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July 23, 2018

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

RE: Theresa Gavin v. PECO Energy Company
Docket No. C-2017-2616249

Dear Secretary Chiavetta:

PECO's *Reply Exceptions* are attached for filing.

Very truly yours,



Ward L. Smith
Assistant General Counsel

WLS/adz
Attachment

c: Honorable Darlene D. Heep, ALJ
Certificate of Service

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Theresa Gavin

v.

PECO Energy Company

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:
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:
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Docket No. C-2017-2616249

CERTIFICATE OF SERVICE

I, Ward L. Smith hereby certify that on July 23, 2018, I served a copy of PECO Energy Company's *Reply Exceptions*, in the above matter, upon all interested parties via overnight delivery to:

Theresa Gavin
8829 Winchester Avenue
Philadelphia, PA 19115

Dated: July 23, 2018



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**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Theresa Gavin	:	
	:	
v.	:	C-2017-2616249
	:	
PECO Energy Company	:	

Reply Exceptions of PECO Energy Company

Contents

I. Reply to Exceptions 1

a. Reply to Exception 1: Notwithstanding the statement in the I.D. that Ms. Gavin established a *prima facie* case, the I.D. correctly concluded that Ms. Gavin did not prove her case by a preponderance of the evidence 1

b. Reply to Exception 2: Ms. Gavin’s reference to the *Povacz* I.D. does not provide a basis for revising the *Gavin* I.D. 2

c. Reply to Exception 3: The I.D. correctly denied Ms. Gavin’s demand for an opt out..... 4

d. Reply to Exception 4: The certified documents referred to by Ms. Gavin are not part of the record in this proceeding 4

II. Conclusion..... 5

Reply Exceptions of PECO Energy Company

On June 25, 2018, the Commission issued the Initial Decision (“I.D.”) of Administrative Law Judge (“ALJ”) Darlene Heep in this docket. On July 13, 2018, PECO informed the Commission by letter that it would not file exceptions to the I.D. On July 16, 2018, PECO received a single-page document titled “Exceptions” of Ms. Gavin.¹ Pursuant to the Commission’s April 27, 2018 Secretarial Letter, Reply Exceptions are due July 26, 2018. Pursuant to 52 Pa. Code §5.533, PECO hereby files its Reply Exceptions.

Ms. Gavin presented four numbered exceptions.

I. Reply to Exceptions

a. Reply to Exception 1: Notwithstanding the statement in the I.D. that Ms. Gavin established a *prima facie* case, the I.D. correctly concluded that Ms. Gavin did not prove her case by a preponderance of the evidence

Ms. Gavin’s first exception is:

I have established a *prima facie* case on the issue of negative cumulative effects of smart meters. The BioInitiative Report 2012, and testimony before other utility commissioners refer to smart meters as irrational, a security risk, and not necessary. The meters were also referred to as having dangerous effects on the body. (Tr. 50) Additionally, scientists study new data have back pedaled recently stating that EMF fields obviously enhance the growth of tumors. (Professor Alexander Lerchl and colleagues from Jacobs University and University of Wuppertal, Germany, 3-16-15).

The issue is that Ms. Gavin is required to establish a *prima facie* case *and also to prove her case by a preponderance of the evidence*. The I.D. concluded (p. 17) that she accomplished the former, but not the latter:

In conducting her research, she came upon the Bio Initiative Report 2012 and testimony before other utility commissions that refer to the smart meters as irrational, a security risk and not necessary. (Tr. 51). In much of her research, the meters were referred to as having dangerous effects on the body based on studies of the meters and their effects. (Tr.

¹ Ms. Gavin’s Exceptions are dated July 4, 2018, but were not received by PECO until July 16, 2018.

50). The Complainant established a *prima facie* case on this issue; *however, PECO presented countering and prevailing testimony.*

The key to understanding the outcome of the I.D, of course, is in the final italicized phrase. Ms. Gavin was required to put on a *prima facie* case in order to justify continuing with the hearing; if she had failed to put on a *prima facie* case the hearing could have ended without any response from PECO. The I.D. concludes that she met the initial, relatively low, evidentiary bar of presenting a *prima facie* case. PECO was then obliged to proceed with its evidentiary case, which it did. Having reviewed all of the evidence from both parties, the I.D. concludes that “PECO presented countering and prevailing testimony.” *See generally*, I.D., p. 9, for discussion of the respective roles played by the *prima facie* case and proof by a preponderance of evidence.

Elsewhere, the I.D. (p. 21) made the same point more forcefully:

The preponderant evidence was the expert opinions of Dr. Davis, Mr. Pritchard and Dr. Israel on behalf of PECO. These expert opinions outweighed the evidence presented by Ms. Gavin and therefore, in this proceeding, were more convincing than the evidence presented by the Complainant. *See Se-Ling Hosiery, Inc., supra* at 8. Therefore, the Complainant cannot prevail on her claims here.

The basis for this conclusion is fully discussed in the I.D, pp. 16-21. Ms. Gavin’s first Exception thus does not provide a basis to overturn or revise the I.D.

b. Reply to Exception 2: Ms. Gavin’s reference to the *Povacz* I.D. does not provide a basis for revising the *Gavin* I.D

Ms. Gavin’s second Exception is:

Quoting Judge Darlene Heep: “The preponderance of evidence does suggest that some other aspect of the PECO smart meter is inimitably perceptible by and contrary to the health and well-being of the individual.” (3-21-18 Philly News).

This appears to be a reference to the I.D. in *Povacz v PECO*, C-2015-275023 (issued March 20, 2018), p. 28, which was reported in local papers. It does not provide a basis for the Commission to revise the I.D. in the *Gavin* case.

First, this passage from the *Povacz* I.D. was based on testimony from Ms. Povacz and her treating physician, Dr. Hanoch Talmor, specific to her health conditions and experiences. *See Povacz* I.D., p. 28. None of that testimony is relevant to Ms. Gavin, nor was it presented in Ms. Gavin's case; PECO had no opportunity to pursue discovery on this testimony *as to Ms. Gavin*, nor to cross-examine on this testimony *as to Ms. Gavin*, nor to present its own testimony on the issues raised in this testimony *as to Ms. Gavin*. It is thus extra-record information which, if used in deciding the *Gavin* case, would violate PECO's due process rights. *See, e.g., Mary Paul v PECO*, C-2015-2475355 (June 14, 2018 Opinion and Order), pp. 21-22 (holding that it would violate PECO's due process rights to allow the testimony of Dr. Marino to be transported from one docket to another because PECO did not have the opportunity to pursue discovery, conduct cross-examination, or present its own testimony *as to Ms. Paul*).

Second, on May 14, 2018 PECO filed 17 pages of Exceptions in the *Povacz* proceeding that were devoted to demonstrating why the Commission should not adopt this passage from the *Povacz* I.D. In those Exceptions, PECO demonstrated, among other things, that there is no record evidence to support this conclusion and that it would be bad policy to adopt it. Rather than repeat those arguments in full here, PECO requests that, to the extent that the Commission wishes to address Ms. Gavin's reliance on the *Povacz* I.D., the Commission refer to the arguments set forth in full in PECO's Exceptions in the *Povacz* docket.

Third on May 24, 2018, Ms. Povacz filed Reply Exceptions in her docket in which she stated (p. 2): "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." Since Ms. Povacz has acknowledged that the I.D.'s conclusion on this issue is not supported by record evidence, it cannot form the basis of relief in her proceeding or Ms. Gavin's proceeding.

c. Reply to Exception 3: The I.D. correctly denied Ms. Gavin’s demand for an opt out

Ms. Gavin’s third Exception is: “I demand to opt out of smart meter installation on my home. . . .”

The I.D. (pp. 10-11) discussed Ms. Gavin’s opt out request and correctly concluded that an opt out is not available:

The Commission recently noted in *Frompovich v PECO Energy Company*, Docket Number C-2015-2474602 (Ordered and Entered May 3, 2018) that "pursuant to Section 2807(f) of the Code, the Commission’s *Smart Meter Procurement and Installation Implementation Order*, and PECO’s Smart Meter Phase I & II Orders approved by the Commission, PECO has been subject to the requirement to replace all AMR meters owned by it within its service territory with AMI meters, or smart meters." *Id* at 9-10.

Additionally, the Commission determined in *Maria Povacz v. PECO Energy Company*, Docket No. C-2012-2317176 (Order and Opinion entered January 24, 2013), that there is no provision in the Code, the Commission’s Regulations or Orders that allows a PECO customer to “opt out” of smart meter installation.

Ms. Gavin’s one-sentence reiteration of her opt-out demand does not provide any basis to overturn or revise the I.D. on this settled issue of law.

d. Reply to Exception 4: The certified documents referred to by Ms. Gavin are not part of the record in this proceeding

Ms. Gavin’s fourth Exception is:

All parties involved have received Certified documents stating that if this meter is forced on me, and I or any person living in my home suffer cumulative EMF related illness, or if there is any damage to my property, all parties, i.e., PECO, PUC et al will be held morally and financially responsible.

This appears to be a reference to a “Notice and Demand” or “Notice of Default” that, at the January 30, 2018 evidentiary hearing, Ms. Gavin testified that she had mailed to PECO and the PUC. At the evidentiary hearing (Tr. 7-8) ALJ Heep inquired about this document and informed Ms. Gavin that she needed to file it with Secretary Chiavetta (which has not been

done), and that, in any event, this document is not part of her formal complaint and would not be heard as part of this proceeding. *See also* Tr. 13-15, 27-28.

In addition, the document is a legal demand for action, and does not provide any evidence related to Ms. Gavin's underlying claims.

For its part, PECO has received this and similar documents from Ms. Gavin (and other complainants). PECO has reviewed the documents and concludes that these documents do not establish any legal rights or obligations with respect to the installation of an AMI meter or in any other way, and has so informed Ms. Gavin.

II. Conclusion

PECO respectfully submits that the Commission should reject each of the four Exceptions presented Ms. Gavin and adopt the Initial Decision.



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