

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

MIRANDA GRACE EDWARDS,

Complainant,

vs.

DUQUESNE LIGHT COMPANY,

Respondent.

No: C-2018-3002741

**REPLY TO COMPLAINANT'S POST-
HEARING BRIEF**

Filed on Behalf of:
Duquesne Light Company

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I. INTRODUCTION

The Commission and Presiding ALJ have repeatedly held that Act 129 requires utilities like Duquesne Light to install smart meters at all premises in their service territory. Complainant disputes the Commission's interpretation of Act 129, but fails to show that it is incorrect. In fact, as the Commission has long recognized, and Complainant overlooks, Act 129 states that electric distribution companies "shall furnish" smart meter technology and creates a broad statutory scheme for the universal deployment of smart meters.

Complainant also overlooks Duquesne Light's tariff, which carries the force of law and expressly requires that a smart meter be installed at the service address. Complainant's last-ditch resort to legislative intent is similarly flawed because it is irrelevant to this dispute. And even if it were relevant, Complainant cannot establish legislative intent through a few cherry-picked references to statements made by an incredibly small portion of the legislative body. Complainant's claim that she is not required to receive a smart meter is simply incorrect.

Not only does Complainant advance a strained, previously-rejected interpretation of Act 129, but she also presented no evidence to support her claims that the Company's smart meters will harm her health, create a fire hazard, or monitor how often she uses individual in-home appliances. Conversely, as pointed out in the Company's Post-Hearing Brief, Duquesne Light presented overwhelming evidence that the amount of radiofrequency ("RF") emitted from its smart meters is far below all relevant health standards, that its smart meters comply with all applicable safety standards and have never caused a fire, and that it only collects *aggregate* consumption data—not individual appliance use. Simply put, Complainant provided no evidence establishing that

Duquesne Light failed to provide her with proper service, while the Company proved that its service was adequate, efficient, safe, and reasonable.

Finally, Complainant's Post-Hearing Brief improperly relies on confidential settlement discussions and includes evidence and information that is not in the record. Both are improper and cannot be considered.

Complainant's complaint should be dismissed with prejudice.

II. ARGUMENT

A. Act 129 and Duquesne Light's tariff require that Duquesne Light install a smart meter at the Service Address.

1. Act 129 mandates system-wide deployment of smart meters for covered EDCs like Duquesne Light.

Complainant's central argument rests on the flawed notion that Act 129 only mandates the installation of smart meters in two very narrow circumstances: (1) when a customer specifically asks for one and agrees to pay for it; and (2) in new building construction. As outlined in Duquesne Light's Post-Hearing Brief (which is fully incorporated by reference), this argument – and various derivations of it – have been routinely rejected by the Commission. See Paul v. PECO Energy Co., Docket No. C-2015-2475355, 2019 WL 1315249, at *8 (Pa. P.U.C. Mar. 14, 2019) (rejecting complainant's claim that Act 129 is an "opt-in" bill); Day v. Duquesne Light Co., Docket No. C-2018-3003960, 2020 WL 1906058, at *10 (Pa. P.U.C. Mar. 23, 2020) (Watson, ALJ) (same).

Rather, Act 129 requires electric distribution companies ("EDCs") with more than 100,000 customers to install smart meters *throughout their service territories*, i.e. universal deployment. 66 Pa. C.S. § 2807(f)(2). And there is no provision in the Code or

the Commission's Regulations or Orders that allows a customer to "opt out" of receiving a smart meter. Hoffman-Lorah v. PPL Elec. Util. Corp., Docket No. C-2018-2644957, 2019 WL 2325713, at *28 (Pa. P.U.C. May 23, 2019); Paul v. PECO Energy Co., Docket No. C-2015-2475355, 2018 WL 3093596, at *4-5 (Pa. P.U.C. June 14, 2018); Frompovich v. PECO Energy Co., Docket No. C-2015-2474602, 2018 WL 2149249, at *4 (Pa. P.U.C. May 3, 2018); Povacz v. PECO Energy Co., Docket No. C-2012-2317176, 2013 WL 392699, at *6 (Pa. P.U.C. Jan. 24, 2013).

Similarly, the Presiding ALJ has repeatedly ruled that Act 129 mandates system-wide deployment for covered EDCs and that customers cannot opt-out of receiving a smart meter, *including Duquesne Light's customers*. See Day, 2020 WL 1906058; Darula v. Pa. Elec. Co., Docket No. C-2017-2618084, 2020 WL 509894 (Pa. P.U.C. Jan. 22, 2020) (Watson, ALJ).

In Day, for example, the complainant sought to prevent Duquesne Light from installing a smart meter at his residence. 2020 WL at *1. Like Complainant, he alleged that Duquesne Light could only install a smart meter upon his request. Id. at *10. The Presiding ALJ correctly ruled that the complainant's "interpretation of Act 129 is inconsistent with the Commission precedent concluding that electric distribution companies with more than 100,000 customers 'shall furnish smart meter technology in accordance with a depreciation schedule not to exceed 15 years.'" Id. The Presiding ALJ dismissed the Day formal complaint with prejudice.¹ Id. at *14.

¹ On May 1, 2020, the complainant in Day filed exceptions to the Presiding ALJ's Initial Decision. The exceptions are pending before the Commission.

As discussed in more detail in Duquesne Light's Post-Hearing Brief, the principle of *stare decisis* compels the same result here.²

Furthermore, an administrative agency's interpretation of a statute for which it has enforcement responsibility is entitled to great deference and should not be reversed unless clearly erroneous. Snyder Brothers, Inc. v. Pa. Public Utility Commission, 198 A.3d 1056, 1079 (Pa. 2018) (ruling that the Commonwealth Court erred by disregarding the Commission's interpretation of a statute that it administered); Alpha Auto Sales, Inc. v. Dep't of State, Bureau of Prof'l & Occupational Affairs, 644 A.2d 153, 155 (Pa. 1994) ("We have long held that the contemporaneous construction of a statute by those charged with its execution and application, especially when it has long prevailed, is entitled to great weight and should not be disregarded or overturned except for cogent reasons and unless it is clear that such construction is erroneous.").

Complainant presents no basis to conclude that the Commission's interpretation of Act 129 is clearly erroneous. She claims that the Commission misconstrued Act 129, but ignores that the very first sentence of Section 2807(f)(2) states that "Electric distribution companies *shall* furnish smart meter technology as follows. . ." 66 Pa. C.S. § 2807(f)(2) (emphasis added). The Commission has long held that the use of the word

² In addition to her allegations against Duquesne Light, Complainant raised two concerns involving the Commission. First, she argues that the Commission prevented her from filing an informal complaint on June 1, 2018. See Complainant's Post-Hearing Brief at 2. Although this allegation is not directed at Duquesne Light, it is worth noting that Complainant suffered no harm from this alleged issue. Regardless of whether Complainant was able to file an informal complaint or not, her service has never been terminated, she has not yet received a smart meter, and she has been given more than ample time to pursue her formal complaint before the Commission. Second, Complainant asserts that the Commission has a conflict of interest because it created the Implementation Order and allegedly receives greater funding when more smart meters are deployed. See Complainant's Post-Hearing Brief at 21-22. Complainant identified no legal authority to support this claim, nor did she provide any evidence suggesting that the Commission is unable to resolve cases involving smart meters in a fair and impartial manner. To the contrary, the Commission has both the authority and obligation to rule on her formal complaint because it has exclusive jurisdiction over the Code, which includes provisions of Act 129 and Section 1501 -- both of which are directly implicated by her formal complaint.

“shall” in Section 2807(f) indicates the General Assembly’s direction that all customers must receive a smart meter. Povacz, 2013 WL at *6

The Commission’s interpretation that Section 2807 of Act 129 requires the universal deployment of smart meters makes sense on its own, but especially when read in conjunction with Act 129’s other provisions. Among other things, Act 129 requires all EDCs with more than 100,000 customers to submit smart meter technology and procurement plans to the Commission for approval. 66 Pa. C.S. § 2807(f)(1) (“Within nine months after the effective date of this paragraph, electric distribution companies shall file a smart meter technology procurement and installation plan with the commission for approval. The plan shall describe the smart meter technologies the electric distribution company proposes to install in accordance with paragraph (2).”)

If, as Complainant argues, the General Assembly only intended for EDCs to install smart meters upon customer request or in new building construction -- and then wanted EDCs to replace those meters 15 years later -- it would make little sense to require EDCs to submit detailed smart meter plans to the Commission for approval. In that situation, EDCs could not predict how many customers would request smart meters or how many new buildings would be constructed, meaning that an EDC could not know how many smart meters they would be required to install. It thus would be difficult -- if not impossible -- for an EDC to craft a detailed smart meter plan. Act 129’s requirement that EDCs submit detailed smart meter plans to the Commission for approval only makes sense if the General Assembly also intended that smart meters be universally deployed. The Commission said as much in its Implementation Order by stating, “[it] is this system-wide deployment [of smart meters] that will provide the foundation for the EDCs’ smart meter

installation plans.” See Implementation Order, Docket No. M-2009-2092655, at 14 (Pa. P.U.C. June 24, 2009).

Accordingly, Complainant’s claim that Section 2807(f)(2)(iii) merely refers to a smart meter’s useful life is unpersuasive in light of Act 129’s larger statutory scheme and must be rejected. And in fact, several administrative judges -- including the Presiding ALJ -- have already rejected similar arguments. Darula, 2020 WL 509894; Quigley v. PECO Energy Co., Docket No. C-2017-2617558, 2018 WL 6931996 (Pa. P.U.C. Dec. 18, 2018) (Heep, ALJ); Swanson v. PPL Elec. Util. Corp., Docket No. C-2018-3006285, 2019 WL 4246996 (Pa. P.U.C. Aug. 26, 2019) (Barnes, ALJ) (Final Order entered on Oct. 4, 2019). The Presiding ALJ should reach the same decision here.

2. Tariff Rule 9B, which carries the force of law and binds both Duquesne Light and Complainant, also requires that Duquesne Light install a smart meter at the Service Address.

Even if Act 129 somehow supported Complainant’s position (which it does not), she still would be required to receive a smart meter under Duquesne Light’s tariff. Commission-approved tariffs have the force of law. Warren v. Duquesne Light Co., Docket No. F-2014-2399085, 2014 WL 3834561, at *3 (Pa. P.U.C. July 15, 2014) (Long, ALJ). Duquesne Light’s Commission-approved tariff states that smart meters conforming to Company standards *must* be installed at each metered service premises. DLC Ex. D-2. Customers cannot refuse the installation of a smart meter for any reason. Id. Thus, even if Act 129 somehow did not require Complainant to receive a smart meter, she still must receive one under Duquesne Light’s tariff.

B. Complainant's resort to what she believes is Act 129's legislative history is both legally irrelevant and procedurally improper.

The General Assembly, Pennsylvania's appellate courts, and the Commission all agree that "[w]here the words of a statute are clear and free from ambiguity, the legislative intent is to be gleaned from those very words, and the plain language is not to be disregarded under the pretext of pursuing its spirit." 1 Pa. C.S. § 1921(b); Pa. Financial Responsibility Assigned Claims Plan v. English, 664 A.2d 84, 87 (Pa. 1995); Coretsky v. Bd. of Commissioners of Butler Twp., 555 A.2d 72, 74 (Pa. 1989); Allegheny Cty. Inst. Dist. v. Dep't of Pub. Welfare, 668 A.2d 252, 257 (Pa. Commw. Ct. 1995); Petition of Metro. Edison Co. for Approval of A Distribution Sys. Improvement Charge Office of Consumer Advocate, No. C-2016-2531019, 2017 WL 3872553, at *18 (Pa. P.U.C. July 26, 2017).

As discussed in Section II(A) and in Duquesne Light's Post-Hearing Brief, the Commission and its administrative law judges – including the Presiding ALJ – have repeatedly held that Act 129 requires the universal deployment of smart meters by utilities with more than 100,000 customers. Customers cannot opt-out of receiving a smart meter. Hoffman-Lorah, 2019 WL at *4; Hess v. PPL Elec. Util. Corp., Docket No. C-2018-3003337, 2019 WL 2744425, at *8 (Pa. P.U.C. June 11, 2019) (Barnes, ALJ); Lamagna v. Pa. Elec. Co., No. C-2017-2608014, 2018 WL 6124353, at *14 (Pa. P.U.C. Oct. 30, 2018) (Watson, ALJ); Fiorito v. Pa. Elec. Co., No. C-2017-2610125, 2018 WL 5082016, at *10 (Pa. P.U.C. Sept. 18, 2018) (Watson, ALJ). Act 129's legislative history thus is irrelevant.

Even if legislative intent were a pertinent inquiry, Complainant's method of establishing it is flawed. When interpreting a statute, a court must "look to what the

legislature did, not what a single legislator thought the legislation did.” Com. v. Wisneski, 29 A.3d 1150, 1153 (Pa. 2011). An individual legislator’s opinion carries little weight in interpreting a statute because it is just one of many in the General Assembly. Hoffman v. Pa. Crime Victim's Comp. Bd., 405 A.2d 1110, 1112 n.2 (Pa. Commw. Ct. 1979) (the remarks or understanding of an individual representative are not binding when endeavoring to ascertain legislative intent); Allegheny Cty. Inst. Dist., 668 A.2d at 257 n.13 (“When ascertaining legislative intent, [the Court] is not bound by the arguments of a single legislator made on the floor in debate of the issue, much less the post-Act expression of opinion by a single legislator.”).

Complainant’s Post-Hearing Brief refers to statements by a few state legislators as purported proof that Act 129 does not mandate smart meters. But these isolated statements carry no weight in interpreting Act 129. The Presiding ALJ must evaluate what the entire General Assembly actually did, not what a few lawmakers thought it did. The Commission has already answered this question many times: Act 129 requires the universal deployment of smart meters for covered EDCs like Duquesne Light.

Complainant’s reference to previous drafts of Act 129 is also unavailing. Bills under consideration by the General Assembly are not law and have no legal authority. See Horst v. PPL Elec. Utilities Corp., Docket No. C-2018-3006774, 2020 WL 1673949, at *11 (Pa. P.U.C. Mar. 5, 2020) (Barnes, ALJ) (bills pending before the General Assembly to amend Act 129 are not law); Andrews v. PPL Electric Utilities Corp., Docket No. C-2019-3008770, 2020 WL 2487395, at *12 (Pa. P.U.C. Apr. 13, 2020) (Barnes, ALJ) (same). The Presiding ALJ must consider the law as it is, not as it might have been.

C. Complainant presented no evidence that Duquesne Light failed to provide adequate, efficient, safe, and reasonable service, let alone evidence sufficient to carry her burden of proof on these claims.

Since Duquesne Light must install a smart meter at the Service Address, the only remaining question is whether it has tried to do so in an adequate, efficient, safe, and reasonable manner. Duquesne Light discussed this issue at length in its Post-Hearing Brief. In contrast, Complainant's Post-Hearing Brief barely mentions it.

At most, Complainant contends that Pennsylvania's smart meter scheme allows EDCs like Duquesne Light to harass customers by threatening them with termination notices. See Complainant's Post-Hearing Brief at 22. This argument must be rejected because issuing termination notices for refusing a smart meter is not harassment; it is expressly permitted by Pennsylvania law and Duquesne Light's tariff. See 66 Pa. C.S.A. § 1406(a); 52 Pa. Code § 56.81; Duquesne Light Tariff Rule 33. It is undisputed that Complainant prevented Duquesne Light from installing a smart meter at the Service Address, so the Company had the right to issue a termination notice.

Unlike her Post-Hearing Brief, Complainant's Proposed Findings of Fact mention a few health, safety, and privacy concerns that she discussed at the hearing. See Complainant's Proposed Findings of Fact, ¶¶ 22-23, 26-27, 30. The Presiding ALJ, however, should not adopt Complainant's Proposed Findings of Fact.

Adjudications by the Commission must be supported by substantial evidence in the record. 2 Pa. C.S. § 704; Myers v. PPL Electric Utilities Corp., Docket No. C-2017-2620710, 2019 WL 4247028, at *6 (Pa. P.U.C. Aug. 29, 2019). "Substantial evidence" is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion. Id.

No substantial evidence supports Complainant's Proposed Findings of Fact. She cited no record evidence to support her claims. Instead, she merely relied on her personal beliefs. See, e.g., Proposed Finding of Fact, ¶ 23 ("Complainant *believes* ... that the deployment of any wireless device by DLC constitutes unsafe service to her, and would constitute DLC's ongoing creation and perpetuation of an unsafe and unhealthy condition at her home . . .") (italics added). Complainant's personal beliefs, "no matter how strongly held, do not constitute evidence." Lamagna, 2018 WL at *15; see also Zimmerman v. PPL Elec. Utilities Corp., Docket No. C-2017-2615038, 2018 WL 4185439, at *9 (Pa. P.U.C. Aug. 16, 2018) (Barnes, ALJ) (bald assertions about alleged health problems arising from smart meters is not evidence).

Duquesne Light presented overwhelming evidence that its smart meter program is safe and reliable and will not violate Complainant's privacy rights. Duquesne Light established through expert testimony that the amount of RF emitted from its smart meters is far below all relevant health standards, including those set by the Federal Communications Commission. Tr. at 188-89, 302-03. Its smart meters also emit much less RF than many natural and man-made sources that Complainant is already exposed to, *including the Earth and other human beings*. DLC Ex. H-2 and H-6.

Duquesne Light further proved that its smart meters passed exhaustive safety and flammability testing. Tr. at 225, 227, 229-33; DLC Ex. G-3. The smart meters comply with safety standards set by the Underwriters Laboratory and the American National Standards Institute. Tr. at 225, 227, 233; DLC Ex. G-3. Duquesne Light also proved that it has installed about 620,000 smart meters to date; none have caused a fire. Tr. at 235, 408-09.

In addition, Duquesne Light proved that its smart meters only collect aggregate consumption data, not information about Complainant's individual appliance use. *Id.* at 262-63. The Company also protects customer information through extensive cybersecurity measures, such as authentication, data encryption, security event monitoring, redundant firewalls, and network segmentation. *Id.* at 267-73, 281-83.³

Complainant offered no evidence to the contrary, and her personal opinion about the alleged health, safety, and privacy risks of Duquesne Light's smart meter program is woefully insufficient to overcome the wealth of evidence presented by Duquesne Light.

D. Complainant's Post-Hearing Brief improperly discloses confidential settlement discussions and relies on evidence that is not in the record.

Under Pennsylvania Rule of Evidence 408, settlement offers generally are not admissible as evidence. Pa.R.E. 408 (evidence of conduct or a statement made during compromise negotiations about the claim is not admissible on behalf of any party to prove or disprove the validity or amount of a disputed claim). The Commonwealth Court and the Commission have ruled that settlement negotiations are inadmissible in administrative proceedings under Rule 408. Liberty Manor Pers. Care Home v. Dep't of Pub. Welfare, No. 979 C.D. 2014, 2015 WL 5432471, at *5 (Pa. Commw. Ct. Apr. 17, 2015); Sabatine v. West Penn Power Co., Docket No. C-2018-3002804, 2020 WL 2487393, at *1 n.1 (Pa. P.U.C. Apr. 20, 2020) (Watson, ALJ).

Here, page 5 of Complainant's Post-Hearing Brief reveals the substance of an alleged conversation between herself and counsel for Duquesne Light on February 22, 2020. She also attached an e-mail exchange with Duquesne Light's counsel, which is marked as Exhibit C, even though this exhibit directly relates to settlement discussions

³ Duquesne Light incorporates by reference the evidence cited in its Post-Hearing Brief.

and was not admitted into evidence at the hearing (see discussion regarding extra-record evidence, below).⁴ These settlement discussions are not admissible under Pennsylvania Rule of Evidence 408. They cannot be used to decide this matter and should be struck from the record.

Further, an administrative decision must be based only on material that was properly accepted into the record; it cannot be based on evidence that is absent from the record, unless good cause is shown. 52 Pa. Code § 5.431(b). The Commission routinely declines to consider extra-record evidence. See Brzostowski v. PPL Electric Utilities Corp., Docket No. C-2019-3009320, 2020 WL 2764455, at *9 (Pa. P.U.C. May 21, 2020) (declining to consider extra-record material offered by the complainant); Landis v. PPL Electric Utilities Corp., Docket No. C-2018-3002142, 2020 WL 2764458, at *10 (Pa. P.U.C. May 21, 2020) (same).

Complainant's Post-Hearing Brief attempts to rely on evidence and information that is not only absent, but was affirmatively excluded, from the record. For example, Complainant attached exhibits A through I to her Post-Hearing Brief. The Presiding ALJ, however, only admitted Complainant's exhibits A and B into evidence at the hearing;

⁴ The following exchange took place on the record after Complainant moved to admit Exhibit C into evidence at the hearing:

THE COURT: Any objection, counsel?

MR. FARRELL: Yes, Your Honor. This is an e-mail exchange between Counsel and Complainant about settlement negotiations. I believe it's inadmissible.

THE COURT: Ms. Edwards, any response?

MS. EDWARDS: If that's how it works, I can't really object to that.

THE COURT: The objection will be sustained for the reasons stated by Mr. Farrell.

Tr. at 128.

exhibits C, D, E, F, G, H, and I were not admitted. Tr. at 127-28, 133, 137, 139-40, 143. They cannot support Complainant's arguments in her Post-Hearing Brief.

Duquesne Light would be severely prejudiced if Complainant is permitted to rely on extra-record evidence – especially extra-record evidence that was specifically excluded at the hearing – and there is no good cause to admit it into the record at this late date because it was properly rejected at the hearing. Complainant cannot make an end-run around the Presiding ALJ's (proper) evidentiary rulings simply by referencing or attaching inadmissible exhibits and statements in her brief. Complainant's extra-record evidence should be disregarded.⁵

III. CONCLUSION

As discussed more fully in Duquesne Light's Post-Hearing Brief, this case boils down to two simple questions: (1) is Duquesne Light required to install a smart meter at Complainant's residence, and (2) has the Company attempted to do so in a safe, adequate, efficient, and reasonable manner? The answer to both questions is yes for several reasons.

First, the Commission has long held that utilities like Duquesne Light *must* install a smart meter at all residential service addresses. The Commission also approved Duquesne Light's tariff, which mandates universal deployment throughout the Company's service territory. Complainant urges the Commission to reconsider its interpretation of Act 129, but her alternate interpretation of Act 129 is strained and unpersuasive.

Moreover, Complainant failed to present meaningful, probative evidence or argument in support of her health, safety, and privacy claims. Duquesne Light, in

⁵ In the near future, Duquesne Light will move to strike certain communications from the record through a motion to strike.

contrast, presented overwhelming testimony and evidence describing its extensive safety, security, and data protection measures. Complainant failed to meet her burden of proof.

This formal complaint should be dismissed in its entirety, with prejudice.

Respectfully submitted,

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**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

MIRANDA EDWARDS, :
 :
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 vs. : No: C-2018-3002741
 :
 DUQUESNE LIGHT COMPANY, :
 :
 Respondent. :

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing Reply to Complainant’s Post-Hearing Brief upon the participants listed below in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant):

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(via mail and e-mail)

Administrative Law Judge Jeffrey Watson
Pennsylvania Public Utility Commission
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Dated this 11th day of September, 2020

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