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March 9, 2020

VIA ELECTRONIC FILING

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

Re: Judith Hendin v. Metropolitan Edison Company
Docket No. C-2018-3003324

Dear Secretary Chiavetta:

Enclosed please find a copy of the Objections of Metropolitan Edison Company to the Admission of Complainant's Late-Filed Hearing Exhibits, in the above-referenced matter. This document has been served as shown in the Certificate of Service.

Should you have any questions or concerns, please do not hesitate to contact me.

Very truly yours,



Tori L. Giesler

Enclosures

c: As Per Certificate of Service

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Judith D. Hendin,	:	
	:	
Complainant,	:	
	:	
v.	:	Docket No. C-2018-3003324
	:	
Metropolitan Edison Company,	:	
	:	
Respondent.	:	

**OBJECTIONS OF
METROPOLITAN EDISON COMPANY TO
THE ADMISSION OF COMPLAINANT’S
LATE-FILED HEARING EXHIBITS**

TO DEPUTY CHIEF ADMINISTRATIVE LAW JUDGE JOEL H. CHESKIS:

Metropolitan Edison Company (“Met-Ed” or the “Company”) hereby files these Objections pursuant to the Pennsylvania Public Utility Commission’s (“Commission”) regulations at 52 Pa. Code § 5.401(a) and the directive of the Deputy Chief Administrative Law Judge Joel H. Cheskis (the “ALJ”) at the Hearing held on December 19 and 20, 2019 and January 24, 2020, to exclude exhibits submitted by Judith Hendin (“Complainant”). Met-Ed objects to these exhibits because they: (1) are hearsay and are not subject to a hearsay exception under the Pennsylvania Rules of Evidence; (2) are irrelevant; (3) are inherently unreliable; (4) have not been and cannot be authenticated by the Complainant; and/or (5) lack a proper foundation.

In support thereof, the Company states as follows:

I. INTRODUCTION

1. On July 11, 2018, Met-Ed was electronically served with the above-captioned Formal Complaint filed by the Complainant.

2. On July 31, 2018, Met-Ed filed an Answer and New Matter to the Complaint.

3. On May 23, 2019, the ALJ issued an Interim Order Requiring Proposed Prehearing Conference and Hearing Dates. Among other things, the Interim Order required the Complainant to submit testimony and exhibits by July 26, 2019. On August 13, 2019, the ALJ issued an Interim Order which granted the Complainant's extension request regarding written testimony of Dr. David Carpenter and extended the Complainant's deadline to submit written testimony and exhibits to September 5, 2019.

4. The Company served its rebuttal testimony and exhibits on October 21, 2019 and again on January 17, 2020.

5. The Complainant served her direct testimony and exhibits on January 18, 2019, January 29, 2019 as well as January 20, 2020. Further, on January 21, 2020, the Complainant submitted exhibits.¹

6. An evidentiary hearing was scheduled for December 19 and 20, 2019. At the hearing, the Company presented the testimony of Mr. John C. Ahr, Dr. Christopher C. Davis, Ph.D., and Dr. Mark Israel, M.D. The Complainant presented her own testimony and the testimony of Dr. Kracht.

7. During the December 20, 2019 hearing, the parties agreed to schedule an additional hearing date to continue cross-examination of the Company's expert witness, Dr. Israel. The additional hearing for the purpose of cross-examining Dr. Israel was scheduled for January 24, 2020.

8. On January 23, 2020, just one day before the additional scheduled hearing date, the Complainant provided cross-examination exhibits X1 through X19. At the evidentiary hearing

¹ This did not include any of the exhibits that the Complainant now seeks to introduce.

held on January 24, 2020, the ALJ directed that the Complainant could submit a motion to admit the late-filed exhibits. Tr. at 262.

9. On February 14, 2020, Complainant filed a Motion to admit late-filed exhibits. In her Motion, the Complainant seeks to admit not only cross-examination exhibits X1 through X19 but also Exhibits 23-41, which should have been presented as part of the Complainant's direct case. These exhibits are improper because the ALJ permitted Complainant to file a motion seeking to admit the late cross-examination exhibits, not any other exhibits that should have been presented as part of the Complainant's direct case. Tr. at 262.

10. Met-Ed hereby submits these Objections to the exhibits submitted by the Complainant. As explained herein, these exhibits should not be admitted into the record because they are hearsay and not subject to a hearsay exception under the Pennsylvania Rules of Evidence. Furthermore, the exhibits are irrelevant, are inherently unreliable, and have not been and cannot be authenticated by the Complainant. Lastly, the exhibits were not served prior to the hearing, depriving Met-Ed of an opportunity to respond to the substance of the exhibits.

II. OBJECTIONS

11. As summarized below, these late-filed exhibits should be excluded from the record because they are objectionable on several grounds, including hearsay, relevance, authenticity and inherent unreliability.

- Exhibit 23 – IRAC Monographs Chart

Objections: (1) inadmissible hearsay on medical and scientific issues; (2) authenticity and inherent unreliability (partial document)

- Exhibit 24 – Manville Powerpoint from Fish & Wildlife Service, 2007

Objections: (1) inadmissible hearsay on medical and scientific issues; (2) authenticity; (3) relevance – does not deal with RF fields from AMI meters

- Exhibit 25 – WHO publication
 - Objections:** (1) inadmissible hearsay on medical and scientific issues; (2) authenticity and inherent unreliability—only a partial document is provided
- Exhibit 26 – GAO 2012 Report to Congress (FCC reassessment of RF standards was completed in 2019)
 - Objections:** (1) inadmissible hearsay on medical and scientific issues; (2) authenticity; (3) relevance – does not deal with RF fields from AMI meters being used by Met-Ed
- Exhibit 27 – WHO Fact Sheet on Mobile Phones
 - Objections:** (1) inadmissible hearsay on medical and scientific issues; (2) authenticity; (3) relevance – does not deal with RF fields from AMI meters being used by Met Ed
- Exhibit 28 – IARC Press Release No. 208
 - Objections:** (1) inadmissible hearsay on medical and scientific issues
- Exhibit 29 – IARC Summary of RF Evaluation
 - Objections:** (1) inadmissible hearsay on medical and scientific issues
- Exhibit 30 – Manville article/Fish & Wildlife Service
 - Objections:** (1) inadmissible hearsay on medical and scientific issues; (2) authenticity and inherent unreliability; (3) relevance – does not deal with RF fields from AMI meters being used by Met-Ed
- Exhibit 31 – Taylor letter, US Dep’t Interior
 - Objections:** (1) inadmissible hearsay on medical and scientific issues; (2) authenticity; (3) relevance – does not deal with RF fields from AMI meters being used by Met-Ed; does not deal with human health
- Exhibit 32 – FirstEnergy Fact Sheet – No objection.
- Exhibit 33 – Pacific Gas and Electric brief in CPUC case
 - Objections:** (1) inadmissible hearsay; (2) authenticity; (3) relevance
- Exhibit 34 – County of Santa Cruz Heath Services Agency Memo
 - Objections:** (1) inadmissible hearsay on medical and scientific issues; (2) hearsay within hearsay when memo quotes from or uses charts from others; (3) authenticity;

(4) relevance – does not deal with RF fields from AMI meters being used by Met-Ed

- Exhibit 35 – Fauteux article/interview of Dr. David Carpenter

Objections: (1) inadmissible hearsay on medical and scientific issues; (2) hearsay within hearsay when article quotes from others; (3) authenticity; (4) inherently unreliable media article repeating statements from “expert” whose opinion about alleged health effects from EMF and RF have been explicitly rejected by the PA PUC (*See, Opinion and Order, Myers v. PPL Electric Utilities Corporation, C-2017-2620710, Pennsylvania Public Utility Commission, August 29, 2019, at pp. 40-41*); (4) relevance – does not deal with RF fields from AMI meters being used by Met-Ed

- Exhibit 36 – Perera article from Politico

Objections: (1) inadmissible hearsay on technical issues; (2) hearsay within hearsay when article quotes from others; (3) relevance – does not deal with AMI meters being used by Met-Ed

- Exhibit 37 – Oregon Senate Bill 283

Objections: (1) inadmissible hearsay; (2) authenticity; (3) relevance

- Exhibit 38 – Children: Effects of EMFs

Objections: (1) inadmissible hearsay on medical and scientific issues; (2) authenticity and inherent unreliability – no identified author; (3) hearsay within hearsay when article quotes from others; (4) relevance – does not deal with RF fields from AMI meters being used by Met-Ed

- Exhibit 39—Effects of EMF on Animals

Objections: (1) inadmissible hearsay on medical and scientific issues; (2) authenticity and inherent unreliability – no identified author; (3) hearsay within hearsay when article quotes from others; (3) relevance – does not deal with RF fields from AMI meters being used by Met-Ed

- Exhibit 40 – “Advisories” on RF Fields

Objections: (1) inadmissible hearsay on medical and scientific issues; (2) authenticity and inherent unreliability – no identified author; (3) hearsay within hearsay when quotes from others; (4) relevance—does not deal with RF fields from AMI meters being used by Met-Ed

- Exhibit 41 – “EMF Explained” series
 - Objections:** (1) inadmissible hearsay on medical and scientific issues; (2) inherent unreliability – no identified author
- Exhibit X1 – AAEM Letter Jan. 2012
 - Objections:** (1) inadmissible hearsay on medical and scientific issues; (2) hearsay within hearsay when quotes from others; (3) authenticity; (4) inherently unreliable opinion material from advocacy group; (5) no foundation established to show that document was relied on by Dr. Israel or is the type of material on which he would rely
- Exhibit X2 – American Academy of Pediatrics letter Dec. 2012
 - Objections:** (1) inadmissible hearsay on medical and scientific issues; (2) hearsay within hearsay when quotes from others; (3) authenticity; (4) no foundation established to show that document was relied on by Dr. Israel or is the type of material on which he would rely
- Exhibit X3 – Takahaski Study (2010)
 - Objections:** (1) inadmissible hearsay on medical and scientific issues; (2) hearsay within hearsay when quotes from others
- Exhibit X4 – Taylor letter, U.S. Dep’t Interior (duplicate of Exhibit 31)
 - Objections:** (1) inadmissible hearsay on medical and scientific issues; (2) authenticity; (3) inherent unreliability – no identified author of “Enclosure A” on alleged health effects on birds; (4) relevance – does not deal with RF fields from AMI meters being used by Met-Ed; does not deal with human health
- Exhibit X5 – Tahvanainen Study (2004)
 - Objections:** (1) inadmissible hearsay on medical and scientific issues; (2) inherently unreliable – abstract only, not authentic copies of entire article
- Exhibit X6 – Berkay Study (2016)
 - Objections:** (1) inadmissible hearsay on medical and scientific issues; (2) hearsay within hearsay when quotes from others; (3) authenticity
- Exhibit X7 – Bandara Study (2017)
 - Objections:** (1) inadmissible hearsay on medical and scientific issues; (2) inadmissible hearsay when quotes from others; (2) authenticity; (3) no foundation established to show that document was relied on by Dr. Israel or is type of material on which he would rely

- Exhibit X8—Cherry Paper on EMF (2002)

Objections: (1) inadmissible hearsay on medical and scientific issues; (2) hearsay within hearsay when quotes from others; (3) authenticity – not a published, peer-revised study; (4) relevance – does not deal with RF fields from AMI meters; (5) inherently unreliable material from well-known albeit deceased activist; (6) no foundation established to show that document was relied on by Dr. Israel or is the type of material on which he would rely
- Exhibit X9—Salili Study (2015)

Objections: (1) inadmissible hearsay on medical and scientific issues; (2) hearsay within hearsay when quotes from others
- Exhibit X10—Beres Study (2018)

Objections: (1) inadmissible hearsay on medical and scientific issues; hearsay within hearsay when quotes from others
- Exhibit X11—Lamech Study (2014)

Objections: (1) inadmissible hearsay on scientific and medical issues; (2) hearsay within hearsay when quotes from others; (3) inherently unreliable material based on internet survey; (4) no foundation established to show that document was relied on by Dr. Israel or is the type of material on which he would rely
- Exhibit X12—IARC Q&A

Objections: (1) inadmissible hearsay on medical and scientific issues
- Exhibit X13—American Academy of Pediatrics letter Aug. 2013

Objections: (1) inadmissible hearsay on medical and scientific issues; (2) hearsay within hearsay when quotes from others; (3) authenticity; (4) no foundation established to show that document was relied on by Dr. Israel or is type of material on which he would rely
- Exhibit X14: Choi Study 2014

Objections: (1) inadmissible hearsay on medical and scientific issues; (2) hearsay within hearsay when quotes from others
- Exhibit X15—Vornoli Study 2019

Objections: (1) inadmissible hearsay on medical and scientific issues; (2) hearsay within hearsay when quotes from others

- Exhibit X16—Smith-Roe Study 2019

Objections: (1) hearsay on medical and scientific issues; (2) hearsay within hearsay when quotes from others

- Exhibit X17—BioInitiative 2012

Objections: (1) inadmissible hearsay on medical and scientific issues; (2) hearsay within hearsay when quotes from others; (3) authenticity; (4) inherently unreliable material prepared by EMF/RF activists; (5) no foundation established to show that document was relied on by Dr. Israel or is type of material on which he would rely

- Exhibit X18—Charts and abstracts from BioInitiative

Objections: (1) inadmissible hearsay on medical and scientific issues; (2) hearsay within hearsay when quotes from others; (3) authenticity and inherent unreliability – no identified author(s); (4) inherently unreliable material from EMF/RF activist group; (5) no foundation established to show that document was relied on by Dr. Israel or that this is the type on material on which he would rely

- Exhibit X19—Document on alleged Neurological Effects

Objections: (1) inadmissible hearsay on medical and scientific issues; (2) hearsay within hearsay when quotes from others; (3) authenticity and inherent unreliability—no identified author(s); (4) inherently unreliable material from EMF/RF activist group, if from BioInitiative; (5) no foundation established to show that document was relied on by Dr. Israel or is the type of material on which he would rely

A. THE COMPLAINANT HAS SUBMITTED EXHIBITS THAT SHOULD BE EXCLUDED BECAUSE THEY ARE HEARSAY

12. The Complainant has submitted exhibits that should be excluded from the record

in this proceeding because they are hearsay statements² and not subject to a hearsay exception.

² Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. Pa.R.E. 801; *Bonegre v. Workers' Compensation Appeal Board (Bertolini's)*, 863 A.2d 68, 72 (Pa. Cmwlth. 2004). Ordinarily, hearsay evidence is inadmissible unless some exception applies. Pa.R.E. 802. The hearsay rule is somewhat relaxed in proceedings before administrative agencies. *Rox Coal Co. v. Workers' Comp. Appeal Bd. (Snizaski)*, 570 Pa. 60, 807 A.2d 906 (2002). The Commonwealth Court established what is commonly called the "Walker Rule" to apply to the use of hearsay evidence during administrative proceedings:

(1) Hearsay evidence, properly objected to, is not competent evidence to support a finding;

13. Nearly all of the Complainant's exhibits constitute or contain hearsay because they include out of court statements being offered for the truth of the matter asserted. In addition, several of the exhibits contain hearsay within hearsay, for which no exception to either layer of hearsay exists.

14. Many of the exhibits quote, cite or reference statements that were not written by the Complainant or the Complainant's expert witness. Moreover, the Complainant did not call any individuals, such as the authors of these various materials, to testify at the hearing and authenticate the statements therein. Therefore, these are out of court statements being offered for the truth of the matters asserted.

15. The materials that the Complainant seeks to admit are hearsay statements and are inadmissible unless subject to a hearsay exception. *See* note 2, *supra*. In addition, many of the proposed exhibits are hearsay within hearsay, because the documents purport to quote from and/or characterize the views of third-parties.

16. An exception to the hearsay rule is that an expert may express an opinion that is based on material not in evidence, including other expert opinions, where such material is of a type customarily relied on by experts in his or her profession. *See Lower Makefield Twp. v. Lands of Dalgewicz*, 4 A.3d 1114, 1122 (Pa. Cmwlth. 2010), *affirmed*, 67 A.3d 772 (Pa. 2013); *Collins v.*

(2) Hearsay evidence, admitted without objection, will be given its natural probative effect and may support a finding, if it is corroborated by any competent evidence in the record, but a finding of fact based solely on hearsay will not stand.

Walker v. Unemployment Comp. Bd. of Review, 367 A.2d 366, 370 (Pa. Cmwlth. 1976). The "Walker Rule" has been affirmed by the Pennsylvania Supreme Court. *Rox Coal Co. v. Workers' Comp. Appeal Bd. (Snizaski)*, 570 Pa. 60, 807 A.2d 906 (2002).

Cooper, 746 A.2d 615, 618 (Pa. Super. 2000); *Primavera v. Celotex Corp.*, 608 A.2d 515, 520-21 (Pa. Super. 1992); Pa.R.E. 703.³

17. Here, however, the Complainant's only expert witness did not rely on any of the exhibits that Complainant seeks to admit.

18. Even if these materials are allowed to form the basis of the Complainant's opinion or any expert's opinion, these materials cannot be submitted into the record. *See Klein v. Aronchick*, 85 A.3d 487, 503-04 (Pa. Super. 2014) (citing *Aldridge v. Edmunds*, 750 A.2d 292, 297-98 (Pa. 2000)). Although hearsay statements, such as articles, studies, and treatises, can be relied upon by expert witnesses in forming their opinions, the hearsay statements are not permitted to be entered into the record to prove the truth of the matter asserted. *See id.*; *Nigro v. Remington Arms Co.*, 637 A.2d 983, 993 (Pa. Super. 1993) (citations omitted). Thus, the proposed exhibits cannot be admitted into the record in this proceeding.

19. The Complainant's claim that her proposed late-filed exhibits are "commensurate with the written testimony of Dr. Israel" is without merit. Motion, ¶ 29. As an expert, Dr. Israel is allowed to rely on hearsay statements and to explain the content and relevance of those statements in his testimony. Moreover, while Dr. Israel was available for cross-examination on his written testimony, the authors of the Complainant's proposed exhibits were not.

20. For these reasons, Met-Ed objects to the admission of the above-identified exhibits as inadmissible hearsay. If Met-Ed's objections are not granted, Met-Ed's due process rights

³ An expert may base his or her opinion on facts made known to the expert; "[t]hat those facts were in part hearsay does not invalidate the expert's opinion. *See Steinhauer v. Wilson*, 485 A.2d 477, 479 (Pa. Super. 1984). However, Pennsylvania Rule of Evidence 705 requires an expert to disclose to the fact-finder the facts or data on which the opinion is based. Pa.R.E. 705 ("If an expert states an opinion the expert must state the facts or data on which the opinion is based.").

would be violated because the Company would be denied the opportunity to cross-examine the individuals who actually authored these materials and statements.

B. THE COMPLAINANT'S EXHIBITS SHOULD OTHERWISE BE EXCLUDED BECAUSE THEY ARE IRRELEVANT, LACK AUTHENTICITY, AND INHERENTLY UNRELIABLE

21. As noted above, many of Complainant's proposed exhibits also are inadmissible due to other significant flaws, including relevance,⁴ authenticity,⁵ and inherent unreliability.⁶

22. First, the contents of many of the proposed exhibits are irrelevant because they: (a) address exposures other than the RF fields from the AMI meters being used by Met-Ed; (b) address health conditions that were not raised by the Complainant; and/or (c) do not address issues relevant to the installation of AMI meters in Pennsylvania.

23. Second, many of the Complainant's proposed exhibits lack authenticity because they: (a) are incomplete extracts or portions of other documents; (b) are composites of documents from multiple sources and different authors, or unknown authors; and/or (c) have been characterized or summarized without providing the underlying content of the document they purport to be.

⁴ See Pa.R.E. 401 ("Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action."); *Ecker v. Amtrak*, 2015 Phila. Ct. Com. Pl. LEXIS 98 (Mar. 13, 2015), *affirmed*, 2015 Pa. Super. Unpub. LEXIS 3615 (Pa. Super. 2015); *Parr v. Ford Motor Co.*, 109 A.3d 682 (Pa. Super. 2014), *appeal denied*, 2015 Pa. LEXIS 1150 (Pa. 2015). Even if evidence is relevant, such evidence may be excluded "if its probative value is outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." *Parr*, 109 A.3d at 697 (quoting Pa.R.E. 403).

⁵ See Pa.R.E. 901(a) ("To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is."). Indeed, "[w]hen 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." Pa.R.E. 901, cmt. (citing *Commonwealth v. Hudson*, 414 A.2d 1381 (Pa. 1980); *Commonwealth v. Pollock*, 606 A.2d 500 (Pa. Super. 1992)).

⁶ See *Blum v. Merrell Dow Pharms., Inc.*, 705 A.2d 1314, 1325 (Pa. Super. 1997) (excluding expert testimony because the "analysis was so flawed as to render [the expert's] conclusions unreliable and therefore inadmissible"), *affirmed*, 764 A.2d 1 (Pa. 2000).

24. Third, many of the exhibits have no identified author or source, thereby making them inherently unreliable. Where the source of a proposed exhibit can be determined, certain of those documents appear to have sourced from the websites of anti-EMF/RF advocacy groups. These types of anonymous and/or advocacy materials cannot be relied on as providing reliable and balanced statements about medical and scientific issues.

25. For these reasons, the Complainant's exhibits should be excluded because they are irrelevant, lack authenticity, and are inherently unreliable.

C. EXHIBITS THAT SHOULD HAVE BEEN PRESENTED IN COMPLAINANT'S DIRECT CASE AND THERE IS NO FOUNDATION FOR THEIR ADMISSION AFTER THE CLOSE OF TESTIMONY

26. With respect to Exhibits 23 through 41, these should have been presented in the Complainant's direct case. The Complainant had an opportunity to present these exhibits in her direct case and failed to do so. These exhibits are beyond the scope of what ALJ Cheskis allowed with regard to cross-examination exhibits. Tr. at 262. There is no good reason to allow the Complainant to expand her direct case now.

27. Complainant seeks to enter Exhibits 23 through 41 into the record without establishing a foundation for any of the exhibits through witness testimony, much less expert testimony. Because the exhibits are not tied to witness testimony, there is no foundation for the admission of any of these exhibits.

28. Exhibits 23 through 41 are improper at this stage when Met-Ed does not have an opportunity to respond to the substance of these exhibits. The Complainant should not be allowed to sneak in the back door what she could have not admitted through the front door at the hearing.

III. CONCLUSION

WHEREFORE, the Company respectfully requests that Deputy Chief Administrative Law Judge Joel H. Cheskis grant its Objections and exclude the Complainant's exhibits from the evidentiary record in this proceeding, as explained above.

Respectfully submitted,

 | bsw

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