

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

Public Meeting held September 12, 2024

Commissioners Present:

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

John M. Chenosky, PE

C-2019-3007622

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 John M. Chenosky, PE (Complainant or Mr. Chenosky) on April 8, 2024, relative to the above-captioned proceeding. The Exceptions were filed in response to the Initial Decision (Initial Decision or I.D.) of Administrative Law Judge (ALJ) Conrad A. Johnson, which the Commission served on the Parties on March 19, 2024. No Replies to Exceptions were filed. In the Initial Decision, the ALJ recommended that the Commission dismiss, with

prejudice, the Formal Complaint (Complaint) filed by the Complainant on January 25, 2019.

Also, before the Commission for consideration and disposition is a “MOTION TO STAY ACTION ON DOCKET C-2019-3007622 PENDING OUTCOME OF APPEAL FROM FINAL ORDER OF THE COMMONWEALTH COURT OF PENNSYLVANIA BEFORE THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA: ALLOCATUR DOCKET 2024 – ALEXIA AND LAWRENCE MCKNIGHT *Petitioners* v. PENNSYLVANIA PUBLIC UTILITY COMMISSION *Respondents*” (Second Motion for Stay<sup>1</sup>), filed by the Complainant on August 6, 2024. Second Motion for Stay at 1 (emphasis in original). To date, no Answer to the Second Motion for Stay has been filed.

For the reasons discussed below, we shall deny the Complainant’s Exceptions; deny the Complainant’s Second Motion for Stay; adopt the Initial Decision of ALJ Johnson; and dismiss the Complaint, with prejudice, consistent with this Opinion and Order.

## I. Background

This case involves a Complaint concerning the safety of the advanced metering infrastructure (AMI), or smart meter, that Met-Ed is attempting to install at the Complainant’s residence and use in the ordinary course of business to measure the Complainant’s electricity consumption. Met-Ed, an 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

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<sup>1</sup> As noted, *infra.*, on January 23, 2024, the Complainant filed a Motion for Stay, therefore the current the motion is identified as the Second Motion for Stay.

at 44.<sup>2</sup> The Complainant is a Met-Ed customer who is objecting to the installation of a smart meter at two locations at the Complainant's service address (home and barn). Complaint at 1, 7.

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

(f) *Smart Meter technology and time of use rates.*

(1) Within nine months after the effective date of this paragraph, electric distribution companies shall file a Smart Meter technology procurement and installation plan with the commission for approval. The plan shall describe the Smart Meter technologies the electric distribution company proposes to install in accordance with paragraph (2).

(2) Electric distribution companies shall furnish Smart Meter technology as follows:

(i) Upon request from a customer that agrees to pay the cost of the Smart Meter at the time of the request.

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<sup>2</sup> At the time of initiation of the instant proceeding, FirstEnergy consisted of four separate companies: Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company, and West Penn. However, these companies have since been merged into a single entity, known as FirstEnergy Pennsylvania Electric Company. *See, Joint Application of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company, West Penn Power Company, Keystone Appalachian Transmission Company, Mid-Atlantic Interstate Transmission, LLC, and FirstEnergy Pennsylvania Electric Company, et.al.*, Docket Nos. A-2023-3038771, *et al.* (Final Order entered December 7, 2023). Nonetheless, in this Opinion and Order, we shall refer to the Company as Met-Ed.

- (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 with substantially all customers to receive an AMI meter by mid-2019. *See, Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company, and West Penn Power Company for Approval of Its Smart Meter Deployment Plan*, Docket Nos. M-2013-2341990, M-2013-2341991, M-2013-2341993, M-2013-2341994 (Opinion and Order entered June 25, 2014) (*2014 Smart Meter Order*).

## II. History of the Proceeding

On January 25, 2019, the Complainant filed the instant Complaint.<sup>3</sup> In the Complaint, Mr. Chenosky indicated that he receives electric service from Met-Ed at two locations on his property (home and barn) and he is scheduled to receive a smart meter at each location. The Complainant, essentially, requested an opt-out of smart meter installation and the ability to retain the use of analog meters. I.D. at 2-3; Complaint at 1-2, 7.

On February 25, 2019, Met-Ed filed an Answer and New Matter to the Complaint (Answer), essentially denying material allegations in the Complaint. Met-Ed, *inter alia*, admitted that the Company provides residential electric service to the Complainant and is attempting to install smart meters at the service location. Further, Met-Ed contended that installation of the smart meters is required by Act 129 and the Company's Commission-approved Smart Meter Deployment Plan (SMDP), and neither Act 129 nor Met-Ed's SMDP permit the Complainant to opt-out of the installation of a smart meter at the service address. Moreover, Met-Ed argued that because the Company is required by Act 129 and its SMDP to install smart meters at the service locations and the Commission is unable to grant the relief requested by the Complainant, the Complaint should be dismissed with prejudice. I.D. at 3-4; Answer at 1-5, 10-11.

Also, on February 25, 2019, Met-Ed filed a Preliminary Objection in response to the Complaint (Preliminary Objection), essentially repeating its legal argument that, in accordance with Act 129 and the Commission's orders, the Company is required to develop and implement a smart meter installation plan. Met-Ed also argued that because the Complainant failed to state a claim upon which the Commission can

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<sup>3</sup> We note that the Commission's case management system indicates the Complaint was received January 25, 2019, but was not served on the Parties until February 4, 2019.

grant relief, the Complaint is legally insufficient and, therefore, must be dismissed. I.D. at 4; Preliminary Objection at 7-8.

On March 15, 2019, the Complainant filed a Petition for a thirty (30) business day extension to file a response to Met-Ed's Answer (Petition for Extension).<sup>4</sup> I.D. at 4.

On March 29, 2019, the Complainant filed a document captioned, "Answer and Objection To New Matter & Preliminary Objection Of [Met-Ed] To The Complaint Of [Mr.] Chenosky To The [Commission]." <sup>5</sup> I.D. at 5.

On May 3, 2019, ALJ Jeffrey A. Watson issued an Interim Order Denying Met-Ed's Preliminary Objections.<sup>6</sup> I.D. at 5.

On May 17, 2019, Met-Ed filed a Certificate of Service certifying that a true copy of the Interrogatories and Requests for Production of Documents (Discovery Requests) had been served upon Mr. Chenosky.<sup>7</sup> I.D. at 5.

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<sup>4</sup> By Secretarial Letter dated March 14, 2019, Mr. Chenosky was informed that his Petition for Extension was being returned to him and directed that he correct a deficiency in the Petition for Extension and return it to the address provided within ten days of the date on the letter.

<sup>5</sup> ALJ Johnson noted that the Complainant's filing was not in conformity with the Commission's Regulations for: (1) pleadings allowed at 52 Pa. Code § 5.1; or (2) the form of the answer to preliminary objections at 52 Pa. Code § 5.101(f)(2), requiring numbered paragraphs to correspond with the preliminary objections. I.D. at 5.

<sup>6</sup> On March 20, 2019, a Motion Judge Assignment Notice was issued assigning the proceeding to ALJ Watson. I.D. at 4.

<sup>7</sup> Although the Initial Decision states that this Certificate of Service was received on May 16, 2019, the Commission's case management system indicates that it was received on May 17, 2019. *See*, I.D. at 5.

On June 6, 2019, Met-Ed filed a letter explaining, *inter alia*, that the Company was in communications with the Complainant and had voluntarily agreed to an extension under which detailed objections to the Company's Discovery Requests would be provided by Friday, June 21, 2019, and responses to all other requests would be due by Friday, July 5, 2019.

On July 1, 2019, ALJ Watson issued an Interim Order Establishing Initial Litigation Schedule, under which the Parties were required to, *inter alia*: (1) submit, in writing, the names and business addresses of their fact and expert witnesses, including a written statement of their respective testimonies, by September 27, 2019; and (2) conclude discovery by September 5, 2019. I.D. at 5.

Also, on July 1, 2019, ALJ Watson issued an Interim Order Granting, in Part, the Complainant's Request for Extension of Time to Respond to Discovery Requests Propounded by Respondent and to File a Responsive Pleading to the Answer and New Matter Filed by Respondent (Interim Order Granting In Part).<sup>8</sup>

On July 22, 2019, the Commission's Secretary's Bureau docketed several documents from the Complainant to the above-captioned proceeding, including, *inter alia*: (1) a copy of an undated two-page email addressed to ALJ Watson from Mr. Chenosky with the subject "Docket No. C-2019-3007622" (Chenosky Email); (2) a document captioned "Obejctions To Interrogatories And Objections To Requests For Production Of Documents Of [Met-Ed] to [Mr.] Chenosky, Set 1 (Objections to Interrogatories);" and (3) a document captioned, "Answer To Set 1 Interrogatories And

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<sup>8</sup> We note that the Interim Order Granting In Part instructed the Parties not to provide pleadings and other requests to the ALJ by e-mail, but to file any pleadings with the Commission's Secretary and provide a copy to the ALJ by First Class mail. *See*, Interim Order Granting In Part at ¶ 2.

Production Of Documents To [Met-Ed] From [Mr.] Chenosky (Answer to Interrogatories).” I.D. at 6.

Also, on July 22, 2019, ALJ Watson issued a letter to the Complainant (ALJ Watson Letter) explaining that email correspondence dated July 19, 2019 and July 21, 2019, which was also sent to his office via U.S. Mail, was being returned to him because, essentially: (1) the ALJ is not permitted to receive *ex parte* communications; and (2) specific requests should be submitted via U.S. Mail, with a copy of the request provided to counsel for the Respondent, and noting in the request that it was provided to counsel for the Respondent.<sup>9</sup>

On July 29, 2019, Met-Ed filed a Motion to Compel Responses to Interrogatories and Document Requests (Motion to Compel).<sup>10</sup> On August 19, 2019, the Complainant filed Objections to Met-Ed’s Motion to Compel (Objections to Motion to Compel). I.D. at 6-7.

On September 3, 2019, ALJ Watson issued an Interim Order Granting, in Part, and Denying, in Part, Met-Ed’s Motion to Compel (September 3, 2019 Interim Order). The September 3, 2019 Interim Order, *inter alia*: (1) granted Met-Ed’s Motion to Compel; (2) ordered that the Complainant shall serve upon counsel for Met-Ed full and complete responses to all of the Discovery Requests served upon the Complainant by Met-Ed no later than September 23, 2019; and (3) ordered that the Complainant shall file and serve upon counsel for Met-Ed and the undersigned presiding officer a certificate of

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<sup>9</sup> Attached to the ALJ Watson Letter, *inter alia*, was a copy of the Chenosky Email. *See*, ALJ Watson Letter at 1, 5-6.

<sup>10</sup> According to Met-Ed’s Motion to Compel, the Complainant objected to the Company’s Discovery Requests. Motion to Compel at 3. Copies of Met-Ed’s Discovery Requests and the Complainant’s Objections to Interrogatories and Answer to Interrogatories are attached to the Motion to Compel. *See*, Motion to Compel at 12-23; 33-41.

service evidencing service of the Complainant's responses to the Discovery Requests upon serving those responses to Met-Ed, not later than September 23, 2019. September 3, 2019 Interim Order at 3-4; I.D. at 7. The Complainant did not file any response to the Company's Discovery Requests. I.D. at 7.

On September 25, 2019, ALJ Watson issued an Interim Order extending the time period for the Complainant to provide full and complete answers to Discovery Requests propounded by Met-Ed, amending the September 3 Interim Order, and requiring the Parties to submit an additional status report (September 25, 2019 Interim Order). I.D. at 7-8. The September 25, 2019 Interim Order, in part, required that the Complainant file answers to Met-Ed's Discovery Requests by October 14, 2019.<sup>11</sup> September 25, 2019 Interim Order at 4; I.D. at 8.

On October 18, 2019, ALJ Joel Cheskis issued a letter to the Complainant addressing Mr. Chenosky's request for an accommodation under the terms of the Americans with Disabilities Act (ADA) (ALJ Cheskis Letter).<sup>12</sup> In the ALJ Cheskis Letter, ALJ Cheskis requested that Mr. Chenosky provide specific information regarding his disability and the accommodation which he is seeking by December 15, 2019. ALJ Cheskis Letter at 1; I.D. at 8.

On December 26, 2019, ALJ Cheskis issued a Scheduling Order (Scheduling Order), under which service of: (1) the Complainant's Direct Testimony

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<sup>11</sup> Although the September 25, 2019 Interim Order stated that the deadline for the Complainant to submit full and complete responses to the Discovery requests was extended until October 14, 2019, the Initial Decision stated that the September 25, 2019 Interim Order required Mr. Chenosky to file answers to Met-Ed's interrogatories and requests for production of documents by October 10, 2019. *See*, I.D. at 8; September 25, 2019 Interim Order at 4.

<sup>12</sup> On September 26, 2019, a Judge Change Notice was issued assigning the proceeding to ALJ Cheskis. I.D. at 8.

was due June 1, 2020; (2) the Company's Rebuttal Testimony was due September 1, 2020; and (3) the Complainant's Surrebuttal Testimony was due November 2, 2020.<sup>13</sup> The Scheduling Order noted that the remainder of the litigation would be addressed afterwards. Scheduling Order at 3; I.D. at 8.

On September 1, 2020, Met-Ed filed a "Motion of [Met-Ed] to Strike Portions The Written Direct Testimony And Exhibits Submitted By [Mr.] Chenosky (Motion to Strike)." In its Motion to Strike, Met-Ed alleged that on June 1, 2020, the Complainant served his Direct Testimony and exhibits. I.D. at 9 (citing Motion to Strike at ¶ 14). Further, Met-Ed argued that certain portions of Mr. Chenosky's Direct Testimony were irrelevant, contained hearsay not subject to a hearsay exemption, constituted improper expert testimony, and contained allegations that were time-barred by 66 Pa.C.S. 3314(a). I.D. at 9 (citing Motion to Strike at 1). The Complainant did not file a response to Met-Ed's Motion to Strike. I.D. at 9.

On September 22, 2020, ALJ Cheskis issued a Second Scheduling Order (Second Scheduling Order). The purpose of the Second Scheduling Order was to modify the schedule for submission of pre-served testimony to formally recognize the changed date that Mr. Chenosky's Surrebuttal Testimony is due January 4, 2021. Second Scheduling Order at 4; I.D. at 10.

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

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<sup>13</sup> As noted, *infra*, Mr. Chenosky served his Direct Testimony, but he did not file a Certificate of Service certifying that he served his Direct Testimony or Surrebuttal Testimony upon Met-Ed. On September 1, 2020, Met-Ed filed a Certificate of Service certifying that it had served its Rebuttal Testimony upon Mr. Chenosky. I.D. at 8-9.

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 of pending smart meter complaints. Notice was provided on November 14, 2023, informing Mr. Chenosky of the lifting of the stay and their procedural rights and obligations under the Commission's regulations. I.D. at 10.

On December 21, 2023, the Commission issued a Call-in Telephonic Prehearing Conference Notice (Conference Notice), scheduling a prehearing conference for February 1, 2024, at 10:00 a.m (Prehearing Conference). The Conference Notice included the Toll-free Bridge Number to dial and PIN to enter to participate in the Prehearing Conference. I.D. at 11.

On December 22, 2023, ALJ Johnson issued a Prehearing Conference Order for Telephonic Conference (Prehearing Order).<sup>14</sup> The Prehearing Order included the Toll-free Bridge Number to dial and PIN to enter to participate in the Prehearing Conference. The Prehearing Order also directed the Parties to: (1) appear and participate in the Prehearing Conference and provided the Parties information about the hearing procedures, including the procedure to follow to request a hearing continuance; and (2) prepare and serve a prehearing memorandum on or by 4:00 p.m. on January 26, 2024. Prehearing Order at 1-4; I.D. at 11-12.

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<sup>14</sup> On November 21, 2022, a Judge Change Notice was issued assigning the proceeding to ALJ Johnson. I.D. at 11.

The Prehearing Order also directed that consistent with the ALJ Cheskis Letter, the Complainant shall file the following:

(1) medical documentation regarding his physical or mental impairment that substantially limits a major life activity and (2) the specific reasonable accommodation he is requesting to participate in the prehearing conference. Complainant John Chenosky shall file his medical documentation and specific reasonable accommodation request with the Commission's Secretary's Bureau by 4:00 p.m., Friday, January 26, 2024, and serve copies upon the ALJ . . . and the Respondent.

Prehearing Order at 4, ¶ 8 (emphasis omitted); I.D. at 12. A copy of the ALJ Cheskis Letter was attached to the Prehearing Order. *See*, Prehearing Order at Attachment A. Additionally, the Prehearing Order cautioned the Parties as follows:

You must call into the prehearing conference on the scheduled day and time. You will not be called by the Administrative Law Judge (ALJ).

You must participate in the prehearing conference. If you fail to do so, your case will be dismissed.

Prehearing Order at 1 (emphasis omitted); I.D. at 12.

On January 23, 2024, the Complainant filed a “Motion of the Complainant for Indeterminate Stay as Chenosky Surrebuttal Testimony Ordered by ALJ Cheskis on 26DEC19 Was Stayed by the PA PUC and Never Allowed Complainant Opportunity to Answer, While the PA PUC and All Utilities Conduct a Weaponization of the Pennsylvania Justice System Against ADA Compliance EMF and Dirty Electricity Disabled, Providing Ample Justification for Stay” (Motion for Stay).<sup>15</sup> I.D. at 13. The

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<sup>15</sup> We note that the Complainant's filing on January 23, 2024 is labeled in the Commission's case management system as “Motion for Indeterminate Stay – Chenosky.”

ALJ treated the Complainant's Motion for Stay as a request for an indefinite stay of the proceedings and a continuance of the prehearing conference.<sup>16</sup> *Id.*

On January 24, 2024, the ALJ issued an Interim Order denying the Complainant's Motion for Stay (Interim Order Denying Motion for Stay), wherein the ALJ found that the Complainant's Motion for Stay "fails to state good cause warranting the granting of a continuance of the prehearing conference." Interim Order Denying Motion for Stay at 2; I.D. at 13. Further, the ordering paragraphs of the Interim Order Denying Motion for Stay stated, *inter alia*, that: (1) the Prehearing Conference "shall convene as scheduled on February 1, 2024;" and (2) the Complainant shall file:

- (1) medical documentation regarding his physical or mental impairment that substantially limits a major life activity and
- (2) the specific reasonable accommodation he is requesting to participate in the prehearing conference with the Commission's Secretary's Bureau by 4:00 p.m., Friday, January 26, 2024, and serve copies upon the ALJ at [the ALJ's email address] and the Respondent.

Interim Order Denying Motion for Stay at 3, ¶ 3 (emphasis omitted); I.D. at 14.

The Complainant did not provide any medical documentation regarding his physical or mental impairment that substantially limits a major life activity, nor the specific reasonable accommodation he was requesting to participate in the Prehearing Conference. I.D. at 14.

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<sup>16</sup> According to the ALJ, the Complainant's Motion for Stay requested an indeterminate stay of the proceedings and, by implication, suggested that the Complainant was also seeking a continuance of the Prehearing Conference. I.D. at 13.

On January 26, 2024, Met-Ed filed its Prehearing Conference Memorandum. The Complainant did not file a prehearing conference memorandum. I.D. at 14 (citing Tr. at 16).

On February 1, 2024, the Complainant sent three emails to ALJ Johnson, counsel for Met-Ed, and three other Commission officials. The ALJ summarized the content of the three emails in his Initial Decision:

In his email at 6:29 a.m. Mr. Chenosky in part stated, “I am unable to join the party today because of continuing health reasons, many of which have been repeated ad-nauseam giving me the impression that you people are the ones with aphasia reinforcing my impressions that are spot on.” Tr. 11-12. In his email, Mr. Chenosky did not clarify or explain his “continuing health reasons.” Tr. 11. His second email at 6:41 a.m. was a duplicate of his first email. His third email at 9:48 a.m. was titled: OBJECTION TO THE LEGALITY OF TODAY’S PRE-CONFERENCE HEARING. Tr. 9. In this email, Mr. Chenosky did not specifically request a continuance of the prehearing conference.

I.D. at 14-15 (citing Tr. at 9, 11-12).<sup>17</sup>

On February 1, 2024, at 10:02 a.m., ALJ Johnson convened the Prehearing Conference. Met-Ed was represented by counsel. However, the Complainant was neither present nor represented by counsel. I.D. at 15 (citing Tr. at 4-6). Given Mr. Chenosky’s failure to appear, Met-Ed made an oral motion to dismiss the Complaint for the Complainant’s failure to appear to proceed with his Complaint. The motion to dismiss was taken under advisement and the hearing adjourned at 10:38 a.m. I.D. at 15

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<sup>17</sup> We note that at the Prehearing Conference, the ALJ read portions of the emails into the record. Tr. at 9-12.

(citing Tr. at 15, 17). The hearing record closed on February 1, 2024, upon the conclusion of the Prehearing Conference.<sup>18</sup> I.D. at 15 (citing 52 Pa. Code § 5.431(a)).

In the Initial Decision issued on March 19, 2024, ALJ Johnson dismissed the Complaint, notwithstanding the Commission's lack of authority to grant the Complainant the relief he seeks (*i.e.*, opt-out of smart meter installation at the service address), for the Complainant's failure to: (1) comply with orders of the presiding officers; and (2) appear, without good cause, for the prehearing conference to prosecute his Complaint. I.D. at 1, 19-20

As noted above, on April 8, 2024, the Complainant filed Exceptions to the Initial Decision. No Replies to Exceptions to Exceptions were filed. Additionally, as previously noted, on August 6, 2024, the Complainant filed a Second Motion for Stay. To date, no Answer to the Second Motion for Stay has been filed.

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<sup>18</sup> The ALJ noted that the Regulation at 52 Pa. Code § 5.431(a) provides that the hearing record closes at the conclusion of a hearing, unless otherwise directed by the presiding officer or the Commission. The ALJ further noted that after the record closes, additional matter may not be relied upon or accepted into the record unless allowed for good cause shown by the presiding officer or the Commission upon motion. I.D. at 15 (citing 52 Pa. Code § 5.431(b)). Further, we note that on February 22, 2024, and February 23, 2024, the Complainant filed additional correspondence. The ALJ did not address this additional correspondence, which was filed more than three weeks after the record was closed in this proceeding. *See*, I.D. at 15.

### III. Discussion

#### A. Legal Standards

##### 1. Due Process

As an administrative agency of the Commonwealth, the Commission is required to provide due process to the parties appearing before it. Due process is satisfied when the parties are afforded notice and the opportunity to appear and be heard. *See, e.g., Leona McCarthy v. Philadelphia Gas Works*, Docket No. C-2018-3000472 (Opinion and Order entered April 20, 2023) (*Leona McCarthy*), citing *Schneider v. Pa. PUC*, 479 A.2d 10, 15 (Pa. Cmwlth. 1984) (*Schneider*). The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. *Id.*, citing *Montefiore Hospital Ass'n of Western Pennsylvania v. Pa. PUC*, 421 A.2d 481, 484 (Pa. Cmwlth. 1980).

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

Once a hearing is scheduled and duly notified by the Commission, it is the responsibility of the parties to appear and participate in the hearing. *Mumma v. PPL*

*Electric Utilities Corporation*, Docket No. C-00014869 (Opinion and Order entered January 24, 2002) (*Mumma*); *Sentner v. Bell Tel. Co. of PA*, Docket No. F-00161106 (Opinion and Order entered October 25, 1993) (*Sentner*).

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

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

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

## 2. General Burden of Proof for Complaint Proceeding

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

To establish a sufficient case and satisfy the burden of proof, the complainant must show that the respondent utility is responsible or accountable for the problem described in the Complaint. *Patterson v. The Bell Telephone Company of Pennsylvania*, 72 Pa. P.U.C. 196 (1990). The offense must be a violation of the Code, a Commission Regulation or Order or a violation of a Commission-approved tariff. 66 Pa.C.S. § 701. Such a showing must be by a “preponderance of the evidence.” *Samuel J. Lansberry, Inc. v. Pa. PUC*, 578 A.2d 600 (Pa. Cmwlth. 1990), *alloc. denied*, 529 Pa. 654, 602 A.2d 863 (1992). That is, the Complainant’s evidence must be more convincing, by even the smallest amount, than that presented by the respondent. *Se-Ling Hosiery, Inc. v. Margulies*, 364 Pa. 45, 70 A.2d 854 (1950).

The burden of proof is comprised of two distinct burdens: (1) the burden of production; and (2) the burden of persuasion. *Hurley v. Hurley*, 2000 Pa. Super. 178, 754 A.2d 1283 (2000). The burden of production, also called the burden of going forward with the evidence, determines which party must come forward with evidence to support a particular claim or defense. *Scott and Linda Moore v. National Fuel Gas Distribution*, Docket No. C-2014-2458555 (Final Order issued August 24, 2015; Initial Decision issued May 11, 2015) (*Moore*). The burden of production goes to the legal

sufficiency of a party's claim or affirmative defense. *See, Id.* It may shift between the parties during a hearing. A complainant may establish a *prima facie* case with circumstantial evidence. *See, Milkie v. Pa. PUC*, 768 A.2d 1217, 1220 (Pa. Cmwlth. 2001) (*Milkie*). If a complainant introduces sufficient evidence to establish legal sufficiency of the claim, also called a *prima facie* case, the burden of production shifts to the utility to rebut the complainant's evidence. *See, Moore*.

If the utility introduces evidence sufficient to balance the evidence introduced by the complainant, that is, evidence of co-equal value or weight, the complainant's burden of proof has not been satisfied and the burden of going forward with the evidence shifts back to the complainant, who must provide some additional evidence favorable to the complainant's claim. *See, Milkie*, 768 A.2d at 1220; *see also, 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<sup>19</sup> may engage in determinations of credibility, may accept or reject testimony of any witness in whole or in part, and may accept or reject inferences from the evidence. *See, Moore*, citing *Suber v. Pennsylvania Com'n on Crime and Delinquency*, 885 A. 2d 678, 682 (Pa. Cmwlth. 2005) (*Suber*).

### **3. Burden of Proof Applied to Section 1501<sup>20</sup> Complaint Challenging Smart Meter Installation**

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

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<sup>19</sup> In formal complaint proceedings, the Commission, not the ALJ, is the ultimate fact-finder; it weighs the evidence and resolves conflicts in testimony. When reviewing the initial decision of an ALJ, the Commission has all the powers that it would have had in making the initial decision except as to any limits that it may impose by notice or by rule. *Milkie*, 768 A.2d at 1220, n. 7 (citing, *inter alia*, 66 Pa.C.S. § 335(a)).

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

meter pursuant to Act 129 and that to raise a viable challenge to smart meter installation, a customer must satisfy the preponderance of evidence standard for a violation of Section 1501 of the Code. *Povacz II* at 280 A. 3d at 983-984.

Pursuant to Section 1501 of the Code, all public utilities have a duty to maintain “adequate, efficient, safe, and reasonable service<sup>21</sup> and facilities” and to make 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,

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<sup>21</sup> The term “service” is defined broadly under Section 102 of the Code to include any and all acts done or rendered or performed and any and all things furnished or supplied and any and all facilities, used, furnished or supplied by public utilities. *See*, 66 Pa.C.S. § 102. The statutory definition of “service” is also to be broadly construed by the Commission and the courts. *Country Place Waste Treatment Co., Inc. v. Pa. PUC*, 654 A.2d 72 (Pa. Cmwlth. 1995).

but also confirmed that challenges to smart meter installation, other than an “opt-out,” may arise under Section 1501<sup>22</sup> of the Code. Therein, the Supreme Court stated:

[W]e conclude that Act 129 does mandate that EDCs furnish smart meters to all electric customers within an electric distribution service area and does not provide electric customers the ability to opt out of having a smart meter 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); *see also Frompovich v. PECO Energy Company*, Docket No. C-2015-2474602 (Opinion and Order entered May 3, 2018).

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.

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<sup>22</sup> The Commission has also determined that if a customer’s formal complaint raises a claim under Section 1501, related to the safety of a utility’s installation and use of a smart meter at the customer’s residence, such a claim is legally sufficient to proceed to an evidentiary hearing before an ALJ. To satisfy the burden of proof a complainant may be required to present medical documentation and/or expert testimony demonstrating that the installation of a smart meter constitutes unsafe or unreasonable service. *Povacz II* at 1000, citing *Susan Kreider v. PECO Energy Company*, P-2015-2495064, 2016 WL 406549, at \*14 (Pa. P.U.C. January 28, 2016) (*Kreider*).

[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.

. . . .  
Pursuant to [S]ection [1501 of the Code], an EDC (as a public utility) must provide service that is, *inter alia*, both safe and reasonable. **To carry their burden of proof on a Section 1501 [of the Code] claim, a smart meter challenger may be required to present medical documentation and/or expert testimony demonstrating that the furnishing of a smart meter constitutes unsafe or unreasonable service** in violation of Section 1501 [of the Code] under the circumstances presented. *Susan Kreider v. PECO Energy Co.*, P-2015-2495064, 2016 WL 406549, at \*14 (Pa. P.U.C. Jan. 28, 2016).

*Povacz II*, 280 A. 3d at 999-1000 (emphasis added; footnote omitted).<sup>23</sup>

In applying the standard of proof to scientific or expert medical evidence in support of alleged adverse health effects, the Commission ruled in the *Povacz 2019 Order*, and was subsequently affirmed by the Supreme Court in *Povacz II*, that in order to prevail in a Section 1501 claim against an EDC alleging that an AMI meter caused or will cause adverse health effects or harm to human health, the Complainant must demonstrate

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<sup>23</sup> With respect to the evidence necessary to support a challenge to smart meter installation under Section 1501, the Commonwealth Court has held that at the hearing, a complainant may prove his/her claim through the complainant's own personal testimony and/or "the testimony of others as well as other evidence that goes to that issue." *Romeo v. Pa. PUC*, 154 A.3d 422, 430 (Pa. Cmwlth. 2017).

by a preponderance of the evidence a “conclusive causal connection” between the harm to human health and the radio frequency fields (RFs)<sup>24</sup> from the AMI meter.<sup>25</sup>

#### 4. Other Relevant Legal Standards

In addition to establishing that a complaint challenging the installation of a smart meter may arise under Section 1501, the Supreme Court’s decision in *Povacz II* acknowledged the Commonwealth Court’s rejection of a constitutional claim for 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. Ill. 2014) (“*Naperville I*”). Therein, a federal district court rejected the customers’ “*Fourteenth Amendment* bodily integrity argument because their complaint failed to identify an arbitrary deprivation of a recognized liberty or property interest” and to aver that the city’s decision to employ smart meters was arbitrary. *Id.* at 839 (internal quotations marks omitted).

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

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<sup>24</sup> RF is an abbreviation for radio frequency and is also used here to denote RF fields or RF signals.

<sup>25</sup> See, *Povacz 2019 Order* slip op., at 28-29 (citing *Letter of Notification of Philadelphia Electric Company Relative to the Reconstructing and Rebuilding of the Existing 138 kV Line to Operate as the Woodbourne-Heaton 230 kV Line in Montgomery and Bucks Counties*, 1993 WL 855896 (Pa. P.U.C. 1993), Docket No. A-110550F0055 (Final Order entered November 12, 1993), slip op. at 11).

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

Finally, we note that any argument or Exception that we do not specifically delineate shall be deemed to have been duly considered and denied without further discussion. The Commission is not required to consider expressly or at length each contention or argument raised by the parties. *Consolidated Rail Corp. v. Pa. PUC*, 625 A.2d 741 (Pa. Cmwlth. 1993); *see also, generally University of Pennsylvania v. Pa. PUC*, 485 A.2d 1217 (Pa. Cmwlth. 1984).<sup>26</sup>

## **B. ALJ’s Initial Decision**

In the Initial Decision, ALJ Johnson made eighteen Findings of Fact (FOF) and reached seven Conclusions of Law (COL). *See* I.D. at 15-17, 21-22. The Findings

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<sup>26</sup> As explained in Section III.C, *infra*, the Complainants’ Exceptions are 207 pages in length. Included in his Exceptions are nine (9) pages of discussion regarding regulations and averments to justify the Complainants’ request for an opt-out of the smart meter installation. The Exceptions are not numbered and do not cite to findings or fact, conclusions of law or relevant pages of the decision. The Complainants’ Exceptions include extensive extra-record materials. Pursuant to our Regulations, each exception must be numbered and identify the finding of fact or conclusion of law to which exception is taken and cite relevant pages of the decision. 52 Pa. Code § 5.533(b). We will accept the Exceptions, as filed, pursuant to 52 Pa. Code § 1.2(a) because the Complainants are not represented by legal counsel in this proceeding and 52 Pa. Code § 1.2(a) requires a liberal construction of our Regulations to secure the just, speedy, and inexpensive determination of every action or proceeding to which they are applicable. However, we will not consider any extra-record materials.

of Fact and Conclusions of Law are incorporated herein by reference and are adopted without comment unless they are either expressly or by necessary implication rejected or modified by this Opinion and Order.

The ALJ first explained the Commission's due process obligations, noting that the Commission, as an administrative agency, is required to provide due process to the parties appearing before it, and this requirement is satisfied when the parties are provided with notice and the opportunity to appear and be heard. I.D. at 18 (citing *Schneider*). The ALJ noted that by the Prehearing Conference Notice, the Complainant was notified that a prehearing conference was scheduled in this matter for February 1, 2024, at 10:00 a.m. Further, the ALJ reasoned that the Complainant was aware of the Prehearing Conference because, in his Motion for Stay, he requested an indefinite stay of the proceedings and a continuance of the prehearing conference.<sup>27</sup> I.D. at 18 (citing Interim Order Denying Motion for Stay). Accordingly, the ALJ found that the Complainant's due process rights were fully protected. I.D. at 18.

The ALJ then explained his recommendation, *infra*, that the Commission dismiss the Complaint for failure of the Complainant to appear and prosecute. The ALJ noted that the Complainant sent a series of emails objecting to the legality of the Prehearing Conference prior to the commencement of the Prehearing Conference. However, Mr. Chenosky did not specify that his failure to appear at the Prehearing Conference was unavoidable. I.D. at 18 (citing Tr. at 9-12). The ALJ found the Complainant's objection to convening the Prehearing Conference surprising and confusing given that on two separate occasions, the Complainant requested a prehearing conference. I.D. at 18 (citing Chenosky Email at 1-2; Objections to Motion to Compel at 1, 3).

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<sup>27</sup> As previously noted, on January 23, 2024, the Complainant filed a Motion for Stay and, on January 24, 2024, the ALJ issued the Interim Order Denying Motion for Stay.

The ALJ cited Section 332(f) of the Code, 66 Pa.C.S. § 332(f), to note that the Complainant did not call into the telephonic conference, as specified in the Prehearing Conference Notice and in the Prehearing Conference Order. I.D. at 18-19 (citing 66 Pa.C.S. § 332(f)). Further, the ALJ noted that the Prehearing Conference Notice: (1) indicated that Mr. Chenosky was to call in to the Prehearing Conference; and (2) provided Mr. Chenosky with the Commission's toll-free conference bridge number and PIN to do so. I.D. at 19. Moreover, the ALJ noted that because the Complainant did not appear or participate in the Prehearing Conference despite receiving two notices of the date and time of the conference, the Prehearing Conference was held in accordance with 66 Pa.C.S. § 332(f) and 52 Pa. Code § 5.245. I.D. at 19 (citing 66 Pa.C.S. § 332(f); 52 Pa. Code § 5.245). Accordingly, counsel for the Company moved to dismiss the Complaint for the Complainant's failure to proceed with his Complaint. I.D. at 19.

The ALJ noted that the party who fails to appear at a prehearing conference has the burden of explaining why their failure to appear was unavoidable. I.D. at 19 (citing *Herr v. West Penn Power Company*, Docket No. C-2021-3028202 (Opinion and Order entered September 15, 2022; 66 Pa.C.S. § 332(a)). The ALJ also cited several Commission cases to note that when there are no facts in the record that the party's failure to appear was unavoidable, a complaint should be dismissed with prejudice. I.D. at 19 (citing *Brown v. PECO Energy Co.*, Docket No. C-2019-3009486 (Opinion and Order entered April 22, 2022); *El-Ayazra v. West Penn Power Company*, Docket No. F-2015-2509292 (Opinion and Order entered June 30, 2016); *Volgstadt v. UGI Penn Natural Gas*, Docket No. F-02266429 (Opinion and Order entered September 12, 2008); *Jefferson v. UGI Utilities, Inc.*, Docket No. Z-00269892 (Opinion and Order entered December 26, 1995)).

The ALJ concluded that here, the Complainant failed to provide an explanation as to why his failure to appear at the conference was unavoidable. The ALJ explained that Mr. Chenosky sent a series of emails the morning of the Prehearing

Conference, wherein he: (1) objected to the Prehearing Conference; and (2) claimed he had “health concerns” without specifying how his health concerns prevented him from participating in the prehearing conference. Accordingly, the ALJ recommended that the Commission grant Met Ed’s oral motion to dismiss the Complaint. I.D. at 19.

However, the ALJ found that there are also other grounds that warrant dismissal of the Complaint. More specifically, the ALJ noted that the Complainant failed to comply with the orders of the presiding ALJs. I.D. at 19. In this regard, the ALJ pointed out that the Complainant did not comply with the September 3, 2019 Interim Order, which directed Mr. Chenosky to file full and complete responses to the Company’s Discovery Requests by September 23, 2019. Further, the ALJ noted that the Complainant failed to comply with the Prehearing Order, which required Mr. Chenosky to file, by January 26, 2024: (1) medical documentation regarding his physical or mental impairment that substantially limits a major life activity; (2) the specific reasonable accommodation he was requesting to participate in the Prehearing Conference; and (3) a prehearing conference memorandum, setting forth a brief history of the proceeding, the issues he intended to present, a listing of his proposed witnesses and subject of the witness’ testimony, a list of any exhibits or documents he intended to present at the hearing, and any proposed revisions to the Commission’s discovery rules. I.D. at 20. The ALJ noted that the Commission has held that “[a]n ALJ’s Orders must be complied with, and such a lack of compliance presents a sufficient basis to dismiss the Complaint without a hearing.” I.D. at 20 (citing *Treffinger v. PPL Electric Utilities Corporation*, 2003 Pa. P.U.C. LEXIS 3 (March 3, 2003)).

The ALJ also addressed the Complainant’s request for a Commission order permitting him to opt-out of the installation of a smart meter at his residence. The ALJ referred to *Povacz II, supra*, to note that the Pennsylvania Supreme Court clearly held that there is no opt-out provision from the installation of a smart meter under Act 129. Consequently, the ALJ found that the Complainant is not entitled to the relief requested.

I.D. at 20. Accordingly, the ALJ recommended that the Complaint be dismissed, with prejudice. *Id.* at 22.

**C. Exceptions, Second Motion for Stay and Disposition, and Disposition of Exceptions<sup>28</sup>**

**1. Exceptions<sup>29</sup>**

The Complainant's Exceptions<sup>30</sup> total, 207 pages in length, of which several pages are copies of material previously filed and ruled upon by the presiding officer. To the extent the Complainant's Exceptions may be summarized, the Complainant reiterates the assertion of a right to opt-out of smart meter installation and reasserts the basis for relief that the ALJ found to be precluded by the Complainant's failure to appear. Exc. at 22-34. Specifically, the Complainant's Exceptions attempt to introduce factual evidence, legal issues, or material to prove his case. This extra-record information will not be addressed here at the Exceptions stage where the Complainant failed to appear at the evidentiary hearing to proffer it, as discussed, below, in the Disposition section. Moreover, in his Exceptions, the Complainant puts forth several assertions to argue that, generally: (1) Met-Ed and the Commission are misconstruing the

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<sup>28</sup> As previously noted, no Replies to Exceptions were filed, nor was any Answer to the Second Motion for Stay.

<sup>29</sup> We note that several times in his Exceptions, Mr. Chenosky, the sole Complainant in this proceeding, refers to himself in a plural tense (e.g. "the Complainants"). *See*, Exc. at *passim*.

<sup>30</sup> We acknowledge that the format of the Complainant's Exceptions does not strictly comply with Section 5.533(b) and (c) of our Regulations, 52 Pa. Code § 5.533(b) and (c), which require that exceptions be numbered, identify the finding of fact and conclusions of law to which exception is taken, cite to the relevant pages of the Initial Decision, and be limited to 40 pages in length. Nevertheless, particularly because the Complainant is appearing *pro se*, we will accept the Exceptions as filed, pursuant to Section 1.2(a) and (d) of our Regulations, 52 Pa. Code § 1.2(a) and (d), in order to secure a just, speedy, and inexpensive determination

legislative intent of Act 129 and 66 Pa.C.S. § 2807(f); and (2) the smart meter mandate is unconstitutional are not legally enforceable. Exc. at 1-207. In his Exceptions, the Complainant does not challenge the ALJ’s recommendation that the Commission dismiss the Complaint, with prejudice, for the Complainant’s failure to appear.

Finally, to the extent the Complainant’s Exceptions include derogatory commentary regarding Commission staff and Met-Ed representatives, 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. See, Exc. at *passim*.

## **2. Second Motion for Stay and Disposition**

In the Second Motion for Stay, the Complainant states that the “[j]ustification” for his Second Motion for Stay “is that the Appeal will have a bearing on the outcome of Exceptions filed April 8, 2024.” Second Motion for Stay at 1.

In the Second Motion for Stay, the Complainant fails to set forth any basis in fact or law to justify a stay of the proceedings at the Exceptions stage. Accordingly, the Second Motion for Stay will be denied.

## **3. Disposition of Exceptions**

As a preliminary matter, we reinforce that the Complainant has filed and made use of several forms of extra-record materials in his Exceptions. We will disregard the extra-record materials – specifically, all documents and citations to reference materials included in the Complainant’s Exceptions – as the use of this extra-record information by the Commission would violate Met-Ed’s due process rights. Exc. at *passim*. It is well-established that parties cannot introduce new evidence at the

exceptions stage. Accordingly, any extra-record information Mr. Chenosky used in his Exceptions will not be considered. *See, Application of Apollo Gas Co.*, 1994 Pa. PUC LEXIS 45 at \*8-14 (Opinion and Order entered February 10, 1994) (*Apollo Gas*).

To the extent the Complainant's, in his Exceptions, asserts a right to opt-out of the installation of a smart meter, we shall deny the Exceptions. As noted by ALJ Johnson, the Pennsylvania Supreme Court's holding in *Povacz II* expressly found that there is no "opt-out" provision under Act 129.

As previously discussed, in *Povacz II*, the Pennsylvania Supreme Court expressly concluded that the complainant's assertion of the right to "opt-out" of Act 129 was unfounded. Therein, the Supreme Court stated:

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

*Povacz II* at 983-84. Therefore, by establishing that there is no "opt-out" permitting a customer to refuse smart meter installation, the Supreme Court's holding in *Povacz II* is controlling on the question. Accordingly, to the extent that the Complainant asserts a right to "opt-out" of Act 129 to refuse smart meter installation, we shall deny the Complainant's Exceptions without further discussion.

To the extent the Complainant raises extra record material to assert a violation of constitutional rights, we shall disregard such material. Accordingly, to the

extent the Complainant asserts a constitutional right to refuse smart meter installation, we shall deny the Complainant's Exceptions without further discussion.

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

We note that the record demonstrates that the Complainant had actual notice that the Prehearing Conference was scheduled to commence February 1, 2024, at 10:00 a.m. As previously noted, on January 23, 2024, the Complainant filed a Motion for Stay, in which the Complainant stated, in pertinent part, the following:

I am in receipt of the subject with an impossible date of February 1, 2024 ...

\* \* \*

Under Pre-Hearing Conference Order 22DEC23, Item 10, a *Pro Hac Vice* would have insufficient time, or technical or medical expertise to be effective representation.

Motion for Stay at 4.<sup>31</sup> The Complainant's reference to the Prehearing Order in his Motion for Stay demonstrates that Mr. Chenosky received the Prehearing Order and,

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<sup>31</sup> We note that in the Prehearing Order, Item No. 10 stated, in part, the following: "Pursuant to 52 Pa. Code §§ 1.21 & 1.22, you may represent yourself, if you are an individual, or you may have an attorney licensed to practice law in the

therefore, was aware that the Prehearing Conference was scheduled to commence February 1, 2024, at 10:00 a.m.<sup>32</sup> The Complainant’s knowledge of the Prehearing Conference is further evidenced in the record by the ALJ’s notation that in one of the three emails the Complainant sent in the hours before commencement of the Prehearing Conference stated, in part, “I am unable to join the party because of continuing health reasons.” I.D. at 14 (citing Tr. at 11-12). The ALJ further noted that Mr. Chenosky’s email at 9:48 a.m. was titled, “OBJECTION TO THE LEGALITY OF TODAY’S PRE-CONFERENCE HEARING.” I.D. at 14-15 (citing Tr. at 9). Therefore, we may presume that Mr. Chenosky was aware that the Prehearing Conference was scheduled to commence at 10:00 a.m. on February 1, 2024. No evidence was submitted in the record or the Complainant’s Exceptions to overcome this presumption. Therefore, we agree with the ALJ that the Complainant received sufficient notice of the hearing. *See*, I.D. at 21, COL No. 2.

Moreover, we agree with the ALJ that despite having sufficient notice of the Prehearing Conference, Mr. Chenosky failed to provide an explanation for why his failure to appear at the Prehearing Conference was unavoidable. As noted by the ALJ, although Mr. Chenosky sent a series of emails the morning of the Prehearing Conference citing health issues and objecting to the hearing, the Complainant did not specify how his health concerns would have prevented him from participating in the Prehearing Conference. Further, we find that the ALJ appropriately addressed the pertinent considerations in finding that Mr. Chenosky failed to provide an explanation as to why his failure to appear at the Prehearing Conference was unavoidable and, therefore, recommended that the Commission grant Met-Ed’s oral motion to dismiss the Complaint. *See*, I.D. at 18-19 (citing Tr. at 9-12). As previously discussed, the public interest is

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Commonwealth of Pennsylvania, or admitted *Pro Hac Vice*, represent you.” Prehearing Order at 5, ¶ 10.

<sup>32</sup> We note that a portion of the Motion for Stay was included in the Complainant’s Exceptions. *See*, Exc. at 2-5.

prejudiced by the wasteful use of the agency's and the respondent's time and resources in addressing a complaint. *See, Jefferson; Nichols III.*

In his Exceptions, the Complainant did not present any reason why he failed to make himself available for the hearing via telephone. Thus, the Complainant has presented no reason for our consideration to conclude that the Complainant's absence via telephone was unavoidable. Therefore, we are left to conclude that the Complainant chose not to appear at the hearing by telephone. As such, we agree with the ALJ that the Complainant waived the opportunity to participate in the hearing by failing to appear.

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

#### **IV. Conclusion**

In light of the above discussion, we shall: (1) deny the Complainant's Exceptions; (2) deny the Complainant's Second Motion for Stay; (3) adopt the ALJ's Initial Decision; and (4) dismiss the Complaint, with prejudice, consistent with this Opinion and Order; **THEREFORE,**

#### **IT IS ORDERED:**

1. That the Exceptions filed by John M. Chenosky, PE, on April 8, 2024, to the Initial Decision of Administrative Law Judge Conrad A. Johnson issued on March 19, 2024, at Docket Nos. C-2019-3007622, are denied, consistent with this Opinion and Order.

2. That the MOTION TO STAY ACTION ON DOCKET C-2019-3007622 PENDING OUTCOME OF APPEAL FROM FINAL ORDER OF THE COMMONWEALTH COURT OF PENNSYLVANIA BEFORE THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA: ALLOCATUR DOCKET 2024 – ALEXIA AND LAWRENCE MCKNIGHT *Petitioners v. PENNSYLVANIA PUBLIC UTILITY COMMISSION Respondents*, filed by John M. Chenosky, PE, on August 6, 2024, at Docket Nos. C-2019-3007622, is denied, consistent with this Opinion and Order

3. That the Initial Decision of Administrative Law Judge Conrad A. Johnson, issued on March 19, 2024, at Docket Nos. C-2019-3007622, is adopted, consistent with this Opinion and Order.

4. That, pursuant to 66 Pa.C.S. § 332(f) and 52 Pa. Code § 5.245, the Complainant, John M. Chenosky, PE, is deemed to have waived his opportunity to participate in a hearing regarding their Formal Complaint filed on January 25, 2019, due to his failure to appear at the February 1, 2024 hearing held in this proceeding.

5. That, the Formal Complaint of John M. Chenosky, PE, filed on January 25, 2019, at this docket, is dismissed, with prejudice, barring the Complainant from filing another formal complaint with the Public Utility Commission raising the same issues or claims as raised in the Formal Complaint.

6. That the Secretary's Bureau shall mark Docket No. C-2019-3007622 closed.

**BY THE COMMISSION,**

Rosemary Chiavetta  
Secretary

(SEAL)

ORDER ADOPTED: September 12, 2024

ORDER ENTERED: