testimony in that case were without merit. They were rejected by the Commission, which found that "Dr. Israel also is a qualified expert on the issues in this proceeding."[59] The Commission also found that Dr. Israel's "expert opinion stated unequivocally that exposure to the low-level RF fields from a PECO smart meter will not be harmful to the Complainant's health," and that this "unequivocal opinion meets PECO's required burden of production and constitutes legally competent evidence to support a finding of fact on

[56] Met-Ed St. 3-R at 16-17.
[57] Met-Ed St. 3-R at 9, 13, 16-17; *see also* Met-Ed Exhibit MI-1.
[58] Complainant MB at 61.
[59] *Sunstein Murphy*, 2019 Pa. PUC LEXIS 159 at *117.

the issue of a causal connection between RF fields from an AMI meter and adverse health effects."[60]

3. The Complainant's measurements and characterizations of the impacts of smart meter radiofrequency waves are incorrect and based on improper lay-witness opinion testimony.

The Complainant baldly asserts that smart meters emit different "radiation" than other RF devices, *i.e.* "the radiation is emitted frequently and in very brief bursts."[61] The record evidence demonstrates this assertion is wrong.

First, the Complainant's own measurements of her neighbor's smart meter do not constitute a scientific study of any kind, much less one conducted by a qualified expert using reliable methodology and instrumentation. There is no evidence of the methodology she used, the results have not been peer reviewed and her measurements have not been independently replicated. Rather, her measurements and testimony about them constitute improper lay-opinion testimony and should not be credited.

The flaws in the Complainant's measurements were made clear by Dr. Davis. Dr. Davis explained that the Cornet ED88T device used by the Complainant "is <u>one of the many cheap meters</u> that people can buy for consumers to perhaps get an estimate of how much radiofrequency exposure they're getting from various kinds of devices."[62] He further explained that the meter was not reliable, and likely not capable of accurately measure and record RF emissions from smart meters.[63] Moreover, the Complainant's assertion that Dr. Davis testified

[60] *Sunstein Murphy*, 2019 Pa. PUC LEXIS 159 at *117.
[61] Complainant MB at 24.
[62] Tr. 175.
[63] Tr. 175.

this meter is "one of the most highly recommended meters" is false and misconstrues the record.[64] Rather, Dr. Davis explained:[65]

> A. The measurement meter that Ms. Hendin said that she had, all I was able to do was to look at the specifications online. It's not a high cost, high quality meter which should really be certified by the National Institute of Standards in Technology to be truly used to calibrate exact exposures.

Having misconstrued the testimony of Dr. Davis, the Complainant pivots and again attempts to again rely upon extra-record evidence, *i.e.* Cross Examination Exhibits X17 and/or X33.[66] Not only is this extra-record evidence, but it is also inadmissible hearsay which has been properly objected to by Met-Ed. Therefore, it cannot be relied upon to form a finding of fact by the Commission.

Finally, the Complainant cites to another proceeding before this Commission (*Maria Povacz v. PECO Energy Company*, Docket No. C-2015-2475023, p. 54 (Order entered March 28, 2019)) and its discussion of "a study being conducted by the National Toxicology Program."[67] Again, the referenced study is not evidence of record; indeed, it is not even identified as an exhibit in the Complainant's list of exhibits or cross examination exhibits. While the Complainant attempts to rely upon Dr. Israel's testimony during cross examination, her Main Brief misses two critical points: (1) the entire statistical significance of the referenced study hinged on one rat in the highest level of exposure exhibiting a heart tumor;[68] and (2) this study stands as an anomaly in the wealth of scientific and medical literature that do not show the levels

[64] Complainant MB at 24.
[65] Tr. 181 (emphasis added).
[66] Complainant MB at 25-26.
[67] Complainant MB at 26-27.
[68] Tr. 279.

of exposure used in this study caused heart tumors.[69] Complainant has simply failed to present credible record evidence demonstrating adverse health effects will result from her exposure to Met-Ed's smart meters.

4. The Complainant has not demonstrated she has suffered or will suffer adverse health effects from Met-Ed's smart meter.

The Complainant further asserts she has electromagnetic hypersensitivity syndrome ("EHS") and has previously experienced adverse health effects from a prior smart mater.[70] Dr. Israel rebutted her claims, and explained that the appropriate medical term for her alleged ailment is "Idiopathic Environmental Intolerance" or "IEI."[71] Specifically, Dr. Israel explained that the term idiopathic means "cause unknown," *i.e.* the cause of Ms. Hendin's symptoms is unknown and unable to be medically diagnosed.[72] Based on a thorough review of scientific and medical research there is no reliable scientific evidence that exposure to RF fields causes claimed IEI symptoms.[73]

Importantly, Complainant's argument that any symptoms she has suffered are attributable to a smart meter hinges on her unsubstantiated belief that the meter used for her gas utility service, is an RF-emitting smart meter.[74] At hearing, Dr. Kracht specifically testified that **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]**[75] Moreover, the

[69] Tr. 279.
[70] Complainant MB, Sections IV.E. and IV.F.
[71] Met-Ed St. 3-R at 10-11.
[72] Met-Ed MB at 20-21.
[73] Met-ED MB at 20-21.
[74] Complainant MB at 29-30 and 31 ("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." (emphasis added)).
[75] Met-Ed MB at 23.

Complainant has no first-hand knowledge of the make and model of this meter,[76] and does not know if it was, in fact, removed and exchanged.[77] The Complainant's assertions that she suffered any symptoms from a gas utility smart meter, and that these symptoms retreated due to its removal, are not based on substantial evidence and should be denied.

For these reasons, and the reasons more fully explained in Met-Ed's Main Brief, the Complainant failed to credible evidence demonstrating she has suffered or will suffer adverse health effects from Met-Ed's smart meter.

5. Met-Ed rebutted the Complainant's claims regarding the safety of its smart meters.

Met-Ed presented substantial, credible evidence showing that its smart meters are safe.[78] Importantly, both of Met-Ed's expert witnesses respectively concluded there was no valid scientific basis within their fields of expertise to conclude that Met-Ed's smart meters will cause or contribute or have caused or contributed, to any adverse health effects.

In her Main Brief, the Complainant attempts to undermine Met-Ed's reliance on and compliance with existing FCC guidelines by relying upon inadmissible hearsay statements by the American Academy of Environmental Medicine.[79] In addition to these documents constituting inadmissible hearsay, several of them also constitute extra-record evidence. Moreover, the American Academy of Environmental Medicine is a known advocacy organization and, therefore, the opinions contained in these pieces are inherently biased and unreliable.[80]

---

[76] Tr. 59-60.
[77] Tr. 59-60.
[78] Met-Ed MB at 17-22.
[79] Complainant MB at 31 (referencing Exhibits 5, 7, 31 and 40 and Cross-Examination Exhibits X1, X2, X13 and X17).
[80] Met-Ed St. 3-R at 14 (noting the American Academy of Environmental Science's pieces lack "balanced consideration of relevant scientific studies and is contradicted by the findings of respected public health agencies).

6. The Complainant mischaracterizes the findings of the scientific and medical communities.

The Complainant further represents that there is an "international consensus" that smart meters constitute a health risk.[81] This is not only false, but mischaracterizes the testimony of the Complainant's own expert witness.

Specifically, Met-Ed's expert witnesses credibly testified that the international consensus from credible public health entities is that the scientific research has **not** shown that the very low levels of RF fields from of smart meters can cause or contribute to adverse health effects.[82] Met-Ed's experts also testified that there is no credible medical or scientific basis to conclude that the Complainant has suffered or will suffer adverse health effects from Met-Ed's smart meter.[83] In fact, it is generally not accepted in the medical community that IEI and its attendant symptoms are attributable to RF fields.[84] Indeed, credible public health organizations such as the World Health Organization have reached this conclusion.[85] Even the Complainant's own witness admitted that in his view "the field is fraught with conflict."[86] Simply put, the Complainant's assertion that there is an international consensus that smart meters pose a health risk is false.

C. The Complainant Failed To Demonstrate Met-Ed's Response To Her Request To Opt-Out Constitutes Unreasonable Service.

The Complainant next raises three arguments in support of her assertion that Met-Ed's response to her request for an opt-out constitutes unreasonable service in violation of Section 1501 of the Public Utility Code.[87] First, the Complainant asserts Met-Ed does not adequately

[81] Complainant MB at 31-32.
[82] Met-Ed St. 3-R at 13-14.
[83] Met-Ed MB at 17-22.
[84] Met-Ed St. 3-R at 13.
[85] Met-Ed St. 3-R at 13.
[86] Tr. 127.
[87] Complainant MB, Section IV.

warn its customers regarding smart meters. Second, the Complainant alleges the Commission's interpretation of Act 129 is inconsistent with its plain language. And third, the Complainant alleges that Act 129 permits customer opt outs. As explained below, each of these bases is incorrect and should be rejected by the Commission.

1. Met-Ed's SMP adequately explains the health, safety and privacy protections afforded to its customers.

As to her first argument, the Complainant ignores the testimony of Met-Ed witness John C. Ahr, regarding the process by which the Commission (and the public) reviewed and vetted Met-Ed's SMP and the smart meters that it must deploy.[88] Under this public process, Met-Ed and applicable stake-holders reviewed and vetted Met-Ed's plan to deploy smart meter technology in its service and the types of smart meters it would deploy to ensure the safety and convenience of the public.

In addition, Met-Ed's smart meters comply with all applicable safety requirements and standards,[89] the manufacturer of the smart meters performs American National Standards Institute ("ANSI") tests on the meters,[90] and the meters are Underwriters Laboratories ("UL") certified.[91] Met-Ed's SMP is publicly available and adequately informs the public of the efforts it has taken to ensure that its smart meters are safe.

2. The Commission's prior interpretation of Act 129 is correct.

[88] *See generally* Met-Ed St. 1-R.
[89] Met-Ed St. 1-R at 11.
[90] *Id.*
[91] *Id.*

As to her second argument, the Complainant fails to actually engage in a plain language analysis of Act 129.[92] Specifically, the Complainant fails to address the meaning of the word "shall" use in Act 129.

Met-Ed has previously explained above that the plain language of Act 129 states that EDCs, like Met-Ed, "shall" install the new AMI meters.[93] Importantly, the word "shall" has been declared by Pennsylvania courts to mean "must."[94] Indeed, the plain language of Act 129 dictates that Met-Ed "must" install smart meters, and does not permit it to provide an opt out. Consistent with this language, Commission precedent has uniformly rejected requests for opt-outs.

3. The Complainant's interpretation of Act 129, pursuant to other authorities, is incorrect.

In her third argument, the Complainant goes to great lengths to provide a tortured interpretation of Act 129 to support her position that opt-outs are permitted under the statute.[95] Initially, the Complainant intensely focuses upon the use of the term "depreciation schedule" to argue this language does not require the mandatory installation of smart meters and that the Commission's interpretation to the contrary is incorrect.[96] Then, she relies upon the comments of several state legislators comments during floor debates on the predecessor bills to Act 129 and

[92] Complainant MB at 32-34.
[93] *See* 66 Pa.C.S. § 2807(f)(2) (emphasis added).
[94] *See Whiteford v. Dep't of Transp.*, 728 A.2d 1127, 1131 (Pa. Cmwlth. 2001) ("[T]he word 'shall' denotes a mandatory, not discretionary instruction.") (citations omitted); *C.B. v. J.B.*, 65 A.3d 946, 952 (Pa. Super. 2013) (finding that "[t]he use of 'shall' means . . . must" and that to hold otherwise "would be to flout the legislative will"); *In re Canvass of Absentee Ballots of Nov. 4, 2003 Gen. Election*, 843 A.2d 1223, 1233 (Pa. 2004) ("[W]e are not compelled to pretend that 'shall' means 'may' under Section 3146.6(a)."); *Griesmer v.* Hill, 36 Pa. Super. 69 (Pa. Super. 1908) ("This provision is mandatory, and not directory merely. It means what it says. The word 'shall' means 'shall' . . . . [The defendant] not only may but 'must.'").
[95] Complainant MB at 34-48.
[96] Complainant MB at 34-40.

Act 129 to argue the legislature did not intend for installation to be mandatory.[97] The Complainant next returns her focus to the term "depreciation" and arguments the Commission's current use of the term is contradicted by its use in 2009 and by Met-Ed's own use of the term.[98] And finally, she asserts that proposed or pending legislation regarding opt-outs is determinative with respect to Act 129.[99]

Met-Ed addresses each of these arguments below. To be clear, neither Act 129, the Commission's regulations, the Commission's orders or Met-Ed's SMDP permit opt outs and the Complainant's arguments to the contrary should be rejected.

a. The Complainant's focus on the term "depreciation schedule" is irrelevant and ignores the mandate imposed by the word "shall."

As explained above and in Met-Ed's Main Brief, Met-Ed is legally required to install a smart meter at the Complainant's residence. Although the Complainant spends a substantial portion of her Main Brief focused upon the term "depreciation" she ignores the mandatory term "shall" used in Act 129.

Indeed, Section 2807(f) of the Public Utility Code prescribes that EDCs, must file smart meter plans and "**shall** furnish smart meter technology" in any of the following situations: (1) "[u]pon request from a customer that agrees to pay the cost of the smart meter at the time of the request"; (2) "[i]n new building construction"; and (3) "[i]n accordance with a depreciation schedule not to exceed 15 years."[100] In interpreting the smart meter provisions of Act 129, the Commission declared that EDCs must "deploy smart meters system-wide" because of the

[97] Complainant MB at 40-42.
[98] Complainant MB at 42-45.
[99] Complainant MB at 45-48.
[100] 66 Pa.C.S. § 2807(f)(1)-(2) (emphasis added).

requirement that smart meters be deployed "in accordance with a depreciation schedule not to exceed 15 years."[101] The Commission also "recognize[d] that deployment of smart meters on a piecemeal or individual basis could involve greater costs than a systematic system-wide deployment."[102] Therefore, Met-Ed must install the new smart meters for every customer in its service territory, including the Complainant.

In addition, nothing in Act 129 permits a customer to "opt-out" of a smart meter installation. Indeed, the Commission previously has found in several cases that Act 129 contains no such opt-out language.[103] Specifically, in *Starr*, the Commission observed that it has "rejected similar claims that the installation of smart meters is not mandatory or that an opt-out is permissible under Act 129."[104]

Moreover, Met-Ed must comply with the relevant Commission orders directing the Company to deploy the new AMI meters.[105] Met-Ed's Commission-approved Smart Meter Deployment Plan ("SMDP"), explicitly states that no opt-out option is available.[106] As explained by Company witness John C. Ahr, Met-Ed's Commission-approved SMDP calls for 98.5% of the Company's smart meter installation to be completed by 2019, with the remaining 1.5% of meters being installed by the end of 2022.[107] The Commission-approved SMDP mandates 100% of its

[101] *Smart Meter Implementation Order* at 14.
[102] *Id.* at 9, 14; *see also Springirth v. Nat'l Fuel Gas Distrib. Corp.*, 1991 Pa. PUC LEXIS 44, at *1-3, 6, 16-17 (Order entered Apr. 12, 1991) (dismissing complaint of customer seeking to make installation of automated meter reading devices optional, noting that the Commission previously found in another case that "[t]he customer should not be given the option of refusing installation of equipment" because "[t]o permit customer discretion in this area would be inefficient and uneconomical") (quoting *Stenker v. The York Water Co.*, Docket No. C-871318 (Order entered July 27, 1987)).
[103] *See, e.g.*, *Starr v. PECO Energy Co.*, Docket No. C-2015-2516061, p. 11 (Order Entered Sept. 1, 2016) (footnote omitted).
[104] *Id.*
[105] Met-Ed MB, Section IV.A.1.; *see also* Met-Ed St. 1-R at 5-11.
[106] *Smart Meter Deployment Plan,* at 9.
[107] Met-Ed St. No. 1-R at 10-11.

meters to be replaced with smart meters. Therefore, if the Company does not install a smart meter on the Complainant's residence in accordance with Act 129 and the Commission-approved deployment schedule,[108] Met-Ed may not only violate Act 129, but also violate the Commission's order approving its SMDP, and *Smart Meter Implementation Order*. Indeed, as the Commission stated in its June 9, 2010 Order approving Met-Ed's initial SMDP, "EDCs are not free to ignore" the *Smart Meter Implementation Order*.[109]

The Complainant simply fails to address the mandatory term "shall" and the mandates include in the *Smart Meter Implementation Order* and the order approving Met-Ed's SMDP. Although she focuses on the term "depreciation schedule" used in Act 129, it is not this term that establishes the mandate. Rather, it is the term "shall" that establishes the mandate which has been confirmed in multiple subsequent Commission orders. Therefore, her argument that the plain language of Act 129 does not mandate smart meter installation should be rejected.

b. The comments of a few legislators are irrelevant and not determinative of the meaning of Act 129 with respect to opt-outs.

Contrary to the Complainant's assertions, a few legislators' comments about Act 129 do not control the analysis of whether an opt-out is permitted. Under the Pennsylvania Statutory Construction Act, "[w]hen the words of a statute are clear and free from all ambiguity, the letter

[108] Although Act 129 uses the language "not to exceed 15 years," the Commission encouraged EDCs "to expedite the deployment process if it will provide increased customer benefits in a cost effective manner." *Smart Meter Implementation Order* at 14. The Commission also recognized that system-wide deployment of smart meters would involve "more than just the meter hardware attached to the customer's premises." *Id.* at 6. EDCs would need time to select the technology, train personnel, and deploy the entire AMI network, including any associated hardware and software. *Id.*

[109] *Joint Petition of Metropolitan Edison Co., Pennsylvania Electric Co. and Pennsylvania Power Co. for Approval of Smart Meter Technology Procurement and Installation Plan*, 2010 Pa. PUC LEXIS 963, at *17 (Order entered June 9, 2010).

of it is not to be disregarded under the pretext of pursuing its spirit."[110] Here, the plain language of Act 129 states that EDCs, like Met-Ed, "shall" install the new AMI meters.[111] Therefore, a few legislators' comments about the interpretation of the statute need not and should not be considered.[112]

Additionally, even if the statute were ambiguous, the "administrative interpretations of such statute" should be considered and given substantial weight.[113] Indeed, the Commission, which is the entity charged with implementing and enforcing Section 2807(f) of the Public Utility Code, has issued several orders holdings that there is no opt-out under the statute.[114] Thus, there is no opt-out under Act 129, and the Complainant's attempted reliance on its legislative history should be rejected.

c. The Commission's interpretation of Act 129 is not contradicted by the Commission's or Met-Ed's use of the term "depreciation."

The Complainant next argues that the Commission's use of the term "depreciation" in the *Smart Meter Implementation Order* and Met-Ed's use of the term "depreciation" in its SMP contradicts their respective positions that the installation of smart meters is mandatory.[115] Specifically, the Complainant asserts that this term imposes "a maximum 15 year limit on the service life of smart meters" and does not mandate their deployment.[116] As explained above, the Complainant's focus on this word is misplaced and the plain language of Act 129 mandates the installation of smart meters.

---

[110] 1 Pa.C.S. § 1921(b).
[111] *See* 66 Pa.C.S. § 2807(f)(2).
[112] *See* 1 Pa.C.S. § 1921(c).
[113] *Id.* § 1921(c)(8).
[114] *See* Met-Ed MB, Section IV.A.
[115] Complainant MB at 42-45.
[116] Complainant MB at 45.

In addition, the Complainant's focus on the term depreciation in Met-Ed's SMDP ignores the fact that the plan explicitly states no opt-out is available.[117] The Commission order approving the SMDP does not modify this requirement. Therefore, Met-Ed is additionally obligated to install a smart meter on the Complainant's residence under the Commission order approving its SMDP.

d. Proposed and/or pending opt-out legislation does not govern the interpretation of the requirements of Act 129.

Finally, the Complainant makes reference to various proposed and/or pending bills before the Pennsylvania General Assembly, which she asserts demonstrates Act 129 was intended to be an "opt in" statute.[118] This assertion must be rejected.

It is axiomatic that proposed and/or pending legislation does not constitute law. Although bills have been proposed in the General Assembly to add such an opt-out (see, e.g., House Bill 1564 of 2017-2018 Session), they have not been enacted. These bills do not constitute law and do not modify the mandatory requirements of Act 129 and applicable Commission orders. Therefore, customer cannot opt-out of the AMI meter installation under Act 129.

D. Met-Ed Presented Credible Expert Testimony That Rebutted Any Scientific Or Medical Evidence Presented By The Complainant.

The Complainant next attempts to attack the credibility of Met-Ed's two expert witnesses, Dr. Mark Israel and Dr. Christopher Davis.[119] Met-Ed largely explained that these attacks are without merit and should be disregarded in Section IV.B.2., *supra*. However, Met-Ed

[117] Met-Ed St. 1-R at 10-11.
[118] Complainant MB at 45-48
[119] *See* Complainant MB, Section V.

responds to the additional, specific challenges raised by the Complainant in Section V of the Complainant's Main Brief below.

First, the Complainant asserts that Dr. Israel's testimony is irrelevant because his experience respecting smart meters is as a witness for utility companies.[120] Specifically, the Complainant argues that Dr. Israel has no experience with electromagnetic frequencies in general and smart meters in particular, and has never evaluated Ms. Hendin nor visited her residence.

Initially, Met-Ed notes that, to the extent that the Complainant argues that Dr. Israel lacks the requisite technical experience to provide expert testimony in the fields of radiofrequency and health, the Complainant failed to demonstrate that Dr. Israel did not possess the requisite experience to provide expert testimony in these areas. At hearing, Complainant's counsel was directed to explore this matter on cross examination by the ALJ.[121] Despite asking Dr. Israel questions about his qualifications, the Complainant never renewed their objection to his being offered as an expert witness. Therefore, the Complainant's attempt to attack his expertise in briefs should be rejected.

The Complainant next attacks Dr. Israel's familiarity with other states' approach to smart meter opt outs.[122] As an initial matter, Dr. Israel was not offered as an expert in legal or regulatory principles or the practice of law in Pennsylvania or any other state. Therefore, his understanding of the law in other jurisdictions is irrelevant to assessing his credibility as a medical expert. Moreover, even if it were, as noted above, the Commission and Pennsylvania courts have previously held that the regulatory approaches of other jurisdictions hold little

[120] Complainant MB at 48-49.
[121] Tr. 207-208.
[122] Complainant MB at 49-50.

weight in assessing claims under the Public Utility Code.[123] Other states' approach to permitting opt outs from the installation of smart meters is not relevant to assessing Dr. Israel's credibility or relevant to the instant Formal Complaint.

The Complainant's further attempt to rehabilitate the credibility of BioInitiative Report by undermining Dr. Israel's criticisms of it, and his reliance upon the statements of other public health agencies and expert groups, should also be rejected.[124] As explained in Section IV.B.2., above, the fact remains that the BioInitiative Report has been widely touted as not being an objective and balanced reflection of the current state of scientific knowledge.[125] In addition, the co-editor of the report himself has admitted that the document is not a consensus scientific review by an expert panel and that the authors of the report were selected based upon their known beliefs about electromagnetic fields and radio frequency fields.[126] The Complainant simply ignores these fundamental flaws with the report and attempts to engage in mudslinging regarding Dr. Israel's credibility.

Moreover, the Complainant's claims that Dr. Israel has selectively reviewed and summarized the body of science in these fields of research is wrong.[127] Dr. Israel himself testified that based on the existing body of scientific research, there are "no consistent and reproducible effects from radio frequency fields on cancer or other adverse health effects."[128]

[123] *See* footnote 13 *supra*.
[124] Complainant MB at 50-51.
[125] Met-Ed St. 3-R at 18.
[126] *Id.*
[127] Complainant MB at 51-52.
[128] Met-Ed St. 3-R at 9.

This is an accurate characterization of the existing body of science, and is corroborated by the Complainant's expert's own statement that "the field is fraught with conflict."[129]

Next, the Complainant claims that Dr. Israel's testimony is not credible because he did not conduct a medical evaluation of Ms. Hendin.[130] However, as explained in Section IV.B.2., above, this ignores the fact that Dr. Israel reviewed the medical history of the Complainant and based his opinion, in part, upon the medical documentation provided by the Complainant.[131] Furthermore, the Complainant's own doctor admits that "there is no known diagnostic test of electromagnetic sensitivity" and, therefore, he has "not conducted any specific testing [of Ms. Hendin] in this regard."[132] Complainant cannot have it both ways and argue for a different burden of proof (*i.e.* the precautionary principle) based upon the inability to diagnostically test for her condition, but then critique Dr. Israel for not performing any such tests or evaluations before he reached his conclusions.

The Complainant next attacks Dr. Israel's conclusion that smart meters are safe by asserting several of the studies he relied upon are not relevant.[133] However, the Complainant's claims are not based on testimony of an expert witness, but on the Complainant's own non-expert misinterpretation of hearsay scientific articles, as more fully explained in Section IV.B.2.

Moreover, many of the studies Complainant cites to are not part of the record in this proceeding (*i.e.* Cross Examination Exhibits X5, X6, X7, X9, X10 and X14). Indeed, the Complainant failed to seek their admission at hearing and Met-Ed properly objected to these late-

[129] Tr. 127.
[130] Complainant MB at 52-53.
[131] Met-Ed MB at 19-22.
[132] Met-Ed MB at 22-23.
[133] Complainant MB at 53-56.

filed exhibits. As such, they do not constitute record evidence that diminishes Dr. Israel's testimony rebutting the Complainant's claims.

The Complainant next relies upon a number of extra-record hearsay statements to assert Dr. Israel's conclusion that EMFs do not affect animals is incorrect.[134] As explained in Met-Ed's Main Brief, the exhibits and studies referenced by Ms. Hendin constitute inadmissible hearsay and have been properly objected to by Met-Ed.[135] Therefore, these studies cannot serve as the basis for any finding of fact in this proceeding.

The additional other studies that the Complainant has cited regarding the effects of RF waves on children are similarly extra-record, inadmissible hearsay, and are not relevant to the Complainant's claims regarding Met-Ed's smart meters.[136] The Complainant's attempts to inject these studies into the proceeding for the first time in briefs should be rejected.

Furthermore, the Complainant's reliance on domestic and international legislation is misplaced.[137] As noted several times in this Reply Brief and in Met-Ed's Main Brief, Pennsylvania courts and the Commission have repeatedly indicated that the practices and policies of other jurisdictions have little if any relevance for Pennsylvania.[138]

The Complainant's attempted reliance on the inadmissible hearsay statements of other "medical societies" "calling for caution" related to smart meters, should also be rejected.[139] In addition to being extra-record hearsay statements which are inadmissible because the

[136] Complainant MB at 58-59.
[137] Complainant MB at 59.
[138] *See* footnote 13 *supra*; *see also* Met-Ed MB at 14, n. 30.
[139] Complainant MB at 60.

Complainant is not an expert, these statements were made by anti-EMF/RF advocacy groups and, therefore, are inherently unreliable.

The Complainant next falsely alleges that Dr. Israel's credibility has been questioned in other proceedings.[140] The quoted excerpt is pulled from the Main Brief of the Complainant in this proceeding. It is axiomatic that legal briefs and argument do not constitute evidence.[141] And, to the extent that briefs do not constitute evidence in the same proceeding in which they are filed, briefs filed in another proceeding are one step further removed. More to the point, the Commission found in the proceeding noted by the Complainant that Dr. Israel is a credible expert witness and substantially relied upon his findings in conclusions in its final order as explained in Section IV.B.2., above.[142]

The Complainant next turns to the testimony of Dr. Davis, and attempts to attack his findings.[143] While the Complainant asserts that the distance of UHF TV towers from the Complainant's residence render the RF fields emitted by them incomparable to the RF fields emitted from a smart meter attached to her residence, her non-expert assertions are without merit and should be given no weight. As an expert in physics and RF dosimetry, Dr. Davis calculated RF fields from UHF TV towers using a methodology that is generally accepted in his field of

[140] *See* Complainant MB at 61-62 (quoting "*Laura Sunstein Murphy v. PECO Energy Company, Docket No. C-2015-2475726, September 25, 2017, pp. 68-71.*").
[141] *Hous. Auth. of Pittsburgh v. Van Osdol*, 40 A.3d 209, 216 (Pa. Cmwlth. 2012) (noting that "assertions in briefs" are "not evidence of record"); *Zinman v. Commonwealth, Dep't of Ins.*, 400 A.2d 689, 601 (Pa. Cmwlth. 1971) ("It is of course, fundamental that matters attached to or contained in briefs are not evidence and cannot be considered part of the record either before an administrative agency or on appeal.").
[142] *Sunstein Murphy v. PECO Energy Co.*, 2019 Pa. PUC LEXIS 159, at *117-118 (Order entered May 9, 2019), *appeal pending*, 606 C.D. 2019 (concluding "Dr. Israel also is a qualified expert on the issues in this proceeding" and that "Dr. Israel's unequivocal opinion meets PECO's required burden of production and constitutes legally competent evidence to support a finding of fact on the issue of a causal connection between RF fields from an AMI meter and adverse human health effects.").
[143] Complainant MB at 62-63.

expertise.[144] The Complainant is not an expert in the fields of physics, biophysics, bioelectromagnetics, or radio frequency bioelectromagnetics and presented no expert testimony that contradicts Dr. Davis's findings and conclusions.

The Complainant next asserts that Dr. Davis's calculations lack credibility for several additional reasons.[145] First, the Complainant states she would have introduced additional testimony on this subject, if her request for surrebuttal testimony would not have been denied. However, the inability of the Complainant to introduce the testimony of other witnesses rests solely on her own shoulders; the Complainant had ample time to identify additional witnesses and present their testimony in accordance with the procedural orders issued in this proceeding. The Complainant next asserts that Dr. Davis omitted part of a statement by the FCC, that "further research is needed" regarding the effects of RF waves on human health.[146] However, this portion of the quote is evidence of nothing. It is instead a statement about a lack of evidence that would verify the Complainant's allegations. Finally, although Dr. Davis has not published on the effects of RF fields from smart meters specifically, he has numerous peer-reviewed scientific publications on RF fields and has conducted a "substantial amount of research" on RF fields of the type produced by AMI meters.[147] His unrebutted testimony demonstrates that there is nothing unusual about the RF fields emitted from Met-Ed's meters compared to RF fields emitted by other devices.[148]

[144] Met-Ed St. 2-R at 14-15; *see also* Met-Ed Exhibit CD-5.
[145] Complainant MB at 63-64.
[146] Complainant MB at 63.
[147] Met-Ed St. 2-R at 13.
[148] Met-Ed St. 2-R at 14.

For these reasons, and the reasons more fully explained in Met-Ed's Main Brief, the Company and its witnesses rebutted each of the Complainant's allegations related to the Company's smart meters.

E. The Proposed Location Of The Smart Meter Is Reasonable And The Complainant May Pay To Have It Moved To An Alternative Location.

The Complainant further contests the proposed location of Met-Ed's smart meter at her residence as constituting unreasonable service, and requests that an alternative location be ordered by the Commission.[149] Ms. Hendin further notes that she previously discussed with Met- the possibility of relocating the meter and that the topography of the land and Met-Ed's insurance policy regarding a relocated wire precluded this option.

The record evidence demonstrates that Met-Ed was responsive to a customer's request to relocate the meter, but was unable to do so due to the customer being non-responsive. Specifically, Met-Ed witness Mr. Ahr testified that after a local designer met with Ms. Hendin to explore possible relocation the Company never heard back from her.[150] In addition, Mr. Ahr explained that customers have the option to relocate the meter at their expense and several customers have elected to pursue this option.[151] Therefore, regardless of whether constraints imposed by insurance or topography or the Complainant's failure to get back to the Company cause the discussions about possible relocation to cease, the Complainant has failed to demonstrate that the Company failed to provide reasonable service by exploring acceptable meter relocation options with her.

F. Met-Ed Has Not Violated The Complainant's Due Process Rights.

[149] Complainant MB at 64.
[150] Tr. 164.
[151] Tr. 165.

For the first time in her Main Brief, the Complainant also asserts that the installation of a smart meter at her residence would violate her due process rights under Article 1, Section 11 of the Pennsylvania Constitution and the 14th Amendment of the United States Constitution.[152]

On the merits, for there to be a deprivation of any constitutional rights, two elements must be met: (1) "the deprivation must be caused by the exercise of some right or privilege created by the state"; and (2) "the party charged with the deprivation must be a person who may fairly said to be a state actor."[153] Met-Ed is not a state actor; rather, the Company is a public utility and an electric distribution company regulated by the Commission. In *Jackson v. Metropolitan Edison Co.*, the U.S. Supreme Court found that a fellow Pennsylvania electric utility, *i.e.*, Metropolitan Edison Company, was not a state actor, even though it arguably had "monopoly power" and "provided an essential public service required to be supplied on a reasonably continuous basis."[154] Therefore, in keeping with the U.S. Supreme Court's holding in *Jackson*, PPL Electric similarly is not a state actor. Moreover, even if the Company were a state actor, the Seventh Circuit Court of Appeals found that the installation of a smart meter and the collection of smart meter data by a city-owned public utility was not a violation of constitutional rights.[155] Thus, Met-Ed cannot violate the Complainants' constitutional rights by installing the new smart meter.

G. Commission Precedent Interpreting Act 129 And Applying The Burden Of Proof Required By The Public Utility Code Is Not Unlawful.

---

[152] Complainant MB at 64-65.
[153] *Commonwealth v. Corley*, 491 A.2d 829, 832 (Pa. 1985) (emphasis added) (quoting *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 937 (1982)); *see Commonwealth v. Demor*, 942 A.2d 898, 899-900 (Pa. Super. 2008) (applying principles outlined in *Corley* to Fourth Amendment analysis); *W. Pa. Socialist Workers 1982 Campaign v. Conn. General Life Ins. Co.*, 485 A.2d 1, 5-6 (Pa. Super. 1984) ("[T]he search and seizure provisions of Article 1, section 8, have been held inapplicable to the conduct of private parties.") (citations omitted).
[154] *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351-53 (1974).
[155] *See Naperville Smart Meter Awareness v. City of Naperville*, 900 F.3d 521, 527-29 (7th Cir. 2018).

In her penultimate argument, the Complainant argues that the Commission's interpretation of Act 129 and the requirement that Ms. Hendin bear the burden of proof under Section 332 of the Public Utility Code somehow illegally supplants the treatment recommendations of her physician.[156] This argument principally relies upon the Complainant's flawed analysis of the text of Act 129,[157] and her impermissible attempt to alter the burden of proof set forth in the Public Utility Code.[158] For these previously explained reasons, the Complainant's argument should be rejected.

The Complainant additionally decries Dr. Israel's testimony in this case and asserts that he "violates the Hippocratic oath" by testifying in this proceeding.[159] This specious argument borders upon, if not falls within, the category of statements that can be result in sanctions, because it is unsupported by any record evidence, and serves not apparent purpose other than to harass and slander Met-Ed's witness. Dr. Israel, by giving his testimony or otherwise, has not caused Complainant harm. Any assertions to the contrary are specious, should be summarily rejected by the Complainant, and should be admonished by the Commission.

H. The Commission Lacks Jurisdiction To Determine The Federal Law Claims Presented For The First Time In The Complainant's Main Brief.

In her final argument, the Complainant asserts that the installation of a smart meter on her residence would violate Section 504 of the Rehabilitation Act of 1973 and the Fair Housing Act Amendments.[160]

---

[156] Complainant MB at 65-66.
[157] *See* Section IV.C.2-3. *Supra*.
[158] *See* Section III *supra*.
[159] Complainant MB at 66.
[160] Complainant MB at 66-67. Page 67 of the Complainant's Main Brief references due process rights, including prehearing discovery, evidentiary hearings and post-hearing submission, none of which appear connected to the instant argument. However, Met-Ed submits that the Complainant has been afforded due process in this proceeding; she was provided the opportunity to conduct discovery, call upon and cross examine witness, and submits post-

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.

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.

---

hearing briefs. In addition, Met-Ed has further addressed the Complainant's arguments regarding her due process rights under the Pennsylvania and United States Constitutions.

Therefore, these arguments should be denied.

I. Portions Of The Complainant's Main Brief Should Be Struck.

Simultaneous with the filing of this Reply Brief, Met-Ed has also filed a Motion to Strike Portions of the Complainant's Main Brief. Met-Ed makes reference to and incorporates the arguments contained in its Motion to Strike as a part of this Reply Brief. As explained in the Motion and throughout this brief, the Complainant attempts to present and rely upon extra-record evidence throughout her Main Brief. 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, the identified portions of the Complainant's Main Brief should be struck and cannot form the basis for any finding or conclusion of the Commission in this proceeding.[161]

[161] To the extent that any of the portions of the Main Brief identified in the Motion are not struck, Met-Ed specifically incorporates its objections and arguments against their consideration in the Motion into this Reply Brief.

V. CONCLUSION

WHEREFORE, Metropolitan Edison Company respectfully requests that the Deputy Chief Administrative Law Judge Joel H. Cheskis recommend that the Pennsylvania Public Utility Commission dismiss the Formal Complaint of Judith Hendin with prejudice.

Respectfully submitted,

Dated: April 6, 2020

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
tgiesler@firstenergycorp.com

Counsel for Metropolitan Edison Company

PUBLIC VERSION – PROTECTED INFORMATION REDACTED

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

JUDITH HENDIN	:	
	:	
v.	:	DOCKET NO. C-2018-3003324
	:	
METROPOLITAN EDISON COMPANY	:	

CERTIFICATE OF SERVICE

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

Service by electronic mail as follows:

Joanna Waldron, Esquire
Curtin & Heefner LLP
2005 S. Easton Road, Suite 100
Doylestown, PA18901
jaw@curtinheefner.com

Judith Hendin
judith@consiousbody.com

Administrative Law Judge Joel H. Cheskis
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, Pa. 17120
jcheskis@pa.gov

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
tgiesler@firstenergycorp.com