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April 20, 2016

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, Second Floor
Harrisburg, PA 17120

RE: Maria Povacz v. PECO Energy Company
Docket No. C-2015-2475023

Dear Ms. Chiavetta:

Enclosed for filing with the Commission is PECO Energy Company's Motion *In Limine* for Immediate Procedural Schedule Adjustments to Address the Failure of Complainant to File Written Direct Testimony for Dr. Hanoch Talmor and Maria Povacz.

Very truly yours,

A handwritten signature in black ink, appearing to read "Ward L. Smith".

Ward L. Smith
Counsel for PECO Energy Company

WS/ab
Enclosure

cc: Christopher P. Pell, ALJ
Darlene D. Heep, ALJ
Ed Lanza, Esquire

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Maria Povacz

v.

PECO Energy Company

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:
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Docket No. C-2015-2475023

NOTICE TO PLEAD

Pursuant to 52 Pa. Code § 5.61, you are hereby notified that, within 20 days, you must answer the enclosed Motion *In Limine* for Immediate Procedural Schedule Adjustments to Address the Failure of Complainant to File Written Direct Testimony for Dr. Hanoch Talmor and Maria Povacz. Please note, however, that PECO has requested that this matter be set for immediate oral argument. You must provide a full copy of any objection or answer to counsel for PECO. If you serve an objection or answers, you may not file the substance of such objection or answer with the Commission or the Administrative Law Judge; however, you must file a certificate of service with the Secretary of the Pennsylvania Public Utility Commission with the Administrative Law Judge, evidencing the service of such objection or answers on PECO.

File with:

Rosemarie Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, Second Floor
Harrisburg, PA 17120

With a copy to:

Ward L. Smith
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Dated at Philadelphia, PA, April 20, 2016



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**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Maria Povacz	:	
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v.	:	C-2015-2475023
	:	
PECO Energy Company	:	

**PECO Energy Company's
Motion *in Limine* for Immediate Procedural Schedule Adjustments to Address the Failure of
Complainant to File Written Direct Testimony for Dr. Hanoch Talmor or Maria Povacz**

In Prehearing Order #1, Ordering Paragraph 4, Your Honors ordered:

That the parties have agreed to and will adhere to the following exchange of
written testimony schedule:

Monday, April 18	--	Povacz Direct
Monday, May 9	--	PECO Rebuttal
Tuesday, May 31	--	Povacz Surrebuttal

On April 18, 2016, PECO was served with the written prefiled direct testimony of Dr. Martin Pall. No other testimony was filed. Notably, no testimony was filed from either Ms. Povacz's treating physician Dr. Hanoch Talmor, M.D., or from Ms. Povacz herself.

On April 19, 2016, counsel for PECO contacted Ms. Povacz's counsel, Mr. Ed Lanza, and inquired whether Mr. Lanza intends to present direct testimony from Dr. Talmor and Ms. Povacz. Mr. Lanza stated that he does intend to present direct testimony from these two witnesses – verbally, on the day of hearing. He also generally stated his position that neither Dr. Talmor nor Ms. Povacz will present expert testimony, and that Ordering Paragraph 4, set forth above, applies only to expert testimony.

PECO disagrees, and believes that if Complainant is allowed to proceed on the basis set forth above, the procedure in this case will be substantially disrupted, to the detriment of the orderly development of the record in this case and PECO's rights. Specifically, PECO strongly believes that Dr.

Talmor must be offered as an expert and thus, even under Complainant's professed understanding of Ordering Paragraph 4, Complainant was required to serve Dr. Talmor's written prefiled direct testimony on April 18. Moreover, PECO does not agree that Ordering Paragraph 4 was (or could be) limited to only expert testimony – it applies to all testimony. Attempting to apply it to only some witnesses creates an unworkable hybrid of partial written and partial verbal direct testimony that cannot work under the current procedural schedule.

PECO establishes both of those propositions below. In the final section of this Motion, PECO proposes alternative procedures to address this unfortunate situation and allow the continued orderly development of the record in this proceeding.

PECO's proposed schedule adjustments must take place immediately in order to be effective. PECO therefore requests that Your Honors schedule telephonic oral argument on this Motion at the earliest possible date to hear Complainant's response and make a ruling on this Motion.

1. Dr. Hanoch Talmor is not a lay witness and he must be offered as an expert witness.

The distinction between lay witnesses and expert witnesses is set forth in Pennsylvania Rules of Evidence 701 and 702, 225 Pa. Code §§ 701 and 702. The distinction primarily is whether a witness has specialized knowledge that allows him to offer opinion testimony – a lay witness generally may not offer testimony in the form of an opinion except in limited circumstances; a qualified expert generally may offer opinions if they meet certain criteria set forth in the Rules of Evidence. In their entirety, the relevant Rules state:

Rule 701. Opinion Testimony by Lay Witnesses.

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.

Rule 702. Testimony by Expert Witnesses.

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.

It is important to realize that, under these Rules, if a witness's opinion is "based on scientific, technical, or other specialized knowledge," it *cannot* be offered as lay testimony – such testimony is, by definition, expert testimony.

Exhibit 3 to the Amended Complaint is an April 9, 2015 letter from Dr. Talmor that states as follows:

Mrs. Povacz is suffering from severe sensitivity to electromagnetic fields. This includes radio frequencies emitted from Smart Meters, WiFi, etc. Installing a smart meter on her house or in its vicinity is likely to cause her severe health problems. In conclusion: she should not have a Smart meter installed on or around the house. (emphasis added).

The italicized sentence is the precise issue that is at the heart of this hearing. (Indeed, the presence of that statement in Dr. Talmor's letter is arguably the reason this docket was set for hearing.) And it is a statement that can only be proved, or disproved, by expert opinion testimony. To render such an opinion requires the witness to review scientific research and data and to synthesize it using a methodology that is generally accepted in the witness's relevant field¹ -- and under Rules 701 and 702,

¹ PECO notes that PECO intends to cross-examine Dr. Talmor on the question of whether his opinions were formed using a methodology that is generally accepted in his relevant field. If PECO is able to establish that his opinion

any opinion testimony that is based upon specialized knowledge (such as medical knowledge) can only be offered by an expert, not a lay person.

Moreover, at the December 15, 2015 prehearing conference in this matter, Administrative Law Judge Vero *already ruled that Dr. Talmor is an expert witness in this proceeding*. At transcript pages 29-30, the following colloquy took place:

MR. SMITH: And I think the doctor that they are talking about [Dr. Talmor] resides in Florida, so I don't know if this is going to affect how you approach on this.

MR. LANZA: Again, the idea was to have him testify over the phone and again, he is going to testify as to this Complainant's symptoms; not as to what does EMF do to the world, so It is not expert testimony from that perspective.

JUDGE VERO: You are not proposing him as expert? Just as a witness?

MR. LANZA: As the Complainant's doctor.

MR. SMITH: That is expert. It is by definition an expert.

JUDGE VERO: And you want him to provide just layman's testimony?

MR. SMITH: It is not possible for a doctor to provide layman's testimony. More to the point Your Honor, if he is not an expert, he is not allowed to offer opinions.

JUDGE VERO: If you are bringing him as an expert to testify to medical issues, then I can foresee a whole lot of cross examination of that witness as to how he reached certain conclusions. Anyway, you need to think it through and look at the Commission's regulations in terms of expert witnesses and I am only willing to allow him to appear via telephone because I understand the cost involved in bringing someone here and also the cost with preparing written testimony ***but he is by definition an expert witness.***²

was not formed using such a methodology, PECO will move to strike the testimony altogether, or alternatively that it should be given no weight whatsoever.

² PECO also notes that, at the March 15, 2016 prehearing conference, Mr. Lanza made a statement that effectively admits that Dr. Talmor is an expert witness. When asked by Your Honors to identify Complainant's witnesses, Mr. Lanza stated (pp. 55-56) that: "Your Honor, because of the status of the case and not having an amended complaint here filed, Ms. Povacz is not prepared at this time to really name witnesses, who the witnesses are, and how many witnesses, not to complicate this hearing, but it is clear from the Commission's orders in the Kreider case that *the Commission seems to want to require the presentation of expert witnesses. To the extent that it is appropriate so we would foresee that we would need a medical witness and some sort of a technical witness to prove the case.*" (emphasis added). Dr. Talmor is the medical witness to be named later who, on March 15, 2015, Mr. Lanza discussed under the general heading of "expert witnesses."

If Complainant wished to challenge that ruling and treat Dr. Talmor as a lay witness, she should have filed a Motion requesting to do so -- prior to the date for filing testimony.

However, Complainant did not file such a Motion, and we are thus faced with three primary potential scenarios at hearing, none of which will allow the orderly development of the record in this proceeding.³

First, Complainant could put Dr. Talmor on the stand and ask him to support his previously stated opinion re health causation (that installing a smart meter is likely to cause Ms. Povacz severe health problems). In that case, his testimony would clearly be expert testimony under the Rules of Evidence and ALJ Vero's ruling -- and it would be offered in direct violation of Ordering Paragraph 4. PECO (and Your Honors) would hear Dr. Talmor's opinion, and the basis for his opinion, at hearing that day, and be required to respond to it "on the fly" during the hearing, using hastily constructed cross-examination questions and oral rejoinder testimony developed during the hearing itself. This is precisely the scenario that Ordering Paragraph 4 was designed to avoid, and allowing this would cause the record to be developed in a disorderly fashion.

It is no answer to say that PECO can serve discovery to determine the basis for Dr. Talmor's opinion, and respond to the information that it obtains through discovery. In the agreed-upon schedule, PECO has to file its rebuttal testimony on May 9. Even if PECO successfully discovers Dr. Talmor's opinion via discovery,⁴ at the time PECO files its written rebuttal testimony, Your Honors would not have any testimony from Dr. Talmor before you. Thus, in order to "rebut" that testimony, PECO would need

³ It is no answer to say that we should wait until the day of hearing to see the scope of Dr. Talmor's testimony. As set forth in detail in text, every potential scope of testimony will disrupt the orderly development of the record.

⁴ PECO notes that this process would prejudice its rights and preparation. Under the agreed-upon schedule, PECO has 21 days to review and respond to expert testimony. If Complainant is allowed to skip the step of filing written pre-filed testimony, PECO's time to determine the expert opinion of Dr. Talmor will be decreased by more than 50%, even under the accelerated discovery rules in place in this proceeding.

to first state Dr. Talmor's opinion (as determined from the discovery answers) and then rebut it – meaning that PECO would effectively have to write Dr. Talmor's direct testimony for him. This is simply not workable.

The second scenario is that Complainant could put Dr. Talmor on the stand and ask him to support the introduction of his April 9, 2015 letter into evidence – and then studiously avoid asking any questions about the health causation sentence in that letter. In that case, Dr. Talmor's proffered expert opinion would still be part of the evidentiary record – but without any basis or rationale for the testimony. PECO (or Your Honors) would thus be forced to ask questions about the basis for this expert causation opinion – and again, PECO and Your Honors would hear Dr. Talmor's opinion, and the basis for his opinion, at hearing that day, and PECO would be required to respond to it "on the fly" during the hearing. This approach is thus just as disorderly as the first scenario. This kind of "back door" expert testimony, in which the witnesses's core opinion on a key issue is stated in the complaint, but then actual testimony on that core issue is withheld until cross-examination, should be seen for what it is (sandbagging), and not allowed.

The third scenario is that Complainant could put Dr. Talmor on the stand, never discuss his April 9, 2015 letter, and choose not to offer the letter into evidence – that is, to never offer any evidence from Dr. Talmor regarding causation. That approach virtually guarantees an incomplete record in this proceeding. In this scenario, the document that is the very genesis of this case, and which is appended to the Amended Complaint as support for the key concept that lead to this hearing, would never be discussed on the record, never supported by its author, and never entered into the record. That approach would result in a confused record, in which the specific allegations made in the complaint are never developed or supported at the evidentiary hearing. Moreover, that approach, quite frankly,

would mock the hearing process by using one set of evidence to justify a hearing, and then withdrawing that evidence from further consideration. It should not be allowed.⁵

In the final section of this Motion, PECO will offer an alternative that it believes will allow this proceeding to continue on its current schedule without significant disruption or prejudice, notwithstanding Complainant's failure to properly serve written pre-filed testimony from Dr. Talmor.

- 2. The April 18 testimonial exchange date was not limited to expert testimony, it applied to all testimony. Complainant should have filed written testimony from Ms. Povacz on that date.**

Ordering Paragraph 4 does not draw any distinction between expert testimony and lay testimony, it simply states that the parties "will adhere to the following exchange of written testimony schedule."

PECO recognizes that discussions of written, pre-filed testimony normally focus on expert testimony. But having decided to use written, pre-filed testimony for the expert witnesses, at that point in became unworkable to use verbal, day-off testimony for Ms. Povacz – because the expert witnesses must, in part, respond to the testimony of Ms. Povacz.

PECO highlighted the difficulty associated with this hybrid approach in both prehearing conferences in this case. In December, the following colloquy occurred (p. 29):

JUDGE VERO: No, this is where we are at this juncture. We are going to decide whether or not we are going to proceed with preserved direct testimony or live testimony or a hybrid. Never witnessed one where one party provides direct testimony - not even in person but via telephone and the other provide direct testimony preserved and –

MR. SMITH: It wouldn't work because we have to respond to their testimony. We can't hear it that day and then file our testimony to respond to it several weeks ahead of time. It just can't work. We have to hear their testimony first and then respond to it.

⁵ There is, of course, a fourth alternative – Dr. Talmor could fail to appear, either due to a ruling from Your Honors or because the Complainant withdraws him as a witness. PECO notes that, in that case, there will be no expert evidentiary record of any sort to establish the key claim that Ms. Povacz has "severe sensitivity to electromagnetic fields." In that case, there would be no need to proceed to hearing at all.

JUDGE VERO: You cannot respond. Your response would be – because you are not filing rebuttal; right? You only want to file direct and your direct will not be in response. It would be -

MR. SMITH: It would absolutely be in response to the claims that they are making. If they make a certain type of claim we will respond to it. If they don't make that claim, of course we won't respond to it.

At the March 15, prehearing conference, PECO made the same point (pp. 59-60):

MR. SMITH: We had a discussion in the Povacz's prehearing conference in December about the possibility of using pre-filed written testimony. I want to make sure that what we said in that case is spread on the record here as well. We respond to what is said by the complainant, and so we can't have a simultaneous exchange of written testimony, because we have to read their testimony and respond to it, and we can't have us going first obviously because they have the burden of proof, so we need to have the opportunity -- we will be preparing our general testimony in the interim, obviously, but we need an opportunity to read their testimony and then analyze it and reply to it in our direct testimony.

Complainant's failure to file Ms. Povacz's testimony creates precisely this sequencing problem, in at least three different ways.

First, and most obviously, is the testimony of PECO's witness Brenda Eison. The purpose of Ms. Eison's testimony is to review PECO's company records and respond to any claims made by Ms. Povacz related to, for example, PECO's practices and procedures. For instance, at the December prehearing conference, there was extensive discussion of a potential claim that PECO should have treated the letter from Dr. Talmor as a medical certificate. If that claim is made by Ms. Povacz and supported by testimony,⁶ Ms. Eison would respond to it. But on May 9, when PECO's written rebuttal testimony is due, there will be no way for Ms. Eison's testimony to address that issue – because Ms. Povacz has not yet made her case on that issue, and therefore there is nothing for PECO to rebut. Under Complainant's approach, PECO and Your Honors would hear about these issues for the first time on the day of hearing - and then PECO would need to elicit verbal testimony from Ms. Eison to respond to and rebut Ms.

⁶ PECO notes that this issue was not included in the Amended Complaint.

Povacz's testimony. That is clearly not the procedure that was envisioned when the schedule for exchanging written testimony was set.

It is no answer to say that PECO can pursue discovery about Ms. Povacz's testimony – although PECO will certainly do that. Even if PECO has extensive discovery answers in hand by May 9, Your Honors will not have any testimony from Ms. Povacz in front of you, and PECO will not have anything to which it can respond. This approach would require PECO to state Ms. Povacz's position (as derived from discovery answers) and then rebut it – effectively, PECO would have to write her direct testimony for her, present it, and then rebut it. This is obviously unworkable.

The second discontinuity will occur if Ms. Povacz wishes to discuss the science on radiofrequency fields and health – which, presumably, she does wish to do.⁷ The sequence of written testimony exchange was designed so that May 9 surrebuttal could comprehensively respond to all of Complainant's direct testimony on health issues, but without Ms. Povacz's health testimony, if any, that is not possible. (Again, it does not work for PECO to seek discovery of Ms. Povacz's potential health testimony and then respond to that presumed testimony on May 9, because that would require PECO to first write, then rebut, Ms. Povacz's health testimony.) This means that, at a minimum, PECO may need to put on extensive oral rejoinder testimony to Ms. Povacz's health claims, which will be heard by Your Honors for the first time on the day of hearing. That is obviously not what was contemplated when the parties agreed to exchange written testimony, but it is the unfortunate consequence of Complainant's actions.

⁷ PECO notes that, if Ms. Povacz wishes to offer such testimony as a lay person, then under Rule 701 she cannot offer her opinion as to whether radiofrequency fields will affect her health because reaching a conclusion on that issue would require the exercise of specialized expertise – and there has been no demonstration that Ms. Povacz has that special expertise. If, on the other hand, Ms. Povacz wishes to offer such testimony on an expert basis, then the deadline for submitting that testimony, even under Complainant's view of Ordering Paragraph #4, was April 18, 2016.

The third discontinuity will occur if Ms. Povacz attempts to put on testimony regarding how radiofrequency transmissions “travel into the living areas of Complainant’s home through the wiring and appliances inside the home.” In Complainant’s Motion to Compel, she states (p. 3) that it is her position that “some of the harmful emissions from PECO’s smart meters travel into the living areas of Complainant’s home through the wiring and appliances in the home.” There was no testimony on that issue from Dr. Pall. Given that Ms. Povacz continues to press that issue through her Motion to Compel, it is reasonable to assume that she intends to present that position in her direct testimony.⁸ The exchange of written testimony was supposed to allow PECO the opportunity to have its two expert witnesses in this field – Glenn Pritchard and Dr. Christopher Davis – respond to such claims on May 9. Under Complainant’s approach, everyone would hear the testimony establishing that position for the first time, at hearing. (Again, it does not work for PECO to seek discovery of Ms. Povacz’s potential “travel over the wires” testimony and then respond to that presumed testimony on May 9, because that would require PECO to first write, then rebut, Ms. Povacz’s testimony.)

In sum, Complainant’s position that the exchange of written testimony does not apply to the Complainant herself is not consistent with Ordering Paragraph 4, and if allowed will create create substantial disruption of the orderly development of the record in this proceeding.

⁸ As with the expected health testimony discussed earlier, if Ms. Povacz wishes to offer such testimony as a lay person, then under Rule 701 she cannot offer her opinion as to whether radiofrequency fields will travel along wires into her home, because reaching a conclusion on that issue would require the exercise of specialized expertise – and there has been no demonstration that Ms. Povacz has that special expertise. If, on the other hand, Ms. Povacz wishes to offer such testimony on an expert basis, then the deadline for submitting that testimony, even under Complainant’s view of Ordering Paragraph #4, was April 18, 2016.

3. At a minimum, revisions to the procedural schedule are necessary to address this issue.

PECO respectfully submits that, based on the above, it could reasonably request that Complainants be prohibited from presenting testimony by Ms. Povacz or Dr. Talmor⁹ -- and Your Honors could reasonably grant that relief. The disruptions and discontinuities described above were easily discernible -- they were specifically discussed at both prehearing conferences -- and Complainant should have taken steps to avoid them. However, PECO is not making such a request at this time.¹⁰

A second reasonable alternative is to move the hearing date, and then develop a new schedule for the exchange of testimony. Again, PECO is not making such a request at this time.¹¹

Short of those more extreme alternatives, revisions to the procedural schedule can resolve most of the issues raised above. PECO proposes the following options:

Option 1: All written testimony:

- Wednesday, April 27 -- Written Direct Testimony by Ms. Povacz and Dr. Talmor.
- Wednesday, May 18 -- PECO Rebuttal Testimony from all witnesses (this would replace the existing May 9 due date)
- Tuesday, May 31 -- Povacz Surrebuttal from all witnesses

The hearing would then occur as scheduled and anticipated, with all witnesses being made available for cross-examination limited oral rejoinder, with the following sequence:

The hearing would then follow this sequence:

- (1) Cross of written direct and surrebuttal testimony of Ms. Povacz, Dr. Talmor and Dr. Pall.
- (2) Oral rejoinder testimony of Ms. Eison; cross of her written direct and oral rejoinder.

⁹ Of course, if testimony from those two witnesses is prohibited, Ms. Povacz would not be able to sustain her burden of proof in this case, and no hearing would be needed at all.

¹⁰ If schedule adjustments similar to those proposed by PECO in text are not reached, PECO reserves the right to make such a request.

¹¹ But PECO reserves its rights to make such a request, if needed.

- (3) Oral rejoinder testimony of Mr. Pritchard; cross of his written direct and oral rejoinder.
- (4) Oral rejoinder testimony of Dr. Tucker; cross of his written direct and oral rejoinder.
- (5) Oral rejoinder testimony of Dr Israel. Pritchard; cross of his written direct and oral rejoinder.
- (6) Any additional oral testimony, with cross.

Option 2: Oral testimony from Ms. Povacz only. PECO strongly prefers Option 1. However, if Your Honors wish to give Ms. Povacz (but not Dr. Talmor) the opportunity to present oral direct testimony at hearing, PECO proposes the following alternative schedule:

- Wednesday, April 27 – Written Direct Testimony Dr. Talmor.
- Wednesday, May 18 – PECO Rebuttal Testimony from all witnesses except Brenda Eison
(this would replace the existing May 9 due date)
- Tuesday, May 31 -- Povacz Surrebuttal from Dr. Pall and Dr. Talmor

The hearing would then follow this sequence:

- (1) Oral direct testimony of Ms. Povacz; cross of same.
- (2) Cross of written direct testimony of Dr. Talmor and Dr. Pall.
- (3) Oral rebuttal testimony of Ms. Eison; cross of same.
- (4) Oral rejoinder testimony of Mr. Pritchard; cross of his written direct and oral rejoinder.
- (5) Oral rejoinder testimony of Dr. Tucker; cross of his written direct and oral rejoinder.
- (6) Oral rejoinder testimony of Dr Israel. Pritchard; cross of his written direct and oral rejoinder.
- (7) Any additional oral testimony, with cross.

For this option, the oral rejoinder testimony of PECO witnesses would be longer, because they would be responding to the oral testimony of Ms. Povacz at hearing. In addition, Ms. Eison's initial testimony would be oral. **This Option thus may require an additional day of hearings.**

If neither of the above options are adopted, then PECO will request to have the hearing delayed, or to prohibit testimony from Ms. Povacz and Dr. Talmor.

Respectfully submitted,

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April 20, 2016

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