

April 18, 2019

Via Electronic Filing

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
2nd Floor, Room-N201
Harrisburg, PA 17120

**RE: Michele Hriadil and Francis Hriadil v. Duquesne Light Company
Docket No. C-2016-2571726**

Dear Secretary Chiavetta:

Enclosed please find Duquesne Light Company's Motion in Limine to Preclude Complainants' Purported Expert Testimony for Failure to Produce Required Expert Reports. A copy of this document has been served upon Complainants in accordance with Commission regulations.

Please feel free to contact me if you have any questions.

Sincerely,



Jeremy V. Farrell
Attorney for Duquesne Light Company

Paul Shane Miller
Attorney for Duquesne Light Company

Enclosure

cc: Michele Hriadil and Francis Hriadil (with enclosure)
Administrative Law Judge Jeffrey Watson (with enclosures)

TADMS:5132494-1 014657-158498

hearing, and (2) precludes expert testimony from any individual who does not timely produce a compliant report. Both requests are consistent with 52 Pa. Code § 5.372(a)(2) (stating that the presiding officer can prohibit a disobedient party “from introducing in evidence designated documents, things or testimony.”).

While Complainants may try to excuse their failure to provide expert reports as a mere technical violation of a procedural rule, this issue involves a much more fundamental right: Duquesne Light is entitled to know what evidence Complainants will present against the Company at the hearing, especially when Complainants apparently will challenge one of Duquesne Light’s core business practices (its smart meter program). The Commission’s discovery regulations prohibit parties from hiding expert evidence until the hearing. Allowing Complainants to introduce expert testimony at the hearing without producing written reports that outline the substance of the *specific facts and opinions* to which each expert will testify prejudices Duquesne Light’s ability to cross-examine these witnesses and present its defense. Complainants would be able to engage in the classic “trial by ambush” that the discovery rules are meant to prevent. Complainants have received ample opportunity to provide written reports and documents that outline the substance of the specific facts and opinions to which their expert witnesses will testify (including during the extended discovery period that closed on April 17, 2019), yet they have steadfastly refused to provide the required information.

Finally, Duquesne Light also asks that Complainants themselves be prevented from offering expert testimony for the separate reason that, while they may have impressive educational and professional backgrounds, they do not meet the legal threshold for qualification as an expert witness for the issues involved in this case.

II. Relevant Procedural History

While this action has a lengthy procedural history, the background to this motion is relatively straightforward. Throughout this action, Complainants have expressed an intent to

offer expert testimony at the hearing from four individuals: both Complainants, Dr. David Carpenter, and Dr. Andrew Michrowski. But, as explained below, they have never produced expert reports for any of these individuals despite being specifically demanded by Duquesne Light to produce them in discovery. Complainants also failed to produce the reports in compliance with the litigation schedule established by the Presiding ALJ.

Duquesne Light served its first set of discovery requests to Complainants on September 11, 2017. As authorized by 52 Pa. Code § 5.324(a)(1)(ii), Duquesne Light made the following demands to Complainant:

11. State the full name, address and telephone number of each person who You expect to call to testify as an expert witness at any hearing of this matter and, for each expert witness, state:
 - a. The subject matter on which the expert is expected to testify;
 - b. The substance of the facts and opinions to which the expert is expected to testify; and
 - c. A summary of the grounds for each expert opinion.
12. Produce the report of any expert You intend to call to testify on Your behalf at trial.

The pertinent pages of Duquesne Light's first set of discovery requests, and Complainants' responses, are attached as Exhibit A.

While Complainants have provided some educational and professional background of their purported experts and produced some short letters and prior articles written by their third-party experts,¹ Complainants have not produced an expert report from any of those four individuals (themselves included), nor have they produced any document in which any of those individuals "state the substance of the facts *and opinions to which the expert is expected to testify and a summary of the grounds for each opinion*" as against Duquesne Light. 52 Pa. Code § 5.324(a)(1)(ii).

¹ These documents are collected in Exhibit B.

Complainants also did not produce expert reports in compliance with the litigation schedule issued by the Presiding ALJ. The first litigation schedule was issued by Prehearing Order dated December 15, 2017, and required, among other things, that Complainants produce “a written summary of the testimony of the expected expert” by February 2, 2018. The Presiding ALJ later extended that deadline to April 30, 2018, by virtue of the First Supplemental Prehearing Order dated February 6, 2018. Copies of these Prehearing Orders are collected in Exhibit C.²

In accordance with that deadline, Duquesne Light sent both of its expert reports to Complainants on April 30, 2018. See Certificate of Service for Respondent’s List of Potential Witness filed on April 30, 2018 attached as Exhibit D. Complainants have been able to study and prepare for Duquesne Light’s evidence for about a year, all the while depriving Duquesne Light of the same opportunity. Copies of Duquesne Light’s expert reports are collected in Exhibit E.

By Interim Order dated June 29, 2018, attached as Exhibit F, the Presiding ALJ cancelled the evidentiary hearing scheduled for July 18 and 19, 2018, to allow sufficient time to review Duquesne Light’s summary judgment motion. At that time, the only item remaining on the litigation schedule was the hearing itself. All other deadlines had passed.

After Duquesne Light’s motion for summary judgment was denied, the Presiding ALJ issued an Interim Order dated December 3, 2018, which asked the parties to confer and agree upon a hearing date in March or April 2019. A copy of that Order is attached as Exhibit G. The Interim Order did not establish any new litigation deadlines or relieve any party from non-compliance with earlier deadlines.

On December 10, 2018, Complainants filed a motion to allow a second expert witness, Dr. Andrew Michrowski, to testify as an expert witness. Three weeks later, Duquesne Light filed

² None of the litigation schedules established in this case relieved Complainants of their obligation to comply with 52 Pa. Code § 5.324(a).

a Motion In Limine To Preclude Complainants' Purported Expert Testimony For Failure To Produce Required Expert Reports.

In an Interim Order dated March 14, 2019, the Presiding ALJ reopened and extended the discovery period to April 17, 2019 so Complainants could add Dr. Michrowski to their expert witness list. The Presiding ALJ expressly stated in the Interim Order that he was not ruling on "the authenticity or admissibility of any evidence or the competency of any witness to testify at the hearing in this proceeding..." The Presiding ALJ thus denied Duquesne Light's motion in limine as premature, but stated that the Company could refile it after the extended discovery period closed.

During the extended discovery period, Complainants failed to provide a revised expert witness list to Duquesne Light. Complainants also failed to provide any expert reports, supplemental discovery responses relating to Dr. Michrowski (or any other witnesses), or any additional document relating to Dr. Michrowski whatsoever during the extended discovery period. Duquesne Light thus refiles this motion to preclude Complainants from offering expert testimony at the hearing, as permitted by the Interim Order dated March 14, 2019.

III. Argument

A. None of Complainants' purported experts may offer expert testimony and opinion since they have not produced the information required by Commission regulations.

The Commission's regulations require that parties produce expert reports or a written summary of the grounds for each of the expert's opinions when asked for them in discovery, like Complainants were here. See Exhibit A. Specifically, the regulations provide:

- (1) A party may through interrogatories **require both** of the following:
 - (i) That the other party identify each person whom the party expects to call as an expert witness at hearing and to state the subject matter on which the expert is expected to testify.
 - (ii) That the other party have each expert so identified **state the substance of the facts and opinions to which the expert is expected to testify and a**

summary of the grounds for each opinion. The party answering the interrogatories may file as the answer a report of the expert, have the interrogatories answered by the expert or provide written direct testimony of the expert. The answer, separate report or testimony shall be signed by the expert and shall be deemed to be provided under oath in accordance with section 333(d) of the act (relating to prehearing procedures).

52 Pa. Code § 5.324(a)(1)(ii) (emphasis added).

Despite the explicit language of that regulation and the clear language of Duquesne Light's discovery requests mirroring it (Exhibit A), Complainants have not produced a compliant expert report or a written summary of the substance of the facts and opinions to which any of their purported expert witnesses are expected to testify.

Duquesne Light anticipates that Complainants will argue that the few letters and articles produced from Drs. Carpenter and Michrowski constitute expert reports under 52 Pa. Code § 5.324, but that argument is mistaken. Those letters and articles do not meet the requirements of 52 Pa. Code § 5.324 for several reasons. The articles are not signed and were not authored in connection with this litigation. The short letters from Drs. Carpenter and Michrowski do not outline any opinions within a reasonable degree of scientific or medical certainty with respect to any specific aspect of Duquesne Light's smart meter program or practices. See Betz v. Erie Ins. Exchange, 957 A.2d 1244, 1258 (Pa. Super. Ct. 2008) (expert testimony must be expressed with a reasonable degree of certainty to be competent). They express general concerns about smart meter technology or radiofrequency, and do not specifically address anything being done by Duquesne Light in any meaningful detail. And as the Presiding ALJ has repeatedly noted, the sole issue in this case is whether Duquesne Light has violated the Public Utility Code (which requires the installation of a smart meter at Complainants' residence), its associated regulations, or the Company's tariff.³ Exhibit D at ¶ 12. Because these documents do not outline any

³ This case is not a wholesale attack on Duquesne Light's smart meter implementation plan, which has already been approved by the Commission, See, e.g., Docket No. M-2009-2123948 (Pa. P.U.C. Opinion and Order entered May 6, 2014), or a challenge to the scientific merit of Act 129's mandatory universal deployment of smart meters, which, as noted above, is a matter of settled law that

opinions directed towards Duquesne Light, let alone any such opinions rendered within a reasonable degree of scientific or medical certainty, they do not qualify as expert reports under Pennsylvania law or the Commission's regulations.

In sum, because Complainants did not produce the information required by Commission regulations and the Presiding ALJ's scheduling orders, their testimony must be precluded under 52 Pa. Code § 5.372(a)(2). Again, this is not a technical issue, but a denial of Duquesne Light's fundamental right to the evidence that will be presented against it at a hearing. Nearly 20 months after serving its discovery requests, and after the expiration of the Presiding ALJ's deadline to produce expert reports, and with a hearing quickly approaching, Duquesne Light has no idea what its opponent's purported expert witnesses will say at the hearing, putting Duquesne Light in precisely the predicament forbidden by 52 Pa. Code § 5.324(a)(1)(ii). Complainants' failure to comply with their basic obligations under the Commission's regulations and this Presiding ALJ's scheduling orders warrants preclusion of the testimony.

B. Complainants cannot offer expert testimony for the additional reason that they do not qualify as experts under the applicable standard.⁴

An independent reason for precluding Mr. and Ms. Hriadil from offering expert testimony is that they do not qualify as experts under Pennsylvania law. Complainants have stated their intent at various points in this litigation to offer expert testimony on their own behalf. Most recently, in paragraph 12 of their motion to allow Dr. Michrowski to testify, Complainants stated that "Francis Hriadil possess engineering expertise. Michele Hriadil possesses computer science expertise." While that may be true, that does not mean they meet the standard to offer expert opinion under Pennsylvania law.

Complainants must (and already have attempted to) address through other forums, such as the legislative and executive branches of state and/or local government.

⁴ It should be noted that nothing in this motion in limine is intended to prevent Complainants from offering fact testimony about relevant matters of which they have personal knowledge. This motion deals strictly with expert testimony and opinion.

Under Pennsylvania law, a person qualifies as an expert witness if, through education, occupation, or practical experience, the witness has a reasonable pretension to specialized knowledge on the matter at issue. Ruzzi v. Butler Petroleum Co., 588 A.2d 1, 10 (Pa. 1991); Kursis v. Baldwin-Lima-Hamilton Corp., 319 A.2d 914, 924 (Pa. 1974). While the precise subjects on which Complainants would like to testify as experts is unclear because they have submitted no expert reports, it seems that Ms. Hriadil intends to opine on cybersecurity and privacy protections, while Mr. Hriadil wishes to testify about RF emissions and the construction of smart meters. But, while Complainants may have impressive professional backgrounds, that does not mean they have *specialized knowledge on the matter at issue*. An individual does not qualify as an expert witness merely because they possess general knowledge about a topic or subject matter.⁵ See Kovalev v. Sowell, 839 A.2d 359, 364 (Pa. Super. Ct. 2003) (ophthalmologist not qualified to testify about the causes and treatment of heart disease even though he had general knowledge of the human body); Dierolf v. Slade, 581 A.2d 649 (Pa. Super. Ct. 1990) (upholding trial court's refusal to qualify orthodontist as an expert witness on oral surgery); Yacoub v. Lehigh Valley Med. Associates, 805 A.2d 579 (Pa. Super. Ct. 2002) (neurosurgeon not qualified to give opinion on internal medicine or nursing).

For example, while Michele Hriadil may have a computer science background, there is no indication that she specializes in cybersecurity measures in the context of a utility company's metering infrastructure. That much is evidenced by Complainants' failure to identify any deficiencies in Duquesne Light's cybersecurity measures; indeed, they have merely argued that Duquesne Light's practices are "no better than" other security systems used throughout the United States and, therefore, are vulnerable to hacking. Response to Respondent's Second Set of Discovery Requests Directed to Complainants at ¶ 16, Exhibit H. Without specialized

⁵ That is important because the matters on which they apparently intend to testify fall within the world of expert, not lay, opinion. An expert witness may testify in the form of an opinion about scientific or technical matters; conversely, a lay witness cannot offer opinion testify about scientific, technical, or other specialized knowledge. Pa. R.E. 701, 702.

knowledge about the issue at hand, Ms. Hriadil simply is not permitted to offer expert testimony under Pennsylvania law.

For similar reasons, Francis Hriadil also should not be permitted to testify as an expert witness at the hearing. Mr. Hriadil does not have a reasonable pretension to specialized knowledge about the subject matter upon which he is expected to testify: whether Duquesne Light's smart meters emit harmful amounts of radiofrequency or otherwise operate in a way that will harm Complainants. Although Francis Hriadil may have an engineering background, there is no evidence in the record that he possesses any specialized knowledge about Duquesne Light's smart meters. He has admitted, for instance, that he is not a certified electrician, has never installed a smart meter, and has never performed any job responsibilities or engaged in a course of study specifically relating to radiofrequency or low frequency radiation. See Exhibit F at ¶¶ 4, 20, 24. Because Francis Hriadil has no knowledge of or experience with smart meters, he does not possess "specialized knowledge" about whether Duquesne Light's smart meters emit harmful amounts of radiofrequency that will harm Complainants.

In addition, even if Francis Hriadil possesses some specialized knowledge about how Duquesne Light's smart meters operate (which he does not), he has no medical training and thus cannot offer an opinion about health effects Complainants would purportedly suffer if Duquesne Light installs a smart meter at their residence. See Baum v. Metropolitan Life Ins. Co., 19 A.2d 486, 487 (Pa. Super. Ct. 1941) (the existence or non-existence of a disease is only discoverable through the training and experience of a medical expert); In re Commitment of Barbour, 733 A.2d 1286, 1288 (Pa. Super. Ct. 1999) (a layperson may not provide a medical diagnosis). For these reasons, Francis Hriadil cannot be permitted to testify as an expert witness at the hearing.

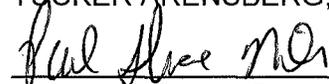
VI. Conclusion

Duquesne Light respectfully requests that the Presiding ALJ issue an order that prohibits Complainants from offering expert testimony at the hearing because they failed to comply with

the Commission's regulations. Alternatively, Duquesne Light asks for an order that (1) compels Complainants to produce reports for each of their purported experts (including themselves) that comply with 52 Pa. Code § 5.324(a)(1)(ii) at least six weeks prior to the hearing date, and (2) precludes expert testimony from any individual who does not timely produce a compliant report.

Respectfully submitted,

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