PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17120

Public Meeting held July 11, 2024

Commissioners Present:

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

Noreen McCarthy C-2019-3006923

v.

Metropolitan Edison Company

OPINION AND ORDER

BY THE COMMISSION:

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition are the Exceptions filed by Noreen McCarthy (the Complainant or Ms. McCarthy) on November 4, 2020, in response to the Initial Decision (Initial Decision or I.D.) of Administrative Law Judge (ALJ) Conrad A. Johnson, which was served on the Parties on October 15, 2020, in the above-captioned proceeding. Replies to Exceptions were filed by Metropolitan Edison Company (Met-Ed or the

Company) on November 27, 2023.[1] The Initial Decision dismissed the Amended Formal Complaint (Complaint) filed by the Complainant on January 7, 2019, and amended on March 11, 2019, with prejudice. For the reasons discussed below, we shall deny the Complainant's Exceptions, adopt the Initial Decision of ALJ Johnson, and dismiss the Complaint, consistent with this Opinion and Order.

I. Background

This case involves a Complaint concerning the safety of the advanced metering infrastructure (AMI), or smart meter, that Met-Ed proposes to install at the Complainant's residence and use in the ordinary course of business to measure the Complainant's electricity consumption. The Complainant refuses to have a smart meter installed for health and safety reasons. In her Amended Complaint, Ms. McCarthy requested: (1) that the Commission require Met-Ed to comply with Section 1501 and Section 1502 of the Public Utility Code and Section 57.194 of the Commission's regulations; (2) that the Commission compel Met-Ed to grant the Complainant an accommodation and desist from deploying or attempting to deploy any wireless equipment that has been shown to cause pathologies and is a fire hazard; (3) that the Commission allow the Complainant to retain the current analog meter; (4) that the Commission waive any rule, regulation or Commission order that the Commission believes requires Met-Ed to deploy a wireless EMF emitting meter; and (5) convert the Formal Complaint into a petition for relief, if necessary, to provide the Complainant an accommodation under the Americans with Disabilities Act (ADA) if the Commission finds that Met-Ed did not violate any statute or regulation. Amended Complaint at 4-5.

[1] Met-Ed's Replies to Exceptions are considered timely. The Commission issued a stay discussed *infra* at 7, affecting this proceeding on November 4, 2020. The stay was lifted on November 14, 2023.

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

The Complainant, Noreen McCarthy, is a Met-Ed customer. Answer to Amended Complaint at 1.

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

> (f) *Smart Meter technology and time of use rates.*
>
> (1) Within nine months after the effective date of this paragraph, electric distribution companies shall file a Smart Meter technology procurement and installation plan with the commission for approval. The plan shall describe the Smart Meter technologies the electric distribution company proposes to install in accordance with paragraph (2).
>
> (2) Electric distribution companies shall furnish Smart Meter technology as follows:
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> (i) Upon request from a customer that agrees to pay the cost of the Smart Meter at the time of the request.
>
> (ii) In new building construction.
>
> (iii) In accordance with a depreciation schedule not to exceed 15 years.

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

By Order entered in 2009, the Commission directed all EDCs subject to Act 129's smart meter requirements, including Met-Ed, to universally deploy smart meter technology within their respective service territories in the Commonwealth in accordance with a depreciation schedule not to exceed fifteen years and in accordance with other guidelines established therein. *See, Smart Meter Procurement and Installation*, Docket No. M-2009-2092655 (Implementation Order entered June 24, 2009) (*Smart Meter Installation Order*). Met-Ed sought and obtained the Commission's approval to complete the installation of AMI meters for substantially all customers within its service territory by mid-2019. *See, Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company, and West Penn Power Company for Approval of their Smart Meter Deployment Plan*, Docket No. M-2013-2341990 (Opinion and Order entered March 6, 2014) (*2014 Smart Meter Order*).

II. History of the Proceeding[2]

On January 7, 2019, Ms. McCarthy filed a Formal Complaint with the Commission averring that she wishes to opt-out of a smart meter installation at the Service Address for health and safety reasons. Complaint at 2-4.

[2] The History of the Proceeding is summarized here. A more extensive History of the Proceeding can be found in the Initial Decision at 1-25.

On January 28, 2019, Met-Ed filed an Answer and New Matter admitting that Met-Ed provides electric service to the Complainant. The Answer contends that Met-Ed is required to install smart meters, for all automatic meter reading (AMR) customers and that it has the right to terminate service for failure of the customer to permit access to the meter. Answer at 1-4. In its New Matter, Met-Ed contends that the Complaint is legally insufficient as neither its Smart Meter Plan or Act 129 enable the Commission to grant the relief requested by the Complaint. Answer at 9. On March 11, 2019, the Complaint was Amended adding a request that Met-Ed provide the Complainant an accommodation she requires in accordance with the ADA. Amended Complaint at 2. On April 1, 2019, Met-Ed submitted an Answer and New Matter to the Amended Complaint. The Answer to the Amended Complaint included a request for a prehearing conference. Answer to Amended Complaint at 11.

On February 22, 2019, the proceeding was assigned to ALJ Jeffrey Watson. I.D. at 3. On February 24, 2020, the Complainant sent a request for a judge reassignment to the Commission's Office of Administrative Law Judge, stating that she was "requesting reassignment to an ALJ that has knowledge of working with ADA accommodated people." I.D. at 14; February 24, 2020 Certificate of Service. The Complainant's request was granted by Hearing Judge Change Notice dated March 31, 2020 that informed the Parties of the ALJ change to ALJ Conrad Johnson. I.D. at 15.

On April 24, 2019, the Complainant filed a Reply to the Answer and New Matter of Met-Ed. In this Reply, the Complainant objected to Met-Ed's request for a prehearing conference, stating: "Further, Complainant objects to the Company's request that this matter be set for a prehearing conference. My family and work obligations preclude me from preparing for multiple hearings." Reply to the Answer and New Matter at 2.

After several continuances, an evidentiary hearing was held on July 14, 2020. At the hearing, the Complainant appeared *pro se* with three witnesses, Laura S. Murphy, PhD, Esquire, Mr. Wes Zimmerman and Tania Slawecki, PhD. The Complainant's witnesses were not permitted to testify because the ALJ determined that they could not be qualified as experts, or the proffered testimony was deemed irrelevant, immaterial or inadmissible hearsay. I.D. at 23. The ALJ provided the following regarding the Complainant's witnesses and exhibits:

> Dr. Murphy's proffered testimony consisted of inadmissible legal arguments or inadmissible hearsay. Tr. 86. Mr. Zimmerman, a tax agent, claimed his background qualified him as an expert to define the word "depreciation" in Act 129. Tr. 73. He admitted he did not have any expert testimony as to the harmful effects of smart meters. *Id*. Dr. Slawecki has a background in the microwave field; however, she did not have any medical expertise as to the effects of smart meters on human beings. Tr. 58-71. Accordingly, none of the Exhibits that Ms. McCarthy proposed to sponsor through her witnesses were admitted into the record. Tr. 86.

I.D. at 23.

The ALJ noted that Ms. McCarthy testified on her own behalf[3] and sponsored a copy of Act 129, marked as Exhibit NM-1, which was admitted into the record. The ALJ provided that Ms. McCarthy's remaining exhibits which consisted of smart meter articles, legal arguments, and other articles culled from the Internet, were not admitted into the record as the ALJ deemed the Exhibits irrelevant, immaterial, or inadmissible hearsay. I.D. at 23 (citing Tr. at 85). The ALJ noted that the Complainant's

[3] Ms. McCarthy was permitted to testify first without interruption. As an accommodation for Ms. McCarthy, the ALJ instructed the Parties to allow Ms. McCarthy to testify uninterrupted and for Met-Ed to hold any objections or motions until Ms. McCarthy had completed her testimony. Tr. at 35, 37.

remaining Exhibits, while not admitted to the record, would be added to the case docket. I.D. at 23-24.

The ALJ informed the Parties that he was taking judicial notice of the Commission's order concerning the implementation of smart meters and the Commission's order approving Met-Ed's smart meter deployment plan. I.D. at 24 (citing Tr. at 89).

After Ms. McCarthy had completed her testimony, Met-Ed decided not to call its witnesses and made a motion to dismiss the case for failure of the burden of proof. I.D. at 24 (citing Tr. at 93-95). The ALJ granted the motion from the bench for failure of the burden of proof. The ALJ informed the Parties that he would issue a decision confirming the dismissal of the case, and if anyone disagreed with the decision, they had the right to file exceptions to the Commission. I.D. at 24 (citing Tr. at 94-95).

A 98-page transcript of the hearing was generated. The record was closed by an Interim Order issued on July 17, 2020. I.D. at 24.

On October 15, 2020, the Commission served ALJ Johnson's Initial Decision in *Noreen McCarthy v. Metropolitan Edison Company*, Docket No. C-2019-3006923.

As noted above, on November 4, 2020, the Complainant filed Exceptions to the Initial Decision. On November 27, 2023, Met-Ed filed Replies to Exceptions.

On November 4, 2020, the Commission entered an Order and Notice, at Docket No. M-2009-2092655, pursuant to 66 Pa. C.S. § 501, instituting a stay of certain formal complaint proceedings then pending before the Commission involving challenges to EDC deployment of smart meter technology as being in violation of Section 1501 of

the Code (*November 2020 Stay Order*). The *November 2020 Stay Order* also directed that the stay would apply to any new formal complaints filed with the Commission claiming that EDC deployment of smart meter technology was a violation of Section 1501, and that the stay would remain in place until it was lifted by further Commission action. By Order entered November 14, 2023, at Docket No. M-2009-2092655, the Commission lifted the stay. 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.

III. Discussion

A. Legal Standards

1. General Burden of Proof for Complaint Proceeding

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

To establish a sufficient case and satisfy the burden of proof, the complainant must show that the respondent utility is responsible or accountable for the problem described in the Complaint. *Patterson v. The Bell Telephone Company of Pennsylvania*, 72 Pa. P.U.C. 196 (1990). The offense must be a violation of the Code, a Commission Regulation or Order or a violation of a Commission-approved tariff.

66 Pa. C.S. § 701. Such a showing must be by a "preponderance of the evidence." *Samuel J. Lansberry, Inc. v. Pa. PUC*, 578 A.2d 600 (Pa. Cmwlth. 1990), *alloc. denied*, 529 Pa. 654, 602 A.2d 863 (1992). That is, the Complainant's evidence must be more convincing, by even the smallest amount, than that presented by the respondent. *Se-Ling Hosiery, Inc. v. Margulies*, 364 Pa. 45, 70 A.2d 854 (1950).

The burden of proof is comprised of two distinct burdens: (1) the burden of production; and (2) the burden of persuasion. *Hurley v. Hurley*, 2000 Pa. Super. 178, 754 A.2d 1283 (2000). The burden of production, also called the burden of going forward with the evidence, determines which party must come forward with evidence to support a particular claim or defense. *Scott and Linda Moore v. National Fuel Gas Distribution*, Docket No. C-2014-2458555 (Initial Decision issued May 11, 2015) (*Moore*). The burden of production goes to the legal sufficiency of a party's claim or affirmative defense. *See, Id*. The burden of production may shift between the parties during a hearing. A complainant may establish a *prima facie* case with circumstantial evidence. *See, Milkie v. Pa. PUC*, 768 A.2d 1217, 1220 (Pa. Cmwlth. 2001) (*Milkie*). If a complainant introduces sufficient evidence to establish legal sufficiency of the claim, also called a *prima facie* case, the burden of production shifts to the utility to rebut the complainant's evidence. *See, Moore*.

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

Having produced sufficient evidence to establish legal sufficiency of a claim, the party with the burden of proof must also carry the burden of persuasion to be entitled to a favorable ruling. *See, Moore*. While the burden of production may shift back and forth during a proceeding, the burden of persuasion never shifts; it always remains on a complainant as the party seeking affirmative relief from the Commission. *See, Milkie*, 768 A.2d at 1220; *see also, Riedel v. County of Allegheny*, 633 A.2d 1325, 1328, n.11 (Pa. Cmwlth. 1993); *see also*, *Burleson*, 443 A.2d at 1375. It is entirely possible for a party to carry the burden of production but not be entitled to a favorable ruling because the party did not carry the burden of persuasion. *See, Moore.* In determining whether a complainant has met the burden of persuasion, the fact-finder[4] may engage in determinations of credibility, may accept or reject testimony of any witness in whole or in part, and may accept or reject inferences from the evidence. *See, Moore*, citing *Suber v. Pennsylvania Com'n on Crime and Delinquency*, 885 A. 2d 678, 682 (Pa. Cmwlth. 2005) (*Suber*).

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

2. Burden of Proof Applied to Section 1501[5] Complaint Challenging Smart Meter Installation

In *Povacz, et al. v. Pa. PUC*, 280 A.3d 975 (Pa. 2022) (*Povacz II*), which dealt with consolidated appeals involving the deployment of smart meters by PECO Energy Company, the Supreme Court of Pennsylvania (Supreme Court) reversed the Commonwealth Court's October 8, 2020 decision in *Povacz v. Pa. PUC* (241 A.3d 481) (*Povacz I*), and thereby affirmed the Commission's March 28, 2019 and May 9, 2019 Orders in *Maria Povacz v. PECO Energy Company,* C-2015-2475023 (*Povacz 2019 Order*); *Laura Sunstein Murphy v. PECO Energy Company*, C-2015-2475726 (*Laura Sunstein Murphy*); and *Cynthia Randall and Paul Albrecht v. PECO Energy Company*, C-2016-2537666 (*Cynthia Randall*). By *Povacz II,* the Supreme Court affirmatively established that there is no "opt-out" provision for installation of a smart meter pursuant to Act 129 and that to raise a viable challenge to smart meter installation, a customer must satisfy the preponderance of evidence standard for a violation of Section 1501 of the Code. *Povacz II*, 280 A. 3d at 983-984.

Pursuant to Section 1501 of the Code, all public utilities have a duty to maintain "adequate, efficient, safe, and reasonable service[6] and facilities" and to make

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

[6] The term "service" is defined broadly under Section 102 of the Code to include any and all acts done or rendered or performed and any and all things furnished or supplied and any and all facilities, used, furnished or supplied by public utilities. *See*, 66 Pa. C.S. § 102. The statutory definition of "service" is also to be broadly construed by

repairs, changes, and improvements that are necessary or proper for the accommodation, convenience, and safety of its patrons, employees, and the public. *See* 66 Pa. C.S. § 1501. Section 1501 of the Code, provides, in pertinent part, as follows:

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

66 Pa. C.S. § 1501.

As previously noted, in *Povacz II*, the Pennsylvania Supreme Court not only affirmed the Commission's determination that there is no "opt-out" provision for smart meter installation in either Act 129, the Code, Commission Regulations, or Orders, but also confirmed that challenges to smart meter installation, other than an "opt-out," may arise under Section 1501[7] of the Code. Therein, the Supreme Court stated:

> [W]e conclude that Act 129 does mandate that EDCs furnish smart meters to all electric customers within an electric distribution service area and does not provide electric customers the ability to opt out of having a smart meter

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

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

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

Povacz II, at 983-984; *See, Povacz v. PECO Energy Company*, Docket No. C-2012-2317176 (Opinion and Order entered January 24, 2013) (*Povacz 2013 Order)*; *see also, Frompovich v. PECO Energy Co*., Docket No. C-2015-2474602 (Opinion and Order entered May 3, 2018) (*Frompovich*).

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

> A customer seeking affirmative relief from the [Commission] must prove by a preponderance of the evidence that the named utility was responsible or accountable for the problem described in the complaint and that the offense was a violation of the Code, a [Commission] regulation or [o]rder, or a violation of a [Commission]-approved tariff. [*See*] 66 Pa.C.S. §§ 332(a), 701; *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm'n*, . . . 134 Pa. Commw. 218, 578 A.2d 600 ([Pa. Cmwlth.] 1990)[.] . . .
>
> Although Act 129 does not provide an electric customer [] with the right to opt-out of the installation of a smart meter at their residence, they [sic] may file a complaint raising a claim that installation of a smart meter violates Section 1501 of the Code.
>
> . . . .
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> Pursuant to [S]ection [1501 of the Code], an EDC (as a public utility) must provide service that is, *inter alia*, both safe and reasonable. **To carry their burden of proof on a Section 1501 [of the Code] claim, a smart meter challenger may be required to present medical documentation and/or expert testimony demonstrating that the furnishing of a smart meter constitutes unsafe or**

> **unreasonable service** in violation of Section 1501 [of the Code] under the circumstances presented. *Susan Kreider v. PECO Energy Co*., P-2015-2495064, 2016 WL 406549, at *14 (Pa. P.U.C. Jan. 28, 2016).

Povacz II, 280 A. 3d at 999-1000 (emphasis added; footnote omitted).[8]

In applying the standard of proof to scientific or expert medical evidence in support of alleged adverse health effects, the Commission ruled in the *Povacz 2019 Order*, and was subsequently affirmed by the Supreme Court in *Povacz II*, that in order to prevail in a Section 1501 claim against an EDC alleging that an AMI meter caused or will cause adverse health effects or harm to human health, the Complainant must demonstrate by a preponderance of the evidence a "conclusive causal connection" between the harm to human health and the radio frequency fields (RFs)[9] from the AMI meter.[10]

3. Other Relevant Legal Standards

In addition to establishing that a complaint challenging the installation of a smart meter may arise under Section 1501, the Supreme Court's decision in *Povacz II* acknowledged the Commonwealth Court's rejection of a constitutional claim for

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

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

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

exemption from smart meter installation predicated on a violation of "bodily integrity." The Supreme Court noted the Commonwealth Court's denial of a claim under the Fourteenth Amendment, stating:

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

Povacz II at 985, fn. 8. As the Supreme Court denied allocator as to any constitutional claims, the Commonwealth Court's holding stands.

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

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

B. ALJ's Initial Decision

In the Initial Decision, ALJ Johnson made eight Findings of Fact (FOF) and reached fourteen Conclusions of Law (COL). *See*, I.D. at 25-26, 38-40. The Findings of Fact and Conclusions of Law are incorporated herein by reference and are adopted without comment unless they are either expressly or by necessary implication rejected or modified by this Opinion and Order.

In his disposition, ALJ Johnson addressed, *inter alia*, the following issues: (1) reasonable accommodation under the ADA; (2) the smart meter mandate; (3) reasonable service issues; and (4) service termination. I.D. at 30-38.

1. Reasonable Accommodation under the ADA for Participation in the Hearing Process

The ALJ noted that the Complainant contended she was not provided a reasonable accommodation under the ADA to present her case due to her dyslexia. I.D. at 30 (citing Tr. at 41-42). The ALJ determined that the Complainant's contention that she was not provided with a reasonable accommodation implicates due process and the Commission's duty to provide a party the opportunity to be heard. I.D. at 30 (citing *Schneider v. Pa. PUC*, 479 A.2d 10, 15 (Pa. Cmwlth. 1984)).

Ms. McCarthy filed her Formal Complaint on January 7, 2019. On February 15, 2019, the Complainant objected to Met-Ed's request for a prehearing conference. The Complainant stated, "My family and work obligations preclude me from preparing for multiple hearings." I.D. at 30 (citing February 15, 2019 Reply to New Matter at 3). A prehearing Litigation Schedule did not include a prehearing conference. ALJ Watson reminded the Parties that a prehearing conference could be scheduled upon request. I.D. at 30-31 (citing March 7, 2019 Prehearing Order at 7).

The ALJ noted that if the Complainant had not objected to the scheduling of a prehearing conference, her request for a reasonable accommodation could have been addressed at the conference. I.D. at 31.

The ALJ provided that the Complainant did not mention any disability until she filed her First Continuance Request, seeking an extension of the litigation schedule, on April 8, 2019, stating she was a "dyslexic person." The Complainant's request for her first continuance was not based on any impairment limiting her ability to participate in discovery, but rather cited to personal matters including homeschooling her children and a college tour for her daughter. On April 24, 2019, the Complainant again objected to a prehearing conference. I.D. at 31 (citing Reply to New Matter ¶ 23).

The Complainant made a second request for a continuance which ALJ Watson granted in his *July 2019 Interim Order*. On October 3, 2019, ALJ Watson granted the Complainant's third request for an extension of the Litigation Schedule due to her claim of disability. I.D. at 31 (citing *October 2019 Interim Order*).

The Complainant requested an accommodation under the ADA by letter dated November 5, 2019. By letter dated December 26, 2019, ALJ Watson acknowledged the request and directed the Complainant to provide specific information regarding her disability. The ALJ noted that there is no evidence in the record that the Complainant complied with ALJ Watson's directive. I.D. at 32.

The ALJ stated that each of the Hearing Notices dated October 4, 2019, April 8, 2019, and March 3, 2020 directed a person in need of an accommodation to contact the Commission's Scheduling office at the telephone number provided in the Notice. In addition, the ALJ noted that the Complainant was permitted to give her evidentiary hearing testimony uninterrupted under the *June 2020 Reasonable Accommodation Order*. The ALJ stated that while the Complainant was grateful for this

accommodation, the Complainant argued that Met-Ed was agreeable to exchanging written testimony and she needed more reasonable and necessary accommodations. I.D. at 32 (citing Tr. at 41-42). The ALJ noted that the Complainant argued she should be granted an additional sixty days to process Met-Ed's 292 pages of exhibits and she needed more time to prepare her case. I.D. at 32 (citing Tr. at 23, 60).

The ALJ concluded that the Complainant's argument must fail for two reasons: (1) starting with the March 7, 2019 Prehearing Order, the Complainant was directed to submit her written testimony and that of her witnesses by July 22, 2019; the litigation schedule was extended four times at the Complainant's request; there is no evidence that the Complainant filed any written direct testimony before the hearing; and (2) the Complainant's due process rights do not entitle her to never-ending extensions of time to litigate her case. I.D. at 33 (citing *Steadwell v. Unemployment Compensation Bd. Of Review*, 462 A.2d 1298 (Pa. Cmwlth. 1983)).

The ALJ reasoned that the Complainant never provided any documentation to support her claimed disability and she cannot rely upon her assertions to establish her claimed disability. I.D. at 33 (citing *Brettler v. Purdue Univ.*, 408 F.Supp.2d 640, 663-64 (N.D. Ind. 2006); *Koteles v. ATM Corp. of Am.*, No. Civ.A. 05-1061, 2008 U.S. Dist. LEXIS 72280; 2008 WL 4412098 (W.D. Pa. Sept. 23, 2008)). The ALJ concluded that the Complainant's contentions that she was not afforded a reasonable accommodation under the ADA is without merit. I.D. at 34.

2. Smart Meter Mandate

The ALJ noted that in prior smart meter deployment cases, the Commission has construed Act 129 as not providing an opt-out for customers. I.D. at 34 (additional citations omitted). The Complainant argued that Met-Ed is required to provide her an accommodation under the ADA by not installing a smart meter. I.D. at 36 (citing

Tr. at 38-41). The ALJ provided that the Commission is required to provide reasonable accommodations to persons appearing before it under the ADA, but the Commission does not have jurisdiction to enforce the ADA. The ALJ concluded that the Commission lacks jurisdiction to adjudicate whether Met-Ed is required to provide the Complainant a reasonable accommodation under the ADA. I.D. at 36.

3. Reasonable Service Issue

The ALJ noted that the Complainant contends that installation of a smart meter at the service address would expose her and her family to unsafe technology, smart meters are harmful to humans and animals, and smart meters are a fire hazard. I.D. at 36 (citing Amended Complaint ¶¶ 5, 8, 9). In addition, the Complainant testified that exposure to wireless devices such as smart meters exacerbates her neurological symptoms and those of her son. I.D. at 36 (citing Tr. at 38-39). However, the ALJ provided that the bulk of the Complainant's case consisted of her reading her 14-page *Notice of Rights* into the record. I.D. at 36-37 (citing Tr. at 15-29, 36). The ALJ stated that the Complainant did not present any evidence other than her lay opinions and beliefs that smart meters are a health risk or unsafe or present a fire hazard. I.D. at 37 (citing Tr. at 58-61). Due to the lack of expert testimony or evidence, the ALJ concluded that the Complainant's claim that the installation of a smart meter would constitute unreasonable service under Section 1501 is without merit. I.D. at 37.

4. Threat of Service Termination

The ALJ explained that under Section 1406(a)(4) of the Code and Section 56.81(3) of the Commission's regulations, a utility may terminate service to a customer when the customer denies the utility access to the service location to replace a meter. I.D. at 38. The ALJ concluded that Met-Ed's threat of a service termination was

authorized since the Complainant would not allow the Company access to replace the analog meter with a smart meter. *Id.*

5. Ruling

Based on all the above, the ALJ dismissed the Amended Complaint with prejudice for failure to establish a *prima facia* case evidencing any violation of a Commission statute, regulation, or order on the part of Met-Ed, or that the Complainant is entitled to the relief requested. I.D. at 1. The ALJ dismissed the Amended Complaint with prejudice. I.D. at 41.

C. Exceptions, Replies, and Disposition

The Complainant's Exceptions generally pertain to the following: (1) due process and the ADA; (2) burden of proof; and (3) Act 129 and an opt-out request.

To the extent the Complainant's Exceptions include 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 Exceptions.

To the extent the Complainant used extra-record materials in her Exceptions, such materials will be disregarded. It is well-established that parties cannot introduce new evidence following the close of the record. *Application of Apollo Gas Co.*, 1994 Pa. PUC Lexis, at *8-14 (Order entered February 10, 1994) (*Apollo Gas*). Accordingly, any extra-record information Ms. McCarthy used in her Exceptions will not be considered. *Apollo Gas*.

1. Complainant's Arguments Regarding Due Process and the ADA

a. Introduction to Exceptions, Exception Nos. 1, 5 and 9

In the Introduction to her Exceptions, the Complainant "takes exception to ALJ Johnson's inappropriate ADA accommodations granted to her and maintains that she has been discriminated against in these proceedings according to ADA laws." Exc. at 5.

In her Exception No. 1, the Complainant argues that due to being *pro se* and dyslexic, she was disadvantaged in being able to respond to Met-Ed's motion to dismiss. Exc. at 8.

In her Exception No. 5, the Complainant alleges that the ALJ erred in the number of extensions the Complainant requested, unjustly casting aspersions on the Complainant. Exc. at 16-18.

In her Exception No. 9, the Complainant repeats her argument that the accommodations granted were inappropriate. Exc. at 28.

b. Replies

Met-Ed contends that the Complainant was afforded due process in this proceeding; she was provided the opportunity to conduct discovery, call upon witnesses, give evidentiary hearing testimony and submit written direct testimony and post-hearing briefs. Met-Ed notes that the Complainant commenced this action on January 7, 2019 and subsequently objected to Met-Ed's request to schedule a prehearing conference. The Complainant stated, "My family and work obligations preclude me from preparing for multiple hearings." R. Exc. at 8 (citing February 15, 2019 Reply at 3). Met-Ed provides that a pre-hearing conference could have addressed the Complainant's request for an

accommodation. According to Met-Ed, the first mention of any disability of the Complainant was not until she filed her *First Continuance Request*, seeking an extension of the litigation schedule, on April 8, 2019, which request was not based on any impairment limiting her ability to engage in discovery, but rather time needed for personal obligations. R. Exc. at 8-9. Met-Ed notes that the Complainant requested and was granted four extensions of the Litigation Schedule due to her claim of disability, but the nature of her disability remained silent until November 5, 2019, (almost a year after she filed her Complaint). Met-Ed maintains that there is no evidence, medical documentation, or otherwise in the record substantiating the Complainant's disability, despite being directed to provide the same by ALJ Watson on December 26, 2019. R. Exc. at 9.

Met-Ed explains that the Complainant objected to and declined to participate in a prehearing conference, failed to comply with the ALJ's litigation schedule, failed to submit written direct testimony prior to the evidentiary hearing, and never provided any documentation to support her claimed disability. According to Met-Ed, any of the Complainant's alleged frustrations with the process and administrating of this proceeding are solely the result of her own conduct and/or lack of conduct. R. Exc. at 9.

c. Disposition

The Complainant argues that she was given "inappropriate" accommodations for her claimed disability. Exc. at 28. She maintains that "she has been discriminated against in these proceedings according to ADA laws." Exc. at 5.

The Initial Decision provides the following regarding the ADA and Due Process:

> The ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C.S. § 12132.
>
> Commonwealth agencies like the Commission are required to comply with the ADA in providing reasonable accommodations to persons with disabilities to access the Commission's services. As an administrative agency of the Commonwealth, the Commission is required to provide due process to the parties appearing before it. Due process is satisfied when the parties are afforded notice and the opportunity to appear and be heard. The Commission is required to fix the time and place of a hearing in a complaint proceeding and to serve notice thereof upon the parties in interest.

I.D. at 26 (citations omitted).

The Complainant was allowed four extensions of the Litigation Schedule.[11] The Complainant alleges that she submitted only three requests for extensions of the Litigation Schedule, while the record includes four requests. The Complainant contends that the ALJ disparaged her by noting that she did not submit written testimony before the hearing. Exc. at 18. We note that the record shows that she did not submit written testimony prior to the hearing. The ALJ accurately noted the number of extensions granted to the Complainant and the lack of submission of written testimony by the Complainant. We do not agree that this information is in any way disparaging to the Complainant, and we shall deny Exception No. 5.

[11] April 8, 2019 First Motion for Continuance, July 8, 2019 Second Motion for Continuance, September 27, 2019 Request for Extension of Time Due to Disability, April 2020 Continuance Request.

The Complainant rejected the prehearing conference where her concerns regarding appropriate accommodations could have been addressed. ALJ Watson provided a letter to the Complainant regarding her request for an ADA accommodation. In the December 26, 2019 letter, ALJ Watson requested additional information from the Complainant regarding her disability and the specific accommodation she was seeking. The letter stated, *inter alia*, that the requested accommodation will be given every consideration. In addition, the letter stated that if the requested accommodation poses an undue hardship to the Commission or to other litigants involved, the Commission will attempt, where possible, to find a reasonable alternative accommodation.[12] The Complainant did not provide a response to ALJ Watson's request for additional information regarding the Complainant's claimed disability.

The Complainant was granted a change in ALJ when she expressed concern that ALJ Watson lacked experience with ADA *pro se* complainants.[13]

As an accommodation, ALJ Johnson allowed the Complainant to testify without interruption.[14] The Complainant indicated that she appreciated this accommodation but needed additional accommodations. Tr. at 41-42.

The Complainant participated in the hearing. Tr. at 4. During the hearing, the Complainant explained why she filed the Complaint and what relief she was seeking. Tr. at 37-41. The Complainant was offered the opportunity to present a closing argument. Tr. at 87.

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[12] December 26, 2019, letter from ALJ Watson regarding ADA/Accommodation Request.

[13] March 30, 2020 Letter from Complainant to Chief ALJ Rainey.

[14] Second Interim Order Providing Complainant Reasonable Accommodation, June 30, 2020.

Based upon review of the transcript and the Initial Decision, we conclude that the Complainant had ample opportunity to present her evidence and legal arguments at the hearing. The Complainant was granted her request for a change in ALJ. The Complainant was provided with several continuances and was permitted to testify without interruption at the hearing. We conclude that the Complainant was granted due process consideration throughout the proceeding. The ALJ was acting within his discretion to regulate the course of the proceeding, including the decision to not allow the Complainant an additional sixty days to review Met-Ed's exhibits and more time to prepare her case. See 52 Pa. Code § 5.483(a); Tr. at 60. We find no error in the ALJ's decisions regarding the accommodations granted and the ALJ's decision to not grant the Complainant's requests at the hearing.

Accordingly, we find that the Complainant's arguments that she was not afforded due process are without merit.[15] Therefore, the Complainant's Exceptions with regard to due process are denied.

2. Complainant's Arguments Regarding the Burden of Proof

a. Exception Nos. 1, 2, 3, 4, 6, 7, 8 and 9

In her Exception No. 1, the Complainant contends that the ALJ erred by failing to uphold the requirements of 66 Pa. C.S. § 701 by ignoring the Complainant's legal argument pertaining to Act 129. Exc. at 5-9.

[15] We note that the Commission does not have the authority to adjudicate a claim of discrimination under the ADA.

In Exception Nos. 2, 3, and 4, the Complainant contends that the ALJ erred in not allowing her witnesses to testify at the hearing. In Exception No. 6, the Complainant argues that the ALJ erred by not admitting all of her proposed exhibits.

In her Exception No. 7, the Complainant avers that Act 129 does not require installation of a smart meter by Met-Ed and her "termination of service threat is without basis." Exc. at 23. In her Exception No. 8, the Complainant contends that the ALJ erred in his cite to Act 129. Exc. at 23-25. In her Exception No. 9, the Complainant contends that the ALJ ignored aspects of *Povacz I* favorable to the Complainant. Exc. at 25-28.

b. Replies

Met-Ed avers that the ALJ correctly dismissed the Amended Complaint because the Complainant failed to demonstrate by a preponderance of the evidence that installation of a smart meter at the service location would become an unsafe or unreasonable service in violation of Section 1501. Met-Ed provided that the ALJ stated, and *Povacz II* affirmed that a complainant's burden of proof is satisfied by establishing a preponderance of evidence which is substantial and legally credible. R. Exc. at 4 (citing I.D. at 27-28) (additional citations omitted).

Met-Ed provides that a customer must present expert opinion rendered to a reasonable degree of medical certainty that RF emissions from the smart meters, either alone or cumulative to other sources of RF emissions caused them harm. Met-Ed notes that the PA Supreme Court concluded that neither fear nor inconclusive scientific research was sufficient to prove that smart meter technology constitutes unsafe service under Section 1501. R Exc. at 6 (citing *Povacz II* at 1005).

Met-Ed explains that the PA Supreme Court held that if a customer establishes by a preponderance of the evidence that smart meter service violates Section 1501, the customer is entitled to an accommodation to the extent allowed by Act 129 and a utility's tariff. Met-Ed explains further that given that Act 129 mandates smart meter deployment, the PA Supreme Court clarified that such accommodation does not rise to the level of an opt-out. R. Exc. at 6 (citing *Povacz II* at 1015).

Met-Ed maintains that the Complainant has failed to meet her burden of proof to establish a violation of Section 1501 and is not entitled to an accommodation. R. Exc. at 6-7.

c. Disposition

We will first address the Complainant's argument regarding the potential termination of the Complainant's service. We disagree with the Complainant's argument that the Company cannot lawfully terminate her electric service for failure to provide access to the meter. The Commission has stated that '[i]t is well-settled that where a customer refuses a utility access to its meter, the utility may terminate service after required notice is provided." *Frompovich*. Accordingly, the Complainant's Exception No. 7 regarding termination of service where the customer prevents access for installation of the meter is denied.

Next, we will address the Complainant's burden of proof in this proceeding. We note that the Complainant averred in her Amended Formal Complaint that the installation of a smart meter by Met-Ed would be a violation of Section 1501 and 1502. She repeated this argument six times throughout the Amended Complaint. Amended Complaint at 2-5.

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

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

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

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

The Complainant's witnesses could not be qualified as experts to enable them to testify on matters "demonstrating that the installation of a smart meter constitutes unsafe or unreasonable service." *Povacz II* at 1000. The ALJ stated the following regarding the Complainant's proposed witnesses – Laura S. Murphy, PhD, Esquire; Mr. Wes Zimmerman, and Tania Slawecki, PhD:

> Ms. McCarthy's witnesses were not permitted to testify because they could not be qualified as experts or the proffered testimony was irrelevant, immaterial or inadmissible hearsay. Dr. Murphy's proffered testimony consisted of inadmissible legal arguments or inadmissible hearsay. Tr. 86. Mr. Zimmerman, a tax agent, claimed his background qualified him as an expert to define the word "depreciation" in Act 129. Tr. 73. He admitted he did not have any expert testimony as to the harmful effects of smart meters. Id. Dr. Slawecki has a background in the microwave field; however, she did not have any medical expertise as to the effects of smart meters on human beings. Tr. 58-71. Accordingly, none of the Exhibits that Ms. McCarthy

> proposed to sponsor through her witnesses were admitted into the record. Tr. 86.

I.D. at 23.

In addition, the ALJ provided the following regarding the Complainant's proposed Exhibits:

> Ms. McCarthy testified on her own behalf and sponsored a copy of Act 129, 66 Pa.C.S. § 2806.1 et seq., marked as Exhibit NM-1 Act 129 of 2008, which was admitted into the record. Ms. McCarthy's remaining Exhibits, consisting of smart meter articles, legal arguments, and other articles apparently culled from the Internet, were not admitted into the record as the Exhibits were irrelevant, immaterial, or inadmissible hearsay. Tr. 85.

Id.

At the evidentiary hearing, the Complainant opined that her health and that of her son are adversely affected by wireless devices such as a smart meter. I.D. at 36 (citing Tr. at 38-39). The ALJ noted that the bulk of the Complainant's case consisted of her reading a 14-page *Notice of Rights*[16] argument into the record. I.D. at 36-37 (citing Tr. at 15-29, 36). The ALJ stated that the Complainant did not present any evidence other than her lay opinions and beliefs that smart meters are a health risk or unsafe or present a fire hazard. I.D. at 37 (citing Tr. at 58-61). Further, the ALJ reasoned that without expert testimony and evidence, the Complainant's claims are reduced to unsubstantiated opinions. The ALJ stated that assertions, personal opinions or

[16] The Complainant's *Notice of Rights* was submitted to the Commission on July 14, 2020 as a letter titled - Notice: Declaration of Rights and Remedy For Relief 01-14-2020 A.D.

perceptions do not constitute factual evidence. I.D. at 37 citing *Pa. Bureau of Corrs. v. City of Pittsburgh*, 532 A.2d 12 (Pa 1987).

To prevail in a Section 1501 claim against an EDC alleging that an AMI meter caused, or will cause, adverse health effects or harm to human health, the Complainant must demonstrate, by a preponderance of the evidence, a "conclusive causal connection" between the harm to human health and the RFs from the AMI meter. *See*, *2019 Povacz Order*. Here the ALJ properly concluded that the Complainant has failed to sustain her burden of proof that Met-Ed violated 66 Pa.C.S. § 1501. I.D. at 40.

The Complainant's witnesses could not be qualified as experts by the ALJ and therefore could not sponsor the Complainant's exhibits. The Complainant's witnesses could not testify on matters "demonstrating that the installation of a smart meter constitutes unsafe or unreasonable service." *Povacz II* at 1000. We find no error in the ALJ's decisions regarding the Complainant's witnesses or exhibits.

We find nothing in the Complainant's Exceptions to refute the ALJ's conclusion that the Complainant has failed to carry her burden of proof that Met-Ed has provided unsafe or unreasonable service. Therefore, we shall deny the Complainant's Exception Nos. 1, 2, 3, 4, 6, 8, and 9 challenging the ALJ's dismissal of the Complaint for failure to satisfy the burden of proof.

3. Complainant's Arguments Regarding Act 129 and an Opt-Out

a. Exception Nos. 1, 7, 8, 9

In her Exception Nos. 1, 7, 8 and 9, the Complainant disagrees with the Commission's interpretation of Act 129 and argues that she should be able to opt out of a smart meter installation at the service address.

b. Replies

Met-Ed contends that the Complainant has not met her burden of proof as discussed *supra*. R. Exc. at 4-5.

c. Disposition

In her Exception Nos. 1, 7, 8 and 9, the Complainant disagrees with the Commission's interpretation of Act 129 and argues that she should be able to opt out of a smart meter installation at the service address.

In *Povacz II*, the Pennsylvania Supreme Court expressly concluded that the complainant's assertion of the right to "opt-out" of Act 129 was unfounded. The Supreme Court further found that a customer may seek an accommodation to smart meter installation, provided the customer first established a violation under Section 1501 of the Code. Therein, the Supreme Court stated:

> [W]e conclude that Act 129 does mandate that EDCs furnish smart meters to all electric customers within an electric distribution service area and does not provide electric customers the ability to opt out of having a smart meter installed. An electric customer with concerns about smart meters may seek an accommodation from the PUC or EDC, but to obtain one the customer must establish by a preponderance of the evidence that installation of a smart meter violates Section 1501 [of the Code].

Povacz II, at 983-984. Therefore, by establishing that there is no "opt-out" permitting a customer to refuse smart meter installation, the Supreme Court's holding in *Povacz II* is controlling on the question. In the present case, the Complainant's Exceptions fail to establish any violation by the utility under Section 1501 of the Code, as a prerequisite to seeking an accommodation. Accordingly, to the extent the Complainant asserts a right to

opt out of Act 129 to refuse smart meter installation, we shall deny the Complainant's Exception Nos. 1, 7, 8 and 9 without further discussion.

IV. Conclusion

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

IT IS ORDERED:

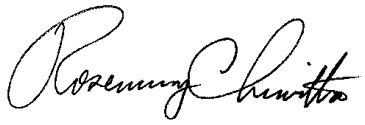
1. That the Exceptions filed by Noreen McCarthy on November 4, 2020, to the Initial Decision of Administrative Law Judge Conrad A. Johnson issued on October 15, 2020, at Docket No. C-2019-3006923, are denied, consistent with this Opinion and Order.

2. That the Initial Decision of Administrative Law Judge Conrad A. Johnson, issued on October 15, 2020, at Docket No. C-2019-3006923, is adopted, consistent with this Opinion and Order.

3. That the Formal Complaint filed by Noreen McCarthy, on January 7, 2019 and amended on March 11, 2019, at Docket No. C-2018-3006923, is dismissed.

4. That this proceeding be marked closed.

BY THE COMMISSION,



Rosemary Chiavetta
Secretary

(SEAL)

ORDER ADOPTED: July 11, 2024

ORDER ENTERED: July 11, 2024