

Legal Department

Exelon Business Services Company
2301 Market Street/S23-1
P.O. Box 8699
Philadelphia, PA 19101-8699

Telephone 215.841.4000
Fax 215.568.3389
www.exeloncorp.com

Direct Dial: 215.841.4220

May 28, 2009

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

Re: New Fizon Catering, Inc. v. PECO Energy Company
PUC Docket No. C-2009-2083990

Dear Mr. McNulty:

Enclosed for filing with the Commission are the following documents and copies in the matter referenced above.

_____	Answer (Original and 3 copies)
_____	Motion to Consolidate (original and 3 copies)
<u> X </u>	Motion for Continuance of Hearing Date (original and 3 copies)
_____	Preliminary Objection (original and 3 copies)
_____	Exceptions (original and 9 copies)
_____	Reply Exceptions (original and 9 copies)
_____	Brief (original and 9 copies)
_____	Reply Brief (original and 9 copies)

Also enclosed is an extra copy of this letter, which I request that you date stamp and return to me in the envelope provided as proof of filing. I have enclosed a Certificate of Service showing that a copy of the above document was served on the interested parties.

Very truly yours,



Michael S. Swerling
Counsel for PECO Energy Company

MSS/zyr

Enc.

cc: New Fizon Catering, Inc.
ALJ Ky Van Nguyen (Via Fax and FedEx)

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

NEW FIZON CATERING, INC.	:	
	:	
v.	:	DOCKET NO. C-2009-2083990
	:	
PECO ENERGY COMPANY	:	

MOTION FOR CONTINUANCE OF HEARING DATE

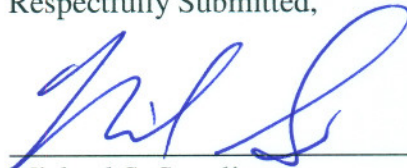
PECO Energy Company ("PECO Energy"), pursuant to 52 Pa. Code § 1.15(b), hereby requests a continuance of the hearing date scheduled in this matter and states the following:

1. An initial in-person hearing for this matter is currently scheduled for Friday, June 5, 2009 at 10:00 am.
2. I will be out of the office on vacation during the June 5, 2009 hearing date and therefore will be unable to attend the hearing.
3. Therefore, PECO is requesting that the hearing date be continued to a later date.
4. PECO also notes that Complainant has filed three formal complaints at three separate dockets (C-2008-2065498, C-2008-2079076 and C-2009-2083990) regarding the same issues and claims for relief.
5. An Initial Decision already issued in two of these dockets (C-2008-2065498 and C-2008-2079076) by Administrative Law Judge Marlane R. Chestnut on March 10, 2009 wherein dockets C-2008-2065498 and C-2008-2079076 were dismissed. A copy of the Initial Decision is attached as Exhibit A.
6. Complainant filed Exceptions to the Initial Decision on March 27, 2009 and PECO filed Reply Exceptions on April 6, 2009. The appeal of the Initial Decision is currently before the Commission awaiting decision at Public Meeting.

7. As the two dockets (C-2008-2065498 and C-2008-2079076) where Exceptions were filed involve the same matters raised in the current Complaint (C-2009-2083990), PECO requests that the hearing in docket C-2009-2083990 be stayed until the Commission renders its Order in dockets C-2008-2065498 and C-2008-2079076.

8. Therefore, PECO requests this proceeding be stayed for at least 60 days or until the Commission renders its Order, whichever comes first.

Respectfully Submitted,



Michael S. Swerling
Counsel for PECO Energy Company
2301 Market Street, S23-1
P.O. Box 8699
Philadelphia, PA 19101-8699
Direct Dial: 215.841.6841;
Fax: 215.568.3389
Michael.Swerling@exeloncorp.com

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

NEW FIZON CATERING, INC.

v.

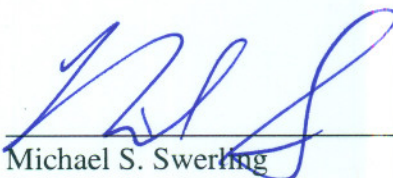
PECO ENERGY COMPANY

:
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:
:
:

DOCKET NO. C-2009-2083990

VERIFICATION

I, Michael S. Swerling, hereby declare that I am counsel for PECO Energy Company; that as such I am authorized to make this verification on its behalf; that the facts set forth in the foregoing Pleading are true to the best of my knowledge, information and belief, and that I make this verification subject to the penalties of 18 Pa. C.S. § 4904 pertaining to false statements to authorities.



Michael S. Swerling

Date: May 28, 2009



COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
P.O. BOX 3265, HARRISBURG, PA 17105-3265

3/12
IN REPLY PLEASE
REFER TO OUR FILE

ISSUED: March 10, 2009

MICHAEL SWERLING

MAR 12 2009

C-2008-2065498
C-2008-2079076

Due - 3/30

MICHAEL S SWERLING ESQUIRE
EXELON BUSINESS SERVICES COMPANY
2301 MARKET STREET/S23-1
PO BOX 8699
PHILADELPHIA PA 19101-8699

New Fizon Catering Inc.
v.
PECO Energy Company

TO WHOM IT MAY CONCERN:

Enclosed is a copy of the Initial Decision of Administrative Law Judge Marlane R. Chestnut. This decision is being issued and mailed to all parties on the above specified date.

If you do not agree with any part of this decision, you may send written comments (called Exceptions) to the Commission. Specifically, an original and nine (9) copies of your signed exceptions **MUST BE FILED WITH THE SECRETARY OF THE COMMISSION 2ND FLOOR, KEYSTONE BUILDING, 400 NORTH STREET, HARRISBURG, PA OR MAILED TO P.O. BOX 3265, HARRISBURG, PA 17105-3265, within **twenty (20) days** of the issuance date of this letter.** The signed exceptions will be deemed filed on the date actually received by the Secretary of the Commission or on the date deposited in the mail as shown on U.S. Postal Service Form 3817 certificate of mailing attached to the cover of the original document (52 Pa. Code §1.11(a)) or on the date deposited with an overnight express package delivery service (52 Pa. Code 1.11(a)(2), (b)). If your exceptions are sent by mail, please use the address shown at the top of this letter. A copy of your exceptions must also be served on each party of record. 52 Pa. Code §1.56(b) cannot be used to extend the prescribed period for the filing of exceptions/reply exceptions. A certificate of service shall be attached to the filed exceptions.

If you receive exceptions from other parties, you may submit written replies to those exceptions in the manner described above within **ten (10) days** of the date that the exceptions are due.

Exceptions and reply exceptions shall obey 52 Pa. Code 5.533 and 5.535 particularly the 40-page limit for exceptions and the 25-page limit for replies to exceptions. Exceptions should clearly be labeled as "EXCEPTIONS OF (name of party) - (protestant, complainant, staff, etc.)".

If no exceptions are received within **twenty (20) days**, the decision of the Administrative Law Judge may become final without further Commission action. You will receive written notification if this occurs.

Very truly yours,


James J. McNulty
Secretary

Encls.
Certified Mail
Receipt Requested
MH

Exhibit A

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

New Fizon Catering Inc.	:	
	:	
v.	:	C-2008-2065498
	:	C-2008-2079076
PECO Energy Company	:	

INITIAL DECISION

Before
Marlane R. Chestnut
Administrative Law Judge

HISTORY OF THE PROCEEDING

On September 10, 2008, New Fizon Catering, Inc. (complainant or New Fizon) filed a formal Complaint with the Pennsylvania Public Utility Commission (Commission) against PECO Energy Company (respondent or PECO). This Complaint, alleging a billing dispute, was docketed at Docket No. C-2008-2065498.

On October 15, 2008 respondent PECO filed an Answer which denied the material averments of the Complaint. Attached to the Answer were printouts from the Pennsylvania Department of State, Corporation Bureau, regarding Argento's Pizza & Spaghetti House (Exh. A), 1976 Pizza Corp. (Exh. B) and New Fizon Catering, Inc. (Exh. C), and an account history (Exh. D).

By Hearing Notice dated November 10, 2008, the matter was assigned to me and a hearing was scheduled for January 29, 2009. On November 13, 2008, I issued a Prehearing Order which directed the parties to comply with various procedural directives. That Prehearing

order specifically directed complainant, a corporate entity, to have an attorney enter a notice of appearance on or before January 5, 2009.

On December 8, 2008, complainant filed another Complaint with the Commission. This Complaint, which was docketed at Docket No. C-2008-2079076, also named PECO as the respondent, and was obviously addressed to the billing dispute that was the subject of the prior Complaint.

Although the Complaints had not been consolidated, by Hearing Notice dated December 19, 2008, this Complaint was also assigned to me and the hearing scheduled for the same date, time and location as the hearing scheduled at Docket No. C-2008-2065498.

On January 5, 2009, respondent PECO filed an Answer which denied the material averments of the Complaint at Docket No. C-2008-2079076. Attached to the Answer were the Complaint and filing documents related to the Complaint at Docket No. C-2008-2065498 (Exh. A), my November 13, 2008 Prehearing Order (Exh. B), the Corporation Bureau printouts (Exhs. C, D, and E), an account statement (Exh. F), a BCS (the Commission's Bureau of Consumer Services) Decision Report at #002346019 dated April 23, 2008 which completely rejected complainant's position that it was not liable for the account balance (Exh. G), a BCS Decision Report at #002440845 dated September 10, 2008, which noted that the matter had been previously addressed (Exh. H), and a BCS Decision Report at #002479156 dated December 12, 2008 which refused to accept the informal complaint (Exh. I).

Separately, on January 5, 2009, respondent PECO also filed a Motion to Consolidate and Dismiss (Motion), in which PECO requested that the Complaints be consolidated pursuant to 52 Pa. Code §5.81, and then dismissed for failure to comply with my November 13, 2008 Prehearing Order. Complainant's answer to PECO's Motion was due not later than January 28, 2009. 52 Pa.Code §§5.101(f)(1), 1.56(a)(1), 1.12(a).

On January 20, 2009, by Order Consolidating Complaints and Continuing Hearing (January 20, 2009 Order), I consolidated the Complaints and continued the hearing pending consideration of the Motion.

As of the date of this Initial Decision, complainant New Fizon has not filed a response to the Motion, nor has it had an attorney file an appearance as required by my November 13, 2008 Prehearing Order.

As discussed in more detail below, consistent with well-established Commission precedent, the Complaints at Docket Nos. C-2008-2065498 and C-2008-2079076 will be dismissed for failure to be represented by an attorney in an adversarial proceeding as well as for failure to comply with the November 13, 2008 Prehearing Order.

FINDINGS OF FACT

1. On September 10, 2008, New Fizon filed a formal Complaint against PECO alleging a billing dispute at Docket No. C-2008-2065498.

2. New Fizon Catering, Inc. is registered as a corporation with the Pennsylvania Department of State, Corporation Bureau.

3. PECO Filed an Answer to the Complaint at Docket No. C-2008-2065498 on October 15, 2008.

4. By Prehearing Order dated November 13, 2008, I directed complainant, which pursuant to 52 Pa. Code §1.21-1.23 must be represented by counsel, to have an attorney licensed to practice in Pennsylvania file a notice of appearance on or before January 5, 2009.

5. On December 8, 2008, New Fizon filed a second formal Complaint at Docket No. C-2008-2079076 against PECO. The subject of this Complaint is the same billing dispute that is the subject of the Complaint filed at Docket No. C-2008-2065498.

6. Both Complaints were assigned to me and scheduled for hearing on January 29, 2009.

7. PECO Filed an Answer to the Complaint at Docket No. C-2008-2079076 on January 5, 2009.

8. Also on January 5, 2009, PECO filed a Motion to Consolidate and Dismiss (Motion), in which PECO requested that the Complaints be consolidated pursuant to 52 Pa. Code §5.81, and then dismissed for failure to comply with my November 13, 2008 Prehearing Order. Pursuant to 52 Pa. Code §§5.101(f)(1), 1.56(a)(1) and 1.12(a), complainant's answer to PECO's Motion was due not later than January 28, 2009.

9. No response to the Motion was filed with the Commission or served on me. No notice of appearance was filed with the Commission or served on me in compliance with the Prehearing Order.

DISCUSSION

The regulations promulgated by the Commission require that corporate entities be represented by counsel. 52 Pa. Code §1.21-§1.23; *In Re: Checker Cab*, 49 Pa. PUC 159, 160 (1975) (Pleadings must be filed by an attorney in good standing to practice before a Court of record of the Commonwealth of Pennsylvania. Letter from manager filed as response to order to show cause rejected.); *Moore v. I. Berman and Cross, Inc.*, 49 Pa. PUC 427, 428 (1975) (Officer cannot appear on behalf of corporation). See also, *Shortz v. Farrell*, 327 Pa. 81, 193 A.20 (1937); *Franconia Mennonite Conference v. Verizon Pennsylvania Inc.*, Docket No. C-20029008, Commission Final Order entered June 6, 2003.

As explained by the Commission in *Rock Street Realty v. PPL Gas Utilities Corp*, Docket No. C-20078194, Commission Opinion and Order entered July 18, 2008, while a complaint

may be filed by an unrepresented corporation, the proceeding becomes adversarial upon the filing of the utility's answer and the representation obligation becomes effective.

This is an adversarial proceeding. Complainant New Fizon, as a corporate entity, is required to be represented by counsel. No attorney was listed on the Complaint, nor had one entered an appearance in compliance with my order. Complainant obviously was aware of this requirement – not only is it contained within the Commission regulations at 52 Pa. Code §1.21-§1.23, it was expressly set out in my November 13, 2008 Prehearing Order as well as the Hearing Notices dated November 10 and December 19, 2008.¹ Sanctions for the failure of complainants to comply with such orders include dismissal of the complaint, either at or prior to hearing. *Treffinger v. PPL Electric Utilities Corp.* Docket No. C-20027978, Commission Opinion and Order entered March 3, 2003.

Therefore, the Complaints at Docket Nos. C-2008-2065498 and C-2008-2079076 will be dismissed for failure to be represented by an attorney as required by the Commission's regulations as well as for failure to comply with my November 13, 2008 Prehearing Order.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the parties and subject matter of this case.
2. The Commission's regulations require that "persons" (other than individuals) be represented by an attorney in "adversarial proceedings." A "person" includes a corporation.
3. This proceeding became an "adversarial proceeding" at the time the Answers were filed.

¹ "Pursuant to 52 Pa. Code §§1.21 & 1.22, you may represent yourself if you are an individual, or you may have an attorney represent you. However, if you are a partnership, corporation, trust, association or government agency or subdivision, you must have an attorney represent you in this proceeding. Unless you are an attorney, you may not represent someone else."

4. Complainant, a corporation, was required to be represented by an attorney once this case became an adversarial proceeding.

5. By failing to comply with the November 13, 2008 Prehearing Order, complainant has engaged in conduct which is ground for sanctions pursuant to 52 Pa. Code §1.26.

6. Dismissal of the Complaints in this case is warranted for the complainant's failure to comply with the Commission's regulations regarding attorney representation and for the complainant's failure to comply with my order.

THEREFORE,

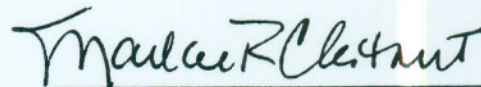
IT IS ORDERED:

1. That the Motion to Consolidate and Dismiss filed by respondent PECO Energy Company is granted;

2. That the Complaints filed with the Pennsylvania Public Utility Commission on September 10, 2008 and December 8, 2008 by New Fizon Catering Inc. at Docket Nos. C-2008-2065498 and C-2008-2079076 are dismissed; and

3. That the record at Docket Nos. C-2008-2065498 and C-2008-2079076 be marked closed.

Date: February 12, 2009



Marlane R. Chestnut
Administrative Law Judge

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

NEW FIZON CATERING, INC.

v.

PECO ENERGY COMPANY

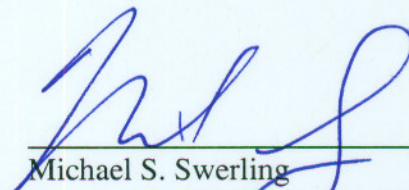
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DOCKET NO. C-2009-2083990

CERTIFICATE OF SERVICE

I, Michael S. Swerling, hereby certify that I have this day served a copy of PECO Energy Company's Motion in the above matter upon all interested parties by mailing a copy, properly addressed and postage prepaid to:

Penna, Grabois & Associates
David C. Devine
166 E. Butler Avenue
Ambler, PA 19002



Michael S. Swerling
Counsel for PECO Energy Company
2301 Market Street, S23-1
P.O. Box 8699
Philadelphia, PA 19101-8699
(215) 841-4220
Fax: 215.568.3389
Michael.Swerling@exeloncorp.com

Dated at Philadelphia, Pennsylvania, May 28, 2009.