

**PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17120**

Public Meeting held February 22, 2024

Commissioners Present:

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

Charles and Sylvia Bolte

C-2019-3011287

v.

Metropolitan Edison Company

OPINION AND ORDER

BY THE COMMISSION:

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition are the Exceptions of Charles and Sylvia Bolte (Complainants or Mr. Bolte and Ms. Bolte¹) filed on September 1, 2020, to the Initial Decision (I.D. or Initial Decision) of Administrative Law Judge (ALJ) Benjamin J. Myers, served on the Parties on August 12, 2020, in the above-captioned proceeding. On September 10, 2020, Metropolitan Edison Company (Met-Ed or the Company) filed

¹ We note that the Complainants' Exceptions identify Sylvia Bolte as "Ms. Bolte." *See, Exc. at passim.*

Replies to Exceptions. The Initial Decision denied the Amended Formal Complaint (Amended Complaint) filed by the Complainants on January 8, 2020. For the reasons discussed below, we shall deny the Complainants' Exceptions, adopt the Initial Decision of ALJ Myers, and dismiss the Amended Complaint, consistent with this Opinion and Order.

I. Background

This case involves a Formal Complaint (Complaint), as amended, concerning the safety of the advanced metering infrastructure (AMI), or smart meter, that Met-Ed proposes to install at the Complainants' residence and use in the ordinary course of business to measure the Complainants' electricity consumption.² The Complainants requested that Met-Ed not install a smart meter at their residence due to safety, health, and privacy concerns. Amended Complaint at 3-10.

Met-Ed is an electric distribution company (EDC) subject to the jurisdiction of the Commission. Met-Ed furnishes, owns, and maintains the meters in its distribution system. *See* Met-Ed's Tariff Electric Pa. P.U.C. No. 52 at 40.

The Complainants are Met-Ed customers who have been notified of Met-Ed's intent to install a smart meter at their residence that provides the function of automatic meter reading (AMR).

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

² We note that, although both Mr. Bolte and Ms. Bolte are listed under the "Customer (Complainant) Information" section, the Verification is signed and dated solely by Ms. Bolte. Amended Complaint at ¶¶ 1, 9; Complaint at ¶¶ 1, 9.

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 Implementation Order*). Met-Ed sought and obtained the Commission's approval to complete the installation of AMI meters with substantially all customers to receive an AMI meter by mid-2019. *See, Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company for Approval of Its Smart Meter Deployment Plan*, Docket Nos. M-2013-2341990, M-2013-2341991, M-2013-2341993, and M-2013-2341994 (Opinion and Order entered June 25, 2014) (*2014 Smart Meter Order*).

II. History of the Proceeding

On June 29, 2019, the Complainants filed the instant Complaint, stating that Met-Ed is threatening to, or already has, shut off electric service at their residence, and requested that Met-Ed not turn off their electric service or install a smart meter on their home. Complaint at 1, 3; I.D. at 1.

On July 22, 2019, the Company filed an Answer to the Complaint and New Matter (Answer), essentially denying the material allegations of the Complaint but contending that it is required to install AMI, or smart meters, for all AMR customers and that it has the right to terminate service for failure of the customer to permit access to the meter. Answer at 1-3; 5-7; I.D. at 2.

Also, on July 22, 2019, Met-Ed filed a Preliminary Objection in response to the Complaint (Preliminary Objection), essentially repeating its legal argument that, in accordance with Act 129 and the Commission's orders, the Company is required to implement a smart meter installation plan. Met-Ed also argued that because the Complainant failed to allege that the Company committed or omitted an act in violation of its tariff or a Commission Statute, Regulation or Order, the Complaint is legally insufficient and, therefore, must be dismissed. Preliminary Objection at 5-6.

On September 17, 2019, the ALJ issued an Order denying Met-Ed's Preliminary Objections and directing that the matter be scheduled for an evidentiary hearing. I.D. at 2.

By Corrected Hearing Notice dated December 17, 2019 (Hearing Notice), an Initial Telephonic Hearing was scheduled for January 21, 2020, at 10:00 a.m. The Hearing Notice included the date, location, and time of the hearing.

On January 8, 2020, the Complainants filed their Amended Complaint, alleging that, generally, the installation of a smart meter or any other wireless device on their home will result in: (1) adverse health symptoms; (2) a violation of Section 1501 of the Code; and (3) a violation of their Fourth Amendment privacy rights. Amended Complaint at 3-10. The Complainants further alleged that, essentially, Act 129 does not require smart meters installations and, because they did not request or agree to pay for a smart meter and their home is not new construction, the Company would be in violation of Act 129 if it installed a smart meter on their home. Amended Complaint at 10-15. As relief, the Complainants requested, *inter alia*: (1) that Met-Ed not shut off their electric service; (2) that they retain an analog meter; and (3) special accommodations under the Americans with Disabilities Act (ADA) and in accordance with Section 1501 of the Code. Amended Complaint at 17. As support, the Complainants included thirty (30) pages of documentation as attachments to their Amended Complaint. On January 14, 2020, the Complainants filed an additional 122 pages of documents, labeled as Exhibits 1 through 19.³ I.D. at 3.

³ On January 20, 2020, the Complainants indicated that their testimony would be what Ms. Bolte submitted in the Amended Complaint and, in anticipation of the hearing scheduled for January 21, 2020, their exhibits would be "those which had been submitted five days prior." I.D. at 4. Upon review of the Commission's case management system, the Complainants' 122-page document, labeled as "Exhibit of Complainant admitted pre-served without hearing," was filed January 14, 2020.

On January 17, 2020, the Complainants, citing health issues, requested: (1) that the scheduled hearing be cancelled; and (2) permission to submit the entirety of their testimony and evidence via email. On January 17, 2020, Met-Ed responded to the Complainants' requests by noting that: (1) Met-Ed would not have the opportunity to file an answer to the Amended Complaint prior to the scheduled January 21, 2020 hearing; and (2) a process where both Parties submit their testimony and exhibits by email would be conditional as follows: (a) Met-Ed reserves the right to object to any testimony or exhibits submitted in writing via a motion to strike and would expect that the Complainants be permitted to do the same; and (b) the working assumption that Ms. Bolte would be testifying on her own behalf and not presenting the testimony of any expert or other witnesses. Accordingly, the hearing scheduled for January 21, 2020, was cancelled. I.D. at 3-4.

On February 6, 2020, Met-Ed filed an Answer to the Amended Complaint and New Matter (Answer to the Amended Complaint), essentially denying the material allegations of the Amended Complaint but contending that it is required to install AMI, or smart meters, for all AMR customers and that it has the right to terminate service for failure of the customer to permit access to the meter. Amended Complaint at 1-4.

On February 25, 2020, the Complainants filed a Reply to Met-Ed's Answer to the Amended Complaint (Reply to Answer), essentially disagreeing with Met-Ed regarding the intent of Act 129. I.D. at 4; Reply to Answer at 1-2.

On March 3, 2020, the ALJ confirmed, via e-mail, that an agreement had been reached regarding the submission of pre-served testimony and exhibits in this matter and the desire of the Parties to forego a telephonic hearing. Furthermore, the ALJ confirmed that the Complainants and the Company would have until March 31, 2020, and April 14, 2020, respectively, to submit any additional testimony or exhibits.

On March 31, 2020, the Complainants submitted the remainder of Ms. Bolte's testimony and one additional exhibit, labeled as Exhibit 20.⁴ On April 14, 2020, Met-Ed submitted the rebuttal testimony of Mr. John C. Ahr (Mr. Ahr). I.D. at 4.

On April 22, 2020, the ALJ, via e-mail, explained that, where the parties have provided pre-served testimony, a hearing would typically be conducted to provide the parties with the opportunity to: (1) cross-examine each other regarding their testimony; (2) object to any exhibits being offered by the parties; and (3) move said testimony and exhibits into the record. The ALJ also reiterated that the hearing would be conducted by telephone at a future date. The ALJ also informed the Parties that given the Complainants' statements that their participation in a hearing is not feasible, a hearing would be unnecessary if both Parties agreed to waive cross-examination and had no objections to the testimony or exhibits becoming a part of the record. The ALJ also advised the Parties his decision would be based on the record as it stood at that time (*i.e.*, all of the pre-served testimony and exhibits submitted by the Parties up to that point). I.D. at 5.

On April 24, 2020, Ms. Bolte, via e-mail, agreed to waive cross-examination and to have written testimony and exhibits become part of the record. In response, Met-Ed indicated that it agreed with this approach but proposed that both Parties be permitted to submit written objections so that such objections are preserved and included in the evidentiary record, with the appropriate weight given to the testimony and exhibits submitted by both of the Parties. On April 24, 2020, the Parties agreed with this approach. I.D. at 5-6.

⁴ As noted, *supra*, on January 14, 2020, the Complainants submitted Exhibits 1-19.

On April 27, 2020, the ALJ advised the Parties, via e-mail, that: (1) the Parties were in agreement that a hearing was not necessary; (2) cross-examination would be waived; and (3) the Parties' testimony and evidence previously provided would be admitted to the record, subject to any objections. The Parties were also directed that any objections to testimony or exhibits should be submitted by May 1, 2020. On April 27, 2020, the Parties agreed to forgo the conduct of an evidentiary hearing and waive cross-examination. I.D. at 6.

On April 28, 2020, Ms. Bolte requested: (1) an extension for the submission deadline for objections to May 8, 2020; and (2) confirmation that the exhibits submitted by mail would be included in the record.⁵ I.D. at 6.

On May 1, 2020, Met-Ed submitted written testimony Statement 1-R, which included two exhibits, labeled JCA-1 and JCA-2. On May 8, 2020, Met-Ed filed objections to the Complainants' testimony and exhibits (Met-Ed Objections), and the Complainants filed objections to Met-Ed's testimony and exhibits (Complainants Objections). Also, on May 8, 2020, subject to the Parties' respective objections, the Parties' respective testimony and exhibits were moved into the record. The record was closed on May 8, 2020. I.D. at 6.

In the Initial Decision issued on August 12, 2020, the ALJ dismissed the Amended Complaint for failure to demonstrate that the installation of the smart meter constitutes unsafe or unreasonable service under 66 Pa. C.S. § 1501, or otherwise violates

⁵ Due to the Coronavirus pandemic (COVID-19 pandemic), the Commission's offices were closed on or about March 16, 2020. The ALJ stated that on July 16, 2020, he retrieved three copies of Ms. Bolte's exhibits that were mailed to the Office of Administrative Law Judge in anticipation of the hearing originally scheduled for January 21, 2020, and delivered them to the Secretary's Bureau for inclusion in the record. I.D. at 6, fn. 1.

any provision of the Code, a Commission Order or a Commission-approved tariff.
I.D. at 1, 12, 14.

As previously noted, the Complainants filed Exceptions on September 1, 2020, and Met-Ed filed Replies to Exceptions on September 10, 2020.

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 2020 Stay Order*). The *November 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 of pending smart meter complaints. 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 Complainants 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-finder⁶ 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.

⁶ 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)).

See, Moore, citing *Suber v. Pa. Comm'n on Crime and Delinquency*, 885 A.2d 678 (Pa. Cmwlth. 2005), (*Suber*).

2. Burden of Proof Applied to Section 1501⁷ 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*, Docket No. C-2015-2475023 (Opinion and Order entered March 28, 2019) (*Povacz 2019 Order*); *Laura Sunstein Murphy v. PECO Energy Company*, Docket No. C-2015-2475726 (Opinion and Order entered May 9, 2019) (*Laura Sunstein Murphy*); and *Cynthia Randall and Paul Albrecht v. PECO Energy Company*, Docket No. C-2016-2537666 (Opinion and Order entered May 9, 2019) (*Cynthia Randall*). By *Povacz II*, the Supreme Court affirmatively established that there is no "opt-out" provision for installation of a smart meter pursuant 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.

⁷ 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*).

Pursuant to Section 1501 of the Code, a public utility has a duty to maintain “adequate, efficient, safe, and reasonable service⁸ 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,

⁸ 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 of the Code.⁹ 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 (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. Util. Comm'n*, . . . 134 Pa. Commw. 218, 578 A.2d 600 ([Pa. Cmwlth.] 1990)[.] . . .

⁹ 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*).

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).¹⁰

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

¹⁰ 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)¹¹ from the AMI meter ¹².

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. Ill. 2014) (“*Naperville I*”). 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.

¹¹ RF is an abbreviation for radio frequency and is also used here to denote RF fields or RF signals.

¹² 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, ALJ Myers made nine Findings of Fact (FOF) and reached eight Conclusions of Law (COL). I.D. at 7-8, 12-14. The FOF and COL 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.

The ALJ's analysis explained that given the Complainants' argument that the installation of a smart meter at their residence raises safety and privacy issues, the burden of proof is upon the Complainants to demonstrate, by a preponderance of the evidence, that the Company is responsible or accountable for the safety or privacy concerns described in their Amended Complaint. Therefore, the ALJ determined that the Complainants must present sufficient evidence to support a finding that they would be adversely affected by a smart meter or that the Company's use of a smart meter would

constitute unsafe or unreasonable service, in violation of Section 1501 of the Code. I.D. at 10.

The ALJ noted that the Complainants provided the testimony of Ms. Bolte and several exhibits regarding Ms. Bolte's health and concerns regarding adverse health and privacy, which the Complainants claim are inherent in smart meters. Specifically, the ALJ noted that Ms. Bolte, in support of her argument that the installation of a smart meter at her home would aggravate her sensitivity to electromagnetic signals and cause a variety of health issues, provided various articles and other written materials, including letters from her doctor. The ALJ found that the Complainants failed to produce competent evidence to substantiate their belief that a smart meter at their residence poses an unsafe or unreasonable risk to their health, safety, and privacy. I.D. at 10-11 (citing *Richard Kirby v. PPL Electric Utilities Corporation*, Docket No. C-20066297 (Final Order entered November 16, 2006) (*2006 Kirby*)).

The ALJ found that several of the Complainants' proposed sources, including articles and letters written by others to corroborate Ms. Bolte's testimony, constitute hearsay and can be afforded little or no weight. I.D. at 11. The ALJ also found that Met-Ed's objections to several of the Complainants' exhibits on admissibility grounds relating to hearsay and relevance were well-placed because most of the Complainants' exhibits, which were presented as to the truth of the matter asserted (*i.e.*, that smart meters pose a risk to health, safety, and privacy), are out-of-court statements from individuals other than the Complainants.¹³ The ALJ also noted that hearsay which has been properly objected to may not serve as a basis for a FOF. I.D. at 11 (citing *Walker v. Unemployment Compensation Board of Review*, 367 A.2d 366, 370 (Pa. Cmwlth. 1976)). Therefore, the ALJ found that the Complainants' evidence offered

¹³ The ALJ noted that the Complainants' objections to the testimony and evidence presented by the Company "were either misplaced legal objections or additional testimony of Ms. Bolte." I.D. at 11.

for consideration is composed almost entirely of Ms. Bolte's testimony, which by itself, is insufficient to satisfy the Complainants' burden because it consists of the Complainants' beliefs and opinions. I.D. at 11.

The ALJ also acknowledged the testimony of the Company's witness, Mr. Ahr, who testified that the smart meters deployed by Met-Ed: (1) comply with all established safety requirements and standards; (2) are subjected to the required testing of the American National Standards Institute and are certified by Underwriters Laboratories (UL) to confirm compliance to UL 2735; (3) only transmit a customer's usage and are not capable of transmitting names, addresses, social security numbers, or similar account numbers; and (4) comply with the Company's Commission-approved customer privacy policy, which prohibits Met-Ed from sharing sensitive customer information with third parties without customer consent. I.D. at 12 (citing Met-Ed St. 1-R at 11-13).

In evaluating the record evidence in this case, the ALJ concluded that, based upon the totality of the testimony and evidence, the Complainants failed to provide the substantial evidence necessary to establish a *prima facie* case or otherwise meet their burden of proof. The ALJ added that, even if the Complainants had established a *prima facie* case or met their burden, Met-Ed presented credible testimony that contradicts the Complainants' arguments. I.D. at 12. Accordingly, the ALJ dismissed the Amended Complaint for failure of the Complainants to prove, by a preponderance of evidence, that the installation of a smart meter constitutes unsafe or unreasonable service under 66 Pa. C.S. § 1501, or otherwise violated the Code, a Commission Order or Regulation or the Company's Commission-approved tariff. I.D. at 1, 12.

C. Exceptions¹⁴

The Complainants' Exceptions consist of twenty-one (21) pages that generally challenge the ALJ's rulings and conclusions regarding burden of proof and Mr. Ahr's credibility as a witness.

The Complainants maintain their argument that smart meters: (1) are not required by Act 129; and (2) are supplied upon: (a) customer request and agreement to pay for it; and (b) in new building construction. Exc. at 1. Further, the Complainants contend that based on the relevant language and "Legislative Record" of Act 129, and Ms. Bolte's detailed analysis and clarified definition "depreciation schedule" cited in Section 2807(f)(2)(iii), the Commission's *Smart Meter Implementation Order* misinterprets the intent of Act 129. Exc. at 1, 3.

The Complainants argue that Act 129 does not require the installation of smart meters because "early versions of HB2200," which mandated smart meters for all customers, received comments from several state representatives opposing such a mandate. Exc. at 1-2. Further, the Complainants challenge the Commission's and the Company's interpretation of: (1) the term "depreciation schedule" between Act 129, Section 2807(f)(2)(iii); and (2) the *Smart Meter Implementation Order*. Exc. at 2-3 (Bolte Objections at 9-10, 12). Moreover, the Complainants argue that because "the Commission's Orders are not in line with the wording and legislative intent of Act 129," Met-Ed is in violation of Act 129 for installing smart meters on customers' homes. As

¹⁴ We acknowledge that the format of the Complainants' Exceptions do 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 exceptions is taken, and cite to the relevant pages of the Initial Decision. Nevertheless, particularly because the Complainants are appearing *pro se*, we will accept the Exceptions as filed, pursuant to Section 1.2(a) and (d) of our Regulations, 52 Pa. Code § 1.2(a) and (d), in order to secure a just, speedy, and inexpensive determination.

such, the Complainants aver that documentation demonstrating the Company's compliance with the Commission's Orders and Regulations, FCC guidelines, security measures, and policies is irrelevant. Exc. at 3-4. Furthermore, the Complainants argue that because they have not requested or agreed to an opt-in for smart meters, and there is no mandate in Act 129 requiring Met-Ed to install smart meters, any mention of "opting out" by Met-Ed or the Commission is irrelevant. Exc. at 4.

The Complainants also question the credibility and expertise of the Company's witness, Mr. Ahr. Exc. at 4-5 (citing I.D. at 12). Specifically, the Complainants argue that Mr. Ahr's assertion that all EDCs with at least 100,000 customers install smart meters throughout their service territory ignores that such installations are available only to: (1) customers who request and agree to pay for them; and (2) new building construction. Exc. at 4. Further, the Complainants argue that Mr. Ahr's testimony regarding Act 129 and 66 Pa. C.S. § 2807(f)(2), *inter alia*: (1) failed to contradict Ms. Bolte's testimony; (2) has "no legal, logical, and/or historical basis;" and (3) is without merit. Exc. at 4-5 (citing Bolte Objections at 4-12; Bolte Testimony at 14-19; Ahr Testimony at 2, 4-5). Moreover, the Complainants argue that based on Mr. Ahr's background, his qualifications and expertise are limited to regulatory compliance matters and he is unqualified to address, *inter alia*: (1) personal health or safety; (2) Ms. Bolte's adverse health effects from wireless signal emissions; (3) the scientific literature presented in this proceeding; and (4) content of a medical nature. Exc. at 6-7, 15-16. Furthermore, the Complainants contend that Mr. Ahr failed to sufficiently address Ms. Bolte's privacy issues and Fourth Amendment rights regarding smart meter transmission exposure. Exc. at 6-7 (citing Bolte Objections at 2; Ahr Testimony at 12-13).

The Complainants also disagree with the ALJ dismissing the Complainants' peer-reviewed journal articles (Complainants Exhibits 2, 3, and 20) as hearsay. Specifically, the Complainants argue that the articles: (1) demonstrate adverse health

effects from wireless devices at non-thermal levels; and (2) “are Supreme Court-admissible” because, under the Daubert Rule, the Company claimed that its smart meters comply with all federally-established safety requirements and standards. Exc. at 8. Further, in protest of the Company’s position that the authors of the studies be present at the hearing, the Complainants argue that “the peer-review process serves as authentication and validation of these articles.” Exc. at 9 (citing Met-Ed Objections at 4-6). Moreover, the Complainants contend that Ms. Bolte’s experience with electromagnetic hypersensitivity (EHS) is sufficient to cite facts sourced from peer-reviewed articles, and therefore, those articles should be given weight. Exc. at 11.

The Complainants also challenge the ALJ’s finding that Ms. Bolte’s letters from her doctor be given little or no weight and concluding that the letters are hearsay. Exc. at 12-14 (citing I.D. at 11; Bolte Objections at 4, 14). Specifically, the Complainants emphasize that Ms. Bolte’s letters from her doctor substantiate her reported symptoms and exposure to electromagnetic radiation. Exc. at 15. Further, the Complainants argue that the Commission lacks the authority to override the judgement of medical professionals and the decision of Ms. Bolte and her doctor about her health risks. Exc. at 16 (citing 66 Pa. C.S. § 1406(f)). Moreover, the Complainants refer to 52 Pa. Code § 1.2(d) to contend that the ALJ’s decision is unreasonable and without justification. Exc. at 20 (citing 52 Pa. Code § 1.2(d)).

The Complainants also disagree with the ALJ’s conclusion that Ms. Bolte’s testimony alone is insufficient to satisfy their burden. Exc. at 16 (citing I.D. at 11). Specifically, the Complainants argue that Ms. Bolte’s testimony clarifies several facts and exhibits overlooked in this proceeding. Exc. at 16. Further, the Complainants allege that the Company and the ALJ continue to deny safe and reliable electricity service to customers like Ms. Bolte, arguing that the recognition of chemical and/or electromagnetic sensitivities by the Architectural and Transportation Barriers Compliance Board (ATBCB) “demonstrates that [ADA] accommodations are possible and important, and

should, in principle and in the spirit of the law, extend to public services that affect the home and neighborhood.” Exc. at 17-18 (citing 66 Pa. C.S. § 1501, under Pennsylvania Rules of Evidence 701, 702). Moreover, the Complainants contend that Ms. Bolte’s testimony and exhibits regarding, *inter alia*, EHS and wireless communication devices was neither countered nor contradicted by the Company’s testimony. Exc. at 18-19 (citing Bolte Objections at 3; Bolte Testimony at 3-5). As such, the Complainants argue that Ms. Bolte’s testimony demonstrates that the Company’s installation of a smart meter on the Complainants’ home will constitute unsafe and unreasonable service, in violation of Section 1501. Exc. at 19 (citing I.D. at 10).

Finally, the Complainants repeat several of their arguments to posit that the ALJ is biased against the Complainants. Exc. at 19-20.

D. Replies to Exceptions

In its Replies to Exceptions, Met-Ed disagrees with the Complainants’ argument that the ALJ erred in concluding that the Complainants failed to carry their burden. Met-Ed agrees with the ALJ’s conclusion that the Company’s witness, Mr. Ahr, presented credible testimony and successfully rebutted the Complainants’ claims. Therefore, the Company avers that the Commission should deny the Complainants’ Exceptions and adopt the ALJ’s Initial Decision. R. Exc. at 1-3 (citing I.D. at 10-12).

Met-Ed asserts that the Complainants’ arguments are based on a flawed interpretation of Act 129 and an improper reliance on proposed or pending legislation. R. Exc. at 3 (citing Met-Ed St. 1-R at 4, 6; 66 Pa. C.S. § 2807(f)(2)). The Company references Act 129 and cites Section 2807(f)(2) to argue that EDCs with 100,000 or more customers, including Met-Ed, “**shall** furnish smart meter technology:” (1) upon the request of a customer that agrees to pay the cost of the smart meter at the time of the request; (2) in new building construction; and (3) in accordance with a depreciation

schedule not to exceed fifteen (15) years. R. Exc. at 3-4 (citing 66 Pa. C.S. § 2807(f)(2)) (emphasis in original). Further, Met-Ed cites four cases to note that the Pennsylvania courts declared that the word “shall” means “must.” Met-Ed continues that, in accordance with Act 129, Met-Ed “must” install smart meters and is not permitted to offer an opt-out.¹⁵ R. Exc. at 4. Moreover, the Company cites the *Smart Meter Implementation Order* to argue that, based on the Commission’s interpretation of Act 129: (1) EDCs must “deploy smart meters system-wide” because of the requirement that smart meters be deployed “in accordance with a depreciation schedule not to exceed 15 years;” and (2) the “deployment of smart meters on a piecemeal or individual basis could involve greater costs than a systemic system-wide deployment.” R. Exc. at 4 (citing *Smart Meter Implementation Order* at 9-14; *Springirth v. National Fuel Gas Distribution Corporation*, 1991 Pa. PUC LEXIS 44, at *1-3, 6, 16-17 (Opinion and Order entered April 12, 1991)).

The Company also cites *Andrew Starr v. PECO Energy Company*, Docket No. C-2015-2516061 (Opinion and Order entered September 1, 2016) (*Starr*) to note that the Commission has “rejected similar claims that the installation of smart meters is not mandatory or that an opt-out is permissible under Act 129.” R. Exc. at 4-5 (citing *Starr* at 11). Further, Met-Ed argues that legislators’ comments and proposals in the Pennsylvania General Assembly to add such an opt out to Act 129 does not constitute law and does not modify the requirements of Act 129 or Commission Orders. R. Exc. at 5 (see Exc. at 1-2). Moreover, the Company disagrees with the Complainants’ assertion that the Commission should modify the *Smart Meter Implementation Order*, arguing that any such modification would deny other EDCs outside of this proceeding their due process rights and interests. R. Exc. at 5-6 (citing Exc. at 3-4).

¹⁵ *Whiteford v. Department of Transportation*, 782 A.2d 1127, 1131 (Pa. Cmwlth. 2001); *C.B. v. J.B.*, 65 A.3d 946, 952 (Pa. Super. 2013); *In re Canvass of Absentee Ballots of November 4, 2003 General Election*, 843 A.2d 1223, 1233 (Pa. 2004); *Griesmer v. Hill*, 36 Pa. Super. 69 (Pa. Super. 1908).

Met-Ed notes that the Company's Commission-approved Smart Meter Deployment Plan (SMDP) states that no opt-out option is available and 100% of its meters must be replaced with smart meters. Therefore, the Company argues that contrary to the Complainants' assertion otherwise, the Complainants seek exception from the installation of a smart meter on their residence and, as such, this constitutes an opt-out from the installation of a smart meter. R. Exc. at 6 (citing Exc. at 6, Met-Ed Exh. JCA-1; Met-Ed St. 1-R at 10-11). Moreover, the Company recounts the procedural history of its SMDP and the resulting *2014 Smart Meter Order* to note that the Commission recognized the benefits of early smart meter deployment. R. Exc. at 6-7 (citing *2014 Smart Meter Order* at 16). Accordingly, Met-Ed contends that the Company must comply with the terms of its SMDP and Act 129. R. Exc. at 8.

Met-Ed also disagrees with the Complainants' assertions that Mr. Ahr is unqualified to address their health or safety allegations. R. Exc. at 8 (citing Exc. at 6-7). The Company counters that Mr. Ahr testified that he: (1) serves as Met-Ed's "subject matter expert" on Act 129 and smart meters; (2) assisted with the development of Met-Ed's SMDP; and (3) is familiar with the pertinent smart meter technology. R. Exc. at 8 (citing Met-Ed St. 1-R at 2, 7-8). Further, Met-Ed noted that Mr. Ahr testimony addressed the Company's compliance with all smart meter safety requirements and standards established by regulatory agencies, including the Federal Communications Commission (FCC), the American National Standards Institute (ANSI), and Underwriters Laboratories (UL). *Id.* (citing Met-Ed St. 1-R at 11-12). Moreover, Met-Ed contends that Mr. Ahr is qualified to testify as to the functionality and safety of Met-Ed's smart meters and his testimony fully rebuts the Complainants' safety concerns. *Id.*

Met-Ed also addresses the Complainants' privacy concerns, stating that the ALJ correctly concluded that Mr. Ahr credibly testified regarding the Company's collection of information via smart meters and the protection of that information. R. Exc. at 9 (citing I.D. at 12). Specifically, Met-Ed notes that the Company's

Commission-approved privacy policy resulted in specific security protections, including encryption, firewalls, password protection and continuous security monitoring. Further, Met-Ed notes that the Company's smart meter network complies with the advanced metering infrastructure guidelines published by the North American Energy Standards Board and the National Institute of Standards and Technology. R. Exc. at 9 (citing Met-Ed St. 1-R at 13). Moreover, Met-Ed addresses the Complainants' assertion that Mr. Ahr's testimony does not address Fourth Amendment privacy concerns, noting that a deprivation of constitutional rights requires that: (1) "the deprivation must be caused by the exercise of some right or privilege created by the state;" and (2) "the party charged with the deprivation must be a person who may fairly said to be a state actor." R. Exc. at 9 (citing Exc. at 7; *Commonwealth v. Corley*, 491 A.2d 829, 832 (Pa. 1985); *Commonwealth v. Demor*, 942 A.2d 898, 899-900 (Pa. Super. 2008); *Western Pennsylvania Socialist Workers 1982 Campaign v. Connecticut General Life Ins. Co.*, 485 A.2d 1, 5-6 (Pa. Super. 1984)). Accordingly, Met-Ed argues that because the Company is not a state actor, it cannot violate the Complainant's constitutional rights with the installation of a new AMI meter. R. Exc. at 9-10 (citing *Jackson v. Metropolitan Edison Company*, 419 U.S. 345, 351-353 (1974)).

Met-Ed also disagrees with the Complainants' argument challenging the ALJ's conclusion that the Complainants failed to substantiate their medical and health concerns because they did not present any expert testimony. R. Exc. at 10 (citing Exc. at 5-6). The Company explains that a lay witness is limited to giving opinion testimony that is rationally based on the witness' own perceptions and any relaxation of the rules of evidence in administrative settings cannot allow lay witnesses to testify regarding technical matters "without personal knowledge or specialized training." R. Exc. at 10 (citing *Gibson v. W.C.A.B.*, 861 A.2d 938, 947 (Pa. 2004); Pa.R.E. 701). Further, Met-Ed argues that lay witness testimony carries evidentiary weight only where the witness has perceived the situation and the opinion is not based on scientific, technical, or specialized knowledge. R. Exc. at 10-11 (citing Pa.R.E. 701). Accordingly, Met-Ed contends that

Ms. Bolte is not qualified to provide expert testimony on any of the issues raised in the Amended Complaint, and her testimony and exhibits are related to issues outside of the scope of her personal knowledge and, therefore, are based on hearsay. R. Exc. at 11 (citing *2006 Kirby*).

The Company also addresses the Complainants' argument that the Commission "second guessed or overrode the decision[s] of Ms. Bolte and her doctor about her health risks." R. Exc. at 11 (citing Exc. at 16). Specifically, Met-Ed notes that because the Complainants did not present the testimony of Ms. Bolte's doctor, the Company did not have an opportunity to evaluate the credibility of any alleged diagnosis or cross-examine her doctor. R. Exc. at 11. Further, the Company notes that contrary to the Complainants' argument otherwise, Met-Ed did not consent to waiving the cross-examination of Ms. Bolte's physician because the physician was never identified or presented as a witness. *Id.* Moreover, Met-Ed notes that the Complainants' assertion that her alleged health and medical conditions are recognized as disabilities under the ADA and warrant evaluation of accommodations is irrelevant and outside of the Commission's jurisdiction. R. Exc. at 11-12 (citing Exc. at 16-18; *Frompovich* at 69).

Met-Ed also disagrees with the Complainants' contention that the ALJ erred by declining to admit the Complainants' Exhibit Nos. 2, 3, and 20. Specifically, the Company argues that each of these Exhibits is an out-of-court statement offered for the truth of the matter asserted and is, therefore, hearsay. Further, Met-Ed argues that the Complainants' assertion that Exhibits 2, 3, and 20 are "peer-reviewed journal articles" does not satisfy any exception to the rule against hearsay. R. Exc. at 12-13 (citing Exc. at 8). Moreover, Met-Ed addresses the Complainants' argument that "[r]equiring a scientist to be present to defend his peer-reviewed, journal published scientific study is without merit." Specifically, Met-Ed explains that because the individuals responsible for the statements relied upon by the Complainant were not offered as a witness, the Company was not afforded an opportunity to cross examine those individuals, a

requirement of due-process. R. Exc. at 13 (citing Met-Ed Objections at 7). Additionally, the Company notes that because the Complainants did not present any expert testimony, the Complainants cannot express an opinion based upon hearsay materials and the Complainants' reference to the Daubert Rule is misplaced. R. Exc. at 13-14 (citing Met-Ed Objections at 3-4, 6-7).

Finally, Met-Ed disagrees with the Complainants' argument that the ALJ exhibited bias against them, countering that none of the Complainants' Exceptions demonstrate that the ALJ erred or otherwise exhibited unfair bias against the Complainants in favor of the Company. R. Exc. at 14 (citing Exc. at 20-21).

E. Disposition

1. Extra-Record Material Not Considered

As a preliminary matter, we note that the Complainants have included and made use of extra-record materials in their Exceptions. We will disregard the extra-record materials – specifically: (1) the Complainant's screen shot of an email message with the subject, "Attached Image;" (2) the website link that the Complainant refers to as the Architectural and Transportation Barriers Compliance Board (ATBCB); and (3) the Complainants' comments regarding the email message and website links¹⁶ – as the use of this extra-record information by the Commission would violate Met-Ed's due process rights. Exc. at 14, 16-17.

It is well-established that parties cannot introduce new evidence at the exceptions stage. *Application of Apollo Gas Co.*, 1994 Pa. PUC Lexis, at *8-14 (Order entered February 10, 1994) (*Apollo Gas*). The email and website links referenced by the

¹⁶ A hyperlink to the extra record materials appears with the Complainant's summarized comments pertaining to those materials. Exc. at 16.

Complainant, as well as the Complainants' commentary regarding that material, are introduced for the first time in their Exceptions and are not in the record. Exc. at 14-17. As noted earlier, the record closed on May 1, 2020. I.D. at 3. The Complainant's extra-record evidence cannot be admitted into the record at this current procedural stage of the case. Therefore, we must reject this extra-record evidence introduced by the Complainant in the Exceptions. *Apollo Gas*.

2. Substance of the Exceptions

At the onset, we will address the Complainants' claim that the ALJ did not sufficiently acknowledge all the Complainants' arguments and objections. We note that the ALJ was aware of the position and arguments put forth by the Complainants; however, it is up to the ALJ to determine whether, and to what extent, further discussion and analysis is warranted. *See*, 52 Pa. Code §§ 5.403, 5.404. Here, it appears that the ALJ did not believe that further consideration of these matters was necessary. Accordingly, we find the Complainants' claim that the ALJ overlooked any of the Complainants' arguments and objections is without merit. Regarding the Complainants' argument in support of their allegation of biased positions and collusion between the Commission and the Company, we are of the opinion that this argument is without merit and must be denied. We note that our decisions in each smart meter installation case are considered on an individual basis established on the facts in the record of each proceeding.

As a general matter, in cases involving a challenge to smart meter installation, the standard burden of proof applicable in complaint proceedings applies. However, case law addressing the specific claims raised in challenges to smart meter installation has also developed. Claims challenging the installation of a smart meter can generally be categorized as claiming one or more of the following: (1) a right to opt out of the smart meter installation; (2) a Section 1501 violation of the provision of reasonable

and safe service based on either alleged adverse health effect or unsafe technology; (3) a constitutional right to refuse the installation; and/or, (4) a right to choose which type of technology to install. *See, generally, Povacz II.*

In the present case, the Complainants allege that smart meter installation will cause unreasonable and adverse effects to their health, and particularly Ms. Bolte's health. The Complainants also allege that the smart meter technology creates an unreasonable risk to the Complainants' safety, security, and privacy. Exc. at 6-7; 17-19. Therefore, each of the Complainants' claims arise, if at all, as a claim under Section 1501 asserting unreasonable or unsafe provision of service. 66 Pa. Code § 1501.

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 999-1000. In that context, the lay opinion of the Complainants 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.¹⁷ 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 1006.¹⁸

In the present case, the ALJ's analysis and disposition turned on the relative weight of the evidence presented by the Complainants 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 ALJ 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 ALJ's well-reasoned analysis in the Initial Decision and the ALJ's conclusion that the Complainants did not meet their burden of proof regarding their claim that the AMI smart meter will

¹⁷ Notably, the Supreme Court concluded that neither fear nor inconclusive scientific research was sufficient to prove that smart meter technology constitutes unsafe service under Section 1501. *Id.* at 1005.

¹⁸ The Supreme Court held that if a 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 allowed by Act 129 and a utility's tariff. However, given that Act 129 mandates smart meter deployment, the Supreme Court clarified that such accommodation may not rise to the level of an opt-out from smart meter installation. *Id.* at 1015.

cause, or contribute to, adverse health effects for the Complainants, and specifically Ms. Bolte, or negatively and/or unreasonably impact the Complainants' safety, security, and privacy. I.D. at 11-12.

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 ALJ properly concluded that the lay opinion of the Complainant does not provide a conclusive, causal connection between the alleged harm to human health and the RFs from the AMI meter. *Id.*

Specifically, we affirm the ALJ's finding in COL No. 8, that the Complainants failed to show that the installation of AMI smart meter constitutes unsafe or unreasonable service under 66 Pa C.S. § 1501. I.D. at 12. Similarly, the Complainants failed to offer any competent evidence of record to support a finding that their health, safety, and privacy will be adversely affected by installation of a smart meter. I.D. at 11. We find nothing in the Complainants' Exception to refute the ALJ's conclusions that the Company's use of a smart meter to measure the electric usage at the Complainants' property will not constitute unsafe or unreasonable service, in violation of Section 1501.

On Exception, the Complainants assert that the ALJ erred in the analysis of the weight of the evidence.¹⁹ Specifically, the Complainants challenge the ALJ's acceptance of and finding of credibility of Met-Ed's witness, Mr. Ahr, as outweighing Ms. Bolte's personal testimony. Exc. at 4-7. However, we find no fault with either the

¹⁹ To the extent that the Complainants claim that their peer-reviewed studies were not admitted into evidence, on May 8, 2020, the Parties' exhibits were moved into the record. Exc. at 8-9; I.D. at 6. In his Initial Decision, the ALJ noted that several of the sources of the Complainants' exhibits, including articles and other forms of material written by others, were given little or no weight because they are hearsay. I.D. at 11.

ALJ's finding of credibility of the Company's witness or the ALJ's conclusion that the Company's witness' testimony outweighed the personal observations and lay testimony of Ms. Bolte. I.D. at 11-12.

The Company presented credible evidence through its expert witness, Mr. Ahr, to support the ALJ's finding that there is no reliable basis to conclude that the new AMI meter will cause, or contribute to, any adverse health effects. Specifically, we agree with the ALJ that based upon the totality of the testimony and evidence presented, the Complainants failed to provide the substantial evidence necessary to establish a prima facie case or otherwise meet their burden. Furthermore, we concur in the ALJ's finding that the Complainants' arguments were contradicted by Mr. Ahr's credible testimony. I.D. at 12.

Therefore, upon review of the record, and based on the foregoing discussion, we find the Complainants' claim fails to establish that the Company violated any provision of the Code, a Commission Regulation or Order, or a Commission-approved tariff. Therefore, for all the foregoing reasons, we shall deny the Complainants' Exceptions.

IV. Conclusion

Based upon our review of the record and the applicable law, we shall deny the Complainants' Exceptions and adopt the Initial Decision, consistent with this Opinion and Order; **THEREFORE,**

IT IS ORDERED:

1. That the Exceptions filed by Charles and Sylvia Bolte on September 1, 2020, are denied, consistent with this Opinion and Order.

2. That the Initial Decision of Administrative Law Judge Benjamin J. Myers, issued on August 12, 2020, at Docket No. C-2019-3011287, is adopted, consistent with this Opinion and Order.

3. That the Formal Complaint of Charles and Sylvia Bolte against Metropolitan Edison Company, filed on July 2, 2019, at Docket No. C-2019-3011287, is dismissed.

4. That this proceeding at Docket No. C-2019-3011287 be marked closed.

BY THE COMMISSION,



Rosemary Chiavetta
Secretary

(SEAL)

ORDER ADOPTED: February 22, 2024

ORDER ENTERED: February 22, 2024