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September 4, 2018

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

Re: James Quigley & Teresa Mendez Quigley v. PECO Energy Company
Docket No. C-2017-2617558

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

James Quigley & Teresa Mendez Quigley :
 : Docket No. C-2017-2617558
 v. :
 :
 PECO Energy Company :

CERTIFICATE OF SERVICE

I, Ward L. Smith hereby certify that on September 4, 2018, I served a copy of PECO Energy Company's *Reply Brief*, in the above matter, upon all interested parties via overnight delivery to:

James Quigley &
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Dated: September 4, 2018



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**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

**James Quigley and
Teresa Mendez-Quigley**

v

PECO Energy Company

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C-2017-2617558

Reply Brief of PECO Energy Company

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Introduction

On August 3, 2018, the parties exchanged Main Briefs. PECO hereby provides its Reply Brief.

Summary of Argument

Complainants have the burden of proof in this proceeding. After a full, two-day evidentiary hearing, the Quigleys did not prove their claims by a preponderance of the evidence. In their Main Brief, the Quigleys present extra-record evidence that cannot be considered in this proceeding. For its part, PECO provided substantial, persuasive evidence that its AMI meters will not cause, contribute to, or exacerbate harm to Ms. Quigley's health. The arguments presented by the Quigleys in their Main Brief do not provide a reason to give less weight to PECO's testimony.

The Quigleys did not demonstrate that PECO provided unreasonable utility service by installing a gas AMI module.

None of the legal arguments raised by the Quigleys provide a reason to rule in their favor.

Therefore, the Quigley's Complaint should be dismissed.

Argument

I. Burden of Proof – The Complainants Have the Burden of Proof

In its Main Brief (p. 15), PECO established that, in all Commission formal complaint proceedings, the Complainant has the burden of proof. *Samuel J. Lansberry, Inc. v. Pa. PUC*, 578 A.2d 600 (Pa. Cmwlth. 1990), *alloc. denied*, 529 Pa. 654, 602 A.2d 863 (1992). Moreover, the Commission has affirmed that this normal burden of proof rule applies to AMI/health claims. *Kreider v PECO*, P-2015-2495064 (Opinion and Order, January 28, 2016) (pp. 22-23);

Frompovich v PECO, C-2015-2474602 (Opinion and Order, May 3, 2018) (pp. 12-14); *Mary Paul v PECO*, C-2015-2475355 (Opinion and Order, June 14, 2018) (pp. 11-13).

The Quigley's Main Brief does not contain an explicitly-labeled section on burden of proof. However, arguably-related concepts are discussed in the Introduction (pp. 3-4) and in their Argument (p. 48). Specifically, in their Introduction the Quigleys claim that "[t]he quality of being safe means the absence of risk or harm," that "PECO takes the extraordinary and unreasonable position that RF exposure from its AMI meters is utterly incapable of causing harm," and that "[t]he Public Utility Commission does not have to resolve the scientific disagreement between these parties to resolve these cases." In their Argument (p. 48), the Quigleys argue that "complainants should not have to prove medical causation as if this were a toxic tort action seeking damages."

These precise arguments were presented, albeit more substantially elaborated, in the September 25, 2017 Main Brief in the *Murphy* proceeding.¹ PECO provided its extensive response to these burden of proof arguments in its October 23, 2017 Main Brief (pp. 12-23) and its November 13, 2017 Reply Brief (pp. 4-18) in *Murphy*. In the Initial Decision in *Murphy* (pp. 18-19), Your Honor reviewed these arguments 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 the Quigleys must meet.

¹ See *Murphy* Main Brief, p. 1 ("The quality of being safe means the absence of risk or harm."); p. 2 ("PECO takes the extreme and unreasonable position that RF exposure from its AMI meters is utterly incapable of causing harm."); p. 2 ("The Public Utility Commission does not have to resolve the scientific disagreement between these parties to resolve these cases."); pp. 75-77 ("There is no requirement for Complainants to prove medical causation as if this were a toxic tort case.")

II. The extra-record materials discussed by the Quigleys do not support a conclusion that PECO's AMI meters will harm Ms. Quigley's health

A. The *Frompovich Order's* discussion of authentication does not mean that out-of-court testimony and letters are admissible in the *Quigley* proceeding

In their Main Brief (p. 9), the Quigleys cite a passage from the Commission's Opinion and Order in *Frompovich v PECO*, C-2015-2474602 (Opinion and Order, May 3, 2018) regarding authentication of evidence pursuant to Rule of Evidence 901. Based on the passage from *Frompovich*, the Quigleys ask "for the following three (3) experts [Dr. Andrew Marino, Mr. William Bathgate, and Dr. David Carpenter] cited in other hearings to authenticate the research submitted at the initial hearing and to support their [health] claim."

PECO respectfully submits that the Quigleys are misreading and misapplying *Frompovich*. The *Frompovich Order* does not provide a basis for using the testimony of Dr. Marino, Mr. Bathgate, or Dr. Carpenter in the *Quigley* proceeding for any purpose whatsoever. Authentication of evidence is certainly required in certain circumstances, but even evidence that has been authenticated may be inadmissible for other reasons – including, as is the case here, when the proffered evidence is comprised of out-of-court statements offered for the truth of the matters asserted therein, and which is thus inadmissible under the hearsay rules. *See* Pennsylvania Rules of Evidence 801-806.

More concretely, PECO does not dispute that the proffered transcripts of Dr. Marino's testimony and Mr. Bathgate's testimony are authentic transcriptions of the testimony that they gave in other Commission proceedings, and it does not dispute that the proffered letter from Dr. Carpenter is an authentic copy of the letter that Dr. Carpenter sent to the North Carolina Utilities Commission. But those documents are still not admissible in this proceeding because, while they are authentic, they are also out-of-court statements offered for the truth of the matters asserted therein, and are thus inadmissible hearsay that cannot be used to prove the Quigley's claims.

Rule 901 of the Pennsylvania Rules of Evidence deals with “Authenticating or Identifying Evidence.” The general rule is stated in subpart (a), and states:

To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce sufficient evidence to support the finding that an item is what the proponent claims it to be.

The Comment to Rule 901 states that:

The authentication or identification requirement may be expressed as follows: When a party offers evidence contending either expressly or impliedly that the evidence is connected with a person, place, thing, or event, the party must provide evidence sufficient to support a finding of the contended connection. *See Commonwealth v Hudson*, 489 Pa. 620, 414 A. 2d 1381 (1980); *Commonwealth v Pollock*, 414 Pa. Super. 66, 606 A. 2d 500 (1992).

In *Frompovich*, the Commission stated (pp. 38-39) that, in order to be admissible, evidence must be authenticated *and also* must not violate the hearsay rules. The Commission stated (PECO has underlined the portion of this statement that was quoted by the Quigleys in their Main Brief, and *italicized* the key passage that states that even authenticated materials are inadmissible if they are also hearsay):

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.

Next, the ALJ was correct in identifying the internet-derived breast cancer studies as hearsay because the studies contain out-of-court statements made by a declarant (i.e., the author of the study) that was offered by the Complainant in this proceeding to prove the truth of the matter asserted in the studies. Upon review, the internet-derived breast

cancer studies do not fall within one of the recognized exceptions to the rule against hearsay. See Pa. R.E., Rules 802, 803, 803.1, 804. Thus, they constitute simple hearsay. For the sake of argument, assuming these studies had been admitted into evidence, without objection by PECO, the studies nonetheless would have been insufficient to support a finding of fact in this proceeding pursuant to the Walker/Chapman rule because no other non-hearsay, competent evidence had been presented by Ms. Frompovich to corroborate the breast cancer studies. Thus, such studies could not be used as competent evidence in this case to prove the truth of the matter asserted therein, or to support a finding of fact.

The “authentication” discussion in *Frompovich* thus does not establish the admissibility of the Marino or Bathgate testimony, or of the Carpenter letter. Instead, the full passage from *Frompovich* establishes that the out-of-court statements of Dr. Marino, Mr. Bathgate, and Dr. Carpenter are inadmissible because they are hearsay.

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

In their Main Brief (pp. 9-10), the Quigleys discuss the 2016-17 testimony of Dr. Andrew Marino in the *Murphy, Povacz, and Randall/Albrecht* proceedings² and, as noted in the prior section of this Reply Brief, request that it be used in this proceeding “to support their [health] claim.”

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

² *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.

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 should be made as to the Quigleys: It would violate PECO’s due process rights to admit Dr. Marino’s testimony in the *Quigley* 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 the Quigleys*.

Moreover, 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 discovery and 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 admitting Dr. Marino’s testimony in this proceeding in a piecemeal fashion, without PECO having an opportunity for discovery, cross-examination, and to respond to that testimony *as to the Quigleys*.

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

The Quigleys next argue (pp. 11-13), that the testimony of Mr. William Bathgate from the *McKnight and Bachman* proceedings³ should be used in this proceeding “to support their [health] claim.”

This argument is virtually identical to the Quigley’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 Marino testimony would have violated PECO’s due process rights, and the same due process considerations apply to Mr. Bathgate’s testimony. Admitting Mr. Bathgate’s April 2018 *McKnight/Bachman* testimony into the *Quigley* 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 the Quigleys, no opportunity to cross-examine Mr. Bathgate as his testimony might apply to the Quigleys, and no opportunity to prepare a response to Mr. Bathgate’s testimony as it might apply to the Quigleys. The Bathgate testimony cannot be used in the *Quigley* docket “to support their [health] claim.”

PECO also reiterates 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.

³ *McKnight v PECO*, C-2017-2621057; *Bachman v PECO*, C-2017-2623504.

D. A letter sent by Dr. David Carpenter to the North Carolina Utilities Commission

The Quigleys next argue (p. 13), that a letter that Dr. David Carpenter submitted to the North Carolina Utilities Commission should be used “to support their [health] claim.”

The Carpenter letter also is clearly an out-of-court statement offered for the truth of the matters asserted therein, and is thus inadmissible hearsay. Moreover, because this letter was offered in a proceeding in North Carolina, PECO has never had an opportunity to review the letter, issue discovery, to cross-examine Dr. Carpenter, or to present evidence contrary to Dr. Carpenter as to *any* Pennsylvania complainant, and certainly not as to the Quigleys. Admission of the Carpenter letter would thus violate PECO’s due process rights.

Some years ago, Dr. Carpenter appeared as an expert witness before the Pennsylvania Public Utility Commission in the PPL *Susquehanna-Roseland* transmission line siting case (Docket No. A-2009-2082652). In that proceeding, the Commission rendered the following 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).

More recently, Dr. Carpenter appeared in a PPL AMI case, *Myers v PPL Electric Utilities Corporation*, C-2017-2620710. In the August 16, 2018 Initial Decision in that case, ALJ Barnes stated (p. 21) that Dr. Carpenter’s BioInitiative Report (Quigley Exh. D1-D6) “does not provide

a balanced view of the scientific research” and that, even with Dr. Carpenter’s on-the-record testimony in support of that Report, Mr. Myers did not sustain his burden of proof. (I.D., p. 32).

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,” found that his Report “does not provide a balanced view of the scientific research,” and held that his testimony was not sufficient to sustain an AMI/health Complainant’s burden of proof. This underscores the importance of not allowing his letter from another Commission proceeding to be admitted in the *Quigley* 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. The Quigley’s request to strike the testimony of Dr. Davis and Dr. Israel is also based on extra-record evidence

In their Main Brief (pp. 30, 37, 39-40),⁴ the Quigleys argue that the testimony of Dr. Davis and Dr. Israel should be stricken because they are compensated for their time. As support thereof, at pages 39-40 they provide a review of testimony from *Kline v PPL Electric Utilities Corp*, C-2017-2621072.

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. All of the *Kline* testimony relied upon by the Quigleys is extra-record to this proceeding and, for the reasons discussed earlier in this Reply Brief, may not be used in this docket.

⁴ PECO reviews the record evidence on this issue in later sections of its Reply Brief.

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

In the Quigley’s Main Brief (pp. 46-47), they argue that PECO “relies too heavily on the FCC’s limits based on a dated 1986 report.” In support of this argument, the Quigleys cite exclusively to record testimony in the *Murphy* proceeding. Indeed, the argument itself appears to be directly 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 its 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.

III. The Quigley’s testimony did not demonstrate that PECO’s AMI meter will cause harm to Ms. Quigley’s health

In their Main Brief (pp. 17-29), the Quigleys review their testimony regarding health issues.

PECO’s Main Brief (pp. 15-17) provides its analysis of the Quigley’s testimony and its testimony in response, and PECO stands on that analysis. PECO’s only additional note in this Reply Brief is that, throughout this section of their Main Brief, the Quigleys attempt to support their health claim by quoting extensively from articles that were introduced as exhibits in this proceeding. However, all of those articles were introduced with a specific limitation – they are

out-of-court declarations (hearsay), and thus cannot be used to prove the truth of the matters asserted therein. *See, for example*, Apr 17 Tr. 27, 81-82, 139, 145-46, 153-54.

The quotations that are set forth in the Quigley's Main Brief thus cannot be used as evidentiary support for their health claim. They can only be used to show that Mr. Quigley reviewed them and to help understand why he holds the beliefs that he does.

IV. PECO provided substantial, persuasive testimony that its AMI meters will not cause harm to Ms. Quigley's health

A. Dr. Davis's Testimony

In PECO's Main Brief (pp. 16-17), it described the testimony of Dr. Christopher Davis. In the Quigley's Main Brief (pp. 36-39), the Quigleys argue that, for a variety of reasons, Dr. Davis's testimony should not be given weight. None of the arguments presented by the Quigleys is a reason to give no weight or less weight to Dr. Davis's testimony.

First, the Quigleys argue (p. 36) that Dr. Davis's testimony should not be given weight because he has never treated a patient and has "no experience in human health." Of course Dr. Davis has not treated patients. He is not a medical doctor; he is a Ph.D. physicist with expertise in the fields of physics, biophysics, chemistry, electrical engineering, electromagnetics, bioelectromagnetics, and dosimetry. Apr 18 Tr. 331-34, 340-41. His opinions were offered in those fields; the Quigleys offer no reason that an expert in those fields would need to have treated patients in order to offer compelling expert opinions in those fields.

Second, the Quigleys argue (p. 37) that Dr. Davis was paid to testify and that he confirmed that PECO would not have selected an expert witness who did not agree with PECO's views. In fact, Dr. Davis's testimony on that issue was more textured than the Quigley's summary would lead one to believe. He stated:

First of all, I would never testify for anybody where I didn't feel comfortable telling the absolute truth of what I believe is correct. And I think what you're asking doesn't make

sense. I mean, any witness that's presented, you hope will help your case. And I believe that I am telling the absolute truth about what the matter is here. And clearly, that's why I like to think I'm valuable in presenting this evidence.

Apr 18 Tr. 299-300. Dr. Davis is only willing to testify in matters where he is comfortable telling the absolute truth. That is a reason to believe, not disbelieve, his testimony.

Third, the Quigleys reiterate Dr. Davis's testimony that radio frequency transmissions do not have sufficient energy to break chemical bonds in DNA, and then assert (p. 37) that Dr. Davis "was unaware of many of the published works [on genetic damage] he was asked about," refer to "114 new papers on genotoxic effects," and claim that "Davis seems unaware [of the 2014 Bioinitiative Report which] states: "Clearly, the preponderance of genetic studies report DNA damage and failure to report DNA damage."⁵ The Quigleys also refer to the BioInitiative Report at page 38 of their Main Brief.

The Quigleys asked Dr. Davis a series of questions about studies listed in their Exhibit D-6, which is an Appendix of the 2014 Bioinitiative Report. *See* Apr 18 Tr. 304-315. While Dr. Davis was not familiar with every one of the studies about which the Quigleys asked,⁶ he nonetheless provided comprehensive and knowledgeable testimony about genetic research, including the studies discussed in the BioInitiative Report:

⁵ The 2014 Bioinitiative Report (Quigley Exhibits D-1 to D-6) is hearsay and cannot be used to prove the truth of the matters asserted therein -- such as whether a preponderance of studies report a specific outcome. *See* Apr 17 Tr. 152: (Mr. Smith: "[T]hey are not to be cited for the truth of the matters asserted therein." ALJ Heep: "All right. So D-1 through 6 are admitted with that limitation.") PECO also notes that, according to Quigley Exhibit D-1, p. 2, one of the editors of the Bioinitiative Report is Dr. David Carpenter, about whom the Commission has previously stated this his "opinions were flawed and were not based on a reliable and objective review of the scientific research" and that his BioInitiative Report "does not present a balanced view of the scientific research." *See* Section II.D. of this Reply Brief.

⁶ The Quigleys refused to show Dr. Davis copies of any of the studies about which they asked questions. The questions were thus simply taking a list of study names, picking some of the studies from that list, and asking Dr. Davis whether he recognized the study based solely on reviewing its title and authors for a few seconds. Apr 18 Tr. 304-15.

- “[Y]ou are missing many references from this list that would contradict these findings. . . [the BioInitiative Report list] is not complete.” Apr 18 Tr. 307;
- “I am quite familiar with Billy Meier's work. He uses a very obscure technique called anomalous viscosity dispersion, which he claims shows slight changes in confirmation of large molecules exposed in-vitro. This technique is not accepted or used by other scientists. And to be honest, this study, really in my opinion, doesn't show anything at all related to a biological effect.” Apr 18 Tr. 309;
- “I'm familiar with Dr. D'Inzeo's work. I would call him a friend of mine. I'm not sure I'm familiar with this particular paper without you showing me a copy of it.” Apr 18 Tr. 310;
- “I've heard of [Kasari's study titled Evidence from Mobile Phone Radiation Exposure, Effects on Reproductive Pattern of Male Rats]. But I couldn't comment more on it without you showing me a copy. Apr 18 Tr. 313;
- “I'm very familiar with [Lai and Singh's study titled Single and Double Strand DNA Breaks in Rat Brain Cells after Acute Exposure to Radiofrequency Electromagnetic Radiation.] This is a study that's failed replication on numerous times. And I would quote the work of Malyapa, Washington University in St. Louis and other workers. They found flaws in Lai and Singh's approach. This study is absolutely not accepted by the general scientific community.” Apr 18 Tr.313;
- “I have seen [the Phillips study DNA Damage in Molt-4 T-Lymphoblastoid Cells Exposed to Cellular Telephone Radiofrequency Fields In-Vitro] a long time ago. My only comment is that this [has], again, failed replication by numerous other scientists. So it's not generally accepted as a scientific finding. Apr 18 Tr. 314;
- “I have made an extensive study of the literature. That does not mean I've read every single of the thousands of pages that have been published in the area. Any more than your list includes all the studies that don't show any effect at all. And it's very important when you look at a study to find out what the experiments have actually done. How they actually inadvertently heated up the samples with their radiofrequencies. And thereby, produce the thermal effect. How they won't be replicated by anybody else. And I'm afraid, you've cherry-picked the literature in comparing this list. There's many, many more papers that would contradict what you have listed here.” Apr 18 Tr. 315.

Clearly, Dr. Davis is not “unaware of” the 2014 Bioinitiative Report, or of the studies listed within it. To the contrary, he has done an extensive study of the literature and disagrees with the conclusions of the BioInitiative Report.

Fourth, the Quigleys claim (p. 37) that Dr. Davis's testimony on harmonics contradicts Mr. Pritchard's testimony on harmonics, and that "this gives pause to the expert credibility of one or the other." Dr. Davis testified that the two testimonies do not contradict each other:

I don't think the statements contradict each other. I am making a strict scientific statement. Dirty electricity is not an accepted scientific term. All Mr. Pritchard said was if it's used colloquially by people who want to describe the phenomenon of harmonics and transients. There is no inconsistency between what I'm saying and what Mr. Pritchard has testified to.

Apr 18 Tr. 322-23.

Fifth, the Quigleys claim (p. 38) that Dr. Davis erred in relying upon the Federal Communications Commission's ("FCC") Maximum Permissible Exposure ("MPE") limits because those limits are based on exposure levels identified by the National Council on Radiation Protection and Measurements ("NCRP") and the American National Standards Institute ("ANSI"), and the Quigleys believe that the NCRP and ANSI are organizations with "no human health expertise." The Quigleys provided no proof that the NCRP and ANSI are so limited. Moreover, Dr. Davis testified that "Before setting its maximum permissible exposure limits, the FCC consulted with the U.S. Food and Drug Administration, the Environmental Protection Agency, the Occupational Safety and Health Administration, and the National Institute of Occupational Safety and Health. Each of those agencies supported the FCC setting its exposure limits based on the threshold level identified by NCRP and ANSI." PECO Exh. CD-3, p. 3. The FCC MPE limits clearly were reviewed and supported by agencies with "human health expertise," and Dr. Davis's reliance upon the FCC's MPE limits is also clearly warranted.

Sixth, the Quigleys claim (p. 38) that Dr. Davis is incorrect when he states that the FCC MPE's are based upon research into the potential for both thermal and non-thermal effects. In support of this position, the Quigleys refer to a letter by the American Academy of

Environmental Medicine (“AAEM”) (Exh. M-5). The limitations of the AAEM letter will be discussed in the section on Dr. Israel’s testimony. However, Dr. Davis addressed this argument at length in PECO Exh. CD-3 (pp. 2-3), and explained that the FCC evaluated research on both thermal and non-thermal effects and concluded that non-thermal effects have not been demonstrated. After review of additional publications, he concluded (p. 3): “In sum, the scientific consensus is that exposure to non-thermal level radio frequency fields does not produce any ‘non-thermal effects.’”

The Quigleys close their discussion of Dr. Davis’s testimony by citing a letter from “EMFscientist.org (Quigley Exh. M-7). No witness in this proceeding testified about or was asked any questions about this letter. It was admitted with the hearsay limitation that it may not be used to prove the truth of matters asserted therein. Apr. 17 Tr. 162-63. It does not provide evidentiary support for the Quigley’s claim.

B. Dr. Israel’s Testimony

In PECO’s Main Brief (pp. 17-18), it described the testimony of Dr. Mark Israel. In the Quigley’s Main Brief (pp. 30-33), the Quigleys argue that, for a variety of reasons, Dr. Israel’s testimony should not be given weight. None of the arguments presented by the Quigleys is a reason to give no weight or less weight to Dr. Israel’s testimony.

First, the Quigleys argue (p. 30), that Dr. Israel’s testimony should be given little weight because he is not currently treating any patients. However, Dr. Israel did have an active medical practice for approximately 40 years, and for the last 15 of those years, he was Director of the Dartmouth-Hitchcock Cancer Center. PECO Exh. MI-1. He has substantial experience treating actual patients.

Second, the Quigleys argue (p. 30) that Dr. Israel was paid to testify and that he could not say whether PECO would have selected an expert witness who did not agree with PECO's views. In fact, as with Dr. Davis, Dr. Israel's testimony on that issue was more textured than the Quigley's summary would lead one to believe. He stated (Apr 18 Tr. 257-38):

Dr. Israel: But I'm here really not on anyone's behalf. But rather to provide testimony about my knowledge and review of the topics I'm an expert in.

Mr. Quigley: Doctor, do you think that PECO or a PECO affiliate would have selected you as an expert witness if you did not agree with their belief about the impact of radiofrequency transmissions on any aspect of health?

Dr. Israel: I don't know.

Third, the Quigleys assert (pp. 30-31) that Dr. Israel could not have truly conducted an extensive research review because "when asked to name at least one report, even one that supported his contention, he was not able to do so. . . . [w]hen asked again, he could not name any," and that "even on a bad day, the Court should expect substantially more than what Israel showed."

Here is what actually happened. Mr. Quigley initiated this line of questions by asking Dr. Israel if he could name a study, and Dr. Israel stated: "I can." Apr 18 Tr. 358. Over the course of this line of questions, Dr. Israel named and discussed research by Simgleski on lymphoma, Apr. 18 Tr. 360-61, Nasta and Rodan on immunological issues, Apr 18 Tr. 361-62, provided an extensive critique of the methods and conclusions of an article by Dr. Trevor Marshall on "electro-smog," Apr 18 Tr. 363-67, and named studies by Rubin and Hietanen on electro-hypersensitivity. Apr 18 Tr. 271. He also provided an extensive discussion of his method of conducting a research review. Apr 18 Tr. 374-78.

During this discussion, Your Honor asked: "Even if you don't agree with [a study], or you thought it was a – whatever reason, do you recall any of the studies?" Dr. Israel replied:

“I can answer that question easily. There were no studies on radiofrequency fields affecting Sjogren's disease, cause, contributing to, or exacerbating. There were no studies on radiofrequency fields causing osteoporosis. Causing, contributing to, or exacerbating. There were no studies regarding . . . Vitamin D deficiency. There were no studies that radiofrequency field exposure could cause, contribute to, or exacerbate vitamin D deficiency.” Your Honor then asked: “And the cardiovascular?” Dr. Israel replied: “There were studies related to various aspects of cardiovascular performance. But there were no studies that identified RF as causing, contributing to, or exacerbating cardiovascular disease. Apr 18 Tr. 372-73. This record does not support the assertion, as made by the Quigleys, that Dr. Israel was unfamiliar with the research and “could not name any” studies.

Fourth, the Quigleys assert (p. 31) that Dr. Israel “overlooked” approximately 1,800 studies from the BioInitiative Report, including a letter from the American Academy of Pediatrics (Quigley Exh. D-2). As noted, the BioInitiative Report is hearsay that cannot be relied upon to prove the truth of the matters asserted therein – and when its editor, Dr. Carpenter, was cross-examined in the *Myers* proceeding, ALJ Barnes concluded that the BioInitiative Report “does not provide a balanced view of the scientific research.” Moreover, Dr. Israel provided a detailed discussion of the approach that he used to conduct his extensive review of the scientific research. PECO Exh. MI-2.

Fifth, the Quigleys discuss the AAEM letter (Quigley Exh. M-5). Your Honor and Dr. Israel had the following discussion regarding the AAEM letter (which, in any event, is hearsay):

ALJ Heep: Out of hundreds of studies of whether there are health effects from electromagnetic and radiofrequency exposure, the AAEM statement cites only 20 studies. . . . Why is that significant?

Dr. Israel: I think it's significant because they never state anywhere that they did a comprehensive review of the literature. And based upon that review, formed an opinion,

and here are some examples of good studies that support this opinion. That's not what this does. On the other hand, I tried very hard in the materials that I provided the Quigleys to not only indicate that the evaluation was comprehensive, but that what I was providing were examples. I don't pretend that there are[n't] studies out there that claim that radiofrequency fields can have effects. There are none in the area of autoimmunity. There are none in the area of osteoporosis. There are none in the area of neuropathy. But there are others out there that claim it can have an effect. When I provide 20 studies, I always am careful to say that these are examples of what my conclusion was. As opposed to the AAEM that never does that.

ALJ Heep: Are you familiar with that organization at all?

Dr. Israel: You know, only through this radiofrequency interest that I have. So I've looked at their website. I've read their materials. I mean, I really feel that they're advocates for a belief they have. They believe that radiofrequency fields have health effects. And they're going to show it. And that's just totally different than what PECO asked me to do, Tom Watson asked me to do. He asked me to do a comprehensive evaluation and tell him what I found.

ALJ Heep: Now, this may be repeating what Mr. Quigley asked. But as a physician, if you had a patient who had a condition, and you found 20 studies linking those conditions to this thing, whatever the thing is, would that be a concern to you as to what, and what you would recommend to your patient to help them?

Dr. Israel: I think this is an important question. It would depend on what other studies about that condition showed. And it would - and this is, this particular choice [Exh. B-2, the Trevor Marshall electrosmog article] is a great example -- If there were 20 articles like B-2, I would dig deeper and try to find some other way to deal with my patient. It matters what the quality and the - it matters what the quality of the studies are. I mean, you don't drive a patient crazy because there are 20 poor articles about something.

The record evidence thus demonstrates that the AAEM letter is not a reliable basis for reaching any conclusion about health effects from RF. Moreover, it is inadmissible hearsay.

The Quigleys end their discussion of Dr. Israel's testimony by referring (pp. 32-33) to the pre-filed testimony of Dr. De-Kun Li in a Maine Public Utilities Commission docket. This testimony was offered as evidence, but specifically excluded from the record on the grounds that PECO had no opportunity to serve discovery on Dr. Li, cross-examine Dr. Li or present opposing testimony when Dr. Li appeared before the Maine PUC. Apr 17 Tr. 162-64.

C. Mr. Pritchard's testimony

In PECO's Main Brief (pp. 18-19), it primarily discussed the testimony of Mr. Pritchard under the heading of "reasonable accommodations."

In the Quigley's Main Brief (pp. 30-33), the Quigleys argue that, for a variety of reasons, Mr. Pritchard's testimony should not be given weight. None of the arguments presented by the Quigleys is a reason to give no weight or less weight to Mr. Pritchard's testimony.

First, they note (p. 34) that Mr. Pritchard – who was offered as an expert in the "design, operation, and technology of advanced grid installations" – has no qualifications in human health. They don't claim that this makes Mr. Pritchard unqualified in his fields of expertise. Instead, they claim (p. 34) that "this validates the Quigley's contention that PECO is not addressing the health concern." Mr. Pritchard was not offered for that purpose and offered no expert testimony in health fields; PECO addressed health issues through other witnesses. That does not mean that less weight should be given to Mr. Pritchard's opinions on accommodative design or operations of an AMI system.

Second, the Quigleys state (p. 34) that Act 129 does not require mandatory installation and that Mr. Pritchard's testimony to that effect is a misstatement. PECO answers this argument in a later section of its Reply Brief dealing with whether Act 129 provides an opt-out.

Third, the Quigleys discuss the Trevor Marshall "electrosmog" article (Quigley Exh. B-2). Dr. Israel provided an extensive critique of the Marshall article, in which he concluded that it "doesn't strike me as a substantive report that provides information, either helpful or not helpful. It's simply a description of some poorly described hats that were given to some poorly described patients, who were asked some poorly described questions." Apr 18 Tr. 363-67.

Fourth, the Quigleys claim (p. 36) that, when they asked Mr. Pritchard about “third party testing,” he “tried to avoid answering the question and when pressed could not provide an answer.” Here is what the transcript actually says (Apr 18 Tr. 253):

Q. Are you aware of any third-party research - and by third-party research, I mean research not funded or conducted by PECO or any power industry player, or any affiliate player meaning, for example, manufacturers of the various meters that you use, or components of those meters. Are you aware of any third-party research that corroborates what you are saying?

A. I think I'm discussing things not being unique about what PECO is doing, so. . . .

Q. And I assume that you mean you do not, you are not aware of any third-party research?

A. I would say any manual, any textbook on RF functionality and how that works would corroborate this. So while I can't specifically quote one, I know there is a wealth of knowledge that nearly every institution that teaches an electrical engineering college degree or even at the high school level, will, you know, will share the similar information. This is basic RF.

That testimony does not support the characterization given to it by the Quigleys.

The Quigleys end their discussion of Mr. Pritchard's testimony by claiming that PECO did not offer them an accommodation. This was discussed at length in PECO's Main Brief (pp. 18-19), and PECO stands on that discussion.

V. The Quigleys did not demonstrate that PECO provided unreasonable utility service by installing an AMI gas module

In their Main Brief (pp. 33-34), the Quigleys argue that it was inappropriate for PECO to install a gas AMI module (and to continue to engage the Quigleys to install an AMI electric meter) after they informed PECO they did not want such technology installed, but before any complaint was filed.

A customer call objecting to AMI meter installation does not create a bar to meter installation. Once PECO has responded to the customer's concern and informed the customer

that it intends to proceed with installation, it may do so, unless and until a formal complaint is filed.

The testimony of Bryan Uber established the sequence of events. As set forth in PECO's

Main Brief (pp. 5-7):

- In June 2012, the Quigleys informed PECO that they did not want an electric AMI meter installed at their residence. Apr 17 Tr. 178; PECO Exh. BU-1, p. 1.
- In December 2013, PECO informed the Quigleys that electric AMI meter deployment was scheduled to begin in their area soon. Apr 17 Tr. 179; PECO Exh. BU-1, p. 1.
- On January 4, 2014, PECO's vendor Grid One attempted to install an electric AMI meter at the Quigley residence, but was not successful. Apr 17 Tr. 189, 199; PECO Exh. BU-1, p. 1.
- On April 3, 2014, Mr. Quigley called PECO and restated that the Quigleys did not want an electric AMI meter. Apr 17 Tr. 180-81; PECO Exh. BU-1, p. 1.
- On April 16, 2014, PECO received a letter from the Quigleys stating that they did not want an electric AMI meter installed. The letter contained a note from their doctor that in its entirety stated: "It is my medical recommendation that this patient reduce involuntary electromagnetic exposure including wireless transmissions." PECO Exh. BU-1, p. 1; PECO Exh. BU-6.
- In June 2015, PECO sent its "proactive" letter to the Quigleys stating that it needed to install a gas AMI module at their residence. Apr 17 Tr. 181, 200; PECO Exh. BU-1, p. 2.
- In July 2015, Mr. Quigley called PECO and stated that the Quigleys refused to accept a gas AMI module for health reasons, and would send a doctor's letter supporting that refusal. Apr 17 Tr. 201, PECO Exh. BU-1, p. 2.
- In January 2016, PECO sent a re-engagement letter to the Quigleys to reinitiate discussions on electric AMI meter installation. Apr 17 Tr. 181-82.
- On September 26, 2016, PECO sent the Quigleys a further re-engagement letter regarding installation of AMI technology at their home. Apr 17 Tr. 182-83; PECO Exh. BU-1, p. 8; PECO Exh. BU-8.
- On September 28, 2016, PECO installed a gas AMI module. At the time of installation of the gas AMI module, the Quigleys did not have a formal complaint pending. Apr 17 Tr. 182-83, 198; 202.

- On October 24, 2016, PECO received a letter from the Quigleys stating that they did not want to have a “smart” meter attached to their house. This letter stated the Quigleys had previously sent a “doctor’s note stating that given my health condition, he did not feel that I should have increased exposure to electric magnetic fields.” Apr 17 Tr. 209; PECO Exh. BU-10.
- On July 10, 2017, PECO sent the Quigleys a residual deployment letter stating that it needed to proceed with installation of an AMI electric meter. PECO Exh. BU-1, p. 18.
- On July 11, 2017, PECO sent the Quigleys a 10-day notice stating that, if they did not provide access to install an electric AMI meter, PECO would terminate their service. PECO Exh. BU-13.
- On July 31, 2017, PECO sent the Quigleys a 72-hour notice stating that, if they did not provide access to install an electric AMI meter, PECO would terminate their service. PECO Exh. BU-14.
- On August 4, 2017, PECO was served with the formal complaint in this matter. PECO Exh. BU-1, p. 25.

At the time PECO installed the gas AMI module, PECO had sent letters to the Quigleys stating that it intended to install a gas AMI module, and no formal complaint was pending. PECO continued to engage the Quigleys regarding installation of the AMI electric meter until the formal complaint was filed. This is a reasonable approach to universal deployment of meters.

VI. Legal and procedural issues

A. The claim that Act 129 allows opt outs

During his testimony, Mr. Quigley read aloud statements made by Pennsylvania legislators that had been published in the Legislative Journal. These statements preceded the passage of Act 129 in 2009. Apr 17 Tr. 20-23. In their Main Brief (pp. 14-17), the Quigleys discuss these legislative materials and claim that they demonstrate that “Act 129 does not mandate said installation on all customers.” Later in their Main Brief (pp. 48-49), the Quigleys specifically request that “medical opt-outs should be implemented.”

The simple answer, as noted by the Quigleys themselves, is that Commission has already evaluated and ruled that opt-outs are not available under Act 129. In 2009, the Commission issued its Smart Meter Implementation Order, and resolved this issue as follows:

The Commission believes that it was the intent of the General Assembly to require all covered EDCs to deploy smart meters system-wide when it included a requirement for smart meter deployment “in accordance with a depreciation schedule not to exceed 15 years.” It is this system-wide deployment that will provide the foundation for the EDCs’ smart meter installation plans. Therefore, it is crucial for the EDCs to develop a plan that will best meet the needs of their service territory, while at the same time operating in a manner that is both cost and time effective.

The EDCs shall detail their system-wide deployment plans to the Commission, including any type of tiered rollout the company proposes, as well as the associated costs and benefits incurred from such a rollout. This system-wide plan should also incorporate a coordination element with the new construction deployment component. Furthermore, the Commission will require all EDCs to file a “Smart Meter Progress” report on an annual basis that will update the status of their installation plans, including the number of customers who received meters in the prior year, the estimated number of customers scheduled to receive meters in the coming year, and all costs associated with the meter plan incurred during the previous year.

It should also be noted that Act 129 uses the language “not to exceed 15 years.” An EDC is encouraged to expedite the deployment process if it will provide increased customer benefits in a cost-effective manner. Again, the primary goal of the EDC deployment plan should be to implement a deployment and installation schedule that best balances the overall efficiency and timeliness of the smart meter installations with the costs incurred.

Smart Meter Procurement and Installation, Docket No. M-2009-2092655 (Implementation Order, June 24, 2009) (p. 14, emphasis added). Pursuant to that Order, PECO proposed, and the Commission approved, a plan for “universal deployment” in its service territory.¹ See *Frompovich v PECO*, C-2015-2474602 (Opinion and Order, May 3, 2018, p. 10, fn 3), where the Commission summarized the procedural history of PECO’s AMI installation plan as follows:

In accordance with the Commission's direction in the *Smart Meter Procurement and Installation Implementation Order*, on August 14, 2009, PECO submitted with the Commission a Petition for Approval of its Smart Meter Installation Plan, at Docket No. M-2009-2123944 (Smart Meter Phase I Plan), requesting to deploy up to 600,000 smart meters in its service territory and committing to universal deployment within ten years. The Smart Meter Phase I Plan went through a formal proceeding with several parties participating in the litigation process, which included evidential hearings, resulting in a partial settlement among the parties. By Order entered May 6, 2010, the Commission approved PECO's Smart Meter Phase I Plan. *See Petition of PECO Energy Company for Approval of its Smart Meter Technology Procurement and Installation Plan*, Docket No. M-2009-2123944 (Phase I Order).

On January 18, 2013, PECO filed another Petition at Docket No. M-2009-2123944 (Smart Meter Phase II Plan), seeking to substantially complete the installation of AMI meters across its service territory by the end of 2014. The Smart Meter Phase II Plan went through a formal proceeding with several parties participating in the litigation process, resulting in a Joint Petition for Settlement of all issues. The Joint Petition for Settlement, *inter alia*, required PECO to complete the installation of the AMI meters for substantially all customers by the end of 2014 as compared to the ten-year deployment plan under the Smart Meter Phase I Plan. By Order entered August 15, 2013 (Phase II Order), the Commission adopted the Recommended Decision of Angela T. Jones, dated July 12, 2013 (Phase II R.D.), which concluded that PECO's Smart Meter Phase II Plan, as modified by the Joint Petition for Settlement, complied with 66 Pa. C.S. §§ 2807(f)(1)-(f)(3) and the Commission's *Smart Meter Procurement and Installation Implementation Order*. The Commission's Phase II Order approved the Joint Petition for Settlement and approved PECO's Smart Meter Phase II Plan, as modified by the Joint Settlement.

Moreover, since the 2009 Implementation Order, many Complainants have argued that Act 129 allows opt-outs, and Your Honor and the Commission have uniformly ruled that Act 129 requires mandatory deployment, and does not allow for "opt-outs." In particular, in the Opinion and Order in which the Commission set the *Frompovich* matter for hearings, it evaluated *the same Legislative Journal language now cited by the Quigleys*⁷, and stated:

In Exception No. 1, the Complainant refers to page six of the Initial Decision and quotes the ALJ's statement that "[t]here is neither an 'opt-out' provision nor a requirement to perform onsite broadcasting tests provided for [in] the Commission's order." Exc. at 2. In support of this Exception, Ms. Frompovich recites the comments of several state

⁷ The Quigleys base their "non-mandatory" argument on entries from the Legislative Journal for October 8, 2008. *See* Quigley Main Brief, p. 14 and Quigley Exhibit C-2. Ms. Frompovich relied upon those same Legislative Journal entries to argue that Act 129 allows an opt-out. *See* Ms. Frompovich's Exceptions to Initial Decision of ALJ Barnes Granting Preliminary Objections, June 26, 2015. <http://www.puc.state.pa.us/pdocs/1368643.pdf> .

legislators from the February 2008 Pennsylvania House Journal and the October 2008 Senate Journal debating Act 129, which she contends question the mandatory deployment of smart meters without consumer choice in contradiction of what she characterizes as the Commission’s misinterpretation of the Act and overreaching administrative powers. *Id.* at 2-4. The debate, the Complainant contends, may and should be considered contemporaneous legislative history evincing legislative intent not to mandate deployment without exception. *Id.* at 5. (pp. 8-9)

* * *

While *PECO* is correct that as adopted Act 129 does not provide a general opt out provision, where a complainant’s objection to installation of a smart meter was not based upon a general objection to smart meters *per se*, but rather upon facts specific to the individual complainant, we have denied preliminary relief and allowed the complaint to proceed to hearing. (p. 11, emphasis added)

Frompovich v PECO, C-2015-2474602 (Opinion and Order, April 21, 2016).

In sum, for nearly a decade the Commission has repeatedly ruled against the position posited by the Quigleys. Act 129 does not contain an opt-out provision.

B. North Carolina Utilities Commission Opt-Out Order

The Quigleys also refer (p. 47) 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. The Quigleys request that the Commission “adopt the same AMI smart meter opt out regulations that the North Carolina PUC ordered.”

The June 22, 2018 NCUC Order does not provide a basis for opt out regulations in Pennsylvania. Simply, North Carolina allows opt-outs,⁸ 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

⁸ 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.

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 Assembly “preclude[d] 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.

C. Americans with Disabilities Act

The Quigleys also briefly state (p. 47) that “We are requesting an accommodation under the Americans with Disabilities Act to have an analog meter.” On page 49, the Quigleys reiterate this claim and expand it to include a variety of statutes dealing with disabilities.

These claims are outside of the Commission’s jurisdiction. As the Commission stated in *Frompovich*:

We affirm the ALJ’s conclusion that it is beyond the jurisdiction of Commission to determine whether the Complainant has a disability or a cause of action under the American with Disabilities Act. *See* I.D. at 18. If Ms. Frompovich believes that she has a valid ADA claim against PECO, she must work through the federal courts or one of the federal enforcement agencies, which include the Department of Labor, the Equal Employment Opportunity Commission, the Department of Transportation, the Federal Communications Commission or the Department of Justice, but not this Commission.

Frompovich May 3, 2018 Order at 43.

D. Due process claim

The Quigley's Main Brief also claims (p. 47) that exposure to radiofrequency fields from PECO's AMI meters will violate their 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 the Quigleys intend to incorporate the case law relied upon in the Murphy Main Brief, PECO answers here as it did in *Murphy*⁹:

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 the Quigleys quote, also is predicated upon a showing of "injury."

E. PECO's *Pro Hac Vice* Motion

In their Main Brief (pp. 41-45), the Quigleys repeat their opposition to PECO's *Pro Hac Vice* Motion. Your Honor granted PECO's *Pro Hac Vice* Motion on August 17, 2018.

⁹ See PECO's November 13, 2017 Reply Brief in *Murphy*, p. 20.

Conclusion

PECO respectfully submits that the Quigleys did not prove by a preponderance of the evidence that PECO's AMI meters will cause, contribute to, or exacerbate harm to Ms. Quigley's health. To the contrary, PECO provided substantial, persuasive evidence that its AMI meters will not cause, contribute to, or exacerbate harm to Ms. Quigley's health. Therefore, the Quigley's Complaint should be dismissed.

Respectfully submitted,



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