

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Deborah Engisch-Platt and Kim Platt	:	
	:	
Complainants,	:	
	:	
v.	:	Docket No. C-2019-3013745
	:	
Metropolitan Edison Company	:	
	:	
Respondent.	:	

**ANSWER OF METROPOLITAN EDISON COMPANY TO THE
MOTION TO STAY FILED BY
DEBORAH ENGISCH-PLATT AND KIM PLATT**

TO ADMINISTRATIVE LAW JUDGE MARY D. LONG:

Pursuant to 52 Pa. Code § 5.61, Metropolitan Edison Company (“Met-Ed” or the “Company”) hereby files this Answer to the “Motion for Recusal of ALJ” (“Motion for Recusal” or “Motion”), which was filed by Deborah Engisch-Platt and Kim Platt (“Complainants”) on or about August 28, 2024, with the Pennsylvania Public Utility Commission (“Commission”) in the above-captioned proceeding. In the Motion, the Complainants request that Administrative Law Judge (“ALJ”) Mary D. Long recuse herself in light of the U.S. Supreme Court’s rulings in *Axon Enterprise, Inc. v. FTC*¹ and *SEC v. Jarkesy*.² According to the Complainants, the Commission’s “administrative law court system” violates their right to a jury trial under the Seventh Amendment of the U.S. Constitution. The Complainants also lodge a series of baseless attacks on the ALJ, the Company, and Commission in support of their Motion.

¹ 598 U.S. 175 (2023) (“*Axon*”)

² 144 S. Ct. 2117 (U.S. 2024) (“*Jarkesy*”).

The Motion should be denied. First, as reinforced by the U.S. Supreme Court in *Jarkesy*, the Seventh Amendment right to a jury trial only applies in cases seeking legal remedies, not equitable remedies. Here, the Complainants seek equitable relief—the prohibition of Met-Ed’s installation of a smart meter at their service address. Thus, on that reason alone, the Seventh Amendment right to a jury trial does not apply here, and the Complainants’ Motion should be denied.

Second, nothing in the Complainants’ Motion establishes any bias, prejudice, or unfairness necessitating the ALJ’s recusal. The ALJ has not “stacked the deck against the [C]omplainants,” as alleged in the Motion. (Motion, p. 1.) The only support the Complainants provide for this assertion is that: (1) the ALJ is an employee of the Commission’s Office of Administrative Law Judge (“OALJ”); (2) the ALJ’s Prehearing Order stated that Mr. Platt is “63 years old when he is actually 68 years old” and summarized the Company’s arguments against the Complaint; and (3) the ALJ “failed to file an order admitting the exhibits” submitted by the Complainants. (Motion, pp. 1-2.) However, the fact that the ALJ is a Commission employee does not mean she is biased toward the Company or would “favor the agency,” which is itself a neutral adjudicator in this proceeding. Also, the reference to Mr. Platt being 63 years old stems back to how this case originated in 2019. The ALJ was recounting how, in the Complaint filed five years ago, the Complainants averred that Mr. Platt was 63 years old. The sheer fact that he has aged 5 years since that time and is now 68 cannot possibly be grounds for recusal. Lastly, there was no need for the ALJ to issue an Order admitting the Complainants’ exhibits. The evidentiary hearing is the time and place for parties to offer their exhibits into the evidentiary record, and such hearing has not been held yet. In this case, the evidentiary hearing is scheduled for September 11, 2024, and, at

that time, the Complainants can move for admission of their exhibits subject to any objections by Met-Ed.

Finally, the Complainants present a series of arguments regarding the merits of their Complaint, including whether the installation of a smart meter is required by law. (*See* Motion, pp. 2-7.) These arguments have nothing to do with whether the ALJ should recuse herself. Therefore, such arguments should be addressed, if at all, in the Complainants' closing argument or post-hearing briefs.

For these reasons, and as explained in more detail herein, the Complainants' Motion is baseless and should be denied.

In support of its Answer, Met-Ed states as follows:

I. INTRODUCTION

1. On October 23, 2019, Met-Ed was served with the Formal Complaint filed by the Complainants, which challenged the Company's planned installation of a smart meter at the Complainants' property.

2. On November 12, 2019, Met-Ed filed an Answer, New Matter, and Preliminary Objections to the Complaint.

3. On December 5, 2019, the Complainants filed an Answer to Met-Ed's New Matter.

4. On December 16, 2019, the Complainants filed an Answer to Met-Ed's Preliminary Objections.

5. On December 24, 2019, a Notice was issued assigning the ALJ to rule on Met-Ed's Preliminary Objections.

6. On January 8, 2020, Deputy Chief Administrative Law Judge Joel H. Cheskis ("ALJ Cheskis") issued an Order denying Met-Ed's Preliminary Objections.

7. Also on January 8, 2020, a Notice was issued scheduling a telephonic evidentiary hearing before ALJ Cheskis on February 14, 2020.

8. On January 10, 2020, a Prehearing Order was issued, which set forth certain procedural rules and requirements for the proceeding.

9. On January 21, 2020, the Complainants filed a request to have the entire hearing conducted through written testimony.

10. On February 3, 2020, ALJ Cheskis emailed the parties explaining that he had received the Complainants' request for the entire hearing to be conducted through written testimony and proposing a schedule for the exchange of written testimony. Under that proposed schedule, the Complainants' direct testimony would be due by April 1, 2020, Met-Ed's rebuttal testimony would be due by June 1, 2020, and the Complainants' surrebuttal testimony would be due by August 3, 2020.

11. Later on February 3, 2020, Met-Ed responded to ALJ Cheskis's email and stated that it did not object to his proposal, with the caveat that if any experts submitted written testimony on behalf of the Complainants, the Company would like a brief hearing to be held so that Met-Ed could cross-examine those experts.

12. On February 6, 2020, the Complainants emailed ALJ Cheskis and Met-Ed that they were agreeable to the proposal.

13. Also on February 6, 2020, the Company served copies of the hearing exhibits it intended to use at the February 14, 2020 hearing.

14. On February 7, 2020, ALJ Cheskis responded to the Complainants' February 6, 2020 email, informing the parties that he would cancel the hearing and issue a scheduling order

adopting this scheduling proposal. ALJ Cheskis also reiterated that the Complainants' direct testimony would be due by April 1, 2020.

15. On February 11, 2020, the ALJ issued a Scheduling Order setting forth the litigation schedule for the proceeding.

16. On or about March 16, 2020, the Complainants filed a Motion to Stay the hearing and all proceedings.

17. The Complainants never served any direct testimony.

18. On or about March 31, 2020, the Complainants submitted a "Brief of Complainant," which was received by Met-Ed on April 14, 2020.

19. On June 1, 2020, Met-Ed filed a letter explaining that the Company was not serving rebuttal testimony, due to the Complainants' failure to serve any direct testimony.

20. On July 10, 2020, Met-Ed filed an Answer in opposition to the Complainants' Motion to Stay.

21. Also on July 10, 2020, Met-Ed filed a Motion for Summary Judgment.

22. On August 18, 2020, ALJ Cheskis issued an Order denying the Complainants' Motion for Stay, denying the Company's Motion for Summary Judgment, and setting a revised litigation schedule.

23. On October 16, 2020, Met-Ed filed a Motion to Stay the Proceeding.

24. On November 4, 2020, the Commission issued an Order at Docket No. M-2009-3092655, staying certain smart meter complaint proceedings, like the instant Complaint. This proceeding was stayed pending the Pennsylvania Supreme Court's disposition of the appeals concerning the Commonwealth Court's decision in *Povacz v. Pa. PUC*, 241 A.3d 481 (Pa. Cmwlth. 2020) ("*Povacz P*").

25. On November 22, 2022, the Commission issued a Judge Change Notice, assigning the instant proceeding to the ALJ.

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

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

28. On December 6, 2023, the ALJ issued an Interim Order on Further Proceedings, which directed the parties to confer and submit a joint status report on or before February 7, 2024.

29. On February 7, 2024, Met-Ed submitted a status report.

30. On or about February 14, 2024, the ALJ issued an Interim Order Scheduling Written Testimony.

31. On or about February 20, 2024, the Complainants filed a Motion for Extension for All Proceedings.

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

⁴ See *id.*, at 1014.

32. On February 26, 2024, the ALJ issued an Interim Order denying in part the Motion for Extension.

33. On April 12, 2024, Met-Ed filed a Notice of Appearance.

34. On March 30, 2020, the Complainants served their direct testimony.

35. On May 20, 2024, Met-Ed served its rebuttal testimony.

36. On May 30, 2024, the Complainants served their surrebuttal testimony.

37. On July 25, 2024, the ALJ issued a Prehearing Order. Also, a Telephonic Hearing Notice was issued, scheduling the evidentiary hearing for 10:00 AM on September 11, 2024.

38. On August 28, 2024, the Complainants filed their Motion for Recusal.

39. Later on August 28, 2024, the ALJ issued an Interim Order Directed an Expedited Response to Motion to Recuse, setting forth an answer deadline of September 4, 2024.

40. Met-Ed herein submits this Answer in opposition to the Complainants' Motion for Recusal.

II. LEGAL STANDARDS

41. Under Section 5.103(a) of the Commission's regulations, "A motion must set forth the ruling or relief sought, and state the grounds therefor and the statutory or other authority upon which it relies." 52 Pa. Code § 5.103(a).

42. "The presiding officer is authorized to rule and will rule upon motions" that are: (1) "[n]ot formerly acted upon by the Commission prior to the commencement of the hearing where an immediate ruling is essential in order to proceed with the hearing"; or (2) "[f]iled or made after the commencement of the hearing and prior to the submission of a decision in the proceeding."

43. When seeking the recusal of a judge, it is "the duty of the party, who asserts that a judge should be disqualified, to allege by petition the bias, prejudice or unfairness necessitating recusal." *Rizzo v. Haines*, 555 A.2d 58 (Pa. 1989) (citation omitted).

III. THE COMPLAINANTS' MOTION FOR RECUSAL SHOULD BE DENIED

44. In the Motion, the Complainants argue that the ALJ should recuse herself in light of the U.S. Supreme Court's rulings in *Axon* and *Jarkesy*. Specifically, the Complainants aver that the Commission's "administrative law court system" violates their right to a jury trial under the Seventh Amendment of the U.S. Constitution. Furthermore, the Complainants contend that the ALJ has "stacked the deck against the [C]omplainants" because: (1) the ALJ is an employee of the Commission's OALJ; (2) the ALJ's Prehearing Order stated that Mr. Platt is "63 years old when he is actually 68 years old" and summarized the Company's arguments against the Complaint; and (3) the ALJ "failed to file an order admitting the exhibits" submitted by the Complainants. (Motion, pp. 1-2.)⁵

45. The Motion should be denied.

46. The Complainants' principal argument for recusal, based around the Seventh Amendment right to a jury trial, is critically flawed.

47. The Complainants fail to realize that, as the U.S. Supreme Court reinforced in *Jarkesy*, that Seventh Amendment protects the right to jury trials in "[s]uits at common law."⁶ Therefore, in a suit seeking equitable relief, the Seventh Amendment right to a jury trial does not apply.⁷ Likewise, "[s]ince some causes of action sound in both law and equity," the U.S. Supreme Court has "concluded that the remedy was the 'more important' consideration."⁸ Because the relief sought in *Jarkesy* was the imposition of civil penalties, which is a "form of monetary relief,"

⁵ The Complainants also set forth unfounded and highly offensive remarks in their Motion. Among other things, the Complainants question whether the ALJ would support slavery or a law banning women from being lawyers or judges. (See Motion, p. 2.) The Complainants further assert that the Commission is corrupt and that the Complainants are being treated like "human collateral." (Motion, p. 3.) These outrageous claims have no basis in fact and should be disregarded entirely.

⁶ *Jarkesy*, 144 S.Ct. at 2128 (quoting U.S. Const. Amend. 7).

⁷ See *id.* (quoting *Parsons v. Bedford*, 28 U.S. 433, 446-47 (1830)).

⁸ *Id.* at 2129 (quoting *Tull v. United States*, 481 U.S. 412, 421 (1987)).

the Court concluded that the case sounded in law, not equity. Thus, the Seventh Amendment right to a jury trial applied in *Jarkesy*.

48. In this case, however, the Complainants demand equitable relief. Specifically, through their Complaint, the Complainants ask that the Commission prohibit Met-Ed from installing a smart meter at their service address. In essence, the Complainants want an injunction, a form of equitable relief where the court issues an “order that prohibits or commands virtually any type of action.” *Woodward Twp. v. Zerbe*, 6 A.3d 651, 658 (Pa. Cmwlth. 2010). Thus, the Complainants have not brought a suit “at common law” where the Seventh Amendment right to a jury trial applies.

49. In addition, nothing in the Complainants’ Motion establishes any bias, prejudice, or unfairness necessitating the ALJ’s recusal.

50. The Complainants erroneously allege that the ALJ has “stacked the deck against the [C]omplainants.” (Motion, p. 1.) However, the only support the Complainants provide for this assertion is that: (1) the ALJ is an employee of the Commission’s Office of Administrative Law Judge (“OALJ”); (2) the ALJ’s Prehearing Order stated that Mr. Platt is “63 years old when he is actually 68 years old” and summarized the Company’s arguments against the Complaint; and (3) the ALJ “failed to file an order admitting the exhibits” submitted by the Complainants. (Motion, pp. 1-2.)

51. Each of these claims lacks merit. Although the ALJ is a Commission employee, that fact alone does not prove she is biased toward the Company. Also, the Commission itself is a neutral adjudicator in this proceeding. It is unclear how the ALJ could “favor the agency” by rendering a decision that sustains or denies the Complaint. If the ALJ ultimately denies the Complaint, it will be because the Complainants’ legal and factual arguments are flawed.

52. Also, the Prehearing Order's reference to Mr. Platt being 63 years old stems back to how this case originated in 2019. The ALJ was recounting how, in the Complaint filed five years ago, the Complainants averred that Mr. Platt was 63 years old. The fact that Mr. Platt has aged 5 years since that time and is now 68 does not constitute grounds for recusal.

53. Furthermore, there was no need for the ALJ to issue an Order admitting the Complainants' exhibits, because the evidentiary hearing has not been held yet. At the evidentiary hearing, the parties will have the opportunity to move for the admission of their exhibits into the evidentiary record. In this case, the evidentiary hearing is scheduled for September 11, 2024, and, at that time, the Complainants can move for admission of their exhibits subject to any objections by Met-Ed.

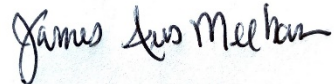
54. Lastly, in their Motion, the Complainants present a series of arguments regarding the merits of their Complaint, including whether the installation of a smart meter is required by law. (*See* Motion, pp. 2-7.) These arguments have nothing to do with whether the ALJ should recuse herself. Accordingly, such arguments should be addressed, if at all, in the Complainants' closing argument or post-hearing briefs.

55. Based on the foregoing, the Complainants' Motion for Recusal has no merit and should be denied.

III. CONCLUSION

For the reasons set forth above, Deborah Engisch-Platt and Kim Platt's Motion for Recusal should be denied.

Respectfully submitted,



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Date: September 4, 2024

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PENNSYLVANIA PUBLIC UTILITY COMMISSION**

**DEBORAH ENGISCH AND KIM
PLATT**

v.

**METROPOLITAN EDISON
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CERTIFICATE OF SERVICE

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

Service by First-Class mail and electronic mail as follows:

Deborah Engisch and Kim Platt
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Administrative law Judge Mary D. Long
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Dated: September 4, 2024


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