

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Cindy Kelly	:	
	:	
v.	:	C-2018-3004681
	:	
Metropolitan Edison Company	:	

INITIAL DECISION

Before
Jeffrey A. Watson
Administrative Law Judge

INTRODUCTION

Complainant filed a Formal Complaint against Respondent objecting to the installation of a smart meter at her residence. This decision dismisses the Formal Complaint due to Complainant’s failure to meet her burden of proof.

HISTORY OF THE PROCEEDING

Cindy Kelly (Complainant) filed a Formal Complaint (Complaint) with the Pennsylvania Public Utility Commission (Commission) against Metropolitan Edison Company (Respondent, Met-Ed, or Company) on September 17, 2018, objecting to the installation of a smart meter at her residence located at 7252 Camp Meeting Road, New Tripoli, Pennsylvania (service location or service address) due to health, safety, and security concerns. As relief, Complainant requested that the Commission exempt her from smart meter installation.

On October 9, 2018, Respondent filed an Answer and New Matter denying the material allegations in the Complaint.

On October 9, 2018, Respondent also filed Preliminary Objections to the Complaint.

On October 19, 2018, Complainant filed a reply to the Answer and New Matter.

On November 2, 2018, a Motion Judge Assignment Notice was issued assigning this proceeding to the undersigned presiding officer.

On November 21, 2018, an Interim Order was issued denying Respondent's Preliminary Objections.

On December 6, 2018, an Interim Order was entered establishing a procedural schedule.

On May 30, 2019, an Interim Order was entered scheduling a prehearing conference for June 27, 2019. The prehearing conference was subsequently canceled due to Complainant advising in a status report filed May 21, 2019, that she was declining any prehearing conference and preferred to proceed directly to an evidentiary hearing

On June 3, 2019, the Commission issued a Call-in Telephone Hearing Notice, scheduling an evidentiary hearing for June 27, 2019.

The evidentiary hearing was subsequently rescheduled for September 10, 2019, by Hearing Notice issued July 18, 2019. On August 30, 2019, an Interim Order Confirming Requirements for Evidentiary Hearing was issued.

On September 4, 2019, Complainant submitted a request that the evidentiary hearing be continued and that the parties be permitted to file written direct testimony. On September 5, 2019, an Interim Order was entered granting Complainant's request to continue the hearing and denying Complainant's request for written direct testimony.

On October 17, 2019, a Hearing Cancellation/Reschedule Notice was issued, rescheduling the evidentiary hearing for November 7, 2019. On October 18, 2019, an Interim Order Confirming Requirements for Rescheduled Evidentiary Hearing was issued.

On November 7, 2019, an evidentiary hearing was held. Complainant appeared *pro se* and presented her case through her own testimony and exhibits. Respondent was represented by counsel, Tori Giesler, Esq., and Lauren Lepkoski, Esq., and presented its case through the testimony of Company employee Mr. John Ahr.

At the evidentiary hearing, Complainant offered various documents as exhibits, including various reports, statements, internet publications and articles, but only Exhibits L-93, M-3, M-8, T-3, and T-13 were admitted into the evidentiary record. Exhibits M-3 and M-8 are confidential exhibits. Respondent presented Respondent Exhibits 1, 2 and 3, which were admitted into evidence. Additionally, official notice was taken of Act 129,¹ Complainant Exhibit L,² 52 Pa.Code § 57.194,³ and Respondent Exhibits PD-1 through PD-5.

At the hearing, Complainant also offered Exhibit E 41-47 and Exhibit A 37-39 to be admitted into evidence, stating they were government or public documents and admissible as an exception to the hearsay rule. Respondent objected to the documents as hearsay at the hearing. The undersigned advised the parties that consideration would be given to take official notice of the documents. Complainant was directed to submit any information to establish that the proposed exhibits were public documents and admissible as an exception to the hearsay rule within 10 days of the hearing, and Respondent was directed to submit any objections within 10 days of service of Complainant's information.

On November 19, 2019, the undersigned presiding officer received correspondence from Complainant dated November 15, 2019, requesting that Complainant

¹ Tr. 169:13-16.

² Tr. 200:3-7.

³ Tr. 211:7-14.

Exhibit E 41-47 and Complainant Exhibit A 37-39 be admitted into evidence. Complainant essentially asserted that Complainant Exhibit E 41-47 is a statement by the National Director of Intelligence before the House of Representatives and that Complainant Exhibit A 37-39 is a statement by the United States Access Board concerning a report on the Indoor Environmental Quality Project, both of which were statements of a public office and exceptions to the hearsay rule.

No objection was filed to the request that official notice be taken of Complainant Exhibit E 41-47 and Complainant Exhibit A 37-39.

On December 20, 2019, an Interim Order Setting Briefing Schedule was entered.

On January 30, 2020, both parties filed main briefs.⁴

On February 6, 2020, Complainant filed a request to submit a reply brief. On April 29, 2020, an Interim Order was entered, granting the parties leave to file reply briefs by May 28, 2020.

On May 11, 2020, an Interim Order was entered granting Complainant's request to take official notice of Exhibit E 41-47, and Complainant Exhibit A 37-39.

On May 22, 2020, Complainant filed a request for extension of time to file reply briefs. Complainant's request was granted by Interim Order entered May 28, 2020.

On August 3, 2020, both parties filed reply briefs.⁵

⁴ Complainant's Main Brief contains references, citations, and quotes from documents not admitted at the hearing as exhibits. This extra-record discussion was not considered by the undersigned in the preparation of this decision.

⁵ Complainant's Reply Brief contains references to documents and information not admitted at the hearing as exhibits or testimony. This extra-record discussion was not considered by the undersigned in the preparation of this decision.

On September 2, 2020, an Interim Order was issued closing the evidentiary record.

FINDINGS OF FACT

1. Complainant is Cindy Kelly, who resides at 7252 Camp Meeting Road, New Tripoli, Pennsylvania (service address).
2. Respondent is Metropolitan Edison Company, an electrical distribution company (EDC) that provides residential electrical service to Complainant at the service address.
3. Act 129 of 2008 required EDCs with more than 100,000 customers to adopt smart meter technology procurement and installation plans (SMTPIPs) to the Commission.⁶
4. Act 129 also defined some of the specific characteristics the meters need to have, including bi-directional communication with the utility and the ability to report consumption data in at least hourly intervals.⁷
5. Met-Ed is an EDC with at least 100,000 customers.⁸
6. On June 24, 2009, the Commission issued an Implementation Order, providing general direction to EDCs regarding their adoption of smart meter programs and requiring EDCs to submit SMTPIPs to the Commission.⁹

⁶ Tr. 334:15-18; Respondent PD-1.

⁷ Tr. 334:18-335-2.

⁸ Tr. 335:5-9.

⁹ Tr. 338: 20-25; Respondent PD-2.

7. On August 14, 2009, Met-Ed's SMTPIP was submitted to the Commission.¹⁰
8. On June 9, 2010, the Commission entered an Order approving Respondent's SMTPIP with modifications.¹¹
9. On December 31, 2012, Respondent filed its initial smart meter deployment plan (SMDP) with the Commission.¹²
10. By Order entered June 5, 2014, the Commission approved Respondent's final SMDP.¹³
11. The SMDP does not provide an opt-out for customers.¹⁴
12. Respondent is installing Itron OpenWay CENTRON smart meters.¹⁵
13. Met-Ed's SMDP requires Met-Ed to deploy 98.5% of smart meters to its customer service locations by mid-2019, and the remaining 1.5% of smart meters, which are located in hard-to-access locations, such as remote hunting cabins, by 2022.¹⁶

¹⁰ Tr. 341:19-21.

¹¹ Tr. 341:24-342:2; Respondent PD-3.

¹² Tr. 343:24-25.

¹³ Tr. 344:3-6; PD-4.

¹⁴ Exhibit JCA-1.

¹⁵ Tr. 346:14-17.

¹⁶ Tr. 348:10-22.

14. Respondent is only able to access a customer's total usage of electricity through the smart meter network and is not able to determine what is causing a customer's usage.¹⁷

15. Respondent must follow its Commission-approved Customer Privacy Policy.¹⁸

16. Respondent's Privacy Policy provides that it may not sell or share any sensitive customer information to third parties and defines sensitive customer information to include customers' names, addresses, usage data, Social Security numbers, employee identification numbers, driver's license numbers, dates of birth, credit card numbers, bank account information, and government passport numbers.¹⁹

17. No personally identifiable customer information is transmitted across the Company's smart meter communication network.²⁰

18. The Company's smart meter network includes a number of security protections which prevent against the unauthorized access of a customer's usage data, including encryption, firewalls, password protection, and continuous security monitoring.²¹

19. The Company's smart meter network complies with the advanced metering infrastructure guidelines published by the North American Energy Standards Board (NAESB) and the National Institute of Standards and Technology (NIST).²²

¹⁷ Tr. 350:3-13.

¹⁸ Tr. 350:14-351:10; Respondent JCA-2; Respondent PD-5.

¹⁹ Tr. 352:10-17; Respondent JCA-2.

²⁰ Tr. 353:1-5; Respondent JCA-2.

²¹ Tr. 353:17-22; Respondent JCA-2.

²² Tr. 353:23-354:2; Respondent JCA-2.

20. Respondent's smart meters are compliant with standards set by the Federal Communications Commission (FCC) and the American National Standards Institute (ANSI) and are Underwriters Laboratory (UL) certified.²³

21. On December 12, 2017, the Company sent correspondence to Respondent regarding the installation of a smart meter at the service location.²⁴

22. On January 11, 2018, the Company's contractor, Wellington Energy, attempted to install a smart meter, but Complainant requested that it be installed at another time.²⁵

23. On January 15, 2019, a Company representative spoke with Complainant who agreed to the installation of a smart meter.²⁶

24. The service request for installation was referred to Met-Ed's meter services group, a field organization, to complete the installation.²⁷

25. Because the meter services group is a field organization, the contacts it had with Complainant would not be recorded in the Company's customer contact records.²⁸

26. On August 24, 2018, a Company representative spoke to Complainant. Complainant advised that she filed a formal Complaint with the Commission, and at that time the representative placed a smart meter refusal flag on Complainant's account.²⁹

²³ Tr. 354:14-355:10.

²⁴ Tr. 356:10-13; Respondent JCA-3.

²⁵ Tr. 140:24-141:14, 356:16-20; Respondent JCA-3.

²⁶ Tr. 357:8-13.

²⁷ Tr. 357:17-358:6.

²⁸ Tr.358:4-6.

²⁹ Tr. 359:12-18.

27. On September 17, 2019, Met-Ed was served with the Complaint in the instant proceeding and ceased its installation efforts.³⁰

28. As of the date of the hearing, Met-Ed has not installed a smart meter at the service location.³¹

29. Complainant offered her own lay witness testimony at the hearing³², and did not testify as an expert.³³

30. Respondent offered testimony of Company employee, John Ahr.³⁴

DISCUSSION

Legal Standards

Under Section 332(a) of the Public Utility Code, 66 Pa.C.S. § 332(a), “the proponent of a rule or order has the burden of proof.” It is well-established that “[a] litigant’s burden of proof before administrative tribunals as well as before most civil proceedings is satisfied by establishing a preponderance of evidence which is substantial and legally credible.” *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm’n*, 578 A.2d 600, 602 (Pa.Cmwlth. 1990). The preponderance of evidence standard requires proof by a greater weight of the evidence. *Commonwealth v. Williams*, 557 Pa. 207, 732 A.2d 1167 (1999). This standard is satisfied by presenting evidence more convincing, by even the smallest amount, than that presented by another party. *Brown v. Commonwealth*, 940 A.2d 610, 614 n.14 (Pa.Cmwlth. 2008).

³⁰ Tr. 359:21-360:7.

³¹ Tr. 359:25-360:7.

³² Tr. 25:16-328:6.

³³ Tr. 59:17-19.

³⁴ Tr. 329:7-386:2.

If the party seeking a rule or order from the Commission sets forth a *prima facie* case, then the burden shifts to the opponent. *MacDonald v. Pa. R.R. Co.*, 348 Pa. 558, 36 A.2d 492 (1944). Establishing a *prima facie* case requires either evidence sufficient to make a finding of fact permissible or evidence to create a presumption against an opponent which, if not met, results in an obligatory decision for the proponent. Once a *prima facie* case has been established, if contrary evidence is not presented, there is no requirement that the party seeking a rule or order from the Commission must produce additional evidence to sustain its burden of proof. See *Replogle v. Pa. Elec. Co.*, 54 Pa. PUC 528, 1980 Pa. PUC LEXIS 20 (Order entered Oct. 9, 1980); see also *Dist. of Columbia's Appeal*, 21 A.2d 883 (Pa. 1941); *Application of Pennsylvania-American Water Co. for Approval of the Right To Offer, Render, Furnish or Supply Water Serv. to the Pub. in Additional Portions Of Mahoning Twp., Lawrence County, Pa.*, Docket No. A-212285F0148, 2008 Pa. PUC LEXIS 874 (Order entered Oct. 29, 2008).³⁵

In her Reply Brief, Complainant argues Respondent has the burden of proof to show that the installation of a smart meter is required by law and that it will not violate any statute or regulation.³⁶ However, in smart meter related matters, the Commission has held that “[t]he Complainant will have the burden of proof during the proceeding to demonstrate, by a preponderance of the evidence, that [the utility] is responsible or accountable for the problem described in the Complaint.” *Kreider v. PECO Energy Co.*, Docket No. P-2015-2495064, p. 18 (Order entered Sept. 3, 2015); see also *Romeo v. Pa. Pub. Util. Comm’n*, 154 A.3d 422, 429 (Pa.Cmwlth. 2017) (finding that the smart meter complainant should have an opportunity to try to prove his claim through “the testimony of others as well as other evidence that goes to that issue.”)

³⁵ In addition, any finding of fact necessary to support an adjudication of the Commission must be based upon substantial evidence. *Met-Ed Indus. Users Grp. v. Pa. Pub. Util. Comm’n*, 960 A.2d 189, 193 n.2 (Pa.Cmwlth. 2008) (citing 2 Pa.C.S. § 704). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Borough of E. McKeesport v. Special/Temporary Civil Serv. Comm’n*, 942 A.2d 274, 281 n.9 (Pa.Cmwlth. 2008) (citation omitted). Although substantial evidence must be “more than a scintilla and must do more than create a suspicion of the existence of the fact to be established,” *Kyu Son Yi v. State Bd. of Veterinary Med.*, 960 A.2d 864, 874 (Pa.Cmwlth. 2008) (citation omitted), the “presence of conflicting evidence in the record does not mean that substantial evidence is lacking.” *Allied Mech. and Elec., Inc. v. Pa. Prevailing Wage Appeals Bd.*, 923 A.2d 1220, 1228 (Pa.Cmwlth. 2007) (citation omitted).

³⁶ Complainant’s Reply Brief at p.5.

When presented with a challenge to a smart meter installation, the Commission has pronounced that “[t]he ALJ’s role . . . will be to determine based on the record in [the] particular case, whether there is sufficient evidence to support a finding that Complainant was adversely affected by the smart meter or whether [the utility’s] use of a smart meter will constitute unsafe or unreasonable service in violation of Section 1501 under the circumstances in this case.” *Kreider v. PECO Energy Co.*, Docket No. P-2015-2495064 at 23 (Order entered Jan. 28, 2016) (citing *Woodbourne-Heaton*, 1992 Pa. PUC Lexis 160, at *12-13). *Frompovich v. PECO Energy Co.*, Docket No. C-2015-2474602 (Opinion and Order entered May 3, 2018 at 10).

Section 701 of the Public Utility Code provides that “any person . . . having an interest in the subject matter . . . may complain in writing, setting forth any act or thing done or omitted to be done by any public utility in violation, or claimed violation, of any law which the commission has jurisdiction to administer, or of any regulation or order of the commission.” 66 Pa.C.S. § 701. Therefore, a complainant must generally demonstrate that the public utility violated the Public Utility Code or a Commission regulation or order.

Section 1501 of the Public Utility Code states, in pertinent part, that:

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. Subject to the provisions of this part and the regulations or orders of the commission, every public utility may have reasonable rules and regulations governing the conditions under which it shall be required to render service....

66 Pa.C.S. § 1501.

The Commission has exclusive jurisdiction to adjudicate “issues involving the reasonableness, adequacy, and sufficiency” of a public utility’s facilities and services. *See Elkin v. Bell of Pa.*, 420 A.2d 371, 374 (Pa. 1980) (citations omitted).

Smart Meter Mandate

On October 15, 2008, Act 129 was signed into law and codified as part of the Public Utility Code (Code).³⁷ Act 129 required EDCs with at least 100,000 customers, such as Met-Ed, to file a SMTPIP with the Commission for approval.³⁸ Specifically, Section 2807(f)(2) of the Code directed EDCs to furnish smart meter technology as follows: 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.³⁹

On June 24, 2009, the Commission entered an Implementation Order declaring, “The Commission believes that it was the intent of the General Assembly to require all covered EDCs to deploy smart meters *system-wide*....”⁴⁰ The Commission approved Respondent’s final SMDP by Order entered June 5, 2014.⁴¹ Met-Ed’s final SMDP requires Met-Ed to deploy 98.5% of smart meters to its customer service locations by mid-2019, and the remaining 1.5% of smart meters, which are located in hard-to-access locations, such as remote hunting cabins, by 2022.⁴²

Respondent argues that Act 129 and its SMDP provide no opt-out for customers.⁴³ Complainant argues that Respondent’s interpretation of Act 129 as requiring the installation of

³⁷ 66 Pa.C.S. § 101, *et seq.*

³⁸ 66 Pa.C.S. § 2807(f).

³⁹ 66 Pa.C.S. § 2807(f)(2).

⁴⁰ Respondent PD-2 (emphasis added).

⁴¹ Respondent PD-4.

⁴² Tr. 347:16-349-5; Exhibit JCA-1.

⁴³ 66 Pa.C.S. § 2807(f)(2); Exhibit JCA-1.

smart meters is inconsistent with the plain language of the statute as well as the Act's legislative history.⁴⁴

Commission precedent supports Respondent's position that the Commission cannot grant exceptions to the statutory directive that smart meters be installed at all service locations and allow customers to "opt-out."⁴⁵ Neither the Company's Commission-approved SMDP nor Act 129 provide for such opt-outs to occur.⁴⁶ The Commission has recently reaffirmed this conclusion, holding in a similar complaint proceeding that: (1) there is no provision in the Code or Commission regulations or Orders that allows a customer to "opt-out" of a smart meter installation; (2) there is Commission precedent that no opt-out provision exists in current Pennsylvania law; and (3) the EDC is legally required to install smart meters by Act 129 and Commission Orders.⁴⁷

Complainant presented no evidence to show that Respondent's refusal to allow Complainant to opt-out of smart meter installation is in any way a violation of the Company's SMITP or SMDP or any Commission Order. Accordingly, this claim is not supported by the evidence and must be dismissed.

Unreasonable or Inadequate Service

Complainant testified about the reasons why she does not want a smart meter and addressed her concerns related to safety, privacy, and health.

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

⁴⁴ Tr. 31:2-11; Complainant's Main Brief at p.7-12.

⁴⁵ See, e.g., *Lutherschmidt v. Metro. Edison Co.*, Docket No. C-2010 2200353 (Final Order entered March 25, 2011); *Negley v. Metro. Edison Co.*, Docket No. C-2010-2205305 (Initial Decision dated January 3, 2011 became final without Commission action on March 3, 2011).

⁴⁶ 66 Pa.C.S. § 2807(f); Exhibit JCA-1.

⁴⁷ *Hoffman-Lorah v. PPL Elec. Util. Corp.*, Docket No. C-2018-2644957 (Order entered May 23, 2019).

that are necessary or proper for the accommodation, convenience, and safety of its patrons, employees, and the public. 66 Pa.C.S. § 1501.

At the hearing, Complainant testified smart meters cause negative impacts to “the viability of humans, wildlife, and the environment around them.”⁴⁸ She argued smart meters “jeopardize the privacy of all homes and buildings that they are placed upon, and makes [her] less safe in [her] home.”⁴⁹ She testified that “smart meters and the networks that they participate in are high-value targets...[and] are vulnerable to hacking and harm caused by external parties.”⁵⁰ She also argued that smart meters “pose a significant danger to all building they are placed upon,” and “[t]he vulnerabilities result in meter meltdowns, fires, and explosions.”⁵¹

Complainant testified about her concerns regarding how smart meters may negatively affect her health. She testified about her medical history and symptoms from which she suffers⁵² and which she has suffered for years⁵³. She also explained her previous medical diagnosis.⁵⁴ She testified she believes smart meters are detrimental to her health⁵⁵, and she attempts to keep her exposure to electromagnetic fields (EMFs) to a minimum.⁵⁶

Complainant testified she is willing to call in her meter readings in lieu of having a smart meter installed.⁵⁷

⁴⁸ Tr. 30:6-9.

⁴⁹ Tr. 30:12-14.

⁵⁰ Tr. 30:15-18.

⁵¹ Tr. 30:20-31:1.

⁵² Tr. 65:8-9.

⁵³ Tr. 71:16-17, 96:25-97:4.

⁵⁴ Tr. 72:5-6, 94:9-13.

⁵⁵ Tr. 106:2-8.

⁵⁶ Tr. 73:6-22.

⁵⁷ Tr. 130:12-17.

Company employee Mr. Ahr testified to rebut Complainant's claims. With regard to Complainant's privacy concerns, Mr. Ahr testified that the only information available to the Company through the smart meter network is a customer's total electric usage and the Company is unable to determine what is causing a customer's electric usage.⁵⁸

He testified that the Company must follow its Commission-approved customer Privacy Policy,⁵⁹ which provides that the Company may not sell or share any sensitive customer information to third parties, and defines sensitive customer information to include customers' names, addresses, interval energy usage data, Social Security numbers, employee identification numbers, driver's license numbers, dates of birth, credit card numbers, bank account information, and government passport numbers.⁶⁰

Mr. Ahr testified that no personally identifiable customer information is stored in or transmitted across the Company's smart meters or smart meter communication network⁶¹ and the Company's smart meter network includes a number of security protections which prevent against the unauthorized access of a customer's usage data, including encryption, firewalls, password protection, and continuous security monitoring.⁶² He testified that the Company's smart meter network complies with the security standards of the advanced metering infrastructure guidelines published by NAESB and NIST.⁶³

With regards to Complainant's health and safety concerns, Mr. Ahr testified that Respondent's smart meters are compliant with standards set by the FCC and ANSI and are UL certified.⁶⁴ He testified he is not aware of any fires caused by smart meters in Met-Ed's service

⁵⁸ Tr. 350:3-13.

⁵⁹ Tr. 350:14-351:10; Respondent JCA-2; Respondent PD-5.

⁶⁰ Tr. 352:10-17; Respondent JCA-2.

⁶¹ Tr. 353:1-5; Respondent JCA-2.

⁶² Tr. 353:17-22; Respondent JCA-2.

⁶³ Tr. 353:23-354:2; Respondent JCA-2.

⁶⁴ Tr. 354:14-355:10.

territory and has no reason to believe the smart meters being installed by the Company are unsafe.⁶⁵

Mr. Ahr testified it is not possible for Complainant to avoid smart meter installation by calling in her meter readings, because it is not permitted under the Act and the Company needs to have the uniform means of reading all customer meters.⁶⁶

Complainant failed to meet her burden to demonstrate that the Company's installation of the smart meter at her residence constitutes unreasonable or inadequate service. Although Complainant raised concerns about health, safety, and privacy, these claims consisted solely of Complainant's lay opinions and beliefs. Assertions, personal opinions, or perceptions do not constitute evidence.⁶⁷ As such, there is no record evidence to support the conclusion that Respondent's installation of the smart meter at the service location constitutes a violation of Section 1501 of the Code. Accordingly, Complainant's claims must be dismissed. In view of Complainant's failure to meet her burden of proof, the Complaint must be denied and dismissed with prejudice.

Complainant's Procedural Due Process Concerns

In her Main and Reply Briefs, Complainant raised procedural due process claims with regard to the conduct of the evidentiary hearing. First, Complainant argues she had a delay on her phone during the hearing such that it impacted her ability to hear others and for others to hear her.⁶⁸ Complainant complained once about a delay on her phone, and it was towards the end of the hearing during Complainant's cross-examination of Mr. Ahr.⁶⁹ At no point did any

⁶⁵ Tr. 356:7-14.

⁶⁶ Tr. 349:16-20.

⁶⁷ *Pa. Bureau of Corr. v. City of Pittsburgh*, 532 A.2d 12 (Pa. 1987).

⁶⁸ Complainant's Brief at p.5.

⁶⁹ Tr. Tr.385:6-7.

individual indicate an inability to hear Complainant, and at no point did Complainant indicate that the delay on her phone impacted her ability to hear others.

Second, Complainant argued that the hearing lasted over eight hours without any breaks for a rest or a meal, and as a result, she was “having difficulty processing information.”⁷⁰ At the beginning of the hearing, prior to the taking of any testimony, the presiding officer instructed the parties that if anybody needed a break to let him know and that he would be “more than generous with breaks.”⁷¹ During Complainant’s testimony, Complainant indicated that she had been a long time without food, had missed some of her medication, and was not “talking well.”⁷² The presiding officer asked her if she needed to take break, but Complainant indicated she was “okay.”⁷³ Later in her testimony, Complainant indicated that it was late in the day and she had not eaten.⁷⁴ The presiding officer again advised that if anyone needed a break, he would be “more than happy” to take a break, but Complainant continued with her testimony.⁷⁵ Prior to the beginning of Mr. Ahr’s direct testimony, the presiding officer asked the parties if anybody needed a break, and when no party indicated they needed one, he again advised the parties to let him know if anyone needed a break.⁷⁶ At no point during the hearing did Complainant request a break.

Third, Complainant argued she spent “hundreds of hours” preparing 190 “well sourced exhibits” for her hearing, but that only 7 were admitted.⁷⁷ She argued she was “overwhelmed” during the hearing and the hearing felt like “being in a foreign country.”⁷⁸ She

⁷⁰ *Id.*

⁷¹ Tr. 20:1-7.

⁷² Tr. 257:14-21.

⁷³ *Id.*

⁷⁴ Tr. 313:1-7.

⁷⁵ *Id.*

⁷⁶ Tr. 328:17-19.

⁷⁷ Complainant’s Main Brief at 14.

⁷⁸ *Id.*

argued that she did not understand the legal procedures and terminology used during the hearing.⁷⁹

As discussed above, an Interim Order was entered on May 30, 2019, scheduling a prehearing conference for June 7, 2019 in order for the parties to discuss the proceeding and to permit the parties to ask questions and to address any concerns that they had. That prehearing conference was subsequently canceled, however, because Complainant advised in a status report filed May 21, 2019, that she was “declining” any prehearing conference and preferred to proceed directly to an evidentiary hearing. Had Complainant participated in the prehearing conference, it is possible she may have had any questions addressed and she may have better understood the hearing procedures and rules of evidence.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the parties and the subject matter in this proceeding. 52 Pa.C.S. § 331; 66 Pa.C.S. §§ 102, 107, 1501, 701.

2. Under Section 332(a) of the Pennsylvania Public Utility Code, the proponent of a rule or order has the burden of proof. 66 Pa.C.S. § 332(a). It is well established that “[a] litigant’s burden of proof before administrative tribunals as well as before most civil proceedings is satisfied by establishing a preponderance of evidence which is substantial and legally credible.” *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm’n*, 578 A.2d 600, 602 (Pa.Cmwlth. 1990).

3. The preponderance of evidence standard requires proof by a greater weight of the evidence. *Commonwealth v. Williams*, 557 Pa. 207, 732 A.2d 1167 (1999). This standard is satisfied by presenting evidence that makes the existence of a contested fact more likely than its nonexistence. *Brown v. Commonwealth*, 940 A.2d 610, 614 n.14 (Pa.Cmwlth. 2008) (citation omitted).

⁷⁹ *Id.*

4. In smart meter-related matters, the Commission has held that “[t]he Complainant will have the burden of proof during the proceeding to demonstrate, by a preponderance of the evidence, that [the utility] is responsible or accountable for the problem described in the Complaint.” *Kreider v. PECO Energy Co.*, Docket No. P-2015-2495064, p. 18 (Order entered Sept. 3, 2015).

5. Section 701 of the Public Utility Code provides that “any person . . . having an interest in the subject matter . . . may complain in writing, setting forth any act or thing done or omitted to be done by any public utility in violation, or claimed violation, of any law which the commission has jurisdiction to administer, or of any regulation or order of the commission.” 66 Pa.C.S. § 701.

6. The Commission has exclusive jurisdiction to adjudicate “issues involving the reasonableness, adequacy, and sufficiency” of a public utility’s facilities and services. *See Elkin v. Bell of Pa.*, 420 A.2d 371, 374 (Pa. 1980) (citations omitted).

7. When presented with a challenge to a smart meter installation, the Commission has pronounced that “[t]he ALJ’s role . . . will be to determine based on the record in this particular case, whether there is sufficient evidence to support a finding that Complainant was adversely affected by the smart meter or whether [the utility’s] use of a smart meter will constitute unsafe or unreasonable service in violation of Section 1501 under the circumstances in this case.” *Kreider v. PECO Energy Co.*, Docket No. P-2015-2495064, p. 23 (Order entered Jan. 28, 2016) (citation omitted).

8. To satisfy his or her burden of proof, a complainant must demonstrate that the utility violated the Public Utility Code or a regulation or order of the Commission. 66 Pa.C.S. § 701. This must be shown by a preponderance of the evidence. *Patterson v. Bell Tel. Co. of Pa.*, 72 Pa. PUC 196 (1990).

9. Upon the presentation by a complainant of evidence sufficient to initially satisfy the burden of proof, the burden of going forward with the evidence, sometimes called the

burden of persuasion, to rebut the evidence of the complainant shifts to the respondent. If the evidence presented by the respondent is of co-equal weight, the complainant has not satisfied the burden of proof. The complainant now has to provide some additional evidence to rebut the evidence of the respondent. *Burleson v. Pa. Pub. Util. Comm'n*, 443 A.2d 1373 (Pa.Cmwlth. 1982), *aff'd*, 501 Pa. 433, 461 A.2d 1234 (1983).

10. While the burden of persuasion may shift back and forth during a proceeding, the burden of proof never shifts. The burden of proof always remains on the party seeking affirmative relief from the Commission. *Milkie v. Pa. Pub. Util. Comm'n*, 768 A.2d 1217 (Pa.Cmwlth. 2001).

11. Assertions, personal opinions, or perceptions do not constitute evidence. *Pa. Bureau of Corrs. v. City of Pittsburgh*, 532 A.2d 12 (Pa. 1987).

12. A public utility is required to provide adequate, efficient, safe, and reasonable service. 66 Pa.C.S. §§ 102 and 1501.

13. There is no specific provision in the Code or the Commission's regulations or orders that provides that an electric distribution customer may opt-out of smart meter installation. *Povacz v. PECO Energy Co.*, Docket No. C-2012-2317176 (Opinion and Order entered January 24, 2013).

14. Act 129 of 2008, 66 Pa.C.S. § 2806.1 *et seq.*, requires electric distribution companies to file smart meter technology procurement and installation plans with the Commission for approval. 66 Pa.C.S. § 2807(f).

15. Complainant failed to carry her burden of proof establishing that Met-Ed would violate the Public Utility Code or a regulation or order of the Commission by installing a smart meter at the service location. 66 Pa.C.S. § 332.

