

Legal Department
2301 Market Street / S23-1
P.O. Box 8699
Philadelphia, PA 19101-8699

Direct Dial: 215-841-6863

Email: Ward.Smith@exeloncorp.com

March 21, 2017

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 the Reply of PECO Energy Company to Complainant's Request to Admit the Transcript of the Testimony of Dr. Marino into the Record in this Proceeding.

This document was served on Complainant and the presiding officers on March 20, 2017.

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

CERTIFICATE OF SERVICE

I, Ward L. Smith, hereby certify that I have this day served a copy of the Reply of PECO Energy Company to Complainant's Request to Admit the Transcript of the Testimony of Dr. Marino into the Record in this Proceeding in the above matter upon all interested parties via e-mail to:

Mary Paul
239 Honey Locust Drive
Avondale, PA 19311
mpaul15@verizon.net

Dated at Philadelphia, Pennsylvania, March 20, 2017



Ward L. Smith
Counsel for PECO Energy Company
2301 Market Street, S23-1
Philadelphia, PA 19101-8699
(215) 841-6863
Fax: 215.568.3389
Ward.Smith@exeloncorp.com

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Mary Paul

v.

PECO Energy Company

**:
:
:
:
:**

C-2015-2475355

**Reply of PECO Energy Company
To Complainant's Request to Admit the Transcript of the Testimony of Dr. Marino into
the Record In This Proceeding**

Contents

Introduction and Summary of Argument 1

Argument 2

I. Ms. Paul’s request is effectively that Dr. Marino be allowed to appear on her behalf as an expert witness. 2

II. The deadline for designating expert witnesses had long passed when Ms. Paul first requested that Dr. Marino’s testimony be admitted into evidence in this proceeding. 2

III. It would violate PECO’s due process rights to allow the testimony of Dr. Marino to be admitted in the manner requested by Ms. Paul. 3

Conclusion 7

Introduction and Summary of Argument

In her Main Brief in this matter, filed on or about March 6, 2017, Complainant Mary Paul requested (pp. 27-29) that “the expert testimony of Andrew Marino, Ph.D., in the *Povacz, Randall/Albrecht, and Murphy* complaints should also be admitted into [the instant] Complaint testimony.” Complainant first made this request at evidentiary hearing on November 15-16, 2016, at which time her request was denied. She was given leave to brief her request, and did so.

Reply Briefs are due on March 27, 2017. However, by email order of March 9, 2017, Administrative Law Judge Heep ordered PECO to file its reply to the Marino request by March 20, 2017.

PECO opposes Complainant’s request. Ms. Paul is essentially requesting that Dr. Marino be allowed to appear as an expert witness on her behalf. The deadline for designating expert witnesses was long passed by the time Ms. Paul made this request at the November hearings. Granting her request in November would have violated PECO’s due process rights because the untimely nature of that request made it impossible for PECO to properly prepare to rebut Dr. Marino’s testimony as it applies to Ms. Paul. Granting the request now, four months after the hearing record was completed, would compound that prejudice.

Argument

I. Ms. Paul's request is effectively that Dr. Marino be allowed to appear on her behalf as an expert witness.

Ms. Paul has requested that the transcript of Dr. Marino's testimony be admitted into evidence in this proceeding. Moreover, she specifically requests (p. 27) that Dr. Marino's testimony be allowed as expert testimony, stating: "The expert testimony of Andrew Marino, Ph.D. . . . should be admitted." She underscores the expert nature of the role by noting (p. 28) that she did not have money to hire expert witnesses, and that she thus requests that the transcript of Dr. Marino's testimony be admitted to fill that role.

PECO therefore respectfully submits that this request should be evaluated on the same basis as if Ms. Paul had waited until the day of hearing and then attempted to introduce the testimony of a previously non-identified expert. For the reasons set forth below, that would not be allowed, and her parallel request should not be granted.

II. The deadline for designating expert witnesses had long passed when Ms. Paul first requested that Dr. Marino's testimony be admitted into evidence in this proceeding.

This case was originally set for hearing on August 16, 2016. For that hearing date, the deadline for designating expert witnesses was June 16, 2016. *See* April 22, 2016 Prehearing Order. PECO identified its expert witnesses on that date.

The hearing was later continued, at PECO's request, until Oct. 4-5. For that hearing date, the deadline for designating expert witnesses was August 2, 2016. *See* June 23, 2016 Prehearing Order. On August 2, 2016, PECO re-identified its experts. On that same date, Ms. Paul

identified her expert witness – Dr. Hanoch Talmor. No mention was made of Dr. Marino appearing on Ms. Paul’s behalf, or of his testimony in other cases being admitted into this proceeding.

Dr. Marino testified in the *Povacz, Randall/Albrecht* and *Murphy* cases on September 15-16, 2016.

On September 27, Ms. Paul requested that her October hearing dates be continued until November. Although Dr. Marino had already testified, in the September 27 request Ms. Paul again made no mention of utilizing Dr. Marino’s testimony. Your Honors ultimately granted the requested continuance until Nov. 15-16. *See* September 30, 2016 Order Granting Continuance.

There was a six-week period between Your Honors’ grant of Ms. Paul’s continuance request and the actual evidentiary hearings. At no time during those six weeks did Ms. Paul mention or request that she be allowed to incorporate the testimony of Dr. Marino into the record in this proceeding. The first such request occurred during the November hearings.

III. It would violate PECO’s due process rights to allow the testimony of Dr. Marino to be admitted in the manner requested by Ms. Paul.

The proffered testimony from Dr. Marino is technical, scientific testimony. Preparation to respond to such testimony requires PECO to undertake multiple tasks, which at a minimum include:

(1) Discovery of the expert regarding the basis for the expert’s general opinion

(2) Cross-examination of the expert regarding the basis for the expert’s general opinion

(3) Discovery of the expert regarding the expert's knowledge of the Complainant's individual situation, and how his general opinion relates to her specific situation

(4) Cross-examination of the expert regarding his knowledge of the Complainant's individual situation, and how his general opinion relates to her specific situation

(5) Discovery and cross-examination of other witnesses, including the Complainant, regarding the interplay between their testimony and Dr. Marino's expressed opinions

(6) Responsive testimony from PECO's experts

In her Main Brief, Ms. Paul correctly notes that PECO had the opportunity to conduct extensive discover and cross-examination of Dr. Marino in *Povacz* and the other "omnibus" cases. PECO notes, however, that its discovery and cross-examination of Dr. Marino in the other complaint proceedings was limited to the basis for Dr. Marino's general opinion – that is, to the matters set forth in items (1) and (2), above.

In the omnibus cases, Dr. Marino also testified about how his general opinion applied to the situation of Ms. Povacz, Ms. Randall, Mr. Albrecht, and Ms. Murphy – that is the parallel of Issues 3 and 4 above – and PECO had the opportunity to prepare for, cross-examine on, and rebut those statements. But PECO has never had the opportunity to conduct discovery as to how Dr. Marino's general conclusions relate to Ms. Paul (Issues 3 and 4 above).

It is noteworthy that, in her Main Brief (p. 28), Ms. Paul asserts, with no record evidence, that her claimed symptoms makes her medically similarly-situated to Ms. Kreider, Ms. Povacz, and Ms. Murphy. That statement is simply not true on its face. Ms. Kreider that claimed that she had vaccine injury; Ms. Povacz claimed hypothyroidism; Mr. Murphy claimed Ehler-Danlos and lipedema. Each of them claimed that these illnesses caused them to be a unique case that required special treatment. Ms. Paul's unproven assertion that she is the same as all of the other complainants, notwithstanding that she doesn't claim to have any of those conditions, is simply

that – an unproven assertion. It should not be allowed as a basis for admitting Dr. Marino’s testimony; to the contrary, that is exactly the sort of issue that could have been the fair focus of discovery and cross-examination.

Because PECO did not have notice and opportunity to prepare for Dr. Marino’s testimony being a part of the record in this proceeding, it also did not have the opportunity to conduct discovery or cross-examination of Dr. Talmor or Ms. Paul in the context of Dr. Marino’s testimony (Issue 5 above).

Finally, and critically, in the *Povacz, Randall/Albrecht* and *Murphy* dockets, PECO had extensive expert testimony that was specifically responsive to Dr. Marino’s testimony (Issue 6 above). None of that responsive testimony was elicited in the instant docket – and Ms. Paul made no request to create a balanced record by also requesting to admit PECO’s responsive testimony. Granting Ms. Paul’s request to admit Dr. Marino’s testimony would thus prejudice PECO because, pursuant to that request, PECO has been stripped of its entire opportunity to respond to Dr. Marino’s testimony.

PECO also notes that proper evaluation of Dr. Marino’s testimony would have required the parties to fully parse the testimony as Proposed Findings of Fact in their Main Briefs. Admitting the testimony at this point in the process would thus guarantee that it receives a very different, short-shrifted level of evaluation compared to the properly admitted record evidence in this proceeding.

PECO recognizes that the Commission’s regulations, 52 Pa. Code §5.407, allow the records of other proceedings to be “offered in evidence.” But such offerings of evidence, like any offer of evidence, must comply with due process and with the procedure set forth in the

instant proceeding. Indeed, because of the unusual nature of the evidentiary request, it should perhaps be held to an even more stringent standard, similar to requests for injunctive relief or summary judgment. That is, Ms. Paul should be required to show a clear right to relief. And, given the prejudice to PECO that would result from granting her request, she should be required to show that she had no other alternative procedure that she could have pursued that would have protected PECO's due process rights.

She cannot do that. In this proceeding, the rulings were clear that expert witnesses must be identified well before hearing so that the other party could properly prepare for that witness. If Ms. Paul had made this request at the time designated to identify expert witnesses, it would have accomplished her goal, and perhaps would have been permissible. PECO could at least have evaluated methods to pursue all six of the issues listed above. But by choosing to wait until hearing to make the request -- even after being granted a six-week extension specifically to prepare for hearing -- Ms. Paul effectively guaranteed that PECO could not utilize all of the responsive tools that are its due right. Rule 5.407 does not allow testimony to be admitted when, as here, doing so would violate the procedural schedule and due process.

It may be possible to use Rule 5.407 to admit certain testimony from Drs. Pall, Marino, Davis, and Israel, and Mr. Pritchard, in some future proceeding. If such a request is made during the prehearing process, so that PECO has the ability to prepare its full case in the light of such a request, then PECO will evaluate to and respond to such a request at that time. But because Ms. Paul's request was made for the first time at hearing, long after the deadline to identify expert witnesses, admitting that testimony would prejudice PECO's due process rights.

Conclusion

For the reasons set forth above, PECO opposes Ms. Paul's request to admit the transcript of Dr. Marino's testimony as evidence in her proceeding. To do so would violate the procedural schedule and this proceeding, violate PECO's due process rights, and prejudice the fair presentation of PECO's case.

Respectfully submitted,



Ward Smith
Shawane Lee
Assistant General Counsel
PECO Energy Company
Ward.smith@exeloncorp.com
Shawane.lee@exeloncorp.com
215-841-6863

Tom Watson
Watson & Renner
tw@w-r.com
202-258-6577
Counsel to PECO Energy Company

March 20, 2017