**BEFORE THE**

**PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Cynthia Randall and Paul Albrecht :

:

v. : C-2016-2537666

:

PECO Energy Company :

**PROTECTIVE ORDER**

On April 1, 2016, Dr. Cynthia Randall, Ph. D. and Paul Albrecht (Complainants), through counsel Edward G. Lanza, Esq., filed a formal Complaint against PECO Energy Company (PECO or respondent) with the Pennsylvania Public Utility Commission (Commission). The Complainants are requesting that the Commission: 1) compel PECO to comply with 66 Pa.C.S. § 1501; 2) compel PECO to cease attempting to install a smart meter on their property; 3) compel PECO to provide an accommodation for Dr. Randall and Mr. Albrecht based on their medical histories; 4) compel PECO to allow them to utilize an analog meter at their residence; and 4) order a permanent stay of any current or future termination on the part of PECO.

On April 21, 2016, PECO filed an Answer and New Matter and Preliminary Objection.

On May 2, 2016, Complainants filed an Answer to Preliminary Objection.

On June 14, 2016, the Preliminary Objection filed by PECO was sustained in part with respect to the request for relief seeking an “opt out” of smart meter installation. It was ordered that a hearing be scheduled to address whether installation of a smart meter at the Complainants’ residence, in light of their health concerns, constitutes unsafe and unreasonable service in violation of 66 Pa.C.S. § 1501.

On August 8, 2016, Stephen G. Harvey, Esq. filed an entry of Appearance as co-counsel for the Complainants.

On August 16, 2016, PECO Energy Company filed with the Commission a Joint Motion For An Omnibus Schedule Revision in the following proceedings:

Povacz v. PECO Energy Company, Docket No. C-2015-2475023

Randall and Albrecht v. PECO Energy Company, Docket No. C-2016-2537666

Van Schoyk v. PECO Energy Company, Docket No. C-2015-2478239

Murphy v. PECO Energy Company, Docket No. C-2015-2475726

All Complainants engaged the same counsel and shared experts. PECO intended to present the same experts in each matter. The Complainants and PECO offered that it is their joint belief that the proposed omnibus schedule would save substantial time and resources (as many as nine hearing days) for the Commission and the parties if there was not duplicative expert testimony.

The Motion for Omnibus Schedule was granted, and a revised Pre-Hearing Order was issued on August 26, 2016.

On August 25, 2016, Complainants Murphy and Povacz each filed a Motion for Reasonable Accommodation of Disability under the Americans with Disabilities Act (ADA). The parties sought to move the hearing to Harrisburg due to their concerns about exposure to electromagnetic fields in the courtroom in Philadelphia. On September 9, 2016, the Motion was denied in part and granted in part and an Order issued allowing the Complainants Murphy and Povacz to participate by telephone or videoconference.

Omnibus Hearings were held September 14-16, 2016, December 5-8, 2016, and January 25, 2017.

On October 17, 2016, Stephen and Diane Van Schoyck (Docket No. C-2015-2478239) filed a Petition to Withdraw, stating that they were removing their home from the electric grid. The Van Schoycks did not participate in the Omnibus hearings.

To accommodate the averred health issues of Complainant Murphy, further Omnibus hearings were delayed and held December 5-8, 2016, and January 25, 2017.

The record closed on November 13, 2017, upon receipt of the final Reply Brief. The matter is ready for a decision. During the hearing, counsel for the Omnibus Complainants requested that all medical information and testimony be marked and kept confidential. PECO did not object, agreed to maintain the confidentiality of such information and the request was granted. Accordingly, Proprietary and Non-Proprietary Initial Decisions will be issued in each matter.

The Commission’s Rules of Practice and Procedure permit the Commission to issue protective orders limiting the availability of certain proprietary or confidential information. 52 Pa. Code §§ 5.362 and 5.423. The party seeking the protective order has the burden to establish that the potential harm to the party of providing the information would be substantial and the harm to the party if the information is disclosed without restriction outweighs the public’s interest in free and open access to the administrative hearing process. Petition for Protective order of GTE North Inc., 1996 Pa PUC LEXIS 95, Docket No. G-00940402, Order (entered August 8, 1996); ITT Communications Services’ Petition for a Protective Order, 1991 Pa PUC LEXIS 193, Docket No. R-912017, Order (entered November 5, 1991). If that burden is satisfied, the least restrictive means of limitation which will provide the necessary protection from disclosure will be applied. 52 Pa. Code § 5.423(a).

In considering whether to issue a protective order, the Commission, pursuant to Section 5.423(a), should consider the following factors:

(1)  The extent to which the disclosure would cause unfair economic or competitive damage.

(2)  The extent to which the information is known by others and used in similar activities.

(3)  The worth or value of the information to the party and to the party’s competitors.

(4)  The degree of difficulty and cost of developing the information.

(5)  Other statutes or regulations dealing specifically with disclosure of the information.

52 Pa. Code § 5.423(a). The Commission’s regulations further provide detail regarding restrictions placed on the proprietary material, access to proprietary material by representatives of parties, special restrictions and the return of proprietary information at the conclusion of the proceeding. 52 Pa. Code §§ 5.423(c)-(f).

Section 5.423, however, must be balanced against Commission regulations that also provide that the Commission’s records, including the record of this proceeding, may be accessed by the public pursuant to 52 Pa. Code §§ 1.71-1.77. In particular, Section 1.71 of the Commission’s regulations provides: “The Commission’s record maintenance system is intended to provide for the greatest degree of public access to Commission documents that is consistent with the exercise of the functions of the Commission under the act and other applicable laws.” 52 Pa. Code § 1.71. In addition, non-disclosure of personal medical information must be viewed in light of the Pennsylvania Right to Know Law. 65 P.S. § 67.102.

In this case, the testimony and the record contain medical information that the Complainant asked be held as confidential and not released to the public. PECO does not object. Maintaining the confidentiality of personal medical information outweighs the public's interest in free and open access to administrative hearings as failure to maintain such information as confidential would have a chilling effect on customers bringing complaints that may involve medical issues. Such an effect would not be in the public interest. Formalizing the understanding of confidentiality in a Protective Order protects the Confidentiality beyond the parties to the proceedings. As a result, this protective order is being issued.

ORDER

THEREFORE,

IT IS ORDERED:

1. That the information subject to this Protective Order is all documents and testimony pertaining to medical information marked or designated as "CONFIDENTIAL" during the proceedings and in the transcript and such information shall be considered Proprietary Information and remain designated as such for the record.
2. That Proprietary Information shall be made available to counsel for a party, subject to the terms of this Protective Order. Such counsel shall use or disclose the Proprietary Information only for purposes of preparing or presenting evidence, cross examination or argument in this proceeding. To the extent required for participation in this proceeding, counsel for a party may afford access to Proprietary Information subject to the conditions set forth in this Protective Order.
3. That information deemed as “CONFIDENTIAL”, shall be made available to a “Reviewing Representative” who is a person who has signed a Non-Disclosure Certificate and who is:
4. An attorney who has made an appearance in this proceeding for a party;
5. The Complainant in the proceedings;

(b) Attorneys, paralegals, and other employees associated for purposes of this case with an attorney described in Paragraph 5(a);

(c) An expert or an employee of an expert retained by a party for the purpose of advising, preparing for or testifying in this proceeding; or

(d) Employees or other representatives of a party appearing in this proceeding with significant responsibility for this docket.

1. Information deemed Proprietary Information shall not be used except as necessary for the conduct of this proceeding, nor shall it be disclosed in any manner to any person except a Reviewing Representative who is engaged in the conduct of this proceeding and who needs to know the information in order to carry out that person’s responsibilities in this proceeding.
2. That reviewing Representatives may not use information contained in any Proprietary Information obtained through this proceeding to give any party or any competitor of any party a commercial advantage. In the event that a Party wishes to designate as a Reviewing Representative a person not described in Paragraphs 5(a) through 5(d) or 6(a) through (c) above, the party shall seek agreement from the party providing the Proprietary Information. If an agreement is reached, that person shall be a Reviewing Representative pursuant to Paragraph 6(d) above with respect to those materials. If no agreement is reached, the party shall submit the disputed designation to the presiding Administrative Law Judge for resolution.
3. That (a) A Reviewing Representative shall not be permitted to inspect, participate in discussions regarding, or otherwise be permitted access to Proprietary Information pursuant to this Protective Order unless that Reviewing Representative has first executed a Non-Disclosure Certificate provided that if an attorney qualified as a Reviewing Representative has executed such a certificate, the paralegals, secretarial and clerical personnel under the attorney's instruction, supervision or control need not do so, nor do Commission employees assisting I&E as noted above in paragraphs 5 and 6. A copy of each Non-Disclosure Certificate shall be provided to counsel for the party asserting confidentiality prior to disclosure of any Proprietary Information to that Reviewing Representative.

(b) Attorneys and outside experts qualified as Reviewing Representatives are responsible for ensuring that persons under their supervision or control comply with the Protective Order.

1. That none of the parties waive their right to pursue any other legal or equitable remedies that may be available in the event of actual or anticipated disclosure of Proprietary Information.
2. That the parties shall designate future testimony or documents as constituting or containing Proprietary Information by stamping the documents “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL PROTECTED MATERIAL.” Where only part of data compilations or multi-page documents constitutes or contains Proprietary Information, the parties, insofar as reasonably practicable within discovery and other time constraints imposed in this proceeding, shall designate only the specific data or pages of documents which constitute or contain Proprietary Information. The Proprietary Information shall be served upon the parties hereto only in an envelope separate from the nonproprietary materials, and the envelope shall be conspicuously marked “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL PROTECTED MATERIAL.”
3. That the party will consider and treat the Proprietary Information as within the exemptions from disclosure provided in Section 335(d) of the Public Utility Code, 66 Pa.C.S. § 335(d), and the Pennsylvania Right-to-Know Act, Act of February 14, 2008, P.L. 6, 65 P.S. §§ 67.101 *et seq.*, until such time as the information is found to be non-proprietary.
4. That any public reference to Proprietary Information by a party or its Reviewing Representatives shall be to the title or exhibit reference in sufficient detail to permit persons with access to the Proprietary Information to understand fully the reference and not more. The Proprietary Information shall remain a part of the record, to the extent admitted, for all purposes of administrative or judicial review.
5. That part of any record of this proceeding containing Proprietary Information, including but not limited to all exhibits, writings, testimony, cross examination, argument, and responses to discovery, and including reference thereto as mentioned in Paragraph 15 above, shall be sealed for all purposes, including administrative and judicial review, unless such Proprietary Information is released from the restrictions of this Protective Order, either through the agreement of the parties to this proceeding or pursuant to an order of the Commission.
6. That the parties shall retain the right to question or challenge the confidential or proprietary nature of Proprietary Information and to question or challenge the admissibility of Proprietary Information. If a party challenges the designation of a document or information as proprietary, the party providing the information retains the burden of demonstrating that the designation is appropriate.
7. That the parties shall retain the right to question or challenge the admissibility of Proprietary Information; to object to the production of Proprietary Information on any proper ground; and to refuse to produce Proprietary Information pending the adjudication of the objection.

That within 30 days after a Commission final order is entered in the above-captioned proceeding, or in the event of appeals, within thirty days after appeals are finally decided, the receiving party, upon request, shall either destroy or return to the producing party all copies of all documents and other materials not entered into the record, including notes, which contain any Proprietary Information. In the event that the receiving party elects to destroy all copies of documents and other materials containing Proprietary Information instead of returning the copies of documents and other materials containing Proprietary Information to the producing party, upon request, the receiving party shall certify in writing to the producing party that the Proprietary Information has been destroyed.

Dated: March 16, 2018 /s/

Darlene Davis Heep

Administrative Law Judge

**APPENDIX A**

**BEFORE THE**

**PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Cynthia Randall and Paul Albrecht :

:

v. : C-2016-2537666

:

PECO Energy Company :

TO WHOM IT MAY CONCERN:

The undersigned is the \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ of \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ (the retaining party).

The undersigned has read and understands the Protective Order deals with the treatment of Proprietary Information. The undersigned agrees to be bound by and comply with the terms and conditions of said Protective Order.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

SIGNATURE

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

PRINT NAME

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

ADDRESS

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

DATE: March 16, 2018 EMPLOYER

**C-2016-2537666 - CYNTHIA RANDALL & PAUL ALBRECHT v. PECO ENERGY COMPANY**

**SERVICE LIST**

EDWARD G LANZA ESQUIRETHE LANZA FIRM LLCPO BOX 61336HARRISBURG PA 17106-1336**717 576 2696**

***Accepts e Service***WARD L SMITH ESQUIREEXELON BUSINESS SERVICES CORPLEGAL DEPARTMENT S23-12301 MARKET STREETPHILADELPHIA PA 19103**215 841 6863**

***Accepts e Service***

STEPHEN G HARVEY

1880 JFK BOULEVARD SUITE 1715

PHILADELPHIA PA 19103

**215-438-6600**

***Accepts e Service***