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May 27, 2020

VIA ELECTRONIC FILING

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

Re: Lydia and Alan Rieger v. Metropolitan Edison Company
Docket No. C-2018-3005877, et al.

Dear Secretary Chiavetta:

Enclosed please find the Reply of Metropolitan Edison Company to the Exceptions of Lydia and Alan Rieger. This document has been served on the Complainants as shown in the Certificate of Service.

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

Very truly yours,



Tori L. Giesler

c: Per Certificate of Service
Office of Special Assistants (via email at ra-OSA@pa.gov)

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

LYDIA AND ALAN RIEGER	:	
	:	Docket No. C-2018-3005877
v.	:	C-2018-3005887
	:	C-2018-3005889
METROPOLITAN EDISON COMPANY	:	

**REPLIES OF METROPOLITAN EDISON COMPANY TO THE
EXCEPTIONS OF LYDIA RIEGER AND ALAN RIEGER**

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TABLE OF CONTENTS

	Page
I. INTRODUCTION.....	1
II. REPLIES TO EXCEPTIONS.....	3
A. THE ALJ PROPERLY DETERMINED THAT THE COMPLAINANTS FAILED TO CARRY THEIR BURDEN OF PROOF.....	3
B. INSTALLATION OF THE SMART METER IS REQUIRED BY LAW.....	4
C. INSTALLATION OF THE SMART METER WOULD NOT VIOLATE COMPLAINANTS' CONSTITUTIONAL RIGHTS.....	7
III. CONCLUSION.....	9

I. INTRODUCTION

Metropolitan Edison Company (“Met-Ed” or the “Company”), pursuant to 52 Pa. Code § 5.535, hereby respectfully submits these Replies to the Exceptions of Lydia and Alan Rieger (“Complainants”).

An evidentiary hearing in this matter was held on March 4, 2020. The Complainants did not appear for the hearing and failed to present any evidence in support of their Complaint. On April 6, 2020, the Pennsylvania Public Utility Commission (“Commission”) issued Administrative Law Judge Jeffrey A. Watson’s (“ALJ”) Initial Decision (“ID”), which dismissed the Formal Complaint challenging the Company’s planned installation of a smart meter at the Complainants’ service locations. The ALJ correctly held that the Complainants failed to meet their burden of proof that they are entitled to relief from the Commission.

On May 17, 2020, Met-Ed was served with the Complainants’ Exceptions to the ID. The Exceptions do not address why the Complainants did not appear for the hearing. Rather, the Exceptions challenge the ID on the basis that the installation of a smart meter at their service locations is not required by law and would violate their constitutional rights.

As explained herein, the Complainant’s Exceptions are without merit and should be denied.¹ Accordingly, the Company respectfully requests that the Commission deny the Exceptions and adopt the ID without modification.

¹ The Exceptions are not individually numbered as required by 52 Pa. Code 5.533(b). However, the Exceptions raise two issues: (1) whether installation of smart meters is required by law and (2) whether installation of the smart meter would violate the Complainants’ constitutional rights. These Replies to Exceptions address each of those issues.

II. REPLIES TO EXCEPTIONS

A. **THE ALJ PROPERLY DETERMINED THAT THE COMPLAINANTS FAILED TO CARRY THEIR BURDEN OF PROOF**

The ID concludes that the Complainants failed to carry their burden of proof and dismisses the Complaints for the Complainants' failure to appear at the hearing and prosecute the Complaints. Despite having notice of the hearing, the Complainants did not participate in the hearing, nor did the Complainants present any evidence in support of their Complaints.

The Complainants had ample notice and opportunity to participate in the evidentiary hearing and chose not to do so. On December 19, 2019, the ALJ issued an Interim Order directing the parties to file a joint letter or status report advising of mutually agreeable dates in February or March 2020 to schedule a hearing. On January 6, 2020, the Complainants filed a status report which stated, "All Administrative Law Judges have an inherent conflict of interest, requiring them to support the PUC or risk termination of employment." The Complainants also stated, "We will NOT be available to attend a hearing with the ALJ as no PA ALJ can provide an unbiased decision. Neither can the PUC be 'Self Policing' in good faith." (emphasis in original). On the same day, Met-Ed filed a status report requesting that a hearing be scheduled for dates in February or March 2020.

On January 8, 2020, the Commission issued a Call-out Telephone Notice, scheduling a hearing for March 4, 2020 at 10:00 a.m. The Notice advised the parties that the ALJ would contact the parties at the scheduled hearing time and listed the phone numbers on file for the parties. The Notice stated, "*Attention: You may lose the case if you do not take part in this hearing and present facts on the issues raised.*" (emphasis in original). On January 24, 2020, Notice was sent by regular first-class mail to the address that the Complainants listed for themselves in their Formal Complaints. It was not returned as undeliverable. (ID, pp. 6-7.) The Complainants did not request

a continuance of the hearing scheduled for March 4, 2020. The ALJ convened the evidentiary hearing on March 4, 2020, at approximately 10:00 a.m. Counsel for Met-Ed was available to participate in the hearing when the ALJ called. When the ALJ called the phone number listed in the January 24, 2020 Notice for the Complainants, there was no answer. Accordingly, counsel for Met-Ed moved to dismiss the Complaints for the Complainants' failure to participate in the hearing and prosecute the Complaints.

In their Exceptions, the Complainants offered no reason for their failure to appear at the hearing. The Complainants had an opportunity to appear and be heard on the issues raised in their Complaints. Instead, the Complainants made a deliberate choice not to participate in the hearing or present any evidence in support of their Complaints. The Commission's regulations address circumstances when a party fails to appear in a proceeding. Section 5.245 of the Commission's regulations provide that, after being notified, a party who fails to appear at a scheduled hearing has waived the opportunity to participate. 52 Pa. Code § 5.245. In addition, Section 5.371 of the Commission's regulations provides for sanctions when a party fails to appear. 52 Pa. Code § 5.371. Therefore, dismissal of the Complaints with prejudice is warranted. *See, e.g. El-Ayazra v. West Penn Power Company*, Docket No. F-2015-2509292 (Opinion and Order entered June 30, 2016) (dismissing complaint with prejudice for failure to appear at hearing).

For these reasons, the Commission should adopt the ID and dismiss the Complaints with prejudice.

B. INSTALLATION OF THE SMART METER IS REQUIRED BY LAW

In their Exceptions, the Complainants dispute that Met-Ed's installation of smart meters for all of its customers is required by law. Instead, the Complainants contend that Act 129 does not require Met-Ed to install smart meters, and the Complainants can "opt out" of having the smart

meter installed. (Exceptions, pp. 2-6.) According to the Complainants, the Commission’s interpretation of Act 129 is erroneous, and the Complainants should be allowed to retain their current meter. (Exceptions, pp. 2-6.) The Complainants’ legal arguments lack merit and should be rejected.

Nothing in the Public Utility Code, the Commission’s regulations, or the Commission’s orders permits a customer to ‘opt-out’ of a smart meter installation. Under Act 129, Met-Ed has an absolute obligation to install smart meters at all of its customers’ service locations. Section 2807(f) of the Public Utility Code prescribes that electric distribution companies (“EDCs”), like Met-Ed, must file smart meter plans and “**shall** furnish smart meter technology” in any of the following situations: (1) “[u]pon request from a customer that agrees to pay the cost of the smart meter at the time of the request”; (2) “[i]n new building construction”; and (3) “[i]n accordance with a depreciation schedule not to exceed 15 years.” 66 Pa.C.S. § 2807(f)(1)-(2) (emphasis added).² In interpreting the smart meter provisions of Act 129, the Commission declared that EDCs must “deploy smart meters system-wide” because of the requirement that smart meters be deployed “in accordance with a depreciation schedule not to exceed 15 years.” *Smart Meter Procurement and Installation*, Docket No. M-2009-2092655, p. 14 (Order entered June 24, 2009) (“*Smart Meter Implementation Order*”). The Commission also “recognize[d] that deployment of smart meters on a piecemeal or individual basis could involve greater costs than a systematic

² Importantly, Pennsylvania courts have long held that the word “shall” means “must.” 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.’”).

system-wide deployment.” *Id.*, pp. 9, 14.³ Therefore, Met-Ed must install the new smart meters for every customer in its service territory, including the Complainants.

In addition, nothing in Act 129 permits a customer to “opt-out” of a smart meter installation. While prior versions of Act 129 may have contained opt-out provisions, the final version contains no such opt-out provision. The Commission has found in several other cases that Act 129 does not contain opt-out language. *See, e.g., Starr v. PECO Energy Co.*, Docket No. C-2015-2516061, p. 11 (Order Entered Sept. 1, 2016) (footnote omitted). Specifically, in *Starr*, the Commission observed that it has “rejected similar claims that the installation of smart meters is not mandatory or that an opt-out is permissible under Act 129.”⁴ Only the General Assembly can amend Act 129 to add an opt-out provision. Notably, although bills have been proposed in the General Assembly to add such an opt-out (see, e.g., House Bill 1564 of 2017-2018 Session), they have never been enacted. Thus, a customer cannot opt out of the AMI meter installation under Act 129.

Moreover, Met-Ed must comply with the relevant Commission orders directing the Company to deploy the new AMI meters. Met-Ed’s Smart Meter Deployment Plan (“SMDP”),

³ *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)).

⁴ *Id.*; *see Frompovich v. PECO Energy Co.*, 2018 Pa. PUC LEXIS 160, at *11-13 (Order entered May 3, 2018); *Povacz v. PECO Energy Co.*, 2019 Pa. PUC LEXIS 102, at *156-59 (Order entered Mar. 28, 2019), *appeal pending*, 492 C.D. 2019; *Sunstein Murphy v. PECO Energy Co.*, 2019 Pa. PUC LEXIS 159, at *157-59; *Randall & Albrecht v. PECO Energy Co.*, 2019 Pa. PUC LEXIS 160, at *145-48 (Order entered May 9, 2019), *appeal pending*, 607 C.D. 2019.

which was approved by the Commission, explicitly states that no opt-out option is available.⁵ The Commission-approved SMDP mandates 100% of its meters to be replaced with smart meters.⁶

For the forgoing reasons, the Complainants' arguments that smart meter installation is not mandatory should be rejected and their Exceptions on this issue should be denied.

C. INSTALLATION OF THE SMART METER WOULD NOT VIOLATE COMPLAINANTS' CONSTITUTIONAL RIGHTS

In their Exceptions, the Complainants raise various allegations that mandatory installation of the smart meter would violate their constitutional rights. The Complainants contend that their constitutional rights under the U.S. Constitution and Pennsylvania Constitution would be violated if the smart meter is installed because installation of the smart meter is effectively a warrantless search. (Exceptions, pp. 6-7.) The Complainants' constitutional claims are without merit and should be rejected.

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." *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).

⁵ *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).

⁶ *Id.*

Here, Met-Ed is not a state actor; rather, the Company is a public utility and an EDC regulated by the Commission. In *Jackson v. Metropolitan Edison Co.*, the U.S. Supreme Court found that the Company was not a state actor, even though it arguably had “monopoly power” and “provided an essential public service required to be supplied on a reasonably continuous basis.” *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351-53 (1974). Therefore, in keeping with the U.S. Supreme Court’s holding in *Jackson*, Met-Ed is not a state actor here. Even if the Company were a state actor, the Seventh Circuit Court of Appeals found that the collection of smart meter data by a city-owned public utility was a reasonable warrantless search. *See Naperville Smart Meter Awareness v. City of Naperville*, 900 F.3d 521, 527-29 (7th Cir. 2018). Thus, Met-Ed cannot violate the Complainants’ constitutional rights by installing the smart meter.

For these reasons, the Commission should reject the Complainants’ constitutional arguments and deny their Exceptions on this issue.

III. CONCLUSION

WHEREFORE, for all the foregoing reasons, as well as those explained in the Initial Decision of Administrative Law Judge Jeffrey A. Watson, the Company respectfully requests that the Pennsylvania Public Utility Commission deny the Exceptions filed by Lydia and Alan Rieger and adopt the Initial Decision without modification.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the Reply of Metropolitan Edison Company to the Exceptions of Lydia and Alan Rieger 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:

Lydia and Alan Rieger
askalan4homes@gmail.com

Administrative Law Judge Jeffrey A. Watson
jeffwatson@pa.gov

Dated: May 27, 2020



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