

**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 L. Zerfuss  
John F. Coleman, Jr.

Lydia Rieger and Alan Rieger

C-2018-3005877  
C-2018-3005887  
C-2018-3005889

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 Lydia and Alan Rieger (Complainants) on May 18, 2020, in response to the Initial Decision (Initial Decision or I.D.) of Administrative Law Judge (ALJ) Jeffrey A. Watson, which was served on the Parties on April 27, 2020, in the above-captioned proceeding. Replies to Exceptions were filed by Metropolitan Edison Company (Met-Ed or the Company) on May 27, 2020. The Initial Decision dismissed, with prejudice, the Formal Complaint (Complaint) filed by the Complainants on October 30, 2018. For the reasons discussed below, we shall

deny the Complainants' Exceptions, adopt the Initial Decision of ALJ Watson, and dismiss the Complaint, with prejudice, 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 installed at the Complainants' residence and uses in the ordinary course of business to measure the Complainants' electricity consumption. The Complainants are seeking a directive that an electric distribution company (EDC) be required to replace the smart meter at their residence with an analog meter. The Complainants are seeking to opt-out of the requirement to have a smart meter at the service address for safety, health, and constitutional reasons. Complaint at 2-3.

Met-Ed, an EDC subject to the jurisdiction of the Commission, furnishes, owns and maintains the meters in its distribution system. *See, See* FirstEnergy Pennsylvania Electric Company Tariff Electric Pa. P.U.C. No. 1, Rule 8 at 44.

The Complainants are Met-Ed customers. The smart meter was installed by Met-Ed on July 2, 2018 at the service address prior to the establishment of the Complainants' Account. Answer at 2.

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*).

On July 2, 2018, Met-Ed, in carrying out its obligations under Act 129 and the relevant Commission's Orders implementing Act 129, installed a smart meter at the service address. On September 26, 2018, Ms. Rieger contacted the Company to refuse installation of a smart meter due to health reasons. A Met-Ed representative advised Ms. Rieger that a smart meter had already been installed at the service address and would not be removed. Met-Ed provided dispute rights to Ms. Rieger when she indicated that she was not satisfied with the results of her telephone call. The Formal Complaint was filed on October 30, 2018, which was served on the Company on November 8, 2018. Answer at 5.

An evidentiary hearing was convened on March 4, 2020. The Complainants did not appear at the evidentiary hearing before ALJ Watson. After the hearing concluded, ALJ Watson's Initial Decision dismissed the consolidated Complaints filed in these matters due to the Complainants' failure to appear for the hearing and prosecute the Complaints. As previously noted, the Complainants filed Exceptions to the Initial Decision and Met-Ed filed Replies thereto. This Opinion and Order addresses the Complainants' Exceptions.

## **II. History of the Proceeding**

On October 30, 2018, the Complainants filed three separate Complaints with the Commission against Met-Ed. In the Complaint docketed at C-2018-3005887, Complainants averred they wanted to opt out of smart meter installation at their residence

(service location No. 1). In the Complaints docketed at C-2018-3005889 and C-2018-3005887, the Complainants averred they wanted to opt out of smart meter installation at service location No. 2 and No. 3, respectively. In each of their Complaints, the Complainants averred they wanted to opt out of smart meter installation at the service locations due to health, safety, and constitutional reasons. For relief, the Complainants requested they be allowed to opt out of smart meter installation at the service locations. I.D. at 1; Complaint<sup>1</sup> at 2.

On November 28, 2018, Met-Ed filed an Answer and New Matter in response to each of the three Complaints admitting it provides residential electric service to Complainants at the service locations. Met-Ed averred installation of the smart meters is required by Act 129 of 2008 (Act 129) and Met-Ed's Commission-approved Smart Meter Deployment Plan (SMP), and neither Act 129 nor Met-Ed's SMP permit the Complainants to opt-out of the installation of a smart meter at the service locations. Met-Ed denied the remaining material averments set forth in the Complaints. In its New Matters, Met-Ed argued the Complaints should be dismissed for legal insufficiency, because it is required by Act 129 and its SMP to install smart meters at the service locations and the Commission is unable to grant the relief requested by the Complainants. I.D. at 2.

On November 28, 2018, Met-Ed filed Preliminary Objections in response to each of the three Complaints averring the requested relief – an exemption from the installation of a smart meter - is not legally recoverable and the Complainants failed to

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<sup>1</sup> Although each is for a separate service location, the Complaints at Docket Nos. C-2018-3005877, C-2018-3005887, and C-2018-3005889 indicate that the Complainants “would like to opt out of the smart meter installation on our house because of safety, health and constitutional reasons.” The Complaints request an opt-out from installation of the smart meter as relief. As the Complaints are duplicative, for ease of reference we will refer to the Formal Complaint at Docket No. C-2018-3005877 as the Complaint.

allege that Met-Ed violated any Commission statute, Regulation, Order, or tariff provision. Met-Ed further averred it is required by Act 129 and its SMP to install a smart meter at the service locations, and the Complaints are legally insufficient because they fail to state a claim upon which the Commission can grant relief. Finally, Met-Ed argued a hearing was not in the public interest. *Id.*

On November 28, 2018, Met-Ed filed a motion to consolidate all three Complaints. *Id.*

On December 14, 2018, the Complainants filed responses to the Preliminary Objections. *Id.*

On December 17, 2018, the Complainants filed responses to the New Matters. I.D. at 3.

On December 19, 2018, the Commission issued a Motion Judge Assignment Notice, assigning these matters to ALJ Watson. *Id.*

On January 10, 2019, ALJ Watson issued Interim Orders consolidating the three Complaints at Docket Number C-2018-3005877, denying Met-Ed's Preliminary Objections, and establishing an initial litigation schedule. The Interim Order regarding the initial litigation schedule ordered the parties to, inter alia, provide the names, addresses, and written summaries (witness information) of fact and expert witnesses by March 15, 2019; conclude discovery by April 30, 2019; and file a status report by May 15, 2019. *Id.*

On January 14, 2019, the Commission issued a Call-in Telephonic Prehearing Conference Notice, scheduling a prehearing conference for February 1, 2019, at 9:00 a.m. *Id.*

On January 16, 2019, ALJ Watson issued an Interim Order, directing the parties to, inter alia, appear at the prehearing conference. *Id.*

On January 22, 2019, Met-Ed filed a certificate of service regarding its service of Interrogatories and Requests for Production of Documents upon Complainants (discovery requests). Objections were due by February 1, 2019, and responses were due by February 11, 2019. *Id.*

On January 28, 2019, Complainants filed correspondence requesting an in-person hearing and objecting to Respondent's discovery requests as irrelevant and invasive. The Complainants also explained they did not have enough time to respond to the discovery requests by the deadline and it would be difficult for them to meet the deadlines of the initial litigation schedule. *Id.*

On January 28, 2019, ALJ Watson issued an Interim Order in response to the Complainants' January 28, 2019, correspondence and advised the parties that the February 1, 2019, prehearing conference would convene as scheduled. ALJ Watson also advised that the Complainants' concerns regarding the scheduling of an in-person hearing, as well as revisions to the initial litigation, would be addressed at the conference. I.D. at 3-4.

On February 1, 2019, ALJ Watson convened a prehearing conference. The Complainants appeared pro se, and Tori Giesler, Esq., and Lauren Lepkoski, Esq., appeared on behalf of Met-Ed. The Parties discussed the litigation schedule, as well as the submission of written testimony. Additionally, the Complainants requested an extension of the deadlines to file objections and responses to the discovery requests. Met-Ed agreed to extend the deadline for objections to February 11, 2019, and the deadline for responses to February 25, 2019. I.D. at 4.

On February 13, 2019, the Complainants filed a certificate of service regarding their service of objections and responses to the discovery requests upon Respondent. *Id.*

On February 14, 2019, ALJ Watson issued an Interim Order revising the litigation schedule. ALJ Watson ordered the parties to, inter alia, exchange witness information by March 15, 2019; conclude discovery by April 30, 2019; and file a status report by May 15, 2019. ALJ Watson also ordered the Complainants to submit written direct testimony by May 31, 2019, and Met-Ed to submit written rebuttal testimony by June 28, 2019. *Id.*

On February 26, 2019, the Complainants filed a certificate of service regarding their service of Interrogatories and Requests for Production of Documents (discovery requests) upon Met-Ed. *Id.*

On March 19, 2019, Met-Ed filed a certificate of service regarding its service of discovery responses upon the Complainants. *Id.*

On March 18, 2019, the Complainants filed a certificate of service regarding their service of their witness information upon Met-Ed. *Id.*

On March 18, 2019, the Complainants filed a Motion to Compel Met-Ed to Answer the Interrogatories and Requests for Production of Documents of Lydia and Alan Rieger (Complainants' Motion to Compel), averring, *inter alia*, they had not received any response to the discovery requests propounded upon Met-Ed. I.D. at 5.

On March 20, 2019, Met-Ed filed a response to the Complainants' Motion to Compel, averring, *inter alia*, the statutory deadline for Respondent to submit responses, accounting for the "mailbox rule," was March 20, 2019, which had not yet

passed by the time the Complainants filed their Motion to Compel on March 18, 2019. Met-Ed also argued the Complainants' Motion to Dismiss was moot, since it served its responses upon the Complainants on March 19, 2019. *Id.*

On March 26, 2019, ALJ Watson issued an Interim Order, directing the parties to submit a status report by May 15, 2019. ALJ Watson ordered the parties to, *inter alia*, identify available dates for the scheduling of an evidentiary hearing and confer and determine whether the hearing should be scheduled as an in-person or telephonic hearing. *Id.*

On March 26, 2019, ALJ Watson issued an Interim Order, denying the Complainants' Motion to Compel as being premature and moot. *Id.* (footnote omitted).

On May 20, 2019, Met-Ed filed a status report dated May 15, 2019. Met-Ed advised, *inter alia*, the parties had completed discovery and exchanged witness information, however, the Complainants had reserved notification of any expert witnesses. *Id.*

On August 21, 2019, the Complainants filed a status report dated August 20, 2019, advising, *inter alia*, they no longer owned the properties located at service locations No. 2 and No. 3. The ALJ noted that the Complainants also detailed various arguments related to their claims and argued, “[W]e have no reason to believe that a PUC appointed ALJ would be empowered to correct the overreach of the PA PUC. It is clear that this Formal Complaint process cannot resolve the primary issues here.” (emphasis omitted). The Complainants also advised they had the meter socket for service location No. 1 relocated away from their residence. The ALJ provided that the Complainants wrote,

[W]e intend to withdraw our formal Complaint without satisfaction. We choose this not because we agree that the PUC could or should force PA customers to use the advanced metering technology. It is our best use of our resources to reduce the potential impact of the device, we cannot turn off which is designed to do far more than just measure our electricity use.... Our dispute is with the way the PA PUC has ignored the need for accommodation, ignored the individual natural rights of consumers and inappropriately imposed mandate, which was not intended by the legislature.

I.D. at 5-6.

On August 27, 2019, Met-Ed filed a status report dated August 20, 2019, advising, *inter alia*, it had not been successful in reaching the Complainants to discuss the evidentiary hearing, the Complainants did not submit any written direct testimony, and it was available for a telephonic evidentiary hearing in the month of October 2019.

I.D. at 6.

On December 19, 2019, ALJ Watson issued an Interim Order, directing the Parties to file a joint letter or status report advising of mutually agreeable dates in February or March 2020 to schedule a hearing. *Id.*

On January 6, 2020, the Complainants filed a status report dated December 30, 2019, arguing, *inter alia*, Act 129 permitted them to opt out of smart meter installation, and, “[A]ll Administrative Law Judges have an inherent conflict of interest, requiring them to support the PUC or risk termination of employment.” They advised, “We will NOT be available to attend a hearing with the ALJ as no PA ALJ can provide an unbiased decision. Neither can the PUC be ‘Self Policing’ in good faith.” (emphasis in original). *Id.*

On January 6, 2020, Met-Ed filed a status report dated December 30, 2019, requesting, *inter alia*, a telephone hearing be scheduled for dates in February or March 2020. *Id.*

On January 8, 2020, the Commission issued a Call-out Telephone Notice, scheduling a hearing for March 4, 2020, at 10:00 a.m. The notice advised the parties that the presiding officer would contact the parties on the day of the hearing and listed the phone numbers on file for the parties. The Notice cautioned, “Attention: You may lose the case if you do not take part in this hearing and present facts on the issues raised.” (emphasis in original). I.D. at 6-7.

The January 24, 2020 Notice was sent by regular first-class mail to the address the Complainants listed for themselves on the Complaints, and it was not returned as undeliverable. I.D. at 7.

The ALJ convened a telephonic hearing on March 4, 2020, at approximately 10:00 a.m. Met-Ed’s counsel and witnesses were available when the ALJ called them. There was no answer when the ALJ called the number listed for the Complainants in the January 24, 2020 Notice. *Id.*

Met-Ed did not offer any testimony or evidence, but rather made a Motion to Dismiss due to the Complainants’ failure to appear at the hearing. The ALJ informed counsel that he would issue an Initial Decision granting the Motion to Dismiss. The ALJ adjourned the hearing, and the hearing record closed. *Id.*

On April 27, 2020, the Commission served ALJ Watson’s Initial Decision in *Lydia and Alan Rieger v. Metropolitan Edison Company*, Docket No. C-2018-3005877, C-2018-3005887, and C-2018-3005889.

As noted above, on May 18, 2020, the Complainants filed Exceptions to the Initial Decision. On May 27, 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 Complainants of the lifting of the stay and their procedural rights and obligations under the Commission's regulations.

### **III. Discussion**

#### **A. Legal Standards**

##### **1. Due Process**

As an administrative agency of the Commonwealth, the Commission is required to provide due process to the parties appearing before it. *Schneider v. Pa. PUC*, 479 A.2d 10, 15 (Pa. Cmwlth. 1984) (*Schneider*), citing *Fusaro v. Pa. PUC*, 382 A.2d 794 (Pa. Cmwlth. 1978). Due process is satisfied when the parties are afforded notice and the opportunity to appear and be heard. *Schneider*, 479 A.2d at 15

(Pa. Cmwlth. 1984), citing *Township of Middleton v. The Institute District of the County of Delaware*, 293 A.2d 885 (Pa. Cmwlth. 1972), *aff'd* 450 Pa. 282, 299 A.2d 599 (Pa. Cmwlth. 1973). The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. *Montefiore Hospital Ass'n of Western Pennsylvania v. Pa. PUC*, 421 A.2d 481, 484 (Pa. Cmwlth. 1980).

The Commission is required to fix the time and place of a hearing in a complaint proceeding and to serve notice thereof upon the parties in interest. *See*, 66 Pa. C.S. § 703(a)-(b). Service on interested persons is sufficient to provide notice. 52 Pa. Code § 5.201(a). Notice mailed to a party's last known address and not returned by the post office is presumed to have been received. *See, Berkowitz v. Mayflower Securities, Inc.*, 455 Pa. 531, 317 A.2d 584 (Pa. 1974) (*Mayflower*); *Chartiers Industrial and Commercial Development Authority v. Allegheny County Board of Property Assessment Appeals and Review*, 645 A.2d 944, 946 (Pa. Cmwlth. 1994), *appeal denied*, 539 Pa. 696, 653 A.2d 1234 (1994); *Geary v. Verizon Pennsylvania Inc.*, Docket No. C-2009-2118625 (Opinion and Order entered September 16, 2010) (*Geary*).

Once a hearing is scheduled and duly notified by the Commission, it is the responsibility of the parties to appear and participate in the hearing. *Mumma v. PPL Electric Utilities Corporation*, Docket No. C-00014869 (Opinion and Order entered January 24, 2002) (*Mumma*); *Sentner v. Bell Tel. Co. of PA*, Docket No. F-00161106 (Opinion and Order entered October 25, 1993) (*Sentner*).

A party to a proceeding has the right to request a continuance of the hearing, which may be considered and granted by the presiding officer "only for good cause shown." *See*, 52 Pa. Code § 1.15(b). The party making the request must file a motion at least five days prior to the hearing date stating the facts on which the request is made, except that during a hearing, an oral request for hearing continuance may be made before the presiding officer in the hearing room. 52 Pa. Code § 1.15(b).

If a party fails to appear at a scheduled and duly notified hearing, the party will be deemed to have waived the opportunity to participate in a hearing in the matter. 66 Pa. C.S. § 332(f); 52 Pa. Code § 5.245(a)-(b). This result is not applied to the party, however, if the presiding officer determines that the party's failure to appear was "unavoidable" and the interests of the other party (or parties) and the public will not be "prejudiced" by permitting the reopening or further examination. 66 Pa. C.S. § 332(f); 52 Pa. Code § 5.245(a)-(b). Also, this result may not be applied if the presiding officer or Commission determines that the complainant demonstrated a good faith attempt to attend the hearing. *See, e.g., Yomari Then v. Philadelphia Gas Works*, Docket No. F-2012-2318264 (Final Order entered June 13, 2013) (*Yomari Then*); *see also, Windell C. Wiggins v. PECO Energy Company*, Docket No. C-2010-2190335 (Opinion and Order entered October 27, 2011) (*Wiggins*).

The public interest is prejudiced by the wasteful use of the agency's and the respondent's time and resources in addressing a complaint. *See, Jefferson v. UGI Utilities, Inc.*, Docket No. Z-00269892 (Opinion and Order entered December 26, 1995) (*Jefferson*), *see also, e.g., Charles Nichols III v. Bell-Atlantic-Pennsylvania*, Docket No. C-00956667 (Opinion and Order entered August 4, 1995) (*Nichols III*).

## 2. **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 (Final Order issued August 24, 2015; 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, Burtleson 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, Burtleson*, 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<sup>2</sup> 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*).

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<sup>2</sup> 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. **Burden of Proof Applied to Section 1501<sup>3</sup> 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 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<sup>4</sup> and facilities” and to make

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<sup>3</sup> 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*).

<sup>4</sup> 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

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, but also confirmed that challenges to smart meter installation, other than an “opt-out”, may arise under Section 1501<sup>5</sup> 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

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the Commission and the courts. *Country Place Waste Treatment Co., Inc. v. Pa. PUC*, 654 A.2d 72 (Pa. Cmwlth. 1995).

<sup>5</sup> 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*).

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. Util. Comm'n*, . . . 134 Pa. Commw. 218, 578 A.2d 600 ([Pa. Cmwth.] 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).<sup>6</sup>

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 by a preponderance of the evidence a “conclusive causal connection” between the harm to human health and the radio frequency fields (RFs)<sup>7</sup> from the AMI meter.<sup>8</sup>

#### 4. 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 conclusion that the assertion of a constitutional claim for exemption from smart meter installation, predicated on a

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<sup>6</sup> 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*).

<sup>7</sup> RF is an abbreviation for radio frequency and is also used here to denote RF fields or RF signals.

<sup>8</sup> 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).

violation of “bodily integrity,” was unfounded in the circumstances. 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. As the Supreme Court denied allocatur as to any constitutional claims, the Commonwealth Court’s holding stands.

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).<sup>9</sup>

## **B. ALJ's Initial Decision**

In the Initial Decision, ALJ Watson made thirty-two Findings of Fact (FOF) and reached three Conclusions of Law (COL). *See* I.D. at 7-10, 14. 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.

The ALJ noted that the Commission sent the Hearing Notices to the Complainants by regular first-class mail to the mailing address stated on the Complaint, and such notices were not returned to sender as undeliverable. The ALJ recognized that under such circumstances, the presumption is that the Hearing Notices had been received by the Complainant. I.D. at 11 (citing *Berkowitz v. Mayflower Securities, Inc.*, 317 A.2d 584 (Pa. 1974); *Meierdierck v. Miller*, 394 Pa. 484 147 A.2d 406 (1959); *Samaras v. Hartwick*, 698 A.2d 71 (Pa. Super. 1997); *Judge v. Celina Mutual Insurance Co.*, 303 Pa. Super. 221, 449 A.2d 658 (1982)).

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<sup>9</sup> The Complainants' Exceptions consist of nine pages of discussion regarding regulations and averments to justify the Complainants' request for an opt-out of the smart meter installation. The Exceptions are not numbered and do not cite to findings or fact, conclusions of law or relevant pages of the decision. The Complainants' Exceptions include extensive extra-record materials. Pursuant to our Regulations, each exception must be numbered and identify the finding of fact or conclusion of law to which exception is taken and cite relevant pages of the decision. 52 Pa. Code § 5.533(b). We will accept the Exceptions, as filed, pursuant to 52 Pa. Code § 1.2(a) because the Complainants are not represented by legal counsel in this proceeding and 52 Pa. Code § 1.2(a) requires a liberal construction of our Regulations to secure the just, speedy, and inexpensive determination of every action or proceeding to which they are applicable. However, we will not consider any extra-record materials.

The ALJ stated that the January 8, 2020 Notice advised the parties that they must be available when called for the hearing and they may lose their case if they did not participate. I.D. at 11. The ALJ provided that he called the parties at the scheduled date and time for the hearing. Met-Ed’s counsel and witnesses were available when the ALJ called them. The Complainants did not answer the phone when the ALJ called them. *Id.*

The ALJ reasoned that the Complainants had an opportunity to appear and be heard in this proceeding, but voluntarily chose not to do so. Therefore, the ALJ concluded that the due process rights of the Complainants have been fully protected. I.D. at 11 (citing *Sentner v. Bell Telephone Co. of Pa.*, Docket No. F-00161101 (Opinion and Order entered October 25, 1993); 52 Pa. Code § 5.245(a)).

The ALJ noted that the Complainants filed status reports dated August 20, 2019 and December 30, 2019. The ALJ explained that in their August 20, 2019 status report, the Complainants stated that they had the meter socket moved at service location No. 1 away from the residence and they no longer owned the properties at service location Nos. 2 and 3. The ALJ noted that the Complainants wrote, “[W]e intend to withdraw our Formal Complaint without satisfaction.” The ALJ noted that, in their December 30, 2019 status report, the Complainants stated “We will not be available to attend a hearing with the ALJ as no PA ALJ can provide an unbiased decision. Neither can the PUC be ‘Self Policing’ in good faith.” (emphasis in original).

While the Complainants indicated that they intended to withdraw their Complaint, the ALJ opined that it is unclear whether they intended their August 20, 2019 status report to be interpreted as a petition for leave to withdraw. The ALJ provided that the Complainants’ filings dated August 20, 2019 and December 30, 2019 were styled as “status reports,” not “petitions for leave to withdraw a Complaint,” and did not contain notices to plead. Further, the ALJ explained that the record does not show that Met-Ed was aware that the Complainants’ status reports could be interpreted to be petitions for

leave to withdraw. The ALJ reasoned that to interpret the status reports in question as petitions to withdraw would violate Met-Ed's due process rights.<sup>10</sup>

The ALJ noted that the presiding officer or the Commission can determine whether to permit the withdrawal. The ALJ reasoned that even if the status reports were intended to be petitions to withdraw, he did not rule on them as such and therefore the Complainants had an obligation to appear at the hearing on March 4, 2020. I.D. at 13 (citing 52 Pa. Code § 5.94).

The ALJ ruled that by not appearing for the scheduled hearing, the Complainants failed to carry their burden of proof. I.D. at 14. As such, the ALJ dismissed the Complaint with prejudice. I.D. at 14 (citing *Jefferson; El-Ayazra v. West Penn Power Company*, Docket No. F-2015-2509292 (Opinion and Order entered June 30, 2016); 52 Pa. Code § 5.245).

## **C. Exceptions, Replies and Disposition**

### **1. Exceptions**

The Complainants' Exceptions consist of numerous paragraphs attempting to introduce factual evidence or legal issues to prove their case. This extra-record information will not be addressed here at the Exceptions stage where the Complainants' failed to proffer it at the evidentiary hearing, as discussed below in the Disposition section. Exc. at 1-9.

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<sup>10</sup> The ALJ noted a similar case, *Hubel v. Duquesne Light Company*, Docket No. C-2018-3002620, (Opinion and Order entered March 12, 2020) (*Hubel*) but distinguished this case where it is unclear if the Complainants had meant to withdraw their Complaint, where it was clearer in *Hubel* that the Complaint was withdrawn.

## 2. Replies

Met-Ed provides that the ALJ properly determined that the Complainants failed to carry their burden of proof. Met-Ed contends that despite having notice of the hearing, the Complainants did not participate in the hearing, and they did not present any evidence in support of their Complaints.

According to Met-Ed, the Complainants had ample notice and opportunity to participate in the evidentiary hearing and chose not to do so. Met-Ed provides that on December 19, 2019, the ALJ issued an Interim Order directing the parties to file a joint letter or status report advising of mutually agreeable dates in February or March 2020 to schedule a hearing. Met-Ed notes that on January 6, 2020, the Complainants filed a status report which stated, “All Administrative Law Judges have an inherent conflict of interest, requiring them to support the PUC or risk termination of employment.” Met-Ed provides that the Complainants also state, “We will NOT be available to attend a hearing with the ALJ as no PA ALJ can provide an unbiased decision. Neither can the PUC be ‘Self Policing’ in good faith.” (emphasis in original). Met-Ed states that on the same day, it filed a status report requesting that a hearing be scheduled for dates in February or March 2020. Replies at 3.

Met-Ed provides that its Counsel was available to participate in the hearing when the ALJ called on March 4, 2020. When the Complainants failed to answer the ALJ’s call, Met-Ed moved to dismiss the Complaints for the Complainants’ failure to participate in the hearing and prosecute the Complaints. Replies at 3-4.

Met-Ed notes that in their Exceptions, the Complainants offered no reason for their failure to appear at the hearing. Met-Ed contends that the Commission’s regulations address circumstances when a party fails to appear in a proceeding. Replies at 4 (citing 52 Pa Code § 5.245; 52. Pa. Code § 5.371).

Met-Ed also provides replies to the Complainants' extra-record materials regarding the Complainants' argument for an opt-out of smart meter installation and the Complainants' argument that a smart meter would violate the Complainants' constitutional rights.<sup>11</sup>

### **3. Disposition**

At the outset, we note that we will not address the extra-record materials included in the Exceptions. To the extent the Complainants attempted to provide evidence through the Exceptions, it is rejected. 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 regarding numerous topics referenced by the Complainants is introduced for the first time in their Exceptions and is not in the record. Therefore, we must reject this extra-record evidence introduced by the Complainants in Exceptions. *Apollo Gas*.

Regarding the Complainants' assertion that they would like to opt-out of the installation of a smart meter, we must disagree. 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.

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<sup>11</sup> As noted *infra*, we will not address the Complainants' extra-record materials found in their Exceptions. We will also not include Met-Ed's replies to the Complainants' extra-record arguments. We will address the request for an opt-out and the constitutional arguments of the Complainants generally in the Disposition *infra*.

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.

To the extent the Complainants' Exceptions raise extra record material to assert a violation of constitutional rights, we shall disregard such materials. Accordingly, to the extent the Complainants assert a constitutional right to refuse smart meter installation, we shall deny the Complainants' Exceptions without further discussion.

Upon review, we find that the Complainants' due process rights were preserved throughout the proceeding. We note that it is within the sound discretion of the ALJ to decide whether the Complainant's failure to appear was unavoidable and whether permitting a hearing would prejudice the public interest or the interest of the other party. *See*, 66 Pa. C.S. § 332(f); *see also*, 52 Pa. Code § 5.245(a)-(b). From an administrative due process standpoint, the question is whether the Complainants' failure to appear should be deemed the Complainant's waiver of the opportunity to participate in a hearing

in this Complaint proceeding, pursuant to 66 Pa. C.S. § 332(f) and 52 Pa. Code § 5.245(a)-(b).

We note that the Hearing Notice had been sent to the Complainants' mailing address listed on the Complaint and was not returned by the post office as undeliverable so that we may presume that the notice was received by the Complainants. No evidence was submitted in the record or the Complainants' Exceptions to overcome this presumption. Therefore, we agree with the ALJ that the Complainants received sufficient notice of the hearing.

When the ALJ called the Complainants' telephone number listed in the Complaint, the Complainants did not answer and were not available to participate by telephone at the scheduled hearing time. In their Exceptions, the Complainants did not present any reason why they failed to make themselves available for the hearing via telephone. Thus, the Complainants have presented no reason for our consideration to conclude that the Complainants' absence via telephone was unavoidable. Thus, we are left to conclude that the Complainants chose not to appear at the hearing by telephone. Therefore, we agree with the ALJ that the Complainants waived the opportunity to participate in the hearing by failing to appear.

Accordingly, for all the forgoing reasons, we shall affirm the Initial Decision and dismiss the Complaint, with prejudice. A dismissal "with prejudice" means that the Complainants are barred from filing another complaint with the Commission raising the same issues or claims as raised in the dismissed complaint.

#### **IV. Conclusion**

In light of the above discussion, we shall: (1) deny the Complainants' 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 Lydia and Alan Rieger on May 18, 2020, to the Initial Decision of Administrative Law Judge Jeffrey A. Watson issued on April 6, 2020, at Docket Nos. C-2018-3005887, C-2018-3005889, and C-2018-3005877, are denied, consistent with this Opinion and Order.

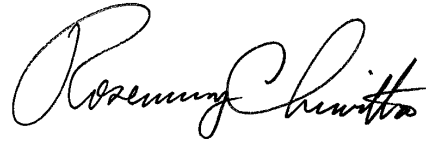
2. That the Initial Decision of Administrative Law Judge Jeffrey A. Watson, issued on April 6, 2020, at Docket Nos. C-2018-3005887, C-2018-3005889, and C-2018-3005877, is adopted, consistent with this Opinion and Order.

3. That, pursuant to 66 Pa. C.S. § 332(f) and 52 Pa. Code § 5.245, the Complainants, Lydia and Alan Rieger, are deemed to have waived their opportunity to participate in a hearing regarding their Formal Complaint filed on October 30, 2018, due to their failure to appear at the March 4, 2020 hearing held in this proceeding.

4. That, the Formal Complaint of Lydia and Alan Rieger, filed on October 30, 2018, at this docket, is dismissed, with prejudice, barring the Complainants from filing another formal complaint with the Public Utility Commission raising the same issues or claims as raised in the Formal Complaint filed on October 30, 2018, at Docket Nos. C-2018-3005887, C-2018-3005889, and C-2018-3005877.

5. That the Secretary's Bureau shall mark Docket Nos. C-2018-3005887, C-2018-3005889, and C-2018-3005877 closed.

**BY THE COMMISSION,**

A handwritten signature in black ink, appearing to read "Rosemary Chiavetta". The signature is written in a cursive, flowing style.

Rosemary Chiavetta  
Secretary

(SEAL)

ORDER ADOPTED: February 22, 2024

ORDER ENTERED: February 22, 2024