

**BEFORE THE PENNSYLVANIA
PUBLIC UTILITY COMMISSION**

SUSAN KREIDER,

Complainant

v.

Docket No. C-2015-2469655

PECO ENERGY COMPANY,

Respondent

**AMICUS CURIAE BRIEF
OF LAURA SUNSTEIN MURPHY
IN OPPOSITION TO PECO ENERGY COMPANY'S
PETITION FOR INTERLOCUTORY REVIEW**

Edward G. Lanza, Esq.
THE LANZA FIRM, LLC
P.O. Box 61336
Harrisburg, PA 17106-1336
(717) 576-2696 (phone)
(717) 798-9897 (fax)
ed@lanzafirm.com

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Counsel for Amicus
Laura Sunstein Murphy

I. INTRODUCTION

Pursuant to Section 5.502(e) of the Commission's Formal Proceeding regulations, 52 Pa. Code § 5.502(e), Laura Sunstein Murphy ("Murphy" or "Amicus") respectfully submits this *Amicus Curiae* Brief in Opposition to PECO Energy Company's ("PECO") Brief in Support of Petition for Interlocutory Review ("Brief") filed with the Commission's Secretary on July 28, 2015 in the above-captioned matter.

Amicus, Laura Sunstein Murphy, is a resident of West Chester, PA and a PECO customer with an interest in the instant matter and the Commission's adjudication of PECO's Petition for Interlocutory Review. Murphy is the Complainant in the matter of *Murphy v. PECO*, Docket No. C-2015-2475726, a case currently pending before the Commission and scheduled for hearing on August 19, 2015. In her Complaint against PECO, Murphy has alleged that PECO's compulsory installation of smart meters that emit Electro Magnetic Field (EMF) radiation may constitute a violation of the utility's duty to provide safe and reasonable service to her under Section 1501 of the Public Utility Code, because Murphy is disabled and uniquely susceptible to the harmful effects of EMF emissions. Although the instant matter and Murphy's case differ in significant ways, PECO has asked the Commission to weigh in on issues that may directly affect Murphy's prosecution of her Formal Complaint.

In its Petition for Interlocutory Review, PECO asks the Commission to resolve two (2) material questions. PECO Brief at 8. The first question deals with disallowing Susan Kreider's "claims of health effects and disability arising from the smart meter." *Id.* The second question relates to the exclusion of "evidence, testimony or discussion" to support Ms. Kreider's claim that PECO is providing unreasonable service where PECO's smart meter caused adverse health effects on Ms. Kreider. *Id.* The Commission's resolution of these questions may directly affect

Murphy's ability to pursue her claims against PECO, and for this reason, Murphy is asking the Commission to deny PECO's request to answer the material questions of the Kreider case in the affirmative. As explained in greater detail below, granting PECO's request would deny Kreider and Murphy their due process rights to be heard in their respective cases. Therefore, the Commission should deny PECO's requests to quash testimony on the two material questions as to harmful effects of the smart meter to Ms. Kreider and unreasonable service in her case.

II. LEGAL ARGUMENT

PECO's Petition for Interlocutory Review asks the Commission to resolve two material questions that, if answered in the affirmative, would preclude Complainant Kreider from introducing relevant and material evidence to support her claims of unreasonable service against the Company. An affirmative answer to those questions also might negatively affect Amicus Murphy because it would establish a precedent that disabled customers cannot put forth the case that an accommodation should be made to protect vulnerable individuals from the harmful health effects of smart meters. The Commission should not adopt a blanket rule that prevents customers from presenting evidence in these types of cases. Instead, the Commission should allow Complainants to proceed with their claims and should examine the evidence on a case-by-case basis to determine whether the allegations of unsafe and unreasonable service are valid.

The Commission should rule against PECO in this matter, because failing to do so would lead to an infringement of Kreider's due process rights and her rights under the Americans with Disability Act Title II. In addition, it is inappropriate for the Commission to preclude Kreider from presenting evidence about her health conditions and disability because there are genuine issues of material fact that require a hearing, and PECO is not entitled to judgment as a matter of law on the questions raised by the Complaint. Further, an affirmative answer to the questions

presented would create substantial prejudice to Amicus and would significantly constrain her ability to prosecute her case before the Commission.

A. Answering the Material Questions in the Affirmative Would Deny Complainants Their Due Process Rights

In its Petition and Brief, PECO asks the Commission to answer the material questions in a manner that would exclude evidence of the adverse health effects of smart meters on Complainant Kreider. PECO argues that excluding evidence of health effects would prevent substantial prejudice to PECO, because allowing the evidence would compel PECO to present expert testimony to rebut the Complainant's evidence. PECO Brief at 7. PECO also claims that allowing the disputed evidence related to the health effects of the smart meter on Ms. Kreider would unnecessarily waste PECO's resources and would expose the Company to similar complaints. PECO Brief at 6. Absent from PECO's justifications for excluding material evidence is the effect of the exclusion on the due process rights of the Complainants, Kreider and Murphy.

In essence, PECO is arguing that the Commission should overturn the decision of Administrative Law Judge Darlene Heep, which denied PECO's Motion *in limine* seeking to exclude evidence of the deleterious health symptoms caused by the Company's smart meter. *See, Kreider v. PECO*, Docket No. C-2015-2469655 (Interim Order No. 7, issued July 23, 2015). In her decision, Judge Heep agreed with PECO that no evidence of "opt-outs" would be allowed, but it denied PECO's attempt to exclude evidence of health symptoms. Judge Heep was correct in her decision because she recognized that Kreider's claim of unreasonable service is directly linked to the negative health effects of the smart meters that PECO is installing in compulsory fashion throughout its territory. The Commission should uphold the ruling of ALJ Heep and allow evidence of health effects to show that smart meters are unsafe to Kreider. If this type of

evidence is excluded, the Presiding Officer and the Commission will lack the necessary facts to adjudicate the questions raised in the instant proceeding.

Answering the material questions in the affirmative would deny Kreider her due process rights and would create a precedent that will negatively impact Murphy's ability to exercise her due process right to be heard. The Kreider and Murphy complaints were filed with the Commission pursuant to Chapter 7 of the Public Utility Code. 66 Pa. C.S. § 701, *et seq.* Chapter 7 and basic principles of due process require "a full hearing, including the development of a record and a decision by the Commission based on that hearing with full findings." *Popowsky v. Pa. PUC*, 805 A.2d 637, 643 (Pa. Cmwlth. 2002). Further, and most importantly, failure by the Commission to provide a party the opportunity to present evidence or cross-examine witnesses denies the party a meaningful opportunity to be heard as provided in Chapter 7 of the Public Utility Code and required by due process. *Id.*

The fact that PECO would have to defend itself against allegations of unsafe or unreasonable service should not preclude complainants from exercising their rights to present evidence to support their claims. It is important that the Commission provide litigants a meaningful opportunity to be heard, even if it means that the utility and the Commission will have to expend resources to defend and adjudicate the claims of Complainants. Due process should not be compromised in order to protect utilities from having the inconvenience of addressing issues raised by customers regarding their service.

B. There Are Genuine Issues of Material Fact in the Kreider and Murphy Complaints that Require a Hearing, and PECO Is Not Entitled to Judgment as a Matter of Law.

In its Brief, PECO argues that the issue of its unreasonable service to disabled individuals with fragile health should not be the subject of evidentiary hearings, because the Commission

has decided that its smart meter deployment plan has no “opt-out.” PECO Brief at 7-8. In support of this untenable position, the Company cites a number of cases where the Commission sided with PECO and ruled that the utility is obligated under Act 129 to install smart meter throughout its territory, and that customers have no right to opt out. The Commission’s decisions on the opt-out question are inapposite to the key issue in the Kreider and Murphy complaints. The Commission has not made a definitive ruling on whether PECO’s compulsory installation of smart meters in homes of disabled customers who are susceptible to Electro Magnetic Field (EMF) emissions constitutes unsafe and unreasonable service in violation of Section 1501 of the Public Utility Code. For this reason, Kreider and Murphy should be allowed to present evidence on the way their health is affected by smart meters and the Commission should decide whether PECO’s refusal to make accommodations constitutes unsafe and unreasonable service.

The Commission’s decisions on the opt-out issue do not control the questions raised by the Kreider and Murphy complaints. The question of unreasonable and unsafe service in the context of compulsory installation of smart meters at the premises of disabled customers was not answered by any of the decisions cited by PECO in its Brief. Of the cases cited by PECO, none of them pleaded violations of Section 1501, disability or specific health effects attributed to smart meters. Some of the cases pleaded generalized concerns with smart meters and sought to opt-out of PECO’s program. In most instances, the complainants proceeded *pro se*, and in some cases, the complainants failed to respond to PECO’s pleadings. It is disingenuous for PECO to claim that these cases should control the outcome in the Kreider or Murphy matters. Every single one of the cases cited is distinguishable from the Complaints at issue here.

When the Commission has addressed violations of Section 1501 and a utility's failure to provide safe, reasonable and adequate service, the agency has investigated fully and has often ruled in favor of complainants. *See, e.g. Young v. National Fuel Gas Distribution Corp.*, Docket No. C-2008-2059233, 2009 Pa. PUC LEXIS 940 (Initial Decision issued Feb. 6, 2009) (NFG ordered to remedy unsafe condition resulting from the installation of a gas meter at Complainant's residence pursuant to Section 1501 of the Public Utility Code). Also, in *PUC BIE v. West Penn Power Co.*, Docket No. C-2012-2307244 (Order issued Jan. 9, 2014), the Commission approved a settlement that imposed an \$86,000.00 fine on the utility for failure to provide safe and reasonable service in accordance with Section 1501 of the Public Utility Code. In the *West Penn Power* case, a customer was killed as a result of an unsafe condition that the utility failed to correct (Carrie Goretzka was killed when a high voltage line fell on her yard after the customer had complained repeatedly about unsafe conditions at the premises). Based on these cases and other precedent, PECO's claim that the Company is entitled to judgment as a matter of law in the Kreider matter is without merit.

PECO mistakenly relies on Act 129 to argue that smart meter installation is compulsory and universal and that no exceptions (opt-outs) should be allowed. PECO Brief at 9. PECO's position disregards the fact that there is nothing in Act 129 or Commission regulations or Orders that compels PECO or any other utility to violate Section 1501 in order to accomplish the goals of Act 129. In reality, the Commission has read Section 1501 and Act 129 in tandem. *See, Implementation of Act 129 of October 15, 2008; Default Service And Retail Electric Markets*, Docket No. L-2009-2095604, 2011 Pa. PUC LEXIS 114 (Order issued Oct. 4, 2011) (the Commission promulgates its Act 129 regulations in accordance with, *inter alia*, Section 1501 of the Public Utility Code). Also, in *Smart Meter Procurement and Installation*, Docket No. M-

2009-2092655 (Implementation Order issued Jan. 24, 2009), the Commission required that smart meters have the capability to disconnect and reconnect service remotely because such functionality provides the ability to realize “*safety, efficiency and cost benefits.*” *Id.* at 18 (emphasis added). Act 129 is not intended to be implemented in a manner that ignores or contravenes the mandate of Section 1501 for utilities to provide safe, reasonable and adequate service. If implementation of Act 129 leads a utility to render unsafe or unreasonable service, the Commission must decide what changes (or accommodations) the utility must make in order to comply with Section 1501. This is the issue that is raised by the Kreider and Murphy complaints, and the Commission must offer these complainants an opportunity to be heard on that question in accordance with due process.

Evidence of disability and negative health effects is crucial to the determination of whether PECO is providing unsafe service in violation of Section 1501. It will be impossible for the Commission to determine whether PECO’s smart meters create an unsafe condition unless the adverse effects of the devices on the Complainants are known. In her Notice of Self Help sent to PECO on August 5, 2014, Kreider’s counsel explained her medical condition and the health effects of PECO’s smart meter. *See*, Exhibit A (attached). This is the kind of evidence the Commission must consider to fairly adjudicate the claims in this matter.

The proper course for the Commission to follow is to allow complainants claiming unsafe and unreasonable service due to the harmful health effects of smart meters as to them to present their evidence at an in-person hearing before an Administrative Law Judge. Each complainant will have the burden to prove that he or she has a condition that makes him or her susceptible to EMF emissions, and that PECO is providing unsafe or unreasonable service by forcing the customer to have smart meters on their premises. These matters should be decided on a case-by-

case basis, and not by a blanket edict that there are no “opt-outs” to PECO’s smart meter deployment plan. Amicus respectfully submits that the Commission will find that accommodations are necessary for some customers, depending on their individual medical circumstances.

III. CONCLUSION

Based on the foregoing, Amicus Laura Sunstein Murphy respectfully requests that the Commission answer the material questions in PECO’s Petition for Interlocutory Review in the negative, affirm and uphold Judge Heep’s Interim Order No. 7 in this matter, and grant any other relief the Commission deems just and proper under the circumstances.

Respectfully submitted,



Edward G. Lanza, Esq.
THE LANZA FIRM, LLC
P.O. Box 61336
Harrisburg, PA 17106-1336
(717) 576-2696 (phone)
(717) 798-9897 (fax)
ed@lanzafirm.com

Date: August 7, 2015

Counsel for Amicus
Laura Sunstein Murphy

CERTIFICATE OF SERVICE

I hereby certify that this day I served a copy of the *Amicus Curiae* Brief upon the persons listed below in the manner indicated in accordance with the requirements of 52 Pa. Code Section 1.54.

Via Electronic Mail and/or First Class Mail

Shawane Lee, Esq.
PECO Energy Company
2301 Market Street / S23-1
P.O. Box 8699
Philadelphia, PA 19101-8699
Shawane.Lee@exeloncorp.com

Hon. Jeffery A Watson
Administrative Law Judge
Pennsylvania Public Utility Commission
301 5th Avenue, Suite 220
Pittsburgh, PA 15222
jeffwatson@pa.gov

Laura Sunstein Murphy
1191 Telegraph Road
West Chester, PA 19380
sunmurphy@verizon.net

Susan Kreider
160 W. Queen Lane
Philadelphia, PA 19144
Susan.Kreider@uphs.upenn.edu

Date: August 7, 2015



Edward G. Lanza, Esq.

HARPER & PAUL
Attorneys at Law
140 West Maplewood Avenue
Philadelphia, Pennsylvania 19144-3307
Telephone (215) 844-4848
TeleFax (215) 844-0464

GERMANTOWN

RONALD J. HARPER
ANDREA B. PAUL
SHARON N. HARVEY

August 5, 2014

Certified Mail #7013 3020 0001 5884 5230 - RRR & U.S. Mail

Craig L. Adams
Executive Vice President, Excelon
President & CEO, PECO
Excelon Corporation
Post Office Box 805379
Chicago, Illinois 60680-5379

NOTICE OF SELF HELP

**RE: Susan Kreider
169 West Queen Lane
Philadelphia, PA 19144
Smart Meter #: 120077348
Account #: 47458-02006**

Dear Mr. Adams:

Please be advised that we represent Susan Kreider. Ms. Kreider lives at the above address and is a PECO customer, account number 47458-02006. You have installed a Smart Meter at Ms. Kreider's home, outside her bedroom and without her permission, Smart Meter #120077348.

Ms. Kreider does not consent to the installation of the Smart Meter and ask that you replace it with an Analog Meter. Ms. Kreider has a particular health issue that requires her to be cautious of every safety risk. She subscribes to the belief that as proven to her by several writings that these Smart Meters are subjecting her to a safety risk. Ms. Kreider is free to demand the absolute safety of the systems attached to her home and she demands that the Smart Meter be removed and an Analog Meter be substituted instead.

Ms. Kreider is willing to provide a substitute reading each month.

Ms. Kreider is in dire need due to her consciousness of the potential danger to her as well as her unique health situation. Already, Ms. Kreider has seen an elevation of her blood pressure, she has become irritable, she is not sleeping well, her heart races and pounds and she is worried with the Smart Meter being outside her bedroom.

Her current illness which makes her particularly susceptible to the signal from the Smart Meter is diagnosed as a Vaccine Injury, a variant of Guillain-Barre Syndrome. Her condition has caused her to develop multiple chemical and environmental sensitivities. Taxing her immune compromised system further with relentless exposure to magnetic fields via installing hazardous equipment on the side of her house for your convenience is unacceptable.

She demands removal and replacement in the next 30 days for these reasons and she may take action to help herself afterwards. In addition she is aware of relentless exposure, fires and cancer causing risks plus the danger from spikes in the electric system.

We ask that you honor Ms. Kreider's request in the next 30 days so that her safety and welfare is assured and to avoid further pursuit of this matter.

Your cooperation is appreciated.

Sincerely,



RONALD J. HARPER

RJH/jp

cc: Susan Kreider
PECO Customer Service Center
Judge Nelson Diaz (FYI)

P.S. I will provide you with medical documentation upon request.