PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17120

Public Meeting held
January 18, 2024

Commissioners Present:

Stephen M. DeFrank, Chairman, Conflict Statement
Kimberly Barrow, Vice Chair
Ralph V. Yanora
Kathryn L. Zerfuss
John F. Coleman, Jr.

Judith D. Hendin C-2018-3003324

v.

Metropolitan Edison Company

OPINION AND ORDER

BY THE COMMISSION:

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition are the Exceptions filed by Judith Hendin (Ms. Hendin or the Complainant) on August 27, 2020, in response to the Initial Decision (Initial Decision or I.D.) of Deputy Chief Administrative Law Judge (DCALJ) Joel H. Cheskis, which was served on the Parties on August 7, 2020, in the above-captioned proceeding. Replies to Exceptions were filed by Metropolitan Edison Company (Met-Ed or the Company) on September 9, 2020. The Initial Decision denied and dismissed the Formal Complaint (Complaint) filed by the Complainant on June 29, 2018. For the reasons discussed

below, we shall deny the Complainant's Exceptions, adopt the Initial Decision of DCALJ Cheskis, and dismiss the Complaint, consistent with this Opinion and Order.

I. Background

This case involves a Complaint concerning the safety of the advanced metering infrastructure (AMI), or smart meter, that Met-Ed proposes to install at the Complainant's residence and use in the ordinary course of business to measure the Complainant's electricity consumption. The Complainant refuses to have a smart meter installed for health reasons. In her Complaint, Ms. Hendin requested a medical waiver to the requirement to have a smart meter installed. Complaint at 3.

Met-Ed, an electric distribution company (EDC) subject to the jurisdiction of the Commission, furnishes, owns and maintains the meters in its distribution system. *See*, Met-Ed's Tariff Electric Pa. P.U.C. No. 52, Supplement 136, Rule 8 at 37-38.

The Complainant is a Met-Ed customer who has been notified of Met-Ed's intent to install a smart meter at her residence.

Act 129 of 2008 (Act 129 or Act), *inter alia*, amended Chapter 28 of the Public Utility Code (Code) and required EDCs with more than 100,000 customers to file smart meter technology procurement and installation plans for Commission approval and to furnish smart meter technology within its service territory in accordance with the provisions of the Act. Section 2807(f) of the Code provides as follows:

> (f) *Smart Meter technology and time of use rates.*
>
> (1) Within nine months after the effective date of this paragraph, electric distribution companies shall file a Smart Meter technology procurement and installation plan with the commission for approval. The plan shall describe

> the Smart Meter technologies the electric distribution company proposes to install in accordance with paragraph (2).
>
> (2) Electric distribution companies shall furnish Smart Meter 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.

66 Pa. C.S. § 2807(f). The General Assembly found that it was "in the public interest" to implement the measures set forth in Act 129 and that the universal installation of smart meters would enhance the "health, safety and prosperity" of Pennsylvania's citizens through the "availability of adequate, reliable, affordable, efficient and environmentally sustainable electric service at the least cost." *See*, H.B. 2200, 192d Gen. Assemb., Reg. Sess. (Pa. 2008).

By Order entered in 2009, the Commission directed all EDCs subject to Act 129's smart meter requirements, including Met-Ed, to universally deploy smart meter technology within their respective service territories in the Commonwealth in accordance with a depreciation schedule not to exceed fifteen years and in accordance with other guidelines established therein. *See, Smart Meter Procurement and Installation*, Docket No. M-2009-2092655 (Implementation Order entered June 24, 2009) (*Smart Meter Installation Order*). Met-Ed sought and obtained the Commission's approval to complete the installation of AMI meters for substantially all customers within its service territory by mid-2019. *See, Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company, and West Penn Power*

Company for Approval of their Smart Meter Deployment Plan, Docket No. M-2013-2341990 (Opinion and Order entered March 6, 2014) (*2014 Smart Meter Order*).

II. History of the Proceeding

On June 29, 2018, Ms. Hendin filed a Complaint with the Commission against Met-Ed. On the Complaint form, Ms. Hendin indicated that she does not want a smart meter installed. She provided that when a utility[1] other than Met-Ed installed a smart meter, her health was negatively affected. Ms. Hendin also provided that after the other utility's smart meter was removed, her health improved. Complaint at 2.

On July 31, 2018, Met-Ed filed an Answer and New Matter to the Complaint (Answer). In its Answer, Met-Ed denied all material allegations of fact in the Complaint. Met-Ed also asserted that the Company was installing the smart meter in accordance with Act 129 and that the Company had the right to terminate service when a customer refuses to allow the Company access to its meters. 66 Pa. C.S. § 2806 *et seq*. Answer at 1-4. In the New Matter, Met-Ed averred there is no legal basis upon which to grant the relief requested in the Complaint. *Id.* at 6. Therefore, Met-Ed requested that the Commission dismiss the Complaint with prejudice. *Id.* at 6.

Also, on July 31, 2018, Met-Ed filed preliminary objections in response to the Complaint. Met-Ed averred that the request for relief for an exemption from the installation of a smart meter is not legally recoverable in the cause of action and that Ms. Hendin has failed to allege that Met-Ed violated any Commission statute, Regulation, Order or tariff provision with regard to the installation of the smart meter. By interim

[1] Ms. Hendin avers that UGI installed a smart meter at her residence in 2012 that was later removed. Hendin M.B. at 4-5.

order dated October 18, 2018, Met-Ed's preliminary objections were denied by Administrative Law Judge (ALJ) Jeffrey Watson.

The hearing was held as scheduled on December 19, 2019 and December 20, 2019. An additional day of hearings was held on January 24, 2020 to complete the presentation of Met-Ed's third witness. Ms. Hendin was represented by counsel and presented two witnesses who sponsored multiple exhibits that were admitted into the record. Met-Ed appeared represented by counsel with multiple exhibits and three witnesses. Seven Complainant Exhibits and two Met-Ed exhibits were admitted into the record. A transcript totaling 289 pages was generated from the three days of hearings.

On January 21, 2020, counsel for Ms. Hendin filed a motion for an extension of time and, in addition or alternative, a motion for leave to file surrebuttal testimony. On February 10, 2020, Met-Ed filed an answer to Ms. Hendin's motion. Ms. Hendin's request for an extension of time and for leave to file surrebuttal testimony was denied via order dated February 19, 2020.

On February 14, 2020, counsel for Ms. Hendin submitted a motion to admit late-filed exhibits. On March 9, 2020, Met-Ed filed an objection to the admission of late-filed exhibits.

On March 16, 2020, Met-Ed filed a motion for the admission of Met-Ed Statement No. 3-R, the rebuttal testimony and exhibits of Dr. Mark A. Israel. Dr. Israel was Met-Ed's third witness whose presentation was concluded on January 24, 2020 and whose testimony and exhibits were not admitted at the time of the hearing. No opposition to the motion for admission of Dr. Israel's rebuttal testimony and exhibits was filed.

On April 6, 2020, Met-Ed filed a motion to strike those portions of Ms. Hendin's briefs that relied on the exhibits not yet admitted into the record. On April 27, 2020, Ms. Hendin filed an answer in opposition to Met-Ed's motion to strike. Both Met-Ed's motion to strike and Ms. Hendin's motion for admission of late-filed exhibits were granted in part and denied in part via the same order dated June 18, 2020.

The record in this case closed on June 18, 2020.

On August 7, 2020, the Commission served DCALJ Cheskis' Initial Decision in *Judith D. Hendin v. Metropolitan Edison Company*, Docket No. C-2018-3003324.

As noted above, on August 27, 2020, the Complainant filed Exceptions to the Initial Decision. On September 9, 2020, Met-Ed filed Replies to Exceptions.

On November 4, 2020, the Commission entered an Order and Notice, at Docket No. M-2009-2092655, pursuant to 66 Pa. C.S. § 501, instituting a stay of certain formal complaint proceedings then pending before the Commission involving challenges to EDC deployment of smart meter technology as being in violation of Section 1501 of the Code (*November 4, 2020 Stay Order*). The *November 4, 2020 Stay Order* also directed that the stay would apply to any new formal complaints filed with the Commission claiming that EDC deployment of smart meter technology was a violation of Section 1501, and that the stay would remain in place until it was lifted by further Commission action. By Order entered November 14, 2023, at Docket No. M-2009-2092655, the Commission lifted the stay. Notice was provided on November 14, 2023, informing the Complainant of the lifting of the stay and their procedural rights and obligations under the Commission's regulations.

III. Discussion

A. Legal Standards

1. General Burden of Proof for Complaint Proceeding

As the party seeking affirmative relief from the Commission, the complainant in a formal complaint proceeding has the burden of proof. 66 Pa. C.S. § 332(a). The evidence necessary to meet that burden must be substantial. 2 Pa. C.S. § 704. "Substantial evidence" is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion. *Consolidated Edison Company of New York v. National Labor Relations Board*, 305 U.S. 197, 229, 59 S.Ct. 206, 217. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk & Western Ry. Co. v. Pa. PUC*, 413 A.2d 1037 (Pa. 1980).

To establish a sufficient case and satisfy the burden of proof, the complainant must show that the respondent utility is responsible or accountable for the problem described in the Complaint. *Patterson v. The Bell Telephone Company of Pennsylvania*, 72 Pa. P.U.C. 196 (1990). The offense must be a violation of the Code, a Commission Regulation or Order or a violation of a Commission-approved tariff. 66 Pa. C.S. § 701. Such a showing must be by a "preponderance of the evidence." *Samuel J. Lansberry, Inc. v. Pa. PUC*, 578 A.2d 600 (Pa. Cmwlth. 1990), *alloc. denied*, 529 Pa. 654, 602 A.2d 863 (1992). That is, the Complainant's evidence must be more convincing, by even the smallest amount, than that presented by the respondent. *Se-Ling Hosiery, Inc. v. Margulies*, 364 Pa. 45, 70 A.2d 854 (1950).

The burden of proof is comprised of two distinct burdens: (1) the burden of production; and (2) the burden of persuasion. *Hurley v. Hurley*, 2000 Pa. Super. 178, 754 A.2d 1283 (2000). The burden of production, also called the burden of going

forward with the evidence, determines which party must come forward with evidence to support a particular claim or defense. *Scott and Linda Moore v. National Fuel Gas Distribution*, Docket No. C-2014-2458555 (Initial Decision issued May 11, 2015) (*Moore*). The burden of production goes to the legal sufficiency of a party's claim or affirmative defense. *See, Id*. It may shift between the parties during a hearing. A complainant may establish a *prima facie* case with circumstantial evidence. *See, Milkie v. Pa. PUC*, 768 A.2d 1217, 1220 (Pa. Cmwlth. 2001) (*Milkie*). If a complainant introduces sufficient evidence to establish legal sufficiency of the claim, also called a *prima facie* case, the burden of production shifts to the utility to rebut the complainant's evidence. *See, Moore*.

If the utility introduces evidence sufficient to balance the evidence introduced by the complainant, that is, evidence of co-equal value or weight, the complainant's burden of proof has not been satisfied and the burden of going forward with the evidence shifts back to the complainant, who must provide some additional evidence favorable to the complainant's claim. *See, Milkie*, 768 A.2d at 1220; *see also, Burleson v. Pa. PUC*, 443 A.2d 1373 (Pa. Cmwlth. 1982), *aff'd*, 501 Pa. 433, 461 A.2d 1234 (1983).

Having produced sufficient evidence to establish legal sufficiency of a claim, the party with the burden of proof must also carry the burden of persuasion to be entitled to a favorable ruling. *See, Moore*. While the burden of production may shift back and forth during a proceeding, the burden of persuasion never shifts; it always remains on a complainant as the party seeking affirmative relief from the Commission. *See, Milkie*, 768 A.2d at 1220; *see also, Riedel v. County of Allegheny*, 633 A.2d 1325, 1328, n.11 (Pa. Cmwlth. 1993); *see also*, *Burleson*, 443 A.2d at 1375. It is entirely possible for a party to carry the burden of production but not be entitled to a favorable ruling because the party did not carry the burden of persuasion. *See, Moore.* In

determining whether a complainant has met the burden of persuasion, the fact-finder[2] may engage in determinations of credibility, may accept or reject testimony of any witness in whole or in part, and may accept or reject inferences from the evidence. *See, Moore*, citing *Suber v. Pennsylvania Com'n on Crime and Delinquency*, 885 A. 2d 678, 682 (Pa. Cmwlth. 2005) (*Suber*).

2. Burden of Proof Applied to Section 1501[3] Complaint Challenging Smart Meter Installation

In *Povacz, et al. v. Pa. PUC*, 280 A.3d 975 (Pa. 2022) (*Povacz II*), which dealt with consolidated appeals involving the deployment of smart meters by PECO Energy Company, the Supreme Court of Pennsylvania (Supreme Court) reversed the Commonwealth Court's October 8, 2020 decision in *Povacz v. Pa. PUC* (241 A.3d 481) (*Povacz I*), and thereby affirmed the Commission's March 28, 2019 and May 9, 2019 Orders in *Maria Povacz v. PECO Energy Company,* C-2015-2475023 (*Povacz 2019 Order*); *Laura Sunstein Murphy v. PECO Energy Company*, C-2015-2475726 (*Laura Sunstein Murphy*); and *Cynthia Randall and Paul Albrecht v. PECO Energy Company*, C-2016-2537666 (*Cynthia Randall*). By *Povacz II,* the Supreme Court affirmatively established that there is no "opt-out" provision for installation of a smart meter pursuant

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[2] In formal complaint proceedings, the Commission, not the ALJ, is the ultimate fact-finder; it weighs the evidence and resolves conflicts in testimony. When reviewing the initial decision of an ALJ, the Commission has all the powers that it would have had in making the initial decision except as to any limits that it may impose by notice or by rule. *Milkie*, 768 A.2d at 1220, n. 7 (citing, *inter alia*, 66 Pa. C.S. § 335(a)).

[3] The applicable Commission Regulation governing an EDC's provision of safe service is codified at 52 Pa. Code § 57.28(a)(1). Pursuant to Section 57.28(a)(1), an EDC must use reasonable efforts to properly warn and protect the public from danger and to exercise reasonable care to reduce the hazards to which customers may be subjected to by reason of the EDC's provision of electric utility service and its associated equipment and facilities. *See,* 52 Pa. Code § 57.28(a)(1). *See, Final Rulemaking Order, Rulemaking Re: Electric Safety Regulations, 52 Pa. Code Chapter 57*, Docket No. L-2015-2500632 (Order entered April 20, 2017) (*Electric Safety Final Rulemaking Order*).

to Act 129 and that to raise a viable challenge to smart meter installation, a customer must satisfy the preponderance of evidence standard for a violation of Section 1501 of the Code. *Povacz II* at 280 A. 3d at 983-984.

Pursuant to Section 1501 of the Code, all public utilities have a duty to maintain "adequate, efficient, safe, and reasonable service[4] and facilities" and to make repairs, changes, and improvements that are necessary or proper for the accommodation, convenience, and safety of its patrons, employees, and the public. *See* 66 Pa. C.S. § 1501. Section 1501 of the Code, provides, in pertinent part, as follows:

> Every public utility shall furnish and maintain adequate, efficient, safe, and reasonable service and facilities, and shall make all such repairs, changes, alterations, substitutions, extensions, and improvements in or to such service and facilities as shall be necessary or proper for the accommodation, convenience, and safety of its patrons, employees, and the public . . . Such service and facilities shall be in conformity with the regulations and orders of the commission.

66 Pa. C.S. § 1501

As previously noted, in *Povacz II*, the Pennsylvania Supreme Court not only affirmed the Commission's determination that there is no "opt-out" provision for smart meter installation in either Act 129, the Code, Commission Regulations, or Orders,

[4] The term "service" is defined broadly under Section 102 of the Code to include any and all acts done or rendered or performed and any and all things furnished or supplied and any and all facilities, used, furnished or supplied by public utilities. *See*, 66 Pa. C.S. § 102. The statutory definition of "service" is also to be broadly construed by the Commission and the courts. *Country Place Waste Treatment Co., Inc. v. Pa. PUC*, 654 A.2d 72 (Pa. Cmwlth. 1995).

but also confirmed that challenges to smart meter installation, other than an "opt-out," may arise under Section 1501[5] of the Code. Therein, the Supreme Court stated:

> [W]e conclude that Act 129 does mandate that EDCs 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. An electric customer with concerns about smart meters may seek an accommodation from the PUC or EDC, but to obtain one the customer must establish by a preponderance of the evidence that installation of a smart meter violates Section 1501 [of the Code].

Povacz II, at 983-984; *See, Povacz 2013 Order*; *see also, Frompovich v. PECO Energy Co*., Docket No. C-2015-2474602 (Opinion and Order entered May 3, 2018) (*Frompovich*).

In applying Section 1501 to a complaint challenging the installation of smart meter technology, the Supreme Court affirmed the Commission's Opinion and Order in the *Povacz 2019 Order*, stating:

> A customer seeking affirmative relief from the [Commission] must prove by a preponderance of the evidence that the named utility was responsible or accountable for the problem described in the complaint and that the offense was a violation of the Code, a [Commission] regulation or [o]rder, or a violation of a [Commission]-approved tariff. [*See*] 66 Pa.C.S. §§ 332(a), 701; *Samuel J. Lansberry, Inc. v. Pa. Pub.*

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[5] The Commission has also determined that if a customer's formal complaint raises a claim under Section 1501, related to the safety of a utility's installation and use of a smart meter at the customer's residence, such a claim is legally sufficient to proceed to an evidentiary hearing before an ALJ. To satisfy the burden of proof a complainant may be required to present medical documentation and/or expert testimony demonstrating that the installation of a smart meter constitutes unsafe or unreasonable service. *Povacz II* at 1000, citing *Susan Kreider v. PECO Energy Company*, P-2015-2495064, 2016 WL 406549, at *14 (Pa. P.U.C. January 28, 2016) (*Kreider*).

> *Util. Comm'n*, . . . 134 Pa. Commw. 218, 578 A.2d 600 ([Pa. Cmwlth.] 1990)[.] . . .
>
> Although Act 129 does not provide an electric customer [] with the right to opt-out of the installation of a smart meter at their residence, they [sic] may file a complaint raising a claim that installation of a smart meter violates Section 1501 of the Code.
> . . . .
> Pursuant to [S]ection [1501 of the Code], an EDC (as a public utility) must provide service that is, *inter alia*, both safe and reasonable. **To carry their burden of proof on a Section 1501 [of the Code] claim, a smart meter challenger may be required to present medical documentation and/or expert testimony demonstrating that the furnishing of a smart meter constitutes unsafe or unreasonable service** in violation of Section 1501 [of the Code] under the circumstances presented. *Susan Kreider v. PECO Energy Co*., P-2015-2495064, 2016 WL 406549, at *14 (Pa. P.U.C. Jan. 28, 2016).

Povacz II, 280 A. 3d at 999-1000 (emphasis added; footnote omitted).[6]

In applying the standard of proof to scientific or expert medical evidence in support of alleged adverse health effects, the Commission ruled in the *Povacz 2019 Order*, and was subsequently affirmed by the Supreme Court in *Povacz II*, that in order to prevail in a Section 1501 claim against an EDC alleging that an AMI meter caused or will cause adverse health effects or harm to human health, the Complainant must demonstrate

[6] With respect to the evidence necessary to support a challenge to smart meter installation under Section 1501, the Commonwealth Court has held that at the hearing, a complainant may prove his/her claim through the complainant's own personal testimony and/or "the testimony of others as well as other evidence that goes to that issue." *Romeo v. Pa. PUC*, 154 A.3d 422, 430 (Pa. Cmwlth. 2017) (*Romeo*).

by a preponderance of the evidence a "conclusive causal connection" between the harm to human health and the radio frequency fields (RFs)[7] from the AMI meter[8].

3. Other Relevant Legal Standards

In addition to establishing that a complaint challenging the installation of a smart meter may arise under Section 1501, the Supreme Court's decision in *Povacz II* acknowledged the Commonwealth Court's rejection of a constitutional claim for exemption from smart meter installation predicated on a violation of "bodily integrity." The Supreme Court noted the Commonwealth Court's denial of a claim under the Fourteenth Amendment, stating:

> The Commonwealth Court rejected Customers' constitutional arguments, persuaded by the reasoning of *Naperville Smart Meter Awareness v. City of Naperville*, 69 F. Supp. 3d 830 (N.D. III 2014) ("*Naperville II*"). Therein, a federal district court rejected the customers' "*Fourteenth Amendment* bodily integrity argument because their complaint failed to identify an arbitrary deprivation of a recognized liberty or property interest" and to aver that the city's decision to employ smart meters was arbitrary. *Id*. at 839 (internal quotations marks omitted).

Povacz II at 985, fn. 8.

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[7] RF is an abbreviation for radio frequency and is also used here to denote RF fields or RF signals.

[8] *See, Povacz 2019 Order* slip op., at 28-29 (citing *Letter of Notification of Philadelphia Electric Company Relative to the Reconstructing and Rebuilding of the Existing 138 kV Line to Operate as the Woodbourne-Heaton 230 kV Line in Montgomery and Bucks Counties*, 1993 WL 855896 (Pa. P.U.C. 1993), Docket No. A-110550F0055 (Final Order entered November 12, 1993) (*Woodbourne-Heaton Final Order*), slip op. at 11).

Further, the Supreme Court noted that a customer must be connected to the distribution system to receive electric service confirming that EDCs operate in a universal basis. *Povacz II* at 993. As such, the Court concluded that by obtaining service from their incumbent EDC, customers contractually accept the EDC's Commission-approved Tariff, including the installation of smart meter technology. *Id* at 994. Therefore, the Supreme Court found that "the authority to select and install a certain type of electric meter rests solely with the EDCs, […] not the customer." *Id*.

Finally, we note that any argument or Exception that we do not specifically delineate shall be deemed to have been duly considered and denied without further discussion. The Commission is not required to consider expressly or at length each contention or argument raised by the parties. *Consolidated Rail Corp. v. Pa. PUC*, 625 A.2d 741 (Pa. Cmwlth. 1993); *see also, generally, University of Pennsylvania v. Pa. PUC*, 485 A.2d 1217 (Pa. Cmwlth. 1984).

B. ALJ's Initial Decision

In the Initial Decision, DCALJ Cheskis made seventy Findings of Fact (FOF) and reached twenty-six Conclusions of Law (COL). *See* I.D. at 3-11, 47-51. The Findings of Fact and Conclusions of Law are incorporated herein by reference and are adopted without comment unless they are either expressly or by necessary implication rejected or modified by this Opinion and Order.

In his disposition, DCALJ Cheskis addressed the following issues: (1) burden of proof; (2) Section 1501; (3) effects of electromagnetic frequencies; (4) request to opt out; (5) Met-Ed's witnesses; (6) proposed location of the smart meter; (7) due process, (8) Dr. William G. Kracht's Treatment recommendations; and (9) federal law. I.D. at 24-46.

1. Burden of Proof

The DCALJ first addressed the Complainant's contention that the threshold of proof in this case should be the "thin skull" or "eggshell plaintiff" doctrine. The DCALJ noted that the Complainant used the Precautionary Principle to argue that Met-Ed should carry the burden of proof in this case to prove unequivocally that smart meters are safe for long-term human health. I.D. at 24 (citing Hendin M.B. at 12-13, 16).

The DCALJ rejected the Complainant's argument because the Complainant has not identified any Commission precedent that demonstrates that the Precautionary Principle or the thin skull doctrine should be adopted as part of the burden of proof in this proceeding. I.D. at 24.

The DCALJ provided that the Commission rejected applying a "precautionary principle" in other smart meter cases. I.D. at 24-25 (citing *Schmukler v. PPL Electric Corp.*, Docket No. C-2017-2621285 (Opinion and Order entered July 23, 2019) and *Myers v. PPL Electric Utilities Corp.*, Docket No. C-2017-2620710 (Opinion and Order entered August 29, 2019)).

The DCALJ explained that Ms. Hendin must show, by a preponderance of the evidence, or evidence more convincing, by even the smallest degree, than evidence presented by the other party, that Met-Ed is responsible or accountable for the problem described in the complaint in order to prevail. I.D. at 26 (citing *Patterson v. Bell Tel. Co. of Pa.*, 72 Pa. PUC 196 (1990); *Se-Ling Hosiery v. Margulies*, 364 Pa. 54, 70 A.2d 854 (1950)). The DCALJ explained further that the offense must be a violation of the Public Utility Code, the Commission's regulations or an outstanding order of the Commission. I.D. at 26 (citing 66 Pa. C.S. § 701). The DCALJ reasoned that all decisions of the Commission must be supported on appeal by substantial evidence. The DCALJ concluded that the Complainant failed to demonstrate that anything other than the well-

established standard used by the Commission to establish the burden of proof should be used in this case. I.D. at 26-27.

2. Section 1501

The DCALJ addressed the Complainant's argument that smart meters are an unsafe utility service that violate Section 1501 of the Public Utility Code. I.D. at 27 (citing Hendin M.B. at 19-21). The DCALJ noted that Ms. Hendin argued that nothing in Act 129 compels the Commission to violate Section 1501 to accomplish the goals of Act 129 and Pennsylvania is the only state that does not allow consumers to opt out of having a smart meter. I.D. at 27 (citing Hendin M.B. at 20). The DCALJ stated that if the Complainant could demonstrate that Section 1501 or any other provision of the Public Utility Code is somehow violated, that violation could be remedied by the Commission while still meeting the goals and policies of Act 129. According to the DCALJ, the Complainant failed to satisfy her burden of showing that Met-Ed's actions in any way violated the Public Utility Code, a Commission Order or Regulation or a Commission-approved tariff of the Company. The DCALJ concluded that Ms. Hendin's complaint must be dismissed. I.D. at 27.

With regard to other states, the DCALJ found that it is irrelevant to Ms. Hendin's complaint whether other states allow consumers to opt out of receiving a smart meter. The DCALJ concluded that Ms. Hendin's argument does not outweigh the legal argument presented by Met-Ed that it is obligated to install smart meters for every customer throughout its territory. *Id.*

3. Effects of Electromagnetic Frequencies

The DCALJ noted that the Complainant stated that she is sensitive to electromagnetic frequencies and that her treating physician has diagnosed her as having

electromagnetic sensitivity. The DCALJ further noted that the Complainant argued that smart meters emit short bursts of high frequency electromagnetic radiation which studies show cause "non-thermal" harm. I.D. at 29 (citing Hendin M.B. at 21-22). The ALJ provided that Ms. Hendin argued that Met-Ed's lack of evidence and international consensus make it unreasonable for Met-Ed to force Ms. Hendin to accept a smart meter. I.D. at 29-30 (citing Hendin M.B. at 31-32).

The DCALJ addressed the Complainant's assertion that the Bioinitiative Report shows that electromagnetic frequencies cause biological harm. I.D. at 29 (citing Hendin M.B. at 24). The DCALJ opined that it is beyond the scope of this proceeding to determine if the Bioinitiative Report is correct. According to the DCALJ, what is within the scope of the proceeding is to determine if there is substantial evidence that Met-Ed's deployment of a smart meter to Ms. Hendin's home violates the Public Utility Code, a Commission Order or Regulation or a Commission-approved tariff. The DCALJ concluded the Complainant has failed to satisfy her burden of demonstrating that the smart meters deployed by Met-Ed emit electromagnetic frequencies that cause her adverse health effects sufficient to find that Met-Ed has violated the Code, a Commission Order or Regulation or a Commission-approved tariff of the Company. I.D. at 30, 33.

4. Response to Request to Opt Out

The DCALJ rejected the Complainant's arguments that Met-Ed's response to her request to refuse installation of a smart meter is wrong. The DCALJ reasoned that Ms. Hendin did not present substantial record evidence to support the argument that the Commission's interpretation of Act 129 and Met-Ed's actions in response to that interpretation, violate the Public Utility Code, a Commission Order or Regulation or a Commission-approved tariff of the company. I.D. at 37.

5. Met-Ed's Witnesses

The DCALJ rejected the Complainant's arguments that the Met-Ed witnesses Dr. Christopher C. Davis and Dr. Israel are not credible. The DCALJ found that the testimony and evidence presented by Met-Ed through Dr. Davis and Dr. Israel outweighed the evidence and testimony presented by the Complainant. I.D. at 37.

6. Proposed Location of the Smart Meter

The DCALJ stated that while the Complainant raised concerns about the location of the smart meter, Met-Ed's tariff requires that she pay the cost of the relocation. I.D. at 41.

7. Due Process

The DCALJ provided that the Complainant argued that she cannot be forced to accept a smart meter at her residence in violation of her due process rights to protect her bodily integrity. I.D. at 42 (citing Hendin M.B. at 64-65). The DCALJ concluded that Ms. Hendin's constitutional arguments do not apply because Met-Ed is not a state actor, which is required within the constitutional analysis. I.D. at 43 (citing *Hughes v. PPL Electric Utilities Corp.*, Docket No. C-2019-3007631 (Opinion and Order entered July 16, 2020); *Naperville Smart Meter Awareness v. City of Naperville*, 900 F.3d 521, 527-529 (7th Circ. 2018)). The DCALJ explained that the Complainant failed to satisfy her burden to demonstrate that Med-Ed's installation of a smart meter would violate the Public Utility Code, a Commission Order or Regulation or a Commission-approved tariff of the company and therefore, there could be no finding that the installation of a smart meter would invade Ms. Hendin's bodily integrity. I.D. at 43.

8. Dr. Kracht's Treatment Recommendation

The DCALJ rejected the Complainant's argument that the Commission's interpretation of Act 129 and application of the standard of proof supplant the treatment recommendations from Ms. Hendin's physician, Dr. Kracht. The ALJ explained that the Commission cannot determine whether smart meters cause health problems. The DCALJ noted that the Complainant could consider raising her claims in a jurisdiction with the necessary expertise. I.D. at 44. Similarly, the DCALJ found that there is not sufficient evidence to determine that the smart meters are causing Ms. Hendin adverse health effects to prevent termination of service in accordance with 52. Pa. Code § 56.113. I.D. at 43-44.

9. Federal Law

Regarding the Complainant's argument that the Commission has violated federal law, the DCALJ provided that the Commission lacks jurisdiction to hear claims brought under the Rehabilitation Act of 1973 and the Fair Housing Act Amendments. I.D. at 45 (citing *White v. PPL Electric Utilities Corp.*, Docket No. C-2018-3003468 (Opinion and Order entered May 21, 2020) at 19). The DCALJ concluded that Ms. Hendin has failed to satisfy her burden of proof to demonstrate that Met-Ed, or the Commission has violated any federal laws. I.D. at 45-46.

Based on all of the above, the DCALJ denied the Complaint because Ms. Hendin has failed to satisfy her burden of proof to demonstrate that Met-Ed's actions with regard to installing a smart meter violate the Public Utility Code, a Commission Order or Regulation or a commission-approve order of the company. I.D. at 46.

C. Exceptions, Replies, and Disposition

The Complainant's Exceptions[9] generally pertain to the following: (1) an opt-out request; (2) burden of proof; (3) Pennsylvania and federal Constitution claims; (4) 52 Pa. Code Sections 56.113 and 57.28; (5) due process; (6) jurisdiction; and (7) preferential treatment.

As noted *supra*, Ms. Hendin filed a motion to admit late-filed exhibits on February 14, 2020. On June 18, 2020, the DCALJ issued an order (*June 2020 Order*) which granted in part and denied in part the admission of late-filed exhibits. The DCALJ ordered that all references to Hendin Exhibits X8, X23-X31 and X33-X41 in the Main and Reply Briefs filed by Ms. Hendin shall be stricken from the record. The Complainant used information from these same exhibits that were denied admission to the record in her Exceptions. Ms. Hendin also used additional extra-record materials. It is well-established that parties cannot introduce new evidence following the close of the record. *Application of Apollo Gas Co.*, 1994 Pa. PUC Lexis, at *8-14 (Order entered February 10, 1994) (*Apollo Gas*). The information Ms. Hendin used in her Exceptions from the late-filed Exhibits X8, X23-X31 and X33-41 will not be considered. Therefore, we shall reject any extra-record evidence in the Exceptions from these Exhibits. Any extra-record information Ms. Hendin used in her Exceptions will also not be considered. *Apollo Gas*.

[9] We acknowledge that the format of the Complainant's Exceptions does not strictly comply with Section 5.533(b) of our Regulations, 52 Pa. Code § 5.533(b), which requires that exceptions be numbered, identify the finding of fact and conclusions of law to which exception is taken, and cite to the relevant pages of the Initial Decision. Nevertheless, particularly because the Complainant is appearing *pro se*, we will accept the Exceptions as filed pursuant to Section 1.2(a) of our Regulations, 52 Pa. Code § 1.2(a), in order to secure a just, speedy, and inexpensive determination.

1. Complainant's Concerns Regarding the Commission's No Opt-Out Interpretation of 66 Pa. C.S. § 2807(f)

a. Exception Nos. 17, 18 and 25

In her Exception Nos. 17, 18, and 25, the Complainant contends that the ALJ dismissed Ms. Hendin's arguments regarding Act 129's legislative history and development, that the ALJ ignored opt-out options from other states, and that Ms. Hendin specifically requests an "electromechanical analog meter" be installed at her residence. Exc. at 12-39.

b. Replies

Met-Ed provides that the Commission correctly rejected the Complainant's arguments that the installation of a smart meter on her residence is not mandated or that the Complainant can opt-out of the installation. R. Exc. at 3-5. Met-Ed provides that the ALJ correctly refused to rely on the precedent of other jurisdictions to allow an opt-out. R. Exc. at 6 (citing Met-Ed M.B. at 14; Met-Ed R.B. at 5). Met-Ed submits that the Complainant is not entitled to an opt-out and is not entitled to have her original meter installed because Met-Ed is required to install a smart meter. R. Exc. at 6.

c. Disposition

In Exception Nos. 17 and 18, the Complainant asserts that the ALJ erred by dismissing Ms. Hendin's arguments regarding the language and history of Act 129 and refusing to approve the Complainant's request to "opt-out" of installation of a smart meter. Exc. at 20-25. Because the Pennsylvania Supreme Court's holding in *Povacz II* expressly found that there is no "opt-out" provision under Act 129, we shall deny the Exceptions.

In *Povacz II*, the Pennsylvania Supreme Court expressly concluded that the complainant's assertion of the right to "opt-out" of Act 129 was unfounded. Therein, the Supreme Court stated:

> [W]e conclude that Act 129 does mandate that EDCs 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. An electric customer with concerns about smart meters may seek an accommodation from the PUC or EDC, but to obtain one the customer must establish by a preponderance of the evidence that installation of a smart meter violates Section 1501 [of the Code].

Povacz II, at 983-984. Therefore, by establishing that there is no "opt-out" permitting a customer to refuse smart meter installation, the Supreme Court's holding in *Povacz II* is controlling on the question. Accordingly, to the extent the Complainant asserts a right to "opt-out" of Act 129 to refuse smart meter installation, we shall deny the Complainant's Exception Nos. 17 and 18 without further discussion.

In Exception No. 25, the Complainant requests that her original "electromechanical analog meter that does not contain a switched-mode power supply" be restored. Exc. at 39.

In *Povacz II*, the Pennsylvania Supreme Court expressly concluded that the utility and not the customer has the right to determine what type of smart meter technology to install. *See, Povacz II* at 993. The Supreme Court noted that a customer must be connected to the distribution system to receive electric service confirming that EDCs operate in a universal basis. *Id.* As such, the Court concluded that by obtaining service from their incumbent EDC, customers contractually accept the EDC's Commission-approved Tariff, including the installation of smart meter technology.

Id. at 994. Therefore, the Supreme Court found that "the authority to select and install a certain type of electric meter rests solely with the EDCs, […] not the customer." *Id*.

Therefore, by establishing that the customer has no right to select which smart meter technology to install, the Supreme Court's holding in *Povacz II* is controlling on the question. Accordingly, to the extent the Complainant asserts the right to select which smart meter technology to install, we shall deny the Complainant's Exception No. 25 without further discussion.

2. Complainant's Arguments Regarding the Burden of Proof

a. Exception Nos. 4-7, 10, 11, 14, 16, 19-21, 23 and 24

In her Exception Nos. 4-7, and 10, the Complainant reiterates her health concerns that were detailed in confidential information in the record, argues that the ALJ did not give proper weight to her physician's medical records, contends that the ALJ ignored the danger of a smart meter placed on her residence, disagrees with evidence provided by Met-Ed witness, Dr. Davis, and avers that the current Federal Communications Commission (FCC) guidelines are not sufficient to protect human health. Exc. at 3-6; 11-12.

In Exception Nos. 11 and 14, the Complainant alleges that the installation of a smart meter would be a violation of Section 1501 and that the installation of smart meters is a "mass experiment without the consent of individuals." Exc. at 12-13; 14-15.

In her Exception No. 16, the Complainant contends that she did show, by a preponderance of the evidence that Met-Ed is responsible for the problem described in the Complaint. Exc. at 16 (citing I.D. at 26). In Exception No. 19, the Complainant disagrees with the ALJ's FOFs Nos. 32, 50-55, 57-59, 61, 63, and 68-70. Generally, she

argues that none of these FOFs are factual, but rather these are examples of "preferential representation." Exc. at 25. She provides a chart of the FOFs and the sources of the FOFs, noting that they originated from the statements of the Met-Ed witnesses. Exc. at 27. Ms. Hendin avers that "the ALJ has shown he is incapable of unbiased decision-making in this case." Exc. at 27.

In her Exception Nos. 23 and 24, the Complainant avers that the ALJ erred in his discussion about technology and RF matters. Exc. at 34-35 (citing I.D. at 31). The Complainant explains that the ALJ erred when he ruled in favor of the utility, and that the ALJ was inconsistent. Exc. at 35-36.

b. Replies

Met-Ed contends that the Complainant did not carry her burden of proof that installing a smart meter on her residence would constitute unsafe and unreasonable service. R. Exc. At 5. Met-Ed avers that credible and substantial record evidence demonstrates that its smart meters comply with all applicable safety requirements of the FCC. R. Exc. at 5 (citing Met-Ed M.B. at 19-20).

Met-Ed notes that the Complainant has misread the portion of the I.D. she objects to in Exception No. 4. Met-Ed explains the ALJ was referencing Met-Ed's position, not setting forth a finding or conclusion. According to Met-Ed, the Complainant asserts in Exception No. 5 that the ALJ did not give proper weight to Dr. Kracht's medical records, and these records should be considered "incontrovertible

facts." R. Exc. at 11 (citing Exc. at 5). Met-Ed argues that it demonstrated that Dr. Kracht's diagnosis is not credible. R. Exc. at 11-12 (citing Tr. at 115-119).[10]

Met-Ed argues that it has fully rebutted any medical claims submitted by the Complainant. Met-Ed witness, Dr. Israel testified that "there is no reliable medical basis to conclude that radio frequency fields from Met-Ed'ssmart [sic] meters at the Complainant's house will cause, contribute to, or exacerbate, any medical condition of Ms. Hendin." R. Exc. at 12 (citing Met-Ed St. 3-R at 17-18).

Met-Ed provides that the Complainant asserts in Exception No. 6 that the ALJ erred by not addressing the distance of the smart meter from Ms. Hendin's daily activities. R. Exc. at 12 (citing Exc. at 5-6). Met-Ed avers that this exception is based on Ms. Hendin's assumption that the RF emissions from the smart meter are unsafe. Met-Ed provides that "there is no reliable scientific basis in physics, biophysics, bioelectromagnetics, or radio frequency bioelectromagnetics to conclude that the very low levels of radio frequency fields from Met-Ed's Itron meters can or will cause any adverse thermal or non-thermal biological effects in people." R. Exc. at 12-13 (citing Met-Ed M.B. at 18).

According to Met-Ed, the Complainant relies on extra-record materials in her Exception No. 7. Additionally, Met-Ed notes that the Complainant is continuing her "meritless attempts to attack Met-Ed's experts" when she states, "Dr. Davis perjured himself." R. Exc. at 13 (citing Met-Ed R.B. at Section IV.D.) Met-Ed provides that the unrebutted record evidence shows that the two RF emitting devices on Met-Ed's smart meters average RF emissions are 62,000 and 527,000 times smaller than the FCC's safety

[10] This section of the transcript is part of the Highly Confidential record in this proceeding. While Ms. Hendin appears to waive the confidential requirement for her medical records in her exceptions, we have not used any confidential information here in this Opinion and Order. *See*, Exc. at 3.

standard. *Id.* (citing Met-Ed M.B. at 17). Additionally, Met-Ed continues that there is nothing unusual about the RF fields emitted from Met-Ed's meters compared to RF fields from other devices. R. Exc. at 12-13 (citing Met-Ed R.B. at 34; Met-Ed St. 2-R at 14).

Met-Ed provides that any finding of fact necessary to support an adjudication of the Commission need only be supported by "substantial evidence." R. Exc. at 7 (citing *Met-Ed Indus. Users Group v. Pa. PUC*, 960 A.2d 189, 193 n.2 (Pa. Cmwlth. 2008) (citing 2 Pa.C.S. § 704)). Met-Ed explains that substantial evidence is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion. R. Exc. at 7 (citing *Borough of E. McKeesport v. Special/Temporary Civil Serv. Comm'n*, 942 A.2d 274, 281 (Pa. Cmwlth. 2008)). However, Met-Ed continues, the "presence of conflicting evidence in the record does not mean that substantial evidence is lacking." *Id.* (citing *Allied Mechanical and Elec., Inc. v. Pa. Prevailing Wage Appeals Bd.*, 923 A.2d 1220, 1228 (Pa. Cmwlth. 2007)). Met-Ed avers that the Complainant's Exceptions fail to demonstrate that any finding of fact reached by the ALJ is not supported by substantial evidence. R. Exc. at 8.

Met-Ed argues that the Complainant's assertions that she was made ill by the gas utility's smart meter and then recovered when the meter was removed are not based on substantial evidence as Ms. Hendin is not aware of the model of meter used by the gas utility, exactly when it was installed or removed, and if it was an RF-emitting smart meter. R. Exc. at 8, 11 (citing Tr. at 59-60).

Met-Ed explains that the Complainant avers that she provided "more" exhibits than Met-Ed and therefore, carried her burden of proof. Met-Ed explains further that the Complainant was not qualified to testify or offer exhibits related to any issues outside of her direct personal knowledge and Met-Ed objected to the admission of these exhibits. R. Exc. at 9 (citing Exc. at 16, Met-Ed M.B. at 24). Met-Ed reasons that the

Complainant's testimony and exhibits regarding health, medical or scientific opinions carry no evidentiary weight. *Id.*

Met-Ed contends that the Complainant relied heavily on the Bioinitiative Report which Met-Ed characterizes as extra-record evidence, hearsay, and unreliable advocacy. *Id.* (citing Met-Ed R.B. at 10, 11; Exc. at 16-19).

Met-Ed addresses the Complainant's arguments that the FCC guidelines are inadequate. Met-Ed contends that the Complainant is not an expert and presented no expert testimony that contradicts Dr. Davis' findings and conclusions. R. Exc. at 14 (citing Met-Ed M.B. at 24-25).

Met-Ed provides that contrary to the Complainant's claims, the expert testimony provided by Met-Ed witnesses, Dr. Davis and Dr. Israel, was credible and unrebutted. While the Complainant averred that several FOFs were preferential to Met-Ed, she did not cite any expert testimony or admissible credible evidence that controverts these facts. R. Exc. at 14. Met-Ed notes that the Complainant's attempts in Exceptions 20 and 21, to attack Dr. Israel and Dr. Davis are "gratuitous and without scientific merit." R. Exc. at 15 (citing Met-Ed R.B. at Sections IV.B.2, 3 and 5 and Section IV.D.) Met-Ed reiterates that the Complainant was not qualified to testify or offer exhibits related to any issues outside of her direct personal knowledge and as such, her testimony and exhibits regarding health, medical or scientific opinions carry no evidentiary weight. R. Exc. at 15 (citing Met-Ed M.B. at 24-25; Met-Ed R.B. at 31). Met-Ed provides that the Complainant did not present admissible and credible scientific or medical expert testimony to support her claims.

Finally, Met-Ed notes that the Complainant takes issue with the ALJ's deductions about technology and biology in his evaluation of her claims. R. Exc. at 15 (citing Exc. at 34-35, Exc. No. 23). According to Met-Ed, the Complainant repeats her

unfounded conclusions regarding the science surrounding smart meters and their alleged effects on human health. Met-Ed concludes that the Complainant is not an expert and presented no expert testimony to rebut Met-Ed's witnesses' explanation that the international consensus from credible public health entities is that the scientific research has not shown that the very low levels of RF fields from smart meters can cause or contribute to adverse health effects. R. Exc. at 16 (citing Met-Ed R.B. at 20).

c. Disposition

As noted *supra*, in affirming the Commission's *2019 Povacz Order*, the Pennsylvania Supreme Court held in *Povacz II* that, in order to prevail in a Section 1501 claim involving the safety of smart meters, and specially, against an EDC alleging that an AMI meter caused, or will cause, adverse health effects or harm to human health, the Complainant must demonstrate, by a preponderance of the evidence, a "conclusive causal connection" between the harm to human health and the RFs from the AMI meter. See, *Povacz II* at 1006. In that context, the lay opinion of the Complainant does not provide a conclusive, causal connection between the harm to human health and the RFs from the AMI meter. *Id.*

The Supreme Court reiterated that complainants seeking relief from the Commission must satisfy their burden of proof by a preponderance of the evidence. The Court explained that inconclusive evidence – evidence that does not lead to a conclusion of a definite result one way or the other – does not meet even the minimal requirements of the preponderance of the evidence standard. *Id.* at 1005. The Court further opined that while a customer's evidence does not need to prove their assertion beyond any doubt, evidence of a mere possibility that harm could result is insufficient to satisfy the preponderance of the evidence standard. *Id.* at 1008.

The Supreme Court further instructed that the burden of proof is two-fold for Section 1501 claims involving the safety of smart meters and RF emissions. First, a customer must present expert opinion rendered to a reasonable degree of scientific certainty that radio frequency emissions from smart meters cause adverse health effects. Next, a customer must present expert opinion rendered to a reasonable degree of medical certainty that RF emissions from the smart meters, either alone or cumulative to other sources of RF emissions, caused them harm. The utility may then refute the customer's evidence by providing scientific and/or medical expert testimony that, within a reasonable degree of certainty, the RF emissions from smart meters did not cause the alleged harm. *Id.* Once the parties have presented their evidence, the onus then falls on the fact finder to weigh the evidence and determine whether it is more likely than not that the smart meter caused the customer harm. *Id.* at 1006.

In the present case, the DCALJ's analysis and disposition turned on the relative weight of the evidence presented by the Complainant to establish that installation of a smart meter would constitute a violation of the Code, a Commission Regulation or Order or a violation of a Commission-approved tariff, versus the weight of the evidence presented by the Company in opposition to the Complaint. The DCALJ concluded that the evidence presented by the Company outweighed the evidence presented by the Complainant on all issues. We concur. Upon review, we agree with the DCALJ's well-reasoned analysis in the Initial Decision and the DCALJ's conclusion that the Complainant did not meet her burden of proof regarding her claim that the AMI smart meter will cause, or contribute to, adverse health effects for the Complainant. I.D. at 33.

In order to prevail in a Section 1501 claim against an EDC alleging that an AMI meter caused, or will cause, adverse health effects or harm to human health, the Complainant must demonstrate, by a preponderance of the evidence, a "conclusive causal connection" between the harm to human health and the RFs from the AMI meter. See *2019 Povacz Order*. Here the DCALJ properly concluded that the Complainant has

failed to satisfy her burden of demonstrating that the smart meters deployed by Met-Ed emit electromagnetic frequencies that cause her adverse health effects. I.D. at 33, 47.

Specifically, we affirm the DCALJ's finding in COL No. 26, that the Complainant failed to satisfy her burden of demonstrating that Met-Ed has violated the Public Utility Code, a Commission order or regulations or a Commission-approved tariff of the company with regard to installing a smart meter at her home. I.D. at 31. We find nothing in the Complainant's Exceptions to refute the DCALJ's conclusions that the Company's use of a smart meter to measure the electric usage at the Complainant's property will not constitute unsafe or unreasonable service, in violation of Section 1501.

On Exception, the Complainant asserts that the ALJ erred in the analysis of the weight of the evidence. Specifically, the Complainant challenges the ALJ's acceptance of and finding of credibility of the Met-Ed's witnesses, Dr. Israel and Dr. Davis, as outweighing the Complainant's personal testimony. Exc. at 27-32. However, we find no fault with either the DCALJ's finding of credibility of the Company's witnesses or the DCALJ's conclusion that the Company's witness' testimony outweighed the evidence presented by the Complainant. I.D. at 37, 40.

The Company presented credible evidence through its expert witnesses, Dr. Israel and Dr. Davis, to support the DCALJ's finding that there is no reliable basis to conclude that the new AMI meter will cause, or contribute to, any adverse health or environmental effects. Specifically, we concur with the DCALJ's finding that the Complainant's arguments concerning the alleged effects of the electromagnetic frequencies on her health from smart meters are non-persuasive and were rejected based on the record developed in this case. I.D. at 32.

Therefore, upon review of the record, and based on the foregoing discussion, we find that the DCALJ properly weighed the evidence presented to conclude

that the Complainant failed to establish by a preponderance of the evidence that the Company's installation of a smart meter would constitute unreasonable or unsafe provision of service under Section 1501 of the Code. Therefore, we shall deny Complainant's Exceptions challenging the DCALJ's dismissal of the Complaint for failure to satisfy the burden of proof.

3. Complainant's Argument Regarding Constitutional Claims

a. Exception No. 9

In her Exception No. 9, the Complainant contends that the ALJ erred by equating "bodily integrity" with "invasion of privacy" and in his comparison of two legal cases and two constitutional amendments. Exc. at 9. Ms. Hendin argues that she cannot be forced to accept a smart meter at her residence in violation of her due process rights, Article I, Section 11 of the Pennsylvania Constitution and the Fourteenth Amendment of the United States Constitution. *Id.*

b. Replies

Met-Ed provides that it is not a state actor and therefore cannot violate the Complainants' constitutional rights. R. Exc. at 16-17.

c. Disposition

To the extent the Complainant's Exception No. 9 asserts that the ALJ erred by not finding that the installation of a smart meter constitutes a violation of the Complainant's constitutional rights, we shall deny the Exception. See Exc. at 9-11.

In *Povacz II*, the Supreme Court acknowledged that the holding of the Commonwealth Court concluded that, in the circumstances, the assertion of a constitutional right to refuse installation of a smart meter predicated upon an asserted violation of "bodily integrity" was unfounded. *See, Povacz II* at 985, fn. 8. In the present case, the Complainant asserts a similar violation of rights predicated upon a violation of "bodily integrity" that was rejected by the Commonwealth Court's holding. Accordingly, to the extent the Complainant asserts a constitutional right to refuse smart meter installation, we shall deny the Complainant's Exception No. 9 without further discussion.

4. Complainant's Claims Regarding 52 Pa. Code §§ 56.113 and 57.28

a. Exception Nos. 12-13

In her Exception No. 12, the Complainant contends that she is entitled to the protections under section 56.113 that prevent termination of electric service based on a certification by a medical professional. In her Exception No. 13, the Complainant avers that Met-Ed has not warned her of the potential dangers of a smart meter. Exc. at 13.

b. Replies

In its Replies, Met-Ed argues that it is unreasonable for the Complainant to except to the I.D. when there is no basis for the medical condition which she alleges justifies the application of Section 56.113. Regarding Exception No. 13, Met-Ed avers that the Complainant has failed to show that the smart meter is unsafe and therefore the ALJ correctly concluded that there is not substantial record evidence to demonstrate that the smart meter is a danger to the public. R. Exc. at 17-18 (citing Met-Ed M.B. at Section IV.A.2; Met-Ed R.B. at Section I.V.B; I.D. at 34).

c. Disposition

We shall deny the Complainant's Exceptions on this issue for the reasons that follow. Dr. Israel testified that there is no evidence that the smart meter can exacerbate the Complainant's health. R. Exc. at 12 (citing Met-Ed St. 3-R at 17-18). Therefore, Section 56.113 does not apply to the Complainant regarding installation of a smart meter. The Complainant has failed to provide evidence that there is a violation of Section 1501, and therefore the record does not show that the smart meter poses a danger to the public. As we conclude there is no violation of Section 57.28 (pertaining to reasonable provision of service), the Complaint's Exceptions should be denied. Thus, the Complainant's Exception Nos. 12 and 13 are denied.

5. Complainant's Due Process Concerns

a. Exception Nos. 2, 15, and 24

In her Exception No. 2, the Complainant contends that the ALJ erred in denying her request for admission of several late-filed exhibits. In Exception No. 15, the Complainant contends that the ALJ cut the hearing short and she "did not receive a fair and impartial hearing because the ALJ did not give the hearing its fair and proper amount of time." Exc. at 15. In her Exception No. 24, the Complainant disagrees with the ALJ's findings and finds fault with his reasoning process. Exc. at 35-38.

b. Replies

In its Replies, Met-Ed provides that the Complainant appears to assert that the ALJ, and the Commission have violated her rights to due process. Met-Ed explains that the Complainant claims that: (1) the timing of the ALJ's exclusion of her late-filed exhibits has put her at a disadvantage (Exc. at 1); (2) the ALJ holding to the established

hearing schedule deprived her of a fair and impartial hearing (Exc. at 15); and (3) the ALJ's considering and weighing of the evidence calls into question his integrity (Exc. at 35-38).

First, Met-Ed avers that the ALJ properly excluded the late-filed exhibits. According to Met-Ed, these exhibits appeared to be an attempt to take advantage of the additional time afforded to the Complainant to complete "a few clean-up items" on cross examination. R. Exc. at 18. Additionally, the Complainant filed a motion to admit these late-filed exhibits. *Id*. (citing Tr. 262; Exc. at 1). Met-Ed filed an Answer and the ALJ issued an order denying the admission of these exhibits. *Id.* (citing Exc. at 1).

Second, Met-Ed notes, the ALJ required the parties to adhere to the agreed upon hearing schedule. Dr. Israel's time was limited on December 20 due to an emergency and the ALJ scheduled an additional day of hearing for January 24, 2020. The ALJ cautioned the parties that the additional time did not "open up the door for more cross or more redirect." R. Exc. at 19 (citing Tr. at 240). Met-Ed avers that the Complainant attempted to use the additional hearing date to expand her cross-examination of Dr. Israel including introduction of additional previously undisclosed exhibits. R. Exc. at 19 (citing Tr. at 257, 260-261).

Finally, Met-Ed contends that the Complainant's attempts to re-weigh the evidence do not demonstrate that the ALJ acted in a biased manner or demonstrate that the ALJ was not fair and impartial. *Id.* (citing Exc. at 35-37; Exc. No. 24). According to Met-Ed, the Complainant misrepresents the ALJ's findings and conclusions. Met-Ed provides that the ALJ properly concluded that the Complainant has not met her burden of proof. R. Exc. at 19-20.

c. Disposition

We note that the DCALJ rejected several of Ms. Hendin's exhibits in his *June 2020 Order* stating:

> Contrary to the cross-examination exhibits discussed above, Ms. Hendin was not prepared during the hearing to use these exhibits when Dr. Israel appeared. Whereas Ms. Hendin was given an opportunity to move for the admission of her cross-examination exhibits after the hearing because they were served the night before the hearing, exhibits 23-41 were not considered. Rather, they were provided as part of Ms. Hendin's motion for admission of late-filed exhibits. Ms. Hendin was allowed in the hearing to move for the admission of the cross-examination exhibits she circulated the night before; she was not given permission to also seek the admission of any other exhibit she desired. This is particularly true as Ms. Hendin noted in her motion, for example, that exhibits 23-31 are provided "for Your Honor's consideration." That was not the purpose of allowing Ms. Hendin to submit a late-filed exhibit and such purpose will not be allowed now. As Met-Ed noted, Ms. Hendin was permitted "to file a motion seeking to admit the late cross-examination exhibits, not any other exhibits that should have been presented as part of the complainant's direct case." Ms. Hendin had an opportunity to present these exhibits as part of her direct case but did not do so. These exhibits are beyond the scope of what was allowed with regard to the cross-examination exhibits, and the fact that there was no prehearing conference held on exchange and acceptance of service of exhibits to be offered into evidence, as Ms. Hendin argued in response to Met-Ed's motion to strike, does not change that fact.

June 2020 Order at 11.

We find that the DCALJ properly rejected these exhibits that were submitted for the DCALJ's "consideration." Ms. Hendin had the opportunity to present these exhibits as part of her direct case but chose not to do so. We also find that the

DCALJ did not err by adhering to the hearing schedule. Ms. Hendin states that "she had prepared seventy pages of cross-examination questions for Dr. Israel." Exc. at 15. This would have extended the hearing schedule that was previously agreed to by several days. The DCALJ advised the parties that the additional day of hearing was not to be used to expand the cross or redirect of Dr. Israel. We also do not agree with the Complainant's assertion in her Exception No. 24 that the ALJ's decision somehow precluded her from meeting her burden of proof. As was discussed in the burden of proof disposition *supra*, we find that the DCALJ properly weighed the evidence submitted by the Company compared to that presented by the Complainant. Accordingly, we shall deny the Complainant's Exception Nos. 2, 15, and 24.

6. Complainant's Concern Regarding the ALJ's Determination of Jurisdiction

a. Exception No. 22

The Complainant disagrees with the ALJ's statement regarding jurisdiction issues. The Complainant avers that the ALJ states that the Commission is not the correct jurisdiction to hear her smart meter claim. Exc. at 34.

b. Replies

Met-Ed provides that the Complainant has misunderstood the ALJ's statement regarding jurisdiction. Met-Ed notes that the ALJ was referring to the Complainant's arguments under the Rehabilitation Act of 1973 and the Fair Housing Act Amendments. R. Exc. at 20 (citing I.D. at 44-46; additional cite omitted). Met-Ed explains that the Commission cannot hear these claims as it lacks jurisdiction for these federal statutes. R. Exc. at 20-21.

c. Disposition

The Complainant refers to the DCALJ's statement on page 44 of the I.D. "[t]o the extent that the recommendations from Dr. Kracht are somehow being overridden or ignored by the Commission due to the Commission's interpretation of Act 129, Ms. Hendin could consider raising her claims in a jurisdiction with the necessary expertise." As discussed *supra*, the Pennsylvania Supreme Court has determined that there is no opt-out allowed. The Complainant's objection to this statement by the DCALJ is now moot.

Regarding the federal statutes discussed in the I.D., we agree with Met-Ed, the Complainant appears to have misread the I.D. regarding the DCALJ's discussion of jurisdiction. We see no error in the DCALJ's statement that the Commission lacks jurisdiction to hear claims brought under the Rehabilitation Act of 1973 and the Fair Housing Act Amendments. I.D. at 44-46 (citing *White v. PPL Electric Utilities Corp.*, Docket No. C-2018-3003468 (Opinion and Order entered May 21, 2020) at 19 (wherein the Commission held that it lacked jurisdiction to enforce the federal Fair Housing Act and federal Americans with Disabilities Act regarding a similar complaint)). Regardless of jurisdiction, we agree with the DCALJ, the Complainant failed in her brief to cite to any record evidence that demonstrates that these federal laws have been violated. Accordingly, we shall deny the Complainant's Exception No. 22.

7. Complainant's Concerns Regarding Preferential Treatment

a. Exception Nos. 1, 3, and 8

In Exception No. 1, the Complainant alleges that the ALJ misrepresented her statements and showed preferential treatment towards Met-Ed. In Exception No. 3, the Complainant contends that the ALJ erred in determining FOFs. In her Exception No.

8, the Complainant contends that the ALJ misrepresented her actions in working with Met-Ed to find a potential site for the smart meter away from her residence. Ms. Hendin provided extra-record material that will not be considered. Exc. at 7-8.

b. Replies

Met-Ed submits that regarding Exception No. 1, the ALJ is simply stating what Met-Ed "averred." Regarding Exception No. 3, Met-Ed notes that the Complainant provided an analysis of the FOFs in an attempt to show bias by the ALJ. Met-Ed explains that the lack of citations to any statement made by the Complainant regarding scientific or medical matters is explained by the fact that the Complainant lacked the necessary qualifications to testify to scientific, health or medical issues related to smart meters and her testimony cannot support any factual findings. R. Exc. at 21 (citing Met-Ed M.B. at 24).

Met-Ed contends that in Exception No. 8, the Complainant misses the point about her cooperation in locating the smart meter at her residence. Met-Ed notes that the Complainant does not want a smart meter in any case, and her attempt to gain an opt-out by stating that there is no way to relocate the meter on her site should be denied. R. Exc. at 22.

c. Disposition

We disagree with the Complainant's assertion that the DCALJ mischaracterized her actions in the I.D. with the statement "Met-Ed averred that Ms. Hendin has refused to allow the company access…" I.D. at 1. The DCALJ was simply stating what was in the Met-Ed Answer to Ms. Hendin's Complaint. Therefore, the Complainant's Exception No. 1 is denied.

The analysis regarding the Findings of Fact that Ms. Hendin provides in Exception No. 3 relates to testimony pages versus number of FOFs. We do not agree with the Complainant's statement that her analysis showed that "[l]ooking at specifics revealed that the Findings of Fact are blatantly biased" or that the ALJ could not make an unbiased decision in this case. Ms. Hendin's analysis of pages of transcript of testimony compared to percentage of FOFs does not support the Complainant's proposition, that the ALJ was somehow biased. The percentage of transcript pages relating to testimony provided does not establish the relative weight the testimony should be afforded. Where a question involves scientific or medical expertise, in weighing the evidence presented, it is within the DCALJ's discretion to afford more weight to the testimony of an expert witness than that of a lay witness. In the present case Ms. Hendin is not a medical expert or expert in smart meter technology or physics or electromagnetics. Her testimony, no matter how voluminous, does not carry the same weight as the witnesses that are experts in medicine or physics or electromagnetics. Findings of Fact must be based on substantial evidence not a layperson's assertions of opinion. Therefore, we find the DCALJ's reasoning in weighing the evidence presented to be sound and justified. Accordingly, the Complainant's Exception No. 3 is denied.

Finally, in her Exception No. 8, the Complainant contends that the ALJ exhibited bias with the statement "Met-Ed stated in its Reply Brief that it was unable to relocate the meter because Ms. Hendin was un-responsive in those discussions…" I.D. at 40. To the contrary, in that passage the DCALJ was explaining what was in Met-Ed's Reply Brief, not expressing an opinion regarding Ms. Hendin's actions. The DCALJ explained that Met-Ed's tariff would require Ms. Hendin to pay for the relocation of the meter. He explained further that if Ms. Hendin would like to pursue relocation of the meter further, the Commission encourages settlements, and she is encouraged to do so. I.D. at 41. Therefore, we do not find bias in the DCALJ's description of the issue of the proposed location of the smart meter. Accordingly, the Complainant's Exception No. 8 is denied.

IV. Conclusion

In light of the above discussion, we shall: (1) deny the Complainant's Exceptions; (2) adopt the ALJ's Initial Decision; and (3) dismiss the Complaint, consistent with this Opinion and Order; **THEREFORE,**

IT IS ORDERED:

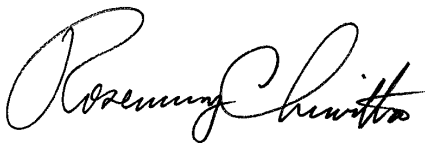
1. That the Exceptions filed by Judith D. Hendin on August 27, 2020, to the Initial Decision of Deputy Chief Administrative Law Judge Joel H. Cheskis issued on August 7, 2020, at Docket No. C-2018-3003324, are denied, consistent with this Opinion and Order.

2. That the Initial Decision of Deputy Chief Administrative Law Judge Joel H. Cheskis, issued on August 7, 2020, at Docket No. C-2018-3003324, is adopted, consistent with this Opinion and Order.

3. That the Formal Complaint filed by Judith D. Hendin, on June 29, 2018, at Docket No. C-2018-3003324, is dismissed.

4. That this proceeding is marked closed.

BY THE COMMISSION,



Rosemary Chiavetta
Secretary

(SEAL)

ORDER ADOPTED: January 18, 2024

ORDER ENTERED: January 26, 2024