

**PENNSYLVANIA PUBLIC UTILITY COMMISSION
HARRISBURG, PENNSYLVANIA 17120**

Alan V. Schmukler

v.

PPL Electric Utilities Corporation

Public Meeting held July 11, 2019

2621285-OSA

C-2017-2621285

MOTION OF VICE CHAIRMAN DAVID W. SWEET

Before the Commission are the Exceptions and Reply Exceptions to the Initial Decision (ID) of Administrative Law Judge Elizabeth Barnes (ALJ) in the case filed by Alan V. Schmukler against PPL Electric Utilities Corporation (PPL). In his Complaint, Mr. Schmukler alleges that the installation of a smart meter by PPL would deprive him and his wife of a healthy environment as he has been electromagnetically sensitive for 30 years and has had to leave various jobs or have accommodations made for him to avoid being near any source of electromagnetic radiation. In addition, he asks that PPL remove his neighbor's smart meter and replace it with an analog, as the houses are connected and the meter is only 12 inches from his house.

Following litigation, the ALJ issued her Initial Decision (ID) which dismissed the complaint for failure to prove that the installation of a smart meter constituted unsafe or unreasonable service under Section 1501 of the Public Utility Code.¹ Both Mr. Schmukler and PPL filed exceptions and reply exception. This Motion grants the exceptions of PPL and denies those of the Complainant.

Mr. Schmukler listed 19 exceptions. These can be loosely grouped as follows for purposes of this motion:

Exceptions 1, 4, 13, 14, and 15 question the judgment of the ALJ in matters such as witness credibility.

Exceptions 2, 3, 4, 5, 6, 7, 8, 13, 14, and 18 challenge the ALJ's findings that the Respondent's witnesses and/or evidence was more credible than his own testimony and evidence and that of his own witness.

Exceptions 9, 10, 11, 16, 17, and 19 challenge the ALJ's recitation of the law and its application to the facts of this case.

Exception 12 is to a statement made by the ALJ that Mr. Schmukler can advocate for the right to opt out of the smart meter program before the General Assembly.

As the ALJ's judgment regarding the credibility of the witnesses is based on her immediate impressions at the hearing, her judgment is given deference. Where her judgment is supported by the quality of the witnesses' curriculum vitae, familiarity with the subject matter and length of time in the relevant fields, it will be given great deference. Accordingly, Exceptions 1 through 8, 13, 14, and 15 are denied.

¹ 66 Pa. C.S.A. § 1501.

Because the ALJ's recitation of the law and its application to this case is correct, Exceptions 9, 10, 11, 16, 17 and 19 are denied.

Exception 12 is simply a statement that Mr. Schmukler could seek relief before the Legislature, which is undoubtedly true. Therefore, Exception 12 is also denied.

PPL filed two Exceptions. In the first, PPL argues that the ALJ's taking of judicial notice of safety standards from ANSI and UL and the TESCO White paper was inappropriate because these materials are not matters of common knowledge or incontrovertible facts. In the taking of judicial notice without proper notice to the parties in advance, PPL argues that it was denied its due process rights.²

Although Commission regulations do permit the taking of official or judicial notice of facts, they also call for the notification of a party adversely affected, which party must be given the opportunity to show that the facts are not properly noticed or that alternative facts should be noticed.³ Arguably, the ANSI regulations may be *cited*, where appropriate, as they are universally used by the industry. The TESCO White Paper, however, was written by a manufacturer of specialty instruments that the sponsoring company sells to the industry and appears in the Initial Decision without appropriate sponsorship or the opportunity for cross examination and rebuttal.⁴ As it qualifies only as hearsay without those two factors, reliance on it is misplaced and the Initial Decision will be modified to remove the discussion.

I note here, too, that any attempt to instruct PPL Electric regarding the proper method of installation of any of its equipment without appropriate technical expert testimony is also inappropriate when unsupported by the record.

Mr. Schmukler had the burden of proving that the smart meters used by PPL Electric presented a safety hazard, and he did not carry this burden. Rather, PPL Electric established that

² PPL Exceptions at 4, citing *Commonwealth v Cassidy*, 521 A.2d 59, 61 (Pa.CmwltH 1987)(quoting *Savoy v. Beneficial Consumer Disc. Co.*, 468 A.2d 465, 468 (Pa. 1983)(judicial notice may be taken only of matters of common knowledge, of facts which are so well know as to be incontestable).

³ § 5.408. Official and judicial notice of fact.

- (a) Official notice or judicial notice of facts may be taken by the Commission or the presiding officer.
 - (b) When the decision of the Commission or the presiding officer rests on official notice or judicial notice of a material fact not appearing in the evidence in the record, the parties will be so notified.
 - (c) Upon notification that facts are about to be or have been noticed, a party adversely affected shall have the opportunity upon timely request to show that the facts are not properly noticed or that alternative facts should be noticed.
 - (d) The Commission or the presiding officer in its discretion will determine whether written presentations suffice, or whether oral argument, oral evidence or cross-examination is appropriate in the circumstances.
 - (e) The Commission or presiding officer may also give official notice as the term is defined in section 331(g) of the act (relating to powers of commission and administrative law judges).
 - (f) Subsections (a)—(e) supersede 1 Pa. Code § 35.173 (relating to official notice of facts).
- 52 Pa. Code §5.408.

⁴ “. . . PPL would have demonstrated . . . that the TESCO White Paper is unreliable because it reaches conclusions that would lead to the purchase of TESCO's products and that the fire safety recommendations have been adopted by the Company or are unnecessary given the Company's established practices and procedures.” PPL Exceptions at 506.

there is no fire hazard created by the installation of its smart meters, and Mr. Schmukler failed to overcome the evidence presented by Respondent. Accordingly, the Initial Decision will be modified to remove the discussion regarding fire safety recommendations.

THEREFORE,

I MOVE:

1. That the Exceptions of Alan Schmukler are denied.
2. That the Exceptions of PPL Electric Utilities Corporation are granted.
3. That the Initial Decision of Administrative Law Judge Elizabeth Barnes in the case captioned Alan Schmukler v. PPL Electric Utilities Corporation, Docket No. C-2017-2621285 is adopted as modified by this Motion.
4. That the Office of Special Assistants prepare an appropriate Opinion and Order consistent with this Motion.

July 11, 2019
DATE



DAVID W. SWEET
VICE CHAIRMAN