

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Darlene Shedlock	:	
	:	
v.	:	C-2018-3001414
	:	
Pennsylvania Electric Company	:	

**INTERIM ORDER
GRANTING RESPONDENT’S MOTION TO STRIKE THE ENTIRETY OF DARLENE
SHEDLOCK’S MAIN BRIEF AND ATTACHMENT TO MAIN BRIEF**

A telephonic evidentiary hearing was held in this proceeding as scheduled on September 4, 2020.

On October 8, 2020, the Commonwealth Court of Pennsylvania (Commonwealth Court) issued an Opinion in *Povacz, et al. v. Pa. Public Utility Commission*,¹ (*Povacz I*), the first of several appeals involving PECO Energy Company’s (PECO) deployment of smart meter technology pursuant to Act 129 of 2008 (Act 129), codified at 66 Pa. C.S. § 2807(f). In the *Povacz I* consolidated opinion, the Commonwealth Court partially affirmed, and partially reversed and remanded, the Commission’s March 28, 2019, and May 9, 2019, Orders in Maria Povacz, Laura Sunstein Murphy, and Cynthia Randall. *Povacz I* at 495. Specifically, the Commonwealth Court, in *Povacz I*, held that Act 129 does not mandate the installation of smart meters, and that the Commission had the authority to grant customers accommodations based on their health concerns.²

In light of the Commonwealth Court’s decision in *Povacz I*, the Commission entered an Order and Notice, at Docket No. M-2009-2092655, on November 4, 2020, pursuant to

¹ *Povacz, et al. v. Pa. Public Utility Commission*, 241 A.3d 481 (Pa. Cmwlth. 2020).

² *Id.* at 490.

66 Pa. C.S. § 501, instituting a stay of certain formal complaint proceedings then-pending before the Commission involving challenges to EDC deployment of smart meter technology as being in violation of Section 1501 of the Code (*November 4, 2020, Stay Order*). *The November 4, 2020, Stay Order* also directed that the stay would apply to any new formal complaints filed with the Commission claiming that EDC deployment of smart meter technology was a violation of Section 1501, and that the stay would remain in place until it was lifted by further Commission action. *The November 4, 2020, Stay Order* applied to and was docketed at the instant case.

The Commission, as well as all other parties in *Povacz I* subsequently sought and were granted review of the Commonwealth Court’s *Povacz I* decision by the Supreme Court of Pennsylvania.

On August 16, 2022, the Supreme Court issued its Opinion in *Povacz II*, affirming the Commission’s determinations in all respects. The Supreme Court reversed the Commonwealth Court’s determination that Act 129 does not mandate smart meter installation and that Court’s remand to the Commission for consideration as to whether the installation of a smart meter was unreasonable service under Section 1501 of the Code, 66 Pa.C.S. § 1501. The Supreme Court did, however, affirm the Commonwealth Court’s conclusion that the “Customers failed to meet their burden of proving, by a preponderance of the evidence, a conclusive causal connection between [radio frequency] emissions from smart meters and adverse human health effects.”³ The Supreme Court noted that while Act 129 does not provide customers with the right to opt-out of smart meter installation at their residence, they may file a complaint with the Commission raising a claim that installation of a smart meter violates Section 1501 of the Code, 66 Pa.C.S. § 1501.

Given the Supreme Court’s decision in *Povacz II*, the Commission lifted the stay implemented by the *November 4, 2020, Stay Order* on November 9, 2023. The Commission entered an Order at Docket No. M-2009-2092655, explaining that cases pending before the

³ *Id.* at 1014.

Office of Administrative Law Judge, such as the instant case, would proceed as directed by the assigned presiding officer.

The Commission entered an Order and Notice, at Docket No. M-2009-2092655, staying the proceeding, on November 4, 2020. The stay was lifted by Order of the Commission on November 9, 2023.

On November 27, 2023, an interim order was entered permitting the parties to file main briefs and any other appropriate requests for relief, on or before January 17, 2024. The order further provided that a copy of all briefs, documents or requests for relief must be sent to the legal assistant for the undersigned presiding officer, by email, to every party.

On January 16, 2023, Complainant provided an email to the legal assistant of the undersigned presiding officer along with a one-page letter and a two-page attachment. The one-page letter appears to be a summary of the argument to support Complainant's Complaint. The two-page article attached to the letter appears to be a newspaper or magazine article entitled "EMF The Invisible Hazard". The documents were provided by email directed to the legal assistant to the undersigned presiding officer and does not indicate that the attachments were filed or that a copy was provided to counsel for Respondent.

On January 17, 2024, Respondent filed its main brief.

On January 17, 2024, an interim order was entered concluding that the one-page letter from Complainant provided by Complainant to the office of the undersigned presiding officer on January 16, 2024, would be treated as the main brief for Complainant and the two-page article will be treated as an attachment to the main brief of Complainant. The email message was treated as a cover letter from Complainant. The interim order provided that Respondent may file any appropriate motions or objections to the main brief and attachment to the main brief on or before February 5, 2024. Complainant was permitted to file any response to the objections or motion of Respondent, on or before February 12, 2024.

On February 5, 2024, Respondent filed a Motion to Strike the Entirety of Darlene Shedlock's Main Brief (Motion to Strike). Complainant did not file a response to the Motion to Strike. Respondent argued that Complainant's Main Brief should be stricken because it fails to conform to the Commission's governing regulations at 52 Pa. Code § 5.501(a) and the directive of the ALJ's November 27, 2023, Interim Order. Respondent further argued that the Main Brief of Complainant should be stricken as: (1) portions of the Complainant's Main Brief and attachment thereto rely on or introduce extra record evidence; (2) the attachment to the Complainant's Main Brief is inadmissible hearsay; (3) portions of the attachment to the Complainant's Main Brief constitute inadmissible hearsay within hearsay; and (4) the attachment to the Complainant's Main Brief, to the extent it is considered, lacks authentication and foundation.

On November 27, 2023, the ALJ issued an Interim Order Setting Briefing Schedule, dictating that Main Briefs, if any, were due on or before January 17, 2023. On January 16, 2024, the Complainant sent, via email, to the legal assistant of the undersigned presiding officer, a one-page letter and two-page attachment. The letter and attachment, considered as Complainant's Main Brief, was not served on the Company by the Complainant.

As Respondent argues, the Complainant's Main Brief fails to conform to the Commission's regulations at 52 Pa. Code § 5.501. Section 5.501(a) requires briefs to contain the following: (1) A concise statement or counterstatement of the case. (2) References to the pages of the record or exhibits where the evidence relied upon by the filing party appears. (3) An argument section preceded by a summary. The party with the burden of proof shall, in its main brief or initial brief, completely address, to the extent possible, every issue raised by the relief sought and the evidence adduced at hearing. (4) A conclusion with requested relief.

Complainant's Main Brief does not contain a concise statement of the case and fails to cite a single provision of law, including but not limited to the Public Utility Code or the Commission's regulations, or the record in support of the Complainant's position. In addition, Complainant's Main Brief does not include an argument section, or a summary of the argument, and does not specifically reference any provision of law, any regulation, nor any record-evidence in this proceeding.

In addition, as Respondent asserts, the various extra-record statements throughout the Complainant's Main Brief and attachment thereto should be stricken. Complainant makes a number of factual allegations in her Main Brief that are not in the record in this proceeding, including: (1) The alleged removal of various appliances in the Complainant's home (Complainant's MB, p. 1); and (2) Alleged circumstances, and measures taken, at the Complainant's workplace (Complainant's MB, p. 1). Furthermore, as Respondent submits, the entirety of the attachment to the Complainant's Main Brief is extra-record evidence and should be excluded from consideration. Complainant had an opportunity to attempt to introduce the attachment to her Main Brief at the Evidentiary Hearing held on September 4, 2020, but did not do so. Such extra record evidence would be inappropriate to consider here, as consideration of the same deprives the Company the opportunity to critically examine the same and cross-examine the Complainant on the purported evidence's authenticity and substance, as the Company is entitled to by law.⁴

Complainant attached what appears to be an article titled "EMF – the Invisible Hazard" to her Main Brief. The entirety of the attachment to the Complainant's Main Brief is inadmissible hearsay. As Respondent argues, the contents of the article are out-of-court statements that are being offered to prove the truth of the matters asserted.⁵ Ordinarily, hearsay evidence is inadmissible unless some exceptions apply. Pa.R.E. 802.⁶ The author of the article reflected in the attachment to the Complainant's Main Brief was not presented as a witness in

⁴ See 66 Pa.C.S. § 332(c).

⁵ 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).

⁶ 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 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).

this proceeding, and cannot simply be sponsored by the Complainant, as the Complainant has denied the Company the ability to cross-examine the actual declarants of the statements. The Company has the right to cross-examine the author of the attachment before it be admitted into the record in this proceeding.⁷ Accordingly, the attachment to the Complainant's Main Brief is inadmissible hearsay and must be stricken from the Complainant's Main Brief.

Finally, Respondent correctly argues that the attachment to the Complainant's Main Brief should be stricken because it lacks authentication and foundation, to the extent that Complainant is attempting to have the document considered as evidence, which is introduced for the first time as an attachment titled "EMF – the Invisible Hazard" to Complainant's Main Brief for the first time. As Respondent submits, Rule 901 of the Pennsylvania Rules of Evidence governs the required procedures to properly authenticate and identify evidence. Rule 901 dictates that: (a) In General. Unless stipulated, 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. The attachment to the Complainant's Main Brief must be stricken, as there is no testimony, from the Complainant or through cross-examination of the Company's witness(es) to authenticate and lay the foundation for the attachment. 41. As such, Complainant's attachment to her Main Brief – to the extent it is considered a late-filed exhibit - lacks authentication and foundation and must be stricken.

THEREFORE,

IT IS ORDERED:

1. That the Motion of Respondent to Strike the Entirety of Darlene Shedlock's Main Brief and attachment, is Granted.

⁷ See 66 Pa.C.S. § 332(c).

2. That the email provided to the legal assistant of the undersigned presiding officer on January 16, 2023, along with a one-page letter and a two-page attachment entitled “EMF The Invisible Hazard, considered as Complainant’s Main Brief and attachment, is hereby stricken in its entirety.

Date: March 22, 2024

_____/s/
Jeffrey A. Watson
Administrative Law Judge

strike the entirety of the Complainant’s Main Brief and attachment thereto or, 4 225 Pa. Code § 901. 5 225 Pa. Code § 901(a). 6 Turek v. Hardy, 458 A.2d 562, 565 (Pa. Super. 1983). 7 See Pa. PUC v. Fawn Lake Forest Water Co., Docket Nos. R-912117, et al., 1992 Pa. PUC LEXIS 100 (Opinion and Order entered August 31, 1992); See also App. of LP Water & Sewer Co. for approval to begin to offer, render, furnish or supply water service to the public in portions of Middle Smithfield Twp., Monroe Cty. and Lehman Twp., Pike Cty. App. of LP Water & Sewer Co. for the approval to begin to offer, render, furnish or supply sewer service to the public in portions of Middle Smithfield Twp., Monroe Cty. and Lehman Twp., Pike Cty. Affiliated Interest Agreement between LP Water & Sewer Company and Lehman Pike Development Corporation. Falls Community Assoc., Inc. LP Water & Sewer Co. Petition of LP Water and Sewer Co. For The Establishment of Temporary Rates, Docket Nos. A-211770, et al., 1993 Pa. PUC LEXIS 117 (Opinion and Order entered July 7, 1993). in the alternative, strike certain portions of the Complainant’s Main Brief and attachment thereto as described above.

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