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November 24, 2023

VIA ELECTRONIC FILING

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor North
P.O. Box 3265
Harrisburg, PA 17105-3265

Re: John and Janet Holder and June Maculesky v. PPL Electric Utilities Corporation
Docket Nos. F-2019-3008809 and F-2019-3008832

Dear Secretary Chiavetta:

Attached for filing are PPL Electric Utilities Corporation's Replies to Exceptions in the above-referenced proceeding. Copies will be provided as indicated on the Certificate of Service.

Respectfully submitted,

Devin Ryan

DR/dmc
Attachments

cc: Certificate of Service
Office of Special Assistants (*via Email ra-OSA@pa.gov*)

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served upon the following persons, in the manner indicated, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant).

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Date: November 24, 2023

Devin T. Ryan

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

John and Janet Holder and June Maculesky,	:	
	:	
Complainants,	:	
	:	
v.	:	Docket No. F-2019-3008809
	:	Docket No. F-2019-3008832
PPL Electric Utilities Corporation,	:	
	:	
Respondent.	:	

REPLIES OF PPL ELECTRIC UTILITIES CORPORATION TO THE EXCEPTIONS OF JOHN AND JANET HOLDER AND JUNE MACULESKY

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Date: November 24, 2023

Attorneys for PPL Electric Utilities Corporation

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I. INTRODUCTION

PPL Electric Utilities Corporation ("PPL Electric" or the "Company"), pursuant to 52 Pa. Code § 5.535, hereby respectfully submits these Replies to the Exceptions of John and Janet Holder and June Maculesky ("Complainants"). In the Initial Decision ("ID"), Administrative Law Judge Elizabeth H. Barnes (the "ALJ") dismissed the Complainants' Formal Complaints challenging the Company's planned installation of new advanced metering infrastructure ("AMI") meters at the Complainants' properties. The ALJ correctly held that the Complainants failed to prove by a preponderance of evidence that the installation of the AMI meters would violate 66 Pa. C.S. § 1501. The ALJ also properly determined that there is no provision to "opt-out" of a smart meter installation under Pennsylvania law.

On November 3, 2020, the Complainants filed Exceptions to the ID.

The case was stayed on November 4, 2023, before PPL Electric's Replies to Exceptions were originally due.

On November 14, 2023, the Pennsylvania Public Utility Commission ("Commission") entered an Order at Docket No. M-2009-2092655 lifting the stays in all active smart meter complaint proceedings, including the instant proceeding. The Commission also issued a notice in this proceeding, which informed the parties that Replies to Exceptions would be due within 10 days, *i.e.*, by November 24, 2023.

As explained herein, the Complainants' Exceptions are without merit and should be denied. Accordingly, the Company respectfully requests that the Commission deny the Complainants' Exceptions and adopt the ID without modification.[1]

[1] Some of the Complainants' Exceptions overlap, while others contain multiple arguments within the same Exception. Accordingly, PPL Electric responds to the Complainants' Exceptions by subject matter rather than individually by the number of the Exception.

II. REPLIES TO EXCEPTIONS

A. REPLIES TO EXCEPTIONS NOS. 1, 2, 3, AND 8 – THE ALJ CORRECTLY REJECTED THE COMPLAINANTS' ARGUMENT THAT THEY SHOULD BE ABLE TO "OPT OUT" OF THE AMI METERS' INSTALLATION

In their Exceptions, the Complainants argue that they should be able to "opt out" of having the AMI meters installed. (Complainants' Exceptions, pp. 7-26, 35-39.) According to the Complainants, Act 129 of 2008 does not mandate the installation of the AMI meters for all customers, and the ALJ misinterpreted the General Assembly's intent in finding that the statute requires AMI meters to be installed throughout the electric distribution companies' ("EDCs") service territories. (Complainants' Exceptions, pp. 7-26, 35-39.) As alleged support, the Complainants rely on the statements of a few Pennsylvania legislators about the statute as well as the Commonwealth Court's ruling in *Povacz v. Pa. PUC*, 241 A.3d 481 (Pa. Cmwlth. 2020). (Complainants' Exceptions, pp. 16-17, 21-22, 25-26.) The Complainants' arguments have no merit and should be rejected.

The ALJ properly held that PPL Electric must install AMI meters for all of its customers. (ID at 10-12.) Although the Complainants try to rely on the Commonwealth Court's ruling in *Povacz v. Pa. PUC*, their argument is fatally flawed because the Pennsylvania Supreme Court reversed the Commonwealth Court on this issue.[2] Specifically, in *Povacz*, the Supreme Court "conclude[d] that Act 129 does mandate that EDCs," like PPL Electric, "furnish smart meters to all electric customers within an electric distribution service area and does not provide electric customers the ability to opt out of having a smart meter installed."[3] Moreover, even "[i]f the customer establishes by a preponderance of the evidence based on the totality of the circumstances that smart meter service violates Section 1501, they are entitled to an accommodation to the extent

[2] *See Povacz v. Pa. PUC*, 280 A.3d 975 (Pa. 2022) ("*Povacz*").
[3] *Id.* at 983.

allowed by Act 129 and a utility's tariff."[4] Nothing in the Company's tariff permits an opt-out of the smart meter's installation. The only accommodation set forth in the Company's tariff is for the meter to be relocated to a different location and for the customer to pay for the estimated relocation costs.[5] As a result, PPL Electric must install smart meters for all of its customers, including the Complainants, under Act 129.

For these reasons, the Commission should deny the Complainants' Exceptions Nos. 1, 2, 3, and 8 because the ALJ correctly held that PPL Electric is required to install AMI meters and that the Complainants cannot opt out of the meters' installation.

B. REPLY TO EXCEPTION NOS. 4, 5, AND 6 – THE ALJ PROPERLY GRANTED PPL ELECTRIC'S MOTION IN LIMINE AND MOTION FOR SANCTIONS AND DID NOT DENY THE COMPLAINANTS DUE PROCESS

The Complainants aver in the Exceptions that the ALJ erred by granting PPL Electric's Motion in Limine and Motion for Sanctions and denied them due process by doing so. (Complainants' Exceptions, pp. 26-32.) Despite the Complainants arguing that the AMI meters would cause, contribute to, or exacerbate adverse health effects, the Complainants claim that their "medical records absolutely were NOT, any more than were their drivers' licenses, materially relevant to their Complaint." (Complainants' Exceptions, p. 26.) Therefore, even though they refused to provide their medical records in support of their health-related allegations, the Complainants assert that they should have been permitted to present evidence about how the smart meters would cause, contribute to, or exacerbate adverse health effects. (Complainants'

[4] *Id.* at 1014 (emphasis added).

[5] Tariff Rule 4(I)(2), Supp. No. 59 to Electric Pa. P.U.C. No. 201, Third Revised Page No. 8E (Effective Jan. 1, 2008) ("The relocation of Company facilities, when done at the request of others, is at the applicant's expense and payment of the Company's estimated cost of the relocation is required in advance of construction. When the request is from an affected property owner and the facilities are on the customer's property, the charges for relocation of distribution system facilities are limited to estimated contractor costs, estimated direct labor and estimated material costs, less an amount equal to any estimated maintenance expense avoided as a result of the relocation.").

Exceptions, pp. 26-28, 32.) The Complainants also assert that certain of their exhibits that were stricken are "public documents" and should have been admitted as such pursuant to Section 5.406(a)(1)-(2) of the Commission's regulations. (Complainants' Exceptions, pp. 28-31.) The Complainants' arguments lack merit.

First, the ALJ properly granted the Company's Motion in Limine and Motion for Sanctions because the information and documents sought by PPL Electric in discovery was, in fact, necessary to determine whether the installation of a PPL Electric AMI meter will cause or contribute to any adverse medical conditions or biological effects that the Complainants claim they may experience. (PPL Reply to Complainants' Exceptions to May 26, 2020 Order Granting Sanctions, p. 3.) Without medical records documenting the health and medical conditions of the Complainants before a PPL Electric AMI meter is installed there is no reasonable basis upon which the Commission could determine that any health or medical conditions the Complainants assert they may exhibit after a PPL Electric AMI meter is installed were caused by the AMI meter. (*Id.*) The pre-installation medical records were essential to determining whether any post-installation condition asserted by the Complainants could have actually been caused by the AMI meter; without such records there is no evidence of a "status quo" prior to the installation of the AMI meter with respect to the Complainants' health and medical conditions. (*Id.*) Thus, by failing to provide their medical records, the Complainants deprived PPL Electric of a reasonable opportunity to rebut the Complainants' health-related assertions.

Second, the ALJ's decision to grant PPL Electric's Motion in Limine and Motion for Sanctions did not deprive the Complainants of due process. It is well-established that the Commission, as an administrative body, is bound by the due process provisions of constitutional law and by the principles of common fairness." *Hess v. Pa. PUC*, 107 A.3d 246, 266 (Pa. Cmwlth.

2014) (citations omitted). "Among the requirements of due process are notice and an opportunity to be heard on the issues, to be apprised of the evidence submitted, to cross-examine witnesses, to inspect documents, and to offer evidence in explanation or rebuttal." *Id.* (citations omitted).

Here, the Complainants were provided notice about the Company's Motion in Limine and Motion for Sanctions, including the arguments and requests set forth therein, because: (1) the filing contained a Notice to Plead, informing the Complainants that they could file an answer to the Motion within 20 days; and (2) the Complainants were served with the filing. Also, the Complainants had an opportunity to be heard on PPL Electric's Motion in Limine and Motion for Sanctions and, in fact, exercised that opportunity. Specifically, on April 16, 2020, the Complainants filed an "Answer in Opposition" to the Motion for Sanctions on April 16, 2020, and a 398-page long "Motion in Opposition" to the Motion in Limine. Also, the Complainants had an opportunity to preserve their health-related allegations, *i.e.*, comply with PPL Electric's discovery request seeking basic information and documents that were highly relevant to their claim that the AMI meters would cause, contribute to, or exacerbate adverse health effects.

Ultimately, after reviewing the Company's Motion in Limine and Motion for Sanctions and the Complainants' pleadings in responses thereto, the ALJ granted those Motions, finding that: (1) "the pre-marked exhibits submitted by Complainants except for the following are inadmissible because they are hearsay and not subject to a hearsay exception: Exhibits 28, 45G, 47A-47-F, 48, 51Q-1 through 51Q-4, 51R, 51X-1 through 51X-2, 51Y-1 through 51Y-4, 51Z-1through 51Z-3; un-numbered exhibits contained on the Complainants' flash drive accompanying the Amended Complaint entitled PPL Meter Data Privacy Notice (October 2017) and PPL Privacy Notice (Feb. 21, 2018); and Letters 2, 4A-4D and 6"; and (2) "because Complainants have failed to produce any information and documents responsive to PPL to Complainant Set I, No. 4 during the course

of this proceeding, and indicated that they do not intend to do so, . . . Complainants have not and will not experience any medical conditions or issues from the installation of PPL Electric's AMI meter." *Holder v. PPL Elec. Utils. Corp.*, Docket Nos. F-2019-3008809 (Order Granting Motion in Limine and Motion for Sanctions dated May 26, 2020). Therefore, the Complainants were afforded due process.

Finally, the Commission should reject the Complainants' argument that certain of their stricken exhibits should have been admitted as public documents. As a preliminary matter, none of the Complainants' exhibits were submitted for admission into the record at the hearing. (ID at 4.) Moreover, the Complainants did not raise their "public documents" argument in response to PPL Electric's Motion in Limine and Motion for Sanctions. Consequently, the Complainants have waived any argument that their exhibits should have been admitted into the record as public documents.[6] Even assuming *arguendo* that the argument was not waived, the Complainants fail to establish that these documents meet the definition of "public documents" under Section 5.406(a)(1)-(2) of the Commission's regulations. 52 Pa. Code § 5.406(a)(1)-(2). Indeed, for many of these exhibits, the Complainants appear to confuse any documents that are "publicly available" with the narrow category of "public documents," which must be "[a] report or other document on file with the Commission" or "[a]n official report, decision, opinion, published scientific or economic statistical data or similar public document which is issued by a governmental department, agency, committee, commission or similar entity which is shown by the offeror to be reasonably available to the public." *Id.* Furthermore, PPL Electric's Motion in Limine and Motion for Sanctions pointed out several other evidentiary issues with the Complainants' Exhibits 1B, 4A,

[6] *See, e.g.*, *Application of Apollo Gas Co.*, 1994 Pa. PUC LEXIS 45, at *7 (Order entered Feb. 10, 1994) ("It is well settled that a party is deemed to have waived its right to assert any issue not addressed during the proceeding or in post hearing Initial Briefs.").

4B, 4E, 13, 14, 19E, 20C, 21C-5,[7] 22A, 23, 29C-4, 30E, 44L-1, and 6G. (PPL Motion in Limine/Motion for Sanctions, pp. 7, 11-13, 15, 18-19, 24-25, 40-41, 50, 57, 80.)

For these reasons, the ALJ properly granted the Company's Motion in Limine and Motion for Sanctions and did not deprive the Complainants of due process as a result. Thus, the Complainants' Exceptions Nos. 4, 5, and 6 should be denied.

C. REPLIES TO EXCEPTIONS NOS. 3, 6, AND 8 – THE ALJ CORRECTLY FOUND THAT THE COMPLAINANTS FAILED TO SUSTAIN THEIR BURDEN OF PROOF THAT INSTALLING THE NEW AMI METERS WOULD VIOLATE THE PUBLIC UTILITY CODE

The Complainants dispute the ALJ's finding that they failed to meet their burden of proof that installing the new AMI meters would violate Section 1501 of the Public Utility Code. (Complainants' Exceptions, pp. 25-27, 31-38.) According to the Complainants, "there is no reliable or scientific evidence upon which to conclude that chronic, long-term exposure to the radiofrequency radiation and RF fields produced as a result of the installation of such metering devices could not, cannot, would not and will not cause, exacerbate or contribute to biological or adverse health effects." (Complainants' Exceptions, p. 37.) The Complainants also raise data privacy concerns because the meters would be used as "relay points to transmit data." (Complainants' Exceptions, p. 37.)

As explained herein, the Complainants' Exceptions are without merit and should be denied.

1. There Is No Reliable Medical or Scientific Basis to Conclude that the New AMI Meters Will Cause, Contribute to, or Exacerbate Any Adverse Health Effects

As explained in Section II.B, *supra,* the ALJ correctly found that the Complainants have not and will not experience any medical conditions or issues from the installation of PPL Electric's

[7] PPL Electric's Motion in Limine and Motion for Sanctions contained a typographical error that referenced this exhibit as Exhibit 20C-5. Any reference to Exhibit 20C-5 in that filing was intended as a reference to Exhibit 21C-5.

AMI meter as a sanction. (*See* ID at 3.) Notwithstanding, PPL Electric presented credible and reliable expert testimony refuting the Complainants' bald assertions that the AMI meter could cause or contribute to adverse health effects. (PPL St. No. 1, pp. 5-17; PPL Exhibits CD-1 through CD-6; PPL St. No. 2, pp. 7-19; PPL Exhibits MI-1 through MI-4.)

First, Dr. Davis testified that the Federal Communications Commission ("FCC") has determined safe public exposure levels for radio frequency ("RF") fields from devices that transmit RF signals, such as the AMI meters. (PPL St. No. 1, p. 9.) The FCC safe public exposure limits are based on evaluations of the body of scientific research on RF fields and were adopted in consultation with other federal agencies, including the Food and Drug Administration ("FDA") and the Environmental Protection Agency ("EPA"). (PPL St. No. 1, p. 9.) The FCC continues to coordinate with the agencies and to consider whether new scientific research shows any adverse effects from RF fields. (PPL St. No. 1, pp. 9-10.) In fact, the FCC recently reviewed its current RF exposure limits and the scientific research related thereto in response to a Notice of Inquiry issued by the FCC. "After reviewing the extensive record submitted in response to that inquiry" by over 564 commenters, the FCC found "no appropriate basis for and thus decline[d] to propose amendments to [its] existing limits at this time." *In the Matter of Proposed Changes in the Comm'n's Rules Regarding Human Exposure to Radiofrequency Electromagnetic Fields*, 2019 FCC LEXIS 3622, at *2, 483 n.1 (F.C.C. Dec. 4, 2019).

Based on the engineering specifications for the Landis + Gyr AMI meter being deployed by the Company, Dr. Davis calculated that the levels of RF fields from the AMI meters are **98,000 times lower** than the RF exposure safety limits established by the FCC. (PPL St. No. 1, pp. 13-14; PPL Exhibit CD-2.) As a result, Dr. Davis found that "the RF field levels from the AMI meters being used by PPL Electric more than comply with the applicable FCC RF exposure limit." (PPL

St. No. 1, p. 13.) Moreover, the RF signals from the AMI meter are of very short duration and will occur for only a total of 84 seconds over a 24-hour period. (PPL St. No. 1, p. 7.)

Dr. Davis also testified that there are many sources of RF signals in the everyday environment and that the RF fields from the AMI meter are much lower than from other typical sources. (PPL St. No. 1, p. 14.) For example, RF fields from using cell phones can be over 260,000 times higher than the RF fields from the AMI meter, and RF exposures from microwave ovens can be over 820,000 times higher. (PPL St. No. 1, p. 15.) Even 30 feet away from a person using a cell phone, the RF fields are 3 times higher than from the AMI meter. (PPL St. No. 1, p. 14.)

Furthermore, the existing background levels of RF fields at the Complainants' residences are many times higher than the fields from the AMI meters. (PPL St. No. 1, p. 15.) Dr. Davis testified that there are 17 television broadcast towers within a 50-mile radius of the Holder residence and the Maculesky residence. (PPL St. No. 1, pp. 15-16.) Based on the locations of each tower and their RF power outputs, the RF fields at three meters from the AMI meter being used by PPL Electric are 51.2 times smaller than the background RF exposure at the Holder residence and the Maculesky residence. (PPL St. No. 1, pp. 15-16; PPL Exhibits CD-5 and CD-6.) Thus, considering the AMI meter's RF fields are substantially lower than the FCC standard and many everyday sources, there is no reliable scientific basis to conclude that the very low levels of RF fields from the AMI meters being deployed by the Company can or will cause any adverse thermal or non-thermal biological effects in people. (*See* PPL St. No. 1, pp. 1-17.)

Second, Dr. Israel – the only medical expert to present testimony in this case – evaluated the scientific research on RF fields and adverse health effects. (PPL St. No. 2, pp. 8-19.) He testified that he has been systematically examining this research over the past several decades and that many hundreds of studies have been published. (PPL St. No. 2, p. 6.) Dr. Israel stated that

three groups of controlled laboratory studies on animals "are particularly informative because they address fundamental biological functions that are very sensitive to any disruption: genetics, reproduction, and growth and development." (PPL St. No. 2, p. 8.) Dr. Israel described a number of the studies in these areas that he considered good examples of well-designed and well-conducted studies, which found no adverse effects on genetics, fertility, reproduction, growth, or development in the animals exposed to RF fields. (PPL St. No. 2, pp. 8-9.) Further, Dr. Israel provided examples of well-conducted animal studies on RF fields and cancer. (PPL St. No. 2, pp. 9-10.) These studies also did not find any increased incidence in cancer in the RF exposed animals compared to non-exposed animals. (PPL St. No. 2, p. 10.)

Based on the body of scientific research showing no consistent and reproducible effects from RF fields on cancer and other adverse health effects, the World Health Organization ("WHO") has concluded that "no adverse health effects have been established as being caused by mobile phone use." (PPL St. No. 2, p. 10.) Many other public health authorities, including agencies in Canada, the U.K., Sweden, Norway, the Netherlands, and New Zealand, among others, have recently reached similar conclusions. (PPL St. No. 2, pp. 10-11.) Further, several U.S. state public health authorities and public utility commissions have investigated claims about health effects from smart meters, all of which have found that RF fields from smart meters do not pose any public health risk. (PPL St. No. 2, p. 11.)

In addition, Dr. Israel reviewed the published scientific research on electromagnetic hypersensitivity ("EHS") from the perspective of a medical doctor. (PPL St. No. 2, pp. 12-15.) Dr. Israel testified that claimed symptoms related to EHS are more accurately described as "Idiopathic Environmental Intolerance" ("IEI"), in which "idiopathic" means "cause unknown," rather than electromagnetic hypersensitivity. (PPL St. No. 2, pp. 12-13) (emphasis added). This

is consistent with a recommendation from the WHO. (PPL St. No. 2, p. 12.) Dr. Israel evaluated the scientific research on IEI and found that "[r]eliable studies dating back to at least 2002 and also recent reviews of the studies by experts and reviews by expert panels of public health authorities have found IEI and the variety of symptoms attributed to it are not caused by exposure to RF fields." (PPL St. No. 2, p. 13.) For example, a systematic review of 46 studies involving 1,175 individuals who claimed IEI symptoms found that people claiming IEI symptoms from RF fields could not replicate the claimed effect under controlled laboratory conditions. (PPL St. No. 2, p. 13.) Another recent study found that people who claimed IEI symptoms from RF fields reported lower levels of well-being when they knew they were exposed to RF fields, but when they did not know if they were being exposed, their reports of symptoms were not associated with RF fields. (PPL St. No. 2, pp. 13-14.) That study concluded that "it is IEI-EMF individuals' belief that exposure to RF EMFs will cause harm, rather than actual exposure itself, that results in the presence of symptoms in IEI-EMF individuals." (PPL St. No. 2, p. 14.) Even more recent studies have shown "[t]his relationship between the belief of exposure and the reporting of symptoms" and "has been described as a 'nocebo effect.'" (PPL St. No. 2, p. 14.) This "nocebo effect" does provide "a reasonable explanation for the presence of symptoms in IEI-EMF and control participants." (PPL St. No. 2, p. 14.)

Moreover, the research on IEI has been evaluated by credible public health entities and expert groups, including the United Kingdom Health Protection Agency (2012), the Royal Society of Canada (2013), the New Zealand Ministry of Health (2015), and the European Commission's Scientific Committee on Emerging and Newly Identified Health Risks (2015). (PPL St. No. 2, p. 14.) Based on their reviews of the scientific research, these entities concluded there is no reliable

scientific evidence that exposure to RF fields causes claimed IEI symptoms. (PPL St. No. 2, pp. 14-15.)

Thus, even if the Complainants were permitted to present their purported evidence that the AMI meters would cause, contribute to, or exacerbate adverse health effects, the record demonstrates that there is no reliable medical or scientific evidence to reach that conclusion.

2. The Complainants' Data Privacy Concerns Lack Merit

The Commission should likewise reject the Complainants' argument that the AMI meters raise data privacy concerns. PPL Electric witness Asbury testified that "[c]ybersecurity was one of the cornerstones" of its Smart Meter Plan filing and that the Company takes several steps to protect the data it receives from the new AMI meters, including the use of technologies such as firewalls, encryption, digital signatures, authentication and access controls. (PPL St. No. 4, pp. 7-8.) Data collected within the meters is protected through proprietary-based applications and five levels of password protection. (PPL St. No 4, p. 8.) Prior to transmission, the data is highly encrypted utilizing advanced security appliances. (PPL St. No 4, p. 8.) Once the data reaches the Company's head systems, the data is further protected through means of firewalls and user role functions. (PPL St. No 4, p. 8.) These user role functions limit the availability of data and functions to only what the user's job requires, and even within these roles, the user is only granted a security key that allows access for that day. (PPL St. No 4, p. 8.) All of these cybersecurity policies and practices are consistent with the national standard for the industry. (PPL St. No 4, p. 8.)

Second, the AMI meter cannot tell if a customer is using a particular appliance. (PPL St. No. 3, p. 7.) As PPL Electric witness Durkin explained, "The Company only collects information about the total electric usage at the premises," and this "information does not differentiate between the use of any specific appliance or appliances." (PPL St. No. 3, p. 7.) Moreover, as a part of its

Smart Meter Plan proceeding, PPL Electric filed a detailed AMI Customer Privacy Policy, which sets forth the data PPL Electric will collect through the new smart meter, the steps the Company will take to protect the data, and the ways in which PPL Electric will use the data. (PPL St. No. 3, p. 6; PPL Exhibit KD-4.) Consistent with that policy, the Company will collect data on the total amount of electricity used at the premises as well as significant event information, such as outages, voltage, heat alarms, and meter tampering alerts. (PPL St. No. 3 p. 7; PPL Exhibit KD-4, Section 1.2.)

In sum, the Company takes appropriate steps to protect the information and data transmitted by the AMI meters. Therefore, the Complainants' data privacy concerns lack merit.

3. The Commission Should Reject the Complainants' Attempt to Introduce and Rely on Extra-Record Evidence in Their Exceptions

In their Exceptions, the Complainants improperly attempt to introduce and rely upon evidence that was not admitted at the hearing and, therefore, is not a part of the record. For example, the Complainants attempt to introduce and rely on all of their "exhibits" that were attached to their Amended Complaint and their Motion in Opposition to PPL Electric's Motion in Limine. (*See* Complainants' Exceptions, pp. 2, 26, 29-31.) These "exhibits" include Complainants' Exhibits 1B, 4A, 4B, 4E, 13, 14, 19E, 20C, 21C-5, 22A, 23, 29C-4, 30E, 44L-1, 6G, 5, 6, 10, 12, and 15. (*See* Complainants' Exceptions, pp. 29-31.) However, as noted in the ID, "[n]o exhibits" from the Complainants "were submitted for admission into the record." (ID at 4.) Thus, all of the Complainants' "exhibits" referenced in their Exceptions are extra-record evidence.

The Commission should completely disregard the Complainants' extra-record evidence and their arguments based on that extra-record evidence. It is well-established that parties cannot

introduce new evidence and arguments for the first time at the exceptions stage.[8] In addition, Section 5.431 of the Commission's regulations prescribes that "[t]he record will be closed at the conclusion of the hearing unless otherwise directed by the presiding officer or the Commission." 52 Pa. Code § 5.431(a). Particularly relevant here, "[a]fter the record is closed, additional matter may not be relied upon or accepted into the record unless allowed for good cause shown by the presiding officer or the Commission upon motion." *Id.* § 5.431(b). In this case, the record closed on August 20, 2020 (ID at 4), and the Complainants never demonstrate good cause for introducing this extra-record evidence, nor do they show changes in fact or law that would warrant the reopening of the record to admit such evidence. As a result, the Complainants' extra-record evidence cannot be admitted into the record.

Thus, although PPL Electric has decided not to burden the Commission with ruling on a Motion to Strike these portions of the Complainants' Exceptions, the Commission should not rely on the Complainants' extra-record evidence, as well as their arguments based on such extra-record evidence, to make any findings in this proceeding. *See, e.g.*, *Petition of Pa. Power Co. for Approval of Interim POLR Supply Plan*, 2006 Pa. PUC LEXIS 56, at *3 (Order entered Apr. 28, 2006) (observing that "ALJ Gesoff ignored Reliant's Reply Brief, due to the extra-record evidence contained within").

Based on the foregoing, the Commission should deny the Complainants' Exceptions Nos. 3, 6, and 8 because the ALJ correctly determined that the Complainants failed to sustain their burden of proof that installing the AMI meters would violate the Public Utility Code.

[8] *See, e.g.*, *Application of Apollo Gas Co.*, 1994 Pa. PUC LEXIS 45, at *8-9 (Order entered Feb. 10, 1994) (denying party's attempt to introduce extra-record evidence in its exceptions); *Arthurs v. Pa. Elec. Co.*, 2019 Pa. PUC LEXIS 197, at *14 (Order entered May 23, 2019) ("This Commission can consider only the evidence in the record before us, and we cannot consider extra record evidence or new arguments presented for the first time in the Exceptions stage of the proceeding.").

D. REPLY TO EXCEPTION NOS. 1, 2, AND 8 – PPL ELECTRIC HAS THE LEGAL RIGHT TO TERMINATE THE COMPLAINANTS' ELECTRIC SERVICE IF IT IS DENIED ACCESS TO ITS METER

In their Exceptions, the Complainants erroneously assert that PPL Electric should be prohibited from terminating their electric service if they do not allow the Company to install the new AMI meters. (Complainants' Exceptions, pp. 11-13, 15, 23-24, 35, 37, 39.)

PPL Electric has a legal right under its Commission-approved tariff, the Commission's regulations, and Chapter 14 of the Public Utility Code to terminate the Complainants' service if it is denied reasonable access to its meters. *See* 66 Pa. C.S. § 1406(a)(4); 52 Pa. Code § 56.81(3); PPL Exhibits KD-5 and KD-6. Indeed, the Commission has declared that "[i]t is well-settled that where a customer refuses a utility access to its meter, the utility may terminate service after required notice is provided." *Frompovich v. PECO Energy Co.*, 2018 Pa. PUC LEXIS 160, at *91-92 (Order entered May 3, 2018). Therefore, the termination of service to a customer for refusing a new AMI meter installation is consistent with Section 1501 of the Public Utility Code, the Commission's regulations, and the utility's tariff. *Id.* at *91-94. Thus, the Company can legally terminate the Complainants' electric service if they deny the Company access to replace their meters.

For these reasons, the Commission should reject the Complainants' argument that the Company should not be permitted to terminate their electric service and, accordingly, deny their Exceptions Nos. 1, 2, and 8.

E. REPLIES TO EXCEPTIONS NOS. 1, 2, 4, 5, 6, 7, AND 8 – THE COMPLAINANTS' CONSTITUTIONAL CLAIMS HAVE NO MERIT

The Complainants contend that the Company's installation of the AMI meter would violate the U.S. Constitution and the Pennsylvania Constitution and that the ALJ erred by finding that the Company was not a "state actor" that could violate their constitutional rights. (Complainants'

Exceptions, pp. 8, 10, 14-16, 23-25, 28, 33-39.) The Complainants' arguments should be soundly rejected.

Pennsylvania appellate courts have held that EDCs, like PPL Electric, are not state actors in relation to the installation of smart meters. Specifically, in *Povacz v. Pa. PUC*, the Commonwealth Court determined that "[c]onstitutional protections apply against state actors," and "PECO is not a state actor in relation to its installation of smart meters and provision of electricity to its customers."[9] This finding was not disturbed by the Supreme Court's *Povacz* decision.[10] Therefore, because PECO Energy Company and PPL Electric are similarly-situated EDCs, PPL Electric is not a state actor that can violate the Complainants' constitutional rights. Also, even if the Company were a state actor, the Seventh Circuit Court of Appeals found that the collection of smart meter data by a city-owned public utility was a reasonable warrantless search. *See Naperville Smart Meter Awareness v. City of Naperville*, 900 F.3d 521, 527-29 (7th Cir. 2018). Therefore, PPL Electric cannot violate the Complainants' constitutional rights by installing the new AMI meters.

Based on the foregoing, the Complainants' constitutional claims have no merit, and the Commission should deny the Complainants' Exceptions Nos. 1, 2, 4, 5, 6, 7, and 8.

[9] *Povacz v. Pa. PUC*, 241 A.3d 481, 486 n.9 (Pa. Cmwlth. 2020).
[10] *See Povacz v. Pa. PUC*, 280 A.3d 975 (Pa. 2022).

III. CONCLUSION

WHEREFORE, for all the foregoing reasons, as well as those more fully explained in the Initial Decision of Administrative Law Judge Elizabeth H. Barnes, the Company respectfully requests that the Pennsylvania Public Utility Commission deny the Exceptions filed by John and Janet Holder and adopt the Initial Decision without modification.

Respectfully submitted,

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