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February 22, 2024

VIA ELECTRONIC FILING

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

Re: Judith Hendin v. Metropolitan Edison Company
Docket No. C-2018-3003324

Dear Secretary Chiavetta:

Enclosed please find the Answer of FirstEnergy Pennsylvania Electric Company on behalf of its Met-Ed Rate District to the Petition for Reconsideration of Judith Hendin. This document has been served on the Complainant as shown in the Certificate of Service.

Please contact me if you have any questions regarding this matter.

Very truly yours,

Tori L. Giesler

TLG/krak

Enclosures

c: As Per Certificate of Service

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Judith D. Hendin,	:	
	:	
Complainant,	:	
	:	
v.	:	Docket No. C-2018-3003324
	:	
Metropolitan Edison Company,	:	
	:	
Respondent.	:	

ANSWER OF FIRSTENERGY PENNSSYLVANIA ELECTRIC COMPANY TO THE PETITION FOR RECONSIDERATION OF JUDITH D. HENDIN

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Date: February 22, 2024

Attorney for FirstEnergy Pennsylvania Electric Company, Met-Ed Rate District

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FirstEnergy Pennsylvania Electric Company on behalf of Met-Ed Rate District[1] ("Company"), pursuant to 52 Pa. Code §§ 5.61 and 5.572, hereby respectfully submits this Answer to the Petition for Reconsideration filed by Judith D. Hendin ("Complainant") on February 12, 2024 ("Petition"). In her Petition, the Complainant requests reconsideration because, among other things, she allegedly has new evidence and arguments not considered by the Pennsylvania Public Utility Commission ("Commission") in its January 26, 2024 Opinion and Order dismissing her Complaint ("January 26, 2024 Order").

As explained herein, the Complainant's request for reconsideration is without merit. The Complainant's Petition is largely based off of a series of flawed legal arguments and extra-record evidence. Namely, the Complainant argues that Federal Communications Guidelines have been "questioned in federal court," that utilities like the Company are required to warn and protect the public from danger, that the Complainant incurred harm as a result of the installation of a smart meter,[2] that electromagnetic sensitivity is recognized and protected and protected under disability, and that installation of the smart meter at the Service Address would constitute "cruel and unusual punishment." Moreover, much of the Complainant's arguments in the Petition completely disregard the Pennsylvania Supreme Court's holding in *Povacz II*.[3] Specifically, in *Povacz II*, the Court held that: (1) Act 129 of 2008 ("Act 129") mandates the systemwide installation of smart meters; (2) the PUC applied the correct burden of proof standard in the smart meter complaint cases arising under Section 1501 of the Public Utility Code; (3) an electric distribution company

[1] On January 1, 2024, FirstEnergy Corp.'s Pennsylvania operating companies (i.e., Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company, and West Penn Power Company) merged into FirstEnergy Pennsylvania Electric Company. Due to the merger transaction, the affected operating companies' tariffs were consolidated into a single tariff, with each former operating company's rates becoming its own rate district. As such, the customers of the former Metropolitan Edison Company have their own separate and distinct rate district under FirstEnergy Pennsylvania Electric Company's tariff.

[2] The Company notes that it has not installed a smart meter at the Complainant's Service Address at 402 Woodland Drive, Easton, PA 18042 ("Service Address").

[3] *See Povacz v. Pa. PUC*, 280 A.3d 975 (Pa. 2022) ("*Povacz II*").

("EDC") cannot be required to provide an accommodation to a customer absent a Section 1501 violation; and (4) even if a smart meter complainant meets their burden of proof, the complainant is only "entitled to an accommodation to the extent allowed by Act 129 and a utility's tariff."[4]

Furthermore, the Complainant attempts to dispute the Evidentiary findings and standards made and used throughout this proceeding and attempts to shift the burden of proof to the Company, which is legally unsupported and otherwise unsound, and argues that that the Pennsylvania Public Utility Commission ("Commission") may not have jurisdiction over the Complaint for a variety of reasons.

The Complainant wholly failed to meet that burden of proof in this proceeding, and none of the arguments and evidence presented in her Petition warrant disturbing that conclusion. Therefore, the Petition for Reconsideration should be denied.

I. INTRODUCTION AND BACKGROUND

On or about June 29, 2018, the Complainant filed the above-captioned formal Complaint against the Company. The Complaint was electronically served on the Company on July 11, 2018.

On July 31, 2018, the Company filed its Answer and New Matter, along with a Preliminary Objection to the Complaint.

On August 21, 2018, the Complainant filed a Request for Extension of Time to File Reply to Answer New Matter and Preliminary Objection. The Complainant the filed a Letter Addendum to her Request for Extension of Time on August 22, 2018.

On August 23, 2018, Administrative Law Judge ("ALJ") Jeffrey A. Watson was assigned as the Presiding Officer in the above-captioned proceeding.

[4] *See id.*, at 1014.

On August 24, 2018, the ALJ issued an Interim Order granting the Complainant's request for an extension of time to file responses to the Company's New Matter and Preliminary Objection until September 12, 2018.

On September 14, 2018, the Company served the Complainant with interrogatories and document requests.

On October 2, 2018, the Complainant filed a letter requesting a continuance of the proceeding until December 15, 2018.

Also on October 2, 2018, the Complainant filed a letter signaling that she provided responses to the Company's September 14, 2018 discovery requests.

On October 18, 2018, the ALJ issued an Interim Order denying the Company's Preliminary Objection. That same day, the ALJ issued an Interim Order establishing an initial litigation schedule.

On October 25, 2018, the ALJ issued a letter returning certain documents to the Complainant.

On October 29, 2018, the Complainant filed a response to the Company's Preliminary Objection.

On November 1, 2018, Joanna Waldron entered a Notice of Appearance on behalf of the Complainant.

On January 17, 2019, the Complainant served interrogatories and documents requests ("Complainant's Set I") on the Company.

On January 18, 2019, the Company filed a letter identifying the witnesses it intended to offer.

On January 29, 2019, the Complainant filed a letter identifying the fact and expert witnesses she intended to call.

On February 11, 2019, the Company served its responses to Complainant's Set I.

On May 9, 2019, the Complainant filed a letter providing the ALJ with a status update.

On May 10, 2019, the Company filed a letter providing the ALJ with a status update.

On May 23, 2019, the ALJ issued an Interim Order Requiring Proposed Prehearing Conference and Hearing Dates, among other things.

On July 16, 2019, both parties submitted a second status update.

On July 26, 2019, the Complainant filed a Motion to Extend the Schedule Pending Prehearing Conference.

On August 13, 2019, the ALJ issued an Interim Order granting the Complainant's Motion to Extend.

On August 21, 2019, the Company filed a Motion in Limine which requested that the ALJ: (1) exclude evidence; (2) preclude the Complainant from presenting the expert testimony of Dr. David O. Carpenter; and (3) preclude the Complainant from presenting testimony related to her Formal Complaint. Therein, the Company averred that the Complainant failed to serve her own testimony or that of her purported expert.

On August 29, 2019, the Complainant filed an additional status report.

On September 3, 2019, the Company filed an additional status report.

On September 5, 2019, the Complainant filed a letter indicating service of her witness statement upon the Company had been made.

Also on September 5, 2019, a Hearing Notice was issued, scheduling evidentiary hearings before ALJ Joel H. Cheskis (the "Presiding Officer") for December 19 and 20, 2019.

On September 10, 2019, the Complainant filed an Answer to the Company's Motion in Limine.

On September 13, 2019, the Presiding Officer issued a Prehearing Order.

On September 19, 2019, the Complainant served an Amended Witness Statement on behalf of the Judith Hendin (Confidential and Public versions).

On October 21, 2019, the Company filed written rebuttal testimony of Dr. Christopher C. Davis, Ph.D., Dr. Mark Israel, M.D., and John Ahr on behalf of the Company.

On December 11, 2019, Attorney Curtis Renner filed an Entry of Appearance and Motion for Admission Pro Hac Vice on behalf of the Company.

Evidentiary Hearings were held as scheduled on December 19 and 20, 2020. An additional day of hearings was scheduled for January 24, 2020.

On January 17, 2020, the Company served copies of an additional exhibit to John Ahr's Direct Testimony. Also on January 17, 220, the Company resubmitted Confidential and Non-Confidential versions of the testimony and exhibits of Dr. Mark Israel, M.D.

On January 20, 2020, the Complainant resubmitted Confidential and Non-Confidential versions of the Complainant's Amended Witness Statement, Plaintiff's Supplement, and the witness Statement of Dr. Kracht.

On January 21, 2020, the Complainant filed a Motion for Extension of Time and Motion for Leave to file Surrebuttal Testimony.

On January 24, 2020, the additional day of evidentiary hearings was held.

On February 10, 2020, Met-Ed filed its Answer to the Complainant's Motion for Extension of Time and Motion for Leave to file Surrebuttal Testimony.

On February 14, 2020, the Complainant submitted a Motion for Admission of Late-Filed Exhibits.

On February 19, 2020, the Presiding Office issued an Order Denying Motion for Extension of Time and Leave to File Surrebuttal Testimony. The Presiding Officer also issued a Briefing Order.

On March 9, 2020, the Company filed an objection to the Motion for Admission of Late-Filed Exhibits

On March 16, 2020, the Company filed its Main Brief.

On March 20, 2020, the Complainant filed her Main Brief.

On April 6, 2020, the Company filed a Motion to Strike certain portions of the Complainant's Main Brief.

On June 18, 2020, the Presiding Officer issued an Order Granting in Part and Denying in Part Motion for Admission of Late-Filed Exhibits and Motion to Strike.

On August 7, 2020, the Presiding Officer issued his Initial Decision ("ID") denying the Complaint, among other things.

On August 10, 2020, the Complainant filed three "BioInitiative reports."

On August 27, 2020, the Company filed a letter indicating that it would not be filing Exceptions to the ID.

On August 27, 2020, the Complainant filed Exceptions to the ID.

On September 8, 2020, the Company filed Replies to the Complainant's Exceptions.

On September 18, 2020, the Complainant filed a "Letter of Concern."

On November 4, 2020, the Commission issued an Order at Docket No. M-2009-3092655, staying all smart meter related Formal Complaint proceedings, like the instant Complaint. This

proceeding was stayed pending the Pennsylvania Supreme Court's disposition of the appeals concerning the Commonwealth Court's decision in *Povacz II*.

On August 16, 2022, the Pennsylvania Supreme Court issued its Opinion affirming in part and reversing in part the Commonwealth Court's decision. Specifically, in *Povacz II*, the Court held that: (1) Act 129 of 2008 ("Act 129") mandates the systemwide installation of smart meters; (2) the PUC applied the correct burden of proof standard in the smart meter complaint cases arising under Section 1501 of the Public Utility Code; (3) an electric distribution company ("EDC") cannot be required to provide an accommodation to a customer absent a Section 1501 violation; and (4) even if a smart meter complainant meets their burden of proof, the complainant is only "entitled to an accommodation to the extent allowed by Act 129 and a utility's tariff."

On November 9, 2023, the Commission issued an Order at Docket No. M-2009-3092655, lifting the stay in certain smart meter related Formal Complaint proceedings, like the instant Complaint.

On January 18, 2024, the Commission issued an Opinion an Order, denying the Complainant's Exceptions, adopting the ID consistent with the Opinion and Order, and dismissing the Complaint.

Also on January 18, 2024, Vice Chair Kimberly Barrow made a Motion, moving that the Complainant's Exceptions be denied and that the Commission's Office of Special Assistants prepare an order consistent with her Motion.

On January 21, 2024, the Complainant filed a Petition to Reopen the Proceeding for the Purpose of Submitting Additional Evidence.

On January 26, 2024, the Commission Entered the January 18, 2024 Opinion and Order.

On January 28, 2024, the Complainant filed a "Notice of Filing Petition for Reconsideration." Also on January 28, 2024, the Complainant filed an "Affirmation that Current Electric Meter Remains in Place During Ongoing Legal Proceedings."

On January 31, 2024, the Complainant filed an Addendum to Petition to Reopen the Proceeding for the Purpose of Submitting Additional Evidence.

On February 12, 2024, the Complainant filed a Motion for Reconsideration.

Pursuant to the Complainant's February 12, 2024 Motion for Reconsideration, the Company is filing the instant Answer to the Petition for Reconsideration.

For the reasons explained below, the Complainant's Petition should be denied.

II. LEGAL STANDARDS

The Commission's standard for reviewing petitions for reconsideration following final orders is set forth in *Duick v. Pennsylvania Gas and Water Co.*, 56 Pa. P.U.C. 553, 559, 1982 Pa. PUC LEXIS 4 (Opinion and Order Upon Reconsideration dated Dec. 17, 1982) (emphasis added):

> A petition for rehearing, under the provisions of 66 Pa C.S. § 703(f), properly must seek the reopening of the record for the introduction of additional evidence of some sort. As grounds therefore it must allege newly discovered evidence, not discoverable though the exercise of due diligence prior to the close of the record. *Public Utility Commission v Reading Co*. (1975) 21 Pa Cmwlth 334, 338, 345 A2d 311; *Mobilfone v Pennsylvania Pub. Utility Commission* (1975) 24 Pa Cmwlth 243, 355 A2d 611; *Abramson v Pennsylvania Pub. Utility Commission* (1980) 489 Pa 267, 414 A2d 60.
>
> …
>
> A petition for reconsideration, under the provisions of 66 Pa.C.S. § 703(g), may properly raise any matters designed to convince the Commission that it should exercise its discretion under this code section to rescind or amend a prior order in whole or in part. In this regard we agree with the Court in the Pennsylvania Railroad Company case, wherein it was said that "[p]arties …, cannot be permitted by a second motion to review and reconsider, to raise the same questions which were specifically considered and decided against them…." What we expect to see raised in such petitions are

> new and novel arguments, not previously heard, or considerations which appear to have been overlooked or not addressed by the Commission.

Consequently, for a petition to warrant rehearing and reconsideration by the Commission, it must demonstrate new and novel arguments that were raised below by the petitioner, but not previously considered by the Commission. The Commission has cautioned that the last portion of the operative language of the *Duick* standard -- "by the Commission" -- focuses on the deliberations of the Commission, not the arguments of the parties. *See Pa. PUC v. PPL Elec. Utils. Corp.*, Docket No. R-2012-2290597, p. 3 (Order entered May 22, 2014). Therefore, a petition for reconsideration cannot be used to raise new arguments or issues that should have been, but were not, previously raised.

A petition seeking relief under the *Duick* standard may properly raise any matter designed to convince the Commission that it should exercise its discretion to rescind or amend a prior order in whole or part. Importantly, however, the *Duick* standard does not permit a petitioner to raise issues and arguments considered and decided below such that the petitioner obtains a second opportunity to argue properly resolved matters. *Id*. Further, as explained by the Pennsylvania Supreme Court, petitions for reconsideration of a final agency order may only be granted judiciously and under appropriate circumstances because such action results in the disturbance of final agency orders. *City of Pittsburgh v. Pa. Dep't of Transp.*, 490 Pa. 264, 416 A.2d 461 (1980).

As explained below, the Complainant's Petition should be denied.

III. ARGUMENT

A. THE COMPLAINANT'S REQUEST FOR RECONSIDERATION SHOULD BE DENIED

In her Petition, the Complainant argues that the Commission should grant reconsideration and reverse January 26, 2024 Order dismissing her Complaint because: "(1) the FCC regulations

have be questioned in federal court; (2) state and federal statutes require Electric Distribution Companies ("EDC") to warn and protect the public from danger; (3) the meter that caused the Complainant harm was a smart meter; (4) independent of the question of cause, harm occurred; (5) general cause is different from specific cause; (6) installing a smart meter on the Complainant's residence would constitute cruel and unusual punishment, citing the Pa. Code; (7) precedents for the electrically hypersensitive are being recognized under disability law; (8) Complainant has the right to a pollution free environment, which includes electric magnetic pollution; (9) the law, as cited by both the Supreme Court and Commonwealth Court of Pennsylvania, compels Met-Ed to provide a reasonable accommodation; (10) two concepts in Pennsylvania status encourage and offer precedent for kindness in consideration of accommodation; (11) the Commission should urge Met-Ed/FirstEnergy to take a cooperative, rather than adversarial, approach to allowing Pennsylvania citizens to opt out of a smart meter; (12) FirstEnergy has been found guilty of bribery of public officials, resulting in fines and imprisonment; (13) contrary to the Commission's Opinion, Met-Ed is a state actor; (14) the Commission should consider the undue burden standard that has been established in the United States Supreme Court; (15) the major questions doctrine addresses the authority of agencies in administrative law cases, and as such raises the question of the right of the Commission to act as it did in Complainant's case; (16) the powers of the [Commission's] Administrative Law Courts extend beyond what has been legally delegated, as adjudicated in the U.S. Court of Appeals; (17) Pennsylvania standards for evidence would have allowed much of Complainant's evidence; (18) funding sources for the [Commission] may compromise its ability to be impartial; (19) the Commission should render the [Commission's] Implementation Order relevant to Act 129 *ultra vires*; (20) the Commission overlooked the Pennsylvania Code that places the burden of proof on Met-Ed; (21) another overlooked matter is

Daubert, which rules that judges are not often qualified to rule on matters of science; (22) the landmark Lamech study was cited in all of the Complainant's filings, but was overlooked; (23) Complainant "appeared to" attempt to improperly utilize a third hearing day; (24) date when smart meter that caused harm was removed was, in fact, known." (Petition, pp. 2-49.)[5] As alleged support, the Complainant two documents: Attachment I - Exhibit A1, which appears to be an unauthenticated hearsay document in the form of a series of emails as well as a screenshot and data related to those emails; and (2) Attachment II, a copy of a United States Court of Appeals for the District of Columbia Circuit "Evidence of Harm Files" issued on August 13, 2021, from *Environmental Health Trust, et al. v. Federal Communications Commission and United States of America* at Case No. 20-1025.

All of the Complainant's arguments should be rejected.

1. The Complainant's Argument(s) Related to the FCC's Regulations and Federal Law Should Be Rejected.

The Complainant acknowledges in her argument related to the FCC's regulations that the ID and the Commission's Opinion and Order in this matter considered the FCC regulations and guidelines. (Petition, p. 2-4.) While the Complainant notes that the United States Court of Appeals for the District of Columbia Circuit decision in *Environmental Health Trust v. FCC*, 9 F.4th 893 (D.C. Cir. 2021) ("*Environmental Health Trust"*) as purported support for her requested reconsideration in both arguments 1 and 2, such arguments are meritless. Indeed, the Supreme Court of Pennsylvania explicitly evaluated and rejected petitioners' arguments related to *Environmental Health Trust* in *Povacz II*:

[5] Complainant's arguments were labeled as "A" through "X" and grouped into three groups of "New or Novel Arguments." For purposes of this Answer, the Company has grouped labelled those arguments numerically, *i.e.,*1-24. Complainant's group one consisted of arguments 1-8. Group two consisted of arguments 9-13. Group three consisted of 14-19. The Complainant also includes "matters that were overlooked or not addressed," consisting of arguments 20-22. Last, Complainant includes "errors of fact," consisting of arguments 23-34.

> We conclude that Environmental Health Trust provides no guidance on [**65] the matter at hand because the circuit court did not reach the merits of the question before it, i.e., whether the 1996 FCC limits for RF radiation exposure adequately protect against purported negative effects unrelated to cancer caused by exposure to RF radiation. Rather, the circuit court found that the FCC violated the requirements of the ADA by failing "to respond to record evidence that exposure to RF radiation at levels below the [FCC's] current limits may cause negative health effects unrelated to cancer" with a reasoned explanation for its contrary conclusion.

Povacz, at 1008; citing Environmental Health Trust, 9 F.4th at 903, 905.

Moreover, the *Povacz II* Court went on to explain that:

> At most, therefore, Environmental Health Trust suggests that the science regarding a causal connection between RF emissions and adverse human health effects has evolved since 1996, the last year FCC limits for RF emissions were updated. However, it does not support a claim that RF emissions at or below the 1996 FCC limits cause adverse human health effects and in no way overcomes the record facts that Customers failed to adduce sufficient evidence to meet the preponderance of the evidence standard

Povacz II, at 1009.

In addition, as part of her reliance on *Environmental Health Trust*, the Complainant argues that the Commission should require the Company to conduct long-term testing of its smart meters pursuant to 42 U.S.C. § 4332 and the National Environmental Policy Act ("NEPA").[6] (Petition, pp. 6-7.) As purported support for her suggested reliance on the aforementioned federal law, the Complainant once again cites *Environmental Health Trust*. Again, this argument fails as *Povacz II* addressed *Environmental Health Trust* and held it inapplicable to smart meter proceedings. Also, the text of the statute cited by the Complainant explicitly directs that "all agencies of the Federal Government shall…" The Commission is not an "agency of the Federal Government."

[6] The Company notes that NEPA is codified at 42 U.S.C. § 4332, thus, the Complainant appears to be relying on two different citations of the same law.

As such, the Complainant's arguments related to *Environmental Health Trust* and/or 42 U.S. Code § 4332 and have already been considered and rejected by the Court or are inapplicable to the Commission and should be rejected here.

2. The Complainant's Argument(s) that the Smart Meter Caused Harm Were Expressly Considered and Rejected by the Commission and Fail the *Duick* Standard.

In her Petition, the Complainant argues that, since the Evidentiary Hearings in this proceeding, she has since discovered the specific model of the smart meter that allegedly caused her harm. (Petition, pp. 6-7.) The Complainant also attempts to reargue that she has incurred harm on account of the smart meter used by another utility unaffiliated with the Company. (Petition, pp. 9-11.) As part of this argument, the Complainant includes Attachment I to her Petition, which appears to be a series of unauthenticated hearsay emails.

Such emails and arguments and emails related thereto are inappropriate for reconsideration under the *Duick* standard. Moreover, to the extent that they do meet the *Duick* standard – which they don't – they are holy unauthenticated, constitute hearsay testimony and should not be considered or admitted in the proceeding at this late stage. If Attachment I is admitted, it should not be given any evidentiary weight. *See Walker v. Unemployment Compensation Board of Review*, 20 A.3d 603, n.8 (Pa. Cmwlth. 2011). Lastly, the model of smart meter purportedly used by a utility other than the Company is wholly irrelevant to the Commission's determination in this proceeding. Indeed, there is no indicia that the same was not "discoverable though the exercise of due diligence prior to the close of the record." *Duick,* at 559.

Similarly, the Complainant's arguments related to causation and harm are simply a re-argument of issues wholly and fully considered by the ALJ and the Commission in both the ID and Order, thus, fail the *Duick* Standard and must be rejected.

3. The Complainant's Threats of Criminal Prosecution and Parallels to Military Law Are Irrelevant and Fail Under *Duick.*

In the Petition, the Complainant makes a series of vague assertions that she plans to pursue criminal charges against the Company's "corporate officers, directors and agents." (Petition, p. 11; *See also* Petition, p. 12.) Such arguments – to the extent they are arguments – wholly fail under *Duick*. Certainly, the Complainant's criminal law allegations are well outside the scope of this proceeding and the jurisdiction of the Commission.

Additionally, the Complainant argues that installation of the smart meter at the Service Address would constitute "cruel and unusual punishment." (Petition, pp. 15-16.) While this argument could have made before the Commission, thereby obviating the need to fail under *Duick*, it is inappropriate for the Commission to consider here. By the Complainant's own admission, "this statute [51 Pa. C.S. § 5801] applies to the military." (Petition, p. 16.) The Complainant cites no support to otherwise bolster her claim that installation of a smart meter at the Service Address would constitute "cruel and unusual punishment."

4. The Complainant's Differentiations Between General and Specific Cause Fail the *Duick* Standard, as They Could Have Been Raised Previously, but Were Not, and *Povacz II* Made Clear the Causal Requirements in Smart Meter Cases.

In the Petition, the Complainant cites to the Commission's Opinion and Order detailing the "conclusive causal connection" standard. (Petition, pp. 12-15.) In purported support of her differentiations between various types of causes, the Complainant cites *McKnight v. Pa. PUC*, which remains pending before the Commonwealth Court. (Petition, p. 13.) The Complainant argues that the facts in the *McKnight* proceeding parallel her Complaint.

The Complainant overlooks that the Commission rejected the complainant's arguments in *McKnight v. PECO Energy Co.*[7] and that the Pennsylvania Supreme Court upheld the Commission's use of the "conclusive causal connection" standard in *Povacz II*, holding "where scientific evidence is required to establish the safety of a service or facility, use of the evidentiary standard of "conclusive causal connection" to assess the evidence is correct." *Povacz II*, at 1006 (*emphasis added*). The Complainant's machinations on "cause" are merely an attempt to relitigate her evidentiary presentation before the Commission. To the extent that they are not, the correct causal standard was affirmed and explained fully in *Povacz II*. *Id.* Thus, the Complainant's argument(s) relating to differentiations in causal standards should be rejected as grounds to grant reconsideration.

5. The Complainant's Arguments Related to "Disability Law" Could Have Been Raised at the Evidentiary Hearings and, Even if Not, Are Outside of the Commission's Jurisdiction

In the Petition, the Complainants argues that "taking this precedent in disability law for the electrically hypersensitive, the Commission would rule that Complainant not be exposed to a smart meter…" (Petition, p. 16.) The Complainant could have raised such a contention previously in this proceeding, and well before her Petition for Reconsideration. Thus, this purported "new and novel" argument fails under *Duick*. Moreover, determinations regarding the Americans with Disabilities Act, or disability law, generally, are beyond the scope of the Commission's limited jurisdiction and should not be considered here.[8]

6. The Complainant's Environmental Concerns Fail under *Duick* and Lack Merit.

[7] 2019 Pa. PUC LEXIS 233 (Order entered Aug. 8, 2019).

[8] *Frompovich v. PECO Energy Company,* 2018 Pa. PUC LEXIS 160, *69, Docket No. C-2015-2474602 (Order Entered May 3, 2018) ("We find the Complainant's Exceptions on this issue to be meritless. We affirm the ALJ's conclusion that it is beyond the jurisdiction of Commission to determine whether the Complainant has a disability or a cause of action under the American with Disabilities Act.")

In the Petition, the Complainant argues that she "has a right to a pollution-free environment, which includes electromagnetic pollution." (Petition, p. 17.) This argument is simply an attempt to supplement arguments that could have been made previously before the Commission and at the series of Evidentiary Hearings in this proceeding. Further, to the extent that this argument passes muster under *Duick*, it should nevertheless be rejected. Again, the Complainant cites *Environmental Health Trust* to support her purported right to a pollution free environment. This argument is unfounded. Indeed, *Environmental Health Trust* did not hold that utility customers have a right to a "pollution free environment." Moreover, as explained in Section III (1), *supra*, *Environmental Health Trust* was evaluated by the Court in *Povacz II* and found to be unpersuasive or irrelevant for smart meter related complaints. Additionally, the Complainant's reading of Section 27 of the Pennsylvania Constitution is incorrect and unsupported by case law.[9] Indeed, the leading case related to Section 27 of the Pennsylvania Constitution, *Robinson Twp. v. Commonwealth*, 83 A.3d 901 (Pa. 2013), does not guarantee Pennsylvania's citizens with a right to a "pollution free environment" and does not discuss "electromagnetic pollution" or "electrosmog." *Id.*

7. The Complainant's Argument that the Company Must Provide Her with a "Reasonable Accommodation" Fails Under *Duick* and Ignores the Accommodation Already Available to the Complainant.

In the Petition, the Complainant argues that the Commission failed to account for the Supreme Court's holding in *Povacz II*, which, according to the Complainant, requires that the Company provide her with a reasonable accommodation. (Petition, pp. 18-20.) This argument is flawed for a number of reasons.

[9] The Company notes that the Complainant appears to refer to Pa. Const. art. I, § 27 as "Article 27." The Company notes that the Complainant appears to be referring to Article I, Section 27 of the Pennsylvania Constitution, rather than Article 27, which does not exist.

First, *Povacz II* made clear that while customers who are able to prove a Section 1501, 66 Pa.C.S. § 1501, violation, the customer is only "entitled to an accommodation to the extent allowed by Act 129 and a utility's tariff."[10] Here, the only accommodation allowed by the Company's Commission-approved tariff is to relocate the smart meter to a mutually-agreeable location at the Complainant's cost.[11] Here, the Complainant has failed to prove by a preponderance of the evidence that the installation or presence of a smart meter would violate Section 1501 of the Code. Even if she had, her available relief is that authorized by the Company's tariff, and is an option that has been available to the Complainant throughout this proceeding. As such, this argument fails and is not grounds for reconsideration under *Duick*.

Second, as the Pennsylvania Supreme Court held in *Povacz II*, customers are not permitted to opt-out of the Company's smart meter installation.[12] The only available relief available to the Complainant is to pay for relocation of the smart meter to a mutually-agreeable location, if such a location exists. These are not new developments, nor has an opt-out been greenlit by the Court, nor the Company's tariff. As such, these arguments are meritless and wholly fail under *Duick*.

8. The Complainant's Extra-Record Allegations Regarding Criminality on the Part of the Company or Its Affiliated Entities Are Wholly Irrelevant and Fail the *Duick* Standard.

In the Petition, the Complainant argues that certain criminal accusations and actions brought against affiliates of the Company should support her request for an opt-out of a smart

[10] *Povacz II,* at 1014.

[11] FirstEnergy Pennsylvania Electric Company Tariff Rule 4, Electric Pa. P.U.C. No. 1, Original Page 40 ("A Customer desiring the removal, relocation or change of Company facilities or interruption shall submit a request to the Company. The Company may accept or reject said request in its sole and exclusive discretion. If the Company accepts said request, the Customer shall pay in advance the Company's total estimated cost for any Customer requested temporary interruption in the Customer's service due to construction, maintenance or other activities.").

[12] *Povacz*, at 984 ("we 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.")

meter's installation at the Service Address. (Petition, pp. 22-23.) This argument is irrelevant and does not address the clear directive of *Povacz II*: utilities are required to install smart meters for all customers pursuant to Act 129, and customers that are able to prove a Section 1501 violation related to the smart meter's installation are only entitled to an accommodation authorized by the Company's tariff. Also, these allegations are an attempt to introduce extra-record and irrelevant evidence and, as such, should be rejected under *Duick*.

9. The Complainant Erroneously Asserts that the Company Is a State Actor.

In the Petition, the Complainant argues that the Company is a state actor. (Petition, pp. 23-29.) This argument was expressly rejected by the Commonwealth Court in *Povacz v. Pa. PUC*, 241 A.3d 481, 486 n.9 (Pa. Cmwlth. 2020). [13] This holding was not disturbed by *Povacz II*, and because the Company and PECO are similarly situated EDCs, the Company is not a state actor that can violate the Complainant's constitutional rights. As such, this argument fails and is not grounds for reconsideration under *Duick*.

10. The Complainant's Attempt to Shift the Burden of Proof to the Company, or Lower Her Burden of Proof, Is Meritless.

In her Petition, the Complainant argues that the Commission "should consider the undue burden standard" established by the United States Supreme Court. (Petition, pp. 29-31.) Further, the Complainant argues that the "Pennsylvania Code […] places the burden of proof on [the Company]. (Petition, pp. 42-44.) Both of these arguments are meritless and will be taken in turn by the Company.

First, the "undue burden" test as articulated in *Planned Parenthood v. Casey,* 505 U.S. 833 (1992) was fashioned to address the "State's interest with the woman's constitutionally protected

[13] "[C]onstitutional protections apply against state actors," and "PECO is not a state actor in relation to its installation of smart meters and provision of electricity to its customers."

liberty."[14] It was not – and has never been – a test to govern the legality of smart meters in Pennsylvania. Indeed, this purported standard is nowhere in Act 129, and has never been used by the Commission in evaluating the legality of a smart meter's installation, nor the accommodations available should a complainant be able to meet his or her burden of proof under Section 1501 of the Public Utility Code. As such, beyond this argument being available to the Complainant throughout this proceeding and, therefore, failing the *Duick* standard, the legal basis for using the "undue burden" standard is nonexistent here and should be rejected.

Second, the Complainant argues that the burden of proof should have been placed on the Company, rather than the Complainant, during litigation of the Complaint. (Petition, p. 42-44.) This is incorrect. Under Section 332(a) of the Public Utility Code, the Complainant maintains the burden of proof in this proceeding.[15] The first step in carrying the burden of proof is establishing a *prima facie* case that the Company violated the Public Utility Code, the Commission's regulations, or a Commission order. Only if the Complainant establishes a *prima facie* case does it become the responsibility of the respondent to provide rebuttal evidence.[16] In order to establish a *prima facie* case, more is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established.[17] Mere bald assertions, personal opinions or perceptions, when not substantiated by facts, do not constitute evidence.[18]

Although the factual burden may shift during a proceeding, the Complainant always maintains the overarching burden of proof. It is clearly established that the Complainant's "burden of proof before administrative tribunals as well as before most civil proceedings is satisfied by

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[14] *Id.,* at 876.

[15] 66 Pa.C.S. § 332(a); *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm'n*, 578 A.2d 600 (Pa. Commw. 1990), alloc. den., 602 A.2d 863 (Pa. 1992).

[16] *Waldron v. Phila. Elec. Co.*, 54 Pa. P.U.C. 98 (Order entered Mar. 14, 1980).

[17] *Norfolk and Western Ry. v. Pa. Pub. Util. Comm'n*, 413 A.2d 1037 (Pa. 1980).

[18] *Pa. Bureau of Corrections v. City of Pittsburgh*, 532 A.2d 12 (Pa. 1987).

establishing a preponderance of the evidence."[19] A preponderance of evidence is demonstrated where the evidence presented is more convincing, even by the smallest degree, than the evidence presented by the opposing party.[20]

Here, the burden of proof lies with the Complainant, and she failed to carry it. As such, this argument is not grounds for reconsideration under *Duick* and should be rejected.

11. The Major Questions Doctrine Does Not Apply in this Case, and the Commission Was Acting Within its Jurisdictional Authority in Evaluating and Ultimately Dismissing the Complaint.

Through the Petition, the Complainant argues that the "major questions" doctrine holds that courts will presume that Congress "does not delegate to executive agencies of major political or economic significance." (Petition, p. 31-32.) This contention is inapplicable to the Complaint and resolution thereof. First, the Commonwealth of Pennsylvania has not adopted the major questions doctrine as articulated by the United States Supreme Court. Indeed, the major questions doctrine, "the agency must point to clear congressional authorization for the authority it claims…"[21] Congress did not enact 129; the Pennsylvania legislature did. Moreover, Act 129 was clear in its directive, as confirmed in *Povacz II*.[22] As such, this argument is meritless and fails under the *Duick* standard. The Complainant's evidentiary issues related to this argument are similarly meritless and should be rejected for reconsideration under *Duick*.

Further, the Complainant argues that the Commission acted beyond its delegated authority in ruling on her Complaint. (Petition, pp. 32-39.) In support of this contention, the Complainant

[19] *Lansberry*, 578 A.2d at 602.

[20] *Pa. Pub. Util. Comm'n v. HIKO Energy, LLC*, 2015 Pa. PUC LEXIS 364 (Initial Decision issued Aug. 21, 2015), *supra.*

[21] *West Virginia v. EPA,* 142 S. Ct. 2587, 2595 (2022); *See also Utility Air Regulatory Group v. EPA,* 573 U. S. 302, 324 (2014).

[22] *Povacz II,* at 992 ("Our comprehensive reading of Act 129 leads us to conclude that the statute is not ambiguous and that Section 2807(f)(2) imposes a mandate on EDCs to furnish smart meter technology to all electric customers within an electric distribution service area, regardless of a customer's preference.")

cites a series of inapposite federal court decisions with no applicability to the instant proceeding. Indeed, the Complainant, citing *Jarkesy v. Sec. & Exch. Comm'n,* 34 F.4th 446 (5th Cir. 2022), argues that *Jarkesy* supports a purported right to a jury trial before the Commission. *Jarkesy* and its progeny are inapplicable here. *Jarkesy* involves whether a federal agency can host a non-jury trial which "savour[s] of a criminal nature."[23] The instant Complaint is not of a criminal nature. Moreover, Pennsylvania law dictates that no right to a jury trial exists at the Commission.[24] As such, this argument is meritless and should be rejected.

12. The Complainant's Evidentiary Concerns Are Unfounded and No Grounds for Reconsideration Under *Duick*.

In the Petition, the Complainant argues "much evidence submitted by the Complainant" was disallowed, and argues that, because "Commonwealth Agencies shall not be bound by the technical rules of evidence at agency hearings, and all relevant evidence of reasonably probative value may be received." (Petition, p. 40.) While the Complainant generally disputes the Evidentiary rulings implemented by the ALJ in this proceeding, and the Company's arguments related to the Complainant's hearsay evidence in its Briefs, such evidentiary concerns are not grounds for reconsideration under *Duick*. Indeed, the Complainant had ample opportunity to argue the admissibility of certain pieces of evidence throughout this proceeding and, in many circumstances, did so. To relitigate the evidentiary record at this stage of the proceeding would be inappropriate. Moreover, while it is true that "Commonwealth agencies are not bound by the

[23] *Id.,* at 453.

[24] *Pa. PUC v. W. J. Dillner Transfer Co.*, 155 A.2d 429, 436 (Pa. Super. 1959) *("*"The Sixth and Seventh Amendments to the United States Constitution and Pa. Const. art. I, § 6 (1874) only preserve the right to trial by jury in those cases where it existed at the time the constitution was adopted. The matters committed by the Pennsylvania Legislature to the Public Utility Commission were then nonexistent. Hence no right to jury trial existed which could be preserved.")

technical rules of evidence"[25] that does not mean that any and all evidence proffered by a party is admissible or should be considered by the ALJ.[26]

Furthermore, the Complainant contends that the Commission erroneously "overlooked" the "landmark Lamech Study." (Petition, pp. 45-46.) Again, this contention is without legal basis. By the Complainant's own acknowledgement, the so-called Lamech Study was admitted as Complainant's Exhibit X11. The Complainant's arguments related to the consideration of the same are unfounded and merely an attempt to relitigate the Complaint, thus failing under *Duick.*

13. The Funding Sources of the Commission Are Irrelevant and Not Grounds for Reconsideration Under *Duick*.

In her Petition, the Complainant argues that, due to how it is funded, the Commission is a "captured agency." (Petition, p. 41.) In doing so, the Complainant implies that there are conflicts of interest that prevent ALJs and the Commission from rendering a "fair and impartial ruling." (Petition, p. 41.) These unfounded allegations could have – but were not – raised previously in litigation of the Complaint. Moreover, how the Commission is funded is irrelevant to its evaluation of the installation of smart meters and its interpretation of Act 129, particularly in light of the Court's decision in *Povacz II*. As such, this argument(s) is meritless and should be rejected as grounds for reconsideration under *Duick*.

14. The Complainant's Argument that Implementation of Act 129 Was Taken *Ultra Vires* Is Incorrect and Meritless.

The Complainant contends that the Commission's Implementation Order for Act 129 was done so *ultra vires* and, therefore, should be rendered "null and void." (Petition, pp. 41-42.) This

[25] *Morton v. Columbia Gas of Pa., Inc.* 72 Pa. PUC 125, Docket No. F-8952320 (Order entered Feb. 6, 1990).
[26] *See* 66 Pa. C.S. §§ 332(a)-(b).

contention is incorrect. Indeed, this argument was rebuffed by the Court in *Povacz II*, which held that:

> "[the Court's] comprehensive reading of Act 129 leads us to conclude that the statute is not ambiguous and that Section 2807(f)(2) imposes a mandate on EDCs to furnish smart meter technology to all electric customers within an electric distribution service area, regardless of a customer's preference. In reaching this conclusion, we have considered Section 2807(f)(2) in its context as the implementation provision of Act 129.[27]

While the Complainant might disagree with this conclusion, it is controlling on the Commission, and it would be wholly inappropriate for the Commission to sidestep the clear directive of the Court in *Povacz II* in reconsidering whether the Implementation Order[28] was rendered *ultra vires*.

15. The Complainant's Reliance on the *Daubert* Standard Is Misplaced and Irrelevant.

In her Petition, the Complainant argues that judges are not equipped to rule on "matters of science" which, according to the Complainant, is supported by the *Daubert* standard.[29] (Petition, pp. 44-45.) However, Pennsylvania does not use the *Daubert* standard, rather, the *Frye* standard.[30] The *Frye* standard allows expert testimony that is "generally accepted by scientists in the relevant field as a method for arriving at the conclusion the expert will testify to at trial."[31] The Complainant does not argue that the several expert witnesses put on by the Company were not qualified. Also, assuming that the Complainant's contentions on this point hold water – which they do not – the Complainant's basic position undercuts itself. According to the Complainant, the Presiding Officer and the Commission are not qualified to rule on "the science in this case" but asks that the

[27] *Povacz II*, at 992.

[28] *Smart Meter Procurement and Installation*, Docket No. M-2009-2092655 (Order entered June 24, 2009) ("Implementation Order").

[29] *See Daubert v. Merrell Dow Pharmaceuticals, Inc*., 509 U.S. 579 (1993),

[30] *Grady v. Frito-Lay, Inc*., 839 A.2d 1038, 1044 (Pa. 2003) ("[the Court] conclude[s] that the *Frye* rule will continue to be applied in Pennsylvania.")

[31] *Id.* at 1045.

Commission revaluate and revise the Opinion and Order in favor of her purported science. In doing so, the Complainant wishes to flip both sides of the coin.

Putting aside the Complainant's erroneous evidentiary arguments, such arguments could have been made at an earlier stage of this proceeding, including at the Evidentiary Hearings and through briefs. They were not. Thus, these arguments do not support reconsideration under the *Duick* standards.

16. The Purported Errors of Fact Cited by the Complainant Are not Grounds for Reconsideration Under *Duick.*

In her Petition, the Complainant makes a series of arguments related to purported errors of fact made by the Commission's Opinion and Order. (Petition, pp. 47-49.) These purported errors are without moment and are improperly raised at this stage in the proceeding. Namely, the Complainant argues that the Order Granting in Part and Denying in Part Motion for Admission of Late-Filed Exhibits and Motion to Strike issued on June 18, 2020, erred in finding that the Complainant was "not prepared during the hearing to use these exhibits when Dr. Israel appeared." (Petition, pp. 47-48.) This argument is not grounds for reconsideration under *Duick*. While the Complainant can defend her evidentiary presentation, such defense is of no moment here, nor is it a new argument that was not made and unavailable to the Complainant throughout her Exceptions and Briefs. As such, it is not a legitimate ground for reconsideration under *Duick*, as it is a simple attempt to relitigate the evidentiary record.

Similarly, the Complainant's contentions related to the date that a utility unaffiliated with the Company removed a smart meter from the Complainant's address are irrelevant here. Indeed, the record citation the Complainant makes to support her argument is uninstructive. It is merely a citation to the Commission's recitation of the Company's arguments in its January 26, 2024 Order,

citing the record. (Tr. 59-60.) Moreover, the January 26, 2024 Order specifically acknowledged the Complainant's argument on this point, noting that "[the Complainant] avers that UGI installed a smart meter at her residence in 2012 that was later removed."[32] This dispute as to fact was clearly considered by the Commission. It does not present a new legal or factual argument, nor does it present an argument that was not made and unavailable to the Complainant throughout this proceeding. As such, it fails under *Duick* and is not grounds for reconsideration.

[32] January 26, 2024 Order, p. 4, n. 1.

IV. CONCLUSION

WHEREFORE, for all the foregoing reasons, FirstEnegy Pennsylvania Electric Company on behalf of Met-Ed Rate District respectfully requests that the Pennsylvania Public Utility Commission deny the Petition for Reconsideration filed by Judith D. Hendin in its entirety.

Respectfully submitted,

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Date: February 22, 2024

Attorney for FirstEnergy Pennsylvania Electric Company, Met-Ed Rate District

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

JUDITH HENDIN	:	
	:	
v.	:	**DOCKET NO. C-2018-3003324**
	:	
METROPOLITAN EDISON COMPANY	:	

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the Answer of FirstEnergy Pennsylvania Electric Company on behalf of its Met-Ed Rate District to the Petition for Reconsideration of Judith Hendin upon the individual listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant).

Service by electronic mail only as follows:

Judith Hendin

judith@consciousbody.com

Dated: February 22, 2024

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