

**PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17105-3265**

Public Meeting held June 14, 2018

Commissioners Present:

Gladys M. Brown, Chairman
Andrew G. Place, Vice Chairman
Norman J. Kennard
David W. Sweet
John F. Coleman, Jr.

Mary Paul

C-2015-2475355

v.

PECO Energy Company

OPINION AND ORDER

BY THE COMMISSION:

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition are the Exceptions filed by Mary Paul (Complainant) on July 13, 2017, in response to the Initial Decision (I.D.) of Administrative Law Judge (ALJ) Darlene D. Heep issued on June 23, 2017, in the above-captioned proceeding. The Initial Decision dismissed the Formal Complaint (Complaint) filed by the Complainant on April 1, 2015. PECO Energy Company (PECO or the Company) filed Replies to Exceptions on July 24, 2017. For the reasons discussed below, we shall deny the Complainant's Exceptions, adopt the Initial Decision of ALJ Heep and dismiss the Complaint, consistent with this Opinion and Order.

I. History of the Proceeding

On April 1, 2015, the Complainant, Ms. Mary Paul, filed a Formal Complaint (Complaint) with the Commission against PECO in which she alleged that PECO was threatening to shut off her service after she refused installation of an Advanced Metering Infrastructure (AMI) meter, also known as a smart meter, at her home. She questioned the information provided by PECO regarding AMI meters and the installation method. Ms. Paul's Complaint included fifteen questions for PECO in Paragraph 5 of the Complaint regarding the safety of AMI meters.

On April 27, 2015, PECO filed an Answer with New Matter in response to the Complaint. In its Answer, PECO averred that it is required to install smart meters for the Company's electric distribution system as a matter of law and that the Complaint should be dismissed. PECO further averred that, in accordance with Act 129 of 2008 (Act 129), it was required to install AMI meters for all its current automated meter reading (AMR) meter customers by the end of 2014. PECO did not answer the Complainant's questions in Paragraph 5 of her Complaint. Finally, PECO averred that in order to comply with Act 129, it is terminating service to customers who do not give the Company access to install the AMI meter. PECO asserted that the Complaint should be dismissed as a matter of law.

PECO asserted in its New Matter that the Complainant requested to opt out of the smart meter installation at her residence and that an opt out was not provided for under PECO's smart meter installation plan that was approved by the Commission. PECO argued that the Complaint should be dismissed because the law does not allow a customer to opt out of smart meter installation and, therefore, there is no legal basis for the Complaint.

Also, on April 27, 2015, PECO filed a Preliminary Objection to the Complaint in which it averred that the Complaint should be dismissed as legally insufficient pursuant to 52 Pa. Code § 5.101(a)(4). PECO contended that legislative and regulatory

legal authority requires PECO to install smart meters. PECO also contended that there are no genuine issues of material fact and that PECO is entitled to judgment as a matter of law.

By Motion Judge Assignment Notice, dated June 1, 2015, PECO's Preliminary Objection was assigned to Administrative Law Judge (ALJ) Joel H. Cheskis.

On June 23, 2015, the Complainant submitted a document entitled "response to PECO's Answer to my complaint."¹ ALJ Cheskis accepted this as an Answer to PECO's New Matter and Preliminary Objection. In the document, the Complainant responded to several averments made by PECO and again asserted her concerns about the health effects of smart meters. The Complainant also contended that smart meter legislation did not mandate that every customer receive a smart meter.

On July 1, 2015, ALJ Cheskis issued an Initial Decision granting PECO's Preliminary Objection. ALJ Cheskis dismissed the Complaint, concluding that a hearing was not necessary because the Complainant would not be entitled to relief under any circumstances as a matter of law.

On July 21, 2015, the Complainant filed Exceptions to the Initial Decision. On August 3, 2015, PECO filed Replies to Exceptions.

On March 17, 2016, the Commission issued an Opinion and Order: (1) granting, in part, the Complainant's Exceptions; (2) reversing the ALJ's Initial Decision; (3) denying PECO's Preliminary Objections; and (4) returning this matter to the Office of Administrative Law Judge for such proceedings as may be necessary. The Commission determined that the Complainant in this proceeding made specific factual averments in her Complaint and Answer to PECO's New Matter that suggest a potential violation of Section

¹ The Complainant requested and was given extra time to file a response.

1501 of the Code. Particularly, the Commission found that the Complainant had raised some issues involving potential customer service violations. These issues are: (1) whether she received reasonable notice from the Company of the replacement of her electric meter and the use of a contractor with whom she was not familiar; (2) that she has experienced physical symptoms that correspond to biological effects associated with “this kind of technology;” and (3) that she received no written answers from PECO in response to fifteen specific questions regarding her concerns for health and safety with respect to smart meters.

By Hearing Notice dated April 12, 2016, an Initial Hearing to address the issues was scheduled for August 16, 2016 and the matter was assigned to ALJs Darlene D. Heep and Christopher P. Pell.

By Hearing Cancellation/Reschedule Notice dated July 20, 2016, the OALJ scheduling unit formally rescheduled the hearing for 10:00 a.m. on Tuesday, October 4, 2016, and Wednesday, October 5, 2016.

On several occasions, the Complainant informally contacted the Philadelphia OALJ to advise that she suffers from a condition that prevents her from appearing in person in Philadelphia for the hearings. To accommodate the Complainant’s health concerns, the legal assistant informed her that she may participate telephonically in the hearings.

On August 31, 2016, the Complainant filed a request for an accommodation with the Secretary’s Bureau. By Order dated September 13, 2016, Complainant’s request for an accommodation was formally granted, advising the Complainant that she may appear telephonically, or if she is willing to make the arrangements, by videoconference. That Order further provided instructions to the Complainant to follow if she elected to appear either telephonically or by videoconference.

On September 27, 2016, the Complainant filed a request for a continuance of the October 4th and October 5th hearings. The Complainant sought a six-week delay because she claimed she was suffering from the ill effects of the AMR meter currently located at her residence, not an AMI meter.² The Complainant supplied statements from two physicians.

On September 28, 2016, PECO filed an Answer opposing the Complainant's Motion for Continuance of Hearing Date.

By Order dated October 3, 2016, the Complainant's Motion for Continuance was granted on the grounds that PECO was granted a continuance over the Complainant's objection and the Complainant was acting *pro se*.

By Hearing Cancellation/Reschedule Notice dated September 30, 2016, the OALJ scheduling unit formally rescheduled the hearing for 10:00 a.m. on Tuesday, November 15, 2016, and Wednesday, November 16, 2016.

On November 4, 2016, the Complainant submitted a Motion to Compel Answers to Questions 1, 5, and 6 of the Complainant's Discovery Set II.

On November 8, 2016, PECO filed its Answer to the Complainant's Motion to Compel.

On November 10, 2016, an Order was issued, dismissing, in part, as moot and denying, in part, the Complainant's Motion to Compel.

² In her Complaint, the Complainant did not allege that she has experienced, or is concerned with, any health effects from her current AMR meter. She only anticipated negative health effects due to the "technology" of the smart meter, or AMI meter, PECO was seeking to install.

On, November 9, 2016, the Complainant filed an amended complaint, captioned as “First Amended Complaint.”

On November 11, 2016, PECO filed its Motion to Strike the First Amended Complaint.

On Sunday, November 13, 2016, the Complainant sent an email response to PECO’s Motion to Strike.³

An Order granting the Motion to Strike was issued on November 14, 2016.

The hearing was held on November 15 and 16, 2016. The Complainant appeared *pro se*, testified on her own behalf and presented one witness, Hanoch Talmor, M.D. PECO was represented by counsel and presented four witnesses, Ms. Brenda Eison, PECO Customer Service and AMI Deployment Manager; Mr. Glenn Pritchard, PECO Manager, Advanced Grid Operations & Technology; Christopher Davis, PhD; and Mark Israel, Physician.

By Judge Change Notice issued on March 21, 2017, the matter was reassigned to ALJ Darlene Heep as the sole presiding officer.

The record closed on March 27, 2017, upon filing of the final Reply Brief. The record in this proceeding consists of a 376-page transcript and twenty-four exhibits.

³ Although the Complainant’s email response to PECO’s Motion to Strike was not in conformity with the Commission’s procedural rules, it was given full consideration. 52 Pa. Code § 1.2(a) provides that the rules of procedure may be “liberally construed to secure the just, speedy and inexpensive determination of every action or proceeding to which it is applicable” and that “[t]he . . . presiding officer at any stage of an action or proceeding may disregard an error or defect of procedure which does not affect the substantive rights of the parties.”

The Complainant presented three exhibits (C1, C2, and C3), and PECO presented twenty-one exhibits (BE-1-7, CD-1-8, PECO Cross 1-2, and GP-1-4).⁴

In the Initial Decision,⁵ issued on June 23, 2017, the ALJ found that the Complainant did not establish that installation of a smart meter at her home would be unreasonable or unsafe and that PECO reasonably responded to the Complainant's concerns and questions regarding smart meters. I.D. at 1. The ALJ dismissed the Complaint.

The Parties filed Exceptions and Replies to Exceptions as previously noted.

II. Discussion

A. Legal Standards

1. Advanced Metering Infrastructure

PECO furnishes, owns and maintains the meters in its distribution system. *See* PECO's Tariff Electric Pa. P.U.C. No. 5, Section 6.4, page 14; *see also* Section 14.1, page 22.

PECO is mandated under applicable law to replace all AMR meters owned by it within its service territory with AMI meters, or smart meters. More specifically,

⁴ Page 6 of the ALJ's Initial Decision indicates that PECO provided twenty-four exhibits. However, our review of the record shows that only twenty-one PECO exhibits were admitted.

⁵ The Commission issued both a confidential "proprietary" version and a "non-proprietary" version of ALJ Heep's Initial Decision. For the purposes of this Opinion and Order, we will be referencing only the non-proprietary version.

Act 129 of 2008, 66 Pa. C.S. § 2807(f),⁶ required electric distribution companies (“EDCs”), including PECO, to file smart meter technology procurement and installation plans with the Commission for approval. Specifically:

(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.

(ii) In new building construction.

(iii) In accordance with a depreciation schedule not to exceed 15 years.

66 Pa. C.S. § 2807(f).

By Implementation Order entered June 24, 2009, the Commission established guidelines for smart meter technology procurement and installation and ordered EDCs with greater than 100,000 customers to adhere to such guidelines. *See Smart Meter Procurement and Installation*, Docket No. M-2009-2092655 (Implementation Order entered June 24, 2009) (*Smart Meter Procurement and*

⁶ Section 2807(f) was added to the Public Utility Code by Act 129 of 2008, which was signed into law on October 15, 2008, and became effective on November 14, 2008.

Installation Implementation Order). The Commission also ordered EDCs to file a smart meter technology procurement and installation plan. *Id.*

Thus, pursuant to Section 2807(f) of the Code, the Commission's *Smart Meter Procurement and Installation Implementation Order*, and PECO's Smart Meter Phase I & II Orders approved by the Commission,⁷ PECO has been subject to the requirement to replace all AMR meters owned by it within its service territory with AMI meters, or smart meters.

⁷ In accordance with the Commission's direction in the *Smart Meter Procurement and Installation Implementation Order*, on August 14, 2009, PECO submitted with the Commission a Petition for Approval of its Smart Meter Installation Plan, at Docket No. M-2009-2123944 (Smart Meter Phase I Plan), requesting to deploy up to 600,000 smart meters in its service territory and committing to universal deployment within ten years. The Smart Meter Phase I Plan went through a formal proceeding with several parties participating in the litigation process, which included evidential hearings, resulting in a partial settlement among the parties. By Order entered May 6, 2010, the Commission approved PECO's Smart Meter Phase I Plan. *See Petition of PECO Energy Company for Approval of its Smart Meter Technology Procurement and Installation Plan*, Docket No. M-2009-2123944 (Phase I Order).

On January 18, 2013, PECO filed another Petition at Docket No. M-2009-2123944 ("Smart Meter Phase II Plan"), seeking to substantially complete the installation of AMI meters across its service territory by the end of 2014. The Smart Meter Phase II Plan went through a formal proceeding with several parties participating in the litigation process, resulting in a Joint Petition for Settlement of all issues. The Joint Petition for Settlement, *inter alia*, required PECO to complete the installation of the AMI meters for substantially all customers by the end of 2014 as compared to the ten-year deployment plan under the Smart Meter Phase I Plan. By Order entered August 15, 2013 (Phase II Order), the Commission adopted the Recommended Decision of Angela T. Jones, dated July 12, 2013 (Phase II R.D.), which concluded that PECO's Smart Meter Phase II Plan, as modified by the Joint Petition for Settlement, complied with 66 Pa. C.S. §§ 2807(f)(1)-(f)(3) and the Commission's *Smart Meter Procurement and Installation Implementation Order*. The Commission's Phase II Order approved the Joint Petition for Settlement and approved PECO's Smart Meter Phase II Plan, as modified by the Joint Settlement.

2. Safe, Adequate and Reasonable Electric Service and Facilities

Pursuant to Section 1501 of the Code, a public utility has a duty to maintain safe, adequate and reasonable service 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. Specifically, Section 1501 of the Code, 66 Pa. C.S. § 1501, provides, in pertinent part, as follows:

§ 1501. Character of service and facilities

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 also shall be reasonably continuous and without unreasonable interruptions or delay. Such service and facilities shall be in conformity with the regulations and orders of the commission.

The term “service” is defined broadly under Section 102 of the Code, 66 Pa. C.S. § 102, in relevant part, as follows:

“Service.” Used in its broadest and most inclusive sense, includes all acts done, rendered, or performed, and all things furnished or supplied, and any and all facilities used, furnished, or supplied by public utilities. . .in the performance of their duties under this part to their patrons, employees, other public utilities, and the public, as well as the interchange of facilities between two or more of them . . .

Pursuant to Section 1501 of the Code, the Commission has developed regulations governing electric safety standards. *See generally* 52 Pa. Code § 57.28. 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. 52 Pa. Code § 57.28(a)(1).

An EDC that violates the Code or a Commission Order or Regulation may be subjected to a civil penalty of up to \$1,000 per violation for every day of that violation's continuing offense. *See* 66 Pa. C.S. § 3301(a)-(b). The Commission's policy statement at 52 Pa. Code § 69.1201 establishes specific factors and standards the Commission will consider in evaluating litigated cases involving violations and in determining whether a fine is appropriate.

3. Burden of Proof

As a matter of law, to establish a legally sufficient claim, a complainant must show that the named utility is responsible or accountable for the problem described in the complaint in order to prevail. *Patterson v. The Bell Telephone Company of Pennsylvania*, 72 Pa. P.U.C. 196 (1990). The offense must be a violation of the Public Utility Code (Code), a Commission Regulation or Order or a violation of a Commission-approved tariff. 66 Pa. C.S. § 701.

Section 332(a) of the Public Utility Code (Code) provides that a complainant, as the party seeking affirmative relief from the Commission, has the burden of proof. 66 Pa. C.S. § 332(a). The burden of proof for actions before the Commission is the "preponderance of the evidence" standard. *Suber v. Pennsylvania Com'n on Crime and Delinquency*, 885 A. 2d 678, 682 (Pa. Cmwlth. 2005) (*Suber*); *Samuel J. Lansberry, Inc. v. Pa. PUC*, 578 A.2d 600 (Pa. Cmwlth. 1990), *alloc. denied*, 529 Pa. 654, 602 A.2d 863 (1992) (*Lansberry*); *see also North American Coal Corp. v. Air Pollution Commission*, 279 A.2d 356 (Pa. Cmwlth. 1971). To establish a fact or claim by a preponderance of the evidence means to offer the greater weight of the evidence, or

evidence that outweighs, or is more convincing than, by even the smallest amount, the probative value of the evidence presented by the other party. *See Se-Ling Hosiery, Inc. v. Margulies*, 364 Pa. 45, 48-49, 70 A.2d 854, 855 (1950).

The burden of proof is comprised of two distinct burdens: the burden of production and 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.* It may shift between the parties during a hearing. 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 Id.* 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. *Milkie v. Pa. PUC*, 768 A.2d 1217 (Pa. Cmwlth. 2001); *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. *Milkie v. Pa. PUC*, 768 A.2d 1217 (Pa. Cmwlth. 2001); *see also, Riedel v. County of Allegheny*, 633 A.2d 1325, 1328, n.11 (Pa. Cmwlth. 1993); *see also, Burleson v. Pa. Pub. Util. Comm'n*,

4443 A.2d 1373 (Pa. Cmwlth. 1982), aff'd. 501 Pa. 443, 461 A.2d 1234. 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 ultimate fact-finder 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*.

4. Commission Decisions Must Be Supported by “Substantial Evidence”

Adjudications by the Commission must be supported by substantial evidence in the record. 2 Pa. C.S. § 704. “Substantial evidence” is an appellate standard of review and not a standard of evidence. *Lansberry*, 578 A.2d at 602. 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*, 489 Pa. 109, 413 A.2d 1037 (1980) (*Norfolk*); *Erie Resistor Corp. v. Unemployment Comp. Bd. of Review*, 166 A.2d 96 (Pa. Super. 1961); *Murphy v. Comm. Dept. of Public Welfare, White Haven Center*, 480 A.2d 382 (Pa. Cmwlth. 1984). “The rule of substantial evidence is one of fundamental importance and is the dividing line between law and arbitrary power.” *National Labor Relations Board v. Thompson Products, Inc.*, 6 Cir., 97 F.2d 13, 15; *National Labor Relations Board v. Union Pacific Stages, Inc.*, 9 Cir., 99 F.2d 153, 177. “Suspicion may have its place, but certainly it cannot be substituted for evidence.” *Union Trust Company of Pittsburgh’s Petition*, 342 Pa. 456, 464, 20 A.2d 779, 782.

B. ALJ's Initial Decision

In her Initial Decision, ALJ Heep made thirty Findings of Fact and reached seven Conclusions of Law. I.D. at 6-9, 21. 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.

The ALJ summarized the Complainant's allegations as follows: (1) that she did not receive reasonable notice from the Company of the replacement of her electric meter and the company used a contractor with whom she was not familiar; (2) that installation of a smart meter at her residence would be unsafe and unreasonable; and (3) that she received no written answers from PECO in response to fifteen specific questions regarding her health and safety concerns. I.D. at 13.

With regard to the notice of meter replacement, the ALJ found that PECO and its representatives acted reasonably. The ALJ noted that PECO introduced evidence that notice was provided by PECO's vendor, Corix, to the Complainant by letter on May 18, 2014, and also by another letter twenty-one days prior to the proposed installation. PECO's records indicate the letters were sent, and the ALJ concluded that PECO must rely on the vendor to report that the letters were sent. The ALJ noted that PECO's tariff provides that the Company is to have access to the premises of the customer at all reasonable times for the purpose of removing or changing any or all equipment belonging to the Company. I.D. at 14 (citing PECO Tariff Electric Section 10.5). The ALJ concluded that there is no support for finding that the appearance of the Corix employee to install the AMI meter was unreasonable in time or method and therefore there is no violation.

The ALJ found that the use of unlicensed technicians to install the AMI meter would not constitute a violation of 66 Pa. C.S. § 1501. PECO's witness Glenn Pritchard, PECO Manager of Advanced Grid Operations & Technology, testified that the Corix technicians were trained in AMI installation and the installation does not require a licensed electrician. I.D. at 15 (citing Tr. at 142).

The ALJ also found that there was no violation by PECO regarding the information provided to the Complainant about the AMI meter. The ALJ noted that PECO sent an initial letter that provided a brief description of the AMI meter. I.D. at 15 (citing PECO-BE-2). The ALJ stated that Ms. Eison, a PECO Customer Service and AMI Deployment Manager, spoke with the Complainant by telephone about the meters and whether they were safe. I.D. at 15 (citing Tr. at 225).

The ALJ addressed the Complainant's March 6, 2017 request to have admitted into evidence the testimony of Andrew Marino, PhD. Dr. Marino had testified on September 15 and 16, 2016 before the Commission as an expert in *Maria Povacz v. PECO*, C-2015-2475023; *Laura Sunstein Murphy v. PECO*, C-2015-2475726; and *Cynthia Randall and Paul Albrecht v. PECO*, C-2016-253766. Dr. Marino's testimony focused on the safety of AMI meters and is part of the record of each action.

On March 20, 2017, PECO submitted an objection to the admission of Dr. Marino's testimony in this matter, noting that the deadline for designating expert witnesses had long passed. PECO also asserted that it would violate its due process to allow the testimony. The ALJ found that admission of Dr. Marino's extra-record testimony would violate PECO's due process rights, as PECO would have no opportunity to cross-examine the witness. The ALJ cited to *Petition of PECO Energy Company for Approval of its Act 129 Energy Efficiency and Conservation Plan and Expedited Approval of its Compact Fluorescent Lamp Program*, 2009 Pa. PUC LEXIS 2301. I.D. at 13.

The ALJ noted that the Complainant presented Hanoch Talmor, M.D., a practitioner of holistic, general, and family medicine in Florida, in support of her claim. According to Dr. Talmor, he has seen numerous patients over seventeen years with health problems related to electromagnetic fields and radiofrequencies. I.D. at 16 (citing Tr. at 68). Dr. Talmor believes that most problems come from radiofrequency fields (RFs) or WI-FI frequencies. I.D. at 16 (citing Tr. at 69). The ALJ explained that when asked whether moving an AMI meter a third of an acre away from the house would reduce any effects that he contends emanate from an AMI meter, he stated that there are other phenomena from a smart meter that could feed back into the house. However, he did acknowledge that moving the meter away from the home may help and that the only way to tell would be to try it. I.D. at 16 -17 (citing Tr. at 120-121). The ALJ further noted that Dr. Talmor recommended to the Complainant that the Company not install an AMI meter at her house and that the Company remove AMI meters from her neighbors' houses. I.D. at 17 (citing Tr. at 83.)

The ALJ noted that PECO expert, Mark Israel, M.D., has studied and conducted research regarding electromagnetic fields (EFs) for purposes of diagnosis and treatment. Dr. Israel has specialized in cancer treatment and prevention and has investigated and considered the possible causes thereof, including EFs and any adverse health effects from them. I.D. at 17-18 (citing Tr. at 326-328). The ALJ explained that Dr. Israel testified that there is no scientific basis upon which to find that the PECO AMI meter would adversely affect the Complainant's health. This was based on his experience and years of review of the medical literature and reports of various public health authorities. I.D. at 18 (citing Tr. at 352-359). The ALJ noted that Dr. Israel testified that the symptoms identified by the Complainant could be indicative of other conditions but that a physical exam and medical tests should be conducted to make a diagnosis and determine proper treatment. I.D. at 18 (citing Tr. at 354-357, 367-368).

The ALJ noted that according to Dr. Christopher Davis, an expert presented by PECO who has a PhD in Physics and has studied and conducted experiments involving EFs for decades, the AMR meter currently at the Complainant's home emits more EFs than the AMI meter PECO seeks to install at the Complainant's residence. I.D. at 18 (citing Tr. at 282-283). The ALJ further noted that PECO witness, Glenn Pritchard testified that the AMI meter emits much less energy than the current AMR meter at the Complainant's home. I.D. at 18 (citing Tr. at 173).

The ALJ summarized the expert testimony of Dr. Talmor, Dr. Israel and Dr. Davis, concluding that the record evidence supports a finding that installation of a smart meter would not be unsafe or unreasonable. The ALJ stated that even if the weight of the evidence has established that the AMI meter would be harmful to the Complainant, PECO acted in a reasonable manner in response. The ALJ noted that PECO proposed the idea of moving the Complainant's meter board and the location of the AMI meter to a remote spot away from the Complainant's home. I.D. at 20.

With regard to the Complainant's assertion that she did not receive written answers from PECO in response to fifteen specific questions regarding her health and safety concerns, the ALJ noted that the record established that PECO responded to these questions. I.D. at 20.

C. Exceptions, Replies, and Disposition

Initially, we note that any issue or Exception that we do not specifically address shall be deemed to have been duly considered and denied without further discussion. It is well-settled that 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. Cmwlt. 1993); *also see, generally, University of Pennsylvania v. Pa. PUC*, 485 A.2d 1217 (Pa. Cmwlt. 1984).

1. Disallowance of the First Amended Complaint

a. Exceptions

In her first Exception, the Complainant states that the ALJ erred in disallowing her First Amended Complaint. The Complainant avers that the ruling prejudiced her and violated her rights. The Complainant contends that “forced installation of an AMI meter would further violate Section 1501.” The Complainant contends that by this ruling, much of her testimony and that of her physician and expert witness was excluded as irrelevant to her Complaint. The Complainant avers that she began to suffer physical symptoms because of the installation of smart meters in her neighborhood at the time of the filing of her Complaint on March 30, 2015. The Complainant alleges that the ALJ’s statements concerning the reasons for her request for a continuance are not accurate and did not adequately portray the Complainant’s medical condition. Exc. at 2-3.

b. Reply Exceptions

In reply, PECO states that the case chronology is important to understanding why it was appropriate to strike the First Amended Complaint. The Complaint was filed on April 1, 2015, and hearings were scheduled for November 15 and 16, 2016. PECO notes that the Complainant filed a First Amended Complaint on November 9, 2016 – over nineteen months after the proceeding was first initiated and five calendar days (two business days) before the hearings were scheduled to begin. PECO maintains that the First Amended Complaint, if allowed, would have materially changed the scope of the proceeding. As PECO offers, the Complainant’s original Complaint claimed that she had been made sick beginning about August 2014 by AMI meters installed at her neighbors’ homes, and for relief she requested that she not be

required to have an AMI meter installed at her home. In the First Amended Complaint, PECO submits that the Complainant claimed that she had been made sick beginning in approximately 2002 by PECO's AMR meter at her home, HVAC control technology at her home, and by AMI meters installed at her neighbors' homes. PECO offers that the Complainant expounded upon her initial request for relief, such that PECO be required to shut down its entire AMI system throughout its service territory and replace it with a fiber optic system and that PECO be required to remove her existing AMR meter and provide service to her residence via a non-transmitting analog meter. PECO contends this was a material expansion of both issues and relief. R. Exc. at 1-2.

PECO further submits that the filing of the First Amended Complaint was not timely. PECO states that it addressed this issue throughout its November 11 Motion to Strike and demonstrated that, when viewed against the history of the case and PECO's due process rights, the First Amended Complaint was both impermissibly broad and late. PECO sets forth that the ALJs' November 14, 2016 Interim Order Granting PECO's Motion to Strike (Interim Order)⁸ directly addressed the timeliness issue stating that the procedures that allow amendments to pleadings, 52 Pa. Code §§ 1.81 and 5.91, "are not without boundary . . . [T]he timing of the Complainant's filing of her amended complaint this late in the proceeding is clearly prejudicial to PECO." R. Exc. at 3-4.

PECO indicates that the Complainant requested to keep her AMR meter in her June 23, 2015 Answer to New Matter, and therefore PECO would not have been prepared for the Complainant's challenge to her AMR meter in her First Amended Complaint. R. Exc. at 5.

⁸ *Interim Order Granting PECO Energy Company's Motion to Strike the First Amended Complaint*, issued November 14, 2016 at C-2015-2475355.

PECO avers that the Complainant's argument, that her rights were violated because if the First Amended Complaint was allowed she would have put on a more extensive case, proves PECO's contention that there was an expanded scope in the First Amended Complaint. PECO contends that the Complainant's rights were not violated by striking the First Amended Complaint because, as the ALJs correctly noted in the Interim Order: "More than seven months have passed since this matter was remanded to the Commission. The Complainant clearly had more than enough time to file an amended Complaint that would have allowed PECO adequate time to respond." PECO offers that the Complainant's rights were not violated; she waited too long to exercise them. R. Exc. at 5.

c. Disposition

In her original Complaint, filed on April 1, 2015, the Complainant stated that she had requested that PECO not install the new smart meter on August 28, 2014, and that she spent the better part of the previous seven months researching the wealth of information available regarding these meters. For relief, she requested PECO provide answers to fifteen questions regarding the safety of smart meters. Complaint at 3.

In her Exception No. 1, the Complainant reiterates her position that the ALJs erred in striking her First Amended Complaint, which she filed on November 9, 2016, and in which she expressed her concerns about the AMR meter installed at her home in 2002, the HVAC controls installed in 2011, and the AMI meters installed throughout her neighborhood. First Amended Complaint at 2-3, 5. For relief, the Complainant requested, *inter alia*, that PECO remove her AMR meter and replace it with an analog meter and that PECO modify its deployed AMI meters in her neighborhood. First Amended Complaint at 12.

We note that in the First Amended Complaint, which was filed less than one week before the hearing, the Complainant sought to expand both the scope and the relief sought in her original Complaint. Thus, we find that the First Amended Complaint was not timely filed. Furthermore, we remanded the Complaint to the OALJ for the primary purpose of determining whether or not installation of a *smart meter* at the Complainant's residence would constitute a violation of 66 Pa. C.S. § 1501. As such, we agree with PECO's argument in its Motion to Strike the First Amended Complaint and the ALJs conclusion in their Interim Order that the Complainant waited too long to file a broadly expanded Complaint and that allowing consideration of the First Amended Complaint at such a late stage in the proceeding would be prejudicial to PECO and impede PECO's due process rights. For these reasons, we find that the Complainant's rights were not violated by the ALJ's ruling that disallowed the First Amended Complaint. Thus, we shall deny the Complainant's Exception No. 1.

2. Exclusion of Dr. Andrew Marino's Testimony

a. Exceptions

In her second Exception, the Complainant contends that the ALJ erred in not admitting the testimony of Andrew Marino, PhD into evidence. The Complainant avers that PECO's due process rights would not have been violated by admission of the testimony as PECO had the opportunity to prepare to rebut Dr. Marino's testimony in the previous cases. The Complainant then quotes extensively from an extra-record report from Dr. Marino's website. Exc. at 4.

b. Reply Exceptions

PECO maintains that Dr. Marino's testimony should not be admitted as the deadline for identifying expert witnesses had passed before the Complainant's request to

admit the testimony. PECO notes that the Complainant states she is *pro se*, but *pro se* latitude must end where other parties' rights begin. PECO contends that it would violate PECO's due process rights to allow the Marino testimony to be admitted in this proceeding. PECO submits that if the Marino testimony had been admitted, it could not have prepared a complete and thorough response to the testimony. PECO also claims that technical scientific testimony regarding one witness cannot be wholesale transferred to apply to another witness. R. Exc. at 7-11.

c. Disposition

The Complainant argues in her Exception No. 2 that the ALJ erred by not allowing the testimony from Dr. Marino be admitted into the case. As noted, Dr. Marino had testified on September 15-16, 2016, as an expert in *Maria Povacz v. PECO*, Docket No. C-2015-2475023; *Laura Sunstein Murphy v. PECO*, Docket No. C-2015-2475726; and *Cynthia Randall and Paul Albrecht v. PECO*, Docket No. C-2016-253766.

Although our Regulation at 52 Pa. Code § 5.407 allows for admission of the records of other proceedings, we stand by our previous pronouncement that in instances where a party seeks to admit evidence after the hearing, "admission of such extra-record testimony violates the principle of fundamental fairness and violates the due process rights of other parties who have no opportunity to cross examine a witness in a separate hearing."⁹ Thus, we agree with the ALJ that admission of Dr. Marino's testimony would violate PECO's due process rights under the circumstances, as PECO did not have adequate time and the opportunity to conduct discovery or to prepare a response to Dr. Marino's testimony as it applied to the Complainant in this proceeding. For this reason, we shall deny Complainant's second Exception.

⁹ See *Petition of PECO Energy Company for Approval of its Act 129 Energy Efficiency and Conservation Plan and Expedited Approval of its Compact Fluorescent Lamp Program*, 2009 Pa. PUC LEXIS 2301. I.D. at 13.

3. Dr. Talmor's Testimony Regarding the Complainant's Medical Condition

a. Exceptions

In her third Exception, the Complainant avers that the ALJ erred in not giving proper evidentiary weight to Dr. Talmor's testimony regarding her medical condition. The Complainant submits that the ALJ erred in believing PECO's expert, Dr. Israel, over her expert witness, Dr. Talmor. After the opening statements in this Exception, the Complainant reiterates much of Dr. Talmor's testimony from the hearing but does not provide any arguments as to why Dr. Talmor's testimony should have more weight than that of Dr. Israel. Exc. at 14.

b. Reply Exceptions

PECO states that the Initial Decision correctly concluded that installation of a smart meter would not be unsafe or unreasonable. PECO notes that only the two introductory paragraphs to the Complainant's third Exception discuss the comparative weight of the evidence. R. Exc. at 13.

c. Disposition

With regard to the Complainant's Exception No. 3, the Complainant contends that the ALJ erred in not giving full weight to Dr. Talmor's testimony as to her medical condition and for not finding Dr. Talmor's testimony more credible than Dr. Israel's testimony. Although the Complainant argues that the ALJ erred in not fully considering Dr. Talmor's testimony, she fails to explain why she believes the ALJ erred. The Complainant simply repeats portions of Dr. Talmor's testimony.

In the Initial Decision, the ALJ noted that Dr. Talmor testified that radio frequency fields, including any from a smart meter, are harmful to the body and that compressors in refrigerators and deep freezers also emit harmful EF waves. I.D. at 17 (citing Tr. at 96-97). Dr. Talmor opined that “pulsed” transmissions emitted by such machinery are more dangerous than non-pulsed fields. Tr. at 85. He further stated that exposure to RFs at 0.01 microwatts per square meter is a safe level of exposure for most persons. He believes that smart meters are dangerous because they could emit 1000s of times that level. Tr. at 88. Dr. Talmor also believes that a smart meter can create feedback into the electric grid of a house creating frequencies and “some kind of electric effect that also can affect people.” Tr. at 111. I.D. at 17.

On the other hand, the ALJ noted that Dr. Israel challenged Dr. Talmor’s conclusions and testified that there is no scientific basis upon which to find that the PECO AMI meter would adversely affect Ms. Paul’s health. Although Dr. Israel acknowledged that there are reports and a few studies that EFs have a negative health effect, he questioned the validity of those studies, noting that some were based on the effects on cells rather than the human body, distinguishing between a biological effect and a health effect, and that other studies relied on self-reported symptoms rather than those objectively observed. I.D. at 18 citing Tr. at 335-339. Dr. Israel further noted that repeated experiments have been unable to replicate a finding that exposure to EFs is what triggered the symptoms reported. *Id.* citing Tr at 346-348. The ALJ also referenced testimony from PECO’s other witnesses who discussed the actual features of PECO’s AMI and AMR meters addressed Dr. Talmor’s concerns. I.D. at 16-19. As presented above, Dr. Davis and Mr. Pritchard testified that the AMI meter that the Complainant does not want to be installed would emit less EFs and at less energy than the AMR meter currently in place.

Based on our review of the record, we agree with the ALJ that the installation of a smart meter would not be unsafe or unreasonable. We also agree with the ALJ that Dr. Israel's testimony and PECO's other witnesses' testimony is more credible than that of Dr. Talmor. Most significant is the fact that Dr. Talmor's testimony is concerned about "pulsed" transmissions" as being detrimental to a person's health. However, as noted by the ALJ, according to Mr. Pritchard, the PECO smart meter system does not use pulsed transmissions. I.D. at 19 citing Tr. at 139. Furthermore, the smart meters used by PECO only measure consumption and do not create harmonics or the "feedback" that concerned Dr. Talmor. I.D. at 19 citing Tr. at 156-157, 259. Furthermore, the ALJ appropriately concluded that there was no showing that the concerns Ms. Paul and Dr. Talmor have about smart meters in general pertain to the AMI meters utilized by PECO in particular. I.D. at 19 citing Tr. at 136.

We also find Dr. Davis' testimony more credible than Dr. Talmor's concerning the EF exposure emitted by PECO's smart meters. As the ALJ explained, Dr. Talmor proposed an EF safe level of 0.1 microwatts per square meter. This level is 100 million times the safe level established by the Federal Communications Commission. Dr. Davis testified that the two radios that are employed in PECO Smart Meters are the Flexnet radio, with average emissions that are at least 7.8 million times smaller than the FCC maximum permissible exposure (MPE) and the Zigbee radio, with emissions that are at least 164 million times smaller than the FCC limit, on average. I.D. at 19 citing Tr. at 269. Looking at the possible peak exposure to EFs, *i.e.*, at the moment when the meters are actually transmitting, the Flexnet level is 40 times smaller than the FCC MPE and the Zigbee level is 3800 times smaller than the FCC MPE. (Tr. 270). Dr. Davis further stated that Complainant's exposure to the nearest neighbor's AMI meter if placed on the neighbor's closest point to Ms. Paul would be 25 times smaller than the safe level stated by Dr. Talmor. I.D. at 19 citing Tr. at 280.

It is also important to note that PECO offered to Dr. Davis further stated that Complainant's exposure to the nearest neighbor's AMI meter if placed on the neighbor's closest point to Ms. Paul, would be twenty-five times smaller than the safe level stated by Dr. Talmor. I.D. at 19 citing Tr. at 280.

Considering the above, we conclude that the overall record evidence in this proceeding supports a finding that the installation of a smart meter at the Complainant's home would not be unsafe or unreasonable. I.D. at 17. Therefore, we shall deny the Complainant's third Exception.

4. The ALJ's Failure to Consider the Harmful Effects of an AMI Meter on the Complainant's Property

a. Exceptions

In her fourth Exception, the Complainant states that the ALJ erred in not considering how the addition of an AMI meter would cause the Complainant "grievous bodily harm" just as the Commission ruled in *Robert M. Mattu v. West Penn Power Company (Mattu v. West Penn)*, Docket No. C-2016-2547322 (Order entered July 14, 2017). The Complainant states that she is "not asking for a blanket exception from the AMI meters for everyone – just for me based upon my need to avoid all wireless . . . due to my EHS [Electromagnetic hypersensitivity]." Exc. at 18.

b. Reply Exceptions

PECO asserts that the Complainant's Fourth Exception is simply an "opt out" argument dressed in new clothes. PECO avers that the *Mattu v. West Penn* case does not address Act 129 or AMI meters, and cannot be read as creating an Act 129 opt-out. R. Exc. at 14-15.

c. Disposition

We find that *Mattu v. West Penn*, which related to a utility's vegetation management plan, cannot be used under the circumstances in this case to establish an Act 129 smart meter "opt-out", because such a result is not supported by the record here. Therefore, we shall deny the Complainant's fourth Exception.

Upon our review and consideration of the Initial Decision and the pleadings of the Parties, we shall deny the Complainant's Exceptions. We find that the Complainant in this proceeding has not satisfied her burden of proving a violation of Section 1501 of the Code, or that the installation by PECO of a smart meter at the Complainant's service address is unsafe or unreasonable.

III. Conclusion

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

IT IS ORDERED:

1. That the Exceptions filed by Mary Paul on July 13, 2017, to the Initial Decision of Administrative Law Judge Darlene D. Heep, are denied, consistent with this Opinion and Order.

2. That the Initial Decision of Administrative Law Judge Darlene D. Heep, issued on June 23, 2017, is adopted, consistent with this Opinion and Order.

3. That the Complaint filed by Mary Paul, on April 1, 2015, in this docket, is dismissed.

4. That this proceeding be marked closed.

BY THE COMMISSION,

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

Rosemary Chiavetta
Secretary

(SEAL)

ORDER ADOPTED: June 14, 2018

ORDER ENTERED: June 14, 2018