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September 9, 2020

**VIA ELECTRONIC FILING**

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

**Re: Liza Mousios and Roy Cumming v. Metropolitan Edison Company**  
**Docket Nos. C-2019-3007989 and C-2019-3007995**

Dear Secretary Chiavetta:

Attached please find the Main 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 contact me if you have any questions.

Very truly yours,



Tori L. Giesler

krak  
Enclosures

c: As Per Certificate of Service

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

**LIZA MOUSIOS AND  
ROY CUMMING**

**v.**

**METROPOLITAN EDISON COMPANY**

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**DOCKET NO. C-2019-3007989  
DOCKET NO. C-2019-3007995**

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**MAIN BRIEF  
ON BEHALF OF  
METROPOLITAN EDISON COMPANY**

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Dated: September 9, 2020

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## **I. PROCEDURAL HISTORY**

On February 11, 2019, each of the Complainants filed separate Formal Complaints with the Pennsylvania Public Utility Commission (“Commission”) regarding 68 Marienstein Road, Revere, Pennsylvania 18953 (“Service Location) under Account No. 100015749383 (“Account”), which were both electronically served on the Company on February 21, 2019.

On March 13, 2019, the Company filed its Answer and New Matter denying the material allegations of both Formal Complaints. On that same day, the Company also filed Preliminary Objections to both Formal Complaints.

On March 28, 2019, each Complainant filed an identical response to the Company’s Answer and New Matter to their respective Formal Complaint.

On April 20, 2019, the Complainants filed a joint pleading titled “Response and Preliminary Objections to Metropolitan Edison Company” in response to the Company’s Preliminary Objections and raised their own objections.

On April 23, 2019, a Motion Judge Assignment Notice was issued assigning Administrative Law Judge (“ALJ”) Emily I. DeVoe to both proceedings.

On May 14, 2019, ALJ DeVoe issued an Interim Order consolidating the Formal Complaints filed by each of the Complainants.

May 15, 2019, ALJ DeVoe issued a Corrected Interim Order granting in part and denying in part the Company’s Preliminary Objections

On May 16, 2019, ALJ DeVoe issued an Interim Order denying the Complainants’ Preliminary Objections.

On May 20, 2019, a Call-In Telephone Pre-Hearing Conference Notice was issued scheduling a prehearing conference for July 23, 2019 for the consolidated Formal Complaints.

On May 22, 2019, ALJ DeVoe issued an Interim Order Scheduling a Prehearing Conference for July 23, 2019.

On May 31, 2019, in accordance with 52 Pa. Code § 5.341, the Company forwarded to the Complainants interrogatories and document requests (“Company’s Set I Discovery Requests”) via first class mail. In its Discovery Requests, the Company sought information and documents related to the Complainants’ allegations regarding the Company’s smart meters.

On June 17, 2019, ALJ DeVoe received correspondence from the Complainants, which was not served upon the Company, wherein they request that the prehearing conference be cancelled and that the matter proceed to a hearing.

On June 20, 2019, ALJ DeVoe issued an Interim Order ordering the parties to appear for and participate in the prehearing conference scheduled for July 23, 2019.

On July 22, 2019, the Company filed a Motion to Compel.

On July 23, 2019, a prehearing conference was held and all parties participated.

On July 24, 2019, an Interim Order which extended the deadlines for the Complainants to submit witness information and file a response to the Company’s Motion to Compel.

On July 26, 2019, the Complainants re-served their discovery responses to the Company’s Set I Discovery Requests upon the Company along with proof of mailing from her original submission.

By letter dated August 23, 2019, which was received on August 30, 2019, the Complainants forwarded to the Company a set of interrogatories (“Complainants’ Set I Discovery Requests”).

On August 28, 2019, an Interim Order was entered which required the submission of a status report.

On September 3, 2019, in accordance with 52 Pa. Code § 5.341, the Company forwarded to the Complainants a second set of interrogatories and document requests (“Company’s Set II Discovery Requests”) via first class mail.

On September 5, 2019, the Company’s Motion to Compel was dismissed as moot per an Interim Order.

On September 9, 2019, the Company submitted objections to portions of Complainants’ Set I Discovery Requests.

On September 10, 2019, the Company re-submitted the Company’s Discovery Requests, Set I.

On September 4, 2019, the Company submitted a status report.

On September 20, 2019, the Company submitted an additional status report.

On September 23, 2019, the Company submitted responses to the Complainants’ Set I Discovery Requests.

On October 1, 2019, a Call In Evidentiary Hearing Telephonic Notice was issued.

On October 4, 2019, a Prehearing Order was issued.

On October 18, 2019, the Company served its proposed exhibits.

Also on October 18, 2019, the Complainants filed a “Motion Per our Second Request for Our Inexorable Right to Have an In-Person Hearing with Americans with Disabilities Act Accommodations Removing All Wireless from the Hearing Area.”

On October 22, 2019, a Hearing Cancellation/Reschedule and a Judge Change Notification was issued.

On November 20, 2019, the Complainants filed a “Motion to Delay Our Hearing Until the Outcome of the Pending Ten Appeals Against the Pernicious Smart Meters.”

On December 13, 2019, a Prehearing Order was issued which denied the Complainants' request to delay the evidentiary hearing.

On January 3, 2020, the Complainants filed a "Motion to Stay the Hearing Given the Ensuing Facts for the Orderly Proceeding of Justice."

On January 7, 2020, the Company submitted its proposed exhibits.

On January 9, 2020, an Order was entered which, *inter alia*, denied the Complainants' Motion to Stay the Hearing, deeming the Complainants' request for accommodation at hearing moot, cancelled the in-person hearing scheduled for January 14 and 15, 2020, and directed a modified procedural schedule with a modified discovery schedule. Further, a Call-In Telephone Hearing Notice was issued.

On January 14, 2020, a Cancellation Notice was issued which cancelled the evidentiary hearings scheduled for January 14 and 15, 2020.

On January 15, 2020, the Complainants filed a "Motion to Supplement Exhibits for Continuing In-Writing Hearing."

On January 17, 2020, the Complainants filed what was labeled as a brief.

On January 28, 2020, in accordance with 52 Pa. Code § 5.341, the Company forwarded to the Complainants a third set of interrogatories and document requests ("Company's Set III Discovery Requests") via first class mail and UPS Overnight Delivery.

On January 29, 2020, the Complainants filed a "Motion for Judge Heep to Vacate Her Own Violation of Complainants' Right to Due Process and Right to Preserve Their Issues on Appeal In Her Preventing Their Use of Their Expert Witness" and "Motion and Request to Deputy Chief Administrative Law Judge Christopher Pell for a Different Judge Such As Administrative Judge DeVoe Whom We Previously Had."

On January 30, 2020, the Company filed a response to the Complainants' Motions.

On January 31, 2020, ALJ Heep issued an Order which, *inter alia*, denied the Complainants' motion to disqualify a presiding officer and grant the Complainants' motion for additional time to submit testimony and exhibits of their expert witness, William Bathgate.

On February 10, 2020, Met-Ed filed a Motion to Compel responses to the Company's Set III Discovery Requests. At the time it was filed, the Complainants had neither objected nor responded to any of the Company's Set III Discovery Requests.

On February 14, 2020, Met-Ed received a document entitled "Answers to Interrogatories Set III" from the Complainants. Also on February 14, 2020, the Complainants filed an Answer to Motion to Compel

On February 19, 2020, Met-Ed filed an Amended Motion to Compel.

On February 21, 2020, the Complainants filed an Amended Motion to Quash Met-Ed's Motion to Compel.

On February 25, 2020, ALJ Heep issued an Order which granted in part Met-Ed's Motion to Compel.

On March 2, 2020, the Complainants filed a Further Motion to Amend Motion to Compel.

On March 12, 2020, the Complainants filed a document entitled "Responses Pursuant to Motion to Compel of Interrogatories."

On March 17, 2020, the Commission issued a Hearing Cancellation Notice, which cancelled the Call-In Telephonic Hearing Scheduled for March 30, 2020.

On March 19, 2020, Met-Ed filed a letter indicating that, because the Complainants had not yet served direct testimony in accordance with the well-established litigation schedule established in this proceeding, it would not be serving rebuttal testimony at this time.

On April 14, 2020, ALJ Heep issued an Order Extending Time which modified the discovery and testimony deadlines in this proceeding in light of the various stay-at-home orders related to COVID-19. Importantly, the Complainants were provided until July 9, 2020 to submit written testimony and exhibits on behalf of their identified expert witness, Mr. Bathgate.

On June 1, 2020, the Complainants emailed a Motion to Stay to Deputy Chief Administrative Law Judge Christopher Pell, and forwarded the Motion to Stay separate to ALJ Heep and Met-Ed.

On June 4, 2020, the Complainants emailed a Motion to Recuse to Deputy Chief Administrative Law Judge Christopher Pell, and forwarded the Motion to Recuse separate to ALJ Heep and Met-Ed.

The Motion to Stay and Motion to Recuse were denied on June 15, 2020.

The Complainants filed an Amended Motion to Recuse and an Amended Motion to Stay on June 24, 2020.

Met-Ed filed a Letter Answer to the Amended Motions on July 1, 2020.

On July 22, 2020, the ALJ issued an Order Denying the Amended Motions on July 2, 2020.

Also on July 22, 2020, Met-Ed filed a letter indicating it was not serving rebuttal testimony because the Complainants failed to present direct testimony in accordance with the litigation schedule established in this proceeding.

On August 10, 2020, the ALJ issued a Briefing Order.

On August 31, 2020, the Complainants filed and served a document titled “Motion to Compel Respondents to Give Complete And Not Mendacious Non-Dissembling Answer to Interrogatories Propounded by Complainants” (“Discovery Requests and Motion”).

Met-Ed filed Objections to the Discovery Requests and Motion on September 2, 2020.

The Complainants sent an e-mail to counsel and the ALJ entitled “DIRECT TESTIMONY AND MAIN BRIEF OF COMPLAINANTS ROY CUMMING AND LIZA MOUSIOS C2019 3007989 AND C2019 3007995” on September 5, 2020.

The Complainants also e-mailed their Main Brief to the Secretary of the Commission, counsel and the ALJ on September 5, 2020. The Secretary of the Commission indicated that none of the e-mails containing the Main Brief were acceptably filed and warned the Complainant’s that failure to submit via e-filing could jeopardize their filing deadline.

Met-Ed submits this Main Brief pursuant to the August 10, 2020 Briefing Order.

## **II. STATEMENT OF THE QUESTIONS PRESENTED**

1. Have the Complainants demonstrated by a preponderance of the evidence that the installation of a smart meter at the Service Location constitutes a violation of the Public Utility Code, a Commission order or Commission regulation?

*Suggested answer: No.*

## **III. LEGAL STANDARDS**

Under Section 332(a) of the Public Utility Code, the Complainants maintain the burden of proof in this proceeding.<sup>1</sup> 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 Complainants establish a *prima facie* case does it become the

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<sup>1</sup> 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).

responsibility of the respondent to provide rebuttal evidence.<sup>2</sup> In order 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 be established.<sup>3</sup> Mere bald assertions, personal opinions or perceptions, when not substantiated by facts, do not constitute evidence.<sup>4</sup>

Although the factual burden may shift during the course of a proceeding, the Complainants always maintain 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."<sup>5</sup> 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.<sup>6</sup>

In order 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."<sup>7</sup> Section 1501 of the Public Utility Code states, in relevant part: "every public utility shall furnish and maintain adequate, efficient, safe and reasonable service and facilities."<sup>8</sup> 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

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

<sup>3</sup> *Norfolk and Western Ry. v. Pa. Pub. Util. Comm'n*, 413 A.2d 1037 (Pa. 1980).

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

<sup>5</sup> *Lansberry*, 578 A.2d at 602.

<sup>6</sup> *Pa. Pub. Util. Comm'n v. HIKO Energy, LLC*, 2015 Pa. PUC LEXIS 364 (I.D. entered Aug. 21, 2015), *supra*.

<sup>7</sup> 66 Pa.C.S. § 701.

<sup>8</sup> 66 Pa.C.S. § 1501.

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.<sup>9</sup>

#### **IV. SUMMARY OF ARGUMENT**

The Complainants wholly failed to meet their 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.

Importantly, the Complainants have repeatedly disregarded the procedural orders issued in this proceeding. The Complainants have failed to file any direct testimony or exhibits in this case and, as such, they have submitted no evidence upon which the ALJ can reach any findings of fact. Having failed to comply with the orders of the ALJ and timely submit any testimony or exhibits, at all, no evidentiary record exists to substantiate any of the Complainants' claims. This complete failure to comply with the ALJ's orders and the Commission's regulations regarding the administration of a proceeding warrant summary dismissal of both of the above-captioned Formal Complaints.

Nevertheless, Met-Ed submits that the Formal Complainants should also be dismissed as a matter of law. Met-Ed has an absolute obligation to install smart meters at all of its customers' service locations under the plain language of Act 129 of 2008 ("Act 129").<sup>10</sup> Neither Act 129 nor subsequent Commission orders related to smart meter installation and deployment permit customers to "opt-out" from smart meter installation.<sup>11</sup> The smart meter components and

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<sup>9</sup> *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).

<sup>10</sup> 66 Pa.C.S. § 2806.1, *et seq.*

<sup>11</sup> *Id.*; see *Smart Meter Procurement and Installation*, Docket No. M-2009-2092655 (Order entered June 24, 2009) ("Implementation Order").

deployment of smart meters in the Met-Ed's territory were identified in Met-Ed's Smart Meter Deployment Plan, which was ultimately approved by the Commission on June 20, 2014.<sup>12</sup> Met-Ed will install a smart meter at the Complainants' Service Location in order to remain in compliance with Act 129, related Commission orders, and its Smart Meter Deployment Plan.

The Complainants' case boils down to a tortured analysis of the plain language of Act 129.<sup>13</sup> Essentially, the Complainants' attempt to distract from the express and unambiguous statement that electric distribution companies ("EDCs") such as Met-Ed that EDCs must file smart meter plans and "shall furnish smart meter technology."<sup>14</sup> The Commission has explained that that EDCs must "deploy smart meters system-wide" because of the unambiguous requirement that smart meters "shall" be deployed "in accordance with a depreciation schedule not to exceed 15 years."<sup>15</sup> Furthermore, the Complainants' attempts to distract from this unambiguous language by (a) focusing on the use of the word "depreciation,"<sup>16</sup> (b) attempting to rely on the comments of a few legislators during floor debate regarding Act 129,<sup>17</sup> and (c) pending or proposed legislation that would modify Act 129 to provide for opt-outs should be rejected.<sup>18</sup> Each of these arguments would violate well established principles of statutory construction.

Moreover, the Complainants' suggestion that the Commission can retroactively change its interpretation of the *Smart Meter Implementation Order* in the context of their individual

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<sup>12</sup> *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").

<sup>13</sup> See generally Complainants MB.

<sup>14</sup> 66 Pa.C.S. § 2807(f).

<sup>15</sup> *Smart Meter Implementation Order* at 14.

<sup>16</sup> See Complainants MB at Sections 2, 4, 5.

<sup>17</sup> See Complainants MB at Section 3.

<sup>18</sup> See Complainants MB at 10-13.

complaint proceedings is without merit.<sup>19</sup> A change in interpretation of the *Smart Meter Implementation Order* would have statewide consequences that affect the interests of not only Met-Ed, but all other EDCs subject to the requirements of Act 129. As such, the Complainant's request is without merit.

In sum, the Complainants failed to establish by a preponderance of the evidence—or any evidence at all—that Met-Ed violated a Commission statute, regulation, or order. Specifically, the Complainants have not met her burden of proof that the installation of a smart meter constitutes unreasonable service by the Company. Furthermore, the Complainants' legal arguments are without merit. Accordingly, Met-Ed urges the Commission to dismiss the Formal Complaints with prejudice.

## V. ARGUMENT

### A. **The Complainants Failed to Establish a *Prima Facie* Case That Met-Ed Violated the Public Utility Code, a Commission Order, or a Commission Regulation.**

Under Section 332(a) of the Public Utility Code, the Complainants maintain the burden of proof in this proceeding.<sup>20</sup> 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 Complainants establish a *prima facie* case does it become the responsibility of the respondent to provide rebuttal evidence.<sup>21</sup> Where a complainant fails to offer any evidence regarding the dispute, the complainant has failed to establish a *prima facie* case and the Commission will dismiss the complaint.<sup>22</sup>

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<sup>19</sup> See Complainants MB at 14.

<sup>20</sup> 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).

<sup>21</sup> *Waldron v. Phila. Elec. Co.*, 54 Pa. P.U.C. 98 (Order entered Mar. 14, 1980).

<sup>22</sup> See, e.g., *Huiping Xu v. The Peoples Natural Gas Company d/b/a Dominion Peoples*, Dokcet No. F-2009-2109569, 2010 Pa. PUC LEXIS 936 (Initial Decision dated June 8, 2010), *adopted without modification* (Order

The Formal Complaints should both be summarily dismissed due to the Complainants' complete failure to establish a *prima facie* case in this proceeding. Importantly, the Complainants submitted no testimony or exhibits in this proceeding.<sup>23</sup> The ALJ's procedural orders established clear deadlines for the Complainants to do so and extended those deadlines several times to accommodate the Complainants. Nevertheless, the Complainants failed to timely submit any direct testimony or exhibits in this proceeding. As such, Met-Ed notified the ALJ and the Complainants by letter dated July 22, 2020, that it would not be serving any rebuttal testimony in this case. The record thereafter closed on July 31, 2020. The Complainants have simply failed to establish a *prima facie* case because failed to submit any testimony or exhibits in accordance with the deadlines established by the ALJ. Therefore, the above-captioned Formal Complaints should be summarily dismissed with prejudice.

**B. The Complainants Failed to Demonstrate that Met-Ed Violated the Public Utility Code, a Commission Order, or a Commission Regulation.**

Although the Complainants presented no evidence in support of their claims, their Brief raises legal arguments regarding the statutory interpretation of Act 129. Essentially, the Complainants raise three arguments in support of their assertions that Met-Ed has provided unreasonable service in violation of Section 1501 of the Public Utility Code. First the Complainants assert that the term "depreciation" used in Act 129, and as used by the Commission and Met-Ed demonstrate that the installation of smart meters is not mandatory.<sup>24</sup> Second, the Complainants attempt to rely on the comments of a few legislators during floor

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Entered Sept. 24, 2010); Eric Miller v. PECO Energy Company, Docket No. C-2008-2038863, 2009 Pa. PUC LEXIS 222 (Initial Decision dated Mar. 22, 2009), *becoming final without further action* (Order dated July 9, 2009).

<sup>23</sup> Although the Complainants make reference to "evidence" at certain points in their Brief, no evidence has been submitted. Met-Ed reserves the right to move to strike any such references to this evidence in its Reply Brief.

<sup>24</sup> See Complainants MB at Sections 2, 4, 5.

debate regarding Act 129 to undercut the express and unambiguous language of Act 129.<sup>25</sup> Third, the Complainants point to pending or proposed legislation that would modify Act 129 to argue they should be provided an opt-out.<sup>26</sup> The Complainants finally assert that the Commission should alter its *Smart Meter Implementation Order* as a part of this proceeding, to afford them an opt-out.<sup>27</sup> As explained below, none of these arguments have any merit and the Formal Complaints should be dismissed.

**1. The Installation of Smart Meters is Required by Law.**

**a. Act 129, and the Commission’s prior interpretations of it, mandate the installation of smart meters.**

On October 15, 2008, Act 129 was signed into law and codified as part of the Public Utility Code (“Code”).<sup>28</sup> Act 129 required EDCs with at least 100,000 customers, such as Met-Ed, to file a smart meter technology procurement and installation plan (“SMP Plan”) with the Commission for approval.<sup>29</sup>

Section 2807(f)(2) of the Code states that EDCs “**shall** furnish smart meter technology” in any of the following situations: 1) upon request from a customer that agrees to pay the cost of the smart meter at the time of the request; 2) in new building construction; and 3) in accordance with a depreciation schedule not to exceed fifteen years.<sup>30</sup> Importantly, the word “shall” has been declared by Pennsylvania courts to mean “must.”<sup>31</sup> 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.

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<sup>25</sup> See Complainants MB at Section 3.

<sup>26</sup> See Complainants MB at 10-13.

<sup>27</sup> See Complainants MB at 14.

<sup>28</sup> 66 Pa.C.S. § 101, *et seq.*

<sup>29</sup> 66 Pa.C.S. § 2807(f).

<sup>30</sup> 66 Pa.C.S. § 2807(f)(2).

<sup>31</sup> 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

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.<sup>32</sup> 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.”<sup>33</sup> 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.”<sup>34</sup>

In this regard the Commission has issued uniform precedent holding that there is no opt-out under the statute. It previously has found in several cases that Act 129 contains no such opt-out language.<sup>35</sup> 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.”<sup>36</sup> Therefore, under Act 129, it is clear Met-Ed has an absolute obligation to install smart meters at all of its customers’ service locations.

**b. Consistent with Act 129, and the Commission’s uniform precedent Met-Ed’s SMDP mandates the installation of smart meters.**

Pertinent here, Met-Ed’s SMDP, approved by the Commission, explicitly states that no

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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.’”).

<sup>32</sup> 1 Pa.C.S. § 1921(c)(8).

<sup>33</sup> *Smart Meter Implementation Order* at 14.

<sup>34</sup> *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)).

<sup>35</sup> *See, e.g., Starr v. PECO Energy Co.*, Docket No. C-2015-2516061, p. 11 (Order Entered Sept. 1, 2016) (footnote omitted).

<sup>36</sup> *Id.*

opt-out option is available.<sup>37</sup> The Commission-approved SMDP mandates 100% of its meters to be replaced with smart meters.

Pursuant to Section 2807(f) of the Public Utility Code, Met-Ed jointly filed its Petition for Approval of Smart Meter Technology Procurement and Installation Plan with Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company on August 14, 2009 (“2009 SMP Plan”).<sup>38</sup> The Commission issued an Order on June 9, 2010, approving 2009 SMP Plan with certain modifications.<sup>39</sup>

Subsequent to the filing of the 2009 SMP Plan, Met-Ed (together with Pennsylvania Electric Company, and Pennsylvania Power Company).<sup>40</sup> On December 31, 2012, the Companies filed their Joint Petition for Approval of their Smart Meter Deployment Plan, in which they requested that the Commission: (1) find that their proposed Deployment Plan satisfies the requirements of Act 129 and the Commission’s Implementation Order; (2) approve the Companies’ proposed procurement and deployment of approximately 2.1 million smart meters, over 98% of which should be installed by the end of 2019; (3) authorize the Companies to continue to recover smart meter costs; and (4) authorize the Companies to create a regulatory

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<sup>37</sup> *Smart Meter Deployment Plan*, at 9.

<sup>38</sup> *Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company Approval of Smart Meter Technology Procurement and Installation Plan*, Docket No. M-2009-2123950 (Petition dated Aug. 10, 2009).

<sup>39</sup> *Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company Approval of Smart Meter Technology Procurement and Installation Plan*, Docket No. M-2009-2123950 (Order entered June 9, 2010).

<sup>40</sup> West Penn filed its Petition for Approval of Smart Meter Technology Procurement and Installation Plan on August 14, 2009. *Petition of West Penn Power Company for Approval of Smart Meter Technology Procurement and Installation Plan*, Docket No. M-2009-2123951 (Petition dated Aug. 14, 2009).. However, during the pendency of the proceeding, FirstEnergy Corp. and West Penn’s then-corporate parent announced their intent to merge and the 2009 SMP Plan was reassessed. Met-Ed, West Penn Power Company, Pennsylvania Electric Company, and Pennsylvania Power Company are hereinafter collectively referred to as the “Companies.”

asset for their investment in their existing meters to be replaced by smart meters.<sup>41</sup> On June 16, 2014, the Companies submitted their Revised SMDP, which *intra alia* accelerated the smart meter deployment schedule laid out in their original SMDP. In its June 25, 2014 Opinion and Order, the Commission recognized the benefits of early deployment of smart meters and approved the Revised SMDP, stating:

[T]his Commission has already observed the benefits of early deployment. We find that the use of Penn Power as a case study may help the Companies identify other more cost-effective meter deployment strategies that can then be leveraged by FirstEnergy’s other operating companies. If deployment and operational savings prove very positive, FirstEnergy may also be able to further accelerate smart meter deployment, thus enabling an option to enhance customer savings even more.<sup>42</sup>

Met-Ed must, therefore, comply with the terms of its SMDP and the express language of Act 129.

## **2. The Complainants’ Interpretation of Act 129 Should Be Rejected.**

In this proceeding, the Complainants request that they be permitted to “opt-out” of the installation of a smart meter at the Service Location and that they be permitted to keep their existing analog meter.<sup>43</sup> Each of the arguments raised by the Complainants in their Brief should be rejected.

### **a. The Complainants’ focus on the terms “depreciation” or “depreciation schedule” is irrelevant and ignores the mandate imposed by the word “shall.”**

As explained above, Met-Ed is legally required to install a smart meter at the

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<sup>41</sup> *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 (Petition filed December 31, 2012).

<sup>42</sup> *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).

<sup>43</sup> *See, e.g.*, Formal Complaint ¶¶ 4-5.

Complainants' residence. Although the Complainants spends a substantial portion of their Main Brief focused upon the term "depreciation" she ignores the mandatory term "shall" used in Act 129. The Complainants simply fail 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 they focus on the term "depreciation" and "depreciation schedule" used in Act 129,<sup>44</sup> 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, their 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.**

The Complainants next argue that certain "dissenting comments" in the House Journal records associated with Act 129 make clear that Met-Ed is not required to install smart meters.<sup>45</sup> 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 of it is not to be disregarded under the pretext of pursuing its spirit."<sup>46</sup> Here, the plain language of Act 129 states that EDCs, like Met-Ed, "shall" install the new AMI meters.<sup>47</sup> Therefore, a few legislators' comments about the interpretation of the statute need not and should not be considered.<sup>48</sup>

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<sup>44</sup> See Complainants MB at Sections 2, 4, 5.

<sup>45</sup> See Complainants MB at Section 3.

<sup>46</sup> 1 Pa.C.S. § 1921(b).

<sup>47</sup> See 66 Pa.C.S. § 2807(f)(2).

<sup>48</sup> See 1 Pa.C.S. § 1921(c).

Additionally, even if the statute were ambiguous, the “administrative interpretations of such statute” should be considered and given substantial weight.<sup>49</sup> 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.<sup>50</sup> Thus, there is no opt-out under Act 129, and the Complainants’ attempted reliance on its legislative history should be rejected.

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

The Complainants also make reference to various proposed and/or pending bills before the Pennsylvania General Assembly, which they asserts demonstrates Act 129 was intended to be an “opt in” statute.<sup>51</sup> 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, a customer cannot opt-out of the AMI meter installation under Act 129.

**d. The Commission should not and cannot alter its *Smart Meter Implementation Order* as a part of this proceeding.**

Finally, the Complainants assert that the Commission should alter the *Smart Meter Implementation Order* in the context of this proceeding.<sup>52</sup> This requested relief should be denied because it cannot properly be granted in the context of this complaint proceeding.

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<sup>49</sup> *Id.* § 1921(c)(8).

<sup>50</sup> *See* Met-Ed MB, Section IV.A.

<sup>51</sup> Complainants MB at 10-13.

<sup>52</sup> *See* Complainants MB at 14.

Indeed, any alteration of the *Smart Meter Implementation Order* would affect the rights and interests of other EDCs that are not parties to this proceeding. These entities would be denied due process if their rights and interests were affected in the context of a proceeding that they are not parties to. Therefore, it is not appropriate for the ALJ or the Commission to grant this requested relief.

**3. The Installation of a Smart Meter Does Not Constitute Unreasonable or Inadequate Service.**

Although the Complainants alleged various health and medical concerns related to RF fields and smart meters, they have offered no evidence to support these allegations. Pursuant to Section 1501 of the Code, public utilities have a duty to maintain safe, adequate and reasonable service and facilities and to make repairs, changes, and improvements that are necessary or proper for the accommodation, convenience, and safety of its patrons, employees, and the public. Section 1501 of the Code provides, in pertinent part:

§ 1501. Character of service and facilities  
Every public utility shall furnish and maintain adequate, efficient, safe, and reasonable service and facilities, and shall make all such repairs, changes, alterations, substitutions, extensions, and improvements in or to such service and facilities as shall be necessary or proper for the accommodation, convenience, and safety of its patrons, employees, and the public. Such service also shall be reasonably continuous and without unreasonable interruptions or delay. Such service and facilities shall be in conformity with the regulations and orders of the commission.<sup>53</sup>

The Complainants failed to demonstrate that the installation of a smart meter at their residence would constitute unreasonable or inadequate service under Section 1501.

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<sup>53</sup> 66 Pa.C.S. § 1501.

**VI. CONCLUSION**

WHEREFORE, Metropolitan Edison Company respectfully requests that the Administrative Law Judge Darlene D. Heep recommend that the Pennsylvania Public Utility Commission dismiss the Formal Complaints of Liza Mousios and Roy Cumming with prejudice.

Respectfully submitted,

Dated: September 9, 2020



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## APPENDIX A

### PROPOSED FINDINGS OF FACT

1. The Complainants failed to timely submit any written testimony or exhibits in this proceeding.
2. On July 22, 2020, Met-Ed filed a letter indicating it was not serving rebuttal testimony because the Complainants failed to present direct testimony in accordance with the litigation schedule established in this proceeding.
3. No evidentiary hearings were held in this matter.
4. No testimony or exhibit was admitted into the record on behalf of the Complainants.
5. The ALJ closed the record and issued a Briefing Order on August 10, 2020.
6. There is no factual record upon which the ALJ or the Commission can grant any of the relief sought by the Complainants.

## APPENDIX B

### PROPOSED CONCLUSIONS OF LAW

1. Under Section 332(a) of the Public Utility Code, the Complainants maintain the burden of proof in this proceeding.<sup>54</sup>

2. 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 Complainants establish a prima facie case does it become the responsibility of the Company to provide rebuttal evidence.<sup>55</sup>

3. In order 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 be established. Mere bald assertions, personal opinions or perceptions, when not substantiated by facts, do not constitute evidence.<sup>56</sup>

4. A party's burden of proof is met by establishing a preponderance of the evidence, which requires proof by a greater weight of the evidence.<sup>57</sup>

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.<sup>58</sup>

6. In order 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

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<sup>54</sup> 66 Pa.C.S. § 332(a); *Se-Ling Hosiery v. Margulies*, 70 A.2d 854 (Pa. 1950); *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).

<sup>55</sup> *Waldron v. Phila. Elec. Co.*, 54 Pa. P.U.C. 98 (Order entered Mar. 14, 1980); *Replogle v. Pa. Elec. Co.*, 54 Pa. PUC 528 (Order entered Oct. 9, 1980).

<sup>56</sup> *Pa. Bureau of Corrections v. City of Pittsburgh*, 532 A.2d 12 (Pa. 1987); *Mid-Atlantic Power Supply Assoc. v. Pa. Public Utility Comm'n*, 746 A.2d 1196, 1200 (Pa. Commw. Ct. 2000).

<sup>57</sup> *Lansberry*, 578 A.2d at 602.

<sup>58</sup> *Pa. Pub. Util. Comm'n v. HIKO Energy, LLC*, 2015 Pa. PUC LEXIS 364 (I.D. entered Aug. 21, 2015); *see also Se-Ling Hosiery, supra*.

violation, or claimed violation, of any law which the Commission has jurisdiction to administer, or of any regulation or order of the commission.”<sup>59</sup>

7. As part of formal complaint proceedings, the Commission evaluates the reasonableness of public utility service and facilities pursuant to Section 1501 of the Public Utility Code. Section 1501 states, in relevant part: “every public utility shall furnish and maintain adequate, efficient, safe and reasonable service and facilities....”<sup>60</sup>

8. In similar complaint proceedings, 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.<sup>61</sup>

9. Neither Act 129 nor subsequent Commission orders related to smart meter installation and deployment permit customers to “opt-out” from smart meter installation.<sup>62</sup>

10. The Complainants failed to establish that the Company’s installation of a smart meter at the Complainant’s service location would violate Act 129 or any related Commission orders.<sup>63</sup>

11. The Complainants failed to present a *prima facie* case that the installation of a smart meter would constitute unsafe or unreasonable service by the Company

12. The Complainants failed to sustain their burden of proof that the installation of a smart meter would constitute unsafe or unreasonable service by the Company.

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<sup>59</sup> 66 Pa.C.S. § 701.

<sup>60</sup> 66 Pa.C.S. § 1501.

<sup>61</sup> *Frompovich v. PECO Energy Co.*, Docket No. C-2015-2474602 (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).

<sup>62</sup> 66 Pa.C.S. § 2806.1, *et seq.*; *see Smart Meter Procurement and Installation*, Docket No. M-2009-2092655 (Order entered June 24, 2009).

<sup>63</sup> *See id.*; *see also Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West West Penn 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).

APPENDIX C

PROPOSED ORDERING PARAGRAPHS

1. The Formal Complaints of Liza Mousios and Roy Cumming filed against Metropolitan Edison Company at the above-referenced docket is dismissed with prejudice.
2. These matters shall be marked as closed.

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

<b>LIZA MOUSIOS AND</b>	:	
<b>ROY CUMMING</b>	:	
	:	<b>DOCKET NO. C-2018-3007989</b>
v.	:	<b>DOCKET NO. C-2019-3007995</b>
	:	
<b>METROPOLITAN EDISON COMPANY</b>	:	

**CERTIFICATE OF SERVICE**


I hereby certify that I have this day served a true copy of the Main 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:

Liza Mousios And Roy Cumming  
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Administrative Law Judge Darlene D. Heep  
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Dated: September 9, 2020

  
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