

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Maria Povacz,	:	
	:	
Complainant,	:	
v.	:	Docket No. C-2015-2475023
	:	
PECO Energy Company,	:	
	:	
Respondent.	:	

**COMPLAINANT MARIA POVACZ REPLY TO EXCEPTIONS OF
RESPONDENT PECO ENERGEY COMPANY TO THE
INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE
DARLENE D. HEEP ISSUED ON MARCH 20, 2018**

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I. INTRODUCTION

Pursuant to Section 5.535 of the Commission's regulations, 52 Pa. Code § 5.535, Complainant Maria Povacz hereby submits this Reply to the Exceptions filed by Respondent PECO Energy Company to the Initial Decision of Administrative Law Judge Darlene D. Heep issued on March 20, 2018 ("Decision"). Complainant filed her own Exceptions on May 14, 2018, to the Decision.

ALJ Heep in her Decision found that Complainant had not proved that PECO's proposal to subject her to RE emissions from a PECO smart meter are unsafe as to her, but the ALJ also found that Complainant testified credibly about symptoms she has experienced and that "while there is no showing that EF's from PECO's smart meters are causing this problem, and PECO successfully rebutted any such claim, the preponderance of the evidence suggests that some other aspect of the PECO smart meters is inimitably perceptible by and contrary to the health and well-being of the individual Ms. Povacz."¹ Decision at 27-28. ALJ Heep concluded that "Complainant has established that installation of a smart meter attached to her home would exacerbate ill health effects." *Id.* at 31. Based on that finding, ALJ Heep ordered PECO to install a smart meter to a new socket location on Complainant's property chosen by her if Complainant so chose to move her socket location, at PECO's expense. *Id.* at 30.

¹ Throughout her Decision, ALJ Heep used the term "electromagnetic fields" or "EFs" to electromagnetic energy in the radiofrequency ranges, which Complainant referred in her own Exceptions as "RF."

PECO takes exception to ALJ Heep's Decision on the grounds that there is no support for ALJ's Heep conclusion that "some other aspect" of PECO's AMI smart meter is harmful. As Complainant argued in her own Exceptions, the ALJ erred in concluding that Complainant (and the Complainants in the companion cases) had not proved that PECO's proposal to subject her to RE emitted by smart meters is unsafe and unreasonable as to her. To be clear, Complainant takes the position that ALJ Heep should have deferred to the recommendation of her treating physician that, under the circumstances including her credible testimony about her symptoms, it is unsafe and unreasonable for PECO to expose her to RF emissions from a smart meter installed on her property. ALJ Heep erred in deciding that PECO's proposal to implement smart meters is unsafe and unreasonable as to her, and also erred in deciding that some aspect of the smart meter other than RF emissions caused her symptoms.

II. REPLIES TO EXCEPTIONS

A. Reply to Exception No. 1

PECO contends that ALJ Heep erred in concluding that some aspect of PECO's smart meters other than RF emissions caused harm to Complainant's health. Overall, Complainant agrees with PECO in so far as her evidence did not prove that some aspect of PECO's smart meters other than RF emissions caused harm to her health. Her evidence proved that RF emissions from PECO's smart meters are capable of causing her harm. She also put on significant evidence that RF emissions actually caused her symptoms and that, under the circumstances,

PECO and the PUC should defer to the recommendation of Complainant's doctor, based on his analysis of the medical facts, that she should not be exposed to RF emissions from a smart meter on her property. Based on that evidence, it is either unsafe or unreasonable or both, for PECO to expose her to RF emissions by means of a device installed on her own property over her objection and the recommendation of her doctor. Complainant also maintains, as a matter of law under Section 1501 by the plain language of the statute and in accordance with Pennsylvania law governing statutory construction, that there is no requirement for her to prove causation of harm as if this were an action for damages in a court of law. Instead, the statute calls for the Commission to be concerned with the potential for harm, not just actual proven harm, as any other reading would eviscerate the meaning of the words "safe" and "reasonable." Complainant also maintains that a reading of the statute that would permit PECO to expose Complainant to a physical force (RF emissions) over her objection and against the recommendation of her doctor would violate substantive due process of law.

For specific responses to PECO's contention, Complainant states as follows. PECO is correct in its Exceptions, at 3-8, that Complainant's evidence of harm or the potential of harm as to her focused on RF emissions from smart meters, not some other aspects of smart meters. PECO is also correct in stating, at 8-9, that Complainant's expert Andrew Marino, Ph.D., testified that subjective self-diagnosis of electromagnetic hypersensitivity ("EHS") is insufficient to prove that a person actually suffers from EHS. It bears emphasis, however, that Dr. Marino also

testified based on published research that EHS is a real syndrome, that it is impossible to prove or disprove that any one person has EHS without conducting tests that cost in excess of \$500,000 (and even then it may be impossible), and that the only reasonable course of action in the meantime is to defer to the diagnosis and treatment recommendations of treating physicians, such as was provided by Dr. Talmor in Complainant's case. Complainant's Exceptions at 9-10.

PECO is wrong to contend that the comparisons of RF exposure testified about by Christopher Davis, Ph.D., have any bearing on this matter, as they are inapposite comparisons of all day average values with peak values. PECO's Exceptions at 9-11. This makes no sense, as Complainant has repeatedly pointed out, and PECO has no response other than to claim that it used all day average values because that is what the FCC Limit calls for, when the FCC Limit is itself being challenged as outdated and insufficiently protective, based on much more recent and highly credible research (the 2016 NTP Report). Complainant's Exceptions at 15-17. PECO has no response on this point.

PECO is further wrong to contend that the Commission should simply adopt its decision in the *Frompovich* case, in which it appears that PECO offered and the Commission accepted similar arguments presented by PECO. PECO's Exceptions at 11. In *Frompovich*, the Commission did not have the benefit of counsel and expert witness testimony to present the errors in PECO's argument. In this matter, Complainant presented arguments, in both lawyer cross-examination of Dr. Davis and Dr. Israel (discussed *infra*), and through testimony of her expert

witness Dr. Andrew Marino, that the same inapposite comparisons Dr. Davis presented in the *Frompovich* hearing were irrelevant and that it was arbitrary and capricious for the ALJ to rely on them, given the failure of PECO's experts to address Complainant's argument based on Dr. Marino's testimony about the risk of harm from peak values.

Likewise, PECO is wrong to argue that the testimony of Mark Israel, M.D., offers any value or support to PECO's position. He is insufficiently qualified to testify as an expert on the potential health effects from RF exposure because he has not worked in the field and at trial admitted that he had no familiarity with the most recent research on the subject (the 2016 NTP Report) and could not discuss it. Complainant's Exceptions at 13-15.

All of Dr. Israel's testimony regarding EHS and EHS symptom causation was successfully rebutted by the direct and rebuttal testimony of Dr. Marino. Further, Dr. Israel's testimony is legally irrelevant because the sum of his testimony is that he cannot find support in the established medical literature that RF exposure causes the symptoms reported by Complainant. As noted earlier, the Complainant is not and should not be required to prove causation of harm to a medical certainty. Rather, with an emerging or at least possibly emerging health risk, such as long-term harm from RF exposure, where the health consequences are not truly not yet known but there is evidence that there could be health consequences, the Commission be concerned with the potential for harm, as any reasonable definition of the word "safe" would include the potential for harm.

Dr. Israel's testimony is, however, a good example of the unreasonably high standard urged by PECO and accepted by ALJ Heep. His statement cited by PECO said "we must look at reliable medical and scientific studies. If those studies as a whole do not consistently show that an event, such as exposure to [RF], causes a symptom or symptoms, we proceed to analyze plausible causes." PECO's Exceptions at 12. In other words, his view is that there is no possibility of harm from RF exposure unless Complainant can show that the studies as whole consistently show that RF exposure causes harm. That is clearly wrong and is not testimony on which the Commission should rely.

Given Complainant's limited admission that there is some merit in PECO's exceptions, as explained above, there is no need for the Commission to address PECO's procedural due process argument. Suffice it to say that Complainant does not wish to have a PECO smart meter installed anywhere on her property following medical advice and her own experiences with smart meter exposure and other RF exposure.

Finally, PECO's argument that ALJ Heep's decision is bad public policy is right, but for reasons different from those listed by PECO, as explicated in Complainant's Exceptions. PECO conjures a parade of horrors to occur as a result of the ALJ's decision that some other aspect of the smart meter caused her harm. Complainant will not comment, except to note again that she proved actual or potential harm to her from RF emissions, not from "some other aspect of the smart meter," and that PECO's bad public policy argument is focused exclusively on ALJ

Heep's decision about some other aspect of smart meters other than RF emissions. As such, it does not detract from or even counter any of the points made by Complainant in her Exceptions.

III. CONCLUSION

For the reasons set forth above, Complainant Maria Povacz respectfully requests that the Commission issue a Final Order that rejects the ALJ's Interim Decision of March 20, 2018, and orders PECO to grant Complainant's request for an accommodation under Section 1501 by using some means other than an RF-emitting smart meter installed on her property to collect data about electric usage for billing purposes.

Respectfully submitted,



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Dated: May 24, 2018

CERTIFICATE OF SERVICE

I hereby certify that on May 24, 2018, I caused to be served a true and correct copy of the foregoing via email upon the following:

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By: _____
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