

**BEFORE THE PENNSYLVANIA
PUBLIC UTILITY COMMISSION**

SUSAN KREIDER,

Complainant

Docket No. P-2015-2495064

v.

Docket No. C-2015-2469655

PECO ENERGY COMPANY,

Respondent

**AMICUS CURIAE BRIEF
OF LAURA SUNSTEIN MURPHY
IN OPPOSITION TO PECO ENERGY COMPANY'S
PETITION FOR RECONSIDERATION**

Edward G. Lanza, Esq.
THE LANZA FIRM, LLC
P.O. Box 61336
Harrisburg, PA 17106-1336
(717) 576-2696 (phone)
(717) 798-9897 (fax)
ed@lanzafirm.com

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Counsel for Amicus
Laura Sunstein Murphy

I. INTRODUCTION

Pursuant to Section 5.502(e) of the Commission's Formal Proceeding regulations, 52 Pa. Code § 5.502(e), Laura Sunstein Murphy ("Murphy" or "Amicus") respectfully submits this *Amicus Curiae* Brief in Opposition to PECO Energy Company's ("PECO") Petition for Reconsideration of the Commission's September 3, 2015 Order ("Petition") filed with the Commission's Secretary on September 18, 2015 in the above-captioned matter.¹

Amicus, Laura Sunstein Murphy, is a resident of West Chester, PA and a PECO customer with an interest in the instant matter and the Commission's final adjudication of PECO's Petition for Interlocutory Review. Murphy is the Complainant in the matter of *Murphy v. PECO*, Docket No. C-2015-2475726, a case currently pending before the Commission. The matter was originally scheduled for hearing on August 19, 2015 before Administrative Law Judge Jeffrey Watson, but that hearing has been canceled and will be rescheduled. In her Complaint against PECO, Murphy has alleged that PECO's compulsory installation of smart meters that emit Electro Magnetic Field (EMF) radiation may constitute a violation of the utility's duty to provide safe and reasonable service to her under Section 1501 of the Public Utility Code, because Murphy is disabled and uniquely susceptible to the harmful effects of EMF and other emissions. Although the instant matter and Murphy's case differ in significant ways, PECO has asked the Commission to weigh in on issues that may directly affect Murphy's prosecution of her Formal Complaint.

In its Petition, PECO asks the Commission to reconsider its Order of September 3, 2015 and answer PECO's two (2) material questions in the affirmative. PECO Petition at 17. In its

¹ Docket No. C-2015-2475726 is the original complaint docket, Docket No. P-2015-2495064 is the docket that was created when PECO filed its Petition for Interlocutory Review on July 28, 2015.

Order, the Commission rejected PECO's attempt to prevent Complainant Kreider from making claims and presenting evidence of the adverse effects of smart meters on her health. *See*, Order at 19-20. The Commission's final resolution of the questions presented by PECO may directly affect Murphy's ability to pursue her claims against PECO, and for this reason, Murphy is asking the Commission to deny PECO's request to have the Commission reconsider the Order and answer the material questions of the Kreider case in the affirmative. The Commission ruled properly in its September 3, 2015 Order, and PECO's Reconsideration Petition should be denied. Answering the material questions in the affirmative, as PECO requests, would deny Kreider and Murphy their due process rights to be heard in their respective cases. Therefore, the Commission should deny PECO's Petition for Reconsideration and allow these two cases to proceed to hearing.

II. LEGAL ARGUMENT

A. PECO Has Failed to Raise New or Novel Arguments that Justify Reconsideration of the Commission's Order

Petitions for reconsideration are brought before the Commission under Section 703(g) of the Public Utility Code, 66 Pa. C.S. § 703(g) (relating to rescission or amendment of Orders), and pursuant to Section 5.572 of our Regulations, 52 Pa. Code § 5.572 (relating to relief following a final decision). *PUC v. PECO*, Docket No. M-00960820, 1999 Pa. PUC LEXIS 24 (Order issued February 11, 1999). Because a grant of relief on a reconsideration petition may result in the disturbance of final orders, it is granted judiciously and only under appropriate circumstances. *West Penn Power v. Pa. PUC*, 659 A.2d 1055 (Pa. Cmwlth. 1995), *petition for allowance of appeal denied*, No. 576 W.D., Allocatur Docket (April 9, 1996); *City of Pittsburgh v. PennDOT*, 416 A.2d 461 (Pa. 1980). In deciding whether to grant or deny a petition for reconsideration filed pursuant to 52 Pa. Code § 5.572, the Commission considers whether the

petitioner has presented new evidence, changed circumstances or previously unconsidered law. *Donald Fix v. PUC*, 2009 Pa. Commw. Unpub. LEXIS 198, 2009 WL 9097142 (Pa. Cmwlth. 2009) (citing, *J.A.M. Cab Company, Inc. v. PUC*, 572 A.2d 1317 (Pa. Cmwlth. 1990)); *See also*, *Duick v. PG&W*, 56 Pa. PUC 553 (1982). Where the Petitioners fails to raise new or novel arguments not previously considered by the Commission in the Petition for Reconsideration, Petitioner does not meet the established standard to warrant that the Commission reopen the proceeding. *PUC v. PECO*, Docket No. M-00960820, 1999 Pa. PUC LEXIS 24 (Order issued February 12, 1999).

In its Petition, PECO does not present new evidence, it does not claim any changed circumstances, and it does not raise previously unconsidered law. As such, PECO has failed to meet the basic standard for grant of a petition for reconsideration established by the Commission. However, PECO argues that the Commission has overlooked two important considerations.

First, PECO maintains that the implementation of smart meter technology pursuant to Act 129 has been deemed reasonable and in the public interest, and this mandate should not be re-examined. Petition at 7. As part of this claim, PECO argues that accommodating Ms. Kreider would result in the creation of a “parallel system of analog meters.” *Id.* This supposedly overlooked issue was considered by the Commission in its September 3, 2015 Order. The Order cites to Act 129 repeatedly, and there is no indication in the Order that the mandates under Act 129 are being re-examined or even questioned. Likewise, the Commission is not compelling PECO to turn its back on its obligations under Act 129 to create a parallel system of analog meters. The Commission’s decision to allow evidence of health effects to be presented at hearing is based on its authority under Section 1501 related to the safety of smart meters. PECO’s obligations to install smart meters pursuant to Act 129 was not overlooked by the

Commission in its Order. *See*, Order at 17. Therefore, this is not an overlooked legal issue that warrants reconsideration of the September 3, 2015 Order.

In addition, PECO argues that the Order is inconsistent with “the unbroken precedent of the Commission dismissing claims based on specific health effects allegedly experienced by customers after the installation of AMI meters.” Petition at 7. This is somehow presented as a new or novel argument or a consideration that has been overlooked by the Commission. Nothing could be further from the truth. The claim that there is precedent that requires the Commission to dismiss Kreider’s case without a hearing was expounded on extensively in multiple PECO filings in this case, including the Petition for Interlocutory Review. *See*, e.g., PECO Brief in Support of Petition for Interlocutory Review at 7. PECO has argued repeatedly that the Commission has dismissed a number of cases on the premise that there are no opt-outs to universal AMI meter installations. In response to these recycled contentions, the Commission specifically distinguished cases cited by PECO. Order at 15-16. The Commission found that cases such as *Larson*, *Morgan* and *Thomas* were distinguishable from the Kreider matter because neither of those cases alleged violations of Section 1501, as Kreider and *amicus* have done. Again, this argument is not new and the Commission did not overlook this legal question.

The Petition for Reconsideration filed by PECO is improper because the Company has not presented any new or novel arguments, not previously heard. There are no changes in circumstances or legal premises that have not been considered by the Commission. Therefore, the Commission should deny the Petition.

B. Universal Deployment of Smart Meters That Make Vulnerable Customers Sick Cannot Be Said to Constitute Safe and Reasonable Utility Service

In its Petition for Reconsideration, PECO misconstrues legislative and Commission pronouncements of smart meter deployment and argues that the compulsory and universal installation of AMI meters has been found to be safe and reasonable by the General Assembly and the Commission. In support of this questionable proposition, PECO claims that the General Assembly stated that the installation of smart meters is in the public interests and is intended to enhance health and safety in the Commonwealth. Petition at 8. However, the legislature did not make any finding regarding whether smart meter emissions are harmful to vulnerable customers. Whether smart meters are safe can only be determined after facts are presented and the claims of the parties are examined. For this reason, it is imperative for the Commission to deny the Petition for Reconsideration – because it will allow the Commission to make a definitive finding about whether PECO’s AMI meters are safe and whether the universal compulsory installation of these devices is consistent with Section 1501. Also, a determination as to the safety and reasonableness of AMI meters, as it pertains to Kreider or any other complainant claiming violations of Section 1501, will require a thorough review of evidence of health effects and medical indications. This can only be done in the context of a hearing where the Complainant can avail herself of the due process right to state her case.

PECO’s claim that universal deployment of AMI meters is consistent with Section 1501, even where a customer’s health is negatively affected, is unsupported and should be rejected. It should be clear that the Commission has not made a finding that deploying a smart meter in accordance with Act 129 is, in every instance, safe and reasonable. Contrary to PECO’s claims, the Commission has not had an opportunity to reconcile the mandate of Act 129 and the Commission’s obligation to ensure that utility devices are not harming customers in violation of

Section 1501. Based on the facts adduced at the hearing in the Kreider matter, the Commission will be able to make a reasoned conclusion on the questions of whether a meter that makes a customer sick should be installed in the customer's premises simply because Act 129 requires universal deployment of AMI meters. Absent an evidentiary hearing, the Commission will not have the facts necessary to make that determination in the Kreider case. *See, Popowsky v. PUC*, 706 A.2d 1197 (Pa. 1997) (PUC decisions must be supported by substantial evidence).

C. A Hearing Is Necessary to Elicit Evidence Necessary for the Commission to Determine Whether PECO's Compulsory Installation of a Smart Meter in a Vulnerable Customer's Home Is Safe and Reasonable

In its Petition, PECO argues that a hearing in the Kreider case is unnecessary because the law does not allow for the relief requested by Complainant in this case. Petition at 11. In support of this dubious contention, PECO cites a bevy of opt-out cases that have been dismissed on preliminary objections. *See*, Petition at 12, fn. 4. The claim that Complainant Kreider is not legally entitled to relief is contradicted by the applicable law. First, the Commission correctly distinguished Complainant's case from other opt-out cases cited by PECO in its September 3, 2015 Order. In its Order, the Commission found that the Kreider matter "is distinguishable from the prior consumer complaint cases, because Ms. Kreider has raised factual averments regarding the specific health effects she has experienced after the smart meter was installed outside of her bedroom." Order at 15-16. Also, the Commission ruled that "Ms. Kreider has alleged material facts relating to a potential violation under Section 1501 of the Code for unsafe and/or unreasonable service to which she can personally testify and provide documentary evidence." *Id.* at 16. In the cases cited by PECO where Complaints were dismissed despite averments of health effects, the Complainant did not allege a violation of Section 1501 as Kreider has done. The Commission has correctly concluded that the Kreider matter is different than all the other

opt-out cases cited by PECO. Therefore, PECO cannot rely on the dismissed opt-out cases to argue that Ms. Kreider is not entitled to relief as a matter of law. The Commission has already rejected that position and should do so again.

PECO relies on broad generalizations to the effect that the Commission's "Act 129 regulations are consistent with Section 1501" to argue that the Commission should not investigate whether universal deployment of smart meters might cause an unsafe condition for some vulnerable customers. *See*, Petition at 15. However, this argument is tantamount to advocating that the Commission should abdicate its responsibility to ensure safe and reasonable service. From PECO's callous point of view, the Commission should turn a blind eye to complaints about the adverse health effects of smart meters simply because Act 129 "is consistent with Section 1501." The Commission should reject the notion that universal deployment of smart meters is an overriding directive that trumps the agency's obligation to examine any possible dangerous condition or medical harm to customers. Section 1501 compels the Commission to investigate harmful conditions created by the installation of dangerous utility equipment. *See, e.g. Young v. National Fuel Gas Distribution Corp.*, Docket No. C-2008-2059233, 2009 Pa. PUC LEXIS 940 (Initial Decision issued Feb. 6, 2009); *PUC BIE v. West Penn Power Co.*, Docket No. C-2012-2307244 (Order issued Jan. 9, 2014).

There is nothing in Act 129 that compels PECO to violate the safe service provisions of Section 1501 in order to accomplish the goals of the smart meter legislation. Act 129 is not intended to be implemented in a manner that ignores or contravenes the mandate of Section 1501 for utilities to provide safe, reasonable and adequate service. If implementation of Act 129 leads a utility to render unsafe or unreasonable service, the Commission must decide what changes (or accommodations) the utility must make in order to comply with Section 1501. This is the issue

that is raised by the Kreider and Murphy complaints, and the Commission must reaffirm its ruling that these complainants should have an opportunity to be heard on that question in accordance with due process. Evidence of disability and negative health effects is crucial to the determination of whether PECO is providing unsafe service in violation of Section 1501. If PECO succeeds in limiting the rights of complainants to present their case, it will be impossible for the Commission to determine whether PECO's smart meters create an unsafe condition. The Commission should allow this matter to proceed to hearing to consider the relevant evidence and to fairly adjudicate the claims in this matter.

III. CONCLUSION

Based on the foregoing, Amicus Laura Sunstein Murphy respectfully requests that the Commission deny PECO's Petition for Reconsideration in this matter, and grant any other relief the Commission deems just and proper under the circumstances.

Respectfully submitted,



Edward G. Lanza, Esq.
THE LANZA FIRM, LLC
P.O. Box 61336
Harrisburg, PA 17106-1336
(717) 576-2696 (phone)
(717) 798-9897 (fax)
ed@lanzafirm.com

Counsel for Amicus
Laura Sunstein Murphy

Date: November 3, 2015

CERTIFICATE OF SERVICE

I hereby certify that this day I served a copy of the *Amicus Curiae* Brief upon the persons listed below in the manner indicated in accordance with the requirements of 52 Pa. Code Section 1.54.

Via Electronic Mail

Hon. Darlene Heep
Administrative Law Judge
Pennsylvania Public Utility Commission
801 Market Street
Philadelphia PA 19107
dheep@pa.gov

Hon. Jeffery A. Watson
Administrative Law Judge
Pennsylvania Public Utility Commission
301 5th Avenue, Suite 220
Pittsburgh, PA 15222
jeffwatson@pa.gov

Ward L. Smith, Esq.
PECO Energy Company
2301 Market Street / S23-1
P.O. Box 8699
Philadelphia, PA 19101-8699
Ward.Smith@exeloncorp.com

Office of Special Assistants
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 3rd Floor, 9 East
Harrisburg, PA 17120
ra-OSA@pa.gov

Susan Kreider
160 W. Queen Lane
Philadelphia, PA 19144
Susan.Kreider@uphs.upenn.edu

Laura Sunstein Murphy
1191 Telegraph Road
West Chester, PA 19380
sunmurphy@verizon.net

Date: November 3, 2015



Edward G. Lanza, Esq.