

File #: 167945

August 5, 2020

VIA ELECTRONIC FILING

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor
P.O. Box 3265
Harrisburg, PA 17105-3265

**Re: John and Janet Holder & June Maculesky v. PPL Electric Utilities Corporation
Docket No. F-2019-3008809 and F-2019-3008832**

Dear Secretary Chiavetta:

Enclosed for filing is the Motion of PPL Electric Utilities Corporation to Strike the Complainants' Main Brief and Motion for Sanctions in the above-referenced proceeding. Copies will be provided as indicated on the Certificate of Service.

Sincerely,



Garrett P. Lent

GPL
Enclosures

cc: Honorable Elizabeth Barnes (*w/enclosures*)

Certificate of Service

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served upon the following persons, in the manner indicated, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant).

VIA ELECTRONIC MAIL

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Date: August 5, 2020



Garrett P. Lent

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

John and Janet Holder and June Maculesky,	:	
	:	
	:	
Complainants,	:	
	:	Docket No. F-2019-3008809
v.	:	Docket No. F-2019-3008832
	:	
PPL Electric Utilities Corporation,	:	
	:	
Respondent.	:	

NOTICE TO PLEAD

YOU ARE HEREBY ADVISED THAT, PURSUANT TO 52 PA. CODE § 5.103(c), ANSWERS TO MOTIONS GENERALLY ARE DUE WITHIN TWENTY (20) DAYS AFTER THE DATE OF SERVICE. YOUR ANSWER SHOULD BE FILED WITH THE SECRETARY OF THE PENNSYLVANIA PUBLIC UTILITY COMMISSION, P.O. BOX 3265, HARRISBURG, PA 17105-3265. A COPY SHOULD ALSO BE SERVED ON THE UNDERSIGNED COUNSEL.



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Date: August 5, 2020

Attorneys for PPL Electric Utilities Corporation

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

John and Janet Holder and June Maculesky,	:	
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Complainants,	:	
	:	Docket No. F-2019-3008809
v.	:	Docket No. F-2019-3008832
	:	
PPL Electric Utilities Corporation,	:	
	:	
Respondent.	:	

**MOTION OF PPL ELECTRIC UTILITIES CORPORATION TO
STRIKE THE IMPROPER MAIN BRIEF OF
JOHN AND JANET HOLDER AND JUNE MACULESKY
AND MOTION FOR SANCTIONS**

TO THE HONORABLE ADMINISTRATIVE LAW JUDGE ELIZABETH H. BARNES:

AND NOW, comes PPL Electric Utilities Corporation (“PPL Electric” or the “Company”), by and through its attorneys, Post & Schell, P.C., and files, pursuant to the Pennsylvania Public Utility Commission’s (“Commission”) regulations at 52 Pa. Code § 5.103, this Motion to Strike the Improper and Premature Main Brief of John and Janet Holder and June Maculesky (“Complainants”) dated July 31, 2020, in its entirety. The Complainants’ Main Brief (a) is premature, (b) does not even attempt to adhere to the Commission’s regulations, (c) relies upon evidence that has not been admitted into the record, and (d) relies upon evidence that the of the Administrative Law Judge Elizabeth H. Barnes (the “ALJ”) has previously ruled upon and excluded from the record. As such, PPL Electric submits that the entirety of the Complainants’ Main Brief should be stricken.

Further, the Company respectfully requests that the ALJ issues appropriate sanctions due to the Complainants’ attempt to rely upon evidence that was explicitly excluded from the record

in the Order Granting PPL Electric Utilities Corporation's Motion in Limine and Motion for Sanctions issued by the ALJ on May 26, 2020 ("Order Granting Motion and Sanctions"), which granted PPL Electric's Motion in Limine and Motion for Sanctions ("PPL Motion"),¹ and due to the Complainants' clear lack of willingness to comply with the ALJ's orders and the Commission's regulations.

In support thereof, PPL Electric states as follows:²

I. BACKGROUND

1. PPL Electric is a public utility that provides electric distribution and provider of last resort services in Pennsylvania subject to the regulatory jurisdiction of the Commission. PPL Electric furnishes electric distribution, transmission, and provider of last resort electric supply services to approximately 1.4 million customers throughout its certificated service territory, which includes all or portions of 29 counties and encompasses approximately 10,000 square miles in eastern and central Pennsylvania.

2. By Secretarial Letters dated March 27, 2019, PPL Electric was served with the above-captioned Formal Complaints filed by the Complainants. The issues raised in the Formal Complaints concern the planned installation of new AMI meters pursuant to the Public Utility Code and the 2015 Smart Meter Order at the Holders' and Ms. Maculesky's service addresses.

¹ The PPL Motion sought a ruling from the ALJ that excluded many of the Complainants' proposed hearing exhibits because the exhibits: are hearsay and not subject to a hearsay exception under the Pennsylvania Rules of Evidence; are irrelevant; have not and cannot be authenticated by the Complainants; constitute statements by individuals the Complainants' failed to disclose as witnesses in discovery; are inherently unreliable; and/or violate the best evidence rule. In addition, it sought to exclude the Complainants' exhibits also because the Complainants have admitted in their discovery responses that they are not calling an expert witness and, therefore, they should not be allowed to introduce and rely upon these numerous hearsay exhibits. Furthermore, the PPL Motion sought sanctions against the Complainants due to the Complainants' willful and egregious choice to inundate PPL Electric, the ALJ and the Commission with thousands of pages of inadmissible documents and hundreds of hours of inadmissible videos, despite their failure to fully and completely respond to basic discovery requests from PPL Electric that were necessary to determine the validity of the Complainants' alleged health concerns.

² PPL Electric further reserves its rights to supplement the arguments raised herein at the hearing scheduled in this matter.

3. On April 16, 2019, PPL Electric filed an Answer to each of the above-captioned Complaints.

4. On April 23, 2019, PPL Electric filed a Motion to Consolidate the above-captioned Complaints.

5. The ALJ granted PPL Electric's Motion to Consolidate on May 13, 2019.

6. Also on May 13, 2019, a Notice was issued scheduling a telephonic evidentiary hearing for October 22, 2019.

7. On September 12, 2019, PPL Electric was electronically served with the Complainants' Amended Formal Complaint. The Amended Formal Complaint contained approximately 405 pages, including references and summaries of over 385 documents, photos, and/or videos which were included in a flash drive accompanying the Amended Formal Complaint.

8. On January 3, 2020, PPL Electric filed its Answer and New Matter to the Amended Complaint.

9. On January 23, 2020, Complainants filed an Answer to PPL Electric's New Matter, along with additional proposed hearing exhibits.

10. On February 28, 2020, PPL Electric filed a Motion in Limine and Motion for Sanctions, *see* footnote 1 *supra*.

11. On March 13, 2020, the Complainants served additional proposed exhibits on PPL Electric.

12. The Complainants filed a Motion in Opposition to PPL Electric's in Motion in Limine and an Answer in Opposition to PPL Electric's Motion for Sanctions on April 20, 2020.

13. On May 26, 2020, the ALJ issued the Order Granting Motion and Sanctions. Therein, the ALJ excluded all of the Complainants' proposed exhibits except for: Exhibits 28,

45G, 47A-47-F, 48, 51Q-1 through 51Q-4, 51R, 51X-1 through 51X-2, 51Y-1 through 51Y-4, 51Z-1 through 51Z-3; un-numbered exhibits contained on the Complainants' flash drive accompanying the Amended Complaint entitled PPL Meter Data Privacy Notice (October 2017) and PPL Privacy Notice (Feb. 21, 2018); and Letters 2, 4A-4D and 6. In addition, the ALJ granted PPL Electric's request for sanctions, and found that "Complainants have not and will not experience any medical conditions or issues from the installation of PPL Electric's AMI meter." Order Granting Motion and Sanctions, Ordering Paragraph 4.

14. On June 3, 2020, the Commission issued a Hearing Cancellation and Reschedule Notice and rescheduled evidentiary hearings in this matter for July 21, 2020.

15. On June 12, 2020, the Complainants filed an Exception to ALJ Order Granting Respondent's Motion for Sanctions ("Improper Exception to Sanctions"). Also on June 12, 2020, the Complainants' filed an Exception to ALJ Order Granting Respondent's Motion in Limine ("Improper Exception").

16. PPL Electric filed Replies to the Improper Exception and Improper Exception to Sanctions on June 22, 2020.

17. On June 23, 2020, the ALJ issued an Order Denying the Complainants' Exceptions.

18. On July 14, 2020, the Complainants filed a request to continue the hearing scheduled for July 21, 2020. PPL Electric subsequently indicated in an e-mail to the Complainants and the ALJ that it did not oppose this request.

19. The hearing was re-scheduled for August 6, 2020.

20. On July 31, 2020, approximately a week prior to the hearings in this matter and a week prior to any evidence being admitted into the record, the Complainants filed their Improper Main Brief.

II. MOTION TO STRIKE

A. THE COMPLAINANTS' MAIN BRIEF IS PREMATURE.

21. Under 52 Pa. Code § 5.502(f), an initial brief or main brief is due “within the time fixed by the presiding officer.” However, “if no specific times are fixed, initial briefs or main briefs shall be filed and served within 20 days after the date of service of notice of the filing of the transcript.” *Id.*

22. As of the date of this filing, the ALJ has not requested or fixed a time for briefs to be filed by the parties. Indeed, the ALJ has not indicated whether the parties will address their arguments regarding the law as applied to the evidence accepted at hearing in this matter via closing statements or via briefs.

23. Moreover, a hearing has not yet been held in this proceeding, but is the scheduled to occur on August 6, 2020. Therefore, at this time, there is no evidence of record upon which the Complainants’ can base their initial brief.

24. As no timing for briefs has been fixed, and no hearings have yet been held, the Complainants’ Main Brief is premature and procedurally improper. Importantly, it is impossible for PPL Electric to respond to the Complainants’ Main Brief at this time because neither PPL Electric nor the Complainants are aware of what evidence will comprise the record in this matter.

25. For this reason alone, the Complainants’ Main Brief should be stricken in its entirety as being premature.

B. THE COMPLAINANTS' MAIN BRIEF VIOLATES THE COMMISSION'S REGULATIONS REGARDING BRIEFS.

26. The Complainants' Main Brief also wholly fails to comply with the Commission's regulations regarding the content and form required for briefs. *See* 52 Pa. Code § 5.501.

27. Among other things, briefs must contain (1) a concise statement or counter-statement of the case, (2) a references to the record where the evidence relied upon by the filing party appears, (3) an argument preceded by a summary, and (4) a conclusion with requested relief. 52 Pa. Code § 5.501(a).

28. In addition, the Commission's regulations state that "[e]xhibits should not be reproduced in the brief." 52 Pa. Code § 5.501(c).

29. And, furthermore, "[b]riefs must be as concise as possible and, except for briefs in rate cases, be limited to 60 pages in length, unless some other limitation is imposed or allowed by the presiding officer. 52 Pa. Code § 5.501(e).

30. With respect to the requirements of Section 5.501(a), the Complainants' brief is non-compliant for several reasons.

31. First, the Complainants provide no statement of the case, let alone a concise one. 52 Pa. Code § 5.501(a)(1).

32. Second, the Complainants' "references to the record" do not comply with the Commission's regulations because no record yet exists in this proceeding. The hearing has not yet occurred, and no evidence has been admitted into the record. Compounding this flaw, the Complainants specifically rely upon evidence that was already excluded from the record by the ALJ. *See* Section III.D. *infra*.

33. Third, the Complainants' Main Brief is approximately 14 times the permitted length of briefs set forth in the Commission's regulations.³ 52 Pa. Code § 5.501(e). Rather than complying with the directive that briefs be "as concise as possible," the Complainants repeat their pattern of attempting to inundate PPL Electric, the ALJ and the Commission with improper and, arguably, frivolous submissions exceeding hundreds of pages in length. Indeed, this pattern began with their Amended Formal Complaint that contained approximately 405 pages, including references and summaries of over 385 documents, photos, and/or videos, and has repeated throughout this case.

34. Given the Complainants' failure to conform their Main Brief to the Commission's regulations, it would be unreasonably burdensome to expect PPL Electric to file a Reply Brief and to expect the ALJ to review the briefs and render an Initial Decision thereon. Rather than waste the time and resources of PPL Electric, the ALJ and the Commission, PPL Electric submits the non-conforming brief should be stricken in its entirety.

C. THE COMPLAINANTS' MAIN BRIEF IMPROPERLY RELIES UPON EXTRA RECORD EVIDENCE.

35. It is well-established that parties cannot present evidence at the briefing stage or cite stricken testimony and exhibits.⁴ "The Commission, as an administrative body, is bound by the due process provisions of constitutional law and by the principles of common fairness."⁵ "Among the requirements of due process are notice and an opportunity to be heard on the issues,

³ Although the Complainants' Main Brief has a signature page at page 41, the various attachments that follow are effectively additional arguments being raised by the Complainants. Indeed, the Complainants include various prior motions in an apparent second (or even third) bite at the apple regarding matters that have been previously settled by the ALJ.

⁴ See, e.g., *Pa. PUC v. Nat'l Fuel Gas Distrib. Corp.*, 1993 Pa. PUC LEXIS 95, at *7-10 (Order entered July 30, 1993); *Petition of the Borough of Cornwall for a Declaratory Order*, 2016 Pa. PUC LEXIS 3, at *24-26 (Jan. 6, 2016) (Recommended Decision), *adopted as modified*, Docket No. P-2015-2476211 (Order entered Aug. 11, 2016).

⁵ *Hess v. Pa. PUC*, 107 A.3d 246, 266 (Pa. Cmwlth. 2014) (citations omitted).

to be apprised of the evidence submitted, to cross-examine witnesses, to inspect documents, and to offer evidence in explanation or rebuttal.”⁶

36. Indeed, Section 332(c) of the Public Utility Code entitles every party to, among other things, “submit rebuttal evidence” and “conduct such cross-examination as may be required for a full and true disclosure of the facts.”⁷ Accordingly, extra-record evidence in briefs is commonly stricken⁸ because including extra-record materials in a party’s brief “brings up hearsay problems and problems associated with the right to respond to evidence.”⁹

37. The Complainants’ Main Brief makes specific reference to certain additional proposed exhibits served on March 13, 2020. *See* Compl. M.B. at 25-30. However, none of these exhibits have been admitted into the record of this proceeding and, therefore, constitute extra-record evidence.

38. Although PPL Electric has not yet objected to these exhibits or moved for their exclusion, it has at no point in this proceeding waived its right to do so. Indeed, PPL Electric intends to appropriately object to any proposed exhibits (included the additional exhibits served on March 13, 2020) offered by the Complainants at the hearing scheduled for August 6, 2020.

39. Furthermore, as noted above, no record has yet been created in this proceeding. A hearing where evidence is offered and admitted has not yet been held. As such, any evidence or

⁶ *Id.* (citations omitted).

⁷ 66 Pa. C.S. § 332(c); *see Nat’l Fuel.*, 1993 Pa. PUC LEXIS at *10 (“[S]uch material was outside the record and could be detrimental to the rights of other parties to confront such evidence.”).

⁸ *See, e.g., Trucco v. PPL Elec. Utils. Corp.*, 2002 Pa. PUC LEXIS 21, at *5 (Order entered Mar. 29, 2002) (noting that ALJ Paist “struck those portions of the Complainants’ Main Brief which referenced extra-record evidence, including those various exhibits attached to that Main Brief”); *Application of Kenneth Scott Cobb, t/a Kennys Transp. Serv.*, 2012 Pa. PUC LEXIS 1802, at * (Nov. 16, 2012) (Initial Decision) (Barnes, J.) (granting motion to strike the applicant’s brief “for attempting to introduce new facts and documents into evidence not previously offered or admitted into the record at the hearing of September 5, 2012”), *became final without further action*, Docket No. A-2011-2280175 (Order entered Jan. 7, 2013); *see also* 52 Pa. Code § 5.501(a)(2) (stating that briefs must contain “[r]eference to the pages of the record or exhibits where the evidence relied upon by the filing party appears”).

⁹ *Pa. PUC v. Pa. Power & Light Co.*, 1995 Pa. PUC LEXIS 190, at *232 (July 28, 1995) (Recommended Decision) (“*PP&L*”).

proposed exhibits cited to or referenced in the Complainants' Main Brief is extra-record and cannot be relied upon.

40. For these reasons, the Complainants' Main Brief should be stricken in its entirety.

D. THE COMPLAINANTS' MAIN BRIEF IMPROPERLY RELIES UPON PREVIOUSLY EXCLUDED EVIDENCE.

50. The Complainants' Main Brief further relies upon extra-record evidence that has already been excluded from the record.

51. The Complainants repeatedly cite to exhibits that were excluded from evidence by the Order Granting Motion and Sanctions issued by the ALJ. *See, e.g.*, Compl. M.B. at 30-33 (citing to various proposed exhibits which were excluded from evidence), and 447-483 (attaching the Amended Formal Complaint and its references to and quotations of excluded evidence in its entirety). And, relatedly, the Complainants cite to prior motions that have already been disposed of by the ALJ. *See* Compl. M.B. at 55-446 (attaching the Complainants' Motion in Opposition to PPL Electric's in Motion in Limine in its entirety).

52. As noted above, the ALJ's Order Granting Motion and Sanctions excluded all of the Complainants' proposed exhibits except for: Exhibits 28, 45G, 47A-47-F, 48, 51Q-1 through 51Q-4, 51R, 51X-1 through 51X-2, 51Y-1 through 51Y-4, 51Z-1 through 51Z-3; un-numbered exhibits contained on the Complainants' flash drive accompanying the Amended Complaint entitled PPL Meter Data Privacy Notice (October 2017) and PPL Privacy Notice (Feb. 21, 2018); and Letters 2, 4A-4D and 6.

53. Furthermore, the Order Granting Motion and Sanctions entirely disposed of the Complainants' Motion in Opposition to PPL Electric's in Motion in Limine, by granting PPL Electric's motion in limine and excluding the identified and objected to exhibits.

54. The Complainants' attempts to rely upon and reference stricken/excluded exhibits violates well-recognized Commission precedent and practice.¹⁰ Moreover, the Complainants' attempt to cite these materials in a premature and non-compliant brief constitutes a willful violation of the ALJ's Order Granting Motion and Sanctions.

55. This violation is made all the more apparent by the Complainants' repeated attempts to offer evidence or arguments asserting that the AMI meter "could adversely impact the Complainants' health and safety." *See, e.g.*, Compl. M.B. at 10. Importantly, the Order Granting Motion and Sanctions explicitly sanctioned the Complainants' and precludes them from attempting to prove that they have or will experience any medical conditions or issues from the installation of PPL Electric's AMI meter. The Complainants' Main Brief ignores this sanction and attempts to argue this issue despite an adverse conclusion to the contrary having already been made.

56. For these reasons, the Complainants' Main Brief should be stricken in its entirety.

III. MOTION FOR SANCTIONS

41. Upon the motion of a party, the presiding officer may make an appropriate order for sanctions if a party refuses to obey an order of the presiding officer respecting discovery. *See* 52 Pa. Code § 5.371(a)(2).

42. In ruling upon a motion for sanctions, the presiding officer may, among other things, issue: (1) "[a]n order that the matters regarding which the questions were asked, the character or description of the thing or land, the contents of the paper, or other designated fact shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order"; (2) [a]n order refusing to allow the disobedient party to support or oppose

¹⁰ *See, e.g., Pa. PUC v. Nat'l Fuel Gas Distrib. Corp.*, 1993 Pa. PUC LEXIS 95, at *7-10 (Order entered July 30, 1993); *Petition of the Borough of Cornwall for a Declaratory Order*, 2016 Pa. PUC LEXIS 3, at *24-26 (Jan. 6, 2016) (Recommended Decision), *adopted as modified*, Docket No. P-2015-2476211 (Order entered Aug. 11, 2016).

designated claims or defenses, or prohibiting the party from introducing in evidence designated documents, things or testimony”; and (3) “[a]n order striking out pleadings or parts thereof, staying further proceedings until the order is obeyed, or entering a judgment against the disobedient party or individual advising the disobedience.” *Id.* § 5.372(a)(1)-(3).

43. The Complainants’ Main Brief ignores and violates the Order Granting Motion and Sanctions. As noted above, the Complainants both attempt to (a) rely upon evidence that was explicitly excluded by the Order and (b) assert claims regarding the health effects of PPL Electric’s AMI meter that the Order precludes them from proving.

44. Complainants’ willful violation of the Ordering Granting Motion and Sanctions flouts the Commission’s regulations, the ALJ’s prior orders and, if permitted, would deprive PPL Electric of due process.

45. Accordingly, because the Complainants have demonstrated a willingness to ignore, and violate, the ALJ’s orders in this proceeding, PPL Electric submits that the Complainants’ Main Brief should be stricken and any further submissions made by the Complainants should be stricken as a matter of course. *See* 52 Pa. Code § 5.372(a)(3).

46. Furthermore, the Complainants’ continued refusals to comply with the ALJ’s orders and the Commission’s regulations clearly demonstrates the Complainants are not willing to conduct this proceeding in accordance with the Commission’s procedures. As such, PPL Electric submits that it is appropriate, at this time, for the ALJ to enter a judgment against the Complainants in this proceeding and dismiss the Amended Formal Complaint in its entirety. *See id.*

47. PPL Electric further submits that such sanctions are warranted given the Complainants’ attempt to inundate PPL Electric, the ALJ and the Commission with substantial amounts of inadmissible and irrelevant information to date.

48. The Commission has previously found that a pattern of submissions designed to forestall a public utility's lawful exercise of its rights may constitute abuse of the Commission's administrative or regulatory process. *See Argento's Pizza v. Philadelphia Gas Work*, Docket Nos. C-2009-2138055 C-2010-2167822, 2010 Pa. PUC LEXIS 2252, at *10-12 (Initial Decision dated Aug. 2, 2010) (Van Nguyen, J.), *becoming final without further action*, Docket Nos. C-2009-2138055 C-2010-2167822 (Order entered Oct. 1, 2010); *see also Application of Modern Motor Coaches, Inc. d/b/a Modern Piano Moving, for the right to transport, by motor vehicle, household goods in use, limited to pianos and organs, between points in Pennsylvania*, 2011 Pa. PUC LEXIS 1736, at *9 (Initial Decision dated May 19, 2011) (Colwell, J.) (warning that the filing of pleadings that attempt to "slow down" a motor carrier's application process constitute an abuse of process).

49. As noted above, the Complainants' Main Brief is over 800 pages long, and includes prior submissions which were already disposed of by the ALJ. The Complainants' continued shotgun approach to litigating their claims constitutes an attempt to abuse the process for hearings set forth in the Commission's regulations, and substantially delay the resolution of this Complaint proceeding.

50. For these reasons, PPL Electric respectfully requests that the ALJ enter an appropriate order that (a) strikes the Complainants' Main Brief and strikes any further written submissions by the Complainants as a matter of course and/ or (b) enters a judgment against the Complainants for failure to comply with the ALJ's order and the Commission's regulations.

IV. CONCLUSION

WHEREFORE, PPL Electric Utilities Corporation respectfully requests that Administrative Law Judge Elizabeth H. Barnes strike the Complainants' Main Brief in its entirety and grant PPL Electric Utilities Corporation appropriate sanctions against the Complainants, including the instant Motion to Strike and/or entering judgment against the Complainants for failure to comply.

Respectfully submitted,



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Date: August 5, 2020

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