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November 4, 2020

VIA ELECTRONIC FILING

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

Re: Noreen McCarthy v. Metropolitan Edison Company Docket No. C-2019-3006923

Dear Secretary Chiavetta:

Attached please find Complainant's (my) "Exceptions to the Initial Decision of Administrative Law Judge Conrad A. Johnson issued on October 15, 2020" in the above-referenced matter. A copy of this document has been served upon all parties, including the Office of Special Assistants, in accordance with Commission regulations. While I have received a Notice of Stay as of today, November 4, 2020, I have not received replies to my phone or email requests for clarification as to whether my Exceptions must still be filed because they are also due today. As I do not wish to be delinquent in this important matter, I am e-filing my Exceptions and will copy to all parties if my submission is not rejected due to the newly issued Stay.

Please feel free to contact me if you have any questions.

Sincerely,

Noreen McCarthy

Attachment

Cc: ALJ Johnson (via email) (with attachment)
Tori L. Giesler (via email) (with attachment)
Lauren M. Lepkoski (via email) (with attachment)
Office of Special Assistants (via email) (with attachment)

BEFORE THE

PENNSYLVANIA PUBLIC UTILITY COMMISSION

Noreen McCarthy	**:**	
	:	
v.	**:**	
	:	**Docket No. C-2019—3006923**
	:	
Metropolitan Edison Company	**:**	

EXCEPTIONS OF COMPLAINANT NOREEN MCCARTHY TO THE INTIAL DECISION OF ADMINISTRATIVE LAW JUDGE CONRAD A. JOHNSON ISSUED ON OCTOBER 15, 2020

Pro Se

Dated: November 4, 2020

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I. Introduction

Pursuant to Section 5.533 of the Commission's regulations, 52 Pa. Code § 5.533, Ms. Noreen McCarthy, Complainant, respectfully submits these Exceptions to the Initial Decision of administrative law judge Conrad A. Johnson issued on October 15, 2020. ALJ Johnson's Initial Decision is wrought with biases, misinformation, misleading presentation and legal irregularities as are detailed in the Exceptions presented below.

Important background to Ms. McCarthy's proceedings and these Exceptions is her assertion of suffering from dyslexia, an ADA-recognized disability, the limitations of which she describes in her November 5, 2019 request to ALJ Watson for ADA accommodation:

> Being dyslexic means I have trouble processing information I hear and read, therefore I have trouble responding verbally and in writing in what most people consider in a reasonable time. I need to hear and read content many times and then have time to process it and respond. The task of writing is difficult and time consuming for me as well. It takes me a very long time and help from family and friends to organize my thoughts into writing. I am unable to take on all the tasks of this Formal Complaint Process as a whole, but require each step to be broken down and taken one step at a time in order to preserve my rights. Specifically, the entire litigation schedule, given as a whole, is incomprehensible to me.

Ms. McCarthy repeatedly requested extensions due to family obligations and because of her dyslexia, which, upon reading the History of the Proceeding by the ALJ (I.D. pages 1-22), becomes apparent as Ms. McCarthy becomes increasingly overwhelmed trying to meet deadlines and fulfill the requirements (e.g., of discovery) expected of her. Reading legal documents from the PUC were especially difficult and confusing for Ms. McCarthy to comprehend. To prepare herself for her own hearing, Ms. McCarthy listened in on other public hearings for smart meter cases for which her ALJ, Judge Jeffrey Watson, was presiding, and Ms. McCarthy became so distraught with the manner in which Mr. Watson conducted his court, which was both confusing to her and emotionally distressing, that she requested a change in ALJ, which she was granted as of March 31, 2020. (I.D. page 15) While Ms. McCarthy is grateful for being reassigned to ALJ Johnson whose calm demeanor was more palatable during the oral hearing process, it does not excuse him from upholding his court conduct in a fair and impartial manner.

Ms. McCarthy's ADA-recognized dyslexia becomes a significant aspect of her case with ALJ Johnson noting that Ms. McCarthy did not produce any medical documentation to substantiate her disability, and so he subsequently granted her an alleged accommodation for her hearing, but one that was not appropriate for her disability.

In his Initial Decision, ALJ Johnson cites case law examples from 2008 [No. Civ.A. 05-1061, 2008 U.S. Dist. LEXIS 72280; 2008 WL 4412098 (W.D. Pa. Sept. 23, 2008) and examples

therein, hence pre-dating 2008] of ADA accommodation claims that failed to hold up in court. (I.D. page 33) The ALJ fails to recognize that in 2016, the Department of Justice adopted new rules to codify the Americans with Disabilities Amendments Act (ADAA) regarding Title II (nondiscrimination in State and local government services) and Title III (nondiscrimination by public accommodations and commercial facilities), taking great effort to correct the issues that infringed on citizens. Under the Title 28, Chapter 1, Section 35 it has been established that if a person meets the definition of "disability", then he/she is qualified as disabled under the ADA/ADAA. Congress rejected narrow definitions and narrow applications. Disability is to be construed broadly.

Federal ADA laws, 28 CFR 35.108(a)(2)(iii) [for ADA Title II] and 28 CFR 36.105(a)(2)(iii) [for ADA Title III] stipulate that when challenging a public entity over ADA accommodation, one must "proceed under the "actual disability" or "record of" prongs, which require a showing of an impairment that substantially limits a major life activity or a record of such an impairment." As Ms. McCarthy has been adversely impacted by dyslexia for her entire life and has received appropriate accommodations throughout her school years (though she had to drop out of college after only two years because of being unable to keep up with her classes due to her dyslexia), she has no explicit medical records to provide as it has been obvious to her teachers and family that her dyslexia interferes with her ability to process information in real time, including written and verbal communication. As such, she is left, as per the ADA laws, to show "an impairment that substantially limits a major life activity."

28 CFR 35.108(c)(1) defines "major life activity":

> (c)(1) Major life activities include, but are not limited to:
> (i) Caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, **learning, reading,** concentrating, **thinking, writing, communicating**, interacting with others, and working; and
> (ii) The operation of a major bodily function, such as the functions of the immune system, special sense organs and skin, normal cell growth, and digestive, genitourinary, bowel, bladder, **neurological**, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, and reproductive systems. The operation of a major bodily function includes the operation of an individual organ within a body system.

[Emphasis added with relevance to dyslexia which is deemed a neurological condition]

28 CFR 35.108(d) and 28 CFR 36.105(d) elucidate what is meant by "substantially limits," and, in particular, 28 CFR 35.108(d)(1)(ii) states:

> (ii) The primary object of attention in cases brought under title II of the ADA should be whether public entities have complied with their obligations and whether discrimination has occurred, not the extent to which an individual's impairment substantially limits a

> major life activity. Accordingly, the threshold issue of whether an impairment substantially limits a major life activity should not demand extensive analysis.

28 CFR 36.105(d)(1)(ii) has a similar statement for cases brought under title III of the ADA. The main point here being that the real issue is, have the EDC's and the PUC complied with their obligations and whether discrimination has occurred, not whether the individual meets the definition of "disability." The question of whether an individual meets the definition of "disability" under this part ***should not demand extensive analysis***.

The import of 28 CFR 35.108(d)(1)(ii) and 28 CFR 36.105(d)(1)(ii) is that a person does not have to go through extensive documentation to an entity about their disability. An affidavit from the disabled person, for example, can often suffice as the documentation. That means no expensive doctor's visits or testing is required. A person is not prohibited from submitting more if he or she wishes or to help tailor the disability accommodation.

Ms. McCarthy has submitted numerous signed documents attesting to her condition with which she is well acquainted but was unclear on what more she could present under the circumstances which included the Covid 19 lockdowns beginning in March 2020. Ms. McCarthy's inability to, in a timely fashion, read and comprehend legal documents sent to her, and inability to be clear about her obligations and deadlines, greatly challenged her ability to keep up with the demands of the case on top of her normal obligations to family (including handling numerous family crises). Had she been able to comply with the deadlines of the earlier litigation schedules (Interim Orders dated April 24, 2019 and July 24, 2019), these schedules called for written testimony to be submitted by Complainant and Complainant's witnesses, which would have partly satisfied her need for accommodation.

As Complainant was unable to meet these deadlines and requested more time, the final litigation schedule of October 3, 2019 dispensed with the requirement for written testimony. Parties were to submit their list of factual and expert witnesses by January 30, 2020, and to submit a summary of the expected testimony from each witness. No date thereafter was set for submitting written testimony. Consequently, Ms. McCarthy then had to request to conduct her hearing via written means, rather than oral, seeking ample time for all written responses (CONFIDENTIAL MOTION FOR REASONABLE ACCOMODATION OF DISABILITY UNDER THE AMERICANS WITH DISABILITIES ACT, dated June 24, 2029). Met-Ed agreed to written testimony being submitted by Complainant and fact witnesses, but that for expert witnesses, "the Company would request that written testimony be exchanged in accordance with Ms. McCarthy's request, to be followed by a hearing scheduled for the limited purpose of cross examination." (Met-Ed's Response to Motion, dated June 29, 2020). Ms. McCarthy affirmed that Met-Ed's proposal was agreeable with her (dated June 30, 2020 and listed as Certificate of Service on the docket).

In his Initial Decision, ALJ Johnson describes Complainant's reply as "…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." (I.D., page 19). Yet, Ms. McCarthy had agreed to all the terms of Met-Ed, including the "certain conditions or modifications", thereby addressing their due process concerns, so his criticism of the Complainants reply is without basis.

ALJ Johnson ruled on the Motion on June 30, 2020 affirming the July 14, 2020 hearing date and not granting any written testimony options, though such options had been agreeable to both parties. His proposed accommodation was to allow Ms. McCarthy to present her testimony uninterrupted during the hearing. Ms. McCarthy realized that his alleged accommodation was both contrary to what both parties had agreed upon and virtually useless in terms of addressing the difficulties she encounters as a dyslexic – difficulties she has explained multiple times in multiple filings to request accommodation. To boot, Ms. McCarthy received a 292 page document containing Met-Ed's exhibits eight days prior to her hearing date, leaving her in tears. How could this possibly result in a "fair and impartial" hearing for a pro se complainant with dyslexia? The ALJ's forcing of Ms. McCarthy's hearing under these conditions was completely unreasonable and lacked any justifiable imperative, particularly in light of the fact that the Commonwealth Court had heard the Povacz et. al., case on June 10, 2020, the decision from which was likely to impact many or all of the smart meter cases being heard by the PUC. Ms. McCarthy proceeded to meet her hearing obligations "under threat and duress." (Tr. 23, 34, 41, 51, 87).

Ms. McCarthy's proceedings must therefore be read with an understanding that she has found this entire litigation process extremely confusing and difficult to keep up with, and all of her submissions have taken an extraordinary effort on her part to produce, relying heavily on others around her for help at times (including for these Exceptions). Along such lines, ALJ Johnson makes reference multiple times (I.D. pages 12, 15, 16) to the fact Ms. McCarthy had available to her an interpreter option for her hearing. For example, in his Initial Decision, ALJ Johnson writes:

> "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." (ID p. 16)

Ms. McCarthy is under the impression that interpreters are for people whose primary language is other than English, not for persons with dyslexia. Ms. McCarthy, who has suffered life-long from dyslexia, has never encountered any "interpreters" who specialize in providing services to those who are dyslexic, so the fact that ALJ Johnson is making it sound like Ms. McCarthy did

not avail herself of appropriate help is without basis. It is unclear to the Complainant how any such interpreter could have helped her situation during her hearing.

As per the above, ALJ Johnson has erred by using case law examples that pre-dated the ADA law amendments, thereby holding Ms. McCarthy's request for reasonable accommodation to standards which are no longer relevant. Ms. McCarthy takes exception to ALJ Johnson's inappropriate ADA accommodations granted to her and maintains she has been discriminated against in these proceedings according to ADA laws.

II. Exceptions

A. Exception No. 1: ALJ Johnson failed to uphold the stipulations of 66 Pa. C.S. § 701 by ignoring Complainant's legal argument pertaining to Act 129 of 2008.

In his Initial Decision, ALJ Johnson clearly states, "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" (I.D., page 27)

He furthermore begins his Conclusions of Law with "The Commission has jurisdiction over the parties and the subject matter in this proceeding. 66 Pa. C.S. § 701." (I.D., page 38).

Pursuant to "any law which the Commission has the jurisdiction to administer," Ms. McCarthy provided ample testimony regarding Act 129 of 2008 to show that it is incongruous with the universal smart meter mandate of the PUC's Implementation Order of June 2009. She first laid out her argument in her Second Amended Formal Complaint which was initially misfiled by the PUC. ALJ Johnson describes Ms. McCarthy's submission of her Second Amended Formal Complaint as follows:

> 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. Slawecki, Ph.D. Therefore, Ms. McCarthy's August 21, 2019 filing is deemed a legal memorandum.[8] (I.D. page 11)

Complainant's Second Amended Formal Complaint – for reasons that remain unclear to Ms. McCarthy – apparently failed to "comply with the Commission's rules for pleadings," as cited above. Nevertheless, the content was specific to Met-Ed's violation of Act 129 of 2008 as well as alleged violations of 66 PA Code Sections 1501 and 1502 of legitimate relevance to the present proceedings. Ms. McCarthy begins, "The following subsections elucidate facts demonstrating that Met-Ed would be in violation of Act 129 if the Complainant's electromechanical analog meter were to be removed from her house and replaced with a smart meter." (Second Amended Formal Complaint, page 4 of 38) The "recited Pennsylvania legislative histories…" (I.D. page 11) was not a mere legal memorandum, but clarified the intent of the General Assembly which happens to run contrary to that which is stated in the PUC's Implementation Order of June 2009 and which is the primary cause of this and all the smart meter cases before the PUC.

Ms. McCarthy's Second Amended Formal Complaint also details the earliest evidence of the wording and intent of Act 129 of 2008 being altered by the PUC in a presentation by PUC Commissioner Kim Pizzingrilli and Counsel Shane Rooney, acting in their professional capacities, in a March 5, 2009 Power Point presentation they gave as part of the Mid-Atlantic Distributed Resources Initiative (MADRI), which presentation was ultimately part of a panel presentation at an April 1, 2009 meeting at the Federal Energy Regulatory Commission (FERC) in Washington, D.C. As stated also in Ms. McCarthy's testimony during her hearing, on slide number 12 of their presentation on "Act 129 of 2008 Overview and Implementation", they state that Act 129 mandates "At a minimum, smart meters must be provided upon customer request (if customer pays), in all new building construction in the service territory, and to all other customers within 15 years." (Second Amended Formal Complaint, page 5 of 38; Tr. 43-45).

Ms. McCarthy explains in both her Second Amended Formal Complaint and during her hearing (Tr. pp. 43-45) how Act 129 of 2008, section 2807(f)(2)(ii) was altered from its original wording and meaning in the Pizzingrilli/Rooney presentation with the addition of the word "all" ("in all new building construction…"), while section 2807(f)(2)(iii) was changed from "in accordance with a depreciation schedule not to exceed 15 years" to "...to all other customers within 15 years." This language makes very clear the intent of the PUC to misapply the PA law in comparison to the more obscure language that was ultimately adopted in their Implementation Order of June 2009, in which the PUC invokes belief over fact, "The Commission **believes that it was the intent** of the General Assembly to require all covered EDCs to deploy smart meters system-wide…." (Second Amended Formal Complaint, page 6 of 38; Tr. 45). Thus Ms. McCarthy's factual evidence in her Second Amended Formal Complaint and, later, in her testimony, was, no doubt, extremely threatening to both Met-Ed and to the PUC, which may have contributed to her unjust treatment and discrimination against her in these proceedings.

ALJ Johnson would not admit into the record Ms. McCarthy's exhibit showing the Pizzingrilli/Rooney presentation (Exhibit, NM-11) as per his statement in the transcripts:

> JUDGE JOHNSON: Thank you. Then your other exhibit is NM dash 11, which is -- let me get to it. Hold on just a moment.
> Opportunity to question -- ask questions on that document so that document is not admitted into the record. (Tr. pp. 56-57)

Ms. McCarthy, with the aid of others, successfully properly submitted her Second Amended Formal Complaint on July 2, 2020, and it was served on Respondent, Met-Ed, on July 7, 2020. It presently remains unanswered by Respondent due to the dismissal of her case by ALJ Johnson on July 14, 2020. **Complainant maintains that since ALJ Johnson dismissed her *Amended* Complaint but not her *Second Amended* Formal Complaint in his Initial Decision (I.D. page 41) that, in fact, since Respondent has not answered her Second Amended Formal Complaint and did not offer any testimony during the July 14, 2020 hearing in opposition to the content of her Second Amended Formal Complaint, that Complainant should be granted the relief she requested therein.**

Returning to Complainant's legal argument with regard to Act 129 of 2008, Ms. McCarthy reiterated Met-Ed's violation of the PA law during her hearing:
"Any attempt at forced install -- installments of a smart meter or any such device that emits RF/ microwave radiation on my property will be in direct violation of Act 129, as it is clearly and explicitly written." (Tr. 42)

During her hearing, Ms. McCarthy proceeded to read into the record the legislative history of Act 129 to demonstrate that "prior to the passage of Act 129, versions of the house bill which mandated universal deployment were not passed." (Tr. 48) She furthermore elucidated the INTENT of the General Assembly that smart meters were *not mandatory* as recorded in the Senate Journal (Tr. 48-49) by reiterating the comments of Senators Tomlinson, Boscola and Fumo. These had also been cited in Complainant's Second Amended Formal Complaint (pages 6-9 out of 38).

Since Act 129 of 2008 stipulates that EDCs "shall furnish smart meter technology… upon request from a customer that agrees to pay the cost of the smart meter at the time of the request," Ms. McCarthy states during her hearing, " …I do not request a smart meter. I do not agree to pay for a smart meter." (Tr. 50)

The grounds for dismissal of Ms. McCarthy's Amended Complaint were stated by Ms. Giesler, Counsel for Respondent, Met-Ed:

MS. GIESLER: Your Honor, at this time the company does not intend to present any testimony beyond the one question that you asked of Mr. Ahr, and at this time the company would make a motion to dismiss the case for failure to carry the burden of proof.

As Your Honor is aware, under section 701 of the Pennsylvania Public Utility Code it is the complainant's obligation to demonstrate that there has been a violation of statute regulation or commission order in order to sustain a formal complaint.

Based on the case in chief, not only was that burden not carried, but no such obligation was actually asserted that I was able to discern. And as such, we believe that the case should be dismissed.

JUDGE JOHNSON: Ms. McCarthy, would you like to make a response to the motion to dismiss your case?

MS. MCCARTHY: I would. I'm still thinking that I -- another part of the issue is the interpretation of 129 that didn't get addressed.

And -- can you repeat the reasons why –

JUDGE JOHNSON: I have made a ruling on that matter, ma'am. Would you like to respond to the motion?

MS. MCCARTHY: Just that I just reserve the right to protect my rights.

JUDGE JOHNSON: Okay. I am going to grant the motion to dismiss the case because of failure of the burden of proof.

In the above exchange, it is clear that ALJ Johnson accepted without question Ms. Giesler's truncated version of 66 Pa. C.S. § 701, glossing over any possible substance to "statue." He then dismissed Ms. McCarthy's case with clear disregard for "any law which the Commission has the jurisdiction to administer" as per 66 Pa. C.S. § 701, even when Ms. McCarthy – who is obviously not clear on what is occurring or why – reminds the ALJ of "the interpretation of (Act) 129". Being pro se and dyslexic, Ms. McCarthy was disadvantaged in being able to respond to the motion to dismiss as would an attorney. In the aftermath of her hearing, she inquired of witnesses to the hearing when she would need to submit her brief. She did not even fully grasp what it meant that her case had been dismissed by the ALJ.

Aside from the obvious disparities that exist between pro se complainants versus seasoned attorneys and administrative law judges, clear bias against Ms. McCarthy is evident in ALJ Johnson's disregard of Ms. McCarthy's testimony and her Second Amended Formal Complaint which cite the violation of Act 129 of 2008 by Met-Ed, which law "the Commission has the

jurisdiction to administer." Therefore ALJ Johnson's dismissal of Ms. McCarthy's case is without merit and should be overturned.

B. Exception No. 2: ALJ Johnson erred in preventing Complainant's expert witness Wes Zimmerman from testifying as to the meaning of "depreciation schedule" with regard to Act 129 of 2008

In his Initial Decision, ALJ Johnson wrote:

> 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.
>
> … 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* … Accordingly, none of the Exhibits that Ms. McCarthy proposed to sponsor through her witnesses were admitted into the record. Tr. 86. (I.D. page 23)

The above statement shows ALJ Johnson's denigration and misrepresentation of Ms. McCarthy's witness as a "tax agent". Mr. Zimmerman is a Criminal Investigator for the IRS. His background highly qualifies him to opine on a very important part of Act 129 of 2008 which is at the heart of the present dispute between Ms. McCarthy and Met-Ed: the failure of the PUC's Implementation Order of June 2009 to correctly implement the law, Act 129 of 2008 with regard to Section 2807 (f) (2) (iii), that smart meter technology shall be furnished "in accordance with a depreciation schedule not to exceed 15 years." Mr. Zimmerman's expertise is therefore highly relevant to Ms. McCarthy's case inasmuch as 66 Pa. C.S. § 701 applies, which stipulates that any person may file a complaint for violation "of any law which the Commission has the jurisdiction to administer." Mr. Zimmerman's testimony was neither irrelevant, immaterial nor inadmissible hearsay as it was grounded in PUC documents (including Met-Ed's own filings with the PUC), Pennsylvania and Federal laws, codes and tax codes.

The tactic employed by ALJ Johnson precluded admitting Mr. Zimmerman's testimony by insisting that the witness had to be an expert on "the harmful effects of smart meters." (Tr. 73) Mr. Zimmerman said he did not come to offer expertise on that matter but rather "my expert testimony and my background qualifies me to define a term that I believe Your Honor will find incredibly valuable in analysis of the statute." (Tr. 73)

The ALJ responded:

> JUDGE JOHNSON: That is not an issue in this case. And I, as the finder of fact and the ultimate decision maker at this level, will draw on conclusions of law.

> So I will not allow Mr. Zimmerman to give any testimony. Before me is the harmful effects of smart meters.
> He does not have any testimony of that and I will not allow him to testify. (Tr. 73-74)

The fact that ALJ Johnson declares himself "the finder of fact and the ultimate decision maker at this level" with regard to "conclusions of law" is akin to the fox guarding the hen house. Clearly it is in the PUC's interest to avoid having to confront Act 129 of 2008, and the actions of ALJ Johnson in these circumstances point all the more strongly to wherein fault lies.

Ms. McCarthy objected to Mr. Zimmerman being not permitted to testify:

> MS. MCCARTHY: I do object.
> …I came to this -- this formal complaint process with a number of different reasons to deny smart meters.
> I did state that Act 129 was a big part of why I'm here today. (Tr. 74)

Being pro se and "under threat and duress," Ms. McCarthy was unable to articulate further why her witness should be allowed to testify other than asserting the scope of her Complaint was beyond the narrow and limited scope imposed by ALJ Johnson and included Act 129 of 2008.

ALJ Johnson's corralling of all possible testimony from witnesses into the very limiting purview of "the harmful effects of smart meters" was inappropriate and in violation of the kind of testimony that should be admissible under 66 Pa. C.S. § 701. The failure of ALJ Johnson to admit Mr. Zimmerman's testimony under the circumstances is highly prejudicial and reveals ongoing bias against Ms. McCarthy to prevent her from being able to present her evidence of Met-Ed's violation of Act 129 of 2008 which stems from the PUC's own disregard for the law and its statutory meaning. Ms. McCarthy did not receive a fair and impartial hearing.

C. Exception No. 3: ALJ Johnson erred in preventing Complainant's factual witness Dr. Laura Murphy from testifying.

In his Initial Decision, ALJ Johnson wrote "Dr. Murphy's proffered testimony consisted of inadmissible legal arguments or inadmissible hearsay. Tr. 86." (I.D. page 23)

Dr. Murphy, a retired attorney whose own case before the PUC is noted to have been joined in the *Povacz, et. al*. case that was recently decided by the Commonwealth Court, was barred from giving testimony at Ms. McCarthy's July 14, 2020 hearing. There is no record of objections from Met-Ed, no evidence in the record regarding the content of Dr. Murphy's testimony, and no record of ALJ Johnson's ruling against her testifying. Conveniently, all mention of this part of the hearing is absent from the transcript. This omission was not discovered by Ms. McCarthy during her review and correction of the transcripts but becomes an issue now, for the purpose of

filing Exceptions. Unknown is whether this omission was inadvertent or intentional. However, by eliminating all of Ms. McCarthy's factual and expert witnesses, the ALJ has committed a highly prejudicial error of law, of which Dr. Murphy's exclusion is one example that cannot be otherwise defended or affirmed here. Nevertheless, Ms. McCarthy contests that the content of Dr. Murphy's testimony would have been "inadmissible legal arguments or inadmissible hearsay" as asserted by ALJ Johnson, whose biases and legal irregularities have already been noted in Exception Nos. 1 and 2 above.

D. Exception No. 4: ALJ Johnson erred in accepting *without evidence* the allegations of Met-Ed's Attorney Renner against Complainant's expert witness, Dr. Slawecki, and disqualified Dr. Slawecki without proper basis.

In his Initial Decision, ALJ Johnson wrote:

> 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. 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." (ID p. 23)

First, Met-Ed entered the appearance of Mr. Renner *on the day of* Ms. McCarthy's hearing, which prevented Ms. McCarthy from being able to determine if his appearance was legitimate in time for the hearing. That Ms. McCarthy had no way of knowing if Mr. Renner's appearance was legitimate was an additional stressor and confusing element in her hearing process. (Tr. 76-77)

Mr. Renner proceeded to recite allegations against Dr. Slawecki which ALJ Johnson accepted *without any evidence* in contrast to what a proper, unbiased judge would do as a standard matter of course in a hearing. The ALJ furthermore did not even check with Dr. Slawecki to ascertain the veracity of Mr. Renner's allegations but rather accepted them into the record as truthful, knowing well that pro se Complainant, Ms. McCarthy, being at significant disadvantage with her dyslexia and unfamiliarity with court protocols, would be unable to counter Mr. Renner's attack on her expert witness. ALJ Johnson failed in his capacity as a fair and impartial judge in this instance and allowed Dr. Slawecki to be disqualified from giving her expert testimony.

Mr. Renner's first objections are cited in the transcripts (erroneously attributed as "Mr. Zimmerman"):

> MR. ZIMMERMAN: Your Honor. Our objection is pretty straightforward, that while Ms. Slawecki had stated that she has background experience in material science, she does not have any qualifications in the fields of human health, and -- she's not a medical doctor.

> She does not have any licensure to diagnose illness or treat patients or reach conclusions about the causation of human health, human health effects.
> Furthermore, she doesn't have any publications dealing with radiofrequency fields from smart meters and health.
> She is, as she said, a material scientist, someone who works with microwaves and looks for their effects on metals and things of that sort. She does not conduct research on basic biology dealing with animals or humans. (Tr. 68-69)

While it is true that Dr. Slawecki is not a licensed medical professional, Mr. Renner's allegations conveniently overlooked Dr. Slawecki's *experience* in human health education and research which qualifies her as per 225 Pa. Code Rule 702. The record shows that Dr. Slawecki had developed and taught a course in integrative medicine (Tr. 66), and worked with both therapeutic electromagnetic devices and therapeutic waters. (Tr. 66-67) She also gave invited talks on "BioAdvances in Electromagnetic Fields" and "Future Energy and Future Medicine." (Tr. 66) The terms "medicine" and "therapeutic" are not without connection to human health. In her CV, publication number 11 is "Ultradilute Ag-aquasols with extraordinary bactericidal properties" which means she was involved in research on how colloidal silver at 10 parts per million in water had extraordinary antibiotic properties – which is directly related to human health.

For Mr. Renner to portray Dr. Slawecki as "She is, as she said, a material scientist, someone who works with microwaves and looks for their effects on metals and things of that sort," (Tr. 68-69) is misleading and overlooks her prior qualifying research and teaching experiences. Mr. Renner further denigrated Dr. Slawecki by referring to her as "Ms. Slawecki" That Mr. Renner did not cross-examine Dr. Slawecki explicitly on her experience in the realm of human health further disqualifies his allegations.

Dr. Slawecki's credentials and experience qualify her equally if not more so to opine on matters of electromagnetism (relevant to smart meters) and human health that Met-Ed's expert witness, electrical engineer Dr. Christopher Davis. Dr. Davis, like, Dr. Slawecki, has a foundation education in physics, but then he was employed in the field of (academic) electrical engineering (whereas Dr. Slawecki is employed in the interdisciplinary field of materials science).

As per Mr. Renner's criteria for Dr. Slawecki (Tr. 68-69), this Court should take note that Dr. Davis:

- does not have any qualifications in the fields of human health – he's not a medical doctor
- does not have any licensure to diagnose illness or treat patients or reach conclusions about the causation of human health, human health effects.
- doesn't have any publications dealing with radiofrequency fields from smart meters and health.

Thus, by Mr. Renner's own criteria for Dr. Slawecki, he has disqualified also Met-Ed's witness, Dr. Davis.

Based on the exhibits Dr. Davis submitted for Ms. McCarthy's hearing as well as past testimony he gave in PUC docket nos. C-2017-2621057 and C-2017-2623504, he has not conducted any research on the effects of smart meters on human beings (to which criterion ALJ Johnson holds Dr. Slawecki). In Met-Ed's Exhibit CD-1, page 1, Dr. Davis states under "Research Experience," "Conducted a substantial amount of research on radio frequency fields of the type produced by AMI meters." There is no mention of the effect of AMI (smart) meters on *human health*. In fact, Dr. Davis' research wasn't even conducted using AMI (smart) meters, but "on radio frequency fields of the type produced by AMI meters." Dr. Slawecki also conducts research using microwaves in the same frequency range as those used by the Itron smart meters being installed by Met-Ed. (Tr. 62) Again, Mr. Renner's objection to Dr. Slawecki's expert qualifications fall short and do not support ALJ Johnson's disqualification of her.

Upon cross-examination by Dr. McKnight (Q) in PUC docket nos. C-2017-2621057 and C-2017-2623504., on April 13, 2018, Dr. Davis (A), who claims expertise in biophysics, ultimately claims he's learned biology "by osmosis":

> Q. Can you explain more about your background in biology specifically? Did you get any specific training in biology?
>
> A. I took a course in biophysics, when I was a graduate student. And for almost the last 50 years, I worked very closely with biologists, M.D.'s, engineers, physicists who have examined this interesting field of bioelectromagnetics.
>
> So you could say I've acquired a lot of knowledge in biology by osmosis.
>
> Q. By osmosis? Okay
>
> But you don't have a formal degree?
>
> A. I don't have a formal degree in biology. (*McKnight*, April 13, 2018, Tr. 17)

Surely if Dr. Davis can be qualified to opine on the health effects of smart meters because he learned biology "by osmosis," Dr. Slawecki's experiences in actual human health-related teaching and research better qualify her in this capacity.

For ALJ Johnson to also overlook Dr. Slawecki's relevant qualifying experiences and then rule against her ostensibly because "she did not have any medical expertise as to the effects of smart meters on human beings" (I.D. page 23) is equally deficient in that it overlooks the criteria by which expert witnesses are qualified as per 225 Pa. Code Rule 702, and worse, was not even mentioned during the hearing – that is, nowhere in the transcripts was Dr. Slawecki asked explicitly about "the effects of smart meters on human beings." In fact, NO ONE has conducted ANY research that has been published in the peer-reviewed scientific literature on "the effects of smart meters on human beings" (in terms of measured exposures and measured effects in real use settings and not just self-reported symptoms), so ALJ Johnson is demanding of Dr. Slawecki

something which no one to-date, including the expert witnesses for Met-Ed/First Energy, has done - which is holding Dr. Slawecki to an unreasonable standard for qualification as an expert in Ms. McCarthy's case.

Mr. Renner's additional allegations (Tr. 69-71) draw upon his cross-examination of Dr. Slawecki in a different case, PUC docket # C-2017-2640338 to which Ms. McCarthy is not a party and, as a pro se complainant, could not possibly be expected to address as would a seasoned attorney. Had ALJ Johnson been conducting the hearing in a fair and impartial manner, he would have
(a) requested evidence from Mr. Renner, and
(b) given Dr. Slawecki the opportunity to respond to Mr. Renner's allegations from this other docket case that were being used against her.

Ms. McCarthy's hearing was not the proper venue for Dr. Slawecki to address Mr. Renner's allegations against her that remain unaddressed in PUC docket # C-2017-2640338 to which Ms. McCarthy is not a party. Not being an attorney, Ms. McCarthy objected to Mr. Renner's allegations from this other docket case with "it is not relevant and it is not appropriate." (Tr. 70) Dr. Slawecki has apprised Ms. McCarthy that Mr. Renner's allegations are without basis, but this information is not in the record because of the manner in which ALJ Johnson conducted the proceedings which rather blatantly favored the utility over Ms. McCarthy. We see instead that ALJ Johnson shifted all burden to address Mr. Renner's objections to Ms. McCarthy, a pro se dyslexic complainant "under threat and duress," who was completely overwhelmed by Mr. Renner's litany against her expert witness as is evident from the transcripts:

> JUDGE JOHNSON: I will give you now, Ms. McCarthy, an opportunity to respond to Mr. Lerner's (sic) objections.
> I believe you stated earlier that you feel it is irrelevant, his objection. Was that your position?
>
> MS. MCCARTHY: Well, I am trying to write fast and furious, and it very difficult for me.
> First of all, it seems like I keep on seeing -- I am being accused of not sending information that I sent, and I did send information.
> And what he's saying is -- is not-- is not relevant to my case -- her – he mentioned a comment. I wrote down something about not persuading.
> I -- I feel that bringing the facts and information that are important to why I am here today, to me it's not persuasion. Persuasion can be -- happen when people state things that are not true or factual.
> Dr. Slawecki does have facts. She has expertise. So I am trying to get away from what's irrelevant.

> And frankly, I -- it seems very inappropriate what he's saying and that is -- thank you. (Tr. 71)

Apropos of Ms. McCarthy's feeling "accused of not sending information," Mr. Renner's final objection makes reference to written expert testimony that he alleges was to be submitted but was not:

> MR. RENNER: Your Honor, I wasn't done. There is another grounds for excluding this so-called expert testimony, which is that Ms. Slawecki, even though she had the opportunity to prepare an expert report, nothing was ever submitted related to Ms. McCarthy.
> And this kind of sand-bagging goes against the PUC's rules and shouldn't be sanctioned here. (Tr. 70-71)

Again, Mr. Renner denigrates Dr. Slawecki by referring to her as "Ms. Slawecki", while alleging she was delinquent in preparing an expert report when, in fact, as is addressed in Exception No. 5, the final litigation schedule Ms. McCarthy was to follow did not stipulate submission of written testimonies by any parties in advance of the hearing. Dr. Slawecki was listed as an expert witness by Ms. McCarthy as per the January 30, 2020 witness deadline. Dr. Slawecki inquired of Ms. McCarthy if written testimony was required of her and, as per Ms. McCarthy's reading of the October 3, 2020 litigation schedule, Ms. McCarthy could find no mention of such a requirement. As such, Dr. Slawecki was under no direction by the Complainant to produce any such a report.

Mr. Renner – who produced no evidence of his allegation - might in fact, be referring to the requests in Met-Ed's discovery requests served to Complainant as noted by ALJ Johnson:

> On February 14, 2020, Met-Ed served Interrogatories and Request for Production of Documents (Set II) upon Ms. McCarthy. (I.D. page 9)

Interrogatories nos. 1-11 of this document pertained to Met-Ed's request for information about Dr. Slawecki's expected testimony. These questions may be read in Met-Ed's March 11, 2020 motion to compel on Complainant's docket. There was no request that Dr. Slawecki prepare and submit "an expert report" (as alleged by Mr. Renner). As Dr. Slawecki was fully occupied at the time with PUC docket # C-2017-2640338 (to which Ms. McCarthy is not a party) for which hearings had been scheduled for February 7, 2020 and March 10, 2020, she was unable to provide Complainant with new material, but intended to rely substantially on her written testimony submitted in July 2019 to Attorney Giesler/West Penn Power in PUC docket # C-2017-2640338, with which Ms. Giesler (also counsel for Met-Ed in Ms. McCarthy's case) was already quite familiar. Thus, at best Dr. Slawecki could respond to Ms. McCarthy's Set II Interrogatories from Met-Ed by referring to her July 22, 2019 written testimony in order to address Met-Ed's requests.

To be clear, there is no record on Ms. McCarthy's docket necessitating a written expert report from Dr. Slawecki in the aftermath of Dr. Slawecki agreeing to and being listed as an expert witness for Ms. McCarthy as of January 30, 2020. If there was any such order, both Ms. McCarthy and Dr. Slawecki were unaware of it. Mr. Renner's allegation, which failed to specify any evidence, is again, without basis.

Overall, ALJ Johnson's acceptance as truth the allegations of Mr. Renner against Ms. McCarthy's expert witness, Dr. Slawecki, *without evidence* and *without providing any opportunity for the witness to respond* to the allegations, shows clear bias against Ms. McCarthy. His disqualification of Dr. Slawecki is without basis and without merit.

The consequence of this improper disqualification of Dr. Slawecki placed Ms. McCarthy at significant disadvantage and prevented her from being able to meet her burden of proof with regard to the safety aspects of smart meters. In his Initial Decision, ALJ Johnson writes,

> 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.
> …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. (I.D. page 37)

It is through ALJ Johnson's own biased conduct during Ms. McCarthy's hearing that placed Ms. McCarthy in this untenable position. Therefore ALJ Johnson's rulings with regard to Ms. McCarthy's failure to meet her burden of proof with regard to 66 Pa.C.S.A. § 1501 cannot be legitimately justified and his dismissal of her case is without proper merit.

E. Exception No. 5: The ALJ erred in his statements about written direct testimony and the number of times extensions were granted to Complainant's litigation schedule, unjustly casting aspersions on Complainant.

In his initial decision, ALJ Johnson wrote,

> 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 exhibits[42] , and she needed more time to prepare her case[43]. 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 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] (I.D. pages 32-33)

To clarify for the record, ALJ Watson served Complainant an initial litigation schedule dated April 24, 2019. Ms. McCarthy subsequently sought two more extensions that were granted, for which ALJ Watson granted revised litigation schedules on, respectively, July 24, 2019 and October 3, 2019. The latter stipulated it would be the final litigation schedule and no additional ones would be granted. This brings the total number of extensions granted to Ms. McCarthy to three, not four, as alleged by ALJ Johnson.

The October 3, 2019 litigation schedule proffers neither deadlines nor instructions on submission of written direct testimony to any parties in *McCarthy v Met-Ed*. Both parties were ordered to submit witness lists and expected testimony summaries by January 30, 2020. A witness added to the repertoire of either party on January 30, 2020 would not be able to comply with a written testimony deadline specified prior to that date, so to suggest otherwise makes no temporal or logical sense. Therefore Ms. McCarthy, in her capacity as a dyslexic pro se complainant was mindful of the deadlines in the October 3, 2020 litigation schedule which did not specify any obligation to produce written testimony for herself or from her witnesses prior to the evidentiary hearing. Yet this alleged mandate, stipulated in an earlier litigation schedule, was used to disparage Complainant (as per ALJ Johnson's statement above) and inappropriately disqualify at least one of her witnesses (Dr. Slawecki) at the time of her hearing.

That ALJ Johnson argues above that "Ms. McCarthy's due process rights do not entitle her to never-ending extensions of time to litigate her case" must be understood in light of the fact that 1) the alleged Pandemic (Covid 19) began to impact the lives of Americans in March 2020, significantly impacting Ms. McCarthy as caretaker of her family and 2) on July 6, 2020, Met-Ed had submitted 292 pages of exhibits which Ms. McCarthy, who suffers from dyslexia, an ADA-recognized disability, had absolutely no way to review in time for her hearing. Ms. McCarthy was merely being realistic while ALJ Johnson was not. Even a pro se complainant *without* disabilities would have an extremely difficult time reviewing 292 pages of exhibits from the Respondent in addition to preparing for their hearing and submitting their own exhibits on top of

daily responsibilities and stresses from the Covid 19 lockdown disrupting our lives and making many things more complicated than normal.

This entire paragraph reveals ongoing bias against Ms. McCarthy on numerous fronts, culminating in the unjust accusation that, "Although Ms. McCarthy had 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." To be clear, since there was no order from the ALJ in the October 3, 2019 litigation schedule, nor any subsequent orders requiring Ms. McCarthy to submit written testimony, ALJ Johnson is misrepresenting the facts and is not justified in his disparaging remarks about Complainant.

F. Exception No. 6: The ALJ erred by acting as an attorney for Met-Ed in his wholesale dismissal of Complainant's exhibits as "irrelevant, immaterial or inadmissible hearsay" including one peer-reviewed journal article that does not meet these criteria in any way.

In his Initial Decision, ALJ Johnsons writes,

> 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 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.D. pages 23-24)

It was not until during the hearing (July 14, 2020) that Ms. McCarthy learned from Met-Ed that they had not received the exhibits Complainant had e-mailed to them on July 9, 2020, which ALJ Johnson, by comparison, did receive. Ms. McCarthy subsequently verified in her "sent" messages that, indeed, she had e-mail them to Counsel for Met-Ed:

From: **Noreen McCarthy** <contactnoreen1@gmail.com>
Date: Thu, Jul 9, 2020 at 5:14 PM
Subject: C-2019-3006923 Exhibits
To: <nmiskanic@pa.gov>, <llepkoski@firstenergycorp.com>, Giesler, Tori <tgiesler@firstenergycorp.com>

Please see attachment, which contains my exhibits. Per Ariel and Dan at the PUC, I was to go to a shared link to send, Unfortunately I couldn't find how to create and account, nor was there a password sent to me.

Please confirm with me that you received my document.

Thank you,

Noreen McCarthy

Nevertheless, rather than attempting to provide Met-Ed's attorneys with Ms. McCarthy's exhibits and giving them proper time to assess and raise objections to them, ALJ Johnson took it upon himself to dispose of them quickly:

> MS. MCCARTHY: Yes. Well, actually -- all the exhibits that were put together are things I feel are very important to why I'm here today.
> So I am not sure if we went through each and every one of them and decided whether they would be admitted as evidence.
>
> JUDGE JOHNSON: Okay. Let me ask. Attorney Giesler, did you receive the e-mail I sent to you? Attorney Giesler?
>
> MS. GIESLER: I did not, Your Honor.
>
> JUDGE JOHNSON: Okay. It is probably because it was too large. Let me state this -- give me just a moment. I am looking at your exhibit. Just give me a moment.
> I have looked at your exhibits, Ms. McCarthy, and I am referring to exhibits NM dash one through NM dash ten.
> I have reviewed them and I am not going to allow you to admit those exhibits, and this is the reason. As presiding officer I have the obligation to exclude irrelevant, immaterial matters. And what you've submitted as exhibits is immaterial and irrelevant, because it's neither conclusions of law or documents authored by someone who is not present to be cross-examined, and therefore it would be hearsay.

> The articles that you, I guess, called from different sources, that is not evidence. It is irrelevant and it is immaterial.
> And I am not going to have the record filled with matters that are irrelevant and inadmissible. (Tr. 84-85)

Ms. McCarthy was expecting to be able to step through each of her exhibits and address any objections Met-Ed might raise against them. Instead, the ALJ glanced over them quickly and did a wholesale off-the-cuff assessment that they were inadmissible. ALJ Johnson's actions above were more like a preemptive strike against an ADA-disabled pro se Complainant in clear biased favor towards Met-Ed than that of a "fair and impartial" judge.

ALJ Johnson's comment that "And what you've submitted as exhibits is immaterial and irrelevant, because it's neither *conclusions of law* or documents *authored by someone who is not present to be cross-examined*, and therefore it would be hearsay," (Tr. 85) first betrays his earlier dismissal of Mr. Zimmerman's testimony on the grounds that only the ALJ can make "conclusions of law" (hence why Mr. Zimmerman's testimony was disallowed), and secondly is absurd in that if one had to subpoena the authors of all the articles one wished to present in a hearing in order for them to be present to be cross-examined, it would be an outrageous and unmanageable affair!

If we examine evidentiary standards and criteria, we find that evidence is relevant if it tends to establish facts in issue. *LeRoi v. Pa. State Civil Service Commission*, 382 A.2d 1260 (Pa. Cmwlth. 1978). Ms. McCarthy was given no opportunity at all to clarify, one exhibit at a time, the facts each exhibit contributed to her argument because of the wholesale manner in which her exhibits were disposed of by ALJ Johnson. Rather, she was disadvantaged by being faced with the entire lump sum of all of her exhibits at once and by being pro se with an ADA-recognized disability which was not properly accommodated.

"Commonwealth agencies shall not be bound by technical rules of evidence at agency hearings, and **all relevant evidence of reasonably probative value may be received**." 2 Pa. C.S. § 505.

The Pennsylvania Public Utility Commission, a Commonwealth agency, is not bound by technical rules of evidence at agency hearings and therefore may receive all relevant evidence of reasonably probative value.

If the evidence is relevant to the issues before the agency and of reasonable probative value, the agency may receive it. 2 Pa. C.S. § 505.

Hearsay evidence may generally be received and considered during an administrative proceeding. *See A.Y. v. Commonwealth, Dep't of Pub. Welfare, Allegheny County Children & Youth Serv.*, 537 Pa. 116, 641 A.2d 1148, 1150 (1994).

Under the relaxed evidentiary standards applicable to administrative proceedings, as provided under 2 Pa. C.S. § 505, it is well-settled that simple hearsay evidence, which otherwise would be inadmissible at a trial, **generally may be received into evidence and considered during an administrative proceeding.** *D'Alessandro v. Pennsylvania State Police*, 937 A.2d 404, 411, 594 Pa. 500, 512 (2007).

The wholesale dismissal as "heresay and irrelevant" of Ms. McCarthy's exhibits by ALJ Johnson, with no objections cited by Respondent, Met-Ed, and contrary to 22 Pa. C.S. § 505 and the cases cited above, shows clear bias on the part of ALJ Johnson that placed Ms. McCarthy at great disadvantage in being able to present her evidence and make her case as is her due process right.

Two of Ms. McCarthy's exhibits warrant special mention:

Complainant's Exhibit NM-4, Pall's study titled *"1. Microwave electromagnetic fields act by activating voltage-gated calcium channels: why the current international safety standards do not predict biological hazard*", is neither hearsay nor irrelevant and must be accepted and admitted as evidence. Complainant's Exhibit NM-4 was study number 125 in a List of 155 Reviews by Dr. Martin Pall that was accepted and admitted into the record as evidence in PUC docket case # C-2017-2620702 (*Myers v PPL*)(*Tr. 4/2/18 at 19:5-6*). Complainant understands that if a scientific study was admitted as evidence by the PUC in a prior hearing it can be cited as evidence again. The burden is then on Met Ed to refute the author's conclusion, and Met-Ed's counsel and witness offered no such testimony on the record. Consequently, if Met Ed does not refute the study, the study's conclusions should stand.

Complainant's Exhibit NM-3, "Captured Agency" is authored by Norm Alster of Harvard University's Edmond J. Safra Center for Ethics. This article is important to Complainant's argument because it shows how there is a revolving door between the FCC and the telecommunications industry, resulting in biases that fail to adequately address public health and safety with regard to – especially – exposure of the public to wireless communication signals. "Captured Agency" was admitted in PUC docket # C- 2015-2475023 (*Povacz v PECO , Direct Testimony of Martin Pall, PhD.*, 7: 6-17 and Appendix E). Complainant understands that if a non-peer reviewed article was presented by an expert witness and was admitted as evidence by the PUC in a prior hearing it can be cited as evidence again. As Met-Ed offered no testimony to counteract the information in this article which shows that the FCC's alleged "safety guidelines" cannot be trusted because of inherent conflicts of interest with the telecommunications industry, then this piece of evidence undermines Met-Ed's reliance on the FCC guidelines.

In stark contrast to how ALJ Johnson handled Ms. McCarthy's exhibits, in the December 5, 2019 ORDER DENYING PPL ELECTRIC UTILITIES CORPORATION'S OBJECTIONS TO THE

ADMISSION OF COMPLAINANT'S HEARING EXHIBITS in PUC Docket # C-2019-3010437 Codella v PPL, ALJ Cheskis wrote,

> Prior to the hearing, Mr. Codella pre-served 13 exhibits. It was discovered during the hearing, however, that he did not serve all of those exhibits on PPL. As a result, a discussion was held during the hearing wherein the parties agreed that PPL would be sent a copy of all of Mr. Codella's exhibits and have 20 days after the hearing to state any objection to the admission of those exhibits into the record. To the extent that PPL had objections, Mr. Codella would then have 10 days to file a response to those objections and the objections would be resolved prior to the issuance of the decision.
>
> On November 18, 2019, PPL filed objections to the admission of Mr. Codella's hearing exhibits. As discussed further below, PPL argued that Mr. Codella's exhibits should be excluded because, among other things, they are hearsay, are irrelevant, lack authenticity, are inherently unreliable or were not provided in response to discovery. Mr. Codella did not file a response to PPL's objections.
>
> PPL's objections to Mr. Codella's exhibits are ready for disposition. For the reasons discussed below, PPL's objections will be denied and Mr. Codella's exhibits will be admitted into the record of this proceeding. (Order, December 5, 2019, Codella v PPL, page 2)

ALJ Cheskis then explains how such "hearsay" evidence is to be utilized in a fair and reasonable manner as exemplified in the following:

> With regard to PPL's arguments that Codella Exhibits 1 thru 7 should be precluded because they are hearsay, this argument will not preclude the admission of Exhibits 1 thru 7 but, rather, will impact the weight that will be afforded to them. For example, Codella Exhibit 3 references an article "from a NASA technical report." PPL is correct that the exhibit only provides part of the technical report and the declarant was not called to testify during the hearing on November 29th. Yet, these facts should not preclude the exhibit from being admitted into the record. Instead, these facts impact the weight that the exhibits can be afforded at the time it is determined if Mr. Codella has satisfied his burden of proof. (Order, December 5, 2019, Codella v PPL, pages 5-6)

ALJ Cheskis continues with,

> PPL's witnesses also reference various studies or articles in their pre-served written testimony and neither provide a complete copy of the report or make the author of the report available to testify and be available for cross-examination. **This practice is not uncommon in an administrative law setting where hearsay rules are relaxed**, *see*,

> Rox Coal Co. v. Workers' Comp. Appeal Bd., 807 A.2d 906 (Pa. 2002), **and should not preclude the admission of the reference to the articles** in Mr. Codella's exhibits **into the record of the proceeding.** (Order, December 5, 2019, *Codella v PPL*, page 6) [Bolded text added for emphasis]

The example above shows how an ALJ could have reasonably treated Ms. McCarthy's exhibits given that Met-Ed apparently had not received them though Ms. McCarthy had e-mailed her exhibits to them on time. Rather than playing attorney for Met-Ed, ALJ Johnson could have allowed Met-Ed to submit objections to Ms. McCarthy's exhibits within 20 days of the hearing and then allow Ms. McCarthy 10 days to respond to those objections.

Overall, ALJ Johnson's treatment of Ms. McCarthy's exhibits was unreasonable, unjust, unjustified, and contrary to the relaxed evidentiary standards applicable to administrative proceedings, as provided under 2 Pa. C.S. § 505.

G. Exception No. 7: The ALJ erred in dismissing Ms. McCarthy's complaint regarding the threat to terminate her service for refusing installation of a smart meter on her home.

In his Initial Decision, ALJ Johnson states, "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 smart meter on her property.[64] As previously discussed, Met-Ed is required to replace its analog meters with smart meters under Act 129." (I.D. pp 37-38)

Complainant, Ms. McCarthy, avers that there is no universal smart meter mandate under Act 129 as mentioned in Exception No. 1 above. Therefore it is false that "Met-Ed is required to replace its analog meters with smart meters under Act 129." Ms. McCarthy's assertion of no universal mandate is corroborated by the recent Commonwealth Court of Pennsylvania's opinion on No. 492 C.D. 2019, No. 606 C.D. 2019 and No. 607 C.D. 2019 filed on October 8, 2020. ALJ Johnson's subsequent dismissal (I.D., p. 38) of Ms. McCarthy's termination of service threat is without basis.

H. Exception No. 8: ALJ Johnson erred by failing to properly cite Act 129 of 2008 with regard to the alleged "Smart Meter Mandate" for EDCs with more than 100,000 customers.

In his Initial Decision, ALJ Johnson erroneously writes:

> 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](I.D. page 34)

Aside from the typographic error that "Met-Ed is an EDC with more than 1000,000 (sic) customers.[51]", the ALJ's first sentence omits the full import of the law. Act 129 of 2008, section 2870 (f) (1) states:

> Within nine months after the effective date of this paragraph, electric distribution companies shall file a smart meter technology ***procurement and installation plan*** with the commission for approval. ***The plan*** shall describe the smart meter technologies the electric distribution company proposes ***to install in accordance with paragraph (2).*** [emphasis added]

In other words, the installation plan was to be made in accordance with paragraph (2) which stipulated that EDC's "shall furnish smart metering technology as follows:

> (i) Upon request from a customer that agrees to pay the cost of the smart meter at the time of the request.
> (ii) In new building construction.
> (iii) In accordance with a depreciation schedule not to exceed 15 years."

Thus, the plan should have begun with a survey of their customer base to assess who wished to buy into the smart meter program and the anticipated demand for smart meters from new building construction, *not* from the imposed forced universal deployment of smart meters to all customers which is in complete opposition to the intention with which House Bill 2200 was passed into law as Act 129 of 2008. The omission of "in accordance with paragraph (2)" with proper adherence to the statutory language of the law results in the skewed and erroneous assertion that EDCs with more than 100,000 customers were required to install smart meters universally. The number of customers is irrelevant to the argument because the fatal flaw is with the failure of the EDC to adhere to the statutory language of Act 129 of 2008, section 2807 (f) (2) which is substantiated and upheld by the recent Commonwealth Court of Pennsylvania's opinion on No. 492 C.D. 2019, No. 606 C.D. 2019 and No. 607 C.D. 2019 filed on October 8, 2020, as is further detailed in Exception No. 9.

Once the EDCs and PUC follow the law, Act 129 of 2008, any and all Commission documents which are based on the flawed Implementation Order of June 2009 are no longer valid, so the Commission-approved smart meter deployment plan for Met-Ed *is irrelevant* to Ms. McCarthy's proceedings, as is the PUC's Implementation Order of June 2009, except as examples of documents that are not in accord with the law, Act 129 of 2008.

I. Exception No. 9: The ALJ erred by ignoring key facets favorable to Complainant from the Commonwealth Court of Pennsylvania's opinion on No. 492 C.D. 2019, No. 606 C.D. 2019 and No. 607 C.D. 2019 Filed: October 8, 2020

In his Initial Decision, ALJ Johnson writes,

> 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. (I.D. page 35)

Once again, ALJ Johnson demonstrates his bias against the Complainant by cherry-picking from the *Povacz* decision to rule against Ms. McCarthy while ignoring the aspects that grant her relief.

In fact, in *Povacz et. al. v. Pa. Pub. Util. Comm'n,* No. 492 C.D. 2019 (Pa. Cmlth. Filed October 8, 2020), the majority opinion states:

> Act 129 mandates that an electric distribution company, such as PECO, "shall furnish smart meter technology . . . in accordance with a depreciation schedule not to exceed 15 years." 66 Pa.C.S. §2807(f)(2)(iii). However, **nothing in the statutory language affirmatively mandates that customers must allow installation of wireless smart meters.**[11]
>
> To "furnish" means "to provide with what is needed; . . . supply, give." Webster's Ninth New Collegiate Dictionary 499 (1985). The definition does not imply that the recipient is forced to accept that which is offered. Therefore, we find **the PUC is incorrect in concluding that Act 129 facially precludes any customer refusal of installation of smart meters**. (*Povacz*, p. 10) [Emphasis added.]

Thus, the Commonwealth Court ***affirms the arguments put forth by Ms. McCarthy*** throughout these proceedings that Act 129 of 2008 does not mandate the installation of smart meters on all customers' homes as alleged by Met-Ed and the PUC's Implementation Order of June 2009. While ALJ Johnson goes on to cite dissenting opinions from the *Povacz* decision (I.D. page 35), such citations are without merit. A dissenting opinion (or dissent) is an opinion written by one or more judges expressing disagreement with the majority opinion. A dissenting opinion does not create binding precedent, nor does it become part of case law: only the majority opinion (in countries based on the common law system) becomes part of the body of case law.

While it is beyond the scope of these proceedings, the arguments proffered in the dissenting opinion in the *Povacz* decision can be shown to be without merit based on the plain English reading of the statute and the intention with which the General Assembly passed HB2200 into law to become Act 129 of 2008 as has been presented by Ms. McCarthy. Because ALJ Johnson is relying in part on this dissenting view to carry weight in Ms. McCarthy's case, a few such flaws in the dissenting viewpoint will be addressed here.

The lone dissenter erroneously focuses on the word "shall" rather than "furnish", in Section 2807(f)(2) that EDC's "shall furnish smart meter technology." (*Povacz* , JAC-3) Furnish means "to provide" (*Povacz*, page 10) and does not in any way mean "install." That Act 129 of 2008 requires EDC to "file a smart meter technology procurement and installation plan", as pointed out previously in Exception No. 8, the "plan" was to be made "accordance with paragraph (2)." (*Povacz*, JAC-2) It is "paragraph (2)" which does NOT mandate smart meter technology to all customers (unless the meaning of paragraph (2)(iii) is twisted around as was done by the PUC in its Implementation Order of June 2009), therefore the procurement and installation plan should have reflected what the EDCs had to provide for customers who requested and agreed to pay for smart meters and in new building construction.

The dissenting view in *Povacz* in reference to smart meter technology states, "At no point did the General Assembly add in the words "which the consumer may or may not choose to accept," or other words to that effect, and it is not our role to read in such language now.[3]" (*Povacz*, JAC-3 to JAC-4). This viewpoint overlooks Section 2807(f)(2)(i) which DOES give the customer choice because the law states that smart meters are furnished, "upon request from a customer that agrees to pay the cost of the smart meter at the time of the request." Therefore the customer is free to choose having a smart meter by requesting one (and agreeing to pay for it) and is equally free to NOT choose to have a smart meter by NOT requesting one. That such simple distinction is so difficult for a judge to grasp defies common sense and logic.

The recurrent claim that "there is no opt-out provision" in Act 129, which is also brought up in the dissenting viewpoint (*Povacz*, JAC- 4) is without relevance because Act 129 is an opt-IN

law, so no opt-out provision is required. This opt-out language is reflected in ALJ Johnson's Initial Decision as well:

> 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. (I.D. page 34)

The ALJ regards the dissenting viewpoint as supportive of the "no opt-out" as stated here:

> The dissenting opinion is in accord with the Commission's earlier cases that there is no opt-out provision under Act 129. (I.D. page 35)

The same language is therefore mirrored by Met-Ed as recounted by ALJ Johnson in the History of the Proceeding in Ms. McCarthy's case:

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. (I.D. page 2)

While such "opt-out" terminology is of relevance to the PUC's Implementation Order of June 2009 which mandates installation of smart meters to all customers, it is without basis because Act 129 of 2008 is an opt-IN law, so no opt-out provision is required. Customers do not get a smart meter unless they request it and agree to pay for it, or if they are in new building construction. There is no need to opt out when one does not opt in.

That a Commonwealth Court judge would then go on to cite a hearsay news article from "Metering.com" as evidence that the new law (Act 129) mandated smart meters for all homes and businesses within 15 years is both shocking and disturbing. (JAC-4) Metering.com is apparently a website for "Smart Energy International" which touts itself to be "the leading authority on the smart meter, smart grid and smart energy markets, providing up-to-the-minute global news, incisive comment and professional resources." Such an entity cannot be relied upon for unbiased news reporting. The dissenting judge's evidence here would never make it through a PUC courtroom hearing.

What the Commonwealth Court decision does not confront – perhaps to avoid shouldering the placement of blame - is that the misapplication of the law has occurred because the PUC interpreted Section 2807(f)(2)(iii) "in accordance with a depreciation schedule not to exceed 15

years" to mean "all covered EDCs to deploy smart meters systemwide" in their Implementation Order of June 2009. A careful analysis of this part of the law can be found in *Zimmerman v Met-Ed*, PUC docket # C-2019-3007568, pending submission of his brief. Mr. Zimmerman's expert analysis, which was denied being entered in Ms. McCarthy's proceedings by ALJ Johnson, demonstrates conclusively that there is no logical, linguistic, historical or legal way for Section 2807(f)(2)(iii) to be construed as it has been in the PUC's Implementation Order of June 2009.

Consequently, all evidence affirms the majority opinion of the Commonwealth Court judges in *Povacz*, that "…nothing in the statutory language affirmatively mandates that customers must allow installation of wireless smart meters" and that "the PUC is incorrect in concluding that Act 129 facially precludes any customer refusal of installation of smart meters."

By continuing to ignore and actively avoid the elephant in the room – Act 129 of 2008 – and its non-mandatory smart meter edict, ALJ Johnson has denied Complainant her due process rights in these proceedings. As has been shown in the above sections of this document, the ALJ has ignored or actively avoided 66 Pa. C.S. § 701 regarding "…violation, of any law which the Commission has the jurisdiction to administer"; he granted Ms. McCarthy an "accommodation" for her hearing which was an inappropriate one for her dyslexia disability and caused her to be unreasonably and impossibly burdened by the 292 page document containing Met-Ed's exhibits eight days prior to her evidentiary hearing; he improperly disallowed all of her witnesses to testify during her hearing (though no objections to her witnesses had been made prior to this time by Met-Ed), stripping Ms. McCarthy of much of the evidence she required to make her case; he similarly improperly disposed of all of her exhibits; and, finally, he dismissed her case without reference to (and, in fact, with clear omission of) 66 Pa. C.S. § 701 regarding "…violation, of any law which the Commission has the jurisdiction to administer." Ultimately, however, the elephant in the room must be confronted and admitted into these proceedings. That ALJ Johnson dismissed Ms. McCarthy's case with prejudice has a double meaning: his treatment of Ms. McCarthy was prejudicial on numerous fronts.

Ms. McCarthy did not request a smart meter and did not agree to pay for one. She should not be forced to have one installed on her home by Met-Ed. It is therefore within the jurisdictional power of the PUC to permit Met-Ed to comply with the law, Act 129 of 2008 and grant the relief requested by Ms. McCarthy, contrary to the improper and unjust arguments and rulings of ALJ Johnson, but in concurrence with the *Povacz* decision.

III. Conclusions

For the reasons set forth above, Complainant Noreen McCarthy respectfully requests that the Commission grant these Exceptions and issue a Final Order that rejects the ALJ's Initial Decision of October 15, 2020, and orders Met-Ed to grant Complainants' request to retain the electromechanical analog meter presently on her home without loss of service and to refrain from installing a smart meter or any wired or wireless transmitting device, including any such meter that includes a switched mode power supply that can cause conducted emissions or voltage transients in the house wiring, on their house or property.

Respectfully submitted,

Noreen McCarthy
18 Millstone Lane
Pottstown, PA 19465
Pro Se Complainant

Dated: November 4, 2020

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

NOREEN MCCARTHY	:	
	:	
V.	:	**DOCKET NO. C-2019-3006923**
	:	
METROPOLITAN EDISON COMPANY	:	

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of my "Exceptions to the Initial Decision of Administrative Law Judge Conrad A. Johnson issued on October 15, 2020" upon the individuals listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant).

Because the PUC is shut down at the moment, service by electronic mail, as follows:

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