

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

July 10, 2020

VIA ELECTRONIC FILING

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

Re: Deborah Engisch-Platt and Kim Platt v. Metropolitan Edison Company
Docket No. C-2019-3013745

Dear Secretary Chiavetta:

Enclosed please find the Motion of Metropolitan Edison Company for Summary Judgement with regard to the above-captioned matter. 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

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Enclosures

c: As Per Certificate of Service

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Deborah Engisch-Platt and Kim Platt	:	
	:	
Complainants,	:	
	:	
v.	:	Docket No. C-2019-3013745
	:	
Metropolitan Edison Company	:	
	:	
Respondent.	:	

NOTICE TO PLEAD

YOU ARE HEREBY ADVISED THAT, PURSUANT TO 52 PA. CODE § 5.102(b), YOU MAY FILE AN ANSWER TO THE ENCLOSED MOTION WITHIN TWENTY (20) DAYS AFTER THE DATE OF SERVICE. YOUR ANSWER SHOULD BE FILED WITH THE SECRETARY OF THE PENNSYLVANIA PUBLIC UTILITY COMMISSION, P.O. BOX 3265, HARRISBURG, PA 17105-3265. A COPY SHOULD ALSO BE SERVED ON THE UNDERSIGNED COUNSEL.



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

Date: July 10, 2020

Attorneys for Metropolitan Edison Company

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Deborah Engisch-Platt and Kim Platt	:	
	:	
Complainants,	:	
	:	
v.	:	Docket No. C-2019-3013745
	:	
Metropolitan Edison Company	:	
	:	
Respondent.	:	

**MOTION OF METROPOLITAN EDISON COMPANY FOR
SUMMARY JUDGMENT**

TO DEPUTY CHIEF ADMINISTRATIVE LAW JUDGE JOEL H. CHESKIS:

AND NOW, comes Metropolitan Edison Company (“Met-Ed” or the “Company”) and files this Motion for Summary Judgment pursuant to Sections 5.102 and 5.103 of the Pennsylvania Public Utility Commission’s (“Commission”) regulations, 52 Pa. Code §§ 5.102-5.103, and Rules 1035.1 through 1035.5 of the Pennsylvania Rules of Civil Procedure, Pa. R.C.P. Nos. 1035.1-1035.5, and respectfully requests that the above-captioned Formal Complaint be summarily dismissed in its entirety and with prejudice.

As explained herein, Deborah Engisch-Platt and Kim Platt (“Complainants”) have the burden of proof in this proceeding to demonstrate that the installation of Met-Ed’s smart meter would violate the Public Utility Code or a Commission regulation or order. However, the Complainants never served any written direct testimony in support of their allegations as required by the Scheduling Order dated February 11, 2020. Therefore, the Complainants have failed to present any evidence as part of their direct case. Moreover, the Complainants requested that there be no evidentiary hearing and that the ALJ adjudicate the Complaint based solely on

the parties' written testimony. As a result, no opportunity exists for the Complainants to present any evidence in support of their direct case. Thus, there are no disputed issues of material fact in this proceeding, and the Company is entitled to judgment as a matter of law.

For these reasons, and as explained in more detail below, Met-Ed respectfully requests that Deputy Chief Administrative Law Judge Joel H. Cheskis (the "ALJ") grant this Motion for Summary Judgment and summarily dismiss the instant Complaint in its entirety and with prejudice.

In support thereof, Met-Ed states as follows:

I. BACKGROUND AND PROCEDURAL HISTORY

1. On October 23, 2019, Met-Ed was served with the Formal Complaint filed by the Complainants, which challenged the Company's planned installation of a smart meter at the Complainants' property.

2. On November 12, 2019, Met-Ed filed an Answer, New Matter, and Preliminary Objections to the Complaint.

3. On December 5, 2019, the Complainants filed an Answer to Met-Ed's New Matter.

4. On December 16, 2019, the Complainants filed an Answer to Met-Ed's Preliminary Objections.

5. On December 24, 2019, a Notice was issued assigning the ALJ to rule on Met-Ed's Preliminary Objections.

6. On January 8, 2020, the ALJ issued an Order denying Met-Ed's Preliminary Objections.

7. Also on January 8, 2020, a Notice was issued scheduling a telephonic evidentiary hearing before the ALJ on February 14, 2020.

8. On January 10, 2020, a Prehearing Order was issued, which set forth certain procedural rules and requirements for the proceeding.

9. On January 21, 2020, the Complainants filed a request to have the entire hearing conducted through written testimony.

10. On February 3, 2020, the ALJ emailed the parties explaining that he had received the Complainants' request for the entire hearing to be conducted through written testimony and proposing a schedule for the exchange of written testimony. Under that proposed schedule, the Complainants' direct testimony would be due by April 1, 2020, Met-Ed's rebuttal testimony would be due by June 1, 2020, and the Complainants' surrebuttal testimony would be due by August 3, 2020.

11. Later on February 3, 2020, Met-Ed responded to the ALJ's email and stated that it did not object to the ALJ's proposal, with the caveat that if any experts submitted written testimony on behalf of the Complainants, the Company would like a brief hearing to be held so that Met-Ed could cross-examine those experts.

12. On February 6, 2020, the Complainants emailed the ALJ and Met-Ed that they were agreeable to the proposal.

13. Also on February 6, 2020, the Company served copies of the hearing exhibits it intended to use at the February 14, 2020 hearing.

14. On February 7, 2020, the ALJ responded to the Complainants' February 6, 2020 email, informing the parties that he would cancel the hearing and issue a scheduling order adopting this scheduling proposal. The ALJ also reiterated that the Complainants' direct testimony would be due by April 1, 2020.

15. On or about March 16, 2020, the Complainants filed a Motion to stay the hearing and all proceedings.

16. The Complainants never served any direct testimony.

17. On or about March 31, 2020, the Complainants submitted a “Brief of Complainant,” which was received by Met-Ed on April 14, 2020.

18. On June 1, 2020, Met-Ed filed a letter explaining that the Company was not serving rebuttal testimony, due to the Complainants’ failure to serve any direct testimony.

19. Met-Ed herein files this Motion for Summary Judgment and respectfully requests that the Formal Complaint be dismissed in its entirety and with prejudice because the Complainants failed to serve any direct testimony in support of their claims and, therefore, will be unable to sustain their burden of proof at the evidentiary hearing.

II. LEGAL STANDARDS

A. BURDEN OF PROOF

20. Under Section 332(a) of the Public Utility Code, the Complainants have the burden of proof in this proceeding.¹ The first step in carrying the burden of proof is establishing a *prima facie* case that Met-Ed violated the Public Utility Code, the Commission’s regulations, or a Commission order. Only if the Complainant establishes a *prima facie* case does it become the responsibility of the Company to provide rebuttal evidence.² To establish a *prima facie* case, more is required than a mere trace of evidence or a suspicion of the existence of a fact sought to

¹ 66 Pa.C.S. § 332(a); *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm'n*, 578 A.2d 600, 602 (Pa. Cmwlth. 1990), *appeal denied*, 602 A.2d 863 (Pa. 1992).

² *Waldron v. Phila. Elec. Co.*, 54 Pa. P.U.C. 98 (Order entered Mar. 14, 1980).

be established.³ Mere bald assertions, personal opinions or perceptions, when not substantiated by facts, do not constitute evidence.⁴

21. Although the factual burden may shift during the course of a proceeding, the Complainants always have the overarching burden of proof in the proceeding. It is clearly established that the Complainants' "burden of proof before administrative tribunals as well as before most civil proceedings is satisfied by establishing a preponderance of the evidence."⁵ A preponderance of evidence is demonstrated where the evidence presented is more convincing, even by the smallest degree, than the evidence presented by the opposing party.⁶

22. For the Commission to sustain a formal complaint, the Complainants 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."⁷ Section 1501 of the Public Utility Code states, in relevant part, that "every public utility shall furnish and maintain adequate, efficient, safe and reasonable service and facilities."⁸ As part of formal complaint proceedings, the Commission evaluates the reasonableness of public utility service and facilities pursuant to Section 1501. 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.⁹

³ *Lyft, Inc. v. Pa. Pub. Util. Comm'n*, 145 A.3d 1235, 1240 (Pa. Cmwlth. 2016) (citing *Norfolk and Western Ry. v. Pa. Pub. Util. Comm'n*, 413 A.2d 1037 (Pa. 1980)).

⁴ *Pa. Bureau of Corrections v. City of Pittsburgh*, 532 A.2d 12 (Pa. 1987).

⁵ *Lansberry*, 578 A.2d at 602.

⁶ See *Brown v. Commonwealth*, 940 A.2d 610, 614 n.14 (Pa. Cmwlth. 2008); *Pa. Pub. Util. Comm'n v. HIKO Energy, LLC*, 2015 Pa. PUC LEXIS 364 (I.D. entered Aug. 21, 2015) (citing *Lansberry*, 578 A.2d at 602).

⁷ 66 Pa.C.S. § 701.

⁸ 66 Pa.C.S. § 1501.

⁹ *Frompovich v. PECO Energy Co.*, 2018 Pa. PUC LEXIS 160, at *86-88 (Order entered May 3, 2018); *Kreider v. PECO Energy Co.*, Docket No. C-2015-2469655 (Order on Reconsideration entered Jan. 28, 2016).

23. In addition, a person does not sustain his or her burden of proof in an electric and magnetic field exposure case when the record evidence, “taken as a whole, leads to the ultimate finding and conclusion that the scientific studies at present are inconclusive.”¹⁰ Rather, the person must demonstrate by a preponderance of the evidence that such exposure actually causes adverse health effects.¹¹ Specifically, in smart meter-related matters, the Commission has held that “[t]he Complainant will have the burden of proof during the proceeding to demonstrate, by a preponderance of the evidence, that [the utility] is responsible or accountable for the problem described in the Complaint.”¹²

B. STANDARD FOR SUMMARY JUDGMENT

24. Section 5.102 of the Commission’s regulations provides the Commission’s standard of review for a request for summary judgment:

(1) *Standard for grant or denial on all counts.* The presiding officer will grant or deny a motion for judgment on the pleadings or a motion for summary judgment, as appropriate. The judgment sought will be rendered if the applicable pleadings, depositions, answers to interrogatories and admissions, together with affidavits, if any, show that there is no genuine issue as to a material fact and that the moving party is entitled to a judgment as a matter of law.

(2) *Standard for grant or denial in part.* The presiding officer may grant a partial summary judgment if the pleadings, depositions, answers to interrogatories and admissions, together with affidavits, if any, show that there is no genuine issue as to a material fact and that the moving party is entitled to a judgment as a matter of law on one or more but not all outstanding issues.

52 Pa. Code § 5.102(d)(1)-(2).

¹⁰ *Letter of Notification of Phila. Elec. Co. Relative to the Reconstructing and Rebuilding of the Existing 138 kV Line to Operate as the Woodbourne-Heaton 230 kV Line in Montgomery and Bucks Cntys.*, 1992 Pa. PUC LEXIS 160, at *210-11 (June 29, 1992) (Initial Decision) (“*Woodbourne-Heaton*”).

¹¹ *Id.* at *211.

¹² *Kreider v. PECO Energy Co.*, Docket No. P-2015-2495064, p. 18 (Order entered Sept. 3, 2015).

25. Similarly, Rule 1035.2 of the Pennsylvania Rules of Civil Procedure sets forth the following:

After the relevant pleadings are closed, but within such time as not to unreasonably delay trial, any party may move for summary judgment in whole or in part as a matter of law

(1) whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report, or

(2) if, after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury.

Pa. R.C.P. No. 1035.2.

26. The Commission is granted discretion to dismiss any complaint without a hearing if, in its opinion, a hearing is not necessary in the public interest. 66 Pa.C.S. § 703(b); 52 Pa. Code § 5.21(d). A hearing is necessary only to resolve disputed questions of fact, and when the question presented is one of law, the Commission need not hold a hearing. *Lehigh Valley Power Comm. v. Pa. Pub. Util. Comm'n*, 563 A.2d 548 (Pa. Cmwlth. 1989); *Edan Transp. Corp. v. Pa. Pub. Util. Comm'n*, 623 A.2d 6 (Pa. Cmwlth. 1993).

III. ARGUMENT

A. THE FORMAL COMPLAINT SHOULD BE DISMISSED BECAUSE THE COMPLAINANTS NEVER SERVED ANY DIRECT TESTIMONY AS REQUIRED BY THE SCHEDULING ORDER

27. Met-Ed incorporates by reference Paragraphs 1 through 26 as if fully set forth herein.

28. Met-Ed respectfully requests that the Formal Complaint be dismissed in its entirety and with prejudice due to the Complainants' failure to serve any direct testimony in support of their claims.

29. Per the Complainants' request, the proceeding was converted such that it would be conducted entirely through the exchange of written testimony.

30. The Scheduling Order dated February 11, 2020 memorialized the litigation schedule agreed to by the Complainants.

31. Under that schedule, the Complainants were required to serve their written direct testimony by April 1, 2020, after which Met-Ed would serve its written rebuttal testimony on June 1, 2020. Then, the Complainants would have an opportunity to serve written surrebuttal testimony by August 3, 2020. No evidentiary hearing would be held, unless the Complainants presented expert testimony.

32. The Complainants never served any written direct testimony.

33. As the parties with the burden of proof,¹³ the Complainants were required to establish a *prima facie* case that the Company's installation of a smart meter would violate the Public Utility Code or a Commission regulation or order.

34. Nothing in the record establishes that *prima facie* case. In fact, the Complainants failed to present any evidence at all. Therefore, Met-Ed had no obligation to present testimony in rebuttal.¹⁴

35. Under Section 5.102(d)(1) of the Commission's regulations, summary judgment will be granted if there is no genuine issue as to a material fact and that the moving party is entitled to a judgment as a matter of law. 52 Pa. Code § 5.102(d)(1).

36. Due to the Complainants' failure to present any evidence in support of their claims, there are no material facts in dispute.

¹³ See Section II.A., *supra*.

¹⁴ See note 2, *supra*.

37. In addition, Rule 1035.2 of the Pennsylvania Rules of Civil Procedure¹⁵ provides that a party can move for summary judgment “if, after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury.” Pa. R.C.P. No. 1035.2.

38. Here, the Complainants, who have the burden of proof, “failed to produce evidence of facts essential to the cause of action.” *Id.* Indeed, the Complainants failed to present any evidence in this proceeding. Therefore, the Complainants never established a *prima facie* case.

39. Met-Ed notes that the Complainants filed a “Brief of Complainant” and a Motion to Stay before the deadline for their written direct testimony. However, neither of these filings can cure their failure to serve any written direct testimony by the April 1, 2020 deadline.

40. *First*, the Complainants’ Brief cannot be considered a substitute for the Complainants’ written testimony and exhibits. Briefs are properly filed after the evidentiary hearing¹⁶ and provide an opportunity for parties to make their written arguments based on the evidence admitted into the record. Briefs are not used to introduce evidence into the evidentiary record. In fact, the Complainants’ Brief is not in the format required for written testimony, which should read like a transcript of a hearing in a question-and-answer format.

41. Moreover, it is completely unclear which of the Complainants or their witnesses is: (1) making each of the factual averments set forth in the Brief; and (2) sponsoring each of the

¹⁵ While the Commission is “not bound by the Rules of Civil Procedure,” the Commission “can and ha[s] found reference to them helpful for guidance.” *AT&T Commc’ns of Pa., LLC v. Armstrong Tel. Co.*, 2009 Pa. PUC LEXIS 1752, at *18 (Order entered July 29, 2009) (citations omitted).

¹⁶ *See* 52 Pa. Code § 5.502(f) (setting forth the deadlines for briefs “after the date of service of notice of the filing of the transcript”).

exhibits referenced in the Brief. Therefore, setting aside other evidentiary issues such as hearsay, all of these averments and exhibits lack the basic requirements of foundation and authentication to be admitted into the record. Further, without clear indications as to who is making these averments or sponsoring these exhibits, it makes it exceedingly difficult for Met-Ed to develop responsive testimony.

42. In addition, the Complainants do not even provide copies of the exhibits that are referenced in their Brief. Specifically, they reference five exhibits (*i.e.*, Exhibits A through E), none of which are attached to their Brief. (Complainants' Brief, p. 1.) The Complainant also state that all of these exhibits will be "supplemented." (Complainants' Brief, p. 1.) However, the deadline for serving their written direct testimony and exhibits was April 1, 2020. Therefore, they would be unable to supplement their exhibits after that date. Thus, by failing to provide any of their exhibits, including the five referenced in their Brief, the Complainants waived their opportunity to introduce any exhibits in support of their direct case.

43. *Second*, the Complainants' Motion to Stay cannot excuse their failure to serve any written direct testimony and exhibits.¹⁷ In their Motion to Stay, the Complainants contend that the hearing and all proceedings should be stayed until one of their purported expert witnesses, William Bathgate, feels that he is out of danger of being exposed to the coronavirus ("COVID-19"). (Motion to Stay, p. 1.) According to the Complainants, Mr. Bathgate was unable to perform measurements on the "radiation and conductive emissions from [the Complainants'] neighbors['] smart meters" because he was worried about being exposed to COVID-19 at the Complainants' property. (Motion to Stay, p. 1.)

¹⁷ Concurrent with the filing of this Motion for Summary Judgment, Met-Ed is filing its Answer to the Complainants' Motion to Stay. Met-Ed's arguments set forth in its Answer to the Motion to Stay are incorporated herein by reference.

44. As explained in Met-Ed's Answer to the Motion to Stay, the Complainants' arguments in that Motion should be rejected. However, even assuming *arguendo* that Mr. Bathgate was unable to perform these measurements due to COVID-19, it does not excuse the Complainants from submitting any written direct testimony and exhibits by the April 1, 2020 deadline.

45. Nothing in the Motion to Stay or the Complainants' Brief states that the Complainants had any issue preventing them from preparing their own written direct testimony and exhibits. Therefore, even if Mr. Bathgate could not perform the measurements referenced in the Motion to Stay, the Complainants were still able to prepare their written direct testimony and exhibits.

46. Moreover, without those measurements, Mr. Bathgate still could have prepared testimony on the alleged issues with smart meters. In fact, as noted in Met-Ed's Answer to the Motion to Stay, Mr. Bathgate presented testimony in a similar proceeding without presenting such measurements.¹⁸ Importantly, the hearing in that case took place on March 9, 2018, well before the COVID-19 outbreak.¹⁹ If Mr. Bathgate did not need to conduct those measurements before the COVID-19 outbreak, there is no reason why he would need to perform those measurements during the COVID-19 outbreak.

47. *Third*, in their Brief, the Complainants state that "Jenna Platt's physician/expert witness has been unavailable for appointments due to" the COVID-19 situation. (*See* Complainants' Brief, p. 2.) No further details, including this witness's name, are provided by the Complainants. The Complainants also never referenced this second expert witness or that

¹⁸ *See Schmukler v. PPL Electric Utilities Corp.*, Docket No. C-2017-2621285 (Order entered July 23, 2019) ("*Schmukler*"), *appeal pending*, *Schmukler v. Pa. PUC*, Docket No. 1102 C.D. 2019.

¹⁹ *See Schmukler*, p. 5.

witness's alleged unavailability in their Motion to Stay. As such, this unsubstantiated claim that another witness was supposedly unavailable cannot excuse the Complainants' failure to serve any written direct testimony and exhibits.

48. In sum, the Complainants were able to and should have served their own written direct testimony and exhibits and Mr. Bathgate's written direct testimony and exhibits. By failing to do so, the Complainants never established a *prima facie* case, and their Formal Complaint should be dismissed accordingly.

49. For these reasons, there are no material facts in dispute, and Met-Ed is entitled to judgment as a matter of law. Thus, the Company respectfully requests that the ALJ grant the instant Motion for Summary Judgment and summarily dismiss the Formal Complaint in its entirety and with prejudice.

IV. CONCLUSION

WHEREFORE, Metropolitan Edison Company respectfully requests that Deputy Chief Administrative Law Judge Joel H. Cheskis enter the proposed Order attached as **Appendix A** granting the Motion for Summary Judgment and dismissing the Formal Complaint with prejudice, as explained above.

Respectfully submitted,



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

Date: July 10, 2020

Attorneys for Metropolitan Edison Company

PROPOSED ORDER GRANTING
MOTION FOR SUMMARY JUDGMENT

THEREFORE,

IT IS ORDERED:

1. That the Motion for Summary Judgment filed by Metropolitan Edison Company in the above-captioned case at Docket No. C-2019-3013745 is granted.
2. That the Formal Complaint filed by Deborah Engisch-Platt and Kim Platt at Docket No. C-2019-3013745 is dismissed in its entirety with prejudice.
3. That the proceeding at Docket No. C-2019-3013745 be marked closed.

Date: July ____, 2020

Joel H. Cheskis
Deputy Chief Administrative Law
Judge

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Deborah Engisch-Platt and Kim Platt	:
	:
Complainants,	:
	:
v.	: Docket No. C-2019-3013745
	:
Metropolitan Edison Company	:
	:
Respondent.	:

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the Motion of Metropolitan Edison Company for Summary Judgement 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:

Deborah Engisch-Platt and Kim Platt
riversong3@comcast.net

Administrative Law Judge Joel H. Cheskis
jcheskis@pa.gov

Dated: July 10, 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

Counsel for Metropolitan Edison Company