

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

Public Meeting held April 4, 2024

Commissioners Present:

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

Judith Hendin

C-2018-3003324

v.

Metropolitan Edison Company

OPINION AND ORDER

BY THE COMMISSION:

Before the Pennsylvania Public Utility Commission (Commission) for consideration is the Petition to Reopen the Proceeding for the Purpose of Submitting Additional Evidence (Petition to Reopen), filed by Judith Hendin (Ms. Hendin or Complainant) on January 22, 2024, offering additional evidence after the close of the record in the proceeding which was decided by the Commission's Opinion and Order entered January 26, 2024 (*January 2024 Order*). Also before the Commission for consideration is the Petition for Reconsideration (Reconsideration Petition), filed by the Complainant on February 12, 2024, seeking reconsideration of the *January 2024 Order*. On February 22, 2024, Metropolitan Edison Company (Met-Ed or the Company) filed its

Answer to the Reconsideration Petition. For the reasons stated below, we shall deny the Complainant's Petitions.

I. History of the Proceeding¹

On June 29, 2018, Ms. Hendin filed a Complaint with the Commission against Met-Ed. On the Complaint form, Ms. Hendin indicated that she does not want a smart meter installed. She provided that when a utility² other than Met-Ed installed a smart meter, her health was negatively affected. Ms. Hendin also provided that after the other utility's smart meter was removed, her health improved. Complaint at 2.

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

Also, on July 31, 2018, Met-Ed filed preliminary objections in response to the Complaint. By interim order dated October 18, 2018, Met-Ed's preliminary objections were denied by Administrative Law Judge (ALJ) Jeffrey Watson.

¹ A more complete discussion of the history of this proceeding is presented in the *January 2024 Order*.

² Ms. Hendin avers that UGI installed a smart meter at her residence in 2012 that was later removed. Hendin M.B. at 4-5.

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

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

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

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

In the Initial Decision, issued on August 7, 2020, the ALJ found that the Complainant failed to satisfy her burden of demonstrating that the Company violated the Public Utility Code (Code), a Commission Order or Regulation or a Commission-approved tariff of the company with regard to the installation of a smart meter. I.D. at 1. Accordingly, the ALJ denied and dismissed the Complaint.

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

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

On January 22, 2024, the Complainant filed a Petition to Reopen the Proceeding for the Purpose of Submitting Additional Evidence.³

On January 26, 2024, the Commission entered the *January 2024 Order* that denied the Complainant’s Exceptions and adopted the ALJ’s Initial Decision that dismissed the Complaint.

On January 29, 2024, the Complainant filed a document titled “Notice of Filing Petition for Reconsideration.” Also, on January 29, 2024, the Complainant filed a document titled “Affirmation That Current Electric Meter Remains in Place During Ongoing Legal Proceedings.”

On January 31, 2024, the Complainant filed a document titled “Addendum to Petition to Reopen the Proceeding for the Purpose of Submitting Additional

³ The Complainant’s Petition to Reopen was filed prior to, but not addressed by the January 2024 Order.

Evidence.” On February 26, 2024, the Complainant filed a document titled “Affidavit to Verify Additional Evidence Submitted on January 21, 2024.”

As noted, Ms. Hendin filed a Petition for Reconsideration of the *January 2024 Order* on February 12, 2024. Met-Ed filed its Answer to the Reconsideration Petition on February 22, 2024. By Opinion and Order entered February 22, 2024, the Commission granted the Reconsideration Petition, pending further review of, and consideration on, the merits.

II. Discussion

A. Legal Standards

With respect to petitions for rehearing, reconsideration, rescission and amendment of Commission orders, the Code establishes a party’s right to seek relief within fifteen days following the service of a Commission order pursuant to Subsection 703(f). 66 Pa. C.S. § 703(f)(relating to rehearing).⁴ Upon the filing of a petition for relief pursuant to Section 703(f) the Commission may affirm, rescind, or modify its original order. 66 Pa. C.S. § 703(f). The Code further provides that the Commission may, at any time, after notice and opportunity to be heard by all affected parties, rescind or amend any order made by the Commission, pursuant to Section 703(g). 66 Pa. C.S. § 703(g)(relating to rescission and amendment of orders). A request for relief pursuant to § 703(f) or § 703(g) must be brought as a petition for relief consistent with Section 5.572 of Commission Regulations. 52 Pa. Code § 5.572 (relating to petitions for relief).

⁴ Petitions under this section which do not allege new evidence are typically treated as petitions for reconsideration. Petitions for *rehearing* pursuant to Section 703(f) of the Code, typically include an allegation of new evidence. 66 Pa. C.S. § 703(f); *See, West Penn Power Co. v. Pa. PUC*, 659 A.2d 1055 (Cmwlth. 1995).

Petitions for relief predicated upon Sections 703(f) and 703(g) of the Code, whether brought under Section 5.572(c) of Commission Regulations as a petition for reconsideration, rehearing, reargument, clarification, supersedeas or others within fifteen days of the service of a Commission order, or under Section 5.572(d) as a petition for rescission or amendment filed at any time following service of a Commission order, are reviewed by the Commission under the same standard.

The standard for granting a petition for amendment, reconsideration, or rescission is set forth in *Philip Duick et al. v Pennsylvania Gas and Water Company*, 56 Pa. PUC 553 (1982) (*Duick*) as follows:

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 on the grounds that the decision or ruling of the Commission on a matter or issue was either unwise or in error.

In this regard we agree with the Court in the *Pennsylvania Railroad Company* case, wherein the Court said,

[b]ut the grounds for reconsideration should be restricted to the new matters and new or changed conditions set up in the joint petition, which had arisen since and were not presented in the several petitions of these appellants ... and dismissed by the Commission ... and not appealed from. Parties,..., cannot be permitted, by a second motion to review and reconsider, to raise the same questions which were specifically considered and decided against them and not appealed from. ...

Pennsylvania Railroad Co. v. Public Service Commission,
118 Pa. Super. 380 (1935)

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. Absent such matters being presented, we consider it unlikely that a party will succeed in persuading us that our initial decision on a matter or issue was either unwise or in error.

Duick at 559; see also, *AT&T v Pa. PUC*, 568 A.2d 1362 (Pa. Cmwlth. 1990)

Application of the considerations of *Duick* essentially requires a two-step analysis. See, e.g., *SBG Management Services, Inc./Colonial Garden Realty Co., L.P. v. Philadelphia Gas Works*, Docket No. C-2012-2304183 (Opinion and Order entered May 19, 2019) (*SBG Order*)⁵ (discussing *Application of La Mexicana Express Service, LLC, to transport persons in paratransit service, between points within Berks County*, Docket No. A-2012-2329717; A-6415209 (Opinion and Order entered September 11, 2014)).

The first step is to determine whether a party has offered new and novel arguments or identified considerations that appear to have been overlooked or not addressed by the Commission in its previous Order. This initial step precludes a party from raising the same questions which were specifically considered and decided against them by a prior Order of the Commission. *Duick* (citing *Pennsylvania Railroad Co. v. Public Service Commission*, 118 Pa. Super. 380 (1935)). The second step of the *Duick* analysis is to evaluate the new or novel argument, or overlooked consideration that is alleged, to determine whether to modify our previous decision. We further note that while the Commission retains the discretion to modify its prior orders whether a party offers a new or novel argument or identifies a consideration that was overlooked or not addressed by the Commission in its previous Order,⁶ we will not necessarily exercise that

⁵ *Affirmed, Phila. Gas Works v. Pa. PUC*, 249 A.3d 963 (2021); No. 14 EAP 2020 (April 29, 2021); 2021 WL 1681311; *remand granted, in part* (June 15, 2021); 2021 WL 2697432 (Table).

⁶ See, 66 Pa. Code § 703(f) and (g).

discretion just because a party raises such arguments. *See, SBG Order*. The ultimate question under *Duick* is one of persuasion, that is: whether the petition persuades the Commission to exercise its discretion to grant the requested relief.

Duick also held that reconsideration based on newly discovered evidence must allege newly discovered evidence *not discoverable through the exercise of due diligence prior to the close of the record*. *Duick* at 558. In this same respect, a Petition for Reconsideration cannot be used to raise new arguments or issues that *should have been raised previously*. As the Commission determined in *Pa. PUC v. PPL Elec. Utils. Corp.*:

...the *Duick* standard does not permit a petitioner to raise questions considered and decided below such that the petitioner obtains a second opportunity to argue properly settled matters. Indeed, the Pennsylvania Supreme Court has noted that petitions that request modification or rescission of a final agency order may only be granted judiciously and under appropriate circumstances because such an action results in the disturbance of final agency orders. *City of Pittsburgh v. Pennsylvania Department of Transportation*, 490 Pa. 264, 416 A.2d 461 (1980).

Pa. PUC v. PPL Elec. Utils. Corp., Docket No. R-2012-2290597 (Opinion and Order entered February 28, 2013) at 3.

B. The January 2024 Order

In the *January 2024 Order*, we denied the Complainant's Exceptions, adopted ALJ Watson's Initial Decision and dismissed the Complaint.

First, based on our review of the record, and in response to the Complainant's Exceptions, we concluded, in concurrence with the ALJ's Initial Decision,

that the Complainant was not entitled to an opt-out of the installation of a smart meter at the service address. *January 2024 Order* at 21-22 (citing *Povacz, et al. v. Pa. PUC*, 280 A.3d 975 (Pa. 2022) (*Povacz II*) (The Pennsylvania Supreme Court held that there is no opt-out permitting a customer to refuse smart meter installation.)).

Second, based on our review of the record, and in response to the Complainant's exceptions, we determined that the Complainant (1) failed to satisfy her burden of proof regarding her claim that the smart meter will cause, or contribute to, adverse health effects for the Complainant, and (2) failed to satisfy her burden of demonstrating that Met-Ed has violated the Code, a Commission Order or Regulation or a Commission-approved tariff of the Company. *January 2024 Order* at 28-30 (citing *Povacz II* at 1006). We found that, in that context, the lay opinion of the Complainant did not provide a conclusive, causal connection between the harm to human health and the radio frequency (RF) from the smart meter. *Id.* We agreed with the ALJ that the evidence presented by the Company outweighed the evidence presented by the Complainant on all issues. *Id.* at 29 (citing I.D. at 33).

Third, based on our review of the record, and in response to the Complainant's Exceptions, we agreed with the ALJ's determination that the installation of a smart meter does not constitute a violation of the Complainant's constitutional rights. *Id.* at 32 (citing *Povacz II* at 985, fn. 8) (the Supreme Court acknowledged that the holding of the Commonwealth Court concluded that, in the circumstances, the assertion of a constitutional right to refuse installation of a smart meter predicated upon an asserted violation of "bodily integrity" was unfounded).

Fourth, for reasons more fully explained in the *January 2024 Order*, we denied the Complainant's arguments that she is entitled to protection under 52 Pa. Code § 56.113 that prevents termination of electric service based on a certification by a

medical professional and that Met-Ed has not warned her of potential danger as per 52 Pa. Code § 57.28. *Id.* at 33.

Fifth, based on our review of the record, we denied the Complainant's argument that she "did not receive a fair and impartial hearing" and that the ALJ erred by not admitting some of the Complainant's late-filed exhibits. *Id.* at 33-34.

Finally, based on our review of the record, we denied the Complainant's Exceptions regarding jurisdiction, and allegations of preferential treatment. *Id.* at 37-39. We found nothing in the record that suggested the ALJ exhibited bias or preferential treatment. *Id.* at 39.

For all the above reasons, we denied the Complainant's Exceptions, adopted the ALJ's Initial Decision, and denied and dismissed the Complaint. *Id.* at 40.

Before addressing the Petitions, we note that any issue not specifically discussed 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).

C. The Complainant's Petition to Reopen the Record

Section 5.431 of the Commission's regulations states "[t]he record will be closed at the conclusion of the hearing unless otherwise directed by the presiding officer or the Commission. 52 Pa. Code § 5.431(a). Additionally, the regulation provides, "[a]fter the record is closed, additional matter may not be relied upon or accepted into the record unless allowed for good cause shown by the presiding officer of the Commission

upon motion. 52 Pa. Code § 5.431(b). Petitions to reopen the record can be granted “if there is reason to believe that conditions of fact or law have so changed as to require, or that the public interest requires, the reopening of the record.” 52 Pa. Code § 5.571(d).

The Complainant’s Petition to Reopen the Record repeats her argument that a smart meter installed by a gas utility caused her harm. The additional information that she would like to add to the record is the specific model of the meter as discussed in an email from Ms. Hendin to another individual. The email does not appear to be from or addressed to the utility that supplied the meter in question.

We are not persuaded that either the Complainant’s assertion that the smart meter causes her harm, or the email allegedly establishing the specific model of smart meter is evidence that is new or novel or showing any change in fact or law that would warrant the reopening of the record in the public interest. 52 Pa. Code §§ 5.431(b) and 5.571(d)(2). The Complainant’s assertion that she was negatively affected by a gas utility meter was previously raised in the Complaint and expressly addressed in the *January 2024 Order. January 2024 Order* at 4. The email is hearsay evidence that was available to the Complainant during discovery. The email is dated August 27, 2012, which is long before the evidentiary hearings held in December 2019 and in January 2020. This material was discoverable and thus available to the Complainant prior to the close of the record. Consequently, this information does not constitute either new or persuasive evidence sufficient to warrant reopening the record. Accordingly, as we find no good cause shown to reopen the record, the Complainant’s Petition to Reopen the Record is denied.

D. The Reconsideration Petition, Met-Ed’s Answers, and Disposition

In the Reconsideration Petition, the Complainant proffers twenty-four arguments that can be grouped into four categories that she avers justify reconsideration

of our *January 2024 Order*. These arguments along with Met-Ed’s answers and our dispositions are summarized and addressed in numeric order below.

1. Installation of the Smart Meter

a. The Reconsideration Petition

In the first group of assertions in the Petition, the Complainant challenges the legality of the installation of a smart meter. First, the Complainant avers that the Federal Communications Commission (FCC) regulations applicable to smart meters have been “called into question in federal court.” The Complainant generally asserts that the FCC limits on emissions from radio frequency sources such as smart meters have been “called into question” in a United States Court of Appeals case. Reconsideration Petition at 2-6 (citing *Environmental Health Trust, et al v. Federal Communications Commission and United States of America*, District of Columbia Circuit, No. 20-1025, Decided August 13, 2021 (*Environmental Health Trust*)).

The Complainant stated that the Court found that the “FCC ignored scientific evidence and failed to provide a reasoned explanation for its determination that its 1996 regulations adequately protect the public against all the harmful effects of wireless radiation.” Petition at 4. The Complainant argues that “[u]ntil the outcome of *Environmental Health Trust* is known, the PUC cannot make a sound decision about Complainant’s case and should consider putting a stay on Complainant’s case until results are known.” According to the Complainant, the stay could apply to all current smart meter complainants.” Reconsideration Petition at 5.

Next, the Complainant argues that the electric distribution companies have not conducted safety testing on the smart meters they use. The Complainant contends that the Commission should institute a stay on the Complainant’s case until such testing

is completed. Reconsideration Petition at 7. The Complainant also repeats her argument here from her Formal Complaint (Complaint at 2), Main Brief (Hendin M.B. at 30), Reply Brief (Hendin R.B. at 3), Exceptions (Exc. at 1), and her Petition to Reopen the Record that she was made ill by a smart meter installed by a gas utility. Reconsideration Petition at 7-12.

The Complainant further provides additional arguments against smart meter installation which: (1) challenge the Commission's application of the *Povacz II* requirement to establish the causal connection between alleged adverse health effects and the installation of a smart meter; (2) raise the prohibition of "cruel and unusual punishment" under Title 51, Military Affairs, Chapter 58, § 5801; (3) assert federal labor standards and disability law for the electrically hypersensitive; and (4) assert a Constitutional right to be free from electromagnetic pollution, as an environmental right. Reconsideration Petition at 15-17.

b. Met-Ed's Answer

In its Answer, Met-Ed first responds to the Complainant's argument regarding the FCC regulations. Met-Ed provides that the Pennsylvania Supreme Court, in *Povacz II*, evaluated and rejected the petitioners' arguments related to *Environmental Health Trust*. In addition, Met-Ed avers that the Complainant's argument that it should be required to conduct safety testing in accordance with the National Environmental Policy Act is not relevant as the Act applies only to agencies of the federal government. Answer at 11-12.

Met-Ed contends that the Complainant attempts to reargue that she was harmed by a smart meter used by another utility. Answer at 13 (citing Reconsideration Petition at 9-11). Met-Ed notes that the Complainant has included Attachment 1 to her Reconsideration Petition which consists of unauthenticated hearsay emails. Met-Ed

submits that the model of the smart meter used by another utility is irrelevant to this proceeding and there is no evidence that this information was not discoverable prior to the close of the record. Answer at 13 (citing *Duick* at 559).

Similarly, Met-Ed notes that the Complainant's arguments related to causation and harm are a re-argument of issues fully considered in both the ALJ's Initial Decision and the Commissions subsequent Opinion and Order and fail the *Duick* standard and must be rejected. Answer at 13.

Met-Ed notes that the Complainant makes assertions that she plans to pursue criminal charges against the Company. Met-Ed contends that these statements fail under *Duick* and are well outside the scope of the Commission's jurisdiction. Answer at 14 (citing Reconsideration Petition at 11-12).

While the Complainant contends that installation of a smart meter would be "cruel and unusual punishment," Met-Ed notes that this argument, by the Complainant's own admission, is inappropriate to consider here as it applies to the military. Answer at 14.

Met-Ed notes that the Complainant argues that the facts in the *McKnight v. Pa. PUC*,⁷ which remains pending before the Commonwealth Court parallel her complaint. Answer at 14 (citing Reconsideration Petition at 13). Met-Ed contends that the Complainant overlooks that the Commission rejected the complainant's arguments in *McKnight v. PECO Energy* and 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

⁷ 2019 Pa. PUC LEXIS 233 (Order entered August 8, 2019).

correct.” Answer at 14-15 (citing *Povacz II* at 1006). Met-Ed argues that the Complainant’s “machinations on “cause” are merely an attempt to relitigate her evidentiary presentation before the Commission.” Answer at 15.

Met-Ed avers that the Complainant’s arguments regarding disability law could have been raised at the evidentiary hearing, and therefore fails the *Duick* standard. Met-Ed further explains that determinations regarding the Americans with Disabilities Act are beyond the scope of the Commission’s jurisdiction. Answer at 15 (citing *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 the Commission to determine whether the Complainant has a disability or a cause of action under the American[s] with Disability Act.”)).

Regarding the Complainant’s environmental concerns, Met-Ed provides that this argument is an attempt to supplement arguments that could have been made previously before the Commission at the hearing in this proceeding. In addition, Met-Ed notes that the Complainant cites to *Environmental Health Trust* to support her purported right to a pollution free environment. Met-Ed provides that *Environmental Health Trust* did not hold that utility customers have a right to a pollution free environment. Met-Ed notes that in *Povacz II*, the Court found *Environmental Health Trust* to be unpersuasive or irrelevant to smart meter related complaints. According to Met-Ed, the Complainant’s reading of Section 27 of the Pennsylvania Constitution is incorrect and unsupported by case law. Answer at 15-16.

c. Disposition

Before we address our disposition on this first issue, we note, as stated previously, that Petitions for Reconsideration are governed by *Duick*, which essentially

requires a two-step analysis. First, we determine whether a party has offered new and novel arguments or identified considerations that appear to have been overlooked or not addressed by the Commission in its previous Order. We will generally not reconsider our previous decision based on arguments that have already been expressly considered and rejected by our prior Opinion and Order. The second step of the *Duick* analysis, therefore, is to evaluate the new or novel argument, or overlooked consideration, to determine whether to modify our previous decision. However, we will not necessarily modify our prior decision just because a party offers a new and novel argument or identifies a consideration that was overlooked or not addressed by the Commission in its previous Order. Further, we note that *Duick* held that a petition for rehearing under Subsection 703(f) of the Code must allege newly discovered evidence not discoverable through the exercise of due diligence prior to the close of the record. *Duick* at 558. Based upon our evaluation of the record and the parties' positions in each particular case, we will determine if there is a sufficient basis which persuades us to exercise our discretion to amend or rescind a prior Order, in whole or in part.

Upon consideration of the record evidence in this proceeding, we will deny the Complainant's Reconsideration Petition on the grounds that it fails to persuade us that reconsideration is warranted. *Duick*. We also note that, in her Reconsideration Petition, the Complainant has attempted to include extra-record evidence regarding several matters. This extra-record information, submitted after the close of the record, will not be considered in this decision. 52 Pa. Code § 5.431. We reject the Complainant's attempt to relitigate her Complaint and introduce new issues and exhibits after the close of the record.

Proceeding to the Complainant’s first issue in which she argues that the “FCC regulations have been questioned in federal court,” we note that Ms. Hendin has cited to *Environmental Health Trust*.⁸

This issue was raised in *Povacz II*, where the Court concluded that *Environmental Health Trust* provides no guidance because it did not reach the merits of the FCC standards and did not constitute “a game changer” as alleged by appellants in that case. *Povacz II* at 1009, n. 34. *Environmental Health Trust* “does not support a claim that [radio frequency] emissions at or below the 1996 FCC limits cause adverse human health effects and in no way overcomes the record facts that [Hendin] failed to adduce sufficient evidence to meet the preponderance of the evidence standard.” *Povacz II* at 1009. Therefore, we exercise our discretion to not reconsider our *January 2024 Order* based on *Environmental Health Trust*.

Ms. Hendin has repeated her argument from her Exceptions here that EDCs must warn and protect the public from danger. Hendin Exc. at 13. Ms. Hendin has not shown that a smart meter will harm the public, and therefore a warning from the EDCs about a potential danger from the installation of a smart meter is not required. *January 2024 Order* at 32-33. Again, we find that the Complainant fails to satisfy the *Duick* standards.

Finally, Ms. Hendin repeats her assertion from her Complaint that she was harmed by a smart meter installed by the gas utility. Complaint at 2. Ms. Hendin has provided an analysis of the “issue of harm.” Petition at 9-15. In this regard, Ms. Hendin is attempting to relitigate her argument that a smart meter may cause her harm. However,

⁸ In December 2019, the FCC decided after issuing a Notice of Inquiry in March 2013 requesting comment on, *inter alia*, its existing exposure guidelines, and evaluating those comments, to keep its existing guidelines in place. The Environmental Health Trust challenged the FCC’s decision.

in our *January 2024 Order*, we expressly agreed with the ALJ's conclusion that Ms. Hendin failed to demonstrate by a preponderance of the evidence that the smart meter will cause her adverse health effects. *January 2024 Order* at 29-30 (citing I.D. at 33, 47). As the ALJ determined, the Complainant failed to satisfy her burden of demonstrating that the company violated the Code, a Commission Order or Regulation or a Commission-approved tariff of the company with regard to the installation of a smart meter. I.D. at 1. Ms. Hendin has not met the burden of proof as discussed in the *January 2024 Order*. *January 2024 Order* at 28-31.

Thus, we find that the Complainant's arguments regarding the potential harm from a smart meter installation and the past alleged harm from a gas utility smart meter all repeat the Complainant's arguments in her Complaint, Exceptions and Briefs, and therefore do not demonstrate a new and novel argument or consideration that has not previously been heard or has been overlooked by the Commission. Therefore, we find that the Complainant fails to assert any persuasive basis for reconsideration of our *January 2024 Order*.

We decline to address Ms. Hendin's arguments regarding military standards for cruel and unusual punishment, federal disability law, or the contention that Met-Ed will be subject to federal prosecution if it installs a smart meter at the service address. Petition at 10-12. These arguments raise matters outside the scope of Commission jurisdiction and are, therefore, rejected.

With regard to Ms. Hendin’s reference to Article 27 of the Pennsylvania Constitution,⁹ we note that the ERA existed at the time of her evidentiary hearing. If she wanted to make this argument, she could have done so at the hearing. Because she did not raise this argument at the hearing, the issue is waived and offers no persuasive value for changing the *January 2024 Order*.

Therefore, we find the Complainant’s first group of assertions fail to provide any persuasive basis upon which to grant reconsideration.

2. Met-Ed and the FirstEnergy Companies

a. The Reconsideration Petition

In the second group of assertions in the Reconsideration Petition, the Complainant argues that she is entitled to an accommodation. Reconsideration Petition at 18-20. Ms. Hendin’s Reconsideration Petition includes extra-record materials regarding Met-Ed and FirstEnergy Corporation that are not relevant to this matter. In addition, the Complainant contends that “the Commission’s rulings on all constitutional issues in this case must be reexamined.” Reconsideration Petition at 23-29.

⁹ Article I, Section 27 of the Pennsylvania Constitution, known as the Environmental Rights Amendment (ERA). The ERA states: “The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania’s public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.” Pa. Const. Art. I, § 27.

b. Met-Ed's Answer

In its Answer, Met-Ed responds that *Povacz II* made clear that even if a customer was able to prove a Section 1501 violation, the customer is only “entitled to an accommodation to the extent allowed by Act 129 and a utility’s tariff.” Answer at 17 (citing *Povacz II* at 1014). According to Met-Ed, 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. Answer at 17. Met-Ed notes that this accommodation has been available to the Complainant throughout this proceeding. Met-Ed provides that this is not a new development and fails under *Duick. Id.*

Met-Ed contends that the Complainant’s argument that certain criminal accusations and actions brought against affiliates of the Company should support her request to opt-out of a smart meter installation at the service address is irrelevant and an attempt to introduce extra-record and irrelevant evidence and should be rejected under *Duick. Answer at 17-18.*

Met-Ed submits that, while the Complainant argues that the Company is a state actor, this argument was rejected by the Commonwealth Court in *Povacz v. Pa. PUC*, 241 A.3d 481, 486 n.9 (Pa. Cmwlth. 2020). Met-Ed maintains that this holding was not disturbed by *Povacz II* and since Met-Ed and PECO are similarly situated EDCs, the Company is not a state actor that can violate the Complainant’s constitutional rights. Met-Ed opines that the Complainant’s argument fails and is not grounds for reconsideration under *Duick. Answer at 18.*

c. Disposition

We note that Ms. Hendin rejected the possible accommodation that Met-Ed offered – the relocation of the meter in accordance with its tariff.¹⁰ Ms. Hendin stated that the parties met twice to discuss relocation of the meter, but “no way forward was found because of the topography of the land and Met-Ed’s insurance policy regarding a relocated wire.” I.D. at 40 (citing Hendin M.B. at 64). On this basis, Ms. Hendin is essentially requesting an opt-out of the installation of a smart meter as accommodation. Since it was established under *Povacz II*, that there is no opt-out for smart meter installation, Ms. Hendin’s request must be denied. Accordingly, this argument is rejected as it does not raise any persuasive new or novel arguments pertinent to the decision in this proceeding; nor does this argument have any relevance to the findings in this proceeding.

Ms. Hendin cites to *Povacz II* and argues that “the Supreme Court opened the door for utilities to provide an accommodation without proving a Section 1501 violation.” Reconsideration Petition at 19. *Povacz II* states “This holding does not preclude an electric utility from providing a reasonable accommodation to an electric customer in the absence of a Section 1501 violation pursuant to a customer service policy.” *Povacz II*, at 983, fn. 5. Met-Ed can only offer an accommodation that is allowed by its tariff. The relocation of the meter was offered to Ms. Hendin, and she deemed it “not possible” and “not a reasonable accommodation.” *Id.*

Regarding the Complainant’s assertion that the Commission must “re-examine” its rulings on Constitutional issues, we disagree. This issue has already been expressly considered and rejected by the Commission in our *January 2024 Order’s*

¹⁰ We also note that Ms. Hendin is the tenant at the service address and not the property owner and may not be able to authorize the relocation of the meter. Met-Ed Motion in Limine dated August 21, 2019, at 4.

rejection of Complainant’s Exception raising the same argument. *January 2024 Order* at 31-32 (denying Complainant’s Exceptions).

Further, in *Povacz II*, the Supreme Court acknowledged that the Commonwealth Court concluded that, in the circumstances, the assertion of a constitutional right to refuse installation of a smart meter predicated upon an asserted violation of “bodily integrity” was unfounded. *See, Povacz II* at 985, fn. 8. As the Supreme Court denied allocator as to any constitutional claims, the Commonwealth Court’s holding stands. *Linda and Hubert Beck v. PPL Electric Utilities Corporation*, Docket No. C-2018-3002924 at 27.

Therefore, we find the Complainant’s second group of assertions fail to provide any persuasive basis upon which to grant reconsideration.

3. The Commission and its Office of Administrative Law Judge

a. The Reconsideration Petition

In her third group of assertions, the Complainant provides arguments related to the Commission’s jurisdiction, includes materials from other cases before the Commission, argues that the Commission showed bias against smart meter complainants, contends that evidence she proposed to submit was blocked by the ALJ, argues that the funding sources of the Commission “compromise its ability to be impartial” (Reconsideration Petition at 40-41), and that the Commission should void the Implementation Order.¹¹ Reconsideration Petition at 41.

¹¹ The Complainant cites to the approval of the FirstEnergy Smart Meter Plan at Docket No. M-2009-2123950 but refers to the Implementation Order. *See, Smart Meter Procurement and Installation*, Docket No. M-200902092655 (Implementation Order entered June 24, 2009) (*Smart Meter Installation Order*).

b. Met-Ed's Answer

Met-Ed provides that the “undue burden” test as articulated in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) was created to address the “State’s interest with the woman’s constitutionally protected liberty.” According to Met-Ed, it was not a test to govern the legality of smart meters in Pennsylvania. Met-Ed explains the legal basis for using the “undue burden” standard is nonexistent. Met-Ed explains further that this argument has been available to the Complainant throughout this proceeding and fails the *Duick* standard. Answer at 18-19.

Met-Ed maintains that the “major questions” doctrine does not apply to the Complaint and its resolution. Met-Ed avers that the Commonwealth of Pennsylvania has not adopted the major questions doctrine as articulated by the United States Supreme Court, Congress did not enact Act 129, and Act 129 was clear in its directive as confirmed in *Povacz II*. Answer at 20 (citing *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.”))

Met-Ed notes that the Complainant argues that the Commission acted beyond its delegated authority in ruling on her Complaint, citing a series of federal court decisions with no applicability to the instant proceeding. Answer at 20-21. Met-Ed provides that *Jarkesy v. Sec. & Exch. Comm’n*, 34 F.4th 446 (5th Cir. 2022) (*Jarkesy*) is inapplicable here. *Jarkesy* involves whether a federal agency can host a non-jury trial in a criminal matter. Met-Ed explains that the instant Complaint is not of a criminal nature and Pennsylvania law dictates that no right to a jury trial exists at the Commission. Answer at 21 (citing *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.”)).

Met-Ed contends that while the Complainant disputes 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*. Met-Ed provides that the Complainant argues the Commission erroneously overlooked the Lamech study, but the so-called Lamech Study was admitted as Complainant’s Exhibit X11. Answer at 21-22.

Met-Ed submits that the Complainant’s argument implies that the Commission, due to how it is funded, may have conflicts of interest preventing it from rendering a “fair and impartial ruling.” Answer at 22 (citing Reconsideration Petition at 41). Met-Ed maintains that this unfounded allegation could have been raised previously in litigation of the Complaint. Additionally, Met-Ed opines that how the Commission is funded is irrelevant to its evaluation of the installation of smart meters and its interpretation of Act 129, especially in the light of the Court’s decision in *Povacz II*. Answer at 22.

Finally, Met-Ed disagrees with the Complainant’s argument that the Commission’s Implementation Order for Act 129 was done so *ultra vires*,¹² and therefore should be rendered “null and void.” Answer at 22 (citing Petition at 41-42). Met-Ed provides that this argument was rejected by the Court in *Povacz II*. Answer at 22 (citing *Povacz II* at 992).

¹² *Ultra vires*: A body exercising an invalid excess or power of authority. Black’s Law Dictionary, 2nd ed.; <https://thelawdictionary.org/ultra-vires/>.

c. Disposition

The Complainant contends that the section of Act 129 that requires installation of smart meters should be nullified. The Complainant is continuing her efforts to opt out of installation of a smart meter. This argument from the Complainant is not new. It was part of her Complaint (Complaint at 3) and her Exceptions (Exc. at 20-24). *Povacz II* states that there is no opt-out available for the Complainant. *Povacz II* at 280 A. 3d at 983-984.

Regarding the “undue burden,” major questions doctrine and the Commission’s jurisdiction, we disagree with the Complainant’s arguments. The Commission’s jurisdiction in this matter is well-established. We agree with Met-Ed, there is no legal basis to apply the “undue burden” standard here. Answer at 18-20. We also agree with Met-Ed regarding the “major questions” doctrine. Answer at 20-21. It is inapplicable here as Act 129 was enacted by the Pennsylvania legislature, not Congress. The Complainant could have raised these issues at the evidentiary hearing but chose not to do so. Accordingly, we conclude that the Complainant’s arguments are unpersuasive and fail the *Duick* standard.

In the Reconsideration Petition, the Complainant repeats her argument from her Exceptions that the ALJ should have allowed documents that she submitted to be added to the record. Exc. at 1. We will not now reconsider the ALJ’s express decision to reject exhibits Ms. Hendin submitted late “for Your Honor’s consideration.” The ALJ noted “Ms. Hendin had an opportunity to present these exhibits as part of her direct case but did not do so.” *See, January 2024 Order* at 35. Accordingly, we conclude the Complainant’s argument is unpersuasive and fails the *Duick* standard.

We expressly reiterate that there is no support in the record of this proceeding for the Complainant’s arguments that the Commission or the ALJ has been

biased in the Complainant's case or other smart meter cases. The Complainant is attempting to relitigate her case by bringing in extra record and hearsay arguments. To the extent Ms. Hendin's Reconsideration Petition includes commentary alleging bias without foundation, such commentary is deemed to be immaterial, impertinent, and otherwise irrelevant to the disposition of this matter. Therefore, pursuant to 52 Pa. Code § 1.4(e), we shall strike such statements from our consideration of the Complainant's Reconsideration Petition.

We agree with Met-Ed that the Complainant's argument that implementation of Act 129 was not taken *ultra vires*. Answer at 22 (citing Reconsideration Petition at 41-42). This argument was considered and rejected in *Povacz II* as follows:

“[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

Povacz II at 992.

Therefore, we find the Complainant's third group of assertions fail to provide any persuasive basis upon which to grant reconsideration.

4. Matters the Complainant Alleges Were Overlooked or Not Addressed and Matters the Complainant Alleges Were Errors of Fact

a. The Reconsideration Petition

The Complainant argues that Met-Ed should have the burden of proof in this proceeding and discusses materials that were in her Main and Reply Briefs, arguing that they were not considered by the Commission. The Complainant identifies two instances that she alleges are errors of fact including one in the Initial Decision and the other in the *January 2024 Order*. Reconsideration Petition at 42-49.

b. Met-Ed's Answer

Met-Ed responds that the Complainant argues that the burden of proof should have been placed on the Company, rather than the Complainant, during the litigation of the Complaint. Answer at 19 (citing Reconsideration Petition at 42-44). Met-Ed disagrees with the Complainant's argument. Met-Ed explains that under Section 332(a) of the Public Utility Code, the Complainant maintains the burden of proof in this proceeding. *Id.* at 19 (citing 66 Pa. C.S. § 332(a); *Samuel J. Lansberry, Inc. v. Pa. PUC*, 578 A.2d 600 (Pa. Cmwlth. 1990), *alloc. denied*, 602 A.2d 863 (Pa. 1992)). Met-Ed further explains that although the factual burden may shift during a proceeding, the Complainant maintains the overarching burden of proof. Answer at 19.

Met-Ed rejects the Complainant's argument regarding the *Daubert* standard, explaining that Pennsylvania uses the *Frye* standard. Additionally, Met-Ed notes that this argument could have been made earlier in the evidentiary process and therefore fails the *Duick* standard. Answer at 23-24.

Met-Ed states that the Complainant’s arguments related to purported errors of fact are “without moment and are improperly raised at this stage in the proceeding.” Answer at 24. According to Met-Ed, the Complainant’s assertion that the *June 2020 Order* erred in finding that the Complainant was “not prepared during the hearing to use these exhibits when Dr. Israel appeared” is not a new argument that was not made and unavailable to the Complainant throughout her Exceptions and Briefs.” Answer at 24 (citing Reconsideration Petition at 47-48). Likewise, Met-Ed argues that the Complainant’s reference to a smart meter removal by another utility at the service address was clearly considered by the Commission. As such, Met-Ed contends that neither argument meets the *Duick* Standard. Answer at 24-25.

c. Disposition

We agree with Met-Ed’s position that in a complaint proceeding challenging smart meter installation, the Complainant retains the burden of proof. We reject the Complainant’s contention that the Commission does not have the proper expertise to rule on her case. The Complainant also contends that one of her Exhibits was not reviewed.

To the extent the Complainant argues that the *Daubert*¹³ standard applies here and that the Commission does not have the “knowledge to adjudicate the facts about science in this case”, the Complainant again repeats arguments previously raised and rejected. *See*, Reconsideration Petition at 44-45; Hendin M. B. at 17-18. In this regard, the Complainant has failed to meet her burden of proof and now wants a second chance to litigate her Complaint. We note that in *Povacz II* the Court stated:

Even if Customers’ expert testimony was sufficient to meet the preponderance of the evidence burden of proof, the PUC

¹³ *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

was free to conclude that the contrary evidence was more weighty.”

Povacz II at 1008.

The Court acknowledged that the Commission was capable of weighing the expert evidence in *Povacz*, a case similar to this proceeding. We reject the Complainant’s argument and note that it is not new or novel and fails the *Duick* standard. Accordingly, we shall deny the Complainant’s request for reconsideration on this basis.

We also reject Ms. Hendin’s contention that the Lamech Paper (Hendin Exh. X11) was overlooked. There is no evidence that the ALJ or the Commission overlooked Exhibit X11. The ALJ discussed the Complainant’s late-filed exhibits including Exhibit X11 in his June 18, 2020 Order Granting in Part and Denying in Part Motion for Admission of Late-Filed Exhibits and Motion to Strike (*June 2020 Order*). *June 2020 Order* at 10-11.

The Lamech Paper is not new evidence, and we are not persuaded to grant reconsideration of the Complainant’s request that she be allowed to opt-out of the installation of a smart meter. Accordingly, the Complainant’s request for reconsideration with regard to this matter is denied.

Regarding the two instances that Ms. Hendin contends are errors of fact, we are not persuaded that these are relevant. The first is regarding a sentence in the ALJ’s *June 2020 Order* that states “Ms. Hendin was not prepared during the hearing to use these exhibits when Dr. Israel appeared.” *January 2024 Order* (citing *June 2020 Order* at 11). The second alleged error of fact is a statement by Met-Ed quoted in the *January 2024 Order*. Reconsideration Petition at 48 (citing *January 2024 Order* at 34). It is not a misquote. Both instances are immaterial to the proceeding and will not be

considered. Finally, the Complainant alleges that the date the gas utility meter was changed out was known in contrast to a quote from Met-Ed's Reply Exceptions. Again, this is immaterial to the proceeding, a reargument and fails the *Duick* standard.

Therefore, we find the Complainant's fourth group of assertions fail to provide any persuasive basis upon which to grant reconsideration.

III. Conclusion

Upon our review and consideration of the Petition to Reopen the Record, the Reconsideration Petition and the record evidence in this proceeding, we shall deny the Complainant's Petitions because the Complainant has provided neither good cause shown to reopen the record, nor sufficient grounds under the *Duick* standards to support the request for reconsideration; **THEREFORE,**

IT IS ORDERED:

1. That the Petition to Reopen the Proceeding for the Purpose of Submitting Additional Evidence, filed by Judith Hendin on January 22, 2024, at Docket No. C-2018-3003324, is denied, consistent with this Opinion and Order.

2. That the Petition for Reconsideration of Judith Hendin, filed on February 12, 2024, at Docket No. C-2018-3003324, is denied, consistent with this Opinion and Order.

3. That this proceeding be marked closed.

BY THE COMMISSION,

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

Rosemary Chiavetta
Secretary

(SEAL)

ORDER ADOPTED: April 4, 2024

ORDER ENTERED: April 18, 2024