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June 23, 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 Ms. Chiavetta:

Enclosed please find PECO Energy Company's Reply Exceptions in this matter.

Very truly yours,

Ward L. Smith
Counsel for PECO Energy Company

WS/ab
Enclosure

cc: Darlene D. Heep, ALJ
Certificate of Service

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Catherine Frompovich	:	
	:	Docket No. C-2015-2474602
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 Reply to the Exceptions of Catherine Frompovich via email to:

Catherine J. Frompovich
23 Cavendish Drive
Ambler, PA 19002

Dated at Philadelphia, Pennsylvania, June 23, 2017

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BEFORE THE
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Catherine Frompovich	:	
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v.	:	**C-2015-2474602**
	:	
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PECO Energy Company's Reply to the Exceptions of Catherine Frompovich

Contents

PECO Energy Company's
Reply Exceptions

I. Introduction

Pursuant to the May 24, 2017 Secretarial Letter in this docket, PECO hereby provides its Reply to the Exceptions of Catherine Frompovich.

On May 24, 2017, the Commission issued the Initial Decision of Administrative Law Judge Darlene Heep in this matter.[1] On or about June 7, 2017, Complainant Catherine Frompovich filed and served her Exceptions, which are comprised of nineteen numbered paragraphs, with no internal headings.

Ms. Frompovich's Exceptions state an overarching claim that the Administrative Law Judge and the Commission are biased against her. The Exceptions also present numerous specific attacks on the Initial Decision.

In this Reply, PECO briefly addresses Ms. Frompovich's overall bias claim. PECO then answers the individual attacks on the Initial Decision to demonstrate that the Initial Decision is correct and should be adopted by the Commission.

[1] The May 24, 2017 Secretarial Letter also set the schedule for Exceptions and Reply Exceptions: Exceptions to be filed and served within 20 days of the date of the Letter (that is, by June 13, 2017), and Reply Exceptions to be filed within ten days of the Exception due date (that is, by June 23, 2017).

II. Reply to Exceptions

A. Ms. Frompovich's claim of bias is not based on actions of the ALJ or Commission; rather, Ms. Frompovich's testimony demonstrates that she entered the hearing room having made a prejudgment that the proceeding would be biased against her (Reply to Frompovich Exceptions ¶¶ 1, 3, 5, 6, 7, 9, 10, 11, 16, 17 and 18)

Throughout her Exceptions, Ms. Frompovich claims that Administrative Law Judge Heep and the Commission are biased against her. *See, for example*, ¶1 ("the PUC is apparently not interested in protecting the public"); ¶3 (the PUC and the ALJ have "close-minded opinions"); ¶5 (the evidentiary hearing was a "kangaroo court"); ¶6 (Complainant did not receive a "fair and judicious hearing" and was "discriminated against" by the ALJ); ¶7 (ALJ Heep "probably did not write much of the Initial Decision"); ¶9 (PECO wrote the Initial Decision); ¶10 (the Initial Decision is "replete with misstatement and downright falsehoods!"); ¶11 (ALJ Heep is "in PECO's back pocket"); ¶16 (the Commission "should be ashamed of its cavalier attitudes"); ¶17 ("PECO, the PA PUC, and even this Court seem to be acting in some sort of complicity"); ¶18 ("what's the use" in Complainant presenting her position since "there apparently is a set agenda" against her).

Frustrated Complainants often make claims that the ALJ and Commission are biased against them. When faced with such claims, the Commission typically focuses on the merits (or lack thereof) of any substantive attacks on the Initial Decision. PECO believes that approach should be used here, and it will demonstrate throughout this Reply that the substantive attacks on the Initial Decision are baseless and that the associated bias claim is thus also baseless.

It nonetheless may be worthwhile for the Commission to know that Ms. Frompovich formed her opinion that the evidentiary hearing would be biased before she ever walked into the hearing room. Only a few minutes into this two-day hearing, PECO raised an evidentiary objection, which was sustained by ALJ Heep. Ms. Frompovich then stated (Tr. 17, lines 13-18):

> Excuse me. If I may say something, I'm a very up-front person and I affirmed to tell the truth. I presume and assume wholeheartedly and honestly and candidly that this case is going to be manufactured against anybody who is an opponent to Smart Meters. So why don't I just go home now?

Based on her own testimony, PECO respectfully submits that Ms. Frompovich entered this proceeding having made a prejudgment that bias would occur -- and thus she had and has a predisposition to see bias where none exists.[2] Viewed in that context, her claim that she experienced bias at her hearing or in the Initial Decision should be given even less weight than the Commission would normally give to such claims.

B. PECO's reply to Ms. Frompovich's Exceptions

PECO provides the following reply to Ms. Frompovich's Exceptions.

1. The ALJ properly limited the evidentiary use of internet documents offered by Ms. Frompovich. Those internet documents are hearsay and cannot be relied upon to prove the truth of the matters asserted therein (Reply to Frompovich Exceptions ¶¶ 3, 4, 6 and 17)

At the evidentiary hearing, Ms. Frompovich testified about, asked cross-examine questions about, and/or offered into evidence numerous documents that she found on the internet. *See, for example*, Tr. 4-5, 51, 67, 72, 87, 90, 91, 176, 181-82, 223-25, 225-28, 231-32, 236, 240, 249-50, 304-09. In her Exceptions (¶¶ 3, 4, 6, and 17), Ms. Frompovich claims that,

[2] Perhaps the most extreme example of Ms. Frompovich's predisposition to see bias where none exists is found at ¶ 9 of the Exceptions, where Ms. Frompovich notes that both PECO and the ALJ referred to Ms. Frompovich's book "A Cancer Answer" as "The Cancer Answer" – and claims that this demonstrates collusion and a bias against her. PECO notes that Ms. Frompovich herself referred (Tr. 25, line 12) to her book as "The Cancer Answer book." But set aside that nomenclatural guidance from Ms. Frompovich. It is simply remarkable that Ms. Frompovich would accuse the ALJ of bias on the slender reed that the ALJ's use of "The" rather than "A" in stating the title of a book somehow demonstrates bias. In fact, seeing bias in that inconsequential event is an example of Ms. Frompovich's predisposition to see bias where none exists.

due to PECO's evidentiary objections, she was precluded from putting on a full case with respect to those internet documents.[3] Ms. Frompovich had breast cancer a few years ago, and her Exceptions specifically focus on internet documents regarding breast cancer, which she claims (¶ 4) "were rejected and not permitted to be entered into the record; something this Court was remiss in by sustaining PECO's objections time after time."

First, the record needs to be set straight on the evidentiary rulings that were actually made by ALJ Heep. A careful review of the transcript will demonstrate that, for every internet-derived document that Ms. Frompovich mentioned on the record, she was ultimately allowed to either testify about the document or read from it and ask cross-examination questions about it.[4] Moreover, every internet document that she requested to be marked for identification was so marked and was later admitted into the record (Tr. 4-5, 181-82), often over PECO's objection.

For the breast cancer studies that Ms. Frompovich claims were excluded, the transcript shows that, during her direct testimony, she had a lengthy exchange with ALJ Heep (Tr. 35-39), in which the ALJ repeatedly tried to elicit testimony from Ms. Frompovich with respect to those studies (while at the same time making it clear that the studies themselves would not be admitted into evidence). The specific dialogue on the breast cancer studies was (Tr. 35-37):

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[3] *See* Exceptions ¶ 3 ("Frompovich presented hundreds, if not thousands, of document citations and/or actual documents . . . only to be totally disregarded and probably procedurally discarded. . . "); ¶ 4 ("Frompovich's attempted introduction . . . of published peer review studies regarding cancer and EMF/RF/ELF, specifically breast cancers, were rejected and not permitted to be entered into the record; something this Court was remiss in by sustaining PECO's objections time after time."); ¶ 6 ("Judge Heep actively prevented evidence, which was germane to Frompovich's case, e.g., cancer studies and EMFs/RFs/ELFs, from being introduced at the behest and objections from PECO's attorneys").

[4] Ms. Frompovich also offered a letter from her treating physician, who was not available to testify. Because the doctor was not available to be cross-examined, ALJ Heep properly excluded that letter as hearsay. Tr. 17.

ALJ Heep: [W]hat we need to focus on today is your opinion. Tell me your opinion regarding the effect. Then you have to explain to me why you've reached the opinion; and, if you base that opinion based on any of the documents or research papers that you have with you, you should reference them.

Ms. Frompovich: Okay. First of all, I'd like to introduce 43 pages of breast and other cancers from EMF, ELF and RF radiation and their human – would you like to have them, Your Honor?

ALJ Heep: I just need you to reference the paper and tell me what is included in that paper that is related to your conclusion.

Ms. Frompovich: Breast cancer and EMF, ELF, RF published studies 1986 to 2005, breast cancer and other various cancers produced by EMF, ELF, and RF. There's approximately 240 on 43 printed pages.

ALJ Heep: All right. Let's see how I can clarify this. Let me clarify we're not going to accept the articles themselves as evidence; however, you can testify. You can say my opinion regarding, my expert opinion is that emissions cause cancer or aggravate cancer, whatever your opinion is. I base that because the articles I've read say whatever they say.

You can then name the article, but how many pages it is and reading specifically from it is not helpful to your case because those particular articles will not be admitted.

I think what we need as background, however, is what is more information on your [breast] cancer and how this Smart Meter is going affect your specific issues because, as I read to you earlier, the Commission referred this to us because their belief was that you could personally testify regarding the specific circumstances and the effect that a Smart Meter would have on your particular circumstances.

Having thus been clearly informed that she could testify about the breast cancer studies, Ms. Frompovich immediately switched topics to discuss her view of the Americans with Disabilities Act. Tr. 37.

ALJ Heep then doggedly attempted once again to elicit testimony from Ms. Frompovich with respect to her internet documents, resulting in the following exchange (Tr. 37-39):

That [testimony regarding the ADA] is not assisting your complaint and is not responsive. What I need you to focus on is you in particular. And, again, I qualified you as an expert; and, if there is any testimony that you have regarding say the effects of the Smart Meter on your nutritional healing treatments or anything like that, that should be put on the record in support of your case.

Ms. Frompovich: Your Honor, what I'm going to tell you is this. Obviously my case isn't going to go anywhere because none of my information is going to be acceptable to the Court because it is all published documents which you don't want to accept, and I don't understand that. I did not manufacture them.

I have with me a jump drive if you want to look at it on your computer that you can pull it all up. Everybody does research on computers anymore, so it's all there; and I just don't understand how this Court is acting.

ALJ Heep: Well, we're acting the way the rules require us to act. Just to give you a little background, I practiced many, many years in federal courts. Federal courts are much more lenient as far as these types of documents; however, Pennsylvania decided that these documents generally should not be admitted unless the person who wrote them is there to have them admitted and testify as to their content and authenticity.

That's just the way the rule operates. However, again, you can testify. You can reference it. You can say, for example, in your paper you have that the American Academy of Pediatrics, you based your opinion because the American Academy of Pediatrics said that nutrition does whatever it does.

Ms. Frompovich: Absolutely.

ALJ Heep: You agreed to testify to that. What I'm explaining to you is the documents themselves will not be admitted.

That was the totality of the dialogue during Ms. Frompovich's case-in-chief with respect to the breast cancer studies.[5] At this point in the hearing Ms. Frompovich dropped her discussion of breast cancer studies and moved to her next topic (EMF and blood cell counts). Tr. 39-40. (Ms. Frompovich never returned to the breast cancer studies, never offered any testimony based on or referring to them, and never asked that they be marked as an exhibit or introduced into evidence.

[5] During cross-examination of PECO's witnesses on the second day of hearings, Mr. Frompovich returned to her breast cancer studies and posed questions to PECO witness Dr. Mark Israel based on those studies. PECO noted that these studies had not been admitted during the previous day's hearing, but did not lodge an objection. Ms. Frompovich and ALJ Heep then asked Dr. Israel a series of questions related to these studies. Tr. 303-09. Ms. Frompovich did not ask that the breast cancer documents be marked as a cross-examination exhibit or be admitted into evidence.

Two things jump out of that discussion. First, ALJ Heep did everything that she could to elicit testimony from Ms. Frompovich on her internet breast cancer studies. It was Ms. Frompovich who, despite repeated opportunities and entreaties, refused to provide testimony. Second, in her Exceptions (¶4) Ms. Frompovich claimed that her studies "specifically [on] breast cancers, were rejected and not permitted to be entered into the record; something this Court was remiss in by sustaining PECO's objections time after time" – but it is clear from the dialogue set forth above that PECO never objected or even spoke at any point during Ms. Frompovich's testimony regarding the internet breast cancer studies.

Over the course of the two-day hearing, ALJ Heep repeatedly admitted the internet documents to show the basis of a witnesses' opinion, but not for the truth of the matters asserted in the documents. *See, for example*, Tr. 4-5, 34-35, 69, 71, 181-82, 313. That is, ALJ Heep properly treated these documents as hearsay, and thus admitted them with a limitation on their evidentiary use. *See, for example,* Tr. 65.[6]

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[6] *See also* Tr. 69:

> JUDGE HEEP: All right. Again, I'm going to admit them as sources for the basis for her opinions, not as the truth of the matter asserted. So are there any objections?
>
> MR. SMITH : On that basis, no, Your Honor. I would like clarity on that so that there's not any untoward surprises later. It is my understanding that that means that, when we come to the briefing stage of this proceeding, these exhibits may not be cited or quoted to prove that exposure to radiofrequency fields or Smart Meters causes adverse human health effects. They may be cited [for] the proposition that Ms. Frompovich read and relied upon them in forming her opinion to that extent.

See also Tr. 71:

> JUDGE HEEP: So, if she submits a post-hearing brief, she can reference it saying this is the basis that I used in forming my opinion; however, again we're still back to the limit that they're not accepted for the truth asserted therein.

With clarity as to the rulings that ALJ Heep actually made, we can now turn to the propriety of those rulings -- and her evidentiary rulings were fully appropriate. The leading Pennsylvania case on the admissibility of hearsay in administrative proceedings is *Walker v. Unemployment Compensation Board of Review*, 27 Pa. Cmwlth. 522, 367 A. 2d 366 (1976). In *Walker*, the Commonwealth Court reviewed prior conflicting precedent on the use of hearsay in administrative proceedings, and resolved the then-existing conflict by setting forth rules for the admissibility and use of hearsay evidence in administrative proceedings:

> To remedy this apparent inconsistency and to lessen confusion regarding the use of hearsay to support the findings of the Board, we set forth the following guidelines: (1) Hearsay evidence, properly objected to, is not competent evidence to support a finding of the Board; (2) Hearsay evidence, admitted without objection, will be given its natural probative effect and may support a finding of the Board, if it is corroborated by any competent evidence in the record, but a finding of fact based solely on hearsay will not stand.

(emphasis added). *See also, Chapman v Unemployment Compensation Board of Review*, 20 A. 3d 603 (Pa. Cmwlth. 2011), fn 8, citing *Walker* for the proposition that "it is well settled that, standing alone, uncorroborated and properly objected to hearsay evidence is not competent to support a finding of fact of the Board" (emphasis added).

PECO objected to the admission of the internet documents on the grounds that they are hearsay. *See, for example*, Tr. 65. Under the *Walker/Chapman* rule, ALJ Heep thus normally would have been correct to exclude Ms. Frompovich's proffered internet documents altogether since, once PECO objected to those documents as hearsay, the documents were no longer competent to support a factual finding.

The ALJ similarly allowed Ms. Frompovich to cross-examine PECO's witnesses using internet documents, and then admitted such documents "as a cross-examination document, not necessarily for the truth of the matter therein." Tr. 250.

The instant proceeding, however, had a wrinkle that warranted the more permissive evidentiary treatment allowed by the ALJ. Because of Ms. Frompovich's professional background, she was recognized as an expert in "a very limited area on nutrition, natural healing, and treating cancers from that perspective." Tr. 33. As an expert, her testimony and supporting documents need to be viewed through the prism of Article VII of the Rules of Evidence.[7] Pursuant to Rule 702, an expert's opinions may be based upon "facts or data . . . that the expert has been made aware of . . . . If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted." This rule allows an expert to rely upon non-admissible hearsay – such as internet documents -- in forming their expert opinion. Under Rule 705, an expert must state the basis for their opinion. And, if the expert relied upon non-admissible hearsay – such as internet documents -- in forming their opinion, then the underlying hearsay is admissible for some purposes (to understand the basis for the expert's opinion) but not for other purposes (hearsay cannot be used to prove the truth of the matter asserted therein.) Indeed, in the civil courts, the procedure for addressing expert reliance on hearsay in forming an expert opinion is almost precisely the solution reached by ALJ Heep:

> When an expert testifies about the underlying facts and data that support the expert's opinion and the evidence would be otherwise inadmissible, the trial judge upon request must, or on the judge's own initiative may, instruct the jury to consider the facts and data only to explain the basis for the expert's opinion, and not as substantive evidence.

Explanatory Note to Pennsylvania Rule of Evidence 705.

PECO respectfully submits that, given that Ms. Frompovich was recognized as an expert, ALJ Heep made the proper ruling as to the limited admissibility and use of these internet

[7] While the Rules of Evidence do not strictly apply in Commission evidentiary proceedings, the Commission often looks to those rules for guidance in developing proper evidentiary records.

documents in this proceeding.[8] Ms. Frompovich was properly allowed to form expert opinions based on hearsay information and to ask PECO's experts questions regarding internet documents, but those hearsay internet documents themselves are not competent evidence to prove the truth of the matters asserted therein.

This evidentiary issue has very real pragmatic implications. The internet remains an unpoliced frontier and, while there is much of value online, there are also many documents online that cannot be relied upon as true and reliable. The authors of these internet articles do not appear in the hearing room for cross-examination and to have their demeanor evaluated by the ALJ and the Commission. This is critical. When internet sources – even apparently respectable internet sources – are subjected to cross-examination, it sometimes becomes apparent that those sources should not be relied upon for Commission decisions and policy.

One obvious example of an internet source that did not hold up well on cross-examination is presented in Ms. Frompovich's Exceptions. In her Exceptions (¶ 17), Ms. Frompovich refers to a "BioInitiative 2012" excerpt (Complainant's Exhibit R-1 and PECO Cross Exhibit 2). Ms. Frompovich claims that the authors of this report have "documented thousands of adverse health effects studies."

The BioInitiative report was edited by Dr. David Carpenter. Tr. 89. Dr. Carpenter appeared as an expert witness before this Commission in the PPL *Susquehanna-Roseland* transmission line siting case (Docket No. A-2009-2082652). In that proceeding, the Commission

[8] PECO takes this position regarding the limited use of hearsay only as it relates to the testimony of expert witnesses. As to lay witnesses, however, PECO does not believe that the lay witness should be allowed to testify about or rely upon hearsay; *see* Pennsylvania Rules of Evidence Article VIII; nor should lay witnesses be allowed to offer opinions about complex technical, scientific or engineering issues that are properly the province of expert testimony. *See* Pa. Rule of Evidence 701(c).

rendered the following extremely negative judgment of Dr. Carpenter's scientific approach (Jan. 14, 2010 Order, pp. 111-14):

> [The ALJ found that] [t]he record evidence shows that Dr. Carpenter's opinions were flawed and were not based on a reliable and objective review of the scientific research. . . .In light of this overwhelming evidence, there is no good basis to give any weight to Dr. Carpenter's extreme views.
>
> * * *
>
> We agree with the ALJ regarding the testimony of the SCECA witness Dr. Carpenter. When the record is viewed in its entirety it is clear that Dr. Carpenter's testimony is his largely unsubstantiated (albeit heartfelt) opinion that EMF poses a health threat at any level.

When Dr. Carpenter himself appeared before this Commission and was subjected to cross-examination, his "extreme views" were given no weight. While it is permissible for Ms. Frompovich, as an expert, to testify that she reviewed Dr. Carpenter's writings and relied upon them in forming her opinion, she should not be allowed to import his extreme views into a Commission proceeding for the truth of the matters that he asserts in those documents. Cross-examination in a Commission case previously exposed the weaknesses in his methods and conclusions; before his opinions could become part of another evidentiary record at the Commission, he would need to be subjected to cross-examination again.

More broadly, this example provides a cautionary note that, while internet documents can be reviewed, assessed, and used by experts to assist them in forming their expert opinions, the documents themselves should not be relied upon to prove the truth of the matters asserted therein. And ALJ Heep's evidentiary rulings walked that fine line -- she allowed expert witnesses to describe the basis for their opinions, including identified internet documents, but not to use those documents as separate competent evidence. Those rulings should be supported by the Commission, and the Initial Decision should be upheld.

2. Ms. Frompovich's Exceptions impermissibly rely upon extra-record materials (Reply to Frompovich Exceptions ¶¶ 3, 12, 13-14, 15, and 16)

Ms. Frompovich's Exceptions also quote extra-record materials that were not introduced or discussed at hearing, including the following:

- ¶3 – publications that Ms. Frompovich claims attack the integrity of the International Commission on Non-Ionizing Radiation Protection ("ICNIRP"). Ms. Frompovich cross-references materials cited at pages 40-45 of her Main Brief, but all of the materials that she cited at those pages of her Main Brief were themselves extra-record materials
- ¶12 – YouTube video on "Onzo" algorithm
- ¶¶13-14 – discussion of "mesh" systems and PowerPoint presentation regarding PECO's Multi-Tiered Smart Grid Network
- ¶15 – Two YouTube videos from Arizona anti-smart-meter activist Warren Woodward
- ¶16 – August 2015 issue of the Journal of Chemical Neouranatomy by Dr. Martin Pall
- ¶16 – Google Charts graphic from Om Ghandi

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 prejudice PECO unless it was given an opportunity to cross-examine the witness sponsoring the documents and to submit rebuttal evidence.

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 in-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 – the extra-record information listed above 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. PECO thus did not have the opportunity to object to the admission of documents now relied upon by Ms. Frompovich; PECO did not have the opportunity to cross-examine a witness sponsoring the documents; and 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 Exceptions 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 facts or law since the close of the record in this proceeding and has not demonstrated that the public interest requires reopening the record. The new information in the Frompovich Exceptions 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 Exceptions were admitted into the evidentiary record in this proceeding or otherwise formed a basis for a Commission decision. PECO therefore respectfully requests that the Commission rule that the non-record information contained in the Frompovich Exceptions is not admitted as part of the record evidence in this proceeding and that the Commission will not rely upon it for its decision.

3. The Initial Decision was correct in holding that the commission does not have jurisdiction over Americans With Disabilities Act claims, and Ms. Frompovich is incorrect in her argument that a different outcome is warranted under the Americans With Disabilities Act Amendments of 1990 (Reply to Frompovich Exceptions ¶¶ 6-8)

One of the recurring themes of Ms. Frompovich's Main Brief is her stated belief that she has a claim against PECO under the Americans with Disabilities Act. For example, she states

(pp. 9-10, ¶ 19) that: "Frompovich asks nothing more of this Honorable Court, the PA PUC and PECO to exercise her unalienable and indefeasible rights under the Americans with Disabilities Act Amendments Act . . . . to live her life free of PECO's Flexnet or any utility company's AMI Smart Meter(s). . . ."

In its Reply Brief (pp. 8-10), PECO noted that the Americans with Disabilities Act applies to employment, transportation access, public accommodation, communication and governmental activities – and that because the fact pattern of this complaint does not fall into any of those areas, Ms. Frompovich has not properly pled a cause of action under the Americans with Disabilities Act. PECO also argued (p. 10) that the Commission does not have jurisdiction over ADA claims, stating that:

> [The Commission does not have] 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 [the federal courts or one of the federal enforcement agencies, which are the Department of Labor, the Equal Employment Opportunity Commission, the Department of Transportation, the Federal Communications Commission, and the Department of Justice], not the Commission.

The Initial Decision (p. 18) agreed with PECO's jurisdictional argument, stating:

> It is beyond the jurisdiction of the Commission to determine whether Complainant has a disability as defined under the ADA. Further, a state agency's determination of what the ADA requires is not determinative. See *McCree v. SEPTA*, 2009 U.S. Dist. LEXIS 4803 (D. PA. 2009).

In her Exceptions (¶¶ 6-8), Ms. Frompovich makes essentially one argument against the Initial Decision's holding on ADA issues. She claims that because both PECO and the ALJ refer to the Americans with Disabilities Act – but not to the 1990 Americans with Disabilities Amendments Act, or "ADAAA" – all statements made by the ALJ or PECO must be understand as referring to the pre-1990 version of the ADA. The conclusions of the Initial Decision with respect to the ADA, she claims, are thus wrong.

PECO respectfully submits that, in 2017, all references to the ADA should be presumed to incorporate reference to the 1990 Amendments to the ADA. For example, the 2017 Department of Labor website quoted in PECO's Reply Brief (pp. 8-10) must be presumed to be referring to the current ADA, not the ADA as it was prior to amendment 27 years ago. The 2009 federal district court decision cited by ALJ Heep must be presumed to have referred to the 2009 version of the ADA, not the un-amended ADA that was in effect 19 years before that decision was issued. Similarly, there is no basis to assume that the ALJ (in the Initial Decision) or PECO (in its briefs) were discussing the ADA as it existed prior to 1990, rather than the current version of the ADA.

PECO also notes that, in making her ADAAA argument, Ms. Frompovich cites (¶ 7) various provisions of 29 C.F.R Part 1630, which is an ADA regulation issued by the Equal Employment Opportunity Commission. The fact that Ms. Frompovich resorted to an EEOC website to make her ADA arguments further supports PECO's view that it is federal agencies and federal courts, not the Commission, that have jurisdiction over ADA matters.

4. The Initial Decision properly rejected Ms. Frompovich's claim that PECO's AMI meters will create "dirty electricity" (Reply to Frompovich Exceptions ¶ 2)

At the evidentiary hearing, Ms. Frompovich expressed concern that PECO's AMI meter would subject her to "dirty" electricity (Tr. 37), also known as "harmonics." In their testimony, PECO witnesses Dr. Christopher Davis and Mr. Glenn Pritchard addressed Ms. Frompovich's concerns. Their testimony on dirty electricity and harmonics is detailed in PECO's Main Brief (pp. 26-27), and that detail will not be repeated here, but in general they stated that "dirty electricity" is not a scientific term; the scientific term for this phenomenon is "harmonics." Harmonics are abundant on the electric system from many sources, including fluorescent bulbs.

Further, AMI meters either produce no harmonics or harmonics of such small magnitude that they do not meaningfully contribute to overall harmonics.

The Initial Decision accurately reflected this testimony. *See* Initial Decision pp. 22-23 and Findings of Fact 63-66.

In her Exceptions (¶ 2), Ms. Frompovich raises the issue of "dirty electricity" again – but she does not challenge the testimony of Dr. Davis or Mr. Pritchard, nor does she suggest that the Initial Decision incorrectly stated the harmonics testimony or incorrectly resolved her "dirty electricity" claim. Instead, she pivots in a new direction to launch an attack on compact fluorescent lightbulbs ("CFLs") as a strong source of harmonics, claiming that PECO recommends the use of CFLs and that this is an "unsafe utility innovation."

CFLs are not at issue in this proceeding. Ms. Frompovich raised no concerns with any PECO CFL program in her Complaint, testimony, brief, or reply brief. She cannot raise a new claim for the first time in Exceptions.

Ms. Frompovich's argument on "dirty electricity" and harmonics provides no reason to believe that the Initial Decision is incorrect in recounting the testimony or in its assessment of Ms. Frompovich's "dirty electricity" claim. Her Exception on this issue should therefore be denied.

5. The Initial Decision correctly stated the periodicity of radio frequency transmissions from the Zigbee radio in PECO's AMI meters (Reply to Frompovich Exceptions ¶¶ 10-11)

At the evidentiary hearing, PECO witness Glenn Pritchard testified regarding the periodicity of radio frequency transmissions from the PECO AMI meter. Tr. 131-34. In her Exceptions, Ms. Frompovich claims that the Initial Decision does not accurately report the testimony with respect to transmissions from the Zigbee radio contained in the AMI meter, and

that Finding of Fact 60 is "wordsmithed to protect PECO's Focus AMI Smart Meter's almost constant search-for-appliance-or-device microwave GHz transmissions as Mr. Pritchard's remarks quoted above prove, and is a blatant misrepresentation in the Initial Decision."

By way of background, PECO's AMI meters have two radios with differing transmission characteristics: First is the FlexNet module, which transmits from the AMI meter to the PECO backbone system. Once the AMI meters are installed, the FlexNet modules are tuned down to the lowest amount of transmissions that result in good communication with the backbone system. Across the PECO service territory, the FlexNet modules in the PECO AMI meters transmit an average of ten times per day, and the FlexNet modules in the PECO AMI meters in Ms. Frompovich's neighborhood transmit an average of eight times per day.

The Initial Decision discusses the transmission characteristics of the FlexNet module at Findings of Fact 46-57. In her Exceptions, Ms. Frompovich does not raise any issues with the Initial Decision's discussion of the transmissions of the FlexNet module.[9]

The second radio in the AMI meter is a Zigbee radio that transmits from the AMI meter to smart devices in the residence. The Zigbee radio transmits every thirty seconds until it pairs with a smart appliance in the home. After pairing with an appliance, the transmissions from the Zigbee radio will decrease to match the requirements of the smart appliance, with an expected transmission rate of from once every five minutes to once an hour or once a day, depending upon the appliance with which it has paired.

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[9] Ms. Frompovich briefly mentions Finding of Fact 53 (Exceptions, ¶10), but does not explain what she thinks is wrong with it. Finding of Fact 53 relates to Mr. Pritchard's testimony about the transmission characteristics of the FlexNet module. It states: "On average, AMI meters transmit ten times a day but also can be configured or tuned to transmit at a maximum of 96 times per day, or once every 15 minutes. (Tr. 133.)" This is an accurate reflection of the transmission periodicity of the FlexNet module.

Ms. Frompovich's Exceptions attack the Initial Decision's discussion of the Zigbee radio in Finding of Fact 60, claiming that it is an "obvious mistake" that is "wordsmithed to protect PECO . . . and is a blatant misrepresentation in the Initial Decision."

Finding of Fact 60 relates to Mr. Pritchard's direct testimony about the transmission characteristics of the Zigbee radio when it is not paired with a device. It states:

> If the Zigbee radio is not paired with a smart device or appliance, it sends out a message every thirty seconds for less than one millisecond at the power of one-tenth of a watt. (Tr. 134).

This Finding of Fact correctly reflects the underlying testimony. Mr. Pritchard's cited testimony is at page 134 of the transcript, and it states:

> Q. Now let's talk about the Zigbee radio. How often does it transmit to the house?
>
> A. Again, the Zigbee radio is configurable as well. In an unprovisioned state, meaning that the ZigBee radio has not been paired to any device in the home, it is in a more aggressive communications state as it seeks a device. So that would be putting out a message every 30 seconds .
>
> Q. Okay. And what is the duration of each of those transmissions?
>
> A. The duration is less than one millisecond.
>
> Q. Millisecond or microsecond?
>
> A. Millisecond. It would be .7 millisecond.
>
> Q. Okay. And what is the power of that transmission?
>
> A. Approximately 100 milliwatts.
>
> Q. So it's one-tenth of a watt?
>
> A. Yes.

This testimony and Finding of Fact 60 comport perfectly.

Ms. Frompovich is correct that, later in the hearing, ALJ Pell asked Mr. Pritchard additional questions regarding the transmission periodicity of the Zigbee radio when it is paired with a device. Tr. 168-170. In response to those questions, Mr. Pritchard testified that:

> In its initial state [the Zigbee radio) will transmit frequently trying to pair up with another device. When another device is found, then the transmissions actually settle out depending on what that device itself needs. It could be once every five minutes to once every hour or maybe even once a day depending on what the device -- whether it would be a smart thermostat, a dishwasher as you mentioned or maybe an in-home display device.

That testimony regarding transmissions from a paired Zigbee radio is accurately reflected in Finding of Fact 62, which states:

> 62. If a device is paired, the number of transmissions [from the Zigbee radio] would decrease from once every five minutes to once an hour or once a day, depending upon the device to which it is paired.

Collectively, this underlying testimony states that the Zigbee radio transmits every 30 seconds until it pairs with a smart device, at which point in time the transmissions decrease, and that is exactly what Findings of Fact 60 and 62 state. Those Findings are not a "mistake," "wordsmithing" or "blatant misrepresentation." Rather, the Initial Decision fully and accurately reflects the underlying testimony.

6. The Initial Decision correctly stated that PECO's AMI network does not use "mesh" technology (Reply to Frompovich Exceptions ¶¶ 13-14)

In her direct testimony (Tr. 20), Ms. Frompovich stated her belief that PECO's AMI meters transmit "9,600 times a day." In reply, PECO witness Glenn Pritchard testified that PECO's AMI meters actually communicate to the backbone system an average of 10 times per day. Finding of Fact 53. He stated that he is aware of other AMI technologies that do have the higher transmission periodicity referred to by Ms. Frompovich, and that these technologies are known as "mesh" systems. He testified that PECO chose not to use a mesh architecture for its

AMI system, but instead chose to use a licensed spectrum approach that allows it to operate using far, far, fewer transmissions per AMI meter than would be required in a mesh system. Tr. 135-37.

The Initial Decision accurately reflected this testimony. *See* Findings of Fact 50-57 and Initial Decision page 21.

In her Exceptions (¶¶ 13-14), Ms. Frompovich focuses on page 21 of the Initial Decision, and briefly discusses extra-record materials (an IEEE presentation by Mr. Pritchard that describes PECO's AMI network as a four-tier system that is comprised of Tier 1: Fiber; Tier 2: Wireless; Tier 3: AMI; and Tier 4: HAN). She then asks (¶14): "What is that four-tier network all about?" Presumably, by asking this question she intends to challenge the Initial Decision's acceptance of Mr. Pritchard's testimony re mesh systems.

As noted in Section II.B.2 of this Reply, the noted IEEE document is extra-record material and therefore cannot form a basis for the Commission's decision in this docket.

Setting aside that document, however, PECO believes that it is important to underscore that Mr. Pritchard gave extensive testimony that PECO's system operates quite differently than other AMI systems. PECO's system does not transmit over the common, unlicensed, Industrial, Scientific, and Medical band of the spectrum. Instead, it utilizes licensed spectrum in which PECO is the only user in its service territory that may transmit over that licensed spectrum. Because of this technology choice, PECO's transmissions do not have to compete to be heard over other transmissions filling the same spectrum space. Consequently, the PECO AMI system is not a mesh system and operates using far less radio frequency transmissions than used in other AMI systems. Tr. 135-37.

Mr. Pritchard was the principal design engineer involved in selecting PECO's AMI technology. Tr. 126. His description of the PECO technology should thus be given substantial deference. The Initial Decision properly gave deference to this testimony and accurately described and relied upon it. There is nothing in Ms. Frompovich's Exceptions (¶¶ 13-14) that suggests that any other conclusion can or should be reached.

III. Conclusion

PECO respectfully submits that the Commission should deny the Exceptions of Complainant Catherine Frompovich and issue an Opinion and Order adopting the Initial Decision in this matter.

Respectfully submitted,

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