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June 16, 2009

REFILING TO CORRECT DOCKET # ON CERTIFICATE OF SERVICE

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

**Re: Digital 833 Chestnut, LLC v. PECO ENERGY Company
PUC Docket No. C-2008-2076610**

Dear Mr. McNulty:

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

<u> </u>	Answer (Original and 3 copies)
<u> </u>	Motion to Consolidate (original and 3 copies)
<u> X </u>	Motion to Dismiss and for a Judgment on the Pleadings (original and 3 copies)
<u> </u>	Preliminary Objection (original and 3 copies)
<u> </u>	Exceptions (original and 9 copies)
<u> </u>	Reply Exceptions (original and 9 copies)
<u> </u>	Brief (original and 9 copies)
<u> </u>	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,



Ward L. Smith
Counsel for PECO Energy Company

WLS/zyr

Enc.

cc: ALJ Guy Koster
Certificate of Service

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

DIGITAL 833 CHESTNUT, LLC	:	
	:	
v.	:	DOCKET NO. C-2008-2076610
	:	
PECO ENERGY COMPANY	:	

**MOTION TO DISMISS AND
MOTION FOR A JUDGMENT ON THE PLEADINGS
OF
PECO ENERGY COMPANY**

PECO Energy Company (“PECO”), in accordance with the provisions of 52 Pa. Code §§ 5.102 and 5.103, hereby respectfully moves to dismiss this matter as against PECO and moves for a judgment on the pleadings as to the formal complaint (“Complaint”) of Digital 833 Chestnut, LLC (“Digital 833” or “Complainant”) filed with the Commission in the above-captioned proceeding, and in support thereof states as follows:

1. Digital 833 initiated this proceeding by Complaint dated November 19, 2008, which was served by the Commission on December 1, 2008.

2. On January 12, 2009, PECO filed its Answer in this proceeding. PECO did not file New Matter.

3. The pleadings in this matter are thus complete, and this proceeding is ripe for a motion for judgment on the pleadings pursuant to 52 Pa. Code § 5.102.

4. The pleadings in this matter do not pose any material fact that is within the jurisdiction of the Commission to resolve. This motion involves an issue of jurisdiction and, as such, it may be decided by the presiding officer by issuance of an initial decision at any time prior to the termination of hearings. 52 Pa. Code § 5.103(d)(3).

5. The Commission has authority, under 66 Pa.C.S. § 508, to “vary, reform, and revise” contracts that are entered into by a public utility and a third party. That power may, of necessity, include the power to interpret such contracts entered into by public utilities. However, the Commission does not have a similar power to interpret contracts to which public utilities are not parties. Such controversies are private contractual disputes, and the Commission generally does not have jurisdiction to resolve private contractual disputes. *See Adams v. Pa. P.U.C.*, 819 A.2d 631 (Pa. Cmwlth. 2003); *Litman v. The Peoples Natural Gas Co.*, 303 Pa. Superior Ct. 345, 449 A.2d 720 (1982); *Leveto v. National Fuel Gas Distribution Corporation*, 243 Pa. Superior Ct. 510, 366 A.2d 270 (1976); *Reading & Southwestern Street Railway Company v. Pa. P.U.C.*, 168 Pa. Superior Ct. 61, 77 A.2d 102 (1950).

6. The Digital 833 Complaint involves a contract between itself and Celeren, to which PECO is not a party. This contract – referred to in the Complaint as the “Contract” – is described in paragraph 10 of the Complaint as being an agreement entered into between Celeren’s property manager, PAMI Renaissance Properties, Inc., and Celeren. A copy of the Contract is attached to the Complaint, and on its face it is an agreement

between the two parties noted in paragraph 10 of the Complaint. There is no allegation or indication that PECO is a party to the Contract.

7. The Contract states (Complaint Exhibit A, paragraph 2.1), in material part, that:

2.1 Ancillary Agreements: During the term, CELEREN shall negotiate as necessary purchase agreements for the delivery of those utility commodities as listed herein for the provision of the Services (each, an “Ancillary Agreement,”) (Ancillary Agreement shall further shall further include each utility account for the energy utilities supplied to the Facility with any current and future energy providers); provided, however, that CUSTOMER hereby agrees that, during the term, CELEREN shall be and otherwise act as, in its sole discretion as necessary from time-to-time, the sole energy consultant, agent, aggregator, broker, supplier, and/or energy marketer, as such terms are defined by applicable federal and state laws, on behalf of CUSTOMER in conjunction and accordance with this Agreement, for the energy utilities supplied to the Facility and covered by this Agreement.

8. Digital 833’s complaint against PECO is set forth in paragraphs 22-36 of the Complaint.¹

9. In paragraph 26 of the Complaint, Digital 833 makes the following allegation regarding the proper interpretation of the Contract:

By the express terms of the Contract [between Digital 833 and Celeren], Celeren was acting as Complainant’s “broker,” “marketer,” or “supplier,” for purposes of coordinating electricity services with PECO.

10. Interpreting this contractual language, Digital 833 has concluded that Celeren was contractually acting as Complainant’s “broker,” “marketer,” or “supplier.” For its part,

¹ Paragraph 22 is a catchall incorporation of the background paragraphs, and does not require further analysis.

PECO has alleged (Answer, ¶ 26) that “since this Contract language does not require Celeren to act as all of the listed functions, but instead on its face allows Celeren to act as one ‘and/or’ the other of these functions, under this Contract Celeren could have acted as Complainant’s ‘sole energy consultant’ or its ‘agent’ while NOT acting as Complainant’s ‘aggregator,’ ‘broker,’ ‘supplier,’ or ‘energy marketer.’” Determination of which of these roles, if any, was being performed by Celeren requires a determination of the respective contractual rights and roles of Digital 833 (through its property manager) and Celeren under the Contract. Such a determination is a quintessential private contractual matter – the review of private contract language to determine the respective roles that private entities agreed to take in their business dealings with each other. As described in paragraphs 4 and 5 of this Motion, the resolution of such private contractual matters is outside the scope of the Commission’s jurisdiction. The key determination set forth in paragraph 26 of the Complaint therefore cannot be jurisdictionally made by the Commission.

11. In paragraph 27 of the Complaint, Digital 833 makes the following allegation regarding Celeren’s activities under the Contract:

Complainant believed in good faith that Celeren was also acting as a licensed EGS under the terms of the Contract and as defined in PECO’s Supply Tariff and PUC regulations.

12. On its face, this allegation requires a separate determination of a private contractual matter – whether Celeren was “acting as a licensed EGS under the terms of the Contract.” The key determination set forth in paragraph 27 of the Complaint therefore also cannot be jurisdictionally made by the Commission.

13. The remaining allegations of the Complaint against PECO are built upon the above-noted determination of a private contractual matter. Paragraph 28, for example, claims that: “As Complainant’s EGS and broker, Celeren was solely responsible to PECO for payment of electric services rendered to Complainant.” That allegation is clearly built upon the private contractual determination that Digital 833 asks the Commission to make in the two preceding paragraphs – that Celeren was contractually acting as an EGS or broker -- and thus also cannot be reached in this proceeding.

14. Paragraphs 23, 24, 29 and 32 of the Complaint reference PECO’s Supply Tariff, but these references do not provide a separate jurisdictional basis for the Commission to determine this matter. These paragraphs purport to describe Celeren’s obligations to both Digital 833 and PECO on the grounds that, under PECO’s Supply Tariff, Celeren is an Electric Generation Supplier (“EGS”). Yet the predicate for demonstrating that Celeren is an EGS, as set forth in paragraph 27 of the Complaint, is a private contractual issue: “Digital 833 believed in good faith that Celeren was also acting as a licensed EGS under the terms of the Contract.” (emphasis supplied).

15. Paragraph 25 of the Complaint briefly references the Public Utility Code, but that reference does not provide a separate jurisdictional basis for the Commission to determine this matter. This paragraph notes that 66 Pa.C.S § 2803 defines a “broker” or “marketer” as “[a]n entity, licensed by the commission, that acts as an agent or intermediary in the sale or purchase of electric energy but that does not take title to

electric energy.” However, Digital 833 makes no allegation that Celeren was “licensed by the Commission” to perform the roles of broker or marketer. Instead, its sole basis for making those allegations is the private contractual language previously described in this motion.²

16. Paragraphs 30, 31, 32 and 33 reference the Commission’s regulations, but these references do not provide a separate jurisdictional basis for the Commission to determine this matter. These paragraphs allege that PECO had a duty to notify Digital 833, separate and apart from any notification given to Celeren, of Digital 833’s delinquent bills. Such an obligation, however, is predicated on the private contractual determination that Celeren was acting as an EGS, rather than as Digital 833’s agent. In order to determine whether such a duty exists, therefore, the Commission would first have to determine the private contractual dispute between Celeren and Digital 833, and resolve the contractual question of which role was being fulfilled by Celeren.

17. Paragraph 33 posits a general PECO “duty” to conduct proper due diligence as to whether Celeren was a proper EGS, but provides no reason, outside of the Celeren/Digital 833 contract, that would arguably lead to such a duty.

² PECO is a party to *Weissenberger v. ConServe*, Delaware County CCP 08-6555. That proceeding involves an agent – ConServe – that performed functions similar to the functions performed by Celeren and which has also gone bankrupt. In that proceeding, PECO has argued that the matter should be removed to the Public Utility Commission because the Complaint in that matter raises specific issues of interpretation of the landlord-tenant notice provisions of the Public Utility Code, 66 Pa. C.S. §1521 et seq. Those landlord-tenant considerations are not implicated in the instant proceeding. PECO’s motion has not been ruled on; the *Weissenberger* matter is currently stayed under the Bankruptcy Code.

18. Paragraph 34 is an omnibus allegation that PECO breached its duty and therefore allowed additional charges to accrue. However, since the alleged “breach” is predicated on the arguments made in the prior paragraphs, it is also based upon the private contractual determinations included in the prior paragraphs.

19. Paragraphs 35 and 36 are requests for relief – requesting a refund and suspension of future payments – but are based “on the foregoing” arguments. Those requests for relief therefore also are predicated on the private contractual determination described above, and similarly fall outside of the Commission’s jurisdiction.

CONCLUSION

For the reasons set forth above, PECO requests that the Commission dismiss this Complaint on the grounds that resolving it would require the Commission to decide private contractual matters that are outside of its jurisdiction to resolve.

Respectfully submitted,



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June 16, 2009

