

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Noreen McCarthy	:	
	:	
v.	:	C-2019-3006923
	:	
Metropolitan Edison Company	:	

INITIAL DECISION

Before
Conrad A. Johnson
Administrative Law Judge

INTRODUCTION

This decision dismisses an Amended Complaint alleging unreasonable service and safety issues and requesting a Commission order directing Respondent to desist from attempting to install a smart meter at Complainant’s service address.¹ Complainant failed to establish a *prima facie* case evidencing any violation of a Commission statute, regulation, or order on the part of Respondent, or that Complainant is entitled to the relief requested.

HISTORY OF THE PROCEEDING

Complaint, Answer and New Matter

Noreen McCarthy (Complainant) filed a Formal Complaint (Complaint) with the Pennsylvania Public Utility Commission (Commission) against Metropolitan Edison Company

¹ A smart meter is an electronic device that records a customer’s consumption of electric energy in increments of an hour or less and communicates that information at least daily, back to the electric distribution company for monitoring and billing purposes. See 66 Pa.C.S. § 2807(f)(1) and (2).

(Met-Ed, Respondent or Company) on January 7, 2019. Complainant alleged that she had received notification on December 18, 2018, that her analog meter was going to be replaced with a smart meter. Complainant averred, “Smart meters are a fire hazard and are in violation of 1501.” Complaint ¶4. As relief, Complainant requested that the analog meter remain installed at her home. *Id.* ¶5. Ms. McCarthy’s Complaint was submitted using the Commission’s standard fill-in the blank complaint form.

On January 28, 2019, Respondent filed an Answer and New Matter, admitting it provides electric service to Complainant at her home (the Service Location) and denying the remaining material allegations of the Complaint. Respondent specifically denied 1) that it notified Complainant that her currently installed meter would be replaced with a smart meter as the Company had not yet commenced deploying smart meters in Complainant’s area (Answer ¶4); 2) that installation of a smart meter at the Service Location would be a violation of Section 1501 of the Public Utility Code (Code), 66 Pa.C.S. § 1501; and 3) that smart meters are a fire or safety hazard. Answer ¶5.

In its New Matter, Respondent averred the Complaint was legally insufficient because the Company was required to install smart meters under Act 129 of 2008 (Act 129) of the Code. 66 Pa.C.S. § 2806.1, *et. seq.* According to Respondent, there was no “opt-out” provision to the installation of a smart meter. Therefore, the Commission was not authorized to grant the relief requested in the Formal Complaint. New Matter ¶¶ 13, 16.

Respondent’s Answer and New Matter requested dismissal of the Formal Complaint with prejudice or, in the alternative, that the matter be set for a prehearing conference.

Preliminary Objections

On January 28, 2019, Respondent also filed Preliminary Objections to the Complaint. Respondent averred the requested relief, an exemption from the installation of a smart meter, was not legally recoverable in the cause of action and Respondent had not violated any Commission statute, regulation, order or tariff provision with regard to the proposed

installation of a smart meter. Respondent argued that, as a matter of law under Act 129, it was required to install a smart meter at the Service Location. Respondent further maintained that the Formal Complaint was legally insufficient because it failed to state a claim upon which the Commission could grant relief. Thus, a hearing was not in the public interest, and the Complaint did not meet the standards set forth in recent Commission decisions sufficient to survive the Preliminary Objections.

On February 10, 2019, Complainant filed a Reply to the Preliminary Objections.

On February 15, 2019, Complainant filed a Reply to New Matter of Metropolitan Edison Company (Reply). Complainant objected to the Company's request for the scheduling of a prehearing conference in this matter. Complainant stated, "My family and work obligations preclude me from preparing for multiple hearings." *See* Reply at unnumbered page 3.

Prehearing Order

On February 22, 2019, the proceeding was assigned to Administrative Law Judge Jeffrey Watson (ALJ Watson).

On March 7, 2019, ALJ Watson issued a *Prehearing Order Revising Litigation Schedule (Prehearing Order)*, informing the Parties about the applicable procedural rules.² The *Prehearing Order* noted that Ms. McCarthy objected to the request of Met-Ed for a prehearing conference. Accordingly, a prehearing conference was not included in the Litigation Schedule. The Parties were reminded that a prehearing conference could be scheduled upon request. *Prehearing Order* at 7.

Pursuant to the Litigation Schedule, 1) the Parties were required to provide each other a written summary of expected factual and expert testimony (except for

² Here it is noted that the word "Revising" was inadvertently included in the heading of the *Prehearing Order*. The March 7, 2019 *Prehearing Order* was in fact the first order entered establishing a litigation schedule in this proceeding.

Complainant's) by May 3, 2019; 2) discovery was to conclude by July 1, 2019; 3) by July 22, 2019, the Parties were required to submit a Status Report identifying their respective witnesses and their availability for an anticipated evidentiary hearing to convene in October 2019; 4) Complainant was required to submit her written direct testimony and that of her witnesses by July 22, 2019; 5) Met-Ed's written rebuttal testimony was due by August 26, 2019; and 6) dispositive motions were due by September 6, 2019.

Ruling on Preliminary Objections

On March 19, 2019, ALJ Watson issued an *Interim Order Denying Respondent's Preliminary Objections (March 2019 Interim Order)*. ALJ Watson reasoned that well-established Commission precedent tends to afford unrepresented complainants the opportunity to orally set forth their cases on the record and cautions against dismissing cases on a preliminary basis. In the often-cited case of *Carlock v. United Tel. Co. of Pa.*, Docket No. F-00163617 (Order entered July 14, 1993), the Commission determined that unrepresented complainants should have an opportunity to be heard orally and not have their case dismissed because of a preliminary pleading. *Id.* at 7. The Commission explained that in many cases, unrepresented complainants can explain their dispute orally much better than they can communicate their grievance in written form and to deny unrepresented complainants a meaningful opportunity to be heard in such cases can be viewed as a gross abuse of authority. *March 2019 Interim Order* at 4 (citing *Carlock*, cited above; *Halpern v. Bell Tel. Co. of Pa.*, Docket No. C-00923950 (Opinion and Order entered October 19, 1992); *Schleisher v. Bell Tel. Co. of Pa.*, Docket No. F-00161252 (Opinion and Order entered December 17, 1992); and *Gera v. PPL Elec. Utils. Corp.*, Docket No. C-20054657 (Opinion and Order entered November 2, 2005).

ALJ Watson noted the granting of Complainant's request to forego a prehearing conference. *March 2019 Interim Order*. at 2. ALJ Watson explained that granting Complainant's request would result in a missed procedural opportunity:

Complainant's request to forego the scheduling of a prehearing conference will be granted however, the Parties will forego the ability to address concerns and issues typically addressed at a prehearing conference and

provide input regarding deadlines and other matters typically addressed at a prehearing conference regarding the establishment or revision of a litigation schedule. The Parties will be expected to timely comply in all respects with the deadlines imposed in this proceeding.

Id.

ALJ Watson also explained Ms. McCarthy's burden of proof in this proceeding:

I note, however, that the standard of proof at a hearing is different than the standard used to dispose of preliminary motions such as the preliminary objections in this case. In order to prevail on some or all of the assertions raised in the Complaint, Complainant must prove, by substantial evidence, that she is entitled to relief because Respondent has violated the Public Utility Code, a Commission order or regulation, or a Commission-approved tariff of the Company concerning the service provided to her. This is a higher legal standard than that which was used to determine Respondent's preliminary objections. In addition, the Parties are cautioned to review the Public Utility Code as well as the statutes, regulations and decisions applicable to this proceeding and to comply with such legal authority.

Id. at 6.

Complainant's Amended Formal Complaint and Respondent's Response

On March 11, 2019, Ms. McCarthy filed an Amended Formal Complaint (*Amended Complaint*), alleging in part, as follows:

II. REASONS FOR COMPLAINT

4. . . . Replacing my analog meter with a wireless computer (aka smart meter) is a violation of PA PUC Code Sections 1501 and 1502 as to myself and my family. *Amended Complaint* ¶4.

5. . . . I'm requesting Met-Ed provide me and my family with the accommodation I require under the ADA.^[3] Placing a smart meter

³ Americans With Disabilities Act of 1990, 42 U.S.C. § 12101 *et seq.* (ADA).

(that isn't even a meter, it is a wireless computer) on my home will subject me and all those living in my household to an unsafe wireless technology that is in violation of PA PUC Code Sections 1501 and 1502 as to myself and other members of my family. *Id.* ¶5.

....

8. The electromagnetic frequencies generated by smart meters on a continual basis cause harm to the health of vulnerable humans, animals, and insects by disrupting cellular communication, promoting stress hormone production, and disrupting many other biological processes in the body. In order to preserve my health and the health of all those dwelling in my home I reject the installation of a smart meter because it would not provide or maintain me and my family safe service based on our unique needs, and therefore will be in violation of PA PUC Code Sections 1501 and 1502. *Id.* ¶8.

9. Smart meters pose a fire hazard to the homeowners who live in smart metered homes. *Id.* ¶9.

III. REQUESTED RELIEF:

10. Complainant respectfully requests that the Commission compel Met-Ed to abide by the requirements of Section 1501 and 1502 of the Public Utility Code and Section 57.194 of the Commission's regulations to provide safe and reasonable service to Complainant.

....

12. Complainant respectfully requests that the Commission allow her to retain the analog meter, which is proven to provide safe, reasonable service, which is the requirements of Section 1501 and 1502, taking into consideration her and her family's unique needs.

13. The Commission should compel Met-Ed to cease and desist from any attempts to install a wireless smart meter or other harmful equipment at Complainant's premises, as such an action is a violation of Section 1501 of the Public Utility Code and Section 57.194 and Section 1502 of the Commission's regulations as they pertain to Complainant's right to preserve the health of herself and that of her family.

14. In the alternative, and pursuant to 52 Pa.Code § 1.91, Complainant respectfully requests that the Commission order the waiver of any rule, regulation or Commission Order that the Commission believes requires Met-Ed to deploy a wireless EMF emitting meter at the Complainant's premises.

Id. ¶¶10, 12-14. Ms. McCarthy's *Amended Complaint* was submitted in a format like a civil complaint with multi-numbered paragraphs together with a signed verification and certificate of service.

Respondent's Response to *Amended Complaint*

On April 1, 2019, Met-Ed filed an Answer and New Matter to the Amended Complaint (*Answer and New Matter*), denying that installation of a smart meter at the Service Location is a violation of 66 Pa.C.S. §§ 1501 and 1502. Met-Ed denied the remaining material allegations of the *Amended Complaint*.

Met-Ed alleged that on December 18, 2018, Ms. McCarthy contacted the Company, refused installation of a smart meter at the Service Location, and requested to "opt out." *Answer* ¶4. Met-Ed argued the Company is required to install a smart meter at the Service Location in accordance with Act 129 of 2008 (Act 129),⁴ and there was no "opt out" provision under Act 129. *Id.* "By refusing to allow the Company access to its meter, the Complainant is in violation of Rules 9 and 20 of the Company's Commission-approved tariff⁵ and would therefore be lawfully subject to termination in accordance with 66 Pa.C.S. § 1406(a)(4) and 52 Pa.Code § 56.81(3)," Met-Ed further contended. *Id.*

⁴ 66 Pa.C.S. § 2806.1 *et seq.* Among other things, Act 129 specifically directed that electric distribution companies with at least 100,000 customers file a smart meter technology procurement and installation plan with the Commission for approval. 66 Pa.C.S. § 2807(f)(1) and (2).

⁵ *Metropolitan Edison Company Retail Electric Service Tariff*, Electric Pa. PUC No. 52, pp. 40, 55, issued May 1, 2015, effective May 3, 2015.

In *New Matter*, Met-Ed argued the *Amended Complaint* was legally insufficient because Act 129 did not enable the Commission to grant the relief requested by Ms. McCarthy. For relief, Met-Ed requested dismissal of the *Amended Complaint* with prejudice, or in the alternative, that the matter be set for a prehearing conference.

On April 24, 2019, Ms. McCarthy filed a Reply to Met-Ed's *New Matter*, admitting in part and denying in part the material averments of the *New Matter*. Ms. McCarthy argued that Section 1501 of the Code mandated that the Commission hear her Complaint. Ms. McCarthy also asserted the following, "**Further, Complainant objects to the Company's request that this matter be set for a prehearing conference. My family and work obligations preclude me from preparing for multiple hearings.**" (emphasis in original). Reply to *New Matter* ¶23.

Discovery Matters

On April 1, 2019, Met-Ed served Interrogatories and Request for Production of Documents (Set I) upon Ms. McCarthy and informed her that responses were due within 20 days of service, that is, April 21, 2019.

On April 24, 2019, Ms. McCarthy served Responses to Interrogatories and Requests for Production of Documents (Set I) upon Met-Ed.

On June 13, 2019, Ms. McCarthy served Interrogatories and Request for Production of Documents (Set 1) upon Met-Ed and informed the Company that responses were due within 20 days of service, that is, July 3, 2019.

On June 24, 2019, Met-Ed served upon Ms. McCarthy objections to certain Interrogatories (Set 1) propounded by Ms. McCarthy.

On June 28, 2019, Met-Ed served Responses to certain Interrogatories (Set 1) propounded by Ms. McCarthy.

On February 6, 2020, Ms. McCarthy served Interrogatories and Request for Production of Documents (Set 2) upon Met-Ed.

On February 14, 2020, Met-Ed served Interrogatories and Request for Production of Documents (Set II) upon Ms. McCarthy.

On February 18, 2020, Met-Ed served objections to certain Interrogatories (Set 2) propounded by Ms. McCarthy.

On February 26, 2020, Met-Ed served Responses to certain Interrogatories (Set 2) propounded by Ms. McCarthy.

On February 27, 2020, Met-Ed filed a letter disputing Ms. McCarthy's claim that the Company's February 18, 2020 objections to certain Interrogatories (Set 2) propounded by Ms. McCarthy were untimely.

Complainant's First Request for Extension of Litigation Schedule

On April 8, 2019, Ms. McCarthy filed a Motion to Revise Litigation Schedule (*First Motion for Continuance*) requesting a 4-month extension of the Litigation Schedule.⁶ Ms. McCarthy listed the following reasons for her extension request: 1) as a dyslexic person, she needed more time to read and process documents; 2) she was developing a custom literacy curriculum for underprivileged students for a June-July summer camp; 3) she was a homeschooling mother and had until June 30, 2019, to submit paperwork to the school district; 4) she would be traveling out-of-state with her daughter on a college tour trip, and therefore she

⁶ The Commission's Secretary's Bureau (Secretary) docketed Ms. McCarthy's Motion as a Petition for Extension of the Litigation Schedule, probably due to this filing and many of Ms. McCarthy's other filings being in letter form and not strictly complying with the Commission's rules for pleadings. 52 Pa.Code §§ 1.31(a); 5.1-5.103. Nevertheless, while Ms. McCarthy's filing may not have strictly complied with the Commission rules, they were given due consideration to secure a just, speedy, and inexpensive determination in this proceeding, particularly because she was self-represented. *See* 52 Pa.Code § 1.2(a) and (d).

was “unable to work on this Formal Complaint process from April 19-25” or respond to Met-Ed’s Interrogatories and Requests for Production of Documents.

By email dated April 18, 2019, Met-Ed objected to Ms. McCarthy’s request for a 4-month extension of the Litigation Schedule, arguing a 4-month extension would delay the resolution of the proceeding.

On April 24, 2019, ALJ Watson issued an *Interim Order Revising Litigation Schedule and Deadline to Respond to Discovery Requests (April 2019 Interim Order)*. Under the *April 2019 Interim Order*, 1) the due date for the exchange of the Parties’ written summary of expected factual and expert testimony was extended from May 3, 2019 to July 1, 2019; 2) the conclusion of discovery was extended from July 1, 2019 to August 2, 2019; 3) by September 27, 2019, the Parties were required to submit a Status Report identifying their respective witnesses and their availability for an anticipated evidentiary hearing to convene in October 2019; 4) the due date for the submission of Complainant’s written direct testimony and that of her witnesses was extended from July 22, 2019 to August 23, 2019; 5) the due date for the submission of Met-Ed’s written rebuttal testimony was extended from August 26, 2019 to September 27, 2019; 6) the due date for dispositive motions was extended September 6, 2019 to October 4, 2019. In all other respects, the *Prehearing Order* remained in effect.

Complainant’s Second Request for Extension of Litigation Schedule

By correspondence received on July 8, 2019, Ms. McCarthy submitted a second request for an extension of the litigation schedule deadlines. On July 24, 2019, ALJ Watson issued another *Interim Order Revising Litigation Schedule and Deadline to Respond to Discovery Requests (July 2019 Interim Order)*. Under the *July 2019 Interim Order*, the Litigation Schedule was again extended. Additionally, Complainant was directed to serve any appropriate objections to the Discovery Requests propounded by Respondent on or before August 2, 2019, and to serve full and complete responses to the Discovery Requests and file a Certificate of Service with the Commission’s Secretary on or before August 30, 2019. By November 15, 2019,

the Parties were to submit a Status Report identifying their respective witnesses and their availability for an anticipated evidentiary hearing to convene in February 2020.

Complainant's Legal Memorandum

On August 21, 2019, Ms. McCarthy filed a 38-page document which she characterized as a Second Amended Complaint. However, Ms. McCarthy's August 21, 2019, filing did not comply with the Commission's rules for pleadings.⁷ Accordingly, the filing was docketed as "Additional Information to Formal Complaint." While Ms. McCarthy claimed in her cover letter that the filing alleged new facts, essentially, the filing instead recited Pennsylvania legislative histories, referenced various Pennsylvania statutes, federal cases, Commission regulations, the ADA and Internet articles, and included the résumé and affidavit of a Tania M. Slaweki, Ph.D. Therefore, Ms. McCarthy's August 21, 2019 filing is deemed a legal memorandum.⁸

Complainant's Third Request for Extension of Litigation Schedule and Hearing Notice

By letter addressed to ALJ Watson, dated September 27, 2019, marked confidential and captioned, **Request for Extension of Time Due to Disability**, Ms. McCarthy made a third request for extension of the Litigation Schedule (emphasis in original). Consequently, on October 3, 2019, ALJ Watson issued *Interim Order Granting Complainant's Third Request to Revise Litigation Schedule (October 2019 Interim Order)* due to Complainant's

⁷ See n. 6, above.

⁸ Procedurally, an amended filing withdraws or voids the preceding filing that is being amended. See *Vetenshtein v. City of Philadelphia*, 755 A.2d 62, 67 (Pa. Cmwlth. 2000). Thus, to have treated Ms. McCarthy's purported Second Amended Complaint as compliant with the regulations would have withdrawn or voided her Amended Complaint and thereby leaving only a legal memorandum, without any factual averments. Consequently, the Second Amended Complaint would have been summarily dismissed without a hearing because an evidentiary hearing would not be necessary on a legal memorandum. "The Commission may dismiss any Complaint without a hearing if, in its opinion, a hearing is not necessary in the public interest." 66 Pa.C.S. § 703(b); 52 Pa.Code § 5.21(d).

On July 2, 2020, Ms. McCarthy filed the same purported Second Amended Complaint, which is again deemed to be a legal memorandum for the reasons previously stated.

disability.⁹ Under the *October 2019 Interim Order*, the Litigation Schedule was extended a third time upon Ms. McCarthy's request.

The *October 2019 Interim Order*, in part, ordered the following. By January 30, 2020, "any Party wishing to present expert testimony (including but not limited to medical, technical, etc.) must provide to the other Party in writing, the name and business address of that expert and a written summary of the expected testimony of that expert." Discovery was to conclude by February 28, 2020. The evidentiary hearing was scheduled for May 5-6, 2020. By April 30, 2020, the Parties were to file a Status Report addressing any outstanding issues in the proceeding. The Parties were cautioned that no further extensions would be granted in the proceeding, absent a finding of exigent circumstances.

On October 4, 2019, a Call-In Telephone Hearing Notice was issued to the Parties reminding them that a telephonic hearing in this proceeding was scheduled for May 5-6, 2020, starting at 10:00 a.m. each day.

Also, the October 4, 2019 Notice advised the Parties as follows:

If you are a person with a disability, and you wish to attend the hearing, we may be able to make arrangements for your special needs. If appropriate, we may be able to provide you with a telephonic hearing instead of an in-person hearing. Please call the scheduling office at the Public Utility Commission at least five (5) business days prior to your hearing to submit your request.

If you require an interpreter to participate in the hearings, we will make every reasonable effort to have an interpreter present. Please call the scheduling office at the Public Utility Commission at least ten (10) business days prior to your hearing to submit your request.

- Scheduling Office: 717.787.1399
- AT&T Relay Service number for persons who are deaf or hearing-impaired: 1.800.654.5988

⁹ The *October 2019 Interim Order* is silent as to the nature of Ms. McCarthy's disability.

Complainant's Request for Reasonable Accommodation Under ADA

By letter dated December 26, 2019, ALJ Watson informed Ms. McCarthy as follows:

Your request for an accommodation under the terms of the Americans with Disabilities Act dated November 5, 2019, was received by me for my consideration on November 12, 2019.

....

Where a litigant's requested accommodation does not impose an undue hardship to the Commission or to other litigants involved in any case before the Commission, the requested accommodation will be given every consideration. Where, in the judgement of the Commission, the requested accommodation may either pose an undue hardship to the Commission or to other litigants involved in any case before the Commission, the Commission will attempt, where possible, to find a reasonable alternative accommodation.

Please provide to me with specific information regarding your disability and documentation substantiating your disability, as well as the specific accommodation which you are seeking with as much specificity as you are able to provide.

....

Please provide this information and documentation to me along with a copy to counsel for Respondent, not later than January 20, 2020.

Here it is important to note, as mentioned above, Ms. McCarthy stated in her April 8, 2019 Motion for a 4-month extension of the Litigation Schedule that she was a dyslexic person. While Ms. McCarthy's April 8, 2019 Motion was not marked confidential, Ms. McCarthy subsequently submitted a filing that she requested remain confidential. Her confidential filing did not contain any medical documentation substantiating her claimed disability. There is nothing in the record to establish that Ms. McCarthy ever provided documentation substantiating her dyslexia or any other disability to ALJ Watson or me. Ms. McCarthy's ADA claim will be more fully discussed below.

Complainant's Motion to Stay

On February 18, 2020, Ms. McCarthy filed a Motion to Stay the proceedings, pending the Commonwealth Court's decisions in cases involving issues similar to those raised in her case, namely that Act 129 violates the reasonable service provisions of Section 1501 of the Code. "Both parties in this proceeding could avoid spending substantial time and resources litigating issues that might ultimately be moot," contended Ms. McCarthy. Additionally, she stated, "I have no resources or time to waste, as I have a full-time job in addition to numerous family and community obligations." Thus, Ms. McCarthy requested that her case be stayed until after the Commonwealth Court made a ruling in the pending cases.

Complainant's Judge Reassignment Request

On February 24, 2020, Ms. McCarthy filed a Certificate of Service representing as follows:

I certify on this day, February 24, 2020, that I have sent a letter dated and sent (sic) on January 16, 2020, to Chief ALJ Rainey, Special Agent Arnold who delivered it to Deputy ALJ Cheskis, and ALJ Watson requesting reassignment to an ALJ that has knowledge of working with ADA accommodated people.

Respondent's Opposition to Complainant's Motion to Stay

On February 26, 2020, Met-Ed filed an Answer opposing Ms. McCarthy's Motion to Stay. Met-Ed maintained, "This Motion for Stay **is the latest** in a series of requests by the **Complainant to delay** these proceedings." (emphasis in original). Met-Ed requested that the Motion to Stay be denied and the Litigation Schedule set forth in the *October 2019 Interim Order* remain in effect. As reasons for its opposition to the Motion, Met-Ed asserted the following: 1) the proceeding initiated over one year ago in January 2019; 2) Ms. McCarthy has sought and received three revisions to the Litigation Schedule; 3) nothing presented in the Motion warranted any further delays of the hearing; 4) the parties had already expended

substantial time and resources on the latest Litigation Schedule; and 5) there is no guarantee that the Commonwealth Court's decisions in the cases pending before it will be controlling of some or all of the issues in the present case.

Respondent's Motion to Compel

On March 11, 2020, Met-Ed filed a *Motion to Compel* Ms. McCarthy to file full and complete responses to the Company's Set II Discovery Requests, which had been propounded to Ms. McCarthy on February 14, 2020. The Company's *Motion to Compel* sought additional information and documents related to the Ms. McCarthy's allegations regarding the Company's smart meters. On February 26, 2020, Ms. McCarthy filed a *Motion to Dismiss the Company's Objections to Complainant's Set II Discovery*. On February 27, 2020, Met-Ed filed a response to Ms. McCarthy's dismissal motion.

Judge Change and March 31, 2020 Hearing Notice

On March 30, 2020, Ms. McCarthy sent a letter to Chief Administrative Law Judge Charles E. Rainey, stating the reasons for her judge reassignment request that she referenced in her February 24, 2020 Certificate of Service. Ms. McCarthy's March 30, 2020 letter also stated, "I need to know who the Grievance Officer is and his/her contact information or who the ADA Coordinator serving the PUC is."

By Hearing Judge Change Notice dated March 31, 2020, the Parties were informed that the Administrative Law Judge in this proceeding "has been changed from Administrative Law Judge Jeffrey Watson to Conrad Johnson." The Notice further informed the Parties that a telephonic hearing would be convened in this matter on May 5 and 6, 2020, starting at 10:00 a.m. each day.

Like the instructions in the April 8, 2019 Hearing Notice, the March 31, 2020 Notice repeated the instructions for a person with a disability to follow if an interpreter or assistance was needed to attend the hearing.

Complainant's Fourth Request for Extension of Litigation Schedule

By letter dated April 7, 2020, Ms. McCarthy requested a continuance of the May 5-6, 2020 telephone hearing due to the COVID-19 pandemic and claimed her request for accommodations under the Americans With Disabilities Act (ADA) remained unresolved (*April 2020 Continuance Request*). Specifically, she requested a 90-day continuance of the telephone hearing.

Concerning her ADA accommodations, Ms. McCarthy claimed that she needed replies, submissions, questions, written testimony, documents, and exhibits to be sent to her electronically and sufficient time to review and comprehend the documents and prepare cross-examination. "Because of auditory processing issues and word retrieval problems I have I am unable to do oral testimony and cross examination. . . I do not have a legal background therefore I do not know how long it will take for me to respond." *April 2020 Continuance Request*, unnumbered page 2. Ms. McCarthy did not present any documentation to substantiate her auditory processing issues.

Hearing Cancellation and Rescheduling

By Corrected Hearing Notice dated April 28, 2020, the Parties were informed that the telephonic hearing scheduled before me on May 5-6, 2020 was canceled and rescheduled for July 14, 2020, at 10:00 a.m.

Additionally, the April 28, 2020 Corrected Hearing Notice directed the Parties to email the Legal Assistant at least ten (10) business day prior to the hearing if they needed an interpreter to participate in the hearing. Every reasonable effort would be made to have to have an interpreter present. The email address for the Legal Assistant was provided in the Notice.

Status Reports

On April 30, 2020, Met-Ed filed a Status Report, pursuant to ALJ Watson's *October 2019 Interim Order*. In part, Met-Ed represented 1) Ms. McCarthy's responses to discovery were not complete; 2) Ms. McCarthy had failed to sign a protective agreement provided by the Company in an attempt to address her concerns regarding her personal information; 3) the Company's Motion to Compel remained pending; 4) the Company had provided its witness list to Ms. McCarthy on three separate dates: June 28, 2019, September 12, 2019 and January 27, 2020; 5) Ms. McCarthy had provided a witness list on July 1, 2019 that had included expert witness, Dr. Schoechle; and 6) the witness list provided by Ms. McCarthy on January 28, 2020, omitted Dr. Schoechle because she was unable to get his commitment, but Ms. McCarthy stated she intended to have him submit written testimony. Met-Ed requested extension of the February 28, 2020 deadline for discovery, "solely to permit the Company to obtain clarification regarding Ms. McCarthy's intended witnesses."

On May 1, 2020, Ms. McCarthy filed a Status Report. In part, Ms. McCarthy represented 1) her Motion to Stay remained pending; 2) her request for information on the Grievance Officer and ADA coordinator were ignored; 3) her "scheduling, volunteer and family commitments would make it a hardship to attend" a July hearing, but she would be available the first week of August; and 4) Met-Ed was using the PUC process to harass and wrongly accuse her because she had emailed them answers to their interrogatories.

Outstanding Motions Held in Abeyance

On May 4, 2020, I issued *Interim Order Holding Outstanding Motions In Abeyance (May 2020 Order)*, which read as follows:

By Notice dated March 31, 2020, this case was reassigned from Administrative Law Judge Jeffrey A. Watson to me for hearing. By Notice dated April 28, 2020, the Parties were informed that this case is scheduled for a telephonic hearing on July 14, 2020, at 10:00 a.m. Any motions in this case that have not been ruled upon and remain outstanding are held in abeyance. *Outstanding motions* will be addressed at the

July 14, 2020 evidentiary hearing, during which the Parties must be prepared to present their testimony and evidence.

(emphasis added).

Complainant's Confidential Motion and Reasonable Accommodation Orders

On June 23, 2020, Ms. McCarthy filed a Confidential Motion for Reasonable Accommodation of Disability Under the Americans With Disabilities Act (*Confidential Motion*), together with a 20-day Notice to Plead. The cover letter submitted with Ms. McCarthy's filing was directed to the Secretary and stated the following: "PLEASE DO NOT POST THE CONTENTS OF THE CONFIDENTIAL MOTION ON THE PUC WEBSITE." In accordance with Ms. McCarthy's request, the Secretary placed the Confidential Motion in a confidential folder in the Commission's online docket system. While Ms. McCarthy requested confidentiality, the Confidential Motion did not contain any new information concerning her dyslexic or auditory processing issues. In her *April 18, 2019 Motion*, Ms. McCarthy had already asserted she was a "dyslexic person." Also, in her *April 2020 Continuance Request*, she asserted she had "auditory processing issues." Neither the *Motion* nor *Request* was marked confidential. Also, Ms. McCarthy's *Confidential Motion* did not contain any medical documentation to substantiate her dyslexia or auditory processing issues. According to Ms. McCarthy, the accommodation she was requesting "will require that certain deadlines be extended"¹⁰ *Confidential Motion* ¶1Ji. Ms. McCarthy further stated she had called the PUC offices about her ADA accommodation request, and PUC personnel informed her the request would be taken up "during my hearing." *Id.* ¶C.

On June 25, 2020, I issued *Interim Order Setting Time Period for Response to Complainant's Confidential Motion (June 2020 Interim Order)*. Under the *June 2020 Interim Order*, Met-Ed was directed to file a response to the *Confidential Motion* by June 30, 2020.

¹⁰ Apparently, Ms. McCarthy was seeking confidentiality concerning personal or medical matters; however, a litigant's statements concerning procedural matters are not protected as confidential under the Commission's regulations. See 52 Pa.Code § 5.365.

The *June 2020 Interim Order* advised the Parties as follows:

Additionally, to the extent Ms. McCarthy is seeking an accommodation and as the party with the burden of proof, *the July 14, 2020 hearing will begin with Ms. McCarthy presenting her testimony and evidence uninterrupted.* After Ms. McCarthy has completed presenting her case, any motions and/or objections will be addressed on July 14, 2020.

(emphasis added).

On June 28, 2020, Met-Ed filed, in letter form, a response to the Confidential Motion. Met-Ed, in part, asserted it was sympathetic to Ms. McCarthy's concerns and the Company was willing to agree that Ms. McCarthy be given a reasonable accommodation with certain conditions or modifications. However, Met-Ed argued the accommodation should not be given to the extent it disrupts Met-Ed's due process rights, and the Company could not "agree to there being absolutely no hearing held in this matter at this time."

On June 30, 2020, Ms. McCarthy filed, in letter form, a reply agreeing to Met-Ed's suggested procedure for the receipt of hearing testimony; however, the reply was silent as to certain conditions or modifications and due process concerns raised by Met-Ed.

On June 30, 2020, I issued *Interim Order Providing Complainant Reasonable Accommodation (June 2020 Reasonable Accommodation Order)*, advising the Parties as follows:

Therefore, it is hereby ordered that to the extent Ms. McCarthy is seeking an accommodation and as the party with the burden of proof, the July 14, 2020 hearing will begin with Ms. McCarthy presenting her testimony and evidence uninterrupted. Ms. McCarthy must be prepared to examine her fact witnesses and expert witnesses at the July 14, 2020 hearing.

After Ms. McCarthy has completed presenting her case uninterrupted, *any motions, objections, cross-examination, and due process issues will be addressed on July 14, 2020, and [the presiding officer will determine] whether a further hearing is needed in the public interest.*

(emphasis added).

On July 1, 2020, Ms. McCarthy filed a letter requesting clarification of the *June 2020 Reasonable Accommodation Order*. In the letter, Ms. McCarthy, in part, stated, “I am requesting further clarification on how your June 30th Order provides me with any ADA accommodation.” Ms. McCarthy’s request was treated as an outstanding motion, which under the *May 2020 Order* would be addressed at the July 14, 2020 hearing.

The Parties’ Proposed Exhibits

On July 6, 2020, Met-Ed mailed to my legal assistant the Company’s proposed hearing Exhibits consisting of 287 pages. Met-Ed listed the Company’s Exhibits as follows:

Witness John C. Ahr

Met-Ed Exhibit JCA-1: 66 Pa.C.S. § 2807.

Met-Ed Exhibit JCA-2: Smart Meter Procurement and Installation, Docket No. M-2009-2092655 (Order entered June 24, 2009).

Met-Ed Exhibit JCA-3: Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company and Pennsylvania Power Company for Approval of its Smart Meter Technology Procurement and Installation Plan, Docket No. M-2009-2123950 (Order dated June 9, 2010).

Met-Ed Exhibit JCA-4: 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 (Final Order entered June 25, 2014).

Met-Ed Exhibit JCA-5: Company’s final approved deployment plan.

Met-Ed Exhibit JCA-6: Smart Meter Privacy Policy, dated March 18, 2015.

Met-Ed Exhibit JCA-7: Smart Meter Customer Privacy Policy for Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company, Docket Nos. M-2013-2341990, M-2013-2341991, M-2013-2341993, and M-2013-2341994 (Secretarial Letter dated May 1, 2015).

Met-Ed Exhibit JCA-8: Customer Contacts

Met-Ed Exhibit JCA-9: Metropolitan Edison Company Tariff Section 9

Witness Dr. Christopher C. Davis

Met-Ed Exhibit CD-1: Dr. Christopher C. Davis Qualifications

Met-Ed Exhibit CD-2: Terminology and Some Basic Concepts

Met-Ed Exhibit CD-3: Metropolitan Edison Company AMI Meters and FCC Exposure Limits for RF Fields

Met-Ed Exhibit CD-4: Electromagnetic Spectrum

Met-Ed Exhibit CD-5: RF Fields from Metropolitan Edison Company Itron Meters Compared to FCC Safety Standard

Met-Ed Exhibit CD-6: Peak RF Fields from Metropolitan Edison Company Itron Meters Compared to FCC Safety Standard

Met-Ed Exhibit CD-7: RF from Common Sources Compared to Exposure Close to Metropolitan Edison Company Itron Meter

Met-Ed Exhibit CD-8: Comparison of RF from UHF TV to Itron AMI Meter at McCarthy Property

Witness Dr. Mark A. Israel

Met-Ed Exhibit MI-1: Dr. Mark A. Israel Qualifications

Met-Ed Exhibit MI-2: Public Health Reviews – RF Fields and Claimed Health Effects

Met-Ed Exhibit MI-3: State Health Agency & PUC Reviews of Smart Meters and Health

Met-Ed Exhibit MI-4: Public Health Reviews – RF Fields and Claimed Electromagnetic Hypersensitivity

On July 9, 2020, Ms. McCarthy emailed to my legal assistant her proposed hearing Exhibits consisting of 381 pages. Ms. McCarthy listed her as Exhibits as follows:

NM-1 Act 129 of 2008 (11 pp)

NM-2 Getting Smarter About the Smart Grid (74 pp)

NM-3 Captured Agency, Alster (59 pp)

NM-4 Pall 2014 MW act on VGCCs sans heating (15 pp)

NM-5 Pall 2018 5G Risks 8 types of harm (53 pp)

NM-6 IEQ Report (21 pp)
NM-7 Am Academy Env Medicine Report (3pp)
NM-8 Env Health Trust (13 pp)
NM-9 Planetary EMF Pollution (3 pp)
NM-10 Abstract 2019 Panagopoulosa (2 pp)
NM-11 MADRI Steering Committee on Act_129_Presentation (15 pp)

Witness Dr. Laura S. Murphy

LSM-1 Mary Paul Reply Brief (22 pp)
LSM-2 Act 129 Legal Argument (14 pp)
LSM-3 Opt out survey (5pp)

Witness Wes Zimmerman

WZ-1 Qualifications (2pp)
WZ-2 Act 129 Depreciation Terminology (14 pp)

Witness Dr. Tania Slaweki

TMS-1 Qualifications (4 pp)
TMS-2 Exhibits for Testimony July 2020 (8 pp)
TMS-3 2015 Pall Scientific evidence (18 pp)
TMS-4 Salzburg Resolution 2000 (2 pp)
TMS-5 2020 Belpomme and Irigaray (20 pp)

Complainant's Notice

On July 14, 2020, Ms. McCarthy filed a 14-page document titled, “**NOTICE: DECLARATION OF RIGHTS AND REMEDY FOR RELIEF 07-14-2020 A.D.**” (*Notice of Rights*).¹¹ (emphasis in original). Ms. McCarthy’s *Notice of Rights* referenced the U.S. Constitution and several federal and state statutes.¹²

Evidentiary Hearing

On July 14, 2020, at 10:00 a.m., from Pittsburgh, I convened the telephone hearing in this matter. Ms. McCarthy was present along with her witnesses, Dr. Laura S. Murphy, Wes Zimmerman and Dr. Tania Slawecki. Ms. McCarthy’s witnesses were not permitted to testify because they could not be qualified as experts or the proffered testimony was irrelevant, immaterial or inadmissible hearsay. Dr. Murphy’s proffered testimony consisted of inadmissible legal arguments or inadmissible hearsay. Tr. 86. Mr. Zimmerman, a tax agent, claimed his background qualified him as an expert to define the word “depreciation” in Act 129. Tr. 73. He admitted he did not have any expert testimony as to the harmful effects of smart meters. *Id.* Dr. Slawecki has a background in the microwave field; however, she did not have any medical expertise as to the effects of smart meters on human beings. Tr. 58-71. Accordingly, none of the Exhibits that Ms. McCarthy proposed to sponsor through her witnesses were admitted into the record. Tr. 86.

Ms. McCarthy testified on her own behalf and sponsored a copy of Act 129, 66 Pa.C.S. § 2806.1 *et seq.*, marked as Exhibit NM-1 Act 129 of 2008, which was admitted into the record. Ms. McCarthy’s remaining Exhibits, consisting of smart meter articles, legal arguments, and other articles apparently culled from the Internet, were not admitted into the record as the Exhibits were irrelevant, immaterial, or inadmissible hearsay. Tr. 85. However, I

¹¹ The Secretary docketed Ms. McCarthy’s filing as a Letter. Procedurally, the filing is not one of the pleadings allowed under the Commission’s regulations. *See* 52 Pa.Code § 5.1.

¹² Ms. McCarthy’s *Notice of Rights* is treated as legal argument. Tr. 29, 36.

informed the Parties that Ms. McCarthy's remaining Exhibits, while not admitted into the record, would be docketed for the Commission to have a complete record. *Id.*

I also informed the Parties I was taking judicial notice of the Commission's order concerning the implementation of smart meters¹³ and the Commission's order approving Met-Ed's smart meter deployment plan (SMDP).¹⁴ Tr. 89.

After Ms. McCarthy rested her case, Met-Ed elected not to call its witnesses and made a motion to dismiss the case for failure of the burden of proof. Tr. 93-95. From the bench, I granted the motion for failure of the burden of proof. I informed the Parties I would issue a decision confirming the dismissal of the case, and if anyone disagreed with my decision, they had the right to file exceptions to the Commission. Tr. 94-95.

The hearing generated a 98-page transcript. The record was closed by an Interim Order issued on July 17, 2020.

Post Hearing Filings

On August 14, 2020, Ms. McCarthy filed a request for an extension of time to submit corrections to the hearing transcript, which was docketed on August 13, 2020. By an Interim Order entered on August 19, 2020, I directed Ms. McCarthy to file and serve her proposed transcript corrections by August 24, 2020. Met-Ed was directed to file and serve any objections to the proposed corrections by September 3, 2020. On August 20, 2020, Ms. McCarthy requested that the time for filing her proposed transcript correction be extended to September 28, 2020. By Interim Order entered on August 21, 2020, I granted Ms. McCarthy a partial extension and directed her to file and serve her proposed corrections to the first 21 pages of the hearing transcript by August 24, 2020, and her remaining corrections were due by

¹³ See *Smart Meter Procurement and Installation*, Docket No. M-2009-2092655 (Implementation Order entered June 24, 2009) (*Smart Meter Procurement and Installation Order*).

¹⁴ *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 (Final Order entered June 25, 2014).

September 11, 2020. Met-Ed's objections to Ms. McCarthy's proposed corrections were due 10 days after service.

Ms. McCarthy filed proposed corrections to the hearing transcript on August 24, 2020 and September 11, 2020. Met-Ed filed responses to the proposed corrections on September 4 and 21, 2020, stating the Company did not have any substantial issues with Ms. McCarthy's proposed corrections. Accordingly, Ms. McCarthy's proposed corrections are deemed granted as unopposed under the Commission's regulations. *See* 52 Pa.Code § 5.253(f)(2).

FINDINGS OF FACT

1. Complainant is Noreen McCarthy, who resides at 18 Millstone Lane, Pottstown, Pennsylvania. (Service Location). Tr. 4.
2. Respondent Metropolitan Edison Company is a jurisdictional public utility providing electric service to Complainant and Pennsylvania customers.
3. Ms. McCarthy filed her Formal Complaint because Met-Ed threatened to terminate her electric service if she did not allow it to install a smart meter on her property. Tr. 38-40.
4. Ms. McCarthy wants her electric usage to continue to be recorded through her analog meter. Tr. 39.
5. Met-Ed is required to install smart meters under its Commission-approved smart meter deployment plan. Tr. 89.
6. Ms. McCarthy did not present any evidence demonstrating that smart meters are a safety hazard.

7. Ms. McCarthy did not present any evidence demonstrating that smart meters are a health hazard.

8. Ms. McCarthy did not present any medical evidence or documentation to substantiate a disability. Tr. 58-59.

DISCUSSION

Legal Standards

Americans With Disabilities Act and Due Process

The ADA provides that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” 42 U.S.C.S. § 12132.

Commonwealth agencies like the Commission are required to comply with the ADA in providing reasonable accommodations to persons with disabilities to access the Commission’s services.

As an administrative agency of the Commonwealth, the Commission is required to provide due process to the parties appearing before it.¹⁵ Due process is satisfied when the parties are afforded notice and the opportunity to appear and be heard. The Commission is required to fix the time and place of a hearing in a complaint proceeding and to serve notice thereof upon the parties in interest.¹⁶

¹⁵ *Schneider v. Pa. Pub. Util. Comm’n*, 479 A.2d 10, 15 (Pa. Cmwlth. 1984) (*Schneider*).

¹⁶ *See* 66 Pa.C.S. § 703(a)-(b).

Complaints and Burden of Proof

Section 701 of the Code provides that any person may complain, in writing, about any act or thing done or omitted to be done by a public utility in violation, or claimed violation, of any law which the Commission has the jurisdiction to administer, or of any regulation or order of the Commission.¹⁷

Under the Code, as the party bringing the Complaint in this proceeding alleging threat of service termination and requesting that the Commission order Respondent to desist from installing a smart meter on her home, Complainant bears the burden of proof.¹⁸ Consequently, Complainant has the burden of proving the allegations she raised in her Complaint and that she is entitled to the relief requested.

The term “burden of proof” means a duty to establish a fact by a preponderance of the evidence.¹⁹ The term “preponderance of the evidence” means one party must present evidence which is more convincing, by even the smallest amount, than the evidence presented by the other party.²⁰ Accordingly, one must review the record in this case to determine whether the Complainant has satisfied his or her burden of proof. If the review indicates the burden has been satisfied, one must then determine whether the Respondent has submitted evidence of co-equal value or weight to refute the Complainant’s evidence. If this has occurred, the burden of proof cannot be satisfied, unless the party bearing the burden of proof presents additional evidence.²¹

¹⁷ 66 Pa.C.S. § 701.

¹⁸ See 66 Pa.C.S. § 332(a).

¹⁹ *Se-Ling Hosiery v. Margulies*, 364 Pa. 45, 70 A.2d 854 (1950); *Feinstein v. Philadelphia Suburban Water Co.*, 50 Pa. PUC 300 (1976).

²⁰ *Id.*

²¹ *Morrissey v. Pa. Dept. of Highways*, 424 Pa. 87, 225 A.2d 895 (1967); *Burleson v. Pa. Pub. Util. Comm’n*, 443 A.2d 1373 (Pa.Cmwlth. 1982).

Furthermore, substantial evidence in the record must support the decision of the Commission.²² The term “substantial evidence” means such relevant evidence that a reasonable mind may accept as adequate to support a conclusion. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established.²³

Reasonable Service

Section 1501 of the Code mandates that a public utility must furnish and maintain adequate, efficient, safe, and reasonable service and facilities, and must make such repairs, changes, alterations, substitutions, and improvements in or to such service and facilities as shall be necessary or proper for the accommodation, convenience and safety of its patrons and the public.²⁴ Upon finding that the service or facilities of a public utility are unreasonable, unsafe or inadequate, the Commission may prescribe, by regulation or order, the reasonable, safe and adequate service or facilities that a public utility must furnish or employ.²⁵

The Commonwealth Court has cautioned that the Commission may not sustain a complaint pursuant to Section 1501 unless it finds that a utility has violated a duty to render reasonable and reliable service.²⁶ Further, the Commission has stated that a utility is not mandated to furnish perfect service:

[Section 1501] does not mandate perfect service nor must a public utility provide the best possible service. Most certainly, a public utility is not a guarantor of either perfect service or the best possible service.^[27]

²² See, e.g., Section 704 of the Administrative Agency Law, 2 Pa.C.S. § 704; *Yellow Cab Co. v. Pa. Pub. Util. Comm'n.*, 524 A.2d 1069 (Pa.Cmwlth. 1987).

²³ *Norfolk & Western Ry. Co. v. Pa. Pub. Util. Comm'n.*, 489 Pa. 109, 413 A.2d 1037 (1980); *Erie Resistor Corp. v. Unemployment Comp. Bd. of Review*, 194 Pa.Super. 278, 166 A.2d 96 (1961); *Murphy v. Pa. Dept. of Pub. Welfare, White Haven Center*, 480 A.2d 382 (Pa.Cmwlth. 1984).

²⁴ 66 Pa.C.S. § 1501.

²⁵ 66 Pa.C.S. § 1505.

²⁶ *West Penn Power Co. v. Pa. Pub. Util. Comm'n.*, 478 A.2d 947, 949 (Pa.Cmwlth. 1984).

²⁷ *Re Metropolitan Edison Co.*, 80 Pa. PUC 663, 672 (1993).

Thus, the test to determine the adequacy of a utility's service and facilities is that of reasonableness.²⁸ This is also the test to determine the adequacy of a utility's response to customer service complaints.²⁹

Smart Meter Cases

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.”³⁰ 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.”³¹

Service Termination

Section 1406 of the Code permits a utility to terminate service under certain conditions. Section 1406, in relevant part, states:

²⁸ *Thurby v. West Penn Power Co.*, C-2011-2254048 (Order April 4, 2013); *Bertsch v. PPL Elec. Utils. Corp.*, C-2011-2251784 (Final Order April 2, 2012); *Scherich v. Verizon Pa. Inc.*, Docket No. C-2008-2061244 (Final Order January 28, 2010).

²⁹ *Thurby*, cited above.

³⁰ *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.”)

³¹ *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).

(a) Authorized termination. — A public utility may notify a customer and terminate service provided to a customer after notice as provided in subsection (b) for any of the following actions by the customer.

....

(4) Failure to permit access to meters, service connections or other property of the public utility for the purpose of replacement, maintenance, repair, or meter reading.

66 Pa.C.S. § 1406(a)(4).³²

Analysis

Reasonable Accommodation Under the ADA

Ms. McCarthy began her hearing testimony by stating she was proceeding under coercion and duress because the Commission and its officers did not grant her “necessary and adequate time.” Tr. 25. Ms. McCarthy contended she was not provided a reasonable accommodation under the ADA to present her case due to her dyslexia.³³ Ms. McCarthy’s contention implicates due process and the Commission’s duty to provide a party the opportunity to be heard.³⁴ As discussed below, there is no support in the record for Ms. McCarthy’s contention.

Ms. McCarthy commenced this action on January 7, 2019. On February 15, 2019, Ms. McCarthy objected to Met-Ed’s request for the scheduling of a prehearing conference. Ms. McCarthy gave the reason for her objection: “My family and work obligations preclude me from preparing for multiple hearings.”³⁵ Thus, a prehearing conference was not included in the

³² *Also see* 52 Pa.Code § 56.81(3).

³³ Tr. 41-42.

³⁴ *See Schneider*, cited above.

³⁵ *See* February 15, 2015 Reply at unnumbered page 3.

Litigation Schedule.³⁶ However, ALJ Watson reminded the Parties that a prehearing conference could be scheduled upon request.³⁷

In ruling upon Met-Ed’s preliminary objections, ALJ Watson explained to the Parties that foregoing a prehearing conference was a missed procedural opportunity to address concerns, issues, and deadlines typically addressed in a prehearing conference.³⁸ Had Ms. McCarthy not objected to the scheduling of a prehearing conference, her claim for a reasonable accommodation could have been examined and discussed during the conference.

Ms. McCarthy did not mention any disability until she filed her *First Continuance Request*, seeking an extension of the litigation schedule, on April 8, 2019, stating she was a “dyslexic person.” Ms. McCarthy’s request for her first continuance was not based upon any impairment limiting her ability to engage in discovery. Rather, like her objection to the prehearing conference, Ms. McCarthy needed time to attend to personal matters, that is, developing a literacy curriculum, homeschooling her children, and traveling with her daughter on a college tour. Additionally, on April 24, 2019, Ms. McCarthy adamantly objected to a prehearing conference: **“Further, Complainant objects to the Company’s request that this matter be set for a prehearing conference. My family and work obligations preclude me from preparing for multiple hearings.”**³⁹

Ms. McCarthy made a second request for an extension of the litigation schedule, which ALJ Watson granted in his *July 2019 Interim Order*. On October 3, 2019, ALJ Watson granted Ms. McCarthy’s third request for an extension of the Litigation Schedule due to her claim of disability.⁴⁰ However, the *Order* is silent as to the nature of Ms. McCarthy’s disability.

³⁶ See March 7, 2019 *Prehearing Order*.

³⁷ *Id.* at 7.

³⁸ *March 2019 Interim Order* at 2.

³⁹ See Reply to *New Matter* ¶23 (emphasis in original).

⁴⁰ See *October 2019 Interim Order*.

Ms. McCarthy did not request a reasonable accommodation to litigate her case until almost a year after filing her Formal Complaint on January 7, 2019. By letter dated December 26, 2019, ALJ Watson acknowledged Ms. McCarthy's November 5, 2019 request for an accommodation under the ADA. In his letter ALJ Watson directed Ms. McCarty to provide him and Met-Ed's counsel specific information regarding her disability and documentation substantiating her disability by January 20, 2020.

Significantly, there is no evidence in the record that Ms. McCarthy ever complied with ALJ Watson's directive. There is no evidence in the record that Ms. McCarthy ever provided to ALJ Watson, Met-Ed's counsel or me any documentation medical or otherwise substantiating her claimed disability.

In her May 1, 2020 Status Report, Ms. McCarthy complained that her request for the name of the Commission's ADA officer was ignored. Ms. McCarthy overlooks the fact that each of the Hearing Notices dated October 4, 2019, April 8, 2019, and March 3, 2020, directed a person in need of an accommodation to contact the Commission's Scheduling Office at the telephone number provided in the Notice.

Ms. McCarthy was permitted to give her evidentiary hearing testimony uninterrupted under the *June 2020 Reasonable Accommodation Order*. While she was grateful for this accommodation, Ms. McCarthy argued that Met-Ed was agreeable to exchanging written testimony and she needed more reasonable and necessary accommodations.⁴¹ Ms. McCarthy argued she should be granted an additional 60 days to process Met-Ed's 292 pages of exhibits⁴², and she needed more time to prepare her case⁴³. Ms. McCarthy's argument must fail for two reasons. One, starting with the March 7, 2019 *Prehearing Order*, Ms. McCarthy was directed to submit her written direct testimony and that of her witnesses by July 22, 2019. The Litigation Schedule was extended four times at Ms. McCarthy's requests. Although Ms. McCarthy had

⁴¹ Tr. 41-42.

⁴² Tr. 23.

⁴³ Tr. 60.

ample opportunity and time to submit written direct testimony, there is no evidence in the record that Ms. McCarthy ever submitted any written direct testimony prior to the hearing. Two, Ms. McCarthy's due process rights do not entitle her to never-ending extensions of time to litigate her case.⁴⁴

The fatal flaw in Ms. McCarthy's reasonable accommodation argument is that she never provided any documentation to support her claimed disability. She cannot rely upon her assertions to establish her claimed disability. In *Brettler v. Purdue Univ.*⁴⁵, a graduate student claimed the university failed to provide him a reasonable accommodation to pursue his graduate work. The court dismissed the case on summary motion because Mr. Brettler had only provided self-serving statements concerning his narcoleptic condition.

In *Koteles v. ATM Corp. of Am.*⁴⁶, Ms. Koteles alleged she was slow in performing her work, in part, because she was dyslexic, and her employer discharged her in violation of the ADA. A psychologist that evaluated Ms. Koteles described dyslexia as "a neurological condition that's related to reading where there are difficulties with reading involving reversal of letters and numbers."⁴⁷ In dismissing the case on a motion for summary judgment the district court ruled as follows:

With respect to dyslexia, plaintiff claims that she suffers from dyslexia, but despite her contention that it was "well-documented," plaintiff provided no evidence that she in fact has dyslexia. Plaintiff's psychologist found that plaintiff did not have a learning disability. Under those circumstances, no reasonable jury could conclude that her claimed impairment of dyslexia substantially limited any major life activity or that she had a record of that claimed impairment. Plaintiff did not specifically allege that she suffers from any other disabilities and did not show that any of her named medical problems substantially limited her in any major life activity.^[48]

⁴⁴ See *Steadwell, v. Unemployment Compensation Bd. of Review*, 463 A.2d 1298 (Pa.Cmwlt. 1983).

⁴⁵ 408 F.Supp.2d 640, 663-64 (N.D. Ind. 2006).

⁴⁶ No. Civ.A. 05-1061, 2008 U.S. Dist. LEXIS 72280; 2008 WL 4412098 (W.D. Pa. Sept. 23, 2008).

⁴⁷ *Id.* at 7.

⁴⁸ *Id.* at 11 (footnote omitted).

Based upon the above analysis, a conclusion is required that Ms. McCarthy's contentions that she was not afforded a reasonable accommodation under the ADA is without merit.

Smart Meter Mandate

Act 129 requires electric distribution companies (EDCs) with at least 100,000 customers, such as Med-Ed,⁴⁹ to file a smart meter technology procurement and installation plan with the Commission for approval.⁵⁰ Met-Ed is an EDC with more than 1000,000 customers.⁵¹ By *Smart Meter Procurement and Installation Order* entered on June 24, 2009, the Commission ordered EDCs with greater than 100,000 customers to adhere to the guidelines established for smart meter technology procurement and installation.⁵² By *Final Order* entered on June 25, 2014, the Commission approved Met-Ed's smart meter deployment plan.⁵³

In prior smart meter and deployment cases the Commission has construed Act 129 as not providing customers the alternative to opt-out of smart meter installations.⁵⁴ Met-Ed's smart meter deployment plan approved by the Commission does not contain a provision permitting a customer to opt-out of a smart meter installation. Recently, Commonwealth Court has held that the Commission's construction of Act 129 on the issue of opting out is incorrect.

⁴⁹ Tr. 92.

⁵⁰ 66 Pa.C.S. § 2807(f).

⁵¹ Tr. 92.

⁵² See n. 14 above.

⁵³ See n. 14 above.

⁵⁴ See *Hoffman-Lorah v. PPL Elec. Util. Corp.*, Docket No. C-2018-2644957 (Order entered May 23, 2019). See also, 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).

In *Povacz et. al. v. Pa. Pub. Util. Comm'n*, No. 492 C.D. 2019 (Pa. Cmlth. Filed October 8, 2020) slip op.; 2020 Pa. Commw. LEXIS 714, the Court opined that the language of Act 129 did not appear to preclude either the utility or the Commission from granting an accommodation to a customer who wanted to avoid installation of a wireless smart meter. “Rather, the language of Act 129 seems calculated to support customer **choice** in the use of smart meter technology.” Slip op. at 13. (emphasis in original). However, the Court explained that the burden of proof remained with the customer to establish either that a smart meter is unsafe or harmful or that the utility’s refusal to provide other reasonable accommodations to the installation of a smart meter is unreasonable. The case was remanded to the Commission to allow consideration of the customers’ requests for accommodations and determination of what, if any, accommodations are appropriate. Here, it must be noted that the time for seeking further review of the Court’s decision in *Povacz* has not expired as of the date of this decision. Additionally, there is a dissenting opinion in *Povacz*, stating, “The intent of the General Assembly was not ambiguous. Smart meters are mandatory in the Commonwealth. There is no opt-out provision.” Slip Op. at JAC- 4. The dissenting opinion is in accord with the Commission’s earlier cases that there is no opt-out provision under Act 129.

Applying the Court’s ruling in *Povacz* to Ms. McCarthy’s case, there is no evidence, as discussed below, that smart meters are a safety hazard. Unlike the customers in *Povacz*, who provided medical evidence, there is no evidence that Ms. McCarthy or any of her household members have a health condition that would be adversely impacted by installation of a smart meter. Furthermore, Ms. McCarthy, other than her personal preference, did not provide any evidence to establish that Met-Ed in any manner acted unreasonably concerning other reasonable accommodations to the installation of a smart meter. Therefore, Ms. McCarthy’s request for relief, that is, a Commission order directing Met-Ed to desist from installing a smart meter at her home cannot be granted.

Assume for the purposes of argument that the Court’s opinion in *Povacz* is not challenged and therefore customers have a choice concerning the installation of a smart meter. Assume that Met-Ed has determined that smart meters are more cost efficient than analog meters. The question becomes whether the Commission could order Met-Ed to desist from

installing smart meters without any evidence that smart meters are unsafe or a health hazard or that installation is unreasonable and thereby in violation of reasonable service provisions of Section 1501 of the Code. The answer is no because Met-Ed's decision to install smart meters as cost efficient would be a business or management decision beyond the Commission's authority. *Metro. Edison Co. v. Pa. Pub. Util. Comm'n*, 62 Pa.Cmwlth. 460, 437 A.2d 76 (1981). In *Metro. Edison*, the court held the Commission is not empowered to act like a super board of director to interfere in the internal management affairs of a utility.

Ms. McCarthy also argued that Met-Ed, under the ADA, is required to accommodate her health issues and that of her son by not installing a smart meter.⁵⁵ While as discussed above, the Commission is required to provide reasonable accommodations to persons appearing before it under the ADA, the Commission does not have jurisdiction to enforce the ADA. Redress for a violation of the ADA is through a federal proceeding.⁵⁶ Therefore, the Commission lacks jurisdiction to adjudicate the issue as to whether Met-Ed is required to provide Ms. McCarthy a reasonable accommodation under the ADA.

Reasonable Service Issue

Under Section 1501 of the Code, Met-Ed is required to provide safe and reasonable service to Ms. McCarthy. In her *Amended Complaint*, Ms. McCarthy alleged, in pertinent part, that installation of a smart meter at her home would expose her and her family to unsafe technology, smart meters are harmful to humans and animals, and smart meters are a fire hazard.⁵⁷ *Amended Complaint* ¶¶ 5, 8, 9. During the hearing, Ms. McCarthy opined that exposure to wireless devices such as smart meters exacerbates her neurological symptoms and that of her son.⁵⁸ The bulk of Ms. McCarthy's case, however, consisted of her reading her 14-

⁵⁵ Tr. 38-41.

⁵⁶ See *Harper v. PPL Elec. Util. Co.*, Docket No. F-2014-2422449 (Order entered January 27, 2015); *MidAtlantic Power Supply Assoc. v. PECO Energy Co.*, 1999 Pa. PUC LEXIS 30.

⁵⁷ *Amended Complaint* ¶¶ 5, 8, 9.

⁵⁸ Tr. 38-39.

page *Notice of Rights* argument into the record.⁵⁹ Ms. McCarthy did not present any evidence other than her lay opinions and beliefs that smart meters are a health risk or unsafe⁶⁰ or a present a fire hazard.

Ms. McCarthy did not present any expert testimony or evidence to support her claim that the installation of a smart meter at the Service Location would present a safety or health hazard. When the issue at hand, here the safety of a smart meter, involves scientific, technical, or other specialized knowledge beyond that possessed by a layperson, expert testimony is needed to assist the factfinder to understand the evidence or to determine a fact in issue.⁶¹ Expert scientific testimony is needed to establish that installation of a smart meter at a residence presents a safety hazard. Expert medical testimony is needed to explain a causal connection between one's health and any harmful effects of a smart meter. Without expert testimony and evidence, Ms. McCarthy's claims are reduced to unsubstantiated opinions. Assertions, personal opinions or perceptions do not constitute factual evidence.⁶²

Considering Ms. McCarthy's lack of expert testimony and evidence concerning the effects of a smart meter on one's health or safety, her claim that installation of a smart meter at her home would constitute unreasonable service under Section 1501 of the Code is without merit and must be denied.

Threat of Service Termination

Ms. McCarthy wants to keep her analog meter.⁶³ She filed her Formal Complaint because Met-Ed threatened to terminate her electric service if she did not allow them to install a

⁵⁹ Tr. 15- 29, 36.

⁶⁰ Tr. 58-61.

⁶¹ *See* Pa. R. E. 702.

⁶² *Pa. Bureau of Corrs. v. City of Pittsburgh*, 532 A.2d 12 (Pa. 1987).

⁶³ Tr. 50-51.

smart meter on her property.⁶⁴ As previously discussed, Met-Ed is required to replace its analog meters with smart meters under Act 129.

Under Section 1406(a)(4) of the Code and Section 56.81(3) of the Commission’s regulations, a utility may terminate service to a customer when the customer denies the utility access to the service location to replace a meter.⁶⁵ There is no evidence in the record that Met-Ed has terminated Ms. McCarthy’s service. However, Met-Ed’s threat of service termination was authorized under the Code and the Commission’s Regulations since Ms. McCarthy would not allow the Company access to replace its analog meter with a smart meter. Therefore, Ms. McCarthy’s threat of service termination issue must be dismissed without further discussion.

Ruling

Ms. McCarthy did not present any evidence to establish that Met-Ed violated the Code or any regulation or order of the Commission. Thus, she did not carry her burden of proof to establish that she is entitled to the relief requested from the Commission. Therefore, in the ordering paragraphs below, Ms. McCarthy’s *Amended Complaint* will be dismissed with prejudice. “A dismissal “with prejudice” means that the Complainant is barred from filing another complaint with the Commission raising the same issues or claims as raised in this dismissed complaint.”⁶⁶

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the parties and the subject matter in this proceeding. 66 Pa. C.S. § 701.

⁶⁴ Tr. 38-40.

⁶⁵ 66 Pa.C.S. § 1406(a)(4); 52 Pa.Code §56.81(3).

⁶⁶ *Kibler v. Metro. Edison Co.*, Docket No. C-2018-3003158 (Opinion and Order entered July 16, 2020).

2. As an administrative agency of the Commonwealth, the Commission is required to provide due process to the parties appearing before it. *Schneider v. Pa. Pub. Util. Comm'n*, 479 A.2d 10, 15 (Pa. Cmwlth. 1984).

3. The Americans with Disabilities Act provides that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” 42 U.S.C.S. § 12132.

4. Commonwealth agencies like the Commission are required to comply with the Americans with Disabilities Act in providing reasonable accommodations to persons with disabilities to access the Commission’s services.

5. Complainant, as the party filing the Complaint, bears the burden of proving that she is entitled to relief from the Commission. 66 Pa. C.S. § 332(a).

6. Complainant must show that the utility company is responsible or accountable for the problem described in his Complaint. *Patterson v. Bell Tel. Co. of Pa.*, 72 Pa. PUC 196 (1990); *Kreider v. PECO Energy Co.*, Docket No. P-2015-2495064, p. 18 (Order entered Sept. 3, 2015).

7. The Public Utility Code mandates that a public utility must furnish and maintain adequate, efficient, safe, and reasonable service and facilities, and must make such repairs, changes, alterations, substitutions, and improvements in or to such service and facilities as shall be necessary or proper for the accommodation, convenience and safety of its patrons and the public. 66 Pa.C.S. § 1501.

8. When a complainant challenges the installation of a smart meter, there must be sufficient evidence to support a finding that complainant would be adversely affected by the smart meter or that the utility’s use of a smart meter would constitute unsafe or unreasonable

service in violation of Section 1501 under the circumstances of the case. *Kreider v. PECO Energy Co.*, Docket No. P-2015-2495064, p. 23 (Order entered Jan. 28, 2016).

9. When the issue at hand, here the safety of a smart meter, involves scientific, technical, or other, specialized knowledge beyond that possessed by a layperson, expert testimony is needed to assist the factfinder to understand the evidence or to determine a fact in issue. Pa. R. E. 702.

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

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

12. A utility may threaten service termination to a customer if a customer does not permit access to meters, service connections, or other property of the public utility for the purpose of replacement, maintenance, repair, or meter reading, including the installation of a smart meter. 66 Pa.C.S. § 1406(a)(4); 52 Pa.Code § 56.81(3).

13. Complainant failed to carry her burden of proof establishing that Metropolitan Edison Company violated the Code or a regulation or order of the Commission in threatening service termination. 66 Pa.C.S. § 332.

14. Complainant failed to carry her burden of proof to establish that Metropolitan Edison Company provided unsafe or unreasonable service in violation of 66 Pa.C.S. § 1501.

ORDER

THEREFORE,

IT IS ORDERED:

1. That the Amended Complaint of Noreen McCarthy against Metropolitan Edison Company at Docket No. C-2019-3006923 is dismissed with prejudice.
2. That the Secretary's Bureau shall mark Docket No. C-2019-3006923 closed.

Date: October 15, 2020

/s/
Conrad A. Johnson
Administrative Law Judge