

Legal Department
2301 Market Street / S23-1
Philadelphia, PA 19101-8699

Direct Dial: 215-841-6863

February 20, 2018

VIA E-FILING

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

**RE: Nancy and Edmond Zeibari v. PECO Energy Company
PUC Docket No. C-2017-2617281**

Dear Ms. Chiavetta:

Enclosed please find the Reply Exceptions of PECO Energy Company in the above-referenced matter. A Certificate of Service evidencing that service is attached for filing.

Very truly yours,



Ward Smith
Counsel for PECO Energy Company

WS/ab
Enclosure

cc: Honorable Darlene D Heep, ALJ
Nancy and Edmond Zeibari

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Nancy and Edmond Zeibari

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Docket No. C-2017-2617281

v.

PECO Energy Company

CERTIFICATE OF SERVICE

I, Ward L. Smith, hereby certify that I have this day served a copy of Reply Exceptions of PECO Energy Company via Overnight Mail:

Nancy and Edmond Zeibari
518 Graystone Road
Ambler, PA 19002

Dated at Philadelphia, Pennsylvania, February 20, 2018



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

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PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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C-2017-2617281

Reply Exceptions of PECO Energy Company

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I. Introduction

By Secretarial Letter dated February 9, 2018, the Commission issued the Initial Decision of Administrative Law Judge Darlene Heep in this docket. In that Secretarial Letter, the Commission noted that Exceptions to the Initial Decision had previously been filed with the Commission, but not properly served on PECO. The Commission thus stated that PECO had until February 20, 2018 to file its Reply Exceptions.

This case came to closure at the ALJ level when Mrs. Zeibari withdrew her complaint because she did not want to go to the effort of preparing for and participating in an evidentiary hearing. At first glance at Mrs. Zeibari's Exceptions it might appear that she has changed her mind and is now seeking a hearing. But a close reading of the Exceptions reveals that she has not requested a hearing either now or in the past. Rather, she withdrew her complaint in order to avoid going to a hearing, but now wants her complaint to "still stand," and asks that the Commission rule "in our favor, thereby precluding any plan by PECO Energy Company to install an AMI or Smart Meter on our property" – *but she wants the Commission to rule that way without going through the hearing process*. Simply, she wants the act of filing her complaint to end the process in her favor.

Of course, the Commission should not, and cannot, grant Mrs. Zeibari's complaint without holding an evidentiary hearing. As the Complainant, Mrs. Zeibari has the burden of proof; if she does not meet her burden of proof, the Commission cannot rule in her favor. To do so would violate PECO's due process right to be heard. The Commission should therefore affirm the Initial Decision.

However, if the Commission does decide to remand this matter for a hearing, PECO requests that such a remand be ordered as soon as possible. As described below, ALJ Heep has

taken steps to ensure that evidentiary hearings for the body of PECO AMI/health cases will be complete in the first half of 2018. That schedule produces significant judicial efficiencies for both the Commission and PECO, and those efficiencies would be disrupted if hearings were to be delayed to the second half of 2018 or later. Thus, if the Commission is going to remand this matter for hearing, PECO requests that it order that remand quickly so that ALJ Heep can schedule a new hearing before mid-year.

II. Argument

A. Mrs. Zeibari is not seeking a hearing. She wants the Commission to rule in her favor without going through a hearing

The history of this proceeding makes it clear that Mrs. Zeibari has never wanted an evidentiary hearing; that she withdrew her complaint specifically to avoid an evidentiary hearing; and that in her Exceptions she did not ask for an evidentiary hearing. What she wants is for the Commission to rule in her favor without going through the hearing process.

The complaint in this matter was filed on or about July 27, 2017. The evidentiary hearing was set for December 13, 2017. By Prehearing Order issued on August 31, 2017, ALJ Heep stated, among other things, that witness summaries were to be exchanged by October 17, 2017.

In these AMI/health cases, PECO asks standard Set I discovery comprised of three questions on other sources of radio frequency exposure (*e.g.*, cell phones) and with respect to medical records. On October 2, 2017, PECO served its standard Set I discovery on Mrs. Zeibari, with a return date of October 22, 2017.

On October 5, 2017 – just days after receiving PECO’s Set I discovery – Mrs. Zeibari called the office of PECO’s lead AMI counsel. In that call, she stated that she had received PECO’s Set I discovery, had no interest in participating in an evidentiary hearing, and wished to

withdraw her complaint. Counsel explained the procedure for withdrawal¹, and Mrs. Zeibari asked if she could wait until November to file a withdrawal because she wanted to delay AMI installation as long as possible. Counsel explained that, on the litigation schedule set by the Prehearing Order, the parties needed to proceed with any non-hearing resolution more quickly than a November filing because of the interim dates, including the requirement to file witness reports on October 17. Consequently, by October 17, 2017, the parties had reached an agreement that would facilitate withdrawal of the complaint. The date of agreement was not coincidental; it was specifically driven by the date originally ordered for the exchange of witness summaries. The agreement was that (1) PECO would not require Mrs. Zeibari to answer its discovery; (2) the parties would agree not to exchange expert reports on October 17; (3) PECO would hold installation of Mrs. Zeibari's AMI for some months (the initial agreement was that PECO would hold installation until the scheduled hearing date in December 2017); and (4) in return, Mrs. Zeibari would withdraw her complaint.

On October 17, 2017, PECO sent a letter to Mrs. Zeibari that evidenced that an agreement had been reached. PECO stated:

As we discussed, you wish to withdraw your complaint in your pending PUC case. Please sign below where noted and return this letter to me using one of the prepaid, pre-addressed envelopes included in this package. I will then present the counter-signed letter to the ALJ, which will effectuate the withdrawal of your complaint.

Even though an agreement had already been reached, Mrs. Zeibari was reluctant to counter-sign the letter. PECO counsel therefore agreed to re-open negotiations and subsequently agreed to delay installation of the AMI until February 2018 (which would avoid dates on which

¹ PECO also offered the option of filing a Certificate of Satisfaction. Mrs. Zeibari refused that option because she did not (and presumably does not) feel that her concerns have been "satisfied."

Mr. Zeibari was scheduled for surgery). With this new, second, agreement in hand, Mrs. Zeibari still would not return the counter-signed letter evidencing the agreement. It was only when counsel informed Mrs. Zeibari that she must return the executed letter by November 3, 2017 or PECO would proceed with the normal litigation schedule – and thus both parties would need to meet deadlines for discovery, preparation of expert reports, preparation for hearing, and appearance at hearing -- that she finally executed and returned the letter. On the executed letter, she included a handwritten annotation:

Although delicate health does not permit my enduring the stress of paperwork and court appearances, we still do not consent to having a Smart meter. At the same time, we cannot face a stoppage of electric current, especially in consideration of my husband's upcoming cataract/glaucoma surgery and convalescence The mid-February deadline would be a help, but 'indefinite' is what is necessary.

Although PECO recognized the ambiguity that was created by Mrs. Zeibari's annotation, it concluded based on its interactions with her that Mrs. Zeibari truly did not want to proceed with the scheduled evidentiary hearing on December 13, and notwithstanding her reservations she in fact did wish to withdraw her complaint in order to avoid such a hearing. On November 6, 2017, it therefore filed the executed withdrawal letter, with Mrs. Zeibari's handwritten annotation, with the Commission and ALJ Heep.

ALJ Heep immediately noted the ambiguous nature of Mrs. Zeibari's handwritten annotation and, the next day (November 7, 2017), the ALJ convened a call with the parties to inquire further into Mrs. Zeibari's intentions. The Initial Decision (p. 2) summarized that call as follows: "[Mrs. Zeibari] stated that she did not want a Smart Meter installed but that she did not want to continue with the complaint. Although she also stated that she did not want to 'concede' anything regarding the Smart Meter, she also clearly stated during the conference that she would no longer pursue the matter, that she would not appear to participate in a hearing and that she

wanted to withdraw her Complaint.” Initial Decision at 2. The latter part of this discussion was placed on the record, which resulted in the following colloquy (Tr. 4-5):

ALJ Heep: I contacted Ms. Zeibari to clarify her request to withdraw her complaint and yesterday I received by email a letter signed by her that states she wishes to withdraw her PUC Complaint at Docket Number C-2017-2617281. And Ms. Zeibari is clarifying for the record that she wishes to withdraw this matter and not pursue it further. Is that correct, Ms. Zeibari?

Mrs. Zeibari: It is correct. It’s not that I do not wish to pursue it further. I hate to be mistaken on this. I do wish to, but my health is not allowing it.

ALJ Heep: All right. So but at this time you want to withdraw your complaint?

Mrs. Zeibari: That’s correct.

ALJ Heep: Thank you very much.

Mrs. Zeibari: You’re very welcome.

ALJ Heep: And you should receive an order confirming this.

Mrs. Zeibari: Thank you.

On the strength of that discussion, Administrative Law Judge Heep accepted Mrs. Zeibari’s withdrawal of her complaint, cancelled the December 13 hearing, and subsequently issued an order granting Mrs. Zeibari’s request for leave to withdraw her complaint and closing the docket.

On January 19, 2018, Mrs. Zeibari filed (but did not serve on PECO) handwritten Exceptions, in which she restated her position that she does not “consent” to installation of an AMI meter, and that she was not able to participate in a hearing – but in the Exceptions she now adds that, instead of withdrawing her complaint, she wishes for it to “stand” and for the Commission to rule in her favor based solely on the complaint itself:

I (we) still do not consent to the installation of a PECO AMI or Smart Meter at our domicile because of privacy and health concerns nor could I appear at a

‘hearing’ due to the stress involved. . . . I propose . . . 3. that the complaint still stand. 4. that the judgment of the Pa Public Utility Commission be in our favor, thereby precluding any plan by PECO Energy Company to install an AMI or Smart Meter on our property.

In PECO’s view, this history makes it quite clear that Mrs. Zeibari withdrew her complaint specifically to avoid an evidentiary hearing and that her Exceptions do not ask for an evidentiary hearing. What she wants and has asked for is for the Commission to rule in her favor without going through the hearing process.

B. The Commission cannot rule for Mrs. Zeibari without first holding an evidentiary hearing because to do so would violate its rules on burden of proof and would also violate PECO’s due process rights

It is axiomatic in all Commission formal complaint proceedings that the Complainant has the burden of proof. *Samuel J. Lansberry, Inc. v. Pa. PUC*, 578 A.2d 600 (Pa. Cmwlth. 1990), *alloc. denied*, 529 Pa. 654, 602 A.2d 863 (1992).

In the seminal Commission case allowing an AMI/health hearing – *Kreider v PECO*, P-2015-2495064 – the Commission made clear that this general rule applies to AMI/health proceedings, stating (Jan. 28, 2016 Order, pp. 21-23, emphasis added) that:

Holding a hearing in this case, to address Ms. Kreider’s factual averments regarding the specific health effects she experienced after the smart meter was installed outside of her bedroom, will enable us to closely evaluate these claims based on a fully developed evidentiary record.

[A]s we expressed in the *September 2015 Order*, while we find that the Complainant should have the opportunity to be heard on her averments *regarding the “deleterious health symptoms” related to the smart meter, the Complainant will have the burden of proof during the proceeding to demonstrate, by a preponderance of the evidence, that PECO is responsible or accountable for the problem described in the Complaint.* 66 Pa. C.S. § 332(a); *Samuel J. Lansberry, Inc. v. Pa. PUC*, 578 A.2d 600 (Pa. Cmwlth. 1990), *alloc. denied*, 529 Pa. 654, 602 A.2d 863 (1992). *In order to carry this burden of proof, the Complainant*

may be required to present evidence in the form of medical documentation and/or expert testimony. The ALJ's role in the proceeding will be to determine, based on the record in this particular case, whether there is sufficient evidence to support a finding that the Complainant was adversely affected by the smart meter or whether PECO's use of a smart meter to measure this Complainant's usage will constitute unsafe or unreasonable service in violation of Section 1501 under the circumstances in this case. (emphasis added).

In the August 31, 2017 Prehearing Order in the instant matter, ¶ 12, the ALJ made clear that this same rule applies in this docket: "The Complainant bears the burden of proof and must demonstrate by a preponderance of the evidence that the respondent violated its tariff, the Public Utility Code or a Commission order or regulation, and that they are entitled to the relief requested in the Complaint."

There has been no evidentiary hearing, and Mrs. Zeibari has presented no proof in support of her claims. The Commission does not have a basis in substantial evidence on which to rule in her favor. Without a preponderance of evidence that supports Mrs. Zeibari's claim, the Commission cannot grant the relief that she asks for in her Exceptions – that the complaint "stand" and form the basis of a ruling in her favor.

Moreover, PECO has due process rights to hear the evidence against it and to establish, both by cross-examination and the presentation of its case, that it did not violate its tariff, the Public Utility Code or a Commission order or regulation. If the Commission were to grant Mrs. Zeibari the relief that she requests (ruling in her favor without a hearing), PECO's due process rights would be violated.

C. If the Commission does decide to remand this matter for an evidentiary hearing, it should do so as quickly as possible

In the first section of this argument, PECO demonstrated that Mrs. Zeibari withdrew her complaint in order to avoid an evidentiary hearing and has not asked for an evidentiary hearing in her Exceptions. PECO therefore urges the Commission not to remand this issue for an evidentiary hearing.

With that said, if the Commission concludes that Mrs. Zeibari does want an evidentiary hearing, and is entitled to one notwithstanding the withdrawal of her complaint, then PECO requests that the remand be issued as quickly as possible so that ALJ Heep can schedule the evidentiary hearing quickly.

PECO shut down its legacy AMR system in April 2017, and it completed Universal Deployment of residential AMI meters in the second half of 2017. As of this time, PECO is working on “residual deployment,” which consists of AMI deployment of about 1500 meters on inactive residential accounts. The only *active* residential accounts on which AMI meters have not been installed are the twenty or so complainants who have active formal complaints before the Commission.

In order to defend those complaints, PECO has organized a hearing team that involves in-house counsel and personnel, as well as outside counsel and personnel from three cities. Coordination and preparation of that team for hearings is a time-consuming and expensive process.

PECO has been litigating these cases for two years – and ALJ Heep has been hearing these cases throughout that time. Beginning in the fourth quarter of 2017, ALJ Heep began to tightly schedule PECO’s AMI hearings, with as many as three different cases going to hearing in

a single week and as many as six in a single month. As of this writing, hearings remain in 11 dockets, all of which hearings are scheduled to take place between now and May 1, 2018. This clustering has had the effect of allowing PECO to obtain important efficiencies in preparing for these cases, because its hearing team does not have significant “down time” between hearings. (Indeed, sometimes the PECO team does not even have much “breathing time.”) It is PECO’s belief and understanding that the presiding officer is similarly benefiting from this clustering of cases, both in her preparation for hearings and her work on Initial Decisions. Moreover, this approach still allows each Complainant to get their full hearing on a timely (but not rushed) schedule (as in the instant *Zeibari* case, where the hearing was originally scheduled about 4.5 months after the complaint was filed). Overall, the result of this clustering is judicial efficiency in handling a body of complex cases.

If the *Zeibari* case, or any other case, is delayed outside of that calendar grouping to the second half of 2018 or beyond, a great deal of that judicial efficiency will be lost because both PECO and the ALJ would then need to “restart” their litigation preparation to deal with the second half cases. Of course, PECO recognizes that some other case may arise that will have a later hearing date, or that one of the existing cases may have an unavoidable continuance. But each time that an “orphan” case is created, PECO and the ALJ will need to devote additional second half resources to resolving these cases, and the negative effect on the judicial efficiencies will increase. It is far better to complete the litigation of these cases on the compact schedule currently envisioned by the ALJs calendaring of this body of cases.

Consequently, if the Commission does decide to remand this matter for hearing, PECO requests that it do so as quickly as possible so that ALJ Heep can schedule a hearing within the current hearing calendar – that is, by or before June 2018.

III. Conclusion

PECO respectfully submits that the Commission should reject Mrs. Zeibari's exceptions and adopt the Initial Decision materially as written.

Respectfully submitted,



Romulo L. Diaz, Jr.
Vice-President and General Counsel
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

February 20, 2018