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September 11, 2020

VIA ELETRONIC FILING

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

Re: Steve and Betty Magill v. West Penn Power Company
Docket No. C-2018-3005818

Dear Secretary Chiavetta:

Enclosed please find a copy of the Objections of West Penn Power Company to the Complainants' late-submitted Exhibits, in the above-referenced matter.

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**

Steve and Betty Magill,	:	
	:	
Complainants,	:	
	:	
v.	:	Docket No. C-2018-3005818
	:	
West Penn Power Company,	:	
	:	
Respondent.	:	

**OBJECTIONS OF
WEST PENN POWER COMPANY TO
THE ADMISSION OF COMPLAINANTS' EXHIBITS**

TO ADMINISTRATIVE LAW JUDGE JEFFREY A. WATSON:

West Penn Power Company (“West Penn” or the “Company”) hereby files these Objections pursuant to the Pennsylvania Public Utility Commission’s (“Commission”) regulations at 52 Pa. Code § 5.401(a) to exclude exhibits submitted by Steve and Betty Magill (“Complainants”). West Penn submits that the objected to exhibits constitute hearsay and are not subject to a hearsay exception under the Pennsylvania Rules of Evidence, are irrelevant, have not and cannot be authenticated by the Complainants, and are inherently unreliable.

In support thereof, the Company states as follows:

I. BACKGROUND

1. On November 6, 2018, West Penn was originally served with the Complainants’ Formal Complaint.
2. On November 26, 2018, West Penn filed an Answer and New Matter to the Complaint as well as Preliminary Objections to the Complaint.

3. On January 2, 2019, a Notice was issued assigning the ALJ to rule on West Penn's Preliminary Objections.

4. On January 10, 2019, a Notice was issued scheduling a telephonic prehearing conference for January 31, 2019, before the ALJ.

5. On January 16, 2019, an Interim Order was issued denying the Company's Preliminary Objections. Also, an Interim Order was issued that established the initial litigation schedule for the proceeding.

6. On January 28, 2019, the Complainants advised that they were unavailable for the prehearing conference scheduled for January 31, 2019. In response, the ALJ canceled the January 31, 2019 prehearing conference.

7. On March 5, 2019, an Interim Order was issued, which scheduled a telephonic prehearing conference for April 29, 2019.

8. On March 11, 2019, the Complainants filed a letter requesting extensions of the due dates for their: (1) responses to West Penn's interrogatories; and (2) submission of witness identification and summary of witnesses' testimony.

9. On March 27, 2019, the ALJ issued an Interim Order extending the due dates for both the Complainants' discovery responses and their submission of witness identification and summary of witnesses' testimony until April 22, 2019.

10. On April 29, 2019, the ALJ issued an Interim Order Rescheduling Prehearing Conference, which canceled the prehearing conference and stated that the prehearing conference would be rescheduled for a later date.

11. On April 30, 2019, a Notice was issued that scheduled a telephonic prehearing conference for May 9, 2019.

12. On May 7, 2019, the ALJ issued a Second Interim Order Rescheduling Prehearing Conference, which rescheduled the May 9, 2019 telephonic prehearing conference for June 26, 2019. Also, a Notice was issued consistent with the Second Interim Order Rescheduling Prehearing Conference.

13. On May 9, 2019, the ALJ issued an Interim Order Extending Revised Litigation Schedule at Request of Complainants, which made further adjustments to the procedural schedule.

14. On June 26, 2019, the prehearing conference was held as scheduled.

15. On June 27, 2019, the ALJ issued a Prehearing Order Revising Litigation Schedule.

16. On September 6, 2019, West Penn filed a status report in accordance with the June 27, 2019 Prehearing Order. In that status report, the Company provided the dates that West Penn was available for in-person hearings in Pittsburgh, Pennsylvania.

17. On September 24, 2019, the ALJ issued a Prehearing Order Further Revising Litigation Schedule.

18. On October 25, 2019, West Penn filed a status report pursuant to the September 24, 2019 Prehearing Order. The Company explained in that status report that the parties could not find any mutually-agreeable hearing dates in January 2020 or February 2020. Accordingly, West Penn provided several dates in March 2020 that the Company was available for hearings, specifically, March 10, 17, 19, 26, 27, or 31. However, at the time of submitting the report, West Penn had not heard back from the Complainants on those dates in March 2020. In the report, the Company also listed the dates in January, February, and April 2020 that the Company was available for hearings.

19. On November 13, 2019, a Notice was issued scheduling an in-person evidentiary hearing for March 31, 2020, in Pittsburgh, Pennsylvania.

20. On February 4, 2020, a Notice was issued scheduled another in-person evidentiary hearing for April 7, 2020, in Pittsburgh, Pennsylvania.

21. On March 10, 2020, the Complainants filed a Motion to Stay Proceedings, requesting that the hearings be continued until at least one month after the Commonwealth Court's disposition of the *Povacz* appeal.

22. On March 16, 2020, the ALJ issued an Interim Order Continuing Hearing, which continued the in-person hearings scheduled for March 31 and April 7, 2020. In the Interim Order, the ALJ explained that the Commission hearing office in Pittsburgh would be closed on the hearing dates.

23. On March 19, 2020, West Penn filed an Answer to the Complainants' Motion to Stay Proceedings.

24. On April 13, 2020, the ALJ issued an Interim Order Requiring the filing of a status report by the parties.

25. On April 21, 2020, a Notice was issued scheduling a telephonic evidentiary hearing for May 14, 2020.

26. On May 1, 2020, West Penn filed a status report.

27. On May 4, 2020, West Penn filed an updated status report.

28. On May 6, 2020, West Penn filed another updated status report.

29. On May 7, 2020, the ALJ issued a Prehearing Order setting forth procedural rules and requirements for the proceeding, including the deadline of August 13, 2020, for the ALJ and

parties to receive hearing exhibits. A Notice also was issued scheduling telephonic hearings for August 27-28, 2020.

30. On July 14, 2020, the ALJ issued an Interim Order denying the Complainants' Motion to Stay Proceedings.

31. On August 12, 2020, West Penn served its hearing exhibits.

32. On August 13, 2020, the Complainants requested an extension until August 24, 2020, to submit their exhibits.

33. On August 14, 2020, the ALJ issued an Interim Order denying the Complainants' requested extension of the exhibit deadline.

34. On August 19, 2020, West Penn filed a Notice of Appearance.

35. On August 27, 2020, the telephonic hearing was held as scheduled. At the hearing, the ALJ permitted the Complainants to submit their exhibits by August 31, 2020, after which West Penn would have until September 11, 2020, to serve the Company's objections, if any, to those exhibits.

36. On August 28, 2020, the Complainants served their exhibits. A Notice also was issued canceling the telephonic hearing scheduled for August 28, 2020.

37. West Penn hereby submits these Objections to the exhibits submitted by the Complainants because they are hearsay and not subject to a hearsay exception under the Pennsylvania Rules of Evidence. Furthermore, the exhibits are irrelevant, have not and cannot be authenticated by the Complainants, and are inherently unreliable.

II. OBJECTIONS

38. The Complainants have submitted the following exhibits. As summarized below, these exhibits should be excluded from the record because they are objectionable on several grounds, including hearsay, relevance, authenticity, and inherent unreliability:

- Exhibit 1 – Document titled “Reducing Electrosmog & Recovering from Electrohypersensitivity.”

Objections: (1) inadmissible hearsay opinions about medical and scientific issues; (2) improper medical and scientific expert opinion testimony by non-expert witness; (3) irrelevant; (4) lack authenticity; and (5) inherently unreliable.

- Exhibit 2 – Document titled “International Appeal: Scientists Call for Protection from Non-ionizing Electromagnetic Field Exposure.”

Objections: (1) inadmissible hearsay opinions about medical and scientific issues; (2) improper medical and scientific expert opinion testimony by non-expert witness; (3) hearsay within hearsay; (4) irrelevant; (5) lack authenticity; and (6) inherently unreliable.

- Exhibit 3 – Document titled “Electromagnetic Pollution is a Neurotoxin.”

Objections: (1) inadmissible hearsay opinions about medical and scientific issues; (2) improper medical and scientific expert opinion testimony by non-expert witness; (3) hearsay within hearsay; (4) irrelevant; (5) lack authenticity; and (6) inherently unreliable.

- Exhibit 4 – Document titled “IARC Classifies Radiofrequency Electromagnetic Fields as Possibly Carcinogenic to Humans.”

Objections: (1) inadmissible hearsay opinions about medical and scientific issues; (2) improper medical and scientific expert opinion testimony by non-expert witness; (3) hearsay within hearsay; (4) irrelevant; and (5) lack authenticity.

A. **THE COMPLAINANTS HAVE SUBMITTED EXHIBITS THAT SHOULD BE EXCLUDED BECAUSE THEY ARE HEARSAY**

39. The Complainants have submitted exhibits that should be excluded from the record in this proceeding because they are hearsay statements¹ and not subject to a hearsay exception.

¹ 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

40. All of the Complainants' exhibits constitute or contain hearsay because they include out of court statements being offered for the truth of the matter asserted. In addition, some of the exhibits contain hearsay within hearsay, for which no exception to either layer of hearsay exists.

41. These exhibits were not written by the Complainants. Instead, the exhibits were written by others and largely consist of, quote, or reference statements found in articles, studies, or reports. Therefore, the exhibits objected to above as hearsay are out of court statements.

42. Further, the Complainants are submitting the exhibits to prove the truth of the matter asserted therein, including allegations about "electrosmog" and "electro-hyper-sensitivity" (e.g., Complainants' Exhibit 1), non-ionizing electromagnetic fields ("EMFs") (e.g., Complainants' Exhibit 2), purported health concerns about radio frequency ("RF") fields (e.g., Complainants' Exhibits 3 and 4). The Complainants are offering these materials to prove their claim that the RF fields produced by West Penn's smart meters cause, contributed to, or exacerbate adverse health effects.

43. Thus, these materials are hearsay statements and are inadmissible unless subject to a hearsay exception. *See* note 1, *supra*. In addition, some of the proposed exhibits are even hearsay within hearsay, because the documents purport to quote from or characterize the views of third-parties. (*See* Complainants' Exhibits 2 through 4.)

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;
- (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).

44. 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. 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. 703.²

45. Here, however, the Complainants did not call any expert witnesses to testify and sponsor these exhibits.

46. Furthermore, the Complainants did not demonstrate that they are medical or scientific experts and, therefore, cannot rely upon these materials as a basis for forming and offering opinions about medical or scientific issues. *See Pa.R.E. 702*. “The test to be applied when qualifying an expert witness is whether the witness has any reasonable pretension to specialized knowledge on the subject under investigation.” *Miller v. Brass Rail Tavern*, 664 A.2d 525, 528 (Pa. 1995).

47. Nothing submitted by the Complainants attests that they are experts in any of the fields relevant to the subject matters of physics, biophysics, chemistry, electrical engineering, electromagnetics, bioelectromagnetics, radio-frequency bioelectromagnetics and dosimetry, or medicine.

² 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.”).

48. Finally, even if these materials are allowed to form the basis of the Complainants' 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 substance of those hearsay statements is 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.

49. For these reasons, West Penn objects to the admission of the above-identified exhibits as inadmissible hearsay. If West Penn's objections are not granted, the Company's due process rights 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 COMPLAINANTS' EXHIBITS SHOULD OTHERWISE BE EXCLUDED BECAUSE THEY ARE IRRELEVANT, LACK AUTHENTICITY, AND ARE INHERENTLY UNRELIABLE

50. As noted above, the Complainants' proposed exhibits also are inadmissible due to other significant flaws, including relevance,³ authenticity,⁴ and inherent unreliability.⁵

³ *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).

⁴ *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)).

51. First, the contents of the proposed exhibits are irrelevant because they: (a) address exposures other than the RF fields from the smart meters being used by West Penn; (b) address health conditions other than the one raised by Complainants; and/or (c) do not address issues relevant to the installation of smart meters in Pennsylvania (*see* Complainants' Exhibits 1 through 4).⁶

52. Second, the Complainants' proposed exhibits lack authenticity because no evidence exists that the Complainants possess the requisite personal knowledge to attest that these documents are what they purport to be. *See* note 4 *supra*.

53. Third, Complainants' Exhibits 1, 2, and 3 are inherently unreliable because they appear to be sourced from the websites of anti-EMF/RF authors and advocacy groups (*see* Complainants' Exhibits 1 through 3). These types of advocacy materials cannot be relied on as providing reliable and balanced statements about medical and scientific issues.

54. Finally, Complainants' Exhibits 1 and 3 appear to be incomplete extracts from a single PowerPoint presentation. For example, Complainants' Exhibit 1 contains pages 1-2 and 39-40 of the presentation, while Complainants' Exhibit 3 contains pages 43-44. Even inside those extracts, there are selective portions of other articles. The Complainants' deliberate omission of substantial portions of this presentation, as well as the presentation's own selective quoting of other materials, only further proves the exhibits' lack of authenticity and reliability.

⁵ *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).

⁶ Moreover, with regards to the IARC press release submitted by the Complainants as Exhibit 4, IARC did not find that RF exposures from environmental sources, such as smart meters, were a "possible" cause of cancer. Rather, IARC concluded that the scientific evidence with regard RF fields from environmental sources is "inadequate" to reach such a conclusion. (*See* Complainants' Exhibit 4, p. 2.)

55. For these reasons, the Complainants' Exhibits 1 through 4 should be excluded because they are irrelevant, lack authenticity, and are inherently unreliable.

III. CONCLUSION

WHEREFORE, West Penn Power Company respectfully requests that Administrative Law Judge Jeffrey A. Watson grant these Objections and exclude the Complainants' exhibits from the evidentiary record in this proceeding, as explained above.

Dated: September 11, 2020



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	:	
Respondent.	:	

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the Objections of West Penn Power Company to the Complainants' late-submitted Exhibits upon the individuals listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant).

Service by electronic mail, as follows:

Steve and Betty Magill
Sgm265@hotmail.com

Administrative Law Judge Jeffrey A. Watson
Jeffwatson@pagov.com

Dated: September 11, 2020



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