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August 8, 2018

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor
Harrisburg, PA 17120

Re: Patti Lynn Caesar v. PECO Energy Company
Docket No. C-2017-2605462

Dear Secretary Chiavetta:

PECO's Reply Brief is attached for filing.

Very truly yours,



Ward L. Smith
Counsel for PECO Energy Company

WS/adz
Enclosures

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

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION


Patti Lynn Caesar :
 :
 v. : Docket No. C-2017-2605462
 :
 PECO Energy Company :

CERTIFICATE OF SERVICE

I, Ward L. Smith hereby certify that on August 8, 2018, I served a copy of PECO Energy Company's *Reply Brief*, in the above matter, upon all interested parties via email and overnight delivery to:

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Dated: August 8, 2018



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**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Patti Lynn Caesar

v.

PECO Energy Company

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C-2017-2605462

Reply Brief of PECO Energy Company

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Introduction

On July 16, 2018, PECO was served with Ms. Caesar's Main Brief in this proceeding. PECO hereby provides its Reply Brief.

Summary of Argument

Complainant has the burden of proof. She must prove her claims by a preponderance of the evidence.

The record evidence in this proceeding does not support Ms. Caesar's claims by a preponderance of evidence. To the contrary, PECO provided substantial, persuasive evidence that its AMI meters will not cause or contribute to any adverse health effect or exacerbate any illness.

A great deal of Ms. Caesar's Main Brief is based upon extra-record information. PECO has not had the opportunity to pursue discovery, cross-examination, or opposing testimony as to that extra-record information and use of that information in this proceeding would thus violate PECO's due process rights.

Ms. Caesar's due process claim is predicated upon her assertion that PECO's AMI meters will cause her harm. She did not meet her burden of proof on the assertion of harm, and therefore her due process claim fails.

Argument

I. Burden of proof

In Ms. Caesar's Main Brief (pp. 28-29), she briefly addresses her burden of proof, arguing that: "There is no requirement for Complainants to prove medical causation as if this were a toxic tort case." Ms. Caesar notes (p. 28) that this argument previously was made in the case of *Murphy v PECO*, C-2015-2475726.¹

In the Initial Decision in the *Murphy* proceeding (pp. 18-19), Your Honor reviewed this precise argument and PECO's response, and ruled against Ms. Murphy, holding that she had the burden to prove harm by a preponderance of the evidence. That is also the standard that Ms. Caesar must meet.

II. Ms. Caesar did not prove, by a preponderance of the record evidence, that PECO's AMI meter will harm her health

A. Dr. Rakel's Letter

At the February 22, 2018 evidentiary hearing, Ms. Caesar discussed a letter from her treating physician, Dr. Birgit Rakel, which she described as "really the basis on which I'm basing my case." Feb. 22 Tr. 21-22.

Your Honor admitted the Rakel letter for the limited purpose of demonstrating how Ms. Caesar formed her opinion. But, because Dr. Rakel was not made available to be cross-examined by PECO, Your Honor correctly ruled that the Rakel letter was not admitted for the purpose of demonstrating the truth of the matters asserted therein. Feb 22 Tr. 21-22.

In Ms. Caesar's Main Brief (pp. 11-12), she briefly reviews the letter from Dr. Rakel. In the header to that section of her Brief, she refers to the Rakel letter as being "admissible medical

¹ Indeed, Ms. Caesar's argument precisely tracks to the same argument made at pp. 75-77 of Ms. Murphy's September 25, 2017 Main Brief.

evidence” – and she then uses that letter to attempt to prove the truth of the matters asserted in that letter. She cannot use the Raket letter to prove the truth of the matters asserted therein. The Raket letter was admitted for a limited purpose, and can only be used for that purpose.

As to the content of the letter itself, PECO presented its review of, and response to, the content of that letter in its Main Brief (pp. 17-20), and stands on that response.

B. American Academy of Environmental Medicine

In her Main Brief (pp. 18-19), Ms. Caesar discusses a letter from the American Academy of Environmental Medicine (“AAEM”). PECO’s testimony established that the AAEM letter is not a reliable basis on which to form a scientific conclusion. *See* PECO Main Brief (p. 15, Proposed FOF 67).

C. Indoor Environmental Quality

In her Main Brief (pp. 19-20), Ms. Caesar discusses a publication by the National Institutes of Building Sciences titled “IEQ Indoor Environmental Quality.” PECO’s testimony demonstrated that it has offered accommodations that are analogous to the accommodations recommended by the National Institute of Building Sciences. PECO Main Brief (pp. 20-22).

D. Letters by Medical Doctors

In her Main Brief (pp. 21), Ms. Caesar discusses “letters by medical doctors/public health experts” which she states were “presented as Exhibit at Evidentiary Hearing.”

Ms. Caesar offered these letters at hearing. PECO objected on the grounds that they are hearsay. Your Honor sustained PECO’s objection, and these letters were not admitted as exhibits and are not part of the record in this proceeding. Feb 22 Tr. 17-19. Ms. Caesar testified that she had read these letters, Feb 22 Tr. 19, but her lay reliance on these letters was outweighed by PECO’s expert testimony, as set forth at length in PECO’s Main Brief.

III. The extra-record materials discussed by Ms. Caesar do not support a conclusion that she proved by a preponderance of evidence that PECO's AMI meters will harm her health

A. North Carolina Utilities Commission Order

In her Main Brief (pp. 10-11, 30), Ms. Caesar refers to a recent Order by the North Carolina Utilities Commission (the "NCUC Order") in which the NCUC adopted no cost opt-outs for people who refuse AMI meters for medical reasons. Ms. Caesar argues (p. 10-11) that the NCUC Order warrants a request for reconsideration to "introduce new information" regarding the NCUC Order. She later argues (p. 30) that the Pennsylvania Commission should implement opt-out regulations that adopt the NCUC approach.

The June 22, 2018 NCUC Order does not warrant reopening the record in this proceeding. Simply, North Carolina allows opt-outs,² and Pennsylvania does not. That distinction is explicitly recognized in the NCUC Order (p. 2, emphasis added):

The Commission asked DEC to provide a [spreadsheet comparing opt out charges in various states.] The spreadsheet [provided information on various fees and] also indicated that the State of Vermont had passed legislation forbidding opt-out fees, while the State of Pennsylvania had passed legislation requiring the installation of smart meters and precluding opt outs altogether.

The NCUC Order thus does not ask whether opt-outs should be allowed (that decision was made in North Carolina several years ago); the NCUC Order looks at the question of who should pay the costs of providing an opt-out system: the customers who request an opt-out or the customer base as a whole? (The NCUC decided to socialize the costs to the customer base as a whole.) That is not a relevant question in Pennsylvania because the Pennsylvania General

² Unlike Pennsylvania, North Carolina does not have a statutory limitation on opt-outs. The NCUC rules on smart meters were initiated as part of regulatory rulemaking docket in 2009, in which the NCUC declined to adopt the federal standards on smart grid investments and instead required North Carolina utilities to file smart grid technology plans as part of the Commission's existing integrated resource planning review. *See* NCUC Docket No. E-100, SUB 123, Dec. 18, 2009 Order Declining to Adopt Federal Standards, p. 7, FOF 8.

Assembly “preclude[ed] opt outs altogether.” The NCUC Order’s evaluation of how to allocate opt-out-driven costs is thus simply not relevant to this proceeding, and it does not warrant reopening the record to “introduce new information.” Nor can the Commission adopt regulations that are similar to the North Carolina opt-outs; the Pennsylvania General Assembly has precluded that option.

B. Testimony of Dr. Marino in the *Murphy, Povacz, and Randall/Albrecht* proceedings

Ms. Caesar next requests (pp. 14-15) that Your Honor admit, as record evidence in her proceeding, the 2016-17 testimony of Dr. Andrew Marino in the *Murphy, Povacz, and Randall/Albrecht* proceedings.³

This parallels the request made by Mary Paul in her proceeding (*Mary Paul v PECO*, C-2015-2475255). In the *Paul* proceeding, Your Honor rejected Ms. Paul’s request to admit Dr. Marino’s testimony and, in its June 14, 2018 Opinion and Order, the Commission affirmed Your Honor’s ruling that such admission is not allowable because it would violate PECO’s due process rights. The Commission stated (*Paul Opinion and Order*, pp. 21-22) (emphasis added):

Although our Regulation at 52 Pa. Code § 5.407 allows for admission of the records of other proceedings, we stand by our previous pronouncement that in instances where a party seeks to admit evidence after the hearing, “admission of such extra-record testimony violates the principle of fundamental fairness and violates the due process rights of other parties who have no opportunity to cross examine a witness in a separate hearing.” Thus, we agree with the ALJ that admission of Dr. Marino’s testimony would violate PECO’s due process rights under the circumstances, as PECO did not have adequate time and the opportunity to conduct discovery or to prepare a response to Dr. Marino’s testimony *as it applied to the Complainant* in this proceeding.

It would violate PECO’s due process rights to admit Dr. Marino’s testimony in the *Paul* proceeding because “PECO did not have adequate time and the opportunity to conduct discovery or to prepare a response to Dr. Marino’s testimony *as it applied to [Mrs. Paul]*. The same ruling

³ *Laura Sunstein Murphy v PECO*, C-2015-2475726; *Maria Povacz v PECO*, C-2015-2475023; *Cynthia Randall and Paul Albrecht v PECO*, C-2016-2537666.

should be made as to Ms. Caesar: It would violate PECO's due process rights to admit Dr. Marino's testimony in the *Caesar* proceeding because "PECO did not have adequate time and the opportunity to conduct discovery or to prepare a response to Dr. Marino's testimony *as it applied to [Ms. Caesar].*"

In her Main Brief (p. 14), Ms. Caesar argues that admission of the Marino testimony is supported by a passage from the Commission's Opinion and Order in *Frompovich v PECO*, C-2015-2474602 (May 3, 2018 Opinion and Order) that discusses authentication of documents under Rule 901 of the Pennsylvania Rules of Evidence. Ms. Caesar is referring to the following discussion in the *Frompovich Opinion and Order* (p. 38) (emphasis added):

First, the ALJ was correct in stating that the breast cancer studies required authentication in order to be relied upon as competent evidence in this case. To be admissible as competent evidence, the studies needed to be authenticated by "evidence sufficient to support a finding that the item is what the proponent claims it is." Pa. R.E., Rule 901. We note here that the ALJ's instruction to Ms. Frompovich during the hearing that the writers of the studies would need to appear at the hearing in order to authenticate the studies is stricter than the Rule permits. While having the authors present at the hearing to authenticate the studies is one acceptable way to satisfy the authentication requirement of Rule 901, we recognize that there may have been an additional way(s) to authenticate the studies. *For example, a comparison by the ALJ of an offered study with an authenticated study admitted in another proceeding would have been sufficient.* In our view, however, the ALJ's strict instruction was harmless error because ultimately the ALJ did provide a more general explanation of the requirement for authentication to Ms. Frompovich at the hearing, but Ms. Frompovich made no attempt to present any evidence to authenticate the studies even after having had this requirement explained to her.

The passage from *Frompovich* does not support the admission of Dr. Marino's testimony in the *Caesar* docket. The *Frompovich* passage deals solely with authentication of documents under Rule 901. The *Frompovich Opinion and Order* does not address the due process arguments made by PECO – arguments that were the basis of Your Honor's exclusion of the Marino testimony in *Paul* (later affirmed by the Commission) -- and it thus does not provide a basis for admitting the Marino testimony in the *Caesar* docket. Put most simply, even if a

transcript of Dr. Marino's testimony was properly authenticated, it would still violate PECO's due process rights to admit it in the instant proceeding because PECO would not have had any opportunity to conduct discovery or cross-examination, or to prepare a response to Dr. Marino's testimony *as it applied to Ms. Caesar*.

Initial Decisions have been issued in the three proceedings in which Dr. Marino testified: *Murphy, Povacz, and Randall/Albrecht*. In those proceedings, PECO had its full due process opportunity to conduct a full cross-examination of Dr. Marino and to elicit expert testimony that specifically rebutted Dr. Marino's opinions. After weighing all of that evidence, Your Honor concluded that the Complainants for whom Dr. Marino testified did not meet their burdens of proof. *See, e.g., Murphy I.D.* (p. 30) ("This was effective rebuttal by PECO. The burden then is upon the Complainant to rebut the utility's evidence by a preponderance of the evidence. Complainant did not meet this burden.") This underscores the importance of not allowing Dr. Marino's testimony to be admitted on a piecemeal fashion, without PECO having an opportunity for discovery, cross-examination, and to respond to that testimony *as to Ms. Caesar*.

C. Testimony of Mr. Bathgate in the *McKnight and Bachman* proceedings

Ms. Caesar next argues (pp. 15-17), that the testimony of Mr. William Bathgate from the *McKnight and Bachman* proceedings⁴ should be admitted into her record.

This argument is virtually identical to Ms. Caesar's request to admit the testimony of Dr. Marino from the *Murphy, Povacz, and Randall/Albrecht* proceedings. The Commission rejected that request as to Dr. Marino (*Paul Opinion and Order*, pp. 21-22) because admitting the testimony would have violated PECO's due process rights:

Thus, we agree with the ALJ that admission of Dr. Marino's testimony would violate PECO's due process rights under the circumstances, as PECO did not have adequate time

⁴ *McKnight v PECO*, C-2017-2621057; *Bachman v PECO*, C-2017-2623504.

and the opportunity to conduct discovery or to prepare a response to Dr. Marino's testimony as it applied to the Complainant in this proceeding.

The same due process considerations apply to Mr. Bathgate's testimony. Admitting Mr. Bathgate's April 2018 *McKnight/Bachman* testimony into the *Caesar* record would violate PECO's due process rights because it had no opportunity to conduct discovery on Mr. Bathgate's testimony as it might apply to Ms. Caesar and no opportunity to cross-examine Mr. Bathgate as his testimony might apply to Ms. Caesar or to prepare a response to Mr. Bathgate's testimony as it might apply to Ms. Caesar. The Bathgate testimony should not be admitted into the *Caesar* docket.

PECO also feels compelled to reiterate the argument that it made at page 45 of its Main Brief in *McKnight* (currently pending before Your Honor):

The most critical aspect of Mr. Bathgate's testimony is that it had nothing to do with health or safety of PECO's AMI meters. He stated that the standards about which he testified, and the concerns that he raised about PECO's AMI meters, are related to whether operation of the AMI meters will interfere with the operation of other radio services. Apr 11 Tr. 328-331. Indeed, he was not recognized as an expert in any health field and was not allowed to express opinions on issues of health. Apr 11 Tr. 352-53. Thus, even if Mr. Bathgate's testimony were to be accepted on its face, it would provide no evidence in support of the McKnight's health claims.

D. A letter sent by Dr. David Carpenter to the NCUC

Ms. Caesar next argues (pp. 17-18), that a letter that Dr. David Carpenter submitted to the NCUC should be admitted into her record.

The Carpenter letter was not offered at hearing, but it is clearly inadmissible hearsay.

Moreover, as with the request to admit the testimony of Dr. Marino and Mr. Bathgate, PECO had no opportunity to review the letter, issue discovery on it as it relates to Ms. Caesar, to cross-examine Dr. Carpenter, or to present evidence contrary to Dr. Carpenter. Admission of the Carpenter letter would thus violate PECO's due process rights.

The last time that Dr. Carpenter appeared as an expert witness before the Pennsylvania Public Utility Commission was in the PPL *Susquehanna-Roseland* transmission line siting case (Docket No. A-2009-2082652). In that proceeding, the Commission rendered the following extremely negative judgment of Dr. Carpenter's scientific approach (Jan. 14, 2010 Order, pp. 111-14):

[The ALJ found that] [t]he record evidence shows that Dr. Carpenter's opinions were flawed and were not based on a reliable and objective review of the scientific research. . . . In light of this overwhelming evidence, there is no good basis to give any weight to Dr. Carpenter's extreme views.

* * *

We agree with the ALJ regarding the testimony of the SCECA witness Dr. Carpenter. When the record is viewed in its entirety it is clear that Dr. Carpenter's testimony is his largely unsubstantiated (albeit heartfelt) opinion that EMF poses a health threat at any level.

Application of PPL for Approval of the Siting and Construction of the Proposed Susquehanna-Roseland 500 kV Transmission Line, 2010 WL 637063 (Pa. P.U.C. 2010).

When Dr. Carpenter appeared before this Commission and was subjected to discovery, cross-examination, and opposing testimony, the Commission gave no weight to his "extreme views." This underscores the importance of not allowing his letter from another Commission proceeding to be admitted in the *Caesar* proceeding. Admitting the letter without PECO having the opportunity for discovery, cross-examination, and to put on evidence opposing his testimony would violate PECO's due process.

E. Ms. Caesar's request to strike the testimony of Dr. Davis and Dr. Israel is also based on extra-record evidence

In her Main Brief (pp. 21-25), Ms. Caesar argues that the testimony of Dr. Davis and Dr. Israel should be stricken for a variety of reasons (including that they are paid for their time, and claimed inconsistencies in their backgrounds). As support thereof, she provides a lengthy

discussion of testimony from *Kline v PPL Electric Utilities Corp*, C-2017-2621072, and *Murphy v. PECO Energy Company*, C-21015-2475726.

All of the testimony relied upon by Ms. Caesar is extra-record to this proceeding and, for the reasons discussed earlier in this Reply, may not be used in this docket. Moreover, these or similar arguments were made in the *Murphy* proceeding (*see, for example*, *Murphy* Main Brief pp. 71-74), and in that proceeding Your Honor correctly dismissed these attacks and accepted the testimony of Dr. Davis and Dr. Israel as being more persuasive than the testimony of Dr. Marino.

Ms. Caesar also claims that, based on an internet search she did in July 2018 (long after her evidentiary hearing), she recently “learned that Dr. Israel’s license to practice medicine in New Hampshire has lapsed.” Of course, this is extra-record information and of dubious relevance to Dr. Israel’s testimony in 2017, but more importantly it is false. Public records show that Dr. Israel’s New Hampshire medical license has a current term through June 30, 2020. *See* Attachment A.

F. Claim that PECO “relies too heavily on the FCC limits based on a dated 1986 report”

In Ms. Caesar’s Main Brief (p. 29), she makes the above-noted argument, citing exclusively to record testimony in the *Murphy* proceeding. Indeed, the argument itself appears to be taken from the *Murphy* Main Brief at pp. 66-67.

This argument is based upon inadmissible extra-record evidence. To the extent that Your Honor or the Commission wishes to understand the full context of the evidence on this issue as presented in the *Murphy* proceeding, PECO refers to Main Brief in the *Murphy* proceeding (pp. 45-46), where it stated:

In setting its standards, the FCC considered claims of both thermal and non-thermal effects; it set the standards to avoid thermal effects because the scientific studies did not show any non-thermal effects. The FCC continues to consider whether there are adverse

biological effects from non-thermal exposure levels, but considers the scientific evidence for such effects to be “ambiguous and unproven.” Murphy Rebuttal Testimony of Christopher Davis at 14-15; Povacz Rebuttal Testimony of Christopher Davis at 14-16. The claim made by Dr. Marino that the FCC is out-of-date is thus untrue. The FCC keeps up-to-date on claims that radiofrequency fields can cause non-thermal effects. It just doesn’t believe that they have been demonstrated sufficiently to warrant change to the FCC standards.

IV. The extra-record materials introduced by Ms. Caesar do not support her non-health claims

A. 10-Day Notice

Ms. Caesar also argues (p. 8) that, according to “Exhibit BU-1,” PECO sent her a 10-day notice at an inappropriate time.

Ms. Caesar made no such claim in her complaint, and presented no testimony on this issue. Mr. Uber did not appear as a witness in this proceeding, and Exh. BU-1 was neither offered nor admitted into the record. There is no record evidence in support of any such claim.

B. Fires

Ms. Caesar also claimed that PECO’s AMI meters cause fires. In PECO’s Main Brief (pp. 23-24), it summarized the record evidence regarding fires and showed that the preponderance of evidence in this proceeding clearly demonstrates that Ms. Caesar’s concerns about fires are unproven and unfounded.

In her Main Brief (pp. 26-28), Ms. Caesar also discusses fires – but never once mentions the record in this proceeding. Instead, she completely relies upon briefs and testimony from two PPL cases (*Schmukler v PPL*, C-2017-2621285 and *Kline v PPL*, C-2017-2621072).

As with Ms. Caesar’s other attempts to introduce extra-record information into this proceeding, her attempt to add extra-record information on fires must also be rejected because allowing it into this record would violate PECO’s due process rights.

V. Ms. Caesar's due process claim

Ms. Caesar's Main Brief also claims (pp. 31-32) that exposure to radiofrequency fields from PECO's AMI meters will violate her due process. This argument also appears to be a variation on an argument originally set forth in the Murphy Main Brief (pp. 77-78).

To the extent that Ms. Caesar intends to incorporate the case law relied upon in the Murphy Main Brief, PECO answers here as it did in *Murphy*⁵:

Complainants' due process argument, as set forth in their Main Briefs (pp. 77-78), is that installing AMI meters would violate the Complainants' "due process right to bodily integrity." PECO's Main Brief demonstrates that Complainants have not shown that AMI meters will harm their bodily integrity. PECO thus negated the underlying factual predicate for the legal argument.

Article 11 of the Pennsylvania Constitution, which Ms. Caesar does quote, also is predicated upon a showing of "injury."

⁵ See PECO's November 13, 2017 Reply Brief in *Murphy*, p. 20.

VI. Conclusion

The record evidence in this proceeding does not support Ms. Caesar's claims by a preponderance of evidence. To the contrary, PECO provided substantial, persuasive evidence that its AMI meters will not cause or contribute to any adverse health effect or exacerbate any illness.

A great deal of Ms. Caesar's Main Brief is based upon extra-record information. PECO has not had the opportunity to pursue discovery, cross-examination, or opposing testimony as to that extra-record information, and use of that information in this proceeding would thus violate PECO's due process rights.

Therefore, Ms. Caesar's Complaint should be dismissed.

Respectfully submitted,



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August 8, 2018

Caesar v PECO

C-2017-2605462

PECO Reply Brief

Attachment A



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| Specialty: Pediatrics | | | |
| Board Certification Information | | | |
| Board Certified | Certification | Expiration | ABMS Board Specialties |
| Yes | AMERICAN BOARD OF PEDIATRICS | Sep 9 9999 12:00AM | PEDIATRICS |
| Medical Education Information | | | |
| Type | Facility Name | Country | Year |
| Medical School | ALBERT EINSTEIN COLL OF MED - BRONX, NY | USA | 1973 |
| Internship | CHILDRENS HOSPITAL - BOSTON, MA | | 1975 |
| Residency | NATIONAL INSTITUTES OF HEALTH- BETHESDA, MD | | 1982 |
| Remarks | | | |
| No Related Documents | | | |
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