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October 24, 2016

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

**RE: Susan Kreider v. PECO Energy Company
Docket No. C-2015-2469655**

Dear Ms. Chiavetta:

Enclosed for filing with the Commission is PECO Energy Company's Reply Exceptions.

Very truly yours,



Ward L. Smith
Counsel for PECO Energy Company

WS/ab
Enclosure

cc: Christopher P. Pell, ALJ
Darlene D. Heep, ALJ
Certificate of Service

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Susan Kreider

v.

PECO Energy Company

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C-2015-2469655

**PECO Energy Company's
Reply Exceptions**

I. Introduction

Pursuant to the September 22, 2016 Secretarial Letter in this docket, PECO hereby provides its Reply to the Exceptions of Susan Kreider.

On or about October 12, 2016, Complainant Susan Kreider filed and served her Exceptions, comprised of four single-space pages, with no internal headings. Accordingly, PECO has organized its Reply under the following headings:

- The Commission Should Not Incorporate the Requested Material from Dr. Marino into the *Kreider* Record
- Ms. Kreider Did Not Demonstrate That the ALJs Were Incorrect in Their Weighting of the Testimony
- Ms. Kreider's Legislative Concerns Are Not Supported By Record Evidence And Are Not Within the Commission's Jurisdiction
- Ms. Kreider's Concerns Regarding the Americans with Disabilities Act and the Rehabilitation Act Are Not Within the Commission's Jurisdiction and are Not Supported By Record Evidence

II. Reply to Exceptions

A. The Commission Should Not Incorporate the Requested Material from Dr. Marino into the *Kreider* Record

The primary argument presented in Ms. Kreider's Exceptions is that the Commission should allow her to incorporate a document she found on the internet into the record in this proceeding. She refers to the document as "Testimony to the PA PUC by Andrew A Marino posted on Smart Grid Awareness, A Website by SkyVision Solutions, Consumer Protection Advocate."

At the outset, PECO notes that this document was not introduced into the record in *Kreider*. In certain circumstances, the Commission's rules and regulations do allow the introduction of all or a portion of the record in some other proceeding into an instant proceeding. *See* 52 Pa. Code §5.407. However, the introduction of such record proceedings must occur while the record is still open in the proceeding in which incorporation is requested. In this case, Ms. Kreider did not make her request until the Exceptions stage. The record has been closed for months, and her request is thus not be timely.

Moreover, it should be noted that, even if some of Dr. Marino's actual testimony from *Povacz, et al.* was admitted into the record in this proceeding, in order to protect PECO's due process rights the cross-examination of Dr. Marino would also have to be admitted. And the cross-examination makes clear that the key findings of the *Kreider* Initial Decision would remain intact even if Dr. Marino's testimony were to be considered. For example, the core holding of the Initial Decision on smart meters and health (p. 30, emphasis added) is that:

Consequently, Complainant's *prima facie* case was outweighed by PECO's rebuttal with the expert opinions of Dr. Davis and Dr. Israel that the Smart Meter did not harm Ms. Kreider. Therefore the Complainant did not meet her burden of demonstrating that PECO installing a Smart Meter at her home constituted

unreasonable or unsafe service. Accordingly, PECO's actions in this instance did not constitute a violation of Section 1501 the Public Utility Code.

The testimony of Dr. Marino in *Povacz, et al.* could not disturb that conclusion because Dr. Marino testified on cross-examination that it is NOT his opinion that exposure to smart meters has been shown to cause health effects in humans. Sept. 15 Transcript at 674-75. Therefore, even if Dr. Marino's full testimony was considered in *Kreider*, it would not change the key findings of the *Kreider* Initial Decision.

Moreover, the information from other dockets can only be incorporated if those documents are, in fact, part of the record in the other proceedings, and the document in question here – an expert report by Andrew Marino -- was exchanged during discovery in *Povacz v. PECO*, C-C-2015-2475023, *Murphy v. PECO*, C-2015-2475726, and *Randall/Albrecht v. PECO*, C-2016-2537666, but was not offered or accepted into evidence in those proceedings. See September 15 Transcript at 562 (Complainants' counsel Mr. Harvey): “[T]he sixth exhibit is the report of Dr. Marino with its own two exhibits. Expert testimony -- expert reports don't go into evidence. It's merely in the record for purposes of identification and I know that Mr. Watson is going to refer to it today, so we're identifying it for the record.” See also September 16 Transcript at 872 (PECO counsel Mr. Renner): ” [Your Honors] made it very clear that, in this phase going forward, the parties would not do prefiled written testimony but we would exchange expert reports and that the expert reports would just be for the parties. They would not become part of the record. And, you know, we've litigated this portion of the case with that in mind, that the expert report could be used for the expert to refresh his recollection to talk about it on the stand; but the report itself doesn't go in the record. . . . “ Mr. Harvey: “No contest.” There is no procedure in the Commission's rules to incorporate non-admitted discovery from other Commission proceedings, and that is what Dr. Marino's report is.

It is instructive to note the path of Dr. Marino's report through the internet to Ms. Kreider's Exceptions, because it is a prime illustration of how quickly materials on the internet can be transmuted from their original form and intention. As noted above, on September 15-16, 2016 evidentiary hearings were held before the Commission in *Povacz, Murphy, and Randall/Albrecht*, at which time it was clear that Dr. Marino's expert report was not being offered into testimony, and would not be a part of the evidentiary record in those dockets. At or about that same time, Dr. Marino appears to have posted his expert report on his personal website with the label "Testimony." http://andrewamarino.com/PDFs/testimony-AAM_Report.pdf On October 2, 2016, the Smart Grid Awareness website linked to and quoted extensively from Dr. Marino's report as posted on his website, and implied that it was before this Commission as evidence, stating:

Whether the Pennsylvania PUC and PECO Energy will favorably respond to the reasoned arguments of Andrew Marino, Ph.D. is yet unknown, but if history is any lesson, they will likely remain with their heads in the sand (like the FCC) and proclaim that any claims for adverse biological effects from low-level wireless emissions remain "ambiguous" and "unproven." We will await the conclusion of the proceedings and update this article at a later date.

<https://smartgridawareness.org/2016/10/02/health-risks-associated-with-smart-meter-wireless-emissions/#more-14972>

By October 12, 2016, Ms. Kreider was referring to the document as "testimony" and specifically requesting that it be treated as record evidence in her proceeding on the grounds that it had been treated as record evidence in another proceeding. *See* Exceptions, p. 4. It thus took less than a month on the internet for the Marino report to take on the cloak of "record evidence," even though in reality it never had that stature. This kind of transmutation and confusion is why documents on the internet are not considered reliable on their face, and why they are not allowed

into evidence, except in limited circumstances where they are reviewed by, vouched for, and form a basis of opinion by an expert.

In sum, PECO respectfully submits that the Commission should reject Ms. Kreider's request to incorporate Dr. Marino's expert report into the record in this proceeding. The request is not timely; on cross-examination Dr. Marino severely limited the scope of his opinions such that it would not change the findings of the Initial Decision; the report is not record evidence in any other proceeding; and her request is thus an illustration of how and why internet materials are not inherently reliable.

B. Ms. Kreider Did Not Demonstrate That the ALJs Were Incorrect in Their Weighting of the Testimony

In the Initial Decision, the Administrative Law Judges evaluated and weighed the testimony of the various witnesses and ultimately gave more weight to the testimony of PECO's expert witnesses, stating (p. 27) that: "Complainant established a *prima facie* case of unsafe or unreasonable service. However, PECO presented rebuttal testimony and evidence that outweighed that presented by Ms. Kreider." *See also*, Initial Decision at 30, quoted above.

A great deal of Ms. Kreider's exceptions consist of various challenges to that conclusion; she variously states that her testimony should have been given more weight (because she is a registered nurse and is describing her own experience) and that the testimony of PECO's witnesses should be given less weight (because, she claims, they are biased because they were hired by PECO).

Generally, the Commission accepts the determinations of its Administrative Law Judges as to weight and credibility of testimony, unless a litigant makes a clear showing of error. Ms. Kreider has not made a clear showing of error – she just disagrees with the Administrative Law Judges.

For example, the Initial Decision did not ignore Ms. Kreider's status as a registered nurse; it specifically notes (p. 6, FOF 1), that Ms. Kreider is a registered nurse, and later states (p. 27, fn 13)

that her testimony was given more weight as a consequence.¹ The Initial Decision did not ignore Ms. Kreider's "empirical observations" (Exceptions, p. 2); it repeated them (p. 11, FOF 51, pp. 26-27) and they are a basis for the conclusion (p. 27) that Complainant made a *prima facie* case.

The claims of bias by PECO's witnesses, on the other hand, have no support whatsoever in the record. For example, Ms. Kreider's claim (Exceptions, p. 3) that Dr. Israel's "literature review was cherry-picked because he was paid to represent PECO's interests" is an unsupported assertion with no argument or record citation. Similarly, in support of her claims that Mr. Pritchard is biased (Exceptions, p. 2), Ms. Kreider claims that he is biased because he is contradicted by things that have been "reported on the internet and validated by our own readings" – none of which information is in the record in this proceeding. (And, given the Marino report illustration from above, there is good reason to disbelieve unexamined and unchallenged internet reports.)²

Ultimately, these claims of bias and incorrect weighting of the evidence are simply the standard claims made whenever a litigant does not triumph on a litigated fact. The Exceptions do not contain the type of specific record evidence or analysis that would suggest that the judgment of the Administrative Law Judges is incorrect.

C. Ms. Kreider's Legislative Concerns Are Not Supported By Record Evidence And Are Not Within the Commission's Jurisdiction

In her Exceptions (pp. 3-4), Ms. Kreider also raises questions as to whether the General Assembly, and Representative Godshall in particular, are biased. She requests an investigation of Representative Godshall for violation of ethics.

¹ Of course, Ms. Kreider was not identified or offered as an expert, so there is a limitation to how much weight can be given her testimony on the scientific issues in this proceeding.

² Similarly, Ms. Kreider's claim (p. 2) that she has a new doctor who agrees with her views is also extra-record to this proceeding, and cannot form the basis for an Exception.

There is no record evidence to support this request. Indeed, the entire record on this issue is a single question and answer during Ms. Kreider's cross-examination of Mr. Pritchard, as follows (Tr. at 87):

Ms. Kreider: Okay. Are you aware that there are numerous bills that have been sitting in Robert Godshall's office that have not been brought to the general assembly since 2012. People have -- legislatures have been trying to get opt-outs for various reasons and Representative Godshall will not allow these bills to go for vote in the general assembly since 2012?

Mr. Pritchard: I have not seen any of them personally, so I could not attest to that.

This is not a proper evidentiary foundation on which to make any findings on this issue.

Moreover, even if there was a proper evidentiary foundation, PECO respectfully submits that no provision of law gives the Commission jurisdiction to grant the requested relief of ordering an ethics investigation of a member of the General Assembly.

D. Ms. Kreider's Concerns Regarding the Americans with Disabilities Act and the Rehabilitation Act Are Not Within the Commission's Jurisdiction and are Not Supported By Record Evidence

In her Exceptions (p. 3), Ms. Kreider briefly makes a claim under the Americans with Disabilities Act and the Federal Rehabilitation Act, stating that: "In addition, PECO Is Ignoring that the Americans with Disabilities Act and Section 504 of the Rehab Act recognizes EHS as a protected class requiring accommodation."

PECO respectfully submits that the Commission does not have jurisdiction to enforce either the Americans with Disabilities Act or the Federal Rehabilitation Act. These are federal acts that require recourse to the federal courts or federal administrative agencies.

Even if one could argue that reasonable utility service needs to conform to Americans with Disabilities Act or the Federal Rehabilitation Act, Ms. Kreider's argument would still have several fatal flaws.

First, after a full opportunity for an evidentiary hearing, Ms. Kreider did not prove that she has a disability related to PECO's AMI meters. She failed to carry her burden of proof that AMI meters cause her harm.

Second, the Americans with Disabilities Act and the Federal Rehabilitation Act apply to a limited set of circumstances, primarily including employment, access to buildings, and access to government programs. Ms. Kreider made no explanation of how any of those provisions apply to PECO's installation of AMI meters.

Third, even if Ms. Kreider has a disability, and even if the Americans with Disabilities Act and the Federal Rehabilitation Act apply to the installation of AMI meters, all that Ms. Kreider claims to be required by those acts is that PECO make a reasonable accommodation to her. In this case, PECO offered to work with Ms. Kreider to relocate the meter at a greater distance from her home, and includes provisions in its tariff to allow Alternative Meter Supply Providers to install alternative technologies. *See* I.D. at 13, FOF 69, and 19, FOF 120-123. These are reasonable accommodations that certainly meet the Commission-jurisdictional requirement, under 66 Pa. C.S. §1501, to provide reasonable utility service. PECO submits that, to the extent that the Americans with Disabilities Act and the Federal Rehabilitation Act are to be considered in this proceeding, if at all, those accommodations should equally be seen as being reasonable under those acts, as well.

In sum, Ms. Kreider's claims with respect to the Americans with Disabilities Act and the Federal Rehabilitation Act are not within the Commission's jurisdiction to address and are outside of the Commission's jurisdiction to address.

III. Conclusion

For the reasons set forth above, PECO respectfully suggests that the Commission should deny the Exceptions of Complainant Susan Kreider and adopt the Initial Decision as written.

Respectfully submitted,



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Date:

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PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Susan Kreider

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Docket No. C-2015-2469655

PECO Energy Company

CERTIFICATE OF SERVICE

I, Ward L. Smith, hereby certify that I have this day served a copy of PECO Energy Company's Reply Exceptions via overnight mail to:

Susan Kreider
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Dated at Philadelphia, Pennsylvania, October 24, 2016



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