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February 21, 2017

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

Re: Catherine Frompovich v. PECO Energy Company
Docket No. C-2015-2474602

Dear Secretary Chiavetta:

Attached please find the ***Reply Brief of PECO Energy Company ("PECO")***, on the above captioned case.

If you have any questions regarding this filing, please contact me directly at 215.841.6863.

Sincerely,

Ward L. Smith
Assistant General Counsel

Attachment

c: Certificate of Service

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Catherine Frompovich	:	
	:	
v.	:	**C-2015-2474602**
	:	
PECO Energy Company	:	

Reply Brief of PECO Energy Company

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Introduction and Summary of Argument

The purpose of this Reply Brief is to respond to arguments raised in the January 20, 2017 Brief filed by Complainant Catherine Frompovich in this proceeding (the "Frompovich Brief").[1] PECO already filed an extensive Main Brief setting forth its primary arguments. PECO will not repeat those arguments here, but does primarily rely upon them.

In this Reply Brief, PECO establishes that:

- The Frompovich Brief impermissibly relies upon extra-record evidence,
- The arguments that are based on record evidence do not establish Ms. Frompovich's claims,
- The Frompovich Brief does not establish that Act 129 has an opt out, and
- The Frompovich Brief does not establish a claim under the Americans with Disabilities Act ("ADA"). In addition, the Commission does not have jurisdiction over ADA claims.

[1] By Briefing Order, Reply Briefs were due in this matter on February 15, 2017. However, in the last few days leading up to that deadline, PECO's lead counsel was unexpectedly advised by his treating physicians that he should undergo MRI and CAT scan tests during the week of February 13. Administrative Law Judge Heep therefore verbally granted PECO an extension until the first business day of the next week – that is, until February 21, 2017 – to file its Reply Brief.

Argument

I. The Frompovich Brief impermissibly relies on information that was newly introduced in the Frompovich Brief itself, and which was thus not admitted into the record in this proceeding. The Frompovich Brief also relies on evidence that was offered by Ms. Frompovich during the hearing and specifically excluded from the record in this proceeding. The Commission should not consider such information in deciding this case.

At the outset, it should be noted that the Frompovich Brief relies extensively on extra-record information, of two sorts: (1) information that was newly introduced in the Frompovich Brief itself, and (2) information that Ms. Frompovich offered at hearing and which was specifically excluded from the record. The Commission should not consider such information in deciding this case.

By way of example only (and not as a comprehensive inventory of all of the extra-record material relied upon by the Frompovich Brief), the following information was newly introduced in the Frompovich Brief, but no evidence of the alleged fact was offered at hearing: ¶ 2, fn2 (claim that effects have been "scientifically proven since the 1930s"); ¶ 15 (claim that Dr. Israel's testimony is "at variance with published science since the 1930s"); ¶ 26 (claim of number of people who rely upon alternative health care); ¶ 37 (reference to Business Insider's Tech Insider); ¶ 38 ("science recognizes terrestrial non-thermal radiation"); ¶ 39 (referring to Dr. Carpenter's comments filed with the FCC); ¶ 40 (introducing an extra-record document written by an attorney for an advocacy group); ¶ 49 (referencing the "U.S. Library of Medicine"); ¶ 80 (quoting a law review article by Dr. Marino); ¶ 87 (quoting the EMFWise website); ¶ 102 (discussing a DeGruyter paper from the internet).

As examples of information that was offered in evidence but which was excluded from the record, PECO notes that Ms. Frompovich repeatedly complains that certain studies and information were excluded from evidence – but then cites and discusses them anyway. *See, for example*, ¶ 6 (15 studies that Ms. Frompovich claimed prove her breast cancer claim, but which were excluded from evidence); ¶ 37 ("Frompovich testified that there are non-thermal radiation adverse health effects from RFs/EMFs and tried introducing documentation to that effect, which was summarily[2] objected to by PECO attorneys and in some instances sustained by the Court."); ¶ 73 (claiming that "cancer is a known adverse health effect for microwave radiation EMFs/RFs" but basing that conclusion upon exhibits that were "objected to by PECO and not permitted to be entered into testimony"); ¶ 29 (stating that her opinions were reached "in conjunction with her treating physician," even though her treating physician did not appear and evidence of her treating physician's opinion was specifically excluded from the record).

The Commission should not rely upon this extra-record material. PECO understands that Ms. Frompovich appeared *pro se*, and that some evidentiary latitude is typically granted to *pro se* complainants who are unfamiliar with the Commission's procedural rules. Giving any consideration to this extra-record material, however, is unwarranted in this circumstance. And doing so would necessitate giving PECO an opportunity to cross-examine the witness sponsoring the testimony and to submit rebuttal evidence.

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[2] The Frompovich Brief claims repeatedly that PECO "summarily objected" to her proffered documents. "Summarily" generally means "in a summary manner, without the customary formalities." PECO notes that, on each occasion on which it lodged an objection, it formally stated a detailed basis for its objection. There was nothing "summary" or "summarily" about those objections, or Your Honors' rulings thereon.

Under the Commission's regulations for formal proceedings, absent special circumstances, the evidentiary record closes at the end of the evidentiary hearing. 52 Pa. Code §5.431 states:

> ***§ 5.431. Close of the record.***
>
> (a) The record will be closed at the conclusion of the hearing unless otherwise directed by the presiding officer or the Commission.
>
> (b) After the record is closed, additional matter may not be relied upon or accepted into the record unless allowed for good cause shown by the presiding officer or the Commission upon motion.

Subpart (a) of this rule is used to allow the introduction of evidence that is specifically identified at hearing, but which is not available in the hearing room. For example, this section allows the record to be kept open to allow a party to answer an on-the-record data request, or to provide a late-filed exhibit when the need for it emerges during testimony. The overriding theme of subpart (a) is that the parties have the opportunity, at the hearing itself, to address what additional evidence or exhibits will later be entered in the record. Importantly, that at-the-hearing discussion gives each party the opportunity to object to the admission of additional evidence – and potentially to cross-examine on the offered evidence or to offer their own testimony at hearing to rebut the evidence that will later be admitted under this rule.

That did not happen in this hearing – much of the information that is provided in the Frompovich Brief was not identified at hearing, no request was made to keep the record open for its late submittal, and no ruling was made that the record would be kept open. For both that information and the documents that were offered, but not allowed into evidence: (1) PECO did not have the opportunity to object to the admission of documents now relied upon by Ms. Frompovich, (2) PECO did not have the opportunity to cross-examine a witness sponsoring the

documents, and (3) PECO did not have the opportunity to submit additional evidence to rebut those documents. Consequently, subpart (a) of this rule does not provide a basis to allow the Frompovich Brief to introduce additional evidence after the close of the record.

Subpart (b) of §5.431 allows the presiding officer or the Commission to re-open the record, upon motion, if good cause is shown. In turn, "good cause" to reopen the record is determined by reference to §5.571 of the Commission's regulations (Reopening prior to final decision), which states that the record may be reopened to take additional evidence "if there is reason to believe that conditions of fact or law have so changed as to require, or that the public interest requires, the reopening of the record."

Ms. Frompovich has not alleged that there has been a change to the law or facts since the close of the record in this proceeding. Indeed, effectively all of the offered extra-record information predates the date of hearing. The new information in the Frompovich Brief therefore does not qualify for admission under subpart (b) of the reopener rule.

PECO has basic due process rights to object to the admission of evidence, to cross-examine on that evidence, and to offer contrary evidence. PECO would be denied those basic due process rights if the new information in the Frompovich Brief were admitted into the evidentiary record in this proceeding or otherwise formed a basis for a Commission decision. PECO therefore respectfully requests that Your Honors hold that the non-record information contained in the Frompovich Brief is not admitted as part of the record evidence in this proceeding and that it cannot be relied upon for the Commission's decision.

II. The few health arguments that are based on record evidence do not establish Ms. Frompovich's contention that PECO's AMI meters will interfere with her healing or ability to live cancer free.

Virtually all of the health and safety arguments made in the Frompovich Brief are based, in material part, on the extra-record evidence discussed above. PECO will not attempt to respond to these extra-record arguments, but instead will rely upon the detailed examination of the health record as set forth in its Main Brief.

In one or two instances, the Frompovich Brief poses arguments that rely only on record evidence, but those arguments do not establish Ms. Frompovich's contentions in this case. PECO will illustrate this by briefly addressing one of those arguments.

The Frompovich Brief argues (¶¶ 44-45) that Dr. Israel contradicted himself when discussing Idiopathic Environmental Intolerance ("IEI"), which is sometimes also called Electro Hypersensitivity ("EHS"), citing the following testimony:

> PECO Attorney Watson Q. Let me ask you this. Is it generally accepted in the scientific or medical communities that idiopathic environmental intolerance to EMF and the variety of symptoms and conditions attributed to it are caused, contributed to or exacerbated by exposure to radiofrequency fields?
>
> Dr. Israel **A. It is not generally accepted.**
>
> Dr. Israel A. We typically refer to them as IEI, idiopathic environmental intolerance, and followed by whatever that intolerance is, **EMF,** some chemical, whatever.
>
> PECO Attorney Watson Q. Do I understand that you're telling us that IEI is simply neutral, a neutral way to describe –
>
> Dr. Israel A. That's the way the World Health Organization proposed, and I think **that's what's generally used amongst physicians today.**

The Frompovich Brief claims (¶45) that this testimony contains "conflicting statements." It does not contain conflicting statements. In this testimony, Dr. Israel simply notes that there is

a generally accepted nomenclature for discussing this claim -- Idiopathic Environmental Intolerance or "IEI" – but that it is not generally accepted in the scientific and medical community that the claimed symptoms of IEI are caused by exposure to radio frequency fields. There is nothing inconsistent in those two statements.

PECO respectfully submits that this example is fully representative of the Frompovich Brief's discussion of the record evidence, and that none of that discussion undercuts the conclusions reached by PECO in its Main Brief. PECO therefore relies upon its Main Brief to establish its position on health and safety issues. Ms. Frompovich has not met her burden of proving that installation of AMI meters will interfere with her healing or ability to live cancer free.

III. The legal arguments in the Frompovich Brief do not establish a valid cause of action before the Commission.

A. The Frompovich Brief did not establish that Act 129 offers an "opt out."

This Commission has held, on numerous occasions, that Act 129 does not contain a general "opt out" provision. In fact, the Commission reiterated that holding in the April 21, 2016 Order remanding this case for an evidentiary hearing, stating (p. 11) that: "PECO is correct that as adopted Act 129 does not provide a general opt out provision." *See also Povacz v. PECO Energy Company*, Docket No. C-2012-2317176 (Order entered January 24, 2013) (*Povacz*); *Gavin v. PECO Energy Company*, Docket No. C-2012-2325258 (Order entered January 24, 2013); *Morgan v. PECO Energy Company*, Docket No. C-2013-2356606 (Final Order entered July 23, 2013); *McCarey v. PECO Energy Company*, Docket No. C-2013-2354862 (Final Order entered September 26, 2013); *Thomas v. PECO Energy Company*, Docket No. C-2012-2336225 (Final Order entered December 31, 2013); *Donnelly v. PECO Energy Company*, Docket No. F-2013-2330663 (Final Order entered March 18, 2014); and *Francis v. PECO Energy Company*, Docket No. C-2014-2451351 (Order entered March 3, 2015).

The Frompovich Brief (¶¶ 8, 9, 11, 22, 23, 36) challenges this legal conclusion, citing the legislative history in support of the claim that Act 129 does allow an opt out.

The key to resolving this issue is to note that Ms. Frompovich made precisely these same arguments, citing the same excerpts from the legislative record, in her June 26, 2015 Exceptions in the instant proceeding – and the Commission has already decided the issue against her. As the Commission stated in its April 21, 2016 remand order (pp. 8-9):

> In Exception No. 1, the Complainant refers to page six of the Initial Decision and quotes the ALJ's statement that "[t]here is neither an 'opt-out' provision nor a requirement to perform onsite broadcasting tests provided for [in] the Commission's order." Exc. at 2. In support of this Exception, Ms. Frompovich recites the comments of several state legislators from the February 2008 Pennsylvania House Journal and the October 2008 Senate Journal debating Act 129, which she contends question the mandatory deployment of smart meters without consumer choice in contradiction of what she characterizes as the Commission's misinterpretation of the Act and overreaching administrative powers. *Id.* at 2-4. The debate, the Complainant contends, may and should be considered contemporaneous legislative history evincing legislative intent not to mandate deployment without exception. *Id.* at 5.

The Commission rejected this view, stating (p. 11) that: "PECO is correct that as adopted Act 129 does not provide a general opt out provision."

The Frompovich Brief simply repeats the same arguments that were already made in her Exceptions and which have already been rejected by the Commission.

B. The Frompovich Brief did not establish a claim under the Americans with Disabilities Act ("ADA"). In addition, the Commission does not have jurisdiction over ADA claims.

The Frompovich Brief claims that the Americans with Disabilities Act ("ADA") provides her with a legal basis to refuse installation of an AMI meter. *See, e.g.*, ¶¶ 4, 18, 23D, 29, 30, 31, 32, 33, 34, and 35.

The Americans with Disabilities Act generally applies to employment, transportation access, public accommodation, communication, and governmental activities. (See the discussion from the Department of Labor website, below). PECO respectfully submits that none of those activities are implicated by its installation of AMI meters, and that Ms. Frompovich therefore has not properly pled a cause of action under the Americans with Disabilities Act.

However, there is no need for Your Honors or the Commission to become experts in ADA law for purposes of this case, and there is truly no need to determine whether Ms. Frompovich has properly pleaded an ADA cause of action, because the Commission simply does not have jurisdiction to resolve ADA claims. On its website, the Department of Labor (which is one of the federal agencies with responsibility to enforce the ADA) outlines the agencies that have enforcement responsibility for the various aspects of the ADA as follows:

> The Americans with Disabilities Act (ADA) prohibits discrimination against people with disabilities in employment, transportation, public accommodation, communications, and governmental activities. The ADA also establishes requirements for telecommunications relay services.
>
> The Department of Labor's Office of Disability Employment Policy (ODEP) provides publications and other technical assistance on the basic requirements of the ADA. It does not enforce any part of the law.
>
> In addition to the Department of Labor, four federal agencies enforce the ADA:
>
> - The Equal Employment Opportunity Commission (EEOC) enforces regulations covering employment.
> - The Department of Transportation enforces regulations governing transit.
> - The Federal Communications Commission enforces regulations covering telecommunication services.
> - The Department of Justice enforces regulations governing public accommodations and state and local government services.
>
> Another federal agency, the Architectural and Transportation Barriers Compliance Board (ATBCB), also known as the Access Board, issues guidelines to ensure that buildings, facilities, and transit vehicles are accessible and usable by people with disabilities.

> Two agencies within the Department of Labor enforce portions of the ADA. The Office of Federal Contract Compliance Programs (OFCCP) has coordinating authority under the employment-related provisions of the ADA. The Civil Rights Center is responsible for enforcing Title II of the ADA as it applies to the labor- and workforce-related practices of state and local governments and other public entities.

https://www.dol.gov/general/topic/disability/ada

There is nothing here that grants the Commission the responsibility, authority, obligation, or jurisdiction to hear or resolve a claim under the Americans with Disabilities Act. If Ms. Frompovich believes that she has a valid ADA claim against PECO, she must work through one of the enforcement agencies listed above, not the Commission.

IV. Conclusion

PECO reiterates the position taken in its Main Brief and respectfully submits that, on the record evidence in this proceeding, the Commission should conclude that there is no reliable medical basis to conclude that radio frequency fields associated with AMI devices could cause, contribute to or exacerbate any health effects or symptoms, including Ms. Frompovich's breast cancer. There is no opt out under Act 129. The Commission does not have jurisdiction to evaluate Ms. Frompovich's ADA claims. PECO therefore submits that the Commission should conclude that the use of an AMI meter to provide service to Ms. Frompovich is reasonable utility service for purposes of 66 Pa. C.S. §1501.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Ward L. Smith, hereby certify that I have this day served a copy of PECO Energy Company's Reply Brief via email to:

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Dated at Philadelphia, Pennsylvania, February 21, 2017

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