STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

CASE 18-E-0067 - Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of Orange and Rockland Utilities, Inc. for Electric Service.

CASE 18-G-0068 - Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of Orange and Rockland Utilities, Inc. for Gas Service.

POST-HEARING BRIEF OF INTERVENOR D. KOPALD

There should be no opt-out fee as a matter of policy. Poor people in particular who want and/or need to opt-out are put in a more onerous position. I ask this court to take judicial notice of the US census findings for the counties in the service territory[1] pursuant to *Kingsbrook Jewish Med. Ctr. v Allstate Ins. Co.*, 61 AD3d 13, 19 - 20 (2nd Dep't: 2009). The poverty rate in Sullivan County is 15%; the poverty rate in Orange County is 11% and the rate in Rockland is 13%. The disability rates in these respective counties are 12%, 8% and 6%. Orange County in particular has many veterans, 19,967 m who tend to have more health problems than the general population (from service and which can include disability) and as a result can be underemployed (or unemployed). Sullivan in particular has a large geriatric percentage (people over 65), who tend to have a fixed income- 19% of their population (Orange has 14% and Rockland has 16%). If people of limited economic means want to opt- out, it is much more onerous for them to do so than it is for people who are working full time. I will return to the issue of general inequities for the financially disadvantaged later as well as other classes- disabled, geriatric, people who don't own their premises, etc. Please take judicial and administrative notice of the Office of Consumer Advocate (Division of the Iowa Department of Justice) Post-Hearing Brief in Docket No. SPU-2018-0007 before the Iowa Utilities Board In Re: Interstate Power and Light Company opposing

[1] Census data for Orange, Sullivan and Rockland Counties (last viewed January 3, 2019)
https://www.census.gov/quickfacts/orangecountynewyork
https://www.census.gov/quickfacts/sullivancountynewyork
https://www.census.gov/quickfacts/rocklandcountynewyork

the opt-out fee. (They also call for consumers to be able to retain their analog meters and suggested the mailer that was sent out did not adequately explain the opt-out[2].) Please also take judicial and administrative notice of Vermont legislative proceedings and Sec. 15. 30 V.S.A. § 2811 SMART METERS; CUSTOMER RIGHTS; REPORTS which mandates a no-fee opt-out.

For now, also of note is the fact that in all three counties, the non-owner occupied housing rate is over 30% in all three counties (31% for Rockland, 32% for Orange and 33% for Sullivan). This is important in regard to the issue of affordability of an opt-out. If someone must opt-out for many medical reasons, they should legally have a no-fee opt-out. If they need their neighbors to opt-out for the same reason, those neighbors should have a no-fee opt-out so that the person needing the medical opt-out is not disadvantaged by their neighbor's inability to pay or their own inability to pay for their neighbors. *Res ipsa loquitur* that someone opt-ing out for the benefit of their neighbor will be more likely to do so if there is no financial cost to them. In a non-owner occupied rental building, the smart meters are in closer proximity than they would be in a situation where there is a neighborhood with detached (or even semi-detached) housing. Also, people who live in apartment buildings tend to have less disposable income than people who live in houses. While some non-owner occupied premises are houses or semi-detached houses, those renters tend to be less economically well off than homeowners. If renting, the landlord may need to agree to the opt-out and again, having it be no fee makes it easier to get their cooperation for the resident. For people who need a medical opt-out due to the Americans with Disabilities Act ("ADA"), there legally can be no fee levied upon such persons. See: 28 C.F.R. § 36.301(c); 28 C.F.R. Part 36 App. B, § 36.301; Technical Assistance Manual § III-4.1400, online at https://www.ada.gov/taman3.html. Services of a corporation must be available

[2] O&R's mailer too was designed to emphasize the benefits of the smart meter and does not mention the opt-out until the second to last paragraph. The insert doesn't talk about the opt-out, but merely evangelizes the smart meter. There is no link to retrieve the opt-out application. It just says go to the website. The design is intended to minimize the number of people opting out. With so few opt-outs, O&R's costs are much reduced.

even if accessed in a person's home pursuant to *Del-Orden v. Bonobos, Inc*., No. 17 CIV. 2744 (PAE), 2017 WL 6547902 (S.D.N.Y. Dec. 20, 2017). I ask the tribunal to take judicial and administrative notice of the HUD/BOLI conciliation agreement (HUD No. 10-14-0015-8 and BOLI No. HUHODP131125-11510) between the City of Scappoose, OR and two residents. I continue to assert that inasmuch as the tribunal has repeatedly said that the opt-out fee issue could be briefed, that that this is a concrete case where a federal and state entity, Housing and Urban Development ("HUD") and the Oregon Department of Justice and the OR Bureau of Labor and Industries ("BOLI") had to step in to remove the wireless meters for someone whom they believed to be affected by it, agree to no opt-out fee and create an incentivization structure for the nearby neighbors to opt-out as well while ostensibly maintaining the residents' privacy. Inasmuch as O&R concedes that 398 people have opted out in the area where the initial limited roll-out took place in Rockland County, it is known that some people have opted out and it is reasonable to infer that some did so for health reasons. I say it is reasonable to infer, because the complaint about smart meter health hazards is well known, was briefed in 14-M-0196 and 17-M-0178 and because in at least one comment in 17-M-0178, one person in Rockland County, Roberta Adam, described a hypersensitivity to the radiation from the smart meters and an inability to function around them. She describes proximity to her neighbors' meters as affecting her as well, which is not unlike the situation in the Scappoose HUD/BOLI case.

> Since the introduction of Smart Meters I have become very ill. My ears ring incessantly and I only get relief in a non-populated area. Not just ring softly, screech very loud. I am unable to sleep...think without distraction or enjoy my life. It also affects my blood pressure. I have had to go to the ER twice.
>
> *I now have an analog meter on my home and the nose bleeds have stopped but I am a prisoner there.*
>
> Both ER visits were after visiting my grandchildren in a home with a Smart Meter and staying more than 2 hours.

> I have MS which is an electrical disease. These meters aggravate it. I cannot even stay outside long due to them surrounding me. I no longer have quality of life.
> This has been noted with all my doctors.
> This started as soon as they were introduced.
> Please remove them immediately.
>
> (Emphasis Added)

> (See the comments for 17-M-0178, reprinted as R177 in *In the Matter of the Application of Deborah Kopald for a Judgment Pursuant to CPLR Article 78 against the New York Public Service Commission and Orange and Rockland Utilities, Inc.*, Index No. 905947-18*)*

Roberta Adam may have been the only one to describe her disability in response to that petition, however, if you look at the comments in 17-M-0178 people talk about how the people never knew the proceeding was going on (there is an ongoing notice issue, and I note that Ms. Malick, the Chair of Protect Orange County, suggested informing people of proceedings in their O&R bill. In fact all of the comments except for one were made in response to the Petition for Rehearing and the information spread virally via email after I emailed concerned citizens with my petition. Only one person had commented in response to O&R's original petition. I also noted in my Article 78, that I spoke to my librarian at the Highland Falls Library and she confirmed that the Ramapo-Catskill library system does not have SAPA notices or give such notices of them to the public. She didn't even know what SAPA was.)

In the Second Circuit, a nexus between the accommodation requested and the disability stated is required. See *Felix v. New York City Transit Authority*, 324 F.3d 102 (2d Cir. 2003). See also *Adams v. Rice*, 531 F.3d 936, 944 (D.C. Cir. 2008) ("when an employee seeks a workplace accommodation, the 'accommodation must be related to the limitation that rendered the person disabled.'") That said, in regard to electrically hypersensitive persons, they allege that the pulse modulated microwave radiofrequency radiation ("PM MW RFR") from the smart meters gives them symptoms in their own homes and even driveways. This includes rendering part or all of the home uninhabitable from their own smart meters. Again, the situation is describe by Ms.

Adam and was described by me in my Article 78 in an affidavit. (Please take judicial and administrative notice of the Motion Affidavit of Deborah Kopald in *In the Matter of the Application of Deborah Kopald for a Judgment Pursuant to CPLR Article 78 against the New York Public Service Commission and Orange and Rockland Utilities, Inc.*, Index No. 905947-18). In that document, I described how when going to jurisdictions with smart meters, in one home without a smart meter, I could feel the neighbors' meters in certain rooms of the home- by windows with line of site to the meters. (The Wi-Fi was disconnected in that home). I also described being in a home with a smart meter, where I didn't know it had a smart meter before I entered, (and in which the Wi-Fi was disconnected) in which I was rendered severely ill within a half hour and forced to leave. When I returned, the symptoms came on even quicker and I had to leave again. I explained that from that exposure, it took me four days to recover from severe head pain that made it impossible to do higher-level executive functions, exhaustion, muscle weakness. I also swore that I do not get such symptoms in homes without smart meters and that by practicing avoidance from homes with meters and buildings with Wi-Fi, (as well as close prolonged proximity to cell phones or proximity to cell towers and equivalents thereof) I never get such disabling symptoms and function normally without headaches, pain, muscle weakness, and sleeping problems that interfere with major life activities pursuant to the ADA 2008 Amendments Act.

This disability is recognized by the United States Access Board. Please take judicial and administrative notice of Federal Register/ Vol. 67, No. 170/ Tuesday, September 3, 2002/ Rules and Regulations in which the Access Board's entry is listed as 36 CFR Part 1191 [Docket No. 98-5] RIN 3014-AA16 Americans with Disabilities Act (ADA) Accessibility Guidelines for Buildings and Facilities; Recreation Facilities; Action: Final Rule, Page 56353:

The Board Recognizes that multiple chemical sensitivities and electromagnetic

> sensitivities may be considered disabilities under the ADA if they so severely impair the neurological, respiratory or other functions of an individual that it substantially limits life activities.

Please also take judicial and administrative notice of Recommendations for Accommodation by both the Access Board and the U.S. Department of Labor include turning things off to the level at which the person can tolerate them: The United States Access Board Indoor Environmental Quality Recommendations for Accommodations for people with chemical and/or electromagnetic sensitivities. https://www.access-board.gov/research/completed-research/indoor-environmental-quality/recommendations-for-accommodations (last viewed: December 27, 2016) and The United States Department of Labor, Office of Disability Employment Policy, Job Accommodation Network's Accommodation Ideas for Electromagnetic Sensitivity: http://askjan.org/soar/other/electrical.html (last viewed: July 2, 2016) (It can be seen in the Google Cache at https://webcache.googleusercontent.com/search?q=cache:VR1vkO8oIYwJ:https://askjan.org/disabilities/Electrical-Sensitivity.cfm+&cd=1&hl=en&ct=clnk&gl=us). Both describe turning things off or allowing people to work remotely. Obviously, one cannot live remotely to one's own home, but must have things turned off there and in the immediate vicinity to the level to which they can tolerate things. Please also take administrative Notice of the Social Security Administration ("SSA")'s Notice of Decision of October 23, 2007 regarding Arthur Robert Firstenberg finding that he is disabled with electromagnetic sensitivity. (See page 4). Please also take judicial and administrative notice of the 2005 National Institute of Building Sciences and Access Board (the former is Congressionally chartered, the latter is a federal agency) Indoor Environmental Quality ("IEQ") report which states the following:

> The NIBS-IEQ Materials Committee recognizes that there are selections that can be made during building design and construction that can provide a more healthful environment for persons with electromagnetic sensitivities. A few of these considerations are: (Pg. 87)

> Incorporation of foil vapor barrier or other metal shielding feature into the walls around electric equipment can reduce certain electromagnetic fields. (Pg. 87)
>
> Wireless ("Bluetooth" type connections should be avoided, or areas of their use should be "contained" by using foil-backed drywall or other incorporation of a foil or metal barrier..... (Pg. 88)
>
> Fiber optic connectivity is preferred for computer networks communication because these data lines may be run without concern for stray emissions...(Pg.88)
>
> By making indoor environments that are safer for the most vulnerable among us, we can create indoor environments that are healthier for everyone, especially children...(Pg. 87)
>
> http://web.archive.org/web/20060714175343/ieq.nibs.org/ieq_project.pdf

Wireless ("Bluetooth") type connections emit PM MW RFR and at levels of lesser intensity than smart meters. Note that the Access Board and the National Institute of Building Science recognize that to block certain emissions, foil backing is necessary. It goes without saying that blocking an emission could also be accomplished by not having it on; an opt- out accomplishes that. Please also take judicial and administrative notice of Swisscom's patent, World Intellectual Property Organization REDUCTION OF ELECTROSMOG IN WIRELESS LOCAL NETWORKS, International Publication Number WO 2004/075583 which states the following:

> The influence of electrosmog on the human body is a known problem.….
>
> These findings indicate that the genotoxic effect of electromagnetic radiation is elicited via a non-thermal pathway.
>
> Moreover aneuploidy is to be considered as a known phenomenon in the increase of cancer risk. Thus it has been possible to show that mobile radio radiation can cause damage to genetic material, in particular in human white blood cells, whereby both the DNA itself is damaged and the number of chromosomes changed. This mutation can consequently lead to increased cancer risk. …
>
> Despite increasingly strict national guidelines with respect to legally specified limits, *the impact of electrosmog in WLANs on the human body can be considerable*. Moreover it is to be expected that this impact will continue to increase in the future for many people. …
>
> This means that even when the WLAN is not being used at all, *an underlying stress from electromagnetic radiation remains for persons in the Basic Service Area of an access*

> *point of the WLAN*. For example, in the case of WLANs at places of employment, such as offices, etc., there exists *therefore permanent stress from electrosmog from the WLAN on the employees of the company or organization*.
>
> (Emphasis added)

Note again, that Swisscom, in its patent acknowledges that its very own wireless emitting product has been linked with stress, including cellular stress and including, but not limited to DNA damage which is a known precursor to cancer. Some of the people requesting that smart meters be removed from their homes are cancer sufferers or those recovering from cancer or those deemed at risk for cancer (e.g. from a compromised immune system). Cancer is covered under the ADA Amendments Act of 2008. Such a person would have a nexus to their requested accommodation of having a meter removed from their home. Smart meters are known to have higher intensity peak pulses than Wi-Fi, but in any case, one can choose whether or not to have Wi-Fi (the Swisscom warning notwithstanding); the smart meter or costs of not having one is being imposed upon people.

Please also take judicial and administrative notice of the European Union ("EU's 2012 statement that the electromagnetic hyper sensitivity growing exponentially in the EU Declaration on the Recognition of Multiple Chemical Sensitivity and Electromagnetic HyperSensitivity in the International Classification of Diseases and Related Health Problems (ICD) on 3/12/12 (See: http://www.europarl.europa.eu/sides/getDoc.do?type=WDECL&reference=P7-DCL-2012-0014&format=PDF&language=EN last viewed: 1/3/19)

Please also take judicial and administrative notice of the European Commission (EC's) advisory body's, the International Commission on Non-Ionizing Radiation Protection (ICNIRP), an organization staffed with people who are remunerated by industry and which is regularly critiqued by international experts pushing for more protection against PM MW RFR, 2002 statement:

> *Different groups in a population may have differences in their ability to tolerate a particular NIR (non-ionizing radiation) exposure*. For example, children, the elderly, and some chronically ill people might have a lower tolerance for one or more forms of NIR exposure than the rest of the population. Under such circumstances, it may be useful or

> necessary to develop separate guideline levels for different groups within the general population, but it may be more effective to adjust guidelines for the general population to include such groups.
>
> *Some guidelines may still not provide adequate protection for certain sensitive individuals* nor for normal individuals exposed concomitantly to other agents, which may exacerbate the effect of the NIR exposure….Where such situations have been identified, appropriate specific advice should be developed within the context of scientific knowledge.
>
> (Emphasis Added)
> International Commission on Non-Ionizing Radiation Protection, ICNIRP Statement: General Approach to Protection Against Non-Ionizing Radiation: *Health Physics* 82(4):540-548; 2002.

This statement underscores the contention of the existence of people who cannot publicly allowable levels of PM MW RFR (their use if the term NIR is effectively interchangeable; non-ionizing radiation compromises all frequencies below visible light. PM MW RFR comprises the frequencies emitted by modern wireless communications). It logically follows that those sensitive individuals cannot be exposed to this radiation in order to reach a level they can tolerate. Obviously, in an environment absent any such levels or absent certain triggering levels, these individuals don't have sensitivity reactions. The removal of a meter that emits such radiation is the appropriate accommodation for people who are so disabled by this sensitivity (pursuant to the Access Board's 2002 statement in the Federal Register).

In *Firstenberg v. City of Santa Fe*, 696 F.3d 1018 (10th Cir. 2012), the Court of Appeals reversed a district court order that claimed that the Telecommunications Act of 1996 preempted the ADA. The court recognized that apparently certain individuals are afflicted with sensitivity to microwave radiation. *G v. The Fay School*, No. 15-CV-40116-TSH, 2018 U.S. Dist. LEXIS 96934 went even further and explicitly indicated that the Telecommunications Act does not preempt the ADA and that electromagnetic hypersensitivity is a genuine phenomenon, stating:

> because they are preempted by the exclusive jurisdiction of the Federal Communications Commission ("FCC").….*EHS is a genuine phenomenon* and

> that, absent a technical determination to the contrary, or other clarification of the scope, nature, and *impact of EHS in relation to regulated emissions by the FCC, that jurisdiction to consider this matter as a potential disability under the ADA is not preempted here.*
>
> Emphasis Added

That Court also found that Dr. David O. Carpenter, the former head of Wadsworth Laboratories for the State of New York, former Executive Secretary of the New York Power Lines Project (a court-ordered review of the health effects of radiation from high tension power lines), member of the Bush, Obama and Trump Presidential Cancer Panels, and founding dean of the SUNY Albany School of Public Health was qualified pursuant to *Daubert* to opine on the general causation between PM MW RFR and electromagnetic hypersensitivity and that Dr. Martha R. Herbert of Harvard Medical School and the Massachusetts General Hospital, was qualified to opine on specific causation; namely whether an individual suffered from electromagnetic hypersensitivity. Certainly a person who has been diagnosed by Dr. Herbert should be seriously considered to be disabled within the meaning of the ADA, and in fact the Department of Public Service is in possession of at least one such letter[3].

In *Metallo v. Orlando Utilities Commission et al.*, 6:14-cv-1975-Orl-40KRS, the Court refused to dismiss a contention on summary judgment that the digital meter on the Plaintiff's home was causing symptoms of electromagnetic hypersensitivity stating the following:

> On an unspecified date in 2014, OUC replaced the analog electric meter attached to Metallo's home with a new digital meter. (Id. ¶ 5).2 Metallo claims that this digital meter caused him to suffer "many physical and emotional problems," including:
>
> > [S]leepless nights, violent headaches, respiratory problems and frequent sneezing, low frequen[c]y humming and buzzing noises that produced shrill ear ringing . . . distraction concerning household functions, skin rashes, frequent power outages that created inconveniences and clock re-settings, lack of concentration, confusion and memory loss,

[3] Ultimately if the Commission were to determine a letter is warranted (a good faith statement should be enough from a policy perspective, O&R should not be in charge of collecting such letters as HIPAA does not protect private medical information in public corporations. The N.Y. Public Health Law states that information obtained from a doctor should be kept confidential, but it does not say must or shall. The DPS and/or PSC are public entities and there is a higher bar to obtaining information under FOIL and would be a more secure collector of such information.

> insomnia, and inability to return to sleep, dry skin . . . and violent ear ringing that exacerbated his tinnitus condition. (Id.).

As a result, Metallo demanded that OUC remove the digital meter and return the analog meter. (Id. ¶ 23). Although OUC ultimately acquiesced, OUC charged Metallo a one-time enrollment fee of $95 to replace the digital meter with the analog meter….This account of the facts is taken from Plaintiff's Complaint (Doc. 1), the allegations of which the Court must accept as true in considering Defendants' motion to dismiss. See Linder v. Portocarrero, 963 F.2d 332, 334 (11th Cir. 1992); Quality Foods de Centro Am., S.A. v. Latin Am. Agribusiness Dev. Corp. S.A., 711 F.2d 989, 994 (11th Cir. 1983)…..

…..Metallo has paid and continues to pay these fees under protest. (Id.). On November 26, 2014, Metallo initiated this lawsuit against OUC and its board members by filing what appears on its face to be a one-count Complaint. (Doc. 1). Metallo essentially claims that Defendants have discriminated against him as a qualified individual with a disability under the Americans with Disabilities Act, 42 U.S.C. §§ 12101– 12213, by charging him fees to opt out of OUC's digital meter program. Defendants now move to dismiss Metallo's Complaint, or in the alternative, for summary judgment. (Doc. 14).

(pages 2 and 3, Omnibus Order, *Metallo v. Orlando Utilities Commission et al.)*

A person is a "qualified individual with a disability" under the ADA when he has a disability and, with or without reasonable modifications, meets the essential eligibility requirements for the receipt of services provided by a public entity. 42 U.S.C. § 12131(2). With respect to the term "disability," an individual is disabled when he has "a physical or mental impairment that substantially limits one or more major life activities." Id. § 12102(1)(A). Importantly, courts are to construe the term "disability" broadly in order to afford the ADA its maximum reach. Id. § 12102(4)(A). "Major life activities" include seeing, hearing, sleeping, learning, reading, concentrating, thinking, and communicating. Id. § 12102(2)(A). *A disability may "substantially limit" a major life activity when the individual in question suffers "a significant restriction as to the condition, manner, or duration under which [he] can perform [the] major life activity as compared to that of the average person in the general population*." E.E.O.C. v. Am. Tool & Mold, Inc., 21 F. Supp. 3d 1268, 1274 (M.D. Fla. 2014).

While Metallo does not confirm that he has been diagnosed with EHS or that he has received any sort of medical treatment for EHS, Metallo states that OUC's digital meter activated symptoms specifically associated with EHS, such as insomnia, "loud and 6 violent ear ringing," and a significant decrease in his ability to concentrate and remember. (Doc. 1, ¶ 5). Because all of these issues involve substantial limitations to major life activities and derive from some sort of physical or mental impairment, the Court can reasonably infer that Metallo has a disability. To the extent Defendants challenge EHS as an actual disability or whether Metallo in fact suffers from EHS, Defendants essentially ask the Court to prematurely address the merits of the case. At this stage of the proceedings, it is enough for Metallo to allege symptoms specifically linked to a mental or physical condition that substantially limits his ability to perform at least one major life activity, thereby placing Defendants on notice of his claims.

Second, Defendants assert that Metallo fails to allege sufficient facts showing that he was excluded from participation in, or denied the benefits of, OUC's services, programs, or activities. Defendants point to the fact that OUC ultimately agreed to replace Metallo's digital meter with an analog meter and that Metallo continues to receive full utility services from OUC to this day. (Doc. 14, p. 11). However, a public entity denies the benefits of its services to a disabled person

> when it provides services that are not equal to services provided to non-disabled persons. 28 C.F.R. § 35.130(b)(1)(ii). Metallo alleges in his Complaint that OUC charges him additional fees and costs to receive the same utility services as everyone else. (Doc. 1, ¶ 23). From this, the Court can reasonably infer that the more expensive utilities OUC provides to Metallo are not equal to the less expensive utilities it provides to non-disabled persons and, therefore, that Metallo has been denied the benefits of OUC's services.
>
> (Emphasis Added)
> (pages 5 and 6, Omnibus Order, *Metallo v. Orlando Utilities Commission et al.)*

> …a public entity engages in discriminatory conduct when it "place[s] a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the costs of measures . . . that are required to provide that individual or group with the nondiscriminatory treatment required by the [ADA]." 28 C.F.R. § 35.130(f). Here, Metallo alleges that OUC charged him the $95 enrollment fee and continues to charge him the recurring $13 monthly fee as surcharges for replacing the digital meter at his home with an analog meter and for reading the analog meter each month. (Doc. 1, ¶¶ 23–24). From this, the Court can reasonably infer that OUC has placed impermissible surcharges on equipment and services that are required for OUC to comply with Metallo's ADA rights. As a result, Metallo has sufficiently alleged a connection between OUC's fees and Metallo's alleged disability.
>
> Because Metallo has alleged sufficient factual material to show that he is a qualified individual with a disability, that he was denied the benefits of OUC's services, and that such exclusion was because of his disability, Defendants' motion to dismiss will be denied as to the ADA claim.
>
> (pages 6 and 7, Omnibus Order, *Metallo v. Orlando Utilities Commission et al.)*

In this case, the meter in question is called a digital meter and not necessarily a wireless AMI type smart meter (which means it would emit even less radiation; however, it may be that this meter is wireless). Either way, this issue further underscores the need for an analog meter opt-out which is not being offered and should be offered by the utility and has not been known to cause symptoms in anybody in homes and other buildings with them on the premises. In regard to the issue of rate design, this case describes similar symptoms to Ms. Adam and some of the symptoms I put in my affidavit in the Article 78. It shows that the Courts will accept a preliminary claim that these extreme symptoms constitute interference with major life activities. Courts are not bound by administrative determinations including claims that electromagnetic hypersensitivity is speculative (the Court in *G v. the Fay School,* supra has already ruled that it is NOT speculative- so a Court holding is superior to an administrative claim); so it would be

prudent policy for the PSC to preempt this problem by mandating the opt-out rescission fee. The issue becomes the extent to which someone thus situated needs removal from the loci of exposure. The Complainant in the HUD/BOLI case needed some of her neighbors water meters to be wired instead of wireless. It can be inferred that Mr. Metallo in the Orlando District Court case did not have symptoms from the analog meter (although it is not clear from the pleadings referenced if he subsequently developed sensitivity to other things, having developed such symptoms from his digital meter). Ms. Adam of Rockland County and I both describe feeling effects from meters off premises. It is therefore reasonable as a matter of policy for the Commission to remove the opt-out fee to avoid costly litigation for the utilities to provide those making allegations of electromagnetic sensitivity and other conditions that substantially limit life activities and for which they and/or their doctors claim are exacerbated by the AMI meters. It costs $120/ year to opt out for an electric meter and $180 per year to opt out of a gas meter. Taking the midway point of $150, for 398 people. That comes to $59,700 for those to opt out. Assuming that the maximum rate of opt-outs at any given time of .7% holds out through the district (the website claims that there are 232,593 electric customers in New York and 133,480 gas customers for a total of 366,073), then there would be 2,563 opt out's maximum (See: https://www.oru.com/en/about-us/media-center/corporate-facts (last viewed: January 3, 2019) for a total of $384,377. The actual current number is .3% (odd, considering that Maryland has documented over 4% in Order No. 87264 in Case No. 9208), which would mean there will only be 1098 opt-outs with a total cost of $164,733. The relatively low opt-out rate in the service territory means that fewer meter readers in total would be needed, so even though the calculation is based on pro-rated time; with fewer opt-outs, the costs go down.

Considering the EU's claim in a resolution from 2012 that the number of people who are electromagnetically sensitive are exponentially rising, O&R could be subject to a lawsuit and/or

a state or federal agency conciliation procedure for opt-out fees. In response to any claim that this is speculative, it should be pointed out that Mr. Metallo is pro se; so assuming that people don't want to spend money on a lawyer to recoup a relatively small opt-out fee could be a faulty assumption. And to assume that only one person is motivated to do something about the opt-out fee would be conclusory as well. The issue of needing an opt-out for a medical disability and needing compliance from neighbors if one is in an apartment building or close enough to one's neighbors that the signal reaches to the home is magnified in an apartment building scenario where there is a bank with multiple smart meters. Opt-out of one will obviously be insufficient when there are people such as the Complainant in the HUD/ BOLI Case who can feel their neighbors' meters or for Ms. Adam and myself who claim to have effects from neighbors' meters when in a jurisdiction with smart meters. If one is in an apartment building with a bank of meters- opting out of 5 meters will cost $120*5= $600 per annum, which one would have to foot the bill for if the neighbors are not compliant. Getting rid of the opt-out fee would facilitate such an arrangement.

Nevertheless, the issue of fairness to those with restricted incomes persists whether they are disabled, asked by their doctor to get the smart meter removed and/or economically disadvantaged. Please take Judicial and Administrative Notice of the Direct Testimony of Megan Sandel, MD MPH in Docket No. 12-0298 before the State of Illinois Commerce Commission in Commonwealth Edison Company ("ComEd")'s Petition for Statutory Approval of a Smart Grid, Advanced Metering Infrastructure Deployment Plan Pursuant to Section 16-108.6 of the Public Utilities Act. In it, Dr. Sandel points out that ultimately, the ultimate use of smart meters can hasten remote disconnection, which can ultimately have health consequences. While some disabled and/or poor people have signed up to be noticed as such (O&R wouldn't or couldn't state how many people this comprised during the cross-examination. Having a digital

meter that is read monthly can slow down the disconnection process. Some of these people may want the digital meter for privacy or health reasons or because a neighbor has requested it to accommodate their disability. Ms. Sandel did a study that encompassed low-income homes that had 400,000 children affected.

On pages 7 and 8, she states:

> The results of the CHIA demonstrate that many families reported making budget trade offs due to the burden of their energy bills. For example, 73% of families reported that they reduced spending on household necessities because they did not have enough money to pay the energy bills. Twenty percent of families went without food, 28% went without medical or dental care, and 23% did not make full rent or mortgage payment at least once. The findings of the CHIA show how the energy burden to low-income families, especially those with young children, has huge implications for health outcomes. The trade-offs that families are forced to make can impact child health, and these families may resort to alternative heating sources, which can put their children in danger in the home.

Given this general insecurity, if a low-income person is approached to opt-out on behalf of a neighbor, it is clear based on her testimony that they would likely have other priorities. And if they themselves wanted to opt-out, they might prioritize buying food, for example, over protecting their own health.

Furthermore, smart meters will eventually, if not in rate year 1 create incentives to use electricity at different times. If one is disabled, one tends to be home often and may have to consume electricity at on-peak hours, especially if the disabled person has a medical device they require to use- meaning the new rate structures will definitely cost than more money than other ratepayers. Therefore, they are extra-disadvantaged by having to pay for an AMI meter. Dr. Sandel identifies the disabled (generally), not any specific type of disabled person as being a vulnerable population. She states on page 15,

> In articulating these hypotheses, particular attention was paid to "vulnerable" or at-risk populations as a subset of residential customers generally, since most utility proposals focus on the "average" customer. Rarely do utility regulators or policymakers have information about subsets of residential customers that might respond differently from or

> require specific needs compared to "average" customers. For the purpose of the ComEd AMI HIA, "vulnerable populations" refers to "five groups within the general population that are at greater risk for adverse health outcomes". They include: the very young (from birth to age 5), older individuals (age 65 and older), individuals with a functional disability such as impaired mobility, persons who are socially isolated, and, those who have limited English proficiency or literacy. It is important to note that low and moderate income customers are also vulnerable, particularly for issues related to electricity costs and potential trade-offs between food, rent and medicine. In the ComEd AMI HIA we highlighted the above groups of the young, elderly, disabled, socially isolated and limited English proficiency beyond low and moderate income populations as well.

On page 16, she specifically identifies peak pricing from smart meters as an issue for these populations (as well as the fact that their rates are going up to pay for AMI, which is the case for O&R's electric meters:

> The first pathway identified the potential positive and negative 326 health impacts of AMI deployment generally, irrespective of the variable pricing programs, and with a focus on
> at-risk, vulnerable groups. Hypothesized impacts include the potential for increased electrical bills for cost recovery of AMI deployment; potential changes in non-ionizing (EMF) radiation exposure; potential changes in reliability or remote connection; and possibility for remote disconnections.
>
> The second, third and fourth pathways set out hypotheses related to dynamic pricing, in particular critical peak pricing, peak time rebates, and time of use rates, again with attention to the impact on vulnerable populations. These health impacts were scoped to consider the potential for pricing plans to influence changes in usage (at the level of peak load demand for energy or overall usage), the resulting potential impact on green house gas emissions, and changes in prices of energy and impact on health. All scoping pathways shared the same set of health determinants and hypothesized range of health outcomes, irrespective of the type of rate plan for electrical service.

She also specifically identifies the health risk of PM MW RFR on page 16:

> The pathway diagrams in the study identified domains or determinants of health impacts that are potentially influenced by AMI, including fuel poverty, housing adequacy and potential exposure to non-ionizing (EMF) radiation, loss of electricity generally and from remote disconnection for non-payment specifically, unintentional injuries and premature deaths,vulnerability to heat or cold, and ambient air pollution.

Dr. Sandel specifically states her findings that AMI causes bills to go up. Given the financial stress that vulnerable populations are subjected to, an opt-out fee would add to that stress. In some people it was found that the added costs caused them to use less electricity and get either

too cold or too hot (depending upon the season), which exacerbated medical conditions. Again, if one is disabled for any reason, any of these disabilities can result in the person being housebound often or all of the time, thus needing to use power at off-peak times. See pages 24-25.

Q. WHAT DID THE COMED AMI HIA FIND ABOUT THE COST OF AMI?

A. The ComEd AMI HIA literature review[10] found that AMI deployment in other jurisdictions indicates that investment in AMI equipment is expected to cost residential customers $2 to $3 more per month.

Based on this information, the ComEd AMI HIA concluded that the costs for deploying AMI could lead to increased delivery services rates to pay for AMI prior to the realization of any benefits in the form of potential reductions in utility costs. Given the large body of literature connecting fuel poverty and trade-offs between food, rent and medicine, it was concluded that even small increases in customer bills will exacerbate the health impact of higher prices to pay for AMI for vulnerable customers, particularly low income customers, but also other vulnerable customers as well.

Q. WHAT DID THE HIA FIND ABOUT THE HEALTH IMPACT OF PRICING PROGRAMS ON VULNERABLE CUSTOMERS?

A. The ComEd AMI HIA found that changes to pricing programs that charge much higher prices during certain times of day can cause some customers to reduce usage to avoid higher or unaffordable bills, resulting in under-usage of electricity resulting in extremes in temperatures indoors. Exposure to temperatures outside of a moderate range increases the likelihood of hospital emergency department visits, hospitalizations, and premature death. ComEd's residential customers include households with young children (7.2%) and seniors (11.2%), all more likely to develop symptoms of heat- and cold-related illness such as hypothermia or heat stroke. Persons who are socially isolated (an eightfold greater risk for death during a heat wave), those with a temperature-sensitive condition such as asthma (13.4% of adults in ComEd's service territory and 14.5% of children), diabetes (8% of adults in ComEd's service territory), and heart disease (28.9% of adults with high blood pressure or cardiovascular disease in ComEd's service territory), and those living with a mobility-limiting disability (nearly six times the risk of death during a heat wave) are also at greater risk.

Someone with a mobility-limiting disability who is forced to be home, is already going to have to use electricity when they need it if they have a medical device and if they are poor, if they try to save, and get over-stressed temperature-wise, they have negative consequences for that. Having to pay an opt-out fee for a non-wireless meter, which may have been recommended by

their doctor is further onerous. Having to pay one at all, is further onerous financially for whatever reason they seek to opt out.

In MSPC No. U-17000 before the Michigan Public Service Commission on page 5 of the Attorney General's Comments pursuant to the MSPC Order Dated, January 12, 2012):

> The Attorney General respectfully submits that utility customers should be given a meaningful choice of whether to have smart meters installed and operated on their property. An "opt-out,' program that requires those customers who opt out to pay an unwarranted economic penalty for doing so does not afford customers such a meaningful choice.

In that brief, the AG questions the smart meter business case as does the KY AG in Case No. 2018-00005 Before the Kentucky Public Service Commission (which led to an order rejecting smart meters). The KY AG goes farther and questions the 20 year service life of the meters on pages 12 and 13:

> ….in his January 10, 2018 Direct Testimony in this matter Mr. Malloy stated, "[t]he Companies project that over the estimated 20-year life of the fully deployed AMS metering system, the Companies and their customers will receive net benefits." Mr. Malloy is further asked the question, "[t]he Companies appear to have assumed an average service life of 20 years for AMS meters (2021-2040) in addition to the deployment period of 2018-2020. Is this reasonable?"[44] Mr. Malloy responded, "Yes, it is reasonable."[45] Mr. Malloy casually goes on to provide testimony in support of the Companies' purported use of a 20-year useful life.[46] In a prolonged attempt to discredit Mr. Alvarez's expert testimony about a more realistic service life for the AMI meters, Mr. Malloy dedicates an entire section of his rebuttal testimony to, "The Companies' Use of a 20-year AMS Service Life is Reasonable and within Industry Norms."

Page 13 of the order entered on August 30, 2018 denying the AMI system says

> The Companies' only evidence to support a 20-year service life of the Landis+Gyr meters is a two-word email from a sales representative that indicates a service life of "20 years." The Companies' cited to cases in several other jurisdictions where a 20-year service life was approved, but did not provide evidence that the other jurisdictions were approving a 20-year service life for the same Landis+Gyr meters at issue in this proceeding. The Companies offered no further evidence, explanation, or support for a 20-year service life.

Here O&R said that Aclara told them the meters had a 20 year life; however, I was forbidden

from subpoena-ing information from Aclara. Survivor curves are not based upon smart meters but older technologies with fewer moving parts and pieces including computers, which anyone who has one, knows that they aren't warrantied past three years. No rational reason was provided as to why I couldn't ask Aclara about post-market functionality including meter breakdown rates. The 1-million meter year figure given in cross-examination is meaningless-because O&R didn't know how many years in total the meters had been in existence (1 million meter years could be 1 million meters for one year). In any event, this information should have been explored in order to properly vet costs pursuant to the ruling in 17-M-0178, including proper depreciation of the meters. This analysis of cost should have included an analysis of the supply chain of the parts for the meters to see if there were any issues with the individual parts. I also was not permitted to introduce evidence about costs of the metering program including unrealized benefits, privacy, health and other externalities. I have briefed this issue and pointed out case law in other state high courts that expand the definition beyond accounting costs when it isn't in the statute or equivalent[4]. Given the findings in Kentucky and the claims by the Attorney General of MI as well as those of the Attorneys General of CT and IL and the Texas legislature (stated in my motion to declare AMI contrary to the public interest and the interlocutory appeal of same), there is little reason to continue with AMI. See also, the post-hearing brief of Lipman and Matara in Docket No. SPU-2018-0007 before the Iowa Utilities Board. I was forbidden from showing evidence that the meters don't do what they say they are going to do, but a cursory

[4] See: *So-Lo Oil Co., Inc. v. Total Petroleum, Inc*, 832 P.2d 14 (Supreme Court of Oklahoma, 1992) and *Board of County Com'rs of Leavenworth County v. McGraw Fertilizer Service, Inc.*, 261 Kan. 901, 933 P.2d 598 (Supreme Court of Kansas, 1997). Costs include unrealized benefits from lack of business case and meter functionality, costs to security, to the public health, to individual health, etc. Investors would not permit more sunk costs to be put into a program that looks to be a dud; the FDA does not continue to insist past the point of reason that drugs should be used as originally approved or to even stay on the market. See:2011 WL 4101960 *Draft Guidance for Industry and Food and Drug Administration Staff – Postmarket Surveillance Under Section 522 of the Federal Food, Drug and Cosmetic Act*: August 16, 2011.

look at the marketplace will show that technologies do not connect to the meter but are using Wi-Fi and cell systems; even Demand Side Response is going through alternate gateways. The issue of meter obsolescence should have been part of the cost analysis as well; in no other industry would investors permit an obsolete system with problems to be rolled out and if we were talking about a drug before the FDA, the product would be limited and/or recalled. The failure to vet all of these issues, including the meter depreciation which should have been allowed under the rules constitutes a failure to create a robust record.

Finally, LED lights create similar problems and not just for electrosensitive people; the testimony of Patti Wood demonstrates that the American Medical Association is concerned about retinal toxicity, etc. and breast cancer risk. Any incentive for LED lights should be rejected-especially any one that would affect rate design as someone pays for rejecting the options of LED lights (they pay more while those who don't care about the health risk pay less. Even a pilot promotes them and leads to this inequitable eventuality.

For all the aforementioned reasons, I am opposed to the Joint Proposal inasmuch as rates are raised with the existence of AMI in rate base. At a minimum, the opt-out fee should not be passed along to ratepayers who do not consent to having an AMI meter and certainly not for those whose disability requires it, and for any of the vulnerable populations identified by Dr. Sandel for the reasons she stated as well as for the fact that those requiring the opt-out fee rescission pursuant to the ADA need their neighbors' compliance with an opt-out in many instances. They should not have to pay to establish the necessary cordon, and the opt-out fee rescission would incentivize the establishment of same without litigation and without a financial hardship for the person disabled by the meter's emissions.

Respectfully Submitted,

/s/ Deborah Kopald,
Intervenor
P.O Box 998
Fort Montgomery, NY 10922
(845) 446-9531
Deborah_Kopald@ymail.com

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Fort Montgomery, NY

TO:

Hon. Kathleen H. Burgess, Esq.
Secretary to the Commission
secretary@dps.ny.gov
New York State Public Service Commission
Empire State Plaza, Agency Building 3
Albany, NY 12223-1350

John L. Carley, Esq.
Associate General Counsel/ Staff Attorney
carleyj@coned.com
Consolidated Edison Company of New York, Inc.
4 Irving Place, Room 1810-S
New York, NY 10003

Hon. Dakin Lecakes
Dakin.Lecakes@dps.ny.gov
Hon. Maureen F. Leary
Maureen.Leary@dps.ny.gov
State of New York
Public Service Commission
Three Empire State Plaza
Albany, NY 12223-1350

Active Parties