

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

September 10, 2020

VIA ELECTRONIC FILING

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

Re: Charles and Sylvia Bolte v. Metropolitan Edison Company
Docket No. C-2019-3011287

Dear Secretary Chiavetta:

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

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

Very truly yours,



Tori L. Giesler

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

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Charles and Sylvia Bolte	:	
	:	
v.	:	Docket No. C-2019-3011287
	:	
Metropolitan Edison Company	:	

**REPLIES OF METROPOLITAN EDISON COMPANY TO THE
EXCEPTIONS OF CHARLES AND SYLVIA BOLTE**

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

Counsel for Metropolitan Edison Company

Date: September 10, 2020

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I. INTRODUCTION

Metropolitan Edison Company (“Met-Ed” or the “Company”), pursuant to 52 Pa. Code § 5.535, hereby respectfully submits these Replies to the Exceptions of Charles and Sylvia Bolte (“Complainants”). On August 11, 2020, Administrative Law Benjamin L. Myers (the “ALJ”) issued an Initial Decision (“I.D.”), which dismissed the Complainants’ Formal Complaint challenging the Company’s planned installation of a smart meter at the Complainants’ service location. The ALJ correctly held that the Complainants failed to demonstrate by a preponderance of evidence that Met-Ed provided unsafe or unreasonable service under 66 Pa.C.S. § 1501, or otherwise violated the Public Utility Code, a Commission order or regulation, or the Company’s Commission-approved tariff. *See* I.D. at 12. As such, the ALJ properly concluded that the Complainants failed to provide the substantial evidence required to meet their burden and dismissed the Complaint.

On August 31, the Complainants filed their Exceptions to the I.D. Per the Secretarial Letter serving the I.D. on August 11, 2020, Complainant’s Exceptions were due on August 31, 2020, and any Replies to Exceptions would be due ten days after the due date for Exceptions.

As explained herein, the Exceptions are without merit and should be denied. Accordingly, the Company respectfully requests that the Commission deny the Exceptions and adopt the I.D. without modification.

II. REPLIES TO EXCEPTIONS

A. THE ALJ CORRECTLY DISMISSED THE COMPLAINT DUE TO THE COMPLAINANTS’ FAILURE CARRY HER BURDEN OF PROOF.

None of the arguments advanced in the Complainants’ Exceptions demonstrate that the ALJ erred in concluding they failed to carry their burden. Importantly, the ALJ correctly rejected the Complainants’ alleged health and privacy concerns which the Complainants asserted are

inherent in smart meter. *See* I.D. at 10-11. The ALJ appropriately weighed the evidence presented by the parties and correctly rejected each of the Complainants' claims. Indeed, although the Complainants presented the testimony and various exhibits of Sylvia Bolte, the ALJ determined that little or no weight could be afforded to these sources because they constitute hearsay. I.D. at 11. Moreover, the ALJ correctly concluded that Met-Ed's witness presented credible testimony and fully rebutted the Complainants' claims. I.D. at 12. Therefore, the I.D. correctly dismissed the Complaint and the Commission should adopt the I.D. without modification.

B. REPLIES TO EXCEPTION NOS. 1 AND 2 – THE ALJ CORRECTLY CONCLUDED THAT THE COMPLAINANTS ARE NOT PERMITTED TO OPT-OUT OF THE INSTALLATION OF A SMART METER UNDER ACT 129.

1. The Plain Language of Act 129 requires Met-Ed to install a smart meter at the Complainants' residence.

The Complainants first argue that the ALJ erred in rejecting their legal arguments regarding Act 129 and accepting the testimony of Met-Ed witness Mr. Ahr, which concluded Act 129 of 2008 mandates the installation of smart meters. *See* Exception Nos. 1 and 2. The Complainants essentially rehash the arguments raised in their Objections dated May 8, 2020,¹ and are based on a flawed interpretation of Act 129, and improper reliance of proposed or pending legislation that would provide for an opt out. These Exceptions should be denied.

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.² 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

¹ In lieu of an in-person or telephonic hearing, the parties agreed to submit this matter for adjudication on documents. *See* I.D. at 5-6. Consistent with this approach, both parties filed written objections to the written testimony and exhibits presented by the other party on May 8, 2020. The testimony and exhibits were moved into the record subject to those objections, which the ALJ indicated they would rule on in the I.D.

² 66 Pa.C.S. § 2807(f); *see also* Met-Ed St. 1-R, pp. 4, 6.

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.³ Importantly, the word “shall” has been declared by Pennsylvania courts to mean “must.”⁴ 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.

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.⁵ 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.”⁶ 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.”⁷

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.⁸ Specifically, in *Starr*, the Commission observed that it has “rejected similar claims

³ 66 Pa.C.S. § 2807(f)(2).

⁴ See *Whiteford v. Dep’t of Transp.*, 728 A.2d 1127, 1131 (Pa. Cmwlth. 2001) (“[T]he word ‘shall’ denotes a mandatory, not discretionary instruction.”) (citations omitted); *C.B. v. J.B.*, 65 A.3d 946, 952 (Pa. Super. 2013) (finding that “[t]he use of ‘shall’ means . . . must” and that to hold otherwise “would be to flout the legislative will”); *In re Canvass of Absentee Ballots of Nov. 4, 2003 Gen. Election*, 843 A.2d 1223, 1233 (Pa. 2004) (“[W]e are not compelled to pretend that ‘shall’ means ‘may’ under Section 3146.6(a).”); *Griesmer v. Hill*, 36 Pa. Super. 69 (Pa. Super. 1908) (“This provision is mandatory, and not directory merely. It means what it says. The word ‘shall’ means ‘shall’ [The defendant] not only may but ‘must.’”).

⁵ 1 Pa.C.S. § 1921(c)(8).

⁶ *Smart Meter Implementation Order* at 14.

⁷ *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)).

⁸ See, e.g., *Starr v. PECO Energy Co.*, Docket No. C-2015-2516061, p. 11 (Order Entered Sept. 1, 2016 (footnote omitted)).

that the installation of smart meters is not mandatory or that an opt-out is permissible under Act 129.”⁹

Similarly, the Complainants’ attempts to rely on the comments of a few legislators are irrelevant and should be rejected. 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.”¹⁰ Here, the plain language of Act 129 states that EDCs, like Met-Ed, “shall” install the new AMI meters.¹¹ Therefore, a few legislators’ comments about the interpretation of the statute need not and should not be considered.¹²

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. *See* Exceptions at 1-2. However, 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.

Finally, the Complainants assert that the Commission should alter the *Smart Meter Implementation Order* in the context of this proceeding. Exceptions at 3-4. This requested relief should be denied because it cannot properly be granted in the context of this complaint proceeding. 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

⁹ *Id.*

¹⁰ 1 Pa.C.S. § 1921(b).

¹¹ *See* 66 Pa.C.S. § 2807(f)(2).

¹² *See* 1 Pa.C.S. § 1921(c).

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.

For these reasons, the Complainants' Exceptions regarding the interpretation of Act 129 should be rejected.

2. Met-Ed witness Mr. Ahr explained the steps Met-Ed has taken to comply with Act 129.

Met-Ed's witness Mr. Ahr credibly testified as to the steps Met-Ed is required to take to comply with Act 129. *See* Met-Ed St. 1-R. Pertinent here, Met-Ed's Smart Meter Deployment Plan ("SMDP"), approved by the Commission, explicitly states that no opt-out option¹³ is available.¹⁴ The Commission-approved SMDP mandates 100% of its meters to be replaced with smart meters.¹⁵

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, and Pennsylvania Power Company on August 14, 2009 ("2009 SMP Plan").¹⁶ The Commission issued an Order on June 9, 2010, approving 2009 SMP Plan with certain modifications.¹⁷

¹³ Although the Complainants assert that they are not seeking an "opt-out" from the installation of a smart meter (*see* Exceptions at 6 (stating opt-outs were not an issue raised by the Complainants)), the relief they seek is an exception from the installation of a smart meter on their residence, which is mandated by Act 129 and Met-Ed's SMDP. This is, in effect, an opt out.

¹⁴ Met-Ed Exh. JCA-1.

¹⁵ Met-Ed St. 1-R, pp. 10-11.

¹⁶ *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); Met-Ed St. 1-R, p. 7.

¹⁷ *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); Met-Ed St. 1-R, p. 7.

Subsequent to the filing of the 2009 SMP Plan, Met-Ed (together with Pennsylvania Electric Company, and Pennsylvania Power Company),¹⁸ 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 asset for their investment in their existing meters to be replaced by smart meters.¹⁹ On June 16, 2014, the Companies submitted their Revised SMDP,²⁰ 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.²¹

¹⁸ 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."

¹⁹ *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); Met-Ed St. 1-R, p. 8.

²⁰ Met-Ed St. 1-R, p. 8; Met-Ed Exh. JCA-1.

²¹ *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).

Met-Ed must, therefore, comply with the terms of its SMDP and the express language of Act 129. The Complainants' Exceptions regarding the requirements of Act 129 and the steps Met-Ed has taken to comply with it should be rejected.

C. REPLIES TO EXCEPTION NO. 3 – THE ALJ APPROPRIATELY FOUND THE TESTIMONY OF MET-ED WITNESS, MR. AHR, TO BE CREDIBLE.

The Complainants next assert that the ALJ erred in concluding the testimony of Met-Ed witness Mr. Ahr was credible. Exceptions at 5-7. The Complainants argue that Mr. Ahr: (1) is not qualified to address the Complainants' human health or safety allegations (Exceptions at 6, 7); and (2) did not address the Complainants' Fourth Amendment claims (Exceptions at 7). These arguments should be rejected.

Mr. Ahr is qualified to testify to the functionality and safety of Met-Ed's smart meters. Indeed, Mr. Ahr testified that he serves "as the Act 129 and smart meter subject matter expert,"²² assisted with the development of the Company's SMDP,²³ and was familiar with the smart meter technology at issue.²⁴ He went on to testify that Met-Ed's smart meters comply with all safety requirements and standards established by regulatory agencies such as the Federal Communications Commission ("FCC")²⁵ and, furthermore, that the smart meters are compliant with American National Standards Institute ("ANSI") testing requirements and Underwriters Laboratories ("UL") certified under UL 2735.²⁶ Mr. Ahr's testimony fully rebuts the Complainants' safety concerns.²⁷

²² Met-Ed St. 1-R, p. 2.

²³ Met-Ed St. 1-R, p. 7.

²⁴ Met-Ed St. 1-R, p. 8.

²⁵ Met-Ed St. 1-R, p. 11.

²⁶ Met-Ed St. 1-R, pp. 11-12.

²⁷ As will be further explained below, neither of the Complainants were qualified to present expert testimony in this proceeding and the Complainants did not call an expert to submit testimony on their behalf. *See* Section II.E *infra*. For this reason, the Complainants did not present admissible or credible evidence to corroborate their health or medical concerns and, therefore, it is not necessary for Met-Ed (or Mr. Ahr) to have presented testimony regarding the Complainants' alleged health and medical concerns.

Regarding the Complainants' privacy concerns, the ALJ correctly concluded that Mr. Ahr credibly testified regarding the information collected by Met-Ed's smart meters and the steps Met-Ed takes to protect that information. I.D. at 12. Indeed, Met-Ed's Commission-approved privacy policy puts in place specific security protections, including encryption, firewalls, password protection and continuous security monitoring.²⁸ Met-Ed's smart meter network complies with the advanced metering infrastructure guidelines published by the North American Energy Standards Board and the National Institute of Standards and Technology.²⁹

Although the Complainants assert that this testimony does not address their privacy concerns under the Fourth Amendment of the United States constitution, this assertion is irrelevant. Exceptions at 7. In order 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."³⁰

Here, Met-Ed is not a state actor. In *Jackson v. Metropolitan Edison Co.*, the U.S. Supreme Court found that a Pennsylvania electric utility, *i.e.*, Met-Ed, 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."³¹ Therefore, in keeping with the U.S. Supreme Court's holding in *Jackson*, West Penn 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-

²⁸ Met-Ed St. 1-R, p. 13.

²⁹ Met-Ed St. 1-R, p. 13.

³⁰ *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).

³¹ *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351-53 (1974).

owned public utility was a reasonable warrantless search.³² Thus, Met-Ed cannot violate the Complainant's constitutional rights by installing the new AMI meter and the Complainants' Exception on this issue should be denied.

D. REPLIES TO EXCEPTION NOS. 5 AND 6 – THE ALJ CORRECTLY CONCLUDED THAT THE COMPLAINANTS WERE ONLY PERMITTED TO OFFER LAY TESTIMONY BASED UPON THEIR PERSONAL KNOWLEDGE.

The ALJ properly concluded that the Complainants did not present any expert testimony in this proceeding and, therefore, failed to substantiate their medical and health concerns. I.D. at 10-11. The Complainants' Exceptions argue that this conclusion was in error for several reasons. See Exception Nos. 5-6. However, each of these arguments should be rejected.

According to Pennsylvania Rule of Evidence 701,³³ a lay witness is limited to giving opinion testimony that is rationally based on the witness's own perceptions. Specifically, Rule 701 provides as follows:

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is: (a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of R 702.

Although the Pennsylvania Rules of Evidence are not strictly adhered to at the Commission, the Pennsylvania Supreme Court has unequivocally stated that any relaxation of the rules of evidence in administrative settings cannot allow lay witnesses to testify to technical matters “without personal knowledge or specialized training.”³⁴ Lay witness testimony only carries evidentiary

³² See *Naperville Smart Meter Awareness v. City of Naperville*, 900 F.3d 521, 527-29 (7th Cir. 2018).

³³ Pa.R.E. 701.

³⁴ *Gibson v. W.C.A.B.*, 861 A.2d 938, 947 (Pa. 2004) (holding Rules of Evidence 602, 701 and 702 generally applicable in agency proceedings).

weight where the witness has actually perceived the situation, and the opinion is not based on scientific, technical or specialized knowledge.³⁵

In this case, the bulk of the Complainants' testimony and exhibits related to issues outside the scope of her personal knowledge and were based on hearsay. I.D. at 11. Importantly, as the ALJ recognized, in *Kirby v. PPL Electric Utilities Corporation*, the Commission ruled that:

Complainant's testimony consisted solely of his opinion ... Regardless of how earnestly Complainant believes the Complaint allegations to be true, personal opinions or perceptions do not constitute substantial evidence sufficient to permit him to sustain his burden of proof.

Kirby v. PPL Electric Utilities Corp., Docket No. C-20066297 (Final Order entered November 16, 2006) (citing *Pa. Bureau of Corrections v. City of Pittsburgh*, 532 A.2d 12 (Pa. 1987)). As Ms. Bolte was not herself qualified to provide expert testimony on any of the issues raised in her Complaint, she cannot testify regarding matters outside of her personal knowledge.

Furthermore, the Complainants' assertion that the ALJ second guessed or overrode "the decision of Ms. Bolte and her doctor about her health risks" is a non-sequitur. Exceptions at 16. The Complainants did not present the written testimony of Ms. Bolte's doctor in this proceeding. As such, Met-Ed has not had the opportunity to evaluate the credibility of any alleged diagnosis or cross examine her physician on any of the statements made in the documents referenced by the Complainants.³⁶

In addition, the Complainants' arguments that her alleged health and medical conditions are recognized as disabilities under the Americans with Disabilities Act ("ADA") and warrant case

³⁵ Pa.R.E. 701.

³⁶ Met-Ed further notes that the Complainants' assertion that Met-Ed consented to waiving the cross examination of Ms. Bolte's physician is misplaced. Ms. Bolte's physician was not presented as a witness in this matter and did not provide written testimony. Met-Ed could not have waived its right to cross examine an individual never identified or presented as a witness.

by case evaluation of accommodations should be denied. Exceptions at 16-18. the Complainant's assertion that West Penn has violated the ADA is irrelevant and outside the jurisdiction of the Commission. Importantly, the Commission has clearly recognized that it no jurisdiction to act under the ADA.³⁷ As the Commission held in *Frompovich*:

[I]t is beyond the jurisdiction of Commission to determine whether the Complainant has a disability or a cause of action under the American with Disabilities Act. See I.D. at 18. If Ms. Frompovich believes that she has a valid ADA claim against PECO, she must work through the federal courts or one of the federal enforcement agencies, which include the Department of Labor, the Equal Employment Opportunity Commission, the Department of Transportation, the Federal Communications Commission or the Department of Justice, but not this Commission.³⁸

For all of the above described reasons, the ALJ properly limited the Complainants' testimony to matters within the scope of Ms. Bolte's personal knowledge and determined that the Complainants' health and medical concerns were based upon their personal beliefs. Therefore, the Commission should adopt the I.D. without modification.

E. REPLIES TO EXCEPTION NO. 4 – THE ALJ PROPERLY EXCLUDED CERTAIN OF THE COMPLAINANTS' EXHIBITS AS INADMISSIBLE HEARSAY.

The Complainants next argue that the ALJ erred by declining to admit Complainants' Exhibits 2, 3 and 20, which they assert are "peer-reviewed journal articles" and are not hearsay. Exceptions at 8. They further assert the ALJ and the Commission "lacks the authority to decline to admit evidence based on the party submitting it" and referenced "Supreme Court Daubert Rule jurisdiction." Exceptions at 8. However, neither of these arguments demonstrate the ALJ erred.

Met-Ed fully explained why these documents are inadmissible in its Objections to the Complainants' Written Testimony and Exhibits dated May 8, 2020 ("Met-Ed's Objections"). Each

³⁷ See *Frompovich v. PECO Energy Co.*, 2018 Pa. PUC LEXIS 160, at *69 (Order entered May 3, 2018).

³⁸ *Frompovich*, 2018 Pa. PUC LEXIS at *69.

of these exhibits is hearsay because it is an out of court statement being offered for the truth of the matter asserted.³⁹ The Complainants' assertion that these documents are "peer-reviewed" does not satisfy any exception to the rule against hearsay.

Moreover, the individuals responsible for these statements were not presented to testify and be subject to cross-examination. Although the Complainants attempt to assert that "[r]equiring a scientist to be present to defend his peer-reviewed, journal published scientific study is without merit" (Exceptions at 9), this requirement is a fundamental aspect of due process. Met-Ed Objections at 7. "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."⁴⁰ Met-Ed was never afforded the opportunity to cross examine the individuals responsible for the hearsay statements relied upon by the Complainants, because those individuals were not offered as witnesses in this proceeding.

Importantly, as explained in Met-Ed's Objections and above, the Complainants did not present any expert testimony; therefore, the Complainants cannot express an opinion based upon

³⁹ Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. Pa.R.E. 801; *Bonegre v. Workers' Compensation Appeal Board (Bertolini's)*, 863 A.2d 68, 72 (Pa. Cmwlth. 2004). Ordinarily, hearsay evidence is inadmissible unless some exception applies. Pa.R.E. 802. The hearsay rule is somewhat relaxed in proceedings before administrative agencies. *Rox Coal Co. v. Workers' Comp. Appeal Bd. (Snizaski)*, 570 Pa. 60, 807 A.2d 906 (2002). The Commonwealth Court established what is commonly called the "Walker Rule" to apply to the use of hearsay evidence during administrative proceedings:

- (1) Hearsay evidence, properly objected to, is not competent evidence to support a finding;
- (2) Hearsay evidence, admitted without objection, will be given its natural probative effect and may support a finding, if it is corroborated by any competent evidence in the record, but a finding of fact based solely on hearsay will not stand.

Walker v. Unemployment Comp. Bd. of Review, 367 A.2d 366, 370 (Pa. Cmwlth. 1976). The "Walker Rule" has been affirmed by the Pennsylvania Supreme Court. *Rox Coal Co. v. Workers' Comp. Appeal Bd. (Snizaski)*, 570 Pa. 60, 807 A.2d 906 (2002).

⁴⁰ *Id.* (citations omitted).

hearsay materials. *See* Met-Ed Objections at 3-4 and 6-7. In this regard, the Complainants' reference to the Daubert Rule is misplaced and should be rejected.

Finally, the Complainants' attempts to rely upon or present properly excluded evidence in their Exceptions should be denied. The Complainants were afforded the opportunity to address the admissibility of these documents by the ALJ and, having reviewed the parties' arguments, the ALJ properly excluded this evidence.

For these reasons, Complainants' Exception Number 4 should be denied.

F. REPLIES TO EXCEPTION NO. 7 – THE ALJ DID NOT EXHIBIT BIAS AGAINST THE COMPLAINANTS.


The Complainants lastly argue that the ALJ exhibited bias against them during the course of this proceeding. Exceptions at 19-21. They argue that: (1) the ALJ did not acknowledge their legal arguments regarding Act 129 (Exceptions at 20); (2) the ALJ excluded various hearsay documents offered by the Complainants as exhibits (Exceptions at 20); (3) the ALJ limited Ms. Bolte's testimony to her personal, lay beliefs and opinions (Exceptions at 20); and (4) determined that Met-Ed's testimony was credible (Exceptions at 20-21). Essentially the Complainants restate each of the other Exceptions they have raised to the I.D., and assert that these Exceptions demonstrate bias. *See* Exceptions at 21.

For the reasons explained above, none of the Complainants' Exceptions have any merit. None of the Complainants' Exceptions demonstrate that the ALJ erred or otherwise exhibits unfair bias against the Complainants in favor of Met-Ed. Therefore, and for the reasons more fully explained above, the Complainants' Exception Number 7 should be denied and the I.D. should be adopted without modification.

III. CONCLUSION

WHEREFORE, for all the foregoing reasons, as well as those more fully explained in the Initial Decision of Administrative Law Judge Benjamin J. Myers, the Company respectfully requests that the Pennsylvania Public Utility Commission deny the Exceptions filed by Charles and Sylvia Bolte and adopt the Initial Decision without modification.

Respectfully submitted,


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

Counsel for Metropolitan Edison Company

Date: September 10, 2020

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	:	
Metropolitan Edison Company	:	

CERTIFICATE OF SERVICE


I hereby certify that I have this day served a true copy of the Reply of Metropolitan Edison Company to the Exceptions of Charles and Sylvia Bolte 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:

Charles and Sylvia Bolte
forestnyc@hotmail.com

Administrative Law Judge Benjamin Myers
benmyers@pa.gov

Dated: September 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