**BEFORE THE**

**PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility Commission, *et al.* : R-2016-2537349, *et al*.

:

v. :

:

Metropolitan Edison Company :

**INTERIM ORDER**

**ON MOTION TO STRIKE AND MOTION TO COMPEL**

On April 28, 2016, Metropolitan Edison Company (Met-Ed), filed Supplement No. 23 to Met-Ed’s Tariff Electric – Pa. P.U.C. No. 52 proposing an annual increase in rates of $140.2 million (9.08%), with a proposed overall rate of return of 8.14% and an effective date of June 27, 2016. By order entered June 9, 2016, the Commission suspended the filing pursuant to Section 1308(d) of the Public Utility Code, until January 27, 2017, unless permitted by Commission Order to become effective at an earlier date.

A prehearing conference was held on Friday, June 17, 2016, at which the parties agreed to a schedule for the service of written testimony and for the commencement of evidentiary hearings to begin on September 6, 2016.

By order dated July 13, 2016, the Environmental Defense Fund (EDF) was granted leave to intervene over the objection of Met-Ed.

By cover letter dated July 22, 2016, counsel for the Environmental Defense Fund (EDF) filed and served the direct testimony of Michael Murray and Paul Alvarez. The subject of Mr. Murray’s testimony is to advocate a Commission order which directs Met-Ed:

as part of its advanced metering infrastructure (“AMI”) deployment to embrace customer and authorized third party access to smart meter data for energy management services so customers can receive the significant energy savings made possible by advanced metering technology.[[1]](#footnote-1)

The purpose of Mr. Alvarez’s testimony is to make recommendations relating to grid modernization related to integrated Volt/VAR control and integrated resource planning.[[2]](#footnote-2)

On August 15, 2016, Met-Ed filed a motion to strike the direct testimony on the grounds that the issues addressed by the testimony are beyond the scope of a base rate case. EDF filed a response to the motion on August 18, 2016, taking the position that a rate case “brings into play all the terms and conditions of the utility’s service” and that the recommendations made in the testimony would reduce Met-Ed’s cost for delivering utility service and reduce greenhouse gas emissions.

Also on August 18, 2016, EDF filed a motion to compel answers to discovery regarding interrogatories which relate to voltage optimization.[[3]](#footnote-3) On August 22, 2016, Met-Ed filed an answer to the motion to compel.

Both motions are premised on the same issue and will be considered in tandem. As explained more fully below, Met-Ed’s motion to strike will be granted and EDF’s motion to compel will be denied.

The Commission regulations clearly state that the presiding officer controls the receipt of evidence.[[4]](#footnote-4) The presiding officer will actively employ these powers to direct and focus the proceedings consistent with due process.[[5]](#footnote-5) Further, related to the admissibility of evidence, the Commission in 52 Pa.Code § 5.401(a) indicates that relevant and material evidence is admissible subject to objections on other grounds. However, evidence will be excluded if:

(1) It is repetitious or cumulative.

(2) Its probative value is outweighed by:

(i) The danger of unfair prejudice.

(ii) Confusion of the issues.

(iii) Considerations of undue delay or waste of time. [[6]](#footnote-6)

Before examining the substance of each party’s arguments, I note that the sponsoring party of the contested direct testimony is unclear. The cover letter stating that the testimony is served on behalf of EDF, but both witness statements are labelled as being presented on behalf of EDF and Citizen’s for Pennsylvania’s Future (PennFuture). Paul Alvarez states that his testimony is offered on behalf of EDF alone, but Michael Murray states that he is testifying on behalf of both EDF and PennFuture. There is nothing in any of the documentation related to the provenance of the written testimony to verify that it is sponsored in any way by PennFuture: only counsel for EDF signed the certificate of service. Therefore the testimony shall be treated as proffered on behalf of EDF alone.

In its motion to strike and answer to the motion to compel, Met-Ed contends that the issues addressed by the testimony involve complex matters that are better considered in other types of Commission proceedings where they can be fully considered, rather than in the compressed procedure afforded by a Section 1308(d) base rate proceeding.[[7]](#footnote-7) Specifically, the matters raised in Mr. Murray’s testimony regarding access to energy usage data by customers and/or third parties are more thoroughly dealt with on a state-wide basis as a matter of regulation and policymaking. Met-Ed also states that nothing in its current rate proposal pertains to the matters raised in Mr. Murray’s testimony. Met-Ed points to several Commission initiatives at other dockets that have involved data access issues on a state-wide basis. Met-Ed finally points to similar testimony that EDF attempted to produce in PPL’s base rate proceeding that was excluded by ALJ Susan Colwell because it was beyond the scope of a base rate proceeding.

In response, EDF contends that the “just and reasonable” standard by which proposed rates are considered encompasses the issues raised in Mr. Murray’s testimony. EDF distinguishes the testimony at issue in the PPL case because Mr. Murray’s testimony addresses how Met-Ed’s customers should be able to access their own usage data, not just how that data should be accessed by third parties.

The data access issues raised by Mr. Murray in his direct testimony are certainly deserving of consideration by electric distribution companies and by the Commission. Indeed, some of the citizens who testified at public input hearings expressed an interest in greater access to usage data in order to control their consumption. While I do not necessarily agree with Met-Ed that the only appropriate proceeding to consider the proposals is in a state-wide context, a 1308(d) base rate proceeding is not the broad based proceeding where Mr. Murray’s recommendations can be fully considered and integrated into Met-Ed’s tariff rules and rates within the short time period permitted by the Public Utility Code. Although EDF makes the argument that broader access to usage data by customers will ultimately reduce Met-Ed’s cost of service, Mr. Murray’s testimony does not provide that linkage. Finally, EDF has not explained in its response to Met-Ed’s motion why other Commission proceedings do not provide an adequate forum to give mindful consideration to its proposals. Therefore, the direct testimony of Michael Murray is stricken.

Similarly, the issues raised in Mr. Alvarez’ testimony regarding voltage optimization and integrated resource planning are also better addressed in other Commission proceedings. While worthy of consideration by Met-Ed and the Commission, Met-Ed’s current rate proposal do not include specific tariff rules or rate changes related to voltage optimization. EDF points to general language in Met-Ed’s tariff which relates to service continuity. But this general language is not sufficient to broaden the area of appropriate inquiry in a base rate proceeding. The long-term planning issues implicated by Mr. Alvarez’ testimony are generally addressed in a distribution company’s energy efficiency and conservation plan which is filed pursuant to Act 129.[[8]](#footnote-8) The costs related to energy efficiency and conservation are specifically recovered by an adjustment clause pursuant to Section 1307 of the Public Utility Code,[[9]](#footnote-9) rather than in a base rate proceeding. EDF does not explain why an Act 129 proceeding or other vehicle provided by the Public Utility Code for examination of the subjects raised by Mr. Alvarez are inadequate for a full examination of the recommendations proposed by the testimony. Therefore, the testimony of Paul Alvarez is stricken as well.

EDF filed its written testimony with the Commission’s Secretary’s Bureau.[[10]](#footnote-10) However, the Commission’s rules provide that only a certificate of service is to be filed with the Secretary’s Bureau:

Written testimony shall be served upon the presiding officer and parties in the proceeding in accordance with the schedule established by this chapter. At the same time the testimony is served, a certificate of service for the testimony shall be filed with the Secretary. Pre-served testimony furnished to the court reporter during an adjudicatory proceeding before the Commission shall be filed with the Commission as required under §  5.412a (relating to electronic submission of pre-served testimony).[[11]](#footnote-11)

Although it appears that EDF did serve its testimony on the parties as required, it filed its written testimony as well as the certificate of service with the Secretary’s Bureau.[[12]](#footnote-12) Therefore, the Secretary will be directed to remove the testimony from the docket.

EDF filed a motion to compel answers to interrogatories on the subject of voltage optimization which were served on Met-Ed on August 10, 2016. Met-Ed objected to the interrogatories. Met-Ed contends that the motion to compel should be denied on the basis that voltage optimization is beyond the scope of a base rate proceeding. Met-Ed also argues that the interrogatories seek information beyond the scope of Mr. Alvarez’s testimony.

As explained above, the issue addressed by EDF in Mr. Alvarez’s testimony regarding voltage optimization and conservation programs are better addressed in other types of Commission proceedings where they can be fully and appropriately considered. Similarly, the subject-matter of EDF’s interrogatories is beyond the scope of this base rate proceeding. The motion to compel is denied.

THEREFORE

IT IS ORDERED:

1. That the Motion to Strike of Met-Ed to exclude the testimony of Michael Murray and Paul Alvarez is granted.

2. That the Direct Testimony of Michael Murray and Paul Alvarez is granted.

3. That the Secretary shall remove the Direct Testimony of Michael Murray and Paul Alvarez, which was filed on July 20, 2016 from the docket at R-2016-2537349.

4. That Motion to Compel of EDF is denied.

Date: August 25, 2016

Mary D. Long

Administrative Law Judge

**R-2016-2537349 - PA PUBLIC UTILITY COMMISSION v. METROPOLITAN EDISON COMPANYR-2016-2537352 - PA PUBLIC UTILITY COMMISSION v. PENNSYLVANIA ELECTRIC COMPANY R-2016-2537355 - PA PUBLIC UTILITY COMMISSION v. PENNSYLVANIA POWER COMPANY**

**R-2016-2537359 - PA PUBLIC UTILITY COMMISSION v. WEST PENN POWER COMPANY**

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1. Murray Testimony at p. 2. [↑](#footnote-ref-1)
2. Alvarez Testimony at p. 3. [↑](#footnote-ref-2)
3. The motion to compel and response to the motion to strike are styled as filings on behalf of both EDF and PennFuture. The interrogatories, however, were only posed by EDF, not PennFuture. [↑](#footnote-ref-3)
4. 52 Pa.Code § 5.403(a). [↑](#footnote-ref-4)
5. 52 Pa.Code § 5.403(b). [↑](#footnote-ref-5)
6. 52 Pa.Code § 5.401(b). [↑](#footnote-ref-6)
7. 66 Pa.C.S. § 1308(d). [↑](#footnote-ref-7)
8. 66 Pa.C.S. §§ 2806-2815. [↑](#footnote-ref-8)
9. 66 Pa.C.S. § 1307. [↑](#footnote-ref-9)
10. EDF also filed an affidavit of Zita Zalai, which does not appear to be related to the direct testimony. There is no explanation for its inclusion with the written direct testimony. [↑](#footnote-ref-10)
11. 52 Pa.Code § 5.412(f). [↑](#footnote-ref-11)
12. Counsel for EDF was granted admission *pro hac vice*. This privilege imposes a duty on counsel to become familiar with the procedural rules of the tribunal in which an attorney is granted temporary permission to appear. Further, *pro hac vice* counsel is to be supervised by sponsoring counsel who also has a duty to be familiar with the procedural rules of the tribunal. Counsel for EDF and sponsoring counsel are cautioned to take the time to become familiar with the Commission’s rules of procedure which can be found at www.pacode.com. [↑](#footnote-ref-12)