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July 27, 2018

VIA ELECTRONIC FILING

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor North
P.O. Box 3265
Harrisburg, PA 17105-3265

Re: Richard N. Myers v. PPL Electric Utilities Corporation
Docket No. C-2017-2620710

Dear Secretary Chiavetta:

Enclosed for filing is the Answer of PPL Electric Utilities Corporation to the Complainant's Motion to Reopen the Record for the Purpose of Taking Additional Evidence in the above-referenced proceeding. Copies will be provided as indicated on the Certificate of Service.

Respectfully submitted,



Devin Ryan

DTR/jl
Enclosures

cc: Honorable Elizabeth Barnes
Certificate of Service

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Richard N. Myers,	:	
	:	
Complainant,	:	
	:	
v.	:	Docket No. C-2017-2620710
	:	
PPL Electric Utilities Corporation,	:	
	:	
Respondent.	:	

**ANSWER OF PPL ELECTRIC UTILITIES CORPORATION TO
THE COMPLAINANT’S MOTION TO REOPEN THE RECORD FOR THE
PURPOSE OF TAKING ADDITIONAL EVIDENCE**

TO ADMINISTRATIVE LAW JUDGE ELIZABETH H. BARNES:

Pursuant to 52 Pa. Code §§ 5.61 and 5.571, PPL Electric Utilities Corporation (“PPL Electric” or the “Company”) hereby files this Answer to Richard N. Myers’s (“Complainant”) Motion to Reopen the Record for the Purpose of Taking Additional Evidence (“Motion”). In his Motion, the Complainant asks that Administrative Law Judge Elizabeth H. Barnes (the “ALJ”) reopen the record to admit his proposed Exhibit 29, a document entitled “Actions from Peer Review of the Draft NTP Technical Reports on Cell Phone Radiofrequency Radiation March 26-28, 2018.”

As explained herein, the Complainant’s Motion should be denied. The Complainant has utterly failed to: (1) prove that there have been “material changes of fact or of law” that “have occurred since the conclusion of the hearing” or that the “public interest requires” reopening the record (52 Pa. Code § 5.571(b), (d)); and (3) demonstrate “good cause” for the admittance of this additional exhibit (52 Pa. Code § 5.431(b)). In fact, the Complainant admits in his Motion that this document was publicly available days before the evidentiary hearing on April 2, 2018, and

well before the record closed on April 23, 2018. (Motion, p. 2) By waiting nearly three months to introduce this proposed exhibit, the Complainant has severely prejudiced PPL Electric because now the Company has no opportunity to cross-examine him about the document or present expert scientific evidence in rebuttal. Further, the Complainant's claim that the document constitutes clear findings of fact is without merit. The document merely recounts the peer review panels' recommendations to the National Toxicology Program ("NTP") with regard to its reports, which have not yet been finalized. These recommendations, which are not binding on NTP, have little to no evidentiary value. Like the NTP's draft studies, which have **not** been submitted for publication in peer-reviewed journals, this proposed exhibit should not be admitted into the record in this proceeding. Further, if the proposed exhibit is admitted, the ALJ should not rely upon these recommendations as the basis for any findings of fact because they are hearsay.

For these reasons, and as explained in more detail herein, no material changes in fact or law have occurred since the record closed on April 23, 2018, the public interest does not require reopening the record, and no good cause exists for admitting the proposed Exhibit 29.

In support of its Answer, PPL Electric states as follows:

I. BACKGROUND

1. On August 22, 2017, PPL Electric was served with the above-captioned Formal Complaint filed by the Complainant with the Pennsylvania Public Utility Commission ("Commission").
2. On September 11, 2017, PPL Electric filed its Answer to the Complaint.
3. An in-person evidentiary hearing was held on April 2, 2018, before the ALJ.
4. The record in this proceeding closed on April 23, 2018.

5. On May 18, 2018, the Complainant and PPL Electric submitted their Main Briefs.
6. On June 11, 2018, the Complainant and PPL Electric submitted their Reply Briefs.
7. On July 9, 2018, PPL Electric filed a Motion to Strike Certain Portions of the Complainant's Reply Brief.
8. On July 16, 2018, the Complainant filed an Answer to PPL Electric's Motion to Strike.
9. On July 19, 2018, the Complainant filed the Motion to Reopen the Record for the Purpose of Taking Additional Evidence.
10. Also on July 19, 2018, the ALJ sent an email to the parties directing PPL Electric to respond to the Motion to Reopen the Record by July 27, 2018.

II. APPLICABLE LEGAL STANDARDS

11. The Commission's regulations specify that "at any time after the record is closed but before a final decision is issued, a party may file a petition to reopen the proceeding for the purpose of taking additional evidence." 52 Pa. Code § 5.571(a).

12. Such a petition "must set forth clearly the facts claimed to constitute grounds requiring reopening of the proceeding, including material changes of fact or of law alleged to have occurred since the conclusion of the hearing." *Id.* § 5.571(b).

13. Further, "[t]he record may be reopened upon notification to the parties in a proceeding for the reception of further evidence if there is reason to believe that conditions of fact or of law have so changed as to require, or that the public interest requires, the reopening of the proceeding." *Id.* § 5.571(d).

14. The Commission's regulations also state that "[a]fter 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." *Id.* § 5.431(b).

III. ANSWER TO MOTION TO REOPEN THE RECORD

15. The Complainants' Motion should be denied because he has completely failed to demonstrate that there have been material changes of fact or law since the record closed, that the public interest requires the reopening of the record, and that good cause exists for the admittance of Exhibit 29.

16. It is undisputed that there have been no material changes in fact or law since the record closed on April 23, 2018. The Complainant admits in his Motion that this document was publicly available days before the evidentiary hearing on April 2, 2018. (Motion, p. 2) Moreover, the hearing record was kept open for certain late-filed exhibits until April 23, 2018. Even during that extended period, the Complainant never sought to introduce this document. Thus, there have been no changes in fact or law, let alone material changes, that would warrant reopening the record.

17. In addition, the public interest does not require the admittance of the proposed exhibit, and there is no good cause for the Complainant's actions. First, as mentioned previously, the Complainant concedes in his Motion that this document was available before the hearing. (Motion, p. 2) Importantly, the Complainant never tried to supplement his pre-served exhibits with the proposed exhibit, nor did he try to introduce it before the record closed on April 23, 2018. Rather, the first time he referenced the proposed exhibit was as improper extra-record evidence in his Reply Brief. Nothing in the Complainant's Motion substantiates why he was

unable to present this document before the April 2, 2018 hearing or even before the record closed on April 23, 2018.

18. Second, the Complainant's late introduction of this new exhibit substantially prejudices the Company. Section 332(c) of the Public Utility Code entitles every party to, among other things, "submit rebuttal evidence" and "conduct such cross-examination as may be required for a full and true disclosure of the facts." 66 Pa. C.S. § 332(c); *see Nat'l Fuel*, 1993 Pa. PUC LEXIS at *10 ("[S]uch material was outside the record and could be detrimental to the rights of other parties to confront such evidence."). Even though this document was publicly available before the hearing on April 2, 2018, and well before the record closed on April 23, 2018, the Complainant has waited nearly three months to try to introduce it into the record. At this late stage of the proceeding, the Company has no opportunity to cross-examine the Complainant about the document or present evidence in rebuttal.

19. Third, the proposed exhibit directly relates to the National Toxicology Program's ("NTP") draft report, which the Complainant and his expert witness, Dr. Carpenter, tried to discuss at the evidentiary hearing. (Tr. 69-71) The ALJ correctly sustained the Company's objections to direct examination about the NTP draft report because the findings of the NTP were preliminary and not final, the draft report was marked as being not for attribution, and the draft report was not identified as an area of Dr. Carpenter's testimony. (Tr. 69-71) Now, however, the Complainant wants to admit the peer review panels' recommendations on the NTP's draft report. As at the evidentiary hearing, the ALJ should find that information related to the NTP's draft report are inadmissible.

20. Fourth, the Complainant mischaracterizes the document as "clear evidence of cell phone radiation causing cancer in rats." (Motion, p. 2) Indeed, the document merely recounts

the peer review panels' "recommendations" to the NTP with regard to its technical reports on research related to cell phones. (Complainant's Proposed Exhibit 29, p. 1) (emphasis added) There is no evidence that the "recommendations" are in any way binding on the NTP study authors or how their conclusions will be worded in the final reports or the published versions of the studies (if and when they get published in peer-reviewed scientific journals). In addition, there is a complete lack of expert testimony in the record to address the scientific meaning of the recommendations, what the data from the NTP animal studies show and how they relate to data from other animal studies, or the context for the levels of radiofrequency ("RF") exposures used in the studies, and how those exposures compare to the Federal Communications Commission ("FCC") RF standards and RF levels from the automated metering infrastructure ("AMI") meters being used by PPL Electric. In this regard, it is worth noting that the NTP studies involved RF exposures related to cell phone use – not AMI meters – and Dr. Davis testified that the exposure to RF from the AMI meter being used by PPL Electric is 260,000 times lower than that from cell phone use. (PPL Electric Statement No. 1, p.15, lines 1-2; Exhibit CD-4) Therefore, these recommendations have little to no evidentiary value. Thus, as with the NTP's draft studies themselves, which continue to be stamped with the disclaimer that they do not represent NTP findings or conclusions, the ALJ should not admit the proposed Exhibit 29 into the record in this proceeding.

21. Finally, even if Exhibit 29 is admitted into the record, it is hearsay and cannot support any findings of fact.¹ The Complainant is offering these out of court statements to prove

¹ Under Pennsylvania's "Walker Rule," it is well-established that "[h]earsay evidence, properly objected to, is not competent evidence to support a finding." *Walker v. Unemployment Comp. Bd. of Review*, 367 A.2d 366, 370 (Pa. Cmwlth. 1976) (citations omitted). Even if hearsay evidence is "admitted without objection," the ALJ must give the evidence "its natural probative effect and may only support a finding . . . if it is corroborated by any

the truth of the matter asserted, and there is no competent evidence in the record to corroborate those statements. Moreover, PPL Electric has a statutory right to cross-examine persons “as may be required for a full and true disclosure of the facts.” 66 Pa. C.S. § 332(c). Because the authors of these hearsay statements did not testify, the Company was denied this right and unable to test the veracity of their statements.


22. Based on the foregoing, the Complainant’s Motion to Reopen the Record should be denied.

competent evidence in the record;” as “a finding of fact based solely on hearsay will not stand.” *Id.* at 370 (citations omitted).

IV. CONCLUSION

WHEREFORE, PPL Electric Utilities Corporation respectfully requests that the Motion of Richard N. Myers to Reopen the Record for the Purpose of Taking Additional Evidence be denied.

Respectfully submitted,



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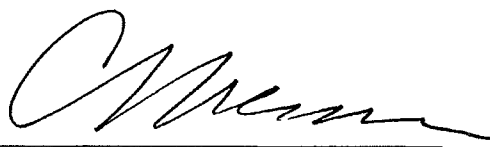
Date: July 27, 2018

Attorneys for PPL Electric Utilities Corporation

VERIFICATION

I, CURTIS S. RENNER, being a partner in the law firm of Watson & Renner and an attorney of record for defendant, hereby state that the facts above set forth are true and correct to the best of my knowledge, information and belief and that I expect PPL Electric Utilities Corporation to be able to prove the same at a hearing held in this matter. I understand that the statements herein are made subject to the penalties of 18 Pa.C.S. § 4904 relating to unsworn falsification to authorities.

Date: 7/26/18



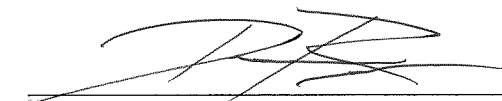
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served upon the following persons, in the manner indicated, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant).

VIA E-MAIL & FIRST CLASS MAIL

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Date: July 27, 2018



Devin T. Ryan