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August 20, 2020

VIA ELECTRONIC FILING

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor North
P.O. Box 3265
Harrisburg, PA 17105-3265

Re: Alan Andrews v. PPL Electric Utilities Corporation
Docket No. C-2019-3008770

Dear Secretary Chiavetta:

Enclosed for filing please find the Replies of PPL Electric Utilities Corporation to the Exceptions of Alan Andrews in the above-referenced proceeding. Copies will be provided as indicated on the Certificate of Service.

Respectfully submitted,

Devin Ryan

DTR/jl
Enclosures

cc: Honorable Elizabeth Barnes
Certificate of Service
Office of Special Assistants (*ra-OSA@pa.gov*)

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served upon the following persons, in the manner indicated, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant).

VIA E-MAIL AND FIRST CLASS MAIL

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Date: August 20, 2020

Devin T. Ryan

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Alan Andrews,	:	
	:	
Complainant,	:	
	:	
v.	:	Docket No. C-2019-3008770
	:	
PPL Electric Utilities Corporation,	:	
	:	
Respondent.	:	

REPLIES OF PPL ELECTRIC UTILITIES CORPORATION TO THE EXCEPTIONS OF ALAN ANDREWS

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Date: August 20, 2020

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I. INTRODUCTION

PPL Electric Utilities Corporation ("PPL Electric" or the "Company"), pursuant to 52 Pa. Code § 5.535, hereby respectfully submits these Replies to the Exceptions of Alan Andrews ("Complainant"). In the Initial Decision ("ID"), Administrative Law Judge Elizabeth H. Barnes (the "ALJ") dismissed the Complainant's Formal Complaint challenging the Company's planned installation of a new advanced metering infrastructure ("AMI") meter at the Complainant's property. The ALJ correctly held that the Complainant failed to prove by a preponderance of evidence that the installation of the AMI meter would violate 66 Pa. C.S. § 1501. The ALJ also properly determined that there is no provision to "opt-out" of a smart meter installation under Pennsylvania law.

On August 10, 2020, the Complainant filed Exceptions to the ID.[1]

As explained herein, the Complainant's Exceptions are without merit and should be denied. Accordingly, the Company respectfully requests that the Pennsylvania Public Utility Commission ("Commission") deny the Complainant's Exceptions and adopt the ID without modification.[2]

II. REPLIES TO EXCEPTIONS

A. REPLY TO EXCEPTION NO. 1 – THE COMPLAINANT WAS AFFORDED MORE THAN DUE PROCESS IN THIS PROCEEDING

The Complaint avers in his Exceptions that the ALJ denied him due process because she failed to issue a briefing schedule and did not "ask [him] about Brief filing." (Exceptions, p. 2.) According to the Complainant, the dismissal of his Complaint without briefing violates his

[1] PPL Electric notes that the Complainant received an extension until August 10, 2020, to file his Exceptions to ID. *See* Secretarial Letter dated May 12, 2020, Docket No. C-2019-3008770. Correspondingly, the Secretarial Letter extended the due date for PPL Electric's Replies to Exceptions until August 20, 2020.

[2] Some of the Complainant's Exceptions overlap, while others contain multiple arguments within the same Exception. Accordingly, PPL Electric responds to the Complainant's Exceptions by subject matter rather than individually by the number of the Exception.

constitutional right to due process. (Exceptions, p. 2.) The Complainant's argument is completely without merit.

The lack of briefs being submitted by the parties did not deny the Complainant due process. The Commission, as an administrative body, is bound by the due process provisions of constitutional law and by the principles of common fairness." *Hess v. Pa. PUC*, 107 A.3d 246, 266 (Pa. Cmwlth. 2014) (citations omitted). "Among the requirements of due process are notice and an opportunity to be heard on the issues, to be apprised of the evidence submitted, to cross-examine witnesses, to inspect documents, and to offer evidence in explanation or rebuttal." *Id.* (citations omitted).

In this case, the Complainant had a full and fair opportunity to present his case and make his arguments at the evidentiary hearing. Indeed, the Complainant had the opportunity to present his testimony and evidence. Moreover, the Complainant was allowed to give a closing argument to present his legal arguments, including that installing the AMI meter would violate 66 Pa. C.S. § 1501 and that Act 129 does not mandate the installation of smart meters for all customers. The fact that no briefs were submitted is irrelevant. The Complainant obviously had the opportunity to present all of his legal arguments orally at the evidentiary hearing. Therefore, the Complainant undoubtedly was afforded due process in this proceeding.

Further, the ALJ's decision not to issue a briefing schedule was entirely within her discretion. Section 5.483(a) of the Commission's regulations explicitly states that the presiding officer has the authority to, among other things, "regulate the course of the proceeding." 52 Pa. Code § 5.483(a). And even if the Complainant was harmed by the lack of briefing, which he was not, his concern is moot. Through the filing of his Exceptions, the Complainant has been able to present his written arguments in support of his challenge to the Company's AMI meter installation.

For these reasons, the Commission should reject the Complainant's Exception No. 1.

B. REPLIES TO EXCEPTIONS NOS. 2, 4, AND 5 – THE ALJ PROPERLY FOUND THAT THE COMPLAINANT FAILED TO SUSTAIN HIS BURDEN OF PROOF THAT INSTALLING THE NEW AMI METER WOULD VIOLATE THE PUBLIC UTILITY CODE

The Complainant disputes the ALJ's finding that he failed to meet his burden of proof that installing the new AMI meter would violate Section 1501 of the Public Utility Code. (Exceptions, pp. 2-3.) According to the Complainant, the ALJ "erred in not giving credence to [his] direct testimony and information provided in [his] other filings" that he has experienced issues sleeping at his "other home which has a smart meter installed." (Exceptions, p. 2.) The Complainant also claims that his wife "has heart issues that would be exacerbated by the installation of a smart meter" and that his pet parrot could be affected by the meter as well. (Exceptions, p. 2.) Furthermore, the Complainant argues that the unrebutted expert testimony of Dr. Christopher Davis and Dr. Mark Israel should be disregarded. (Exceptions, pp. 11-12.) He alleges that Dr. Davis's testimony is not credible and that the ALJ erred in accepting Dr. Davis as an expert in Biophysics. (Exceptions, p. 11.) Regarding Dr. Israel, the Complainant argues that his expert testimony is irrelevant because, among other reasons, he never saw the Complainant or his wife before the hearing. (Exceptions, p. 11.) As explained herein, the Complainant's Exceptions are without merit and should be denied.

1. The Complainant's Allegations about the Expert Opinions and Qualifications of Dr. Christopher Davis and Dr. Mark Israel Are Completely Without Merit and Should Be Rejected

The Complainant's characterizations of the expert opinions and qualifications of Dr. Christopher Davis and Dr. Mark Israel completely lack merit. Both of these experts have extensive professional qualifications, they are highly regarded in their respective fields (*see* PPL St. No. 1, pp. 1-5; PPL St. No. 2, pp. 1-7), and they have been recognized as qualified experts in federal and

state court proceedings and in many proceedings before this Commission.[3] The fact that the experts have had their opinions relied on by the Commission in multiple proceedings does not indicate any type of bias or lack of credibility, as alleged by the Complainant. (*See* Exceptions, p. 11.) To the contrary, it demonstrates that their expert opinions are reliable and demonstrate that there is no reliable medical or scientific basis to conclude that the Company's new AMI meters cause, contribute to, or exacerbate adverse health effects.

Further, uncontroverted record evidence demonstrates that both Dr. Davis and Dr. Israel have more than sufficient qualifications, education, and experience to offer expert opinions in their respective fields of expertise. (S*ee* PPL St. No. 1, pp. 1-5; PPL St. No. 2, pp. 1-7.) Therefore, although the Complainant objects to Dr. Davis being accepted as an expert in the field of biophysics, that objection was correctly overruled. (Tr. 38-39.) Dr. Davis testified that he has "degrees in natural science and physics," and his "expertise in biophysics comes from over 40 years of research . . . ." (Tr. 41.) Based on Dr. Davis's scientific education, experience, and knowledge in the fields of physics, chemistry, and biology, and their intersection (*i.e.*, biophysics), the ALJ correctly recognized Dr. Davis as an expert in those fields.

The Complainant never objected at the hearing to Dr. Israel being certified as an expert in his fields of expertise. (*See* Tr. 56.) Thus, he waived any objection to Dr. Israel's being considered as an expert in the fields for which he was accepted and cannot raise that objection for the first time in his Exceptions.

[3] *See, e.g., Newman v. Motorola, Inc.*, 218 F. Supp.2d 769 (D. Md. 2002), *affirmed*, 78 Fed. Appx. 292 (4th Cir. 2003); *Lakey v. Puget Sound Energy, Inc.*, 296 P.3d 860 (Wash. 2013); *Application of PPL Electric Utilities Corporation Filed Pursuant to 52 Pa. Code Chapter 57, Subchapter G, for Approval of the Siting and Construction of the Pennsylvania Portion of The Proposed Susquehanna-Roseland 500 kV Transmission Line in Portions of Lackawanna, Luzerne, Monroe, Pike and Wayne Counties, Pennsylvania*, Docket Nos. A-2009-2082652, *et al.* (Order entered Feb. 12, 2010); *Frompovich v. PECO Energy Co.*, Docket No. C-2015-2474602 (Order entered May 3, 2018).

Moreover, the Complainant argues that Dr. Davis has been testifying on this subject for several decades and specifically points to an AMI meter case filed with the Commission in 2015. (*See* Exceptions, p. 11) (citing *Kreider v. PECO Energy Co.* case where Dr. Davis testified). The Commission's records show that Dr. Davis testified in that case on March 7, 2016,[4] and this is consistent with his testimony about his involvement in these cases. More importantly, the Complainant's argument does not provide any credible basis for ignoring Dr. Davis's expert testimony, which has been accepted and relied on by the Commission in numerous AMI meter cases. Thus, the ALJ properly relied on the expert opinions offered by Dr. Davis and Dr. Israel in rendering her ID.

2. The ALJ Correctly Determined that There Is No Reliable Medical or Scientific Basis to Conclude that the New AMI Meter Will Cause, Contribute to, or Exacerbate Any Adverse Health Effects

The ALJ properly held that there is no reliable medical or scientific basis to conclude that the new AMI meter will cause, contribute to, or exacerbate any adverse health effects. (ID at 10-14.) As the ALJ found, "[t]here is no reliable medical basis to conclude that RF fields from the AMI meter being used by PPL Electric will cause or contribute to the development of illness or disease." (ID at 12.) Furthermore, the ALJ held that "[t]here is no reliable medical basis to conclude that RF fields from the AMI meter being used by PPL Electric would cause, contribute to, or exacerbate any of the symptoms claimed by the Complainant[], or any other adverse health effects." (ID at 12-13.)

In reaching that determination, the ALJ relied on PPL Electric's credible and reliable expert testimony refuting the Complainant's bald assertions that the AMI meter could cause or contribute to adverse health effects. (PPL St. No. 1, pp. 5-16; PPL Exhibits CD-1 through CD-5; PPL St. No.

[4] *See Kreider v. PECO Energy Co.*, Docket No. C-2015-2469655, p. (Order entered May 23, 2017) (noting that the evidentiary hearing was "held on March 7, 2016, as scheduled").

2, pp. 7-18; PPL Exhibits MI-1 through MI-3.) First, Dr. Davis testified that the Federal Communications Commission ("FCC") has determined safe public exposure levels for radio frequency ("RF") fields from devices that transmit RF signals, such as the AMI meters. (PPL St. No. 1, p. 9.) The FCC safe public exposure limits are based on evaluations of the body of scientific research on RF fields and were adopted in consultation with other federal agencies, including the Food and Drug Administration ("FDA") and the Environmental Protection Agency ("EPA"). (PPL St. No. 1, p. 9.) The FCC continues to coordinate with the agencies and to consider whether new scientific research shows any adverse effects from RF fields. (PPL St. No. 1, pp. 9-11.) In fact, the FCC recently reviewed its current RF exposure limits and the scientific research related thereto in response to a Notice of Inquiry issued by the FCC. "After reviewing the extensive record submitted in response to that inquiry" by over 564 commenters, the FCC found "no appropriate basis for and thus decline[d] to propose amendments to [its] existing limits at this time." *In the Matter of Proposed Changes in the Comm'n's Rules Regarding Human Exposure to Radiofrequency Electromagnetic Fields,* 2019 FCC LEXIS 3622, at *2, 483 n.1 (F.C.C. Dec. 4, 2019).

Based on the engineering specifications for the Landis + Gyr AMI meter being deployed by the Company, Dr. Davis calculated that the levels of RF fields from the AMI meters are **98,000 times lower** than the RF exposure safety limits established by the FCC. (PPL St. No. 1, p. 13; PPL Exhibit CD-2.) As a result, Dr. Davis found that "the RF field levels from the AMI meters being used by PPL Electric more than comply with the applicable FCC RF exposure limit." (PPL St. No. 1, p. 13.) Moreover, the RF signals from the AMI meter are of very short duration and will occur for only a total of 84 seconds over a 24-hour period.[5] (PPL St. No. 1, p. 7.)

[5] Dr. Davis never testified that the AMI meters transmit signals up to "26,000 transmissions daily," as alleged by the Complainant. (Exceptions, p. 11.)

Dr. Davis also testified that there are many sources of RF signals in the everyday environment and the RF fields from the AMI meter are much lower than from other typical sources. (PPL St. No. 1, p. 14.) For example, RF fields from using cell phones can be over 260,000 times higher than the RF fields from the AMI meter, and RF exposures from microwave ovens can be over 820,000 times higher. (PPL St. No. 1, p. 15.) Even 30 feet away from a person using a cell phone, the RF fields are 3 times higher than from the AMI meter. (PPL St. No. 1, p. 15.)

Furthermore, the existing background levels of RF fields at the Complainant's residence are many times higher than the fields from the AMI meter. (PPL St. No. 1, p. 15.) Dr. Davis testified that there are 9 television broadcast towers within a 50-mile radius of the Complainant's location. (PPL St. No. 1, p. 15.) Based on the locations of each tower and their RF power outputs, the RF fields at three meters from the AMI meter being used by PPL Electric are 16.3 times smaller than the background RF exposure at the Complainant's residence. (PPL St. No. 1, p. 15; PPL Exhibit CD-5.) Thus, considering the AMI meter's RF fields are substantially lower than the FCC standard and many everyday sources, there is no reliable scientific basis to conclude that the very low levels of RF fields from the AMI meters being deployed by the Company can or will cause any adverse thermal or non-thermal biological effects in people. (*See* ID at 12-13; PPL St. No. 1, pp. 1-16.) Notably, Dr. Davis's expert testimony on these points was not contradicted by any other expert testimony.

Second, Dr. Israel – the only medical expert to present testimony in this case – evaluated the scientific research on RF fields and adverse health effects. (PPL St. No. 2, pp. 7-8.) He testified that he has been systematically examining this research over the past several decades and that many hundreds of studies have been published. (PPL St. No. 2, p. 6.) Dr. Israel stated that the three groups of controlled laboratory studies on animals "are particularly informative because they

address fundamental biological functions that are very sensitive to any disruption: genetics, reproduction, and growth and development."[6] (PPL St. No. 2, p. 8.) Dr. Israel described a number of the studies in these areas that he considered good examples of well-designed and well-conducted studies, which found no adverse effects on genetics, fertility, reproduction, growth, or development in the animals exposed to RF fields. (PPL St. No. 2, pp. 8-9.) Further, Dr. Israel provided examples of well-conducted animal studies on RF fields and cancer. (PPL St. No. 2, pp. 9-10.) These studies also did not find any increased incidence in cancer in the RF exposed animals compared to non-exposed animals. (PPL St. No. 2, p. 10.)

Based on the body of scientific research showing no consistent and reproducible effects from RF fields on cancer and other adverse health effects, the World Health Organization ("WHO") has concluded that "no adverse health effects have been established as being caused by mobile phone use." (PPL St. No. 2, p. 10.) Many other public health authorities, including agencies in Canada, the U.K., Sweden, Norway, the Netherlands, and New Zealand, among others, have recently reached similar conclusions. (PPL St. No. 2, p. 10.) Further, several U.S. state public health authorities and public utility commissions have investigated claims about health effects from smart meters, all of which have found that RF fields from smart meters do not pose any public health risk. (PPL St. No. 2, p. 11.)

In addition, Dr. Israel reviewed the published scientific research on electromagnetic hypersensitivity ("EHS") from the perspective of a medical doctor. (PPL St. No. 2, pp. 12-15.) He was the only medical doctor to provide expert testimony in this case. Dr. Israel testified that

[6] In his Exceptions, the Complainant alleges that "ALJ Barnes refers to three studies on page 12, third paragraph that were not a part of Dr. Israel's testimony, written or otherwise." (Exceptions, p. 12.) However, there is no third full paragraph on page 12 of the ID. Presumably, the Complaint is referencing the third sentence on page 12, which discusses these "three groups of controlled laboratory studies on animals," which are addressed on pages 8 and 9 of Dr. Israel's direct testimony. (ID at 12; *see* PPL St. No. 2, pp. 8-9.)

claimed symptoms related to EHS are more accurately described as "Idiopathic Environmental Intolerance" ("IEI"), in which "idiopathic" means "cause unknown," rather than electromagnetic hypersensitivity. (PPL St. No. 2, p. 12) (emphasis added). This is consistent with a recommendation from the WHO. (PPL St. No. 2, p. 12.) Dr. Israel evaluated the scientific research on IEI and found that "[r]eliable studies dating back to at least 2002 and also recent reviews of the studies by experts and reviews by expert panels of public health authorities have found IEI and the variety of symptoms attributed to it are not caused by exposure to RF fields." (PPL St. No. 2, p. 13.) For example, a systematic review of 46 studies involving 1,175 individuals who claimed IEI symptoms found that people claiming IEI symptoms from RF fields could not replicate the claimed effect under controlled laboratory conditions. (PPL St. No. 2, p. 13.) Another recent study found that people who claimed IEI symptoms from RF fields reported lower levels of well-being when they knew they were exposed to RF fields, but when they did not know if they were being exposed, their reports of symptoms were not associated with RF fields. (PPL St. No. 2, pp. 13-14.) That study concluded that "it is IEI-EMF individuals' belief that exposure to RF EMFs will cause harm, rather than actual exposure itself, that results in the presence of symptoms in IEI-EMF individuals." (PPL St. No. 2, p. 14.) Even more recent studies have shown "[t]his relationship between the belief of exposure and the reporting of symptoms" and "has been described as a 'nocebo effect.'" (PPL St. No. 2, p. 14.) This "nocebo effect" does provide "a reasonable explanation for the presence of symptoms in IEI-EMF and control participants." (PPL St. No. 2, p. 14.)

Moreover, the research on IEI has been evaluated by credible public health entities and expert groups, including the United Kingdom Health Protection Agency (2012), the Royal Society of Canada (2013), the New Zealand Ministry of Health (2015), and the European Commission's

Scientific Committee on Emerging and Newly Identified Health Risks (2015). (PPL St. No. 2, p. 14.) Based on their reviews of the scientific research, these entities concluded there is no reliable scientific evidence that exposure to RF fields causes claimed IEI symptoms. (PPL St. No. 2, pp. 14-15.)

Based on the evidence presented, the ALJ correctly concluded that the Complainant's allegations, which were based on his non-expert opinion and largely based on unnamed hearsay materials, were insufficient to sustain his burden of proof. (ID at 10-15, 17, 19.) Moreover, the Company presented overwhelming evidence through its scientific and medical expert witnesses, Dr. Christopher Davis and Dr. Mark Israel, to support the ALJ's finding that there is no reliable basis to conclude that the new AMI meter will cause or contribute to any adverse health effects. Nevertheless, the Complainant contends that the ALJ erred in finding that he failed to sustain his burden of proof.

The Complainant fails to recognize the burden of proof applied by the Commission in this proceeding. It is well-established that "[p]roof of causation is required in order to prevail under Section 1501." *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. It is not sufficient to merely demonstrate "a potential for harm." *Hoffman-Lorah*, 2019 Pa. PUC LEXIS at *62. Therefore, 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." *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*").

Here, the Complainant merely has alleged that the new AMI meter could cause him or members of his household to experience adverse health effects, based upon hearsay materials and his unsupported allegation that the Company's AMI meters could affect his pet parrot.[7] (Exceptions, p. 2.) Such bald assertions, personal opinions or perceptions do not constitute evidence. *See Mid-Atlantic Power Supply Ass'n v. Pa. PUC*, 746 A.2d 1196, 1200 (Pa. Cmwlth. 2000) (citation omitted). Further, testimony consisting of guesses, conjecture or speculation cannot prove a party's claims. *Cuthbert v. City of Philadelphia*, 417 Pa. 610, 209 A.2d 261 (1965); *B & K Inc. v. Commonwealth Dep't of Highways*, 398 Pa. 518, 159 A.2d 206 (1960). Thus, the ALJ correctly held that the Complainant did not sustain his burden of proof that the AMI meter's installation would cause, contribute to, or exacerbate adverse health effects.

3. PPL Electric Has the Legal Right to Terminate the Complainant's Electric Service if It Is Denied Access to Its Meter

In his Exceptions, the Complainant erroneously asserts that it would be unlawful for PPL Electric to terminate his electric service if he does not allow the Company to install the new AMI meter. (Exceptions, pp. 2-3.)

PPL Electric has a legal right under its Commission-approved tariff, the Commission's regulations, and Chapter 14 of the Public Utility Code to terminate the Complainant's service if it is denied reasonable access to its meter. *See* 66 Pa. C.S. § 1406(a)(4); 52 Pa. Code § 56.81(3); PPL Electric Exhibits KD-4 and KD-5. Indeed, the Commission has declared that "[i]t is well-settled that where a customer refuses a utility access to its meter, the utility may terminate service

[7] As explained previously, PPL Electric's expert witnesses presented credible, thorough, and reliable testimony establishing that there is no reliable medical or scientific basis to conclude that the AMI meters will cause, contribute to, or exacerbate adverse health effects.

after required notice is provided." *Frompovich v. PECO Energy Co.*, 2018 Pa. PUC LEXIS 160, at *91-92 (Order entered May 3, 2018). Therefore, the termination of service to a customer for refusing a new AMI meter installation is consistent with Section 1501 of the Public Utility Code, the Commission's regulations, and the utility's tariff. *Id.* at *91-94. Thus, the Company can legally terminate the Complainant's service if he denies the Company access to replace his meter.

4. The Commission Should Reject the Complainant's Attempt to Introduce and Rely on Extra-Record Evidence in His Exceptions

In his Exceptions, the Complainant improperly attempts to introduce and rely upon evidence that was not admitted at the hearing and, therefore, is not a part of the record. Specifically, the Complainant presents, cites to, or mentions the following alleged facts and materials, which are **not** in the record:

- Allegation that "[b]irds are especially sensitive to their environment" (Exceptions, p. 2);
- Claim that the FCC's exposure standards "were developed for a 200-lb man for 30 minutes and 6 minutes of exposure" (Exceptions, p. 11);
- Assertion that the FCC did not consider "[e]xposure of women, children or any other life forms" when developing its exposure standards" (Exceptions, p. 11);
- Contention that "[a]ccording to the Koshland Science Museum, rates share a staggering 90% of genes with humans" (Exceptions, p. 12);
- Allegation that "in no way do rats compare to the sensitive physiology of birds which are not used in research for human health effects" (Exceptions, p. 12);
- Claim that "[t]here are literally hundreds if not thousands of peer-reviewed studies by independent scientists that do show harm" (Exceptions, p. 12);
- Link to an IARC press release (Exceptions, p. 12); and
- Assertion about the peer review journal in which the Lamech Study was published (Exceptions, p. 12).

The Commission should completely disregard the Complainant's extra-record evidence and his arguments based on that extra-record evidence. It is well-established that parties cannot

introduce new evidence and arguments for the first time at the exceptions stage.[8] "The Commission, as an administrative body, is bound by the due process provisions of constitutional law and by the principles of common fairness." *Hess v. Pa. PUC*, 107 A.3d 246, 266 (Pa. Cmwlth. 2014) (citations omitted). "Among the requirements of due process are notice and an opportunity to be heard on the issues, to be apprised of the evidence submitted, to cross-examine witnesses, to inspect documents, and to offer evidence in explanation or rebuttal." *Id.* (citations omitted). Indeed, Section 332(c) of the Public Utility Code entitles every party to, among other things, "submit rebuttal evidence" and "conduct such cross-examination as may be required for a full and true disclosure of the facts." 66 Pa. C.S. § 332(c); *see Pa. PUC v. Nat'l Fuel Gas Distrib. Corp.*, 1993 Pa. PUC LEXIS 95, at *10 (Order entered July 30, 1993) ("[S]uch material was outside the record and could be detrimental to the rights of other parties to confront such evidence.").

Here, the Complainant's extra-record evidence and arguments based thereon were presented for the first time in the Complainant's Exceptions. By waiting until his Exceptions to present this purported evidence and these arguments, the Complainant denied PPL Electric an opportunity to review and inspect that evidence, to cross-examine the Complainant about that evidence, and to present evidence and arguments in rebuttal. Therefore, it would violate PPL Electric's due process rights for any of the Commission's findings to be based upon or influenced by the Complainant's extra-record evidence and new arguments.

In addition, Section 5.431 of the Commission's regulations prescribes that "[t]he record will be closed at the conclusion of the hearing unless otherwise directed by the presiding officer

[8] *See, e.g., Application of Apollo Gas Co.*, 1994 Pa. PUC LEXIS 45, at *8-9 (Order entered Feb. 10, 1994) (denying party's attempt to introduce extra-record evidence in its exceptions); *Arthurs v. Pa. Elec. Co.*, 2019 Pa. PUC LEXIS 197, at *14 (Order entered May 23, 2019) ("This Commission can consider only the evidence in the record before us, and we cannot consider extra record evidence or new arguments presented for the first time in the Exceptions stage of the proceeding.").

or the Commission." 52 Pa. Code § 5.431(a). Particularly relevant here, "[a]fter the record is closed, additional matter may not be relied upon or accepted into the record unless allowed for good cause shown by the presiding officer or the Commission upon motion." *Id.* § 5.431(b). Petitions to reopen the record can be granted "if there is reason to believe that conditions of factor or law have so changed as to requires, or that the public interest requires, the reopening of the record." 52 Pa. Code § 5.571.

Here, the record closed on February 26, 2020. (ID at 3.) The Complainant made no motion to keep the record open or to reopen the record so that his extra-record evidence could be admitted. Moreover, in his Exceptions, the Complainant never demonstrates good cause for introducing this extra-record evidence, nor does he show changes in fact or law that would warrant the reopening of the record to admit such evidence. As a result, the Complainant's extra-record evidence cannot be admitted into the record.

Thus, although PPL Electric has decided not to burden the Commission with ruling on a Motion to Strike these portions of the Complainant's Exceptions, the Commission should not rely on the Complainant's extra-record evidence, as well as his new arguments based on such extra-record evidence, to make any findings in this proceeding. *See, e.g.*, *Petition of Pa. Power Co. for Approval of Interim POLR Supply Plan*, 2006 Pa. PUC LEXIS 56, at *3 (Order entered Apr. 28, 2006) (observing that "ALJ Gesoff ignored Reliant's Reply Brief, due to the extra-record evidence contained within").

Based on the foregoing, the Complainant's Exceptions Nos. 2, 4, and 5 should be denied.

C. REPLY TO EXCEPTION NO. 3 – THE ALJ CORRECTLY REJECTED THE COMPLAINANT'S ARGUMENT THAT HE SHOULD BE ABLE TO "OPT OUT" OF THE AMI METER'S INSTALLATION

In his Exceptions, the Complainant argues that he should be able to "opt out" of having an AMI meter installed at his property. (Exceptions, pp. 3-11.) According to the Complainant, Act

129 of 2008 does not mandate the installation of the AMI meters for all customers and was passed as an "opt-in" statute. (Exceptions, pp. 3-11.) He avers that the Commission misinterpreted the General Assembly's intent in finding that the statute requires AMI meters to be installed throughout the electric distribution companies' ("EDCs") service territories. (Exceptions, pp. 3-11.) As alleged support, the Complainant relies on the statements of a few Pennsylvania legislators about the statute. (Exceptions, pp. 5-6.) The Complainant's argument should be completely rejected.

The ALJ properly held that the installation of the new AMI meter is required by law. (ID at 14-16, 19.) Section 2807(f) of the Public Utility Code prescribes that EDCs, like PPL Electric, 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). 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*"). Therefore, PPL Electric 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. In fact, the Commission has repeatedly held that PPL Electric must install the new AMI meters for all of its customers. *See Hoffman-Lorah v. PPL Electric Utilities Corp.*, 2019 Pa. PUC LEXIS 195, at *72-73; *Schmukler v. PPL Electric Utilities Corp.*, Docket No. C-2017-

2621285, pp. 73-74 (Order entered July 23, 2019), *appeal pending*, 1102 C.D. 2019. Similarly, the Commission found in several other cases that Act 129 contains no such 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." *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. 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, PPL Electric must comply with the relevant Commission orders directing the Company to deploy the new AMI meters. The Commission determined that the Company's PLC meters were not compliant with Act 129 and the Commission's *Smart Meter Implementation Order*. *See Petition of PPL Electric Utilities Corporation for Approval of Smart Meter Technology Procurement and Installation Plan*, Docket No. M-2009-2123945, p. 24 (Order entered June 24, 2010) ("*2010 Smart Meter Order*"). Under the Company's Commission-approved Smart Meter Plan, PPL Electric must replace all of the PLC meters with the RF Mesh meters, which the Commission declared as meeting all of the requirements of Act 129 and the Commission's *Smart Meter Implementation Order*. *See Petition of PPL Electric Utilities Corp. for Approval of Its*

Smart Meter Technology Procurement and Installation Plan, Docket No. M-2014-2430781, p. 24 (Order Entered Sept. 3, 2015) ("*2015 Smart Meter Order*"). PPL Electric is not permitted to install any other type of meter under its Smart Meter Plan and cannot leave the existing, non-compliant PLC meter in place. (*See* PPL St. No. 4, pp. 6-7.) Therefore, the Company must follow its Smart Meter Plan and install the new AMI meter for the Complainant's property.

The Complainant also erroneously contends that the Company should be allowed to grant him an opt-out of the smart meter installation because the Commission's *Smart Meter Implementation Order* is not legally binding. (*See* Exceptions, p. 10.) The Order cited by the Complainant is the Commission's June 9, 2010 Order approving the initial Smart Meter Deployment Plan for Metropolitan Edison Company ("Met-Ed"), Pennsylvania Electric Company ("Penelec"), and Pennsylvania Power Company ("Penn Power") at Docket No. M-2009-2123950. *See 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 (Order entered June 9, 2010). In his Exceptions, the Complainant omits the Commission's statement in that Order that "EDCs are not free to ignore" the *Smart Meter Implementation Order*. *Id.* at *17 (Order entered June 9, 2010). Therefore, the Complainant's reliance on that Order is misplaced.

Additionally, the Commission's *2015 Smart Meter Order*, which requires the installation of smart meters for all of PPL Electric's customers, is legally binding on the Company. Indeed, Section 501(c) of the Public Utility Code requires "[e]very public utility, its officers, agents, and employees" to "observe, obey, and comply" with the Commission's orders. 66 Pa. C.S. § 501(c); *see also id.* § 701 (stating that formal complaints can be filed for non-compliance with a Commission order). Thus, PPL Electric must follow its Smart Meter Plan and the Commission's

Orders and must install the new AMI meters for all of the Company's customers, including the Complainant.

For these reasons, the Commission should deny the Complainant's Exception No. 3.

D. REPLIES TO EXCEPTIONS NOS. 2 AND 6 – THE COMPLAINANT'S REMAINING LEGAL ARGUMENTS ARE ENTIRELY WITHOUT MERIT

The Complainant raises other legal arguments in his Exceptions. Specifically, the Complainant contends that denying him an "opt-out" of the AMI meter installation would violate the U.S. Constitution and the Pennsylvania Constitution. (Exceptions, pp. 2-3.) He further contends that the ALJ "erred when she stated that the PUC decides cases on an individual basis and the specific allegations presented" because, among other reasons, nobody "has ever won an accommodation from the deployment of a smart meter on their property." (Exceptions, p. 12.) The Complainant's arguments should be soundly rejected.

1. The Complainant's Constitutional Claims Should Be Dismissed

The Complainant argues in his Exceptions that the installation of the new AMI meter would violate his rights under the U.S. Constitution and the Pennsylvania Constitution. (Exceptions, pp. 2-3.) However, he fails to identify with specificity which rights he believes would be violated. (*See* Exceptions, pp. 2-3.) These unsubstantiated and unspecific claims should be dismissed by the Commission.

For there to be a deprivation of 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).

Here, PPL Electric is not a state actor. 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." *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*, 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 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, PPL Electric cannot violate the Complainants' constitutional rights by installing the new AMI meter.

2. Nothing Presented by the Complainant Demonstrates that the Commission Fails to Decide Cases on an "Individual Basis" and on the "Specific Allegations Presented"

The Complainant also alleges that the Commission fails to decide cases on an "individual basis" and on the "specific allegations presented." (Exceptions, p. 12.) His only alleged support is that the Commission has not granted "an accommodation from the deployment of a smart meter" in other cases and that several of those cases involved the same attorneys and expert witnesses. (Exceptions, p. 12.)

Nothing in the record or in any Commission orders demonstrates that the Commission fails to thoroughly review the records of every case before it and render its decisions accordingly. The fact that no customer has received an "opt-out" of an AMI meter installation to date merely reflects:

(1) the Commission lacks the authority to grant an "opt-out" of an AMI meter installation under Pennsylvania law; and (2) the allegations that the new AMI meters cause, contribute to, or exacerbate adverse health effects are entirely unfounded.

Based on the foregoing, the Commission should deny the Complainant's Exceptions Nos. 2 and 6.

III. CONCLUSION

WHEREFORE, for all the foregoing reasons, as well as those more fully explained in the Initial Decision of Administrative Law Judge Elizabeth H. Barnes, the Company respectfully requests that the Pennsylvania Public Utility Commission deny the Exceptions filed by Alan Andrews and adopt the Initial Decision without modification.

Respectfully submitted,

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