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November 11, 2016

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

**RE: Mary Paul v. PECO Energy Company  
Docket No. C-2015-2475355**

Dear Ms. Chiavetta:

Enclosed for filing is PECO Energy Company's Motion to Strike the First Amended Complaint.

Very truly yours,



Ward L. Smith  
Counsel for PECO Energy Company

WS/ab  
Enclosure

cc: Christopher P. Pell, ALJ  
Darlene D. Heep, ALJ  
Certificate of Service

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Mary Paul	:	
	:	Docket No. C-2015-2475355
v.	:	
	:	
PECO Energy Company	:	

**NOTICE TO PLEAD**

Pursuant to 53 Pa. Code §5.61, you are hereby notified that you have the opportunity to Answer this Motion. Normally, you would have 20 days to respond unless the presiding officers order a different period for your response. Please be aware that PECO has raised arguments that it believes must be resolved at or before the scheduled November 15 hearing in this matter, and that the presiding officers may therefore accelerate the time for your Answer. You may therefore wish to prepare your position with respect to this Motion in such a time and manner that you are able to fully present that position at the beginning of the scheduled November 15 hearing. If you do prepare a written Answer, you must provide a full copy to counsel for PECO, the Commission and the Administrative Law Judges.

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  
PECO Energy Company  
2301 Market Street, S-23  
Philadelphia, PA 19103

Dated at Philadelphia, PA, November 11, 2016



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Ward L. Smith  
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Philadelphia, PA 19101-8699  
215-841-6863  
Ward.Smith@exeloncorp.com

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

<b>Mary Paul</b>	:	
	:	
<b>v.</b>	:	<b>C-2015-2475355</b>
	:	
<b>PECO Energy Company</b>	:	

**PECO Energy Company’s Motion to Strike  
the  
First Amended Complaint**

On Wednesday, November 9, 2016, PECO was served with a “First Amended Complaint” in this proceeding. As described below, the First Amended Complaint seeks to materially expand the scope of this proceeding. Moreover, this material expansion is being requested only a few days before the scheduled hearing. This combination – material expansion of scope a few days before hearing – is prejudicial to PECO’s rights in this proceeding. PECO therefore objects to the First Amended Complaint, and moves that it be stricken.

**I. Standard of Review**

In its Introduction paragraph, the First Amended Complaint cites to two provisions of the Commission’s rules: 52 Pa. Code §§ 1.81 and 5.91. Section 1.81 generally states that an amendment to a pleading may be tendered at any time; Section 5.91 generally states that no amendment to a pleading may be filed within five days of hearing, absent permission from the presiding officer. Ms. Paul apparently has read these two rules as giving her an opportunity to

file an Amended Complaint up until five days before hearing, and served this Amended Complaint two hours before that deadline.<sup>1</sup>

These two rules, however, must be read and applied in the larger context of the Commission's obligation to ensure that all parties' due process rights are protected, which includes the right to meaningfully respond to the new claims. *See, e.g., Enrico Partners v Blue Pilot Energy*, 2015 WL 1291631 (PaPUC Docket No. C-2014-2432979) (2015) (Amendment of complaint during hearing disallowed because, on the circumstances in that case, allowing such amendment "would deprive Blue Pilot of notice and opportunity to be heard."); *Pennsylvania Public Utility Commission, Bureau of Transportation and Safety v. USA Express Moving and Storage*, 2010 WL 1458129 (PaPUC Docket No. A-00117215C071 (2010) ("[W]hile our regulations allow for amendments to complaints to conform to evidence at hearing, the regulations contemplate some form of notice, *as well as the chance to respond*, will be provided to affected parties." (emphasis added). When viewed against that broader obligation, the First Amended Complaint is impermissibly broad and late.

## **II. The Amended Complaint materially changes the scope of this proceeding.**

The First Amended Complaint materially changes the scope of this proceeding in two important ways.

First, it materially changes the health claims being made by Ms. Paul, both as to the time period during which Ms. Paul claims to have been made ill by PECO's facilities, and the

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<sup>1</sup> In fact, because the intervening days included a federal holiday (Veterans' Day), a Saturday, and a Sunday, Ms. Paul filed the First Amended Complaint only two business days before the hearing.

facilities that she claims made her ill. In the original Complaint, which was filed on March 30, 2015, Ms. Paul made the following health claim:

I have spent the better part of the last seven months researching the wealth of information regarding these meters. Simultaneously, I began to suffer physical symptoms that corresponded to known biological effects associated with this kind of technology.

According to this initially-pled chronology, therefore, Ms. Paul began to suffer symptoms no earlier than August 31, 2014 – seven months prior to filing her original Complaint. In context of the original Complaint, she was clearly complaining about PECO’s AMI meters.

The First Amended Complaint now contends (¶¶18, 21, 30) that she was harmed and began to suffer symptoms as long ago as 2002, with those symptoms caused by PECO’s AMR meter; that she suffered symptoms as early as 2011 from a an HVAC control technology not associated with PECO’s AMI meter (and which her husband requested to have installed) (¶9), and that she began to suffer symptoms in 2012 from AMI meters and technology installed at other customers’ residences in her neighborhood. (¶¶12, 13). This is a material expansion of the harm she claims to have suffered.

Second, the First Amended Complaint seeks a material expansion of the legal issues and relief beyond what was requested in the original Complaint. In her original Complaint, she asked only that a series of questions be answered and, by implication only and not by specific request, that she not be required to have an AMI meter installed at her home. In the First Amended Complaint, she seeks relief under the Rehabilitation Act of 1973 (¶¶ 14, 17, 24, 27, 40); the Americans with Disabilities Act (¶¶ 16, 17, 24, 27, 40); that PECO “cease and desist all activity of wireless transmissions to or from PECO’s Tower Gateway Basestations and to or from *all of PECO’s smart meters*”) (¶¶ 24, 44) – that is, to essentially shut down the entire AMI

system; that her AMR be removed and replaced with an analog meter (§§ 25, 42(1)); and that PECO be required to install a fiber optic system (§ 42(2)). Again, this is a very material expansion of the relief previously requested.

### **III. The Expanded Scope Requested in the First Amended Complaint, If Allowed, Would Prejudice PECO's Due Process Rights**

In discussing the prejudicial effect of the First Amended Complaint, it is first necessary to briefly review the procedural posture of this matter. As noted above, the First Amended Complaint was served and filed on Wednesday, Nov. 9, 2016. Hearings in this matter are scheduled for November 15-16, 2016.

This matter was initiated by formal complaint approximately 19 months ago, on April 1, 2015. It was originally set for hearing by Commission Order approximately eight months ago, on March 17, 2016. The current hearing dates, which were set based on a continuance request by Complainant, were set approximately six weeks ago, on September 30, 2016. That continuance was granted over PECO's objection, with said objection being largely based on PECO's view that it is necessary and in the public interest to bring this case and the other pending PECO AMI cases to closure without additional delay.

With that background, we can now review the First Amended Complaint's requested expansion of health claims. As noted, the First Amended Complaint seeks to include health claims from 2002-2014, putatively caused by HVAC technology, AMR technology, and transmissions from other AMI meters in the neighborhood. Of course, PECO is prepared to and will present testimony in its case-in-chief that none of the radiofrequency transmissions associated with its equipment have been demonstrated to cause adverse health effects. But the requested expansion of these claims is nonetheless prejudicial to PECO because it has not had

the opportunity to conduct discovery as to these new claims, and in particular discovery as to medical records.

This prejudice is significant. PECO sought and obtained discovery on Ms. Paul's medical records with respect to her more recent health claims and expects to use those records in its cross-examination of Ms. Paul. We are now faced with a Complainant who, a few days before hearing, claims that she was actually sick for over a decade longer than she originally claimed. She apparently did not deem that prior decade-long illness to be worth mentioning in her original Complaint. PECO frankly views such a late-breaking claim with extreme skepticism, and would definitely not consider its preparation complete until it had sought and obtained all available information regarding Ms. Paul's medical record history during that decade. The late filing of the First Amended Complaint makes it impossible for PECO to meaningfully seek those medical records, and thus makes it impossible for PECO to have a meaningful chance to fully respond to the new health claims.

PECO recognizes that, in some situations, prejudice of this sort can be cured by delaying the hearing to allow the opportunity for discovery to occur. PECO respectfully submits that this cure option should not be used in this proceeding. The hearings in this matter have already been continued twice, most recently at Complainant's request and over PECO's objection. As PECO stated in its September 28, 2016 Answer to Complainant's Motion for Continuance (¶5):

Granting this continuance would be disruptive to the orderly disposition of this case and the other AMI/health cases currently pending before the Commission. . . . Granting this continuance thus would run the very real risk of pushing the hearing for this matter into 2017.

In Your Honors' September 30 Order Granting Continuance (p. 8) , you specifically noted that further procedural delays would not be allowed, stating: "*The parties are advised that we cannot have an endless cycle of rescheduled hearing dates and continuances.*" The "cure" of delaying this proceeding to allow PECO to conduct discovery thus prejudices PECO in another way – it delays the prompt resolution of this and related AMI matters.<sup>2</sup> Put bluntly, it allows Ms. Paul to grant herself another continuance because of the need to cure her dilatory filing. This should not be allowed.

As to the requested expansion of relief, it appears largely to be comprised of matters that are outside of the Commission's jurisdiction (Americans with Disabilities Act; Federal Rehabilitation Act); or impermissible collateral attacks on prior Commission orders (the request that PECO not be allowed to operate the AMI system that the Commission previously approved). If these requests for relief had been contained in the original Complaint, PECO would have had twenty calendar days to analyze and respond to those requests, and would have had the opportunity to develop and file a Preliminary Objection stating its jurisdictional arguments. Ms. Paul would then have had ten days to respond to that Preliminary Objection, and Your Honors would have had time to research, evaluate, and respond to both pleadings – which would have allowed Your Honors to issue a Prehearing Order describing the allowable scope of argument and testimony.

By choosing to file the First Amended Complaint only a few days before hearing, Ms. Paul effectively has guaranteed that this orderly process and evaluation cannot occur. This

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<sup>2</sup> At this time, PECO continues to operate both its AMR and AMI systems in order to collect AMR billing information from the handful of customers whose AMI meters have not been installed. This is an expensive dual system and cannot be allowed to continue indefinitely.

particularly prejudices PECO because it cannot simultaneously write an accelerated version of a Preliminary Objection and prepare for next week's hearings without giving short shrift to both.

PECO also notes that Ms. Paul appears to have purposefully waited until what she thought was the last minute to make this filing. If, as appears to be the case, Ms. Paul was reading 52 Pa. Code §5.91 as giving her an opportunity to file an amended complaint up to five days prior to hearing, it is noteworthy that she served the First Amended Complaint at 2:30 p.m. on Wednesday, Nov. 9 – less than 2 hours before the moment she believed that her deadline would expire (and only two business days before the hearing begins). Given the procedural background of this case, this dilatory choice should not be allowed. The Commission Order sending this matter to hearing was issued eight months ago, and Ms. Paul was recently given a six week continuance to allow her to further prepare her case. If she was going to attempt to alter the scope of this case, she should have used that time wisely to request that expansion at a time and in a way that would have allowed PECO a full opportunity to develop its responsive case. She should not be allowed to wait until a few days before hearing and materially change the scope of both her claimed harm and of the relief requested.

#### **IV. Conclusion**

PECO therefore moves to strike the First Amended Complaint in its entirety.

Respectfully submitted,



**Ward Smith**

**Assistant General Counsel  
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**November 11, 2016**

**BEFORE THE  
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Mary Paul	:	
	:	Docket No. C-2015-2475355
v.	:	
	:	
PECO Energy Company	:	

**CERTIFICATE OF SERVICE**

I, Ward L. Smith, hereby certify that I have this day served a copy of PECO Energy Company's Motion to Strike the First Amended Complaint in the above matter upon all interested parties via e-mail to:

**Via Electronic Mail**  
Mary Paul  
239 Honey Locust Drive  
Avondale, PA 19311

Dated at Philadelphia, Pennsylvania, November 11, 2016



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