

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

Public Meeting held May 3, 2018

Commissioners Present:

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

Catherine J. Frompovich

C-2015-2474602

v.

PECO Energy Company

OPINION AND ORDER

BY THE COMMISSION:

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition are the Exceptions (Exceptions) of Catherine J. Frompovich (Ms. Frompovich or the Complainant) filed on June 7, 2017, to the Initial Decision (Initial Decision or I.D.) of Administrative Law Judge (ALJ) Darlene D. Heep, issued on May 24, 2017, in the above-captioned proceeding. The Initial Decision dismissed the Formal Complaint (Complaint) filed by the Complainant on March 24, 2015. On June 23, 2017, PECO Energy Company (PECO or the Company) filed Replies to Exceptions. 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. Background

This Complaint arises from PECO's attempt to replace its automatic meter reading (AMR) meter located at the Complainant's service address with an advanced metering infrastructure (AMI) meter, or a smart meter, in accordance with applicable law. The Complainant refused PECO's installation of an AMI meter, or a smart meter, at her service address. In response, PECO sent the Complainant a written shut-off notice, which indicated that PECO was proposing to then-imminently terminate electric service to the Complainant's service address.¹ The Complainant filed the instant Complaint, disputing PECO's proposed termination of service and installation of an AMI meter at her service address, for the reasons summarized in more detail below. The Complainant and PECO eventually litigated this matter in an evidentiary hearing before ALJ Heep. After the hearing concluded, ALJ Heep's written Initial Decision concluded that the Complainant failed to satisfy her burden of proof with respect to the claims contained in the Complaint. The Complainant filed Exceptions to the Initial Decision, and PECO filed Replies thereto. This Order addresses the Complainant's Exceptions.

II. History of the Proceeding

On March 24, 2015, Ms. Frompovich filed the instant Complaint with the Commission alleging that PECO was threatening to terminate her service because she would not allow PECO to access the meter at her residence in order to replace it with an AMI meter, or smart meter. The Complainant asserted that, as a 76-year-old who previously had breast cancer, she could not tolerate the radiation from a smart meter. She attached a letter from her physician to support her assertion. She also attached to her Complaint a letter that she had written to PECO wherein she asserted that smart meters

¹ During the pendency of the Complaint before the Commission for a final decision, PECO's proposed termination of service is prohibited. 52 Pa. Code § 56.94 (1).

cause fires, that there is a trend of insurance providers denying coverage for fires caused by smart meters and that smart meters are associated with higher utility bills.

Ms. Frompovich requested the Commission instruct PECO to perform onsite broadcasting tests at each customer's smart meter, that her electric service not be turned off, and that the Commission consider the health implications of smart meters as well as the legal implications in conjunction with the Americans with Disabilities Act and the United States Constitution.

On April 10, 2015, PECO filed an Answer with New Matter and Preliminary Objections. In its Answer, PECO contended that it was required to install AMI, or smart meters, for all AMR meter customers by the end of 2014 and that it has the right to terminate service for failure of the customer to permit access to the meter. In its New Matter, PECO asserted that Section 2807(f) of the Code directed PECO and other EDCs to file smart meter procurement and installation plans with the Commission, and that PECO was seeking to comply with the installation plan already approved by the Commission. PECO's Answer and New Matter requested that the Commission dismiss the Complaint.

In its Preliminary Objections, PECO contended that the Complaint is legally insufficient under 52 Pa. Code § 5.101(a)(4). The Preliminary Objections asserted that the Company is installing smart meters in compliance with Act 129 and the Commission's order approving the Company's Smart Meter procurement and installation plan. PECO also asserted in the Preliminary Objections that although the Complainant is seeking to opt out of smart meter installation, that she may not opt out and that she is subject to termination of service for refusing access to her meter and installation of a smart meter. PECO contended that there were no genuine issues of fact present, that the Company is entitled to judgment as a matter of law and that the Commission should dismiss all issues raised in the Complaint.

On May 11, 2015, the Complainant filed a letter, again asserting that she would like to opt out of a smart meter due to her health concerns as a breast cancer survivor and that the Commission had misinterpreted Act 129 as requiring mandatory installation of smart meters.

On June 15, 2015, the Commission issued the Initial Decision of ALJ Elizabeth H. Barnes, which sustained PECO's Preliminary Objections on the basis that under the then-current law in Pennsylvania, there had been no customer "opt-out" option for smart meters, and that PECO had been required to deploy and install smart meters in accordance with its Commission-approved Smart Meter Plan as of May 6, 2010. ALJ Barnes noted that the Commission has no authority, absent a directive in the form of legislation, to prohibit the EDC from installing a Smart Meter where a customer does not want one.

On June 26, 2015, the Complainant filed four Exceptions to the Initial Decision of ALJ Barnes, in which she: (1) questioned that there is no opt out of a smart meter available and that the interpretation by the Commission of Act 129 as mandating smart meter installation in violation of the U.S. Constitution, ethics, the First and Fourth Amendments to the U.S. Constitution and the Consumer Products Safety Act; (2) asserted that the Commission's decisions stating that there is no opt out available is overreaching and overstepping the agency's statutory authority and that PECO's constant threat to consumers that their electric service will be terminated if they do not relent to installation despite legitimate health and safety concerns is emotional injury for which PECO and the Commission may be held liable; (3) contended that bills have been introduced to the legislature to provide an opt out; and (4) alleged that the Act 129 legislative record shows legislative intent to provide an opt out of Smart Meter installation.

On April 21, 2016, the Commission entered an Opinion and Order granting, in part, the Complainant's Exceptions and reversing the Initial Decision on the

Preliminary Objections. Particularly, the Commission found that the relief sought by PECO in its Preliminary Objections is not clearly warranted and free from doubt. The Commission determined that the Complainant's allegations warranted a hearing given her "status as a breast cancer survivor with concerns over smart meter emissions, who fears for her health status if a smart meter is installed, and who remains under medical care for her condition by a physician prepared to offer his medical opinion that the radio frequencies emitted by a smart meter installed in the Complainant's home will interfere with her ability to heal and live cancer free." April 21, 2016 Order at 11. As the Commission stated: "Ms. Frompovich has alleged factual averments specific to her that, *if proven*, could implicate, under her particular circumstances, a violation of Section 1501 of the Code, a statute the Commission has jurisdiction to administer." *Id.* (emphasis added).

The matter was returned to the Office of Administrative Law Judge to address the Complainant's Section 1501 allegations and assigned to Administrative Law Judges Christopher Pell and Darlene Heep.

A hearing was held on November 2-3, 2016. The Complainant appeared *pro se*, testified on her own behalf and presented no other witnesses. Because of the Complainant's professional background, the ALJ recognized her as an expert in "a very limited area on nutrition, natural healing, and treating cancers from that perspective." Tr. at 33. Thirteen exhibits were admitted on behalf of the Complainant. *See*, Tr. at 4-5, 51- 67, 72, 87, 90, 91, 176, 181-82, 223-25, 225-28, 231-32, 236, 240, 249-50, 304-09.

PECO was represented by Ward Smith, Esq., Shawane Lee, Esq. and Thomas Watson, Esq. Twenty-four PECO exhibits were admitted. Testifying on behalf of PECO were Ms. Brenda Eison, PECO Customer Service and AMI Deployment Manager; Mr. Glenn Pritchard, PECO Principal Engineer for the AMI Deployment Project; Christopher Davis, Ph.D. in Physics; and Dr. Mark Israel, Physician.

The record closed on February 21, 2017, upon filing of the final Reply Brief.

By Judge Change Notice issued on March 24, 2017, the matter was reassigned to Administrative Law Judge Darlene Heep, as the sole presiding officer.

On May 24, 2017, the Commission issued the Initial Decision of ALJ Heep. As noted, on June 7, 2017, Ms. Frompovich filed Exceptions to the Initial Decision and PECO filed Reply Exceptions on June 23, 2017.

On July 3, 2017, Ms. Frompovich filed a Letter in response to PECO's Reply Exceptions (Complainant's Letter). On July 6, 2017, the Commission's Secretary's Bureau received the following two *amicus curiae* Letters from non-parties who claimed to have attended the hearing in support of Ms. Frompovich: (1) a Letter, dated July 3, 2017, from Thomas A. McCarey (Mr. McCarey's Letter); and (2) a Letter, dated July 5, 2017, from Laraine C. Abbey-Katzev, Certified Nutrition Specialist (Ms. Abbey-Katzev's Letter). Such third-person Letters apparently respond to PECO's Reply Exceptions, in support of Ms. Frompovich.

On July 11, 2017, PECO filed a Letter indicating that it will not file a substantive response to the Complainant's Letter or Mr. McCarey's Letter unless it is further instructed to do so by the Commission, given that the Commission's Regulations do not provide an opportunity for replies to replies and the Commission typically does not consider such filings in reaching its final determinations.

III. Discussion

As a preliminary matter, we will address the three Letters filed in response to PECO's Reply Exceptions in this matter – the Complainant's Letter, Mr. McCarey's Letter and Ms. Abbey-Katzev's Letter. As the Complainant's Letter was filed after the period for filing Exceptions, and Replies to Exceptions and our Regulations do not provide for the filing of responses to Replies to Exceptions, *see* 52 Pa. Code §§ 5.533 and 5.535, we will not consider the Complainant's July 3, 2017 Letter.

Similar to the Complainant's Letter, Mr. McCarey's and Ms. Abbey-Katzev's Letters were filed after the period for filing Exceptions and Replies to Exceptions. Moreover, our Regulations permit interested parties to intervene in a proceeding and obtain intervenor-party status, *see* 52 Pa. Code § 5.71, *et seq.*, but neither Mr. McCarey or Ms. Abbey-Katzev petitioned to intervene in this proceeding. Additionally, while our Regulations allow for the filing of *amicus curiae* briefs, *see* 52 Pa. Code § 5.502(d), our Regulations do not provide for the filing of *amicus curiae* Exceptions or Replies to Exceptions by a non-party. *See Verizon Pennsylvania Inc., et al*, Docket No. C-20066987 (Order entered August 29, 2008) (finding that *amicus curiae* exceptions could conflict with the just, speedy and inexpensive determination of Commission actions and proceedings per 52 Pa. Code § 1.2(a)). Accordingly, we will not consider Mr. McCarey's Letter and Ms. Abbey-Katzev's Letter in our final disposition of this matter, as set forth herein.

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 automatic meter reading (AMR) meters owned by it within its service territory with advanced metering infrastructure (AMI) meters, or smart meters. More specifically, Act 129 of 2008, 66 Pa. C.S. § 2807(f),² 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 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.

(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 Installation Implementation Order*). The Commission also ordered EDCs to file smart meter technology procurement and installation plans. *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,³ 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.

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:

³ 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.

§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 any and all acts done, rendered, or performed, and any 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.

5. Rules of Evidence in an Administrative Hearing

The Commission, not the ALJ, is the ultimate fact-finder in formal proceedings on a complaint of a public utility’s quality of service; the Commission must weigh the evidence and resolve conflicts in the testimony. 66 Pa. C.S. § 335(a); *see also Milkie v. Pa. PUC*, 768 A.2d 1217, 1220, n. 7 (Pa. Cmwlth. 2001). Nonetheless, the admission of evidence is generally a matter within the sound discretion of the ALJ, and typically we will not reverse an ALJ’s rulings thereon unless there is a clear abuse of

discretion or an error of law. *See Jo Anna Warren Williamson v. Duquesne Light Company*, Docket No. C-2009-2138578 (Opinion and Order entered February 10, 2011).

As a Commonwealth agency, the Commission is governed by the Commonwealth's Administrative Agency Law, 2 Pa. C.S. § 101, *et seq.* Section 505 of the Administrative Agency Law, 2 Pa. C.S. § 505, specifies that a Commonwealth agency is not bound by technical rules of evidence at an agency hearing. Specifically, 2 Pa. C.S. § 505, provides: "Commonwealth agencies shall not be bound by technical rules of evidence at agency hearings, and all relevant evidence of reasonably probative value may be received. Reasonable examination and cross-examination shall be permitted." Thus, if the evidence is relevant to the issues before the agency and of reasonable probative value, the agency may receive it. 2 Pa. C.S. § 505. Evidence is relevant if it tends to establish facts in issue. *LeRoi v. Pa. State Civil Service Commission*, 382 A.2d 1260 (Pa. Cmwlth. 1978).

The Pennsylvania Supreme Court has stated, however, that in order for evidence relied upon in an administrative proceeding to be considered "substantial evidence," the ". . . information admitted into evidence must have sufficient indicia of reliability . . ." *Gibson v. W.C.A.B.*, 861 A.2d 938, 944, 580 Pa. 470, 480 (Pa. 2004). "If the evidence is both competent and sufficient, then the finding is supported by substantial evidence." *Id.*

Accordingly, while the strict rules of evidence have been relaxed in agency hearings under the Commonwealth's Administrative Agency Law, *see* 2 Pa. C.S. § 505, there has not been an abandonment of all rules. *Ronald and Beverly Dawes v. Pennsylvania Gas and Electric*, F-2013-2361655 (Initial Decision Issued January 14, 2014) (related to authentication per Pa. R.E. Rules 901 of a third-party recording of a customer call and application of Best Evidence Rule, Pa. R.E. Rules 1001 and 1002). For

evidence relied upon in an administrative proceeding to be considered competent, the evidence must be authenticated and follow the applicable hearsay rules.

Under the Pennsylvania Rules of Evidence, Rule 901, parties to a hearing are required to satisfy the requirement of authenticating or identifying an item of evidence. To do so, “the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.” Pa. R.E., Rule 901. The rationale for requiring authentication is that it provides a measure of protection against fraud or mistaken attribution of a writing to a person who fortuitously has the same name as the author. *Commonwealth v. Brooks*, 508 A. 2d 316 (Pa. Super. 1986); *Commonwealth v. Harrison*, 434 A.2d 808 (Pa. Super. 1981). Improper authentication can lead to reversal on appeal. *Kopytin v. Aschinger*, 947 A.2d 739 (Pa. Super. 2008). As it is the duty of the ALJ to ensure that the evidentiary record is solid and reliable, permitting improper authentication is a breach of that duty. *See Moore*.

Hearsay is an out-of-court statement made by a declarant that is offered by a party to prove the truth of the matter asserted in the statement. *See* Pa. R.E., Rule 801. The general rule against hearsay is that hearsay is inadmissible at trial unless it falls into one of the recognized exceptions to the hearsay rule pursuant to the Pennsylvania Rules of Evidence, other rules prescribed by the Pennsylvania Supreme Court, or statute. *See* Pa. R.E., Rules 801, 802, 803, 803.1, 804. The rationale for the rule against hearsay is that hearsay lacks the guarantees of trustworthiness to be considered by the trier of fact; however, exceptions have been fashioned to accommodate certain classes of hearsay that are substantially more trustworthy than hearsay in general, and thus merit exception to the rule against hearsay. *See e.g. Commonwealth v. Kriner*, 915 A.2d 653 (Pa. Super. 2007); *Commonwealth v. Cesar*, 911 A.2d 978 (Pa. Super. 2006); *Commonwealth v. Bruce*, 916 A.2d 657 (Pa. Super. 2007).

Under the relaxed evidentiary standards applicable to administrative proceedings, *see* 2 Pa. C.S. § 505, it is well-settled that simple hearsay evidence, which otherwise would be inadmissible at a trial, generally may be received into evidence and considered during an administrative proceeding. *D'Alessandro v. Pennsylvania State Police*, 937 A.2d 404, 411, 594 Pa. 500, 512 (2007) (D'Alessandro). The Supreme Court of Pennsylvania stated:

‘Hearsay’ is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Pa. R.E. 801(c). Hearsay evidence is normally inadmissible at trial unless an exception provided by the Pennsylvania Rules of Evidence, this Court's jurisprudence, or statute is applicable. Pa. R.E. 802. Complicating this general rule in the administrative law context, however, is Section 505 of the Administrative Agency Law: “Commonwealth agencies shall not be bound by technical rules of evidence at agency hearings, and all relevant evidence of reasonably probative value may be received. Reasonable examination and cross-examination shall be permitted.” 2 Pa. C.S. § 505. Therefore, hearsay evidence may generally be received and considered during an administrative proceeding. *See A.Y. v. Commonwealth, Dep't of Pub. Welfare, Allegheny County Children & Youth Serv.*, 537 Pa. 116, 641 A.2d 1148, 1150 (1994).

Id.

However, whether simple hearsay may support a finding of an agency depends on whether the evidence meets the criteria of the *Walker/Chapman* rule. The *Walker/Chapman* rule provides that simple hearsay evidence may support an agency's finding of fact so long as the hearsay is admitted into the record without objection and is corroborated by competent evidence in the record. *See Walker v. Unemployment Compensation Board of Review*, 367 A. 2d 366, 370 (Pa. Cmwlth. 1976) (*Walker*) (citations omitted); *see also Chapman v. Unemployment Compensation Board of Review*,

20 A. 3d 603, fn. 8 (Pa. Cmwlth. 2011) (*Chapman*). Specifically, the Commonwealth Court stated:

Hearsay evidence, properly objected to, is not competent evidence to support a finding of the agency...Hearsay evidence, admitted without objection, will be given its natural probative effect and may support a finding of an agency if it is corroborated by any competent evidence in the record . . . a finding of fact based solely on hearsay will not stand.

Walker, 367 A. 2d at 370.

To be “properly objected to” in an administrative proceeding, the hearsay evidence must not fall within one of the recognized exceptions to the rule against hearsay. Hearsay that falls within one of the recognized exceptions to the hearsay rule is competent evidence that may be relied upon by the agency. *See Chapman, supra*, n. 8 (finding that the Board properly relied upon a party’s admission as competent evidence as a recognized exception to the hearsay rule); *see also Ruth Sanchez v. PPL Electric Utilities Corporation*, Docket No. C-2015-2472600 (Order entered July 21, 2016) (*Sanchez*) (finding that testimony related to the issuance of a termination letter fell within the business records exception to the hearsay rule, and, therefore, was not simple hearsay, and was competent evidence to be relied upon in the proceeding to determine whether the complainant satisfied her burden of proof); *see also* Pa. R.E., Rules 802, 803, 803.1, 804.

Moreover, hearsay cannot corroborate hearsay. *See Sule v. Philadelphia Parking Authority*, 26 A. 3d 1240, 1244 (Pa. Cmwlth. 2011), citing *J.K. v. Department of Public Welfare*, 721 A.2d 1127, 1133 (Pa. Cmwlth. 1998) (noting substantial evidence did not exist because there was no non-hearsay evidence to corroborate hearsay testimony).

B. The ALJ's Initial Decision

In the Initial Decision, ALJ Heep made seventy-five Findings of Fact and reached five Conclusions of Law. *See* I.D. at 5-13; 24-25. 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 essence of Ms. Frompovich's allegations, as follows: that the installation of a smart meter at her residence would have a deleterious impact on her medical condition and constitute a violation of the 66 Pa. C.S. § 1501 requirement that a utility company provide its customers with safe and reasonable service and facilities. Specifically, the Complainant contended that smart meters create a fire hazard and that installation of a smart meter will expose her to harmful electromagnetic fields (EMF) emissions that will counter or reverse her recovery from and the remission of her breast cancer. I.D. at 17-18.

The ALJ first addressed Ms. Frompovich's allegations that PECO's installation of a smart meter presents a fire hazard. Specifically, in a letter attached to her Complaint, Ms. Frompovich expressed concern that the PECO AMI meters cause fires. Mr. Pritchard, a PECO Registered Professional Engineer, who was the principal engineer on the AMI project, testified that there was a problem with a brand of meter initially used in the deployment. In approximately 2012, those meters were all removed and replaced with the Landis + Gyr Focus meters. PECO showed that since the installation of over 1.2 million of Landis + Gyr Focus meters, there have been no reports of fire incidents related to the meters. I.D. at 18 (citing Tr. at 143). PECO showed that A Landis + Gyr meter would be installed at Ms. Frompovich's home. The Complainant did not present any competent evidence to show that such brand of meters causes fires. Therefore, the ALJ concluded that the Complainant cannot prevail on the claim that the AMI meter to be

installed at her home would constitute an unsafe fire hazard in violation of 66 Pa. C.S. § 1501. I.D. at 18.

The ALJ next addressed Ms. Frompovich's contention that the installation of a smart meter at her home is unsafe and unreasonable because EMF emissions from a smart meter will adversely affect her healing and her health. I.D. at 18.

First, the ALJ noted that Ms. Frompovich asserted that she is protected by, and that PECO is subject to, the Americans with Disabilities Act (ADA), 42 U.S.C.S. § 12132, *et seq.* because she had cancer. I.D. at 18. The ALJ concluded that it is beyond the jurisdiction of Commission to determine whether Complainant has a disability as defined under the ADA. Further, the ALJ determined that a state agency's characterization of what the ADA requires is not determinative. I.D. at 18 (citing *McCree v. SEPTA*, 2009 U.S. Dist. LEXIS 4803 (E.D. Pa. 2009)).

Next, the ALJ concluded that the preponderance of and prevailing evidence presented did not support a finding that installing a smart meter at the Complainant's home would be unsafe or unreasonable. I.D. at 19. Indeed, the ALJ stated that the dominant evidence presented at this hearing supports a finding that installation of an AMI Meter would not be unreasonable and would not be unsafe for Ms. Frompovich. I.D. at 20. The ALJ recognized that the Complainant based her conclusion that installation of PECO's AMI meters would be harmful to her on information obtained through reviewing general information regarding EMFs and smart meters. I.D. at 20. However, the ALJ concluded that the testimony and evidence presented by PECO at the hearing weighed against the Complainant's conclusion. I.D. at 20.

Specifically, the ALJ noted that the Complainant testified that based on a literature search regarding EMFs and her knowledge of holistic healing, she had concluded that she will be harmed by "dirty electricity" if a smart meter is installed at her

home. Ms. Frompovich described “dirty electricity” as high electrical pulses emitted by smart meters that occur as a result of the microwave transmissions every fifteen seconds. She further contended that she will be harmed by the non-thermal health effects from microwave energy and radio frequency or EMFs emanating from a smart meter. She expressed the opinion that such “radiation” and EMFs from smart meters will negatively affect her health, and that continued exposure to them is contrary to the natural and holistic methods that she employs in healing. I.D. at 19 (citing Tr. at 34).

The ALJ explained that, in reaching her conclusions, the Complainant also referenced the World Health Organization International Agency for Research on Cancer as classifying radiofrequency (RFs) and EMFs as possibly carcinogenic to humans, group 2B. She asserted that this conclusion is based on a finding that RFs and EMFs present an increased risk of glioma, a malignant type of associated brain cancer. I.D. at 19-20 (citing Tr. at 42, C B-1). The Complainant testified that she read reports of studies involving experiments on the carcinogenicity of extremely low frequency magnetic fields. I.D. at 19-20 (citing Tr. at 43, C B2). She also referenced a report of a study of children which concluded that microwave radiation is a class 2B carcinogen. I.D. at 19-20 (citing Tr. at 47, C F). She contended that EMF electromagnetic radiation intensities damage to DNA and interfere with DNA repair, a key to a healthy body and healing. I.D. at 19-20 (citing Tr. at 50).

The ALJ noted that the Complainant testified that she currently has an AMR meter located near her front door. She testified that she used two different devices to measure EMFs near her door and in her neighborhood and that she had to stand fifteen feet away in order to get a “normal reading.” PECO had offered to move the Complainant’s meter away from her home if she chose to relocate her meter socket. I.D. at 20 (citing Tr. at 144-45). However, Ms. Frompovich testified that she would decline installation of a smart meter at a remote location because she believes that harmonics will

send damaging EMFs into her home as long as the meter is connected to her home electric system. I.D. at 20 (citing Tr. at 60).

Moreover, the ALJ discussed that the Complainant testified that exposure to such emissions is particularly harmful to her because she is a cancer survivor and she has eliminated anything from her home that could possibly have such emissions. She testified that she does not have a smart phone, a microwave oven or a TV, to keep things “clean.” I.D. at 20 (citing Tr. at 56). When the Complainant leaves her home, she walks in a route to avoid as many of the meters of her neighbors as possible. I.D. at 20 (citing Tr. at 61). She has no Wi-Fi or wireless internet service and she keeps her router turned off. She also has no smart appliances or electronic security. I.D. at 20 (citing Tr. at 62).

The ALJ noted that Ms. Frompovich testified that she believes that non-ionizing non-thermal radiation from AMI Smart Meters will cause a recurrence of her cancer and adversely affect her health. I.D. at 20 (citing Tr. at 78-79; 51-53; C R-1, C-K).

The ALJ noted that, in rebuttal, PECO presented evidence to show that some of the emissions of concern to Ms. Frompovich do not emanate from smart meters and that any actual emissions from smart meters are miniscule and harmless and measure significantly less than those to which the average person is exposed daily. I.D. at 21.

The ALJ explained that the primary information about the AMI meters utilized by PECO was provided by Mr. Glenn Pritchard, a PECO registered electrical engineer who heads the PECO AMI project and is an expert in smart grid and advanced metering infrastructure systems. I.D. at 21 (citing Tr. at 128). The ALJ found he testified credibly that PECO’s AMI meter system does not have the emission characteristics of concern to Ms. Frompovich. He stated that while some other utilities employ a mesh system, which transfers data from meter to meter until it reaches a data

collector, resulting in many transmissions, in the PECO system, messages are transmitted directly to the collector and do not have to transmit from one meter to the next in a relay, resulting in fewer transmissions. I.D. at 21 (citing Tr. at 136).

The ALJ indicated that PECO presented evidence that it uses Landis + Gyr AMI meters in its system, one of which would be installed at Complainant's residence. These meters have two components- the FlexNet Meter that communicates usage data to Base Stations, and the Zigbee radio transmitter that is designed to transmit both price and consumption information. The FlexNet module operates at a frequency of 901.1 MHz, with a projected setting of transmitting ten times per day for about 70 milliseconds for each transmission. I.D. at 21 (citing Tr. at 133-135). The Zigbee radio operates at 2.4 GHz and at the power of one-tenth of a watt, transmits anywhere from every thirty seconds to once a day, depending upon whether it is paired with a smart appliance or device. I.D. at 21 (citing Tr. at 169). When asked whether the AMI meters transmit with a daily periodicity of 9600 transmissions, the level of concern to Ms. Frompovich, Mr. Pritchard testified that they did not. I.D. at 21 (citing Tr. at 137). Mr. Pritchard also testified that any higher measurements or readings obtained by Ms. Frompovich using her hand-held meters would have included other sources in the area such as the cell phones, wireless phones, garage door openers, other AMI meters in the neighborhood, TV stations transmitting at radio frequencies, security systems and the like. I.D. at 21 (citing Tr. at 139).

The ALJ explained that, when asked about the complainant's "harmonics" concerns, Mr. Pritchard stated that harmonics in a home are inevitable because nearly all of the electricity that we generate is produced by rotating machinery, which will produce higher harmonics. I.D. at 22 (citing Tr. at 199). He stated that florescent lights have particularly strong harmonics and other devices such as computers, cell phones, and any plugged in or wired items, such as refrigerators, can cause such disturbances in the sinusoidal wave form. I.D. at 22 (citing Tr. at 141). He testified that PECO AMI meters

do not meaningfully contribute to harmonics and disruption of the sinusoidal wave. I.D. at 22 (citing Tr. at 142, 200). He also noted that harmonics are present with or without a meter. I.D. at 22 (citing Tr. at 171).

The ALJ further noted that PECO expert Christopher Davis holds a Ph.D. in Physics and is a Professor of Electrical and Computer Engineering. Dr. Davis has taught extensively, written about and conducted research regarding electromagnetics and radiofrequency waves. I.D. at 22 (citing Tr. 184-187). The ALJ explained that Dr. Davis acknowledged that AMR and AMI meters used by PECO periodically emit radiofrequency fields. I.D. at 22 (citing Tr. at 186-189). He stated that in everyday life, people are exposed to radiofrequency field levels from many sources that are much higher than those associated with the PECO Smart Meters, from cell phones to TVs to transmission towers. I.D. at 22 (citing Tr. at 212-217). According to Dr. Davis, however, emissions from smart meters are very small and will have no ill health effect. I.D. at 22 (citing Tr. at 207, 212).

The ALJ stated in the Initial Decision that Dr. Davis noted that the Federal Communications Commission (FCC) looked at exposures that produce an effect in animals and resolved that the maximum permissible exposure to radiofrequency fields emitted by a smart meter is 0.6 mW/cm^2 calculated as an average exposure over time. I.D. at 22 (citing Tr. at 203-207, PECO Exh. CD-2). According to Dr. Davis, calculated per cm^2 , the unit used by the FCC, the *average* exposure from PECO's AMI meters is millions of times less than the FCC maximum permissible exposure levels and the *peak*, or highest, exposure from PECO's AMI meters is at least 37.5 times less than the FCC average-exposure standards. I.D. at 22 (citing Tr. at 207-209). He also testified that the AMR meter currently at Ms. Frompovich's residence emits 6.4 times more radiofrequency than would an AMI meter. I.D. at 22 (citing Tr. at 215).

As for the “harmonics” that are of concern to Ms. Frompovich, the ALJ described Dr. Davis’s testimony as more definitive than Mr. Pritchard in that he testified that the AMI meters do not produce “harmonics.” In conclusion, based on the meter specifications stated by Mr. Pritchard and his own knowledge, study and expertise, Dr. Davis testified that, to a reasonable degree of scientific certainty, “AMI meters are incapable of causing any biological effects, certainly no adverse biological effects, in anybody.” I.D. at 22-23 (citing Tr. at 216).

The ALJ noted that Dr. Mark Israel also testified for PECO, a physician who has studied radiofrequency fields and health effects. The ALJ noted that for at least 25 years he has treated, as well as taught or supervised, the treatment of cancer patients. It is in that context that he has researched electromagnetic fields and their health effects. I.D. at 23 (citing Tr. at 254-257). It was his medical opinion that radiofrequency fields such as those associated with PECO’s AMI meter would not interfere with the body’s ability to heal or increase stress. I.D. at 23 (citing Tr. at 323, 325).

The ALJ explained that, in response to Ms. Frompovich’s testimony that the International Agency for Research on Cancer (IARC) has categorized radiofrequency electromagnetic fields as category 2B possibly carcinogenic to humans, Dr. Israel testified that the IARC characterization of radiofrequency fields only applies to a brain tumor called glioma and acoustic neuroma. He further distinguished the term “possible” carcinogen from “probable” and “actually” carcinogenic. I.D. at 23 (citing Tr. at 42, 283). He also noted that the IARC designation of radio frequency fields as “possible” carcinogenic does not apply to breast cancer. I.D. at 23 (citing Tr. at 283-84).

The ALJ noted that Ms. Frompovich asked Dr. Israel about the term “idiopathic environmental intolerance” (IEI), a reference to people who report particular sensitivities to environmental conditions. Dr. Israel testified that studies conducted on people who consider themselves sensitive to EMFs found that such people are unable to

independently detect EMFs and the occurrence of symptoms appears unrelated to exposure. I.D. at 23 (citing Tr. at 49-51). He testified that conditions and symptoms of IEI with respect to EMF exposure are not generally accepted in the scientific or medical fields. I.D. at 23 (citing Tr. at 278).

The ALJ noted that it is Dr. Israel's opinion that exposure to radiofrequency fields from the PECO AMR meter have not been harmful and that those from the AMI meter will not be harmful to Ms. Frompovich. I.D. at 23 (citing Tr. at 294).

Based on review of the evidence presented, as discussed above, the ALJ concluded that the Complainant did not present evidence sufficient to establish her claims. The ALJ explained that in order to prevail, a Complainant's case must be supported by substantial evidence, more than a mere trace or suspicion. I.D. at 24 (citing 2 Pa. C.S. § 704; *Norfolk, supra*). The ALJ determined that there was scant evidentiary support for the Complainant's contention that installation of a smart meter at her home would be unreasonable or unsafe. Accordingly, the ALJ concluded that the Complainant cannot prevail. I.D. at 24.

The ALJ stated that because the prevailing evidence did not support the claims presented by Ms. Frompovich, the ALJ concluded that Ms. Frompovich had not met her burden of proof of establishing an offense in violation of the Code, the Commission's Regulations or an outstanding order of the Commission. 66 Pa. C.S. § 701. *See* I.D. at 24-25; COL No. 2. Accordingly, the ALJ denied the claims and dismissed the Complaint. I.D. at 24.

C. Exceptions, Reply Exceptions and Disposition

The Complainant's Exceptions filed in this case are set forth in a ten-page document with nineteen numbered paragraphs. PECO's Reply Exceptions respond to the issues raised in the Exceptions, *extra ordinem*. We have reviewed the Exceptions and Replies to Exceptions in full. Set forth below is a summary of the position or arguments articulated in each document, followed by our disposition thereto.

1. The Complainant's Exceptions to the ALJ's Evidentiary Rulings on Admission of Internet Documents Offered by the Complainant (Exc. ¶¶ 3, 4, 6, 17; R. Exc. at 3-11)

a. Exceptions

In her Exceptions, the Complainant claims that, due to PECO's evidentiary objections and the ALJ's evidentiary rulings at the hearing, she was unfairly precluded from putting on a full case with respect to certain evidence she attempted to present. Exc. ¶¶ 3, 4, 6, 17. In summary, Ms. Frompovich makes two claims. The first claim is that she offered certain breast cancer studies into the record but the ALJ did not admit the studies into the record because the ALJ sustained PECO's hearsay objections thereto. Exc. ¶ 4. The second claim is that for the other exhibits offered by Ms. Frompovich and admitted into the record, the ALJ wrongly sustained PECO's objections thereto. Exc. ¶ 6. Ms. Frompovich concludes "she did not receive a fair and judicious hearing" because of the evidentiary rulings by the ALJ. Exc. ¶ 6.

b. Reply Exceptions

In its Replies to Exceptions, PECO asserts that a careful review of the transcript will demonstrate that for every internet-derived document that Ms. Frompovich mentioned on the record, she was ultimately allowed to either testify about the document

or read from it and ask cross-examination about it. Every internet document that she requested be marked for identification was so marked and was later admitted into the record, often over PECO's objection. R. Exc. at 4.

PECO explains that the breast cancer studies referenced in Ms. Frompovich's Exceptions were internet-derived. R. Exc. at 4. PECO avers that while Ms. Frompovich claims these studies had been excluded from the record, the transcript shows that Ms. Frompovich never asked that they be marked as an exhibit or introduced into evidence and never offered any testimony based on or referring to them. R. Exc. at 6.

Specifically, PECO submits that during Ms. Frompovich's direct testimony, that after having been qualified by the ALJ as an expert witness in "a very limited area on nutrition, natural healing, and treating cancers from that perspective," (citing Tr. at 33), Ms. Frompovich had a lengthy exchange with the ALJ, Tr. 35-39, in which the ALJ attempted to elicit expert testimony from Ms. Frompovich with respect to the breast cancer studies, while at the same time making it clear that the studies themselves would not be admitted into evidence because the authors of such studies were not available at the hearing to testify. R. Exc. at 4-6 (citing Tr. at 35-37). Having thus been clearly informed that she could testify about breast cancer studies, Ms. Frompovich immediately switched topics to discuss her views with the American Disabilities Act. R. Exc. at 4-6 (citing Tr. at 37). PECO explained that ALJ Heep then doggedly attempted once again to elicit testimony from Ms. Frompovich with respect to the breast cancer studies. R. Exc. at 4-6 (citing Tr. at 37-39). At this point in the hearing, Ms. Frompovich dropped her discussion of breast cancer studies and moved to her next topic, EMF and blood cell counts. R. Exc. at 4-6 (citing Tr. at 39-40). PECO asserts that Ms. Frompovich never returned to the breast cancer studies. R. Exc. at 6.

In addition, PECO explains that during cross-examination of PECO's witnesses on the second day of hearings, Ms. Frompovich returned to her breast cancer studies and posed questions to PECO witness Dr. Mark Israel based on those studies. PECO noted that these studies had not been admitted during the previous day's hearing, but PECO did not lodge an objection. Ms. Frompovich and ALJ Heep then asked Dr. Israel a series of questions related to these studies. Ms. Frompovich did not ask that the breast cancer documents be marked as a cross-examination exhibit or be admitted into evidence. R. Exc. at 6, n. 5 (citing Tr. at 303-09).

As to other documents that Ms. Frompovich found through her internet research and offered into the record, PECO asserts that ALJ Heep repeatedly admitted these documents to show the basis of Ms. Frompovich's opinion, but not for the truth of the matters asserted in the documents. R. Exc. at 7 (citing Tr. at 4-5, 34-35, 69, 71, 181-82, 313). PECO submits that ALJ Heep properly treated these documents as hearsay, and thus admitted them with a limitation on their evidentiary use. R. Exc. at 7 (citing Tr. at 65, 69, 71). PECO also asserts that in other instances, the ALJ similarly allowed Ms. Frompovich to cross-examine PECO's witnesses using internet documents, and then admitted such documents "as a cross-examination document, not necessarily for the truth of the matter therein." R. Exc. at 8, n. 6 (citing Tr. at 249-250).

In support of its contention that the ALJ's evidentiary rulings were fully appropriate regarding the internet documents offered by the Complainant, PECO cites to and discusses the *Walker* and *Chapman* Commonwealth Court decisions as well as Article VII of the Rules of Evidence. R. Exc. at 8 -10. PECO also explains that while the Rules of Evidence do not strictly apply in Commission evidentiary proceedings, the Commission often looks to those rules for guidance in developing proper evidentiary records. R. Exc. at 9, n. 7 (no citation provided).

PECO explains the *Walker/Chapman* rule as stating that: “uncorroborated and properly objected to hearsay evidence is not competent to support a finding of fact of the Board.” R. Exc. at 8 (citing *Chapman*, fn 8, citing *Walker*). PECO notes that it objected to the admission of the Complainant’s offered internet documents on the grounds that they are hearsay. R. Exc. at 8 (citing, *e.g.*, Tr. 65). PECO argues that under the *Walker/Chapman* rule, the ALJ normally would have been correct to exclude the proffered internet documents, in their entirety, once PECO objected to those documents as hearsay, because the documents are no longer competent to support a factual finding. R. Exc. at 8. However, because Ms. Frompovich’s was recognized as an expert in this proceeding, her testimony and supporting documents need to be viewed through the prism of Article VII of the Rules of Evidence. R. Exc. at 9.

Specifically, pursuant to Rule 703,⁴ an expert is permitted to rely upon non-admissible hearsay – such as internet documents – in forming their expert opinion. And, under Rule 705,⁵ an expert must state the basis for their opinion. The comment to Rule 705 explains if the expert relied upon non-admissible hearsay in forming their opinion, then the underlying hearsay is admissible for the purpose of understanding the basis for

⁴ We note here that PECO cited to Pa. R.E., Rule 702 in its Reply Exceptions; however, the correct cite is to Pa. R.E., Rule 703, which provides: “An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted.”

⁵ Pa. R.E., Rule 705 states: “If an expert states an opinion the expert must state the facts or data on which the opinion is based.” The Explanatory Note to this Rule states:

When an expert testifies about the underlying facts and data that support the expert's opinion and the evidence would be otherwise inadmissible, the trial judge upon request must, or on the judge's own initiative may, instruct the jury to consider the facts and data only to explain the basis for the expert's opinion, and not as substantive evidence.

the expert's opinion but not for the purpose of being used to prove the truth of the matter asserted therein. R. Exc. at 9.

Thus, PECO contends that, given that Ms. Frompovich was recognized as an expert, ALJ Heep made the proper ruling as to the limited admissibility and use of Ms. Frompovich's proffered internet documents in this proceeding. Ms. Frompovich was properly allowed to form expert opinions based on the inadmissible hearsay information and to ask PECO's experts questions based on the information in the internet documents, but those specific hearsay internet documents are not competent evidence to prove the truth of the matters asserted therein. R. Exc. at 9-10. Accordingly, PECO asserts that the ALJ's evidentiary rulings pertaining to the identified internet documents – including those admitted as exhibits and the breast cancer studies which were not admitted – should be supported by the Commission, and the Initial Decision should be upheld. R. Exc. at 11.

c. Disposition

As discussed in more detail below, we have carefully reviewed the Exceptions, the Reply Exceptions and the transcript in this matter, and we conclude that there is no basis to overrule the ALJ's evidentiary rulings in this case.

Ms. Frompovich appeared *pro se* in this proceeding. During the presentation of her direct case, and during cross-examination of PECO's witnesses, she presented only one witness – herself. Judge Heep qualified Ms. Frompovich as an expert witness, pursuant to Pa. R.E., Rule 702, in “a very limited area on nutrition, natural healing, and treating cancers from that perspective.” Tr. at 33.

Pennsylvania Rule of Evidence, Rule 702, provides as follows:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge is beyond that possessed by the average layperson; (b) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; and (c) the expert's methodology is generally accepted in the relevant field.

We note that Ms. Frompovich did not request to be qualified as an expert witness; rather, the ALJ did this on her own motion. The ALJ requested a copy of Ms. Frompovich's resume, but she did not have one available at the hearing to provide. Tr. at 21. The ALJ then asked Ms. Frompovich a series of questions as to Ms. Frompovich's qualifications and experience. *See* Tr. at 20-26. After PECO's counsel *voir dire* of Ms. Frompovich, *see* Tr. at 27-29, the ALJ stated that she was ready to recognize Ms. Frompovich as an expert in nutrition and natural healing, but indicated that more information would be required to explain how she is an expert in the area of cancer. Tr. at 30. Ms. Frompovich agreed to further questioning by the ALJ for this purpose. After the ALJ asked additional questions related to her qualifications and experience, *see* Tr. at 30-33, the ALJ qualified Ms. Frompovich as an expert in nutrition, natural healing and the treatment of cancers from that perspective, *see* Tr. at 33.

In our view, ALJ Heep provided the opportunity for a fair hearing by recognizing Ms. Frompovich's expertise in the subject areas of nutrition, natural healing and the treatment of cancers from the perspective of nutrition and natural healing. Chiefly, the subject areas in which the ALJ recognized Ms. Frompovich as an expert related directly to Ms. Frompovich's claims in this case as to whether the smart meter PECO proposes to install at her service will result in unreasonable or unsafe service or

facilities due to her concerns for her health as a breast cancer survivor. Additionally, by recognizing Ms. Frompovich as an expert witness in these subject areas, it did two crucial things. First, it enabled Ms. Frompovich to provide expert opinion testimony as to the effects of a smart meter on her cancer and the treatment of her cancer from a nutritional and natural healing perspective. It also gave Ms. Frompovich the opportunity to counter the expert opinion testimony presented by PECO in this proceeding as to whether a smart meter poses unreasonable or unsafe service or facilities. Second, it allowed the ALJ to admit and consider, pursuant to Pa. R.E., Rule 705, the internet-derived studies and exhibits that Ms. Frompovich offered into evidence, as the basis for Ms. Frompovich's opinion.

Neither of the foregoing would have been possible had Ms. Frompovich testified only as a lay witness pursuant to Pa. R.E., Rule 701. First, a lay witness's testimony is limited to opinion not based on scientific, technical or other specialized knowledge within the scope of Rule 702. A lay witness is limited to giving opinion that is rationally based on the witness's own perceptions and helpful to clearly understanding the witness's testimony or to determining a fact in issue. Specifically, Rule 701 provides as follows:

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is: (a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Secondly, underlying documents relied upon by a lay witness in providing lay opinion testimony cannot be admitted into evidence pursuant to Pa. R.E., Rule 705, as the basis of such opinion, unless such documents are otherwise reliable as competent evidence, which in this case they are not, as discussed further below.

Based on the Complainant's Exceptions, there appears to be two main categories of documents that Ms. Frompovich introduced or referred to at the hearing to which she takes exception to the ALJ's evidentiary rulings in this proceeding. Those two categories are: (1) the internet-derived breast cancer studies, which Ms. Frompovich claims in her Exceptions had been denied by the ALJ from being admitted into evidence based on PECO's hearsay objections to such exhibits; and (2) other internet-derived documents which had been admitted into the record as the basis of Ms. Frompovich's expert opinion, but not as substantive evidence, based on PECO's hearsay objections.

As for the first category of documents – the internet-derived breast cancer studies – based on our review of the transcript, it appears Ms. Frompovich did not actually mark the breast cancer studies as exhibits and offer them into evidence. *See* Tr. at 35-39. Given that the breast cancer studies had not been offered for admission into the record, PECO did not object to the breast cancer studies. Tr. at 35-39. We note that PECO's counsel did not speak at any point during Ms. Frompovich's testimony during which the breast cancer studies had been raised. *See* Tr. at 35-39, 64-66.

Nevertheless, it does appear that during the hearing Ms. Frompovich questioned how she could present the studies, stating: "And I have a lot of documentation to that, and I don't know how I can present that if I just have to answer questions." Tr. at 34. In light of the Complainant's Exceptions, in reviewing this question and the exchanges that followed between Ms. Frompovich and the ALJ in the transcript, we acknowledge it is possible that this *pro se* Complainant viewed such exchanges as her attempt to offer the breast cancer studies into the record. We further acknowledge that in addressing Ms. Frompovich's question, Judge Heep explained to Ms. Frompovich that the studies could not be admitted into the record "because the writers are not here." Tr. at 34-35. The ALJ explained to Ms. Frompovich that as an expert witness she could testify as to her opinion and refer to the breast cancer studies as the basis for her opinion, but that the evidentiary use of the studies would be limited. Tr. at 35-37.

Ms. Frompovich again indicated that she did not understand why the ALJ would not allow her to present the studies into evidence. Tr. at 38. The ALJ explained that based on the evidentiary rules in Pennsylvania, the studies could not be admitted as evidence, unless the “person who wrote them is there to have them admitted and testify as to their content and authenticity.” Tr. at 38. Again, the ALJ reiterated Ms. Frompovich’s right to provide her opinion and to refer to the studies on which her opinion is based, but that the breast cancer documents or studies themselves will not be admitted. Tr. at 38-39.

In review of the exchanges between ALJ Heep and Ms. Frompovich on the subject of the breast cancer studies, *see* Tr. at 35-39, it appears ALJ Heep, pursuant to Pa. R.E., Rules 703 and 705, attempted to obtain Ms. Frompovich’s expert opinion testimony and to reference the breast cancer studies upon which her opinion was based. However, Ms. Frompovich did not offer her specific testimony based on, or in reference to, the breast cancer studies. *See* Tr. at 35-39, 65-66. During these exchanges, at one point, Ms. Frompovich explained that it was her opinion that “dirty electricity would adversely affect my health, my nutritional status, and also precipitate cancer.” Tr. at 39. However, at no point did she refer to the underlying breast cancer studies as a basis for such opinion.

At a later point in the exchange, Judge Heep again attempted to solicit Ms. Frompovich’s opinion based on the breast cancer studies. However, no expert opinion testimony was given as to the effects of smart meters on her health and cancer healing based on the studies. Rather, the witness stated her opinion that PECO was not qualified to cross-examine her on the subjects of holistic health, natural nutrition, and natural healing modalities. Tr. at 64-66. The specific exchange went as follows:

Judge Heep: Counsel?

Mr. Smith [PECO's counsel]: Is she resting on direct?

Judge Pell: Do you have anything else to add, ma'am, that we haven't asked you about?

The Witness [Ms. Frompovich]: I have a ton of research that you don't want to take.

Judge Pell: Judge Heep has already explained why we can't, but is there anything else you want to tell us that we can know?

The Witness: I think yes . . .

* * *

Judge Heep: If you'd like at this time you can summarize your opinions and basis for that opinion . . . We've already taken note of your articles, but what's your opinion regarding the effect of the Smart Meter on your health in your opinion?

The Witness: In my opinion from all the physicians that I network with who research in cancer –

Mr. Smith: Objection, Your Honor. She's about to testify about other people's opinions and out-of-court statements, and that's hearsay and it's not allowable.

Judge Heep: I'll consider it as the basis upon which she formed her opinion –

Mr. Smith: Thank you.

Judge Heep: -- as opposed to the truth of the matter.

Mr. Smith: Thank you, Your Honor.

Judge Heep: You may continue.

The Witness: Thank you, Your Honor. As a researcher you network with people. I network with people around the world. I have a very extensive network on very –

Judge Heep: Why don't you state your opinion first?

The Witness: As this is how I am able to ascertain, come to conclusions, and deal with my specific – as a matter of fact when I was diagnosed and sent out on my network, I got all kinds of help, information, etc. So, based upon my expertise and these people across the table from me know nothing probably about holistic health, natural nutrition, and natural healing modalities. So I, in my opinion, feel they are not qualified even to cross-examine me because they don't have an expert here in that field, Your Honor. So, therefore, my conclusion is this. I rest my case.

Judge Heep: Counsel?

Tr. at 64-66.

Upon review, we do not find error in the ALJ's rulings with regard to the breast cancer studies because, as discussed above, Ms. Frompovich did not provide her expert opinion testimony with a reference to the breast cancer studies as a basis for such opinion. As a result, there was no indication that the studies served as a basis for Ms. Frompovich's expert opinion and, therefore, there was no basis to admit the studies pursuant to Pa. R.E., Rule 705.

In addition, we do not find error in the ALJ's rulings as to the breast cancer studies because such could not be relied upon as competent evidence in this case given that they lacked authentication and constituted uncorroborated hearsay. We acknowledge that under the relaxed evidentiary rules applicable to administrative agencies, 2 Pa. C.S. § 505, the ALJ, technically, could have received the studies into the record based on the studies' relevance to the Complainant's claims in this proceeding. However, in our

opinion, the ALJ's refusal to admit the studies was harmless error since the studies themselves could not be relied upon in this proceeding as competent evidence. In other words, even if the ALJ had received the studies into evidence, they would have been given their natural probative effect, which in this case would have been insufficient to support a finding of fact in this proceeding, as explained further below.

First, the ALJ was correct in stating that the breast cancer studies required authentication in order to be relied upon as competent evidence in this case. To be admissible as competent evidence, the studies needed to be authenticated by "evidence sufficient to support a finding that the item is what the proponent claims it is." Pa. R.E., Rule 901. We note here that the ALJ's instruction to Ms. Frompovich during the hearing that the writers of the studies would need to appear at the hearing in order to authenticate the studies is stricter than the Rule permits. While having the authors present at the hearing to authenticate the studies is one acceptable way to satisfy the authentication requirement of Rule 901, we recognize that there may have been an additional way(s) to authenticate the studies. For example, a comparison by the ALJ of an offered study with an authenticated study admitted in another proceeding would have been sufficient. In our view, however, the ALJ's strict instruction was harmless error because ultimately the ALJ did provide a more general explanation of the requirement for authentication to Ms. Frompovich at the hearing, but Ms. Frompovich made no attempt to present any evidence to authenticate the studies even after having had this requirement explained to her.

Next, the ALJ was correct in identifying the internet-derived breast cancer studies as hearsay because the studies contain out-of-court statements made by a declarant (*i.e.*, the author of the study) that was offered by the Complainant in this proceeding to prove the truth of the matter asserted in the studies. Upon review, the internet-derived breast cancer studies do not fall within one of the recognized exceptions to the rule against hearsay. *See* Pa. R.E., Rules 802, 803, 803.1, 804. Thus, they

constitute simple hearsay. For the sake of argument, assuming these studies had been admitted into evidence, without objection by PECO, the studies nonetheless would have been insufficient to support a finding of fact in this proceeding pursuant to the *Walker/Chapman* rule because no other non-hearsay, competent evidence had been presented by Ms. Frompovich to corroborate the breast cancer studies. Thus, such studies could not be used as competent evidence in this case to prove the truth of the matter asserted therein, or to support a finding of fact.

Therefore, we affirm the ALJ's evidentiary ruling to not admit that the internet-derived breast cancer studies as substantive evidence since the breast cancer studies could not be relied upon in this case as competent evidence given that they lacked authentication and constituted uncorroborated hearsay.

Next, as to the exhibits that had been admitted into the record on behalf of Ms. Frompovich, *see, e.g.*, Tr. at 4-5, 34-35, 69, 71-72, 181-82, 313, these documents also were internet-derived documents identified by Ms. Frompovich through her internet research. PECO objected to these documents as hearsay. *See, e.g.*, Tr. at 65. Similar to the breast cancer studies, the internet-derived studies required authentication to be reliable or competent. Additionally, PECO's objections to these internet-derived documents as hearsay were proper because the studies do not fall within one of the recognized exceptions to the rule against hearsay. Although the ALJ admitted the documents, she noted that the evidence was not being admitted for the truth of the matters asserted therein. We do not see an error in such evidentiary rulings, given that under the *Walker/Chapman* rule, simple hearsay, when properly objected to, is not competent evidence to support a finding of fact in an administrative proceeding.

Moreover, we note that the ALJ received many of the internet-derived documents into the record to show the basis of Ms. Frompovich's opinion, as an expert witness, in accordance with Pa. R.E., Rules 703, 705. In another instance, Ms.

Frompovich cross-examined using a State of California Public Utilities Commission decision, which the ALJ admitted as a cross-examination exhibit, not necessarily for the truth of the matter therein. Tr. at 249-250. In another instance, the ALJ sustained PECO's objection to the introduction of evidence during cross-examination, but the ALJ allowed Ms. Frompovich to cross-examine based on it. Tr. at 315. We find the ALJ's evidentiary treatment of these internet-derived documents to be appropriate.

Finally, we note that Ms. Frompovich also offered a letter from her treating physician. Tr. at 16-17. PECO objected to the admission of the letter on the grounds of hearsay and lack of authentication and explained that if Ms. Frompovich wanted to have her treating physician's opinion included in this case, she needed to make him available for cross-examination. Tr. at 16-17. The ALJ sustained PECO's objection, stating that because the statement was written by someone who is not present, it is hearsay. Upon review, we note that there was no indication in the record that the treating physician's letter was a medical record that would qualify for the "business records" exception to the hearsay rule. *See* Pa. R.E., Rule 803(6). This means PECO's objection to the letter on hearsay grounds was proper and there is no basis to overrule the ALJ's classification of the physician's letter as simple hearsay. As simple hearsay, we acknowledge that the ALJ could have received the letter into evidence. However, the ALJ's refusal to admit the letter, in our opinion, was harmless error, because the physician's letter was properly objected to and, therefore, pursuant to the *Walker/Chapman* rule, the letter was not competent evidence to support a finding of fact in an administrative proceeding. Accordingly, even if the physician's letter had been received into evidence, it could not be used as substantive evidence in this proceeding to prove the truth of the matter or support a finding of fact.

Based on the foregoing, we find no abuse of discretion or error of law in the evidentiary rulings made by the ALJ during the hearing in this proceeding.

2. The Complainant’s Exception to ALJ’s Ruling on the Complainant’s American with Disabilities Claims and the Complainant’s Allegations of the ALJ’s Biased and Unethical Behavior (Exc. ¶¶6-8, 9; R. Exc. at 14-16)

a. Exceptions

In her Exceptions, the Complainant contends that she was discriminated against in this proceeding because the Initial Decision “totally ignore[d] the American with Disabilities Amendments Act, which grants Frompovich special health considerations, which this Court apparently deliberately ignores . . .” The Complainant asserts that ALJ Heep is a known expert in ADA law and submits that the ALJ’s mishandling of her ADA claims is attributable to PECO’s attorney writing the Initial Decision on behalf of ALJ Heep, rather than ALJ Heep writing the Initial Decision herself. The Complainant contends that the ALJ’s alleged biased and unethical behavior is evidenced by the Initial Decision having wrongly cited to, allegedly, the Americans with Disabilities Act (ADA), 42 U.S.C.S. § 12132, *et seq.* The Complainant contends that the correct citation was as follows: the “American with Disabilities Act *Amendments Act.*” *See* Exc. at ¶¶ 6-8 (emphasis added).

Additionally, the Complainant contends further that the ALJ’s alleged unethical behavior is evidenced by the Initial Decision’s citation, on page 6 of the Initial Decision, to the book she authored as “The Cancer Answer” rather than by its correct title of “A Cancer Answer, Holistic BREAST Cancer Management.” *See* Exc. at ¶ 9 (emphasis in original).

b. Reply Exceptions

In its Reply Exceptions, PECO contends that the Complainant’s Exceptions essentially makes one argument against the Initial Decision’s holding on the ADA issue: she claims that because both PECO and the ALJ refer to the Americans with Disabilities

Act but not to the American with Disabilities Act *Amendments* Act – that all statements made by the ALJ or PECO must be understood as referring to the pre-1990 version of the ADA. The Complainant thus claims that the conclusions of the Initial Decision with respect to the ADA are wrong. In response, PECO submits that all references to the ADA should be presumed to refer to its current version, which incorporate reference to the 1990 Amendments to the ADA. There is no basis to assume that the ALJ, in the Initial Decision, or PECO, in its briefs, were discussing the ADA as it existed prior to 1990, rather than the current version of the ADA. *See* R. Exc. at 14-16.

As for the Complainant’s allegations of the ALJ’s bias and allowing PECO to write the Initial Decision for her, PECO asserts it may be worthwhile for the Commission to know that Ms. Frompovich formed her opinion that the evidentiary opinion would be biased before she ever walked into the hearing room. PECO explained that only a few minutes into the two-day hearing, PECO raised an evidentiary objection, which was sustained by ALJ Heep, to which Ms. Frompovich stated: “I presume and assume wholeheartedly and honestly and candidly that this case is going to be manufactured against anybody who is an opponent to smart meters. So why don’t I just go home now?” R. Exc. at 2-3 (citing Tr. at 17, lines 13-18). PECO asserts that Ms. Frompovich prejudged bias to occur and she had and has a predisposition to see bias where none exists. R. Exc. at 2-3.

PECO states that the most extreme example of Ms. Frompovich’s predisposition to see bias where none exists is found at ¶ 9 of the Exceptions, where she notes that both PECO and the ALJ referred to Ms. Frompovich’s book “A Cancer Answer” as “The Cancer Answer” – and claims that this demonstrates collusion and a bias against her. PECO notes that Ms. Frompovich herself referred to her book as “The Cancer Answer book.” *See* R. Exc. at 3 (citing Tr. at 25, line 12). But setting aside that nomenclature guidance from Ms. Frompovich herself, PECO asserts that it is simply remarkable that Ms. Frompovich would accuse the ALJ of bias on the slender reed that

the ALJ's use of "The" rather than "A" in stating the title of a book somehow demonstrates bias. In fact, PECO argues, seeing bias in that inconsequential event is an example of Ms. Frompovich's predisposition to see bias where none exists. *See* R. Exc. at 3, n. 2.

c. Disposition

We find the Complainant's Exceptions on this issue to be meritless. We affirm the ALJ's conclusion that it is beyond the jurisdiction of Commission to determine whether the Complainant has a disability or a cause of action under the American with Disabilities Act. *See* I.D. at 18. If Ms. Frompovich believes that she has a valid ADA claim against PECO, she must work through the federal courts or one of the federal enforcement agencies, which include the Department of Labor, the Equal Employment Opportunity Commission, the Department of Transportation, the Federal Communications Commission or the Department of Justice, but not this Commission.

More importantly, we find no merit or basis to the Complainant's allegations that PECO, not the ALJ, wrote the Initial Decision, and, therefore, deny the Complainant's Exceptions on these grounds.

3. The Complainant's Exception to Findings of Fact Nos. 53 and 60 (Exc. ¶¶ 10-11; R. Exc. at 17-20)

a. Exceptions

The Complainant stated that the Initial Decision "is replete with misstatements and downright falsehoods!" She gave the specific examples of Findings of Fact Nos. 53 and 60, in which Ms. Frompovich claims the Initial Decision does not accurately report the testimony of PECO witness Glenn Pritchard regarding the

periodicity of radio frequency transmissions from the PECO AMI meter. (Tr. 131-34.) Specifically, Ms. Frompovich claims that the Initial Decision does not accurately report Mr. Pritchard's testimony with respect to transmissions from the Zigbee radio contained in the AMI meter, and that Finding of Fact No. 60 is "wordsmithed [*sic*] to protect PECO's Focus AMI Smart Meter' almost constant search-for-appliance-or-device microwave GHz transmissions as Mr. Pritchard's remarks quoted above prove, and is a blatant misrepresentation in the Initial Decision." Exc. at ¶¶ 10-11. The Complainant asked "how can the PA PUC and this Court accept apparent LIES as facts, truths and science in the Initial Decision? Can you please answer that, Judge Heep, as you signed the document?" Exc. at ¶ 11.

b. Reply Exceptions

In its Reply Exceptions, PECO explained that its AMI meters have two radios with differing transmission characteristics. The first is the FlexNet module, which transmits from the AMI meter to the PECO backbone system. The second is the Zigbee radio, which transmits from the AMI meter to smart devices in the residence. R. Exc. at 18.

As for the FlexNet module, the Initial Decision discusses the transmission characteristics thereof at Findings of Fact Nos. 46-57. As PECO explained, once the AMI meters are installed, the FlexNet modules are turned down to the lowest amount of transmissions that result in good communication with the backbone system. Across the PECO service territory, the FlexNet modules in the PECO AMI meters transmit an average of ten times per day, and the FlexNet modules in the PECO AMI meters in Ms. Frompovich's neighborhood transmit an average of eight times per day. As PECO noted, Ms. Frompovich's Exceptions do not raise any issues with the Initial Decision's discussion of the transmissions of the FlexNet module. Although Ms. Frompovich mentions Finding of Fact No. 53, she does not explain what she thinks is wrong with it.

Finding of Fact No. 53 relates to Mr. Pritchard's testimony about the transmission characteristics of the FlexNet module, and it states: "On average, AMI meters transmit ten times a day but also can be configured or turned to transmit at a maximum of 96 times per day, or once every 15 minutes. (Tr. 133.)" PECO submits that Finding of Fact No. 53 is an accurate reflection of the transmission periodicity of the FlexNet module. R. Exc. at 18.

As for the Zigbee radio, the Initial Decision discusses the transmission characteristics thereof at Findings of Fact Nos. 60 and 62. As PECO explained, Mr. Pritchard's testimony indicated that the Zigbee radio transmits every 30 seconds until it pairs with a smart device, at which point in time the transmissions decrease, to possibly once every five minutes to once every hour or maybe even once a day depending on the device. R. Exc. at 18-20 (citing Tr. at 133-34, 168-170). PECO submits that Findings of Fact Nos. 60 and 62 fully and accurately reflect the underlying testimony of Mr. Pritchard with respect to the transmission characteristics. R. Exc. at 18-20.

c. Disposition

The Complainant's Exceptions claim that the Initial Decision, specifically, Findings of Fact Nos. 53 and 60, do not accurately reflect the underlying testimony of Mr. Pritchard. Upon review of Findings of Fact Nos. 53 and 60, and the testimony of Mr. Pritchard appearing at Tr. at 131-34, 168-70, we find that the Findings of Fact accurately reflect the testimony of Mr. Pritchard. Therefore, we deny the Complainant's Exceptions.

4. The Complainant’s Exception to Findings of Fact Nos. 61 and 62 (Exc. ¶¶ 3, 12, 13-14, 15 and 16; R. Exc. at 12-14)

a. Exceptions

The Complainant claims that Findings of Fact Nos. 61 and 62 are at variance with what utilities are doing regarding collection and selling of data as described by the two-minute video explaining the algorithm “Onzo” used in smart meter data mining, which the Complaint stated is found at <https://youtu.be/uluKjzqHDz0?t=8>. Exc. at ¶ 12.

b. Reply Exceptions

PECO submits that the Exceptions quote extra-record material – the YouTube video on “Onzo” algorithm – that was not introduced or discussed at the hearing. PECO argues that the Commission should not reply upon this extra-record material as such consideration is unwarranted in this proceeding, and doing so would prejudice PECO unless it was given an opportunity to cross-examine the witness sponsoring the documents and to submit rebuttal evidence. PECO cites to 52 Pa. Code § 5.431, which provides, in relevant part, as follows:

§ 5.431. Close of the record.

(a) The record will be closed at the conclusion of the hearing unless otherwise directed by the presiding officer or the Commission.

(b) After the record is closed, additional matter may not be relied upon or accepted into the record unless allowed for good cause shown by the presiding officer or the Commission upon motion.

PECO argues that subpart (a) of Section 5.431 is intended so that the parties have the opportunity, at the hearing itself, to address what additional evidence or exhibits will later be entered in the record. Importantly, that in-hearing discussion gives each party the opportunity to object to the admission of additional evidence and potentially to cross-examine on the offered evidence or to offer their own testimony at hearing to rebut the evidence that will later be admitted under this rule. PECO asserts such did not happen in this hearing. In other words, the extra-record information listed in Ms. Frompovich's Exceptions was not identified at hearing; no request was made to keep the record open for its late submittal; and no ruling was made that the record would be kept open. Thus, PECO submits it did not have the opportunity to object to the admission of the video now relied upon by Ms. Frompovich; PECO did not have the opportunity to cross-examine a witness sponsoring the video; and PECO did not have the opportunity to offer additional evidence to rebut the video. Consequently, subpart (a) of this Regulation does not provide a basis to allow Ms. Frompovich through Exceptions to introduce additional evidence after the close of the record. R. Exc. at 12-13.

Moreover, PECO explains that subpart (b) of Section 5.431 allows the presiding officer or the Commission to re-open the record, upon motion, if good cause is shown. In turn, PECO submits "good cause" to reopen the record is determined by reference to Section 5.571 of the Commission's Regulations (re: reopening prior to final decision), which states that the record may be reopened to take additional evidence "if there is reason to believe that conditions of fact or law have so changed as to require, or that the public interest requires, the reopening of the record." PECO asserts that Ms. Frompovich has not alleged that there has been a change to the facts or law since the close of the record in this proceeding and has not demonstrated that the public interest requires reopening the record to receive the additional information into evidence. The new information in the Exceptions, therefore, does not qualify for admission under subpart (b) of the Section 5.431. R. Exc. at 14.

Finally, PECO asserts that it has basic due process rights to object to the admission of evidence, to cross-examine on that evidence, and to offer contrary evidence. PECO submits that it would be denied those basic due process rights if the new information contained in Ms. Frompovich's Exceptions is admitted into the evidentiary record in this proceeding or otherwise forms a basis for a Commission decision. PECO, therefore, respectfully requests that the Commission rule that the non-record information contained in the Exceptions is not admitted as part of the record evidence in this proceeding and that the Commission will not reply upon it for its decision. R. Exc. at 14.

c. Disposition

We agree with PECO that the YouTube video is extra-record material submitted by the Complainant in Exceptions after the close of the record. We are persuaded by PECO's arguments in its Reply Exceptions that good cause has not been shown for our consideration of such extra-record material, pursuant to 52 Pa. Code § 5.431(b). Specifically, Ms. Frompovich has not made a showing in her Exceptions that there is reason to believe that conditions of fact or law have so changed since the close of the record in this proceeding as to require, or that the public interest otherwise requires, the reopening of the record. Accordingly, we will deny the Complainant's Exceptions regarding Findings of Fact Nos. 61 and 62 of the Initial Decision.

5. The Complainant's Exception to Page 21 of the Initial Decision (Exc. ¶¶ 13-14; R. Exc. at 12-14, 20-22)

a. Exceptions

In paragraph 13 of the Exceptions, the Complainant quotes from a sentence on page 21 of the Initial Decision related to Mr. Pritchard's testimony of PECO's system transmitting directly to the collector resulting in fewer transmissions, unlike mesh

systems employed by some other utilities, which transfers data from one meter to the next in a relay. In paragraph 14, she points to a particular slide of a PowerPoint presentation regarding PECO's Multi-Tiered Smart Grid Network, which she attaches to her Exceptions and claims she referenced her Brief. (The slide is a presentation by Mr. Pritchard for the Institute of Electrical and Electronics Engineers (IEEE) that describes PECO's AMI network as a four-tier system that is comprised of Tier 1: Fiber, Tier 2: Wireless, Tier 3: AMI, and Tier 4: HAN). She concludes paragraph 14 with the following question: "What is that four-tier network all about?"

b. Reply Exceptions

PECO submits that the IEEE PowerPoint slide is extra-record material and makes the same arguments as it did above regarding the YouTube video that the Commission should not rely on this material after the close of the record. R. Exc. at 12-14, 21.

In addition, PECO asserts that page 21 of the Initial Decision accurately reflected Mr. Pritchard's testimony regarding PECO's AMI system, which is unlike a mesh system. R. Exc. at 20-21, citing Tr. 20; Tr. 135-37; Findings of Fact 50-57. PECO acknowledges Ms. Frompovich's question in her Exceptions and states that "Presumably, by asking this question [Ms. Frompovich] intends to challenge the Initial Decision's acceptance of Mr. Pritchard's testimony re mesh systems." R. Exc. at 21. PECO states that it believes it is important to underscore that Mr. Pritchard gave extensive testimony that PECO's system operates quite differently from other AMI systems. PECO's system does not transmit over the common, unlicensed, Industrial, Scientific, and Medical band of the spectrum. Instead, it utilizes licensed spectrum in which PECO is the only user in its service territory that may transmit over that licensed spectrum. Because of this technology choice, PECO's transmissions do not have to compete to be heard over other transmissions filling the same spectrum space. Consequently, the PECO AMI system is

not a mesh system and operates using far less radio frequency transmissions than used in other AMI systems. R. Exc. at 21, citing Tr. 135-37.

PECO states further that Mr. Pritchard was the principal design engineer involved in selecting PECO's AMI technology. R. Exc. at 22, citing Tr. 126. PECO submits that his description of the PECO technology should thus be given substantial deference. The Initial Decision properly gave deference to this testimony and accurately described and relied upon it. PECO submits that there is nothing in Ms. Frompovich's Exceptions that suggests that any other conclusion can or should be reached. R. Exc. at 22.

c. Disposition

We agree with PECO that the IEEE PowerPoint slide is extra-record information submitted by the Complainant in Exceptions after the close of the record. We are persuaded by PECO's arguments on pages 12-14 and page 21 of its Reply Exceptions that good cause has not been shown for our consideration of such extra-record material, pursuant to 52 Pa. Code § 5.431(b). Specifically, Ms. Frompovich has not made a showing in her Exceptions that there is reason to believe that conditions of fact or law have so changed since the close of the record in this proceeding as to require, or that the public interest otherwise requires, the reopening of the record.

Moreover, upon review, it appears page 21 of the Initial Decision accurately reflected Mr. Pritchard's testimony regarding mesh systems and how PECO's system functions differently from a mesh system.

In our opinion, there is nothing in Ms. Frompovich's Exceptions that suggests that any other conclusion can or should be reached.

Accordingly, we will deny the Complainant's Exceptions regarding page 21 of the Initial Decision.

6. The Complainant's Exceptions Re: Smart Meters and "Dirty Electricity" (Exc. ¶ 2; R. Exc. at 16-17)

a. Exceptions

In her Exceptions, paragraph 2, the Complainant raises a concern over "dirty electricity." She specifically raises an issue on compact fluorescent lightbulbs ("CFLs") as a strong source of "dirty electricity" and claims that PECO's recommending the use of CFLs is an "unsafe utility innovation." Presumably, Ms. Frompovich is implying in her Exceptions that smart meters also are a source of "dirty electricity." However, Ms. Frompovich does not challenge the record of the Initial Decision in any respect with regard to her concerns over "dirty electricity." Exc. at ¶ 2.

b. Reply Exceptions

PECO explains that at the evidentiary hearing, Ms. Frompovich expressed concern that PECO's AMI meter would subject her to "dirty electricity," also known as "harmonics." R. Exc. at 16, citing Tr. 37. In their testimony, PECO witnesses Dr. Christopher Davis and Mr. Glenn Pritchard addressed Ms. Frompovich's concerns. Their testimony on "dirty electricity" and harmonics is detailed in PECO's Main Brief (citing M.B. at 26-27), and that detail was not repeated in PECO's Reply Exceptions, but in general, PECO explained that the two witnesses stated that "dirty electricity" is not a scientific term; the scientific term for this phenomenon is harmonics. R. Exc. at 16.

For the sake of completeness, we reviewed PECO's Main Brief, pp. 26-27, as referenced in PECO's Reply Exceptions, which we will summarize here. As

explained therein, the testimony of Dr. Davis and Mr. Pritchard indicated that harmonics can be thought of as disruptions to the normal sinusoidal 60 Hz wave form of electricity. Tr. at 140, 198. Their testimony indicated that disruptive harmonics are inevitable because nearly all of the electricity that is generated is produced by rotating machinery, which introduces disruptive harmonics. Tr. at 199. In addition, harmonics are created by the earth's magnetic field, interruptions from the sun, and any device that is plugged into an electric system, including fluorescent lights, devices that have power supplies, computers, cell phone chargers, and refrigerators. Tr. at 140-41. The AMI meter, however, is an extremely light user of electricity and therefore an AMI either produces no harmonics or harmonics of such small magnitude that they do not meaningfully contribute to the overall harmonics and disruption of the sinusoidal wave. Tr. at 142, 200. A home that does not have an AMI meter will still have significant disruption of the sinusoidal wave, even if the resident of that home has eliminated microwaves and other sources of radiofrequency fields. Tr. at 142-43. Similarly, a home with an AMR meter will have significant disruption of the sinusoidal wave. Tr. at 171. The bottom line is that, while harmonics exist on the electric system at all times, the type of meter being used at the home – AMI, AMR, or even analog – is not a material contributor to the amount of harmonic disruption. Changing the meter type will not change the amount of harmonic disruption. PECO also explained that Ms. Frompovich expressed concern that the PECO system uses “pulses” or “pulsed communication,” which she believes is particularly dangerous. Both Dr. Davis and Mr. Pritchard testified that PECO's AMI meters do not use pulsed transmissions. Tr. at 173, 200. PECO M.B. at 26-27.

In its Reply Exceptions, PECO further explained that the testimony of Dr. Davis and Mr. Pritchard indicated that harmonics are abundant on the electric system from many sources, including fluorescent bulbs. Further, PECO explained that AMI meters either produce no harmonics or harmonics of such small magnitude that they do not meaningfully contribute to overall harmonics. PECO states that the Initial Decision,

pages 22-23 and Findings of Fact Nos. 63 through 66, accurately reflected this testimony. R. Exc. at 16-17.

PECO asserts that the Complainant's Exceptions do not challenge the testimony of Dr. Davis or Mr. Pritchard, nor does she suggest that the Initial Decision incorrectly stated the harmonics testimony or incorrectly resolved her "dirty electricity" claim. Instead, PECO points out that Ms. Frompovich pivots to CFLs being a source of "dirty electricity" and an "unsafe utility innovation." R. Exc. at 17.

PECO submits that CFLs are not at issue in this proceeding. Given that Ms. Frompovich raised no concerns with any PECO CFL program in her Complaint, testimony, brief or reply brief, she cannot raise a new claim for the first time in her Exceptions. R. Exc. at 17.

PECO asserts that Ms. Frompovich's argument on "dirty electricity" provides no reason to believe that the Initial Decision is incorrect in recounting the testimony or in its assessment of Ms. Frompovich's "dirty electricity" claim. Accordingly, PECO contends that Ms. Frompovich's Exception on this issue should be denied. R. Exc. at 17.

c. Disposition

We deny the Complainant's Exceptions regarding "dirty electricity." We agree with PECO that CFLs are not at issue in this proceeding. Given that Ms. Frompovich raised no concerns with any PECO CFL program in her Complaint, testimony, brief or reply brief, we will not permit her to raise a new claim for the first time in her Exceptions in this proceeding.

Additionally, Ms. Frompovich’s argument on “dirty electricity” provides no reason to believe that the Initial Decision is incorrect in recounting the harmonics testimony presented by PECO in this proceeding or in its assessment of Ms. Frompovich’s claim regarding harmonics. Accordingly, we will deny Ms. Frompovich’s Exception on this issue.

7. The Complainant’s Claims that the ALJ and Commission are Biased (Exc. ¶¶ 1, 2, 5, 7-9, 11, 17, 18; R. Exc. at 2-3)

a. Exceptions

Finally, littered throughout the Complainant’s Exceptions, at ¶¶ 1, 2, 5, 7-9, 11, 17 and 18, are claims that the ALJ and the Commission are biased against her.

b. Reply Exceptions

PECO addresses and categorically denies the Complainant’s claims of bias in its Reply Exceptions. See R. Exc. at 1-3.

c. Disposition

We find no merit to the Complainant’s bias claims and therefore deny the Exceptions with regard thereto.

D. Final Disposition

Based upon our review of the record and the applicable law, we find the Complainant’s Exceptions overall lack merit. Each of the issues raised by the Complainant in her Exceptions, as well as PECO’s Reply thereto, are discussed at length

above, followed by our specific analysis and reasons for denial. Additionally, we wish to note that we are 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); *also see, generally, University of Pennsylvania v. Pa. PUC*, 485 A.2d 1217 (Pa. Cmwlth. 1984). Therefore, any issue that we did not specifically address or delineate in this Order shall be deemed to have been duly considered and denied without further discussion.

A customer has the right to file a formal complaint with the Commission in accordance with 66 Pa. C.S. § 701 and 52 Pa. Code §§ 5.21-22. A formal complaint disputing a utility's installation of an AMI meter must proceed to hearing if the complaint contains factual averments, either specific to the individual complainant, or general in nature, that support a claim that the utility's installation or use of a smart meter would cause a violation of the utility's duty to maintain safe, adequate and reasonable service and facilities pursuant to Section 1501 of the Code, 66 Pa. C.S. § 1501. *See Romeo v. Pa. PUC*, 154 A. 3d 422 (Pa. Cmwlth. 2017) (*Romeo*); *see also Alfred Ottaviano v. PECO Energy Company*, Docket No. F-2016-2542081 (Order entered July 13, 2017) (*Ottaviano*); *see also Kreider v. PECO Energy Company*, Docket No. P-2015-2495064 (Order on Material Question entered September 3, 2015; Order on Reconsideration entered January 28, 2016) (*Kreider*); *see also Paul v. PECO Energy Company*, Docket No. C-2015-2475355 (Order entered March 17, 2016). As the Commission stated in *Kreider*, "the [applicable] law does not prohibit us from considering or holding a hearing on issues related to the safety of smart meters, consistent with our statutory authority in Section 1501 of the Code, when a legally sufficient claim is presented." *Kreider*, Order on Material Question at 17. In such instance, the Commission must afford the complainant a hearing and opportunity to establish its case by a preponderance of the evidence through the complainant's own testimony or the testimony of others or through other evidence. *See Romeo*, 154 A. 3d at 430.

In this case, given that the claims raised in her Complaint implicated 66 Pa. C.S. § 1501, Ms. Frompovich was afforded a hearing and opportunity to establish her case against PECO by a preponderance of the evidence. Ms. Frompovich presented her own expert testimony during the evidentiary hearing, but she did not present any testimony of third parties or other competent evidence to establish her case. Upon review of the ALJ's Initial Decision and the record in its entirety, we affirm the ALJ's conclusion that the Complainant failed to carry her burden of proof in this proceeding. Specifically, we find that the Complainant failed to show, by a preponderance of the evidence, that PECO's proposed installation of smart meter at the Complainant's service address would cause or result in unreasonable or unsafe service or facilities in violation of PECO's duty under Section 1501 of the Code. We agree with the ALJ's statement in the Initial Decision: "There was scant evidentiary support for [the] Complainant's contention that installation of a smart meter at her home would be unreasonable or unsafe." I.D. at 24.

Specifically, as to the Complainant's fire hazard claim, PECO satisfied its burden of production, or the burden of going forward with the evidence, to show that the brand of AMI to be installed at the Complainant's home – the Landis + Gyr meter – does not present a fire hazard. PECO presented evidence in this case that previously there was a fire hazard problem with a particular brand of meter PECO had initially used in the AMI deployment. However, in approximately 2012, those meters were all removed and replaced with the Landis + Gyr Focus meters. PECO showed that since the installation of over 1.2 million of Landis + Gyr Focus meters, there have been no reports of fire incidents related to the meters. Tr. at 143. PECO showed that a Landis + Gyr meter would be installed at Ms. Frompovich's home.

Additionally, we take judicial notice here that the fire hazard issue involving the prior brand of AMI meter was raised to our attention during PECO's Smart Meter Phase II Plan proceeding at Docket No. M-2009-2123944, discussed *supra*, fn 3. In

the Recommended Decision for that case, it was noted that PECO had experienced several meter events involving overheating during the Phase I deployment. PECO initiated corrective action including replacement of the installed smart meters with meters manufactured by a different contractor, Landis + Gyr. PECO had completed replacing the meters on or before January 18, 2013, the date PECO filed its Smart Meter Phase II Plan. *See* Phase II R.D. at 9.

Moreover, the Complainant did not present any competent evidence in this record to show that the Landis + Gyr brand of meters causes fires or otherwise presents a fire hazard. Therefore, we agree with the ALJ's conclusion that the Complainant did not satisfy her burden of proving that the type of AMI meter to be installed at her home would constitute an unsafe fire hazard in violation of 66 Pa. C.S. § 1501.

As to Ms. Frompovich's second claim that the installation of a smart meter at her home is unsafe and unreasonable because EMF emissions from a smart meter will adversely affect her healing and her health, the Complainant presented her expert testimony. It is her opinion that she will be harmed by the harmonics and the non-thermal health effects from microwave energy and radio frequency, or EMFs, emanating from a smart meter. It is also her opinion that that non-ionizing, non-thermal radiation from AMI Smart Meters will cause a recurrence of her cancer and adversely affect her health.

However, the overwhelming evidence presented by PECO, in rebuttal to Ms. Frompovich's direct case, showed that some of the emissions of concern to Ms. Frompovich do not emanate from AMI meters and that any actual emissions from AMI meters are miniscule and harmless and measure significantly less than those to which the average person is exposed daily. Accordingly, we affirm the ALJ's conclusion that the Complainant did not satisfy her burden of proving that the type of AMI meter to

be installed at her home would be unreasonable or unsafe in violation of PECO's duty under 66 Pa. C.S. § 1501.

It is well-settled that where a customer refuses a utility access to its meter, the utility may terminate service after required notice is provided. 52 Pa. Code § 56.81(3).⁶ The Commission's Regulations, at 52 Pa. Code § 56.81(3), provide, in pertinent part, the following:

A public utility may notify a customer and terminate service provided to a customer after notice as provided in §§ 56.91-56.100 (relating to notice procedures prior to termination) for any of the following actions by the customer . . . Failure to permit access to meters, service connections or other property of the public utility for the purpose of replacement, maintenance, repair or meter reading.

Additionally, PECO's Tariff Electric Pa. P.U.C. No. 5, Section 18.3, page 26, states that the Company may terminate electric service on reasonable notice if PECO's entry to the meter is refused, or if PECO's access to the meter is obstructed or hazardous.⁷

⁶ While PECO furnishes and owns the meter, the meter typically is located on a customer's property. PECO's ability to change a meter or metering equipment – *i.e.*, to remove an existing AMR meter and install a new AMI meter – requires that the customer give PECO reasonable access to its meter located on the customer's property. Indeed, PECO's Tariff provides that its "identified employees shall have access to the premises of the customer at all reasonable times for the purpose of reading meters, and for installing, testing, inspecting, repairing, removing or changing any or all equipment belonging to the Company." PECO's Tariff Electric Pa. P.U.C. No. 5, Section 10.5, page 19.

⁷ A public utility's Commission-approved tariff is *prima facie* reasonable, has the full force of law and is binding on the utility and the customer. 66 Pa. C.S. § 316, *Kossmann v. Pa. Pub. Util. Comm'n*, 694 A.2d 1147 (Pa. Cmwlth. 1997) (*Kossmann*); and *Stiteler v. Bell Telephone Co. of Pennsylvania*, 379 A.2d 339 (Pa. Cmwlth. 1977) (*Stiteler*).

Based on our adjudication of Ms. Frompovich's claims herein, we find that PECO's proposed termination of electric service to the Complainant's service address for the Complainant's refusal to permit PECO access to its meter, so that PECO's employees can replace the existing AMR meter with an AMI meter, to be consistent with and authorized under Section 1501 of the Code, the Commission's Regulations at 52 Pa. Code § 56.81(3), and the Company's Tariff. We remind PECO, however, that prior to taking any steps related to such termination of service, it must adhere to the applicable provisions of the Commission's Regulations relating to Notice Procedures Prior to Termination at 52 Pa. Code §§ 56.91-100. In the applicable written notice(s) required under the Commission's Regulations, PECO is requested to inform or instruct Ms. Frompovich as to how she may avoid termination related to the meter. This will include Ms. Frompovich's permitting PECO to install the AMI meter at a location designated by the Company and in accordance with the Company's Tariff.⁸

IV. Conclusion

Based upon our review of the record and the applicable law, we shall deny the Complainant's Exceptions, adopt the Initial Decision, and dismiss the Complaint, consistent with this Opinion and Order; **THEREFORE,**

IT IS ORDERED:

1. That the Exceptions filed by Catherine J. Frompovich on June 7, 2017, in this docket, are denied.

⁸ We note here the record reflects, as discussed *supra*, that PECO had offered to move the Complainant's meter away from her home if she chose to relocate her meter socket. *See* I.D. at 20 (citing Tr. at 60, 144-45).

2. That the Initial Decision of Administrative Law Judge Darlene D. Heep, issued on May 24, 2017, in this docket, is adopted.

3. That the Complaint filed by Catherine J. Frompovich, on March 24, 2015, in this docket, is dismissed.

4. That the Secretary's Bureau shall mark this proceeding closed.

BY THE COMMISSION,

A handwritten signature in black ink, appearing to read "Rosemary Chiavetta". The signature is fluid and cursive, with the first name being the most prominent.

Rosemary Chiavetta
Secretary

(SEAL)

ORDER ADOPTED: May 3, 2018

ORDER ENTERED: May 3, 2018