

NOTICE TO PLEAD:

You are hereby notified that a responsive pleading must be filed within twenty (20) days after service of this motion or a judgment may be entered against you.

KLEHR, HARRISON, HARVEY,
BRANZBURG & ELLERS LLP

BY: Keith Lorenze
Keith Lorenze
Attorney for Complainant
Old York LLC

**COMMONWEALTH OF PENNSYLVANIA
BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION**

OLD YORK LLC,

Complainant,

v.

PECO ENERGY COMPANY,

Respondent.

No. C-2009-2086070

**MOTION OF COMPLAINANT OLD YORK LLC TO ENFORCE SETTLEMENT
AGREEMENT**

Complainant Old York LLC (“Old York”) hereby moves this Commission, pursuant to 52 Pa. Code § 5.103, for an order enforcing the settlement agreement reached between the parties. In support thereof, Old York avers as follows:

Introduction

1. This matter involves Old York’s challenge to the improper conversion of payments to an unannounced deposit by respondent PECO Energy Company (“PECO”), as well as to PECO’s subsequent demand for payment of the amount that should have been applied

toward Old York's account, but was being held as a deposit, and PECO's application of a late charge to monies already paid off by Old York.¹

2. In August 2009, ongoing settlement discussions between counsel culminated in the parties reaching an amicable resolution of their dispute. Although they were unable to finalize the form of the settlement, counsel for Old York and counsel for PECO reached an agreement as to all essential terms. This conclusion is evident from the communications between counsel, from the communications between PECO's counsel and the Honorable Ky Van Nguyen, and from the documentation that was exchanged by counsel to memorialize the parties' agreement.

3. Notwithstanding the parties' agreement, PECO now has sought to change one or more of the terms of the settlement previously reached. In that regard, on September 22, 2009, PECO suggested changing a twenty-day notice period to fifteen under the false premise that it was "reinitiat[ing] settlement discussions from the point that they collapsed a few weeks ago." Old York now brings this motion to enforce the terms of the parties' settlement agreement in light of PECO's apparent intent not to abide by the obligations to which it previously had agreed to assume.

Argument

4. Section 5.103(a) of Title 52 of the Pennsylvania Code provides: "A request may be made by motion for relief desired, except as may be otherwise expressly provided in this chapter and Chapters 1 and 3 (relating to rules of administrative practice and procedure; and special provisions). A motion must set forth the ruling or relief sought, and state the grounds therefor and the statutory or other authority upon which it relies." 52 Pa. Code § 5.103(a).

¹ The facts of this matter are set forth more fully in the Formal Complaint filed by Old York on or about January 23, 2009 and are incorporated herein by reference.

5. Section 5.103(b) of Title 52 of the Pennsylvania Code provides: “A motion may be made in writing at any time, and a motion made during a hearing may be stated orally upon the record, or the presiding officer may require that an oral motion be reduced to writing and filed separately. Written motions must contain a notice which states that a responsive pleading shall be filed within 20 days of the date of service of the motion.” 52 Pa. Code § 5.103(b).

6. Old York moves to enforce the settlement agreement into which the parties entered as a result of the communications between counsel in August 2009. As explained in further detail below, enforcement is consistent with Pennsylvania law because, *inter alia*, the parties reached an agreement as to all material and necessary details of their bargain. Thus, notwithstanding the fact that certain non-essential issues were not finally resolved, a settlement of this matter has been reached and PECO should be directed to perform its obligations under the essential terms of the contract.

7. The voluntary settlement of disputes is encouraged in Pennsylvania: “Judicial policy favors the settlement of law suits and in the absence of fraud and mistake the court will enforce an agreement to settle a legal dispute.” *Miller v. Clay Township*, 555 A.2d 972, 973 (Pa. Commw. Ct. 1989).

8. The enforceability of settlement agreements is determined according to principles of contract law. *Krebs v. United Refining Co.*, 893 A.2d 776, 783 (Pa. Super. Ct. 2006).

9. “[I]f the parties agree on essential terms and intend them to be mutually binding, a contract is formed even though the parties intend to adopt a formal document later which will include additional terms.” *Compu Forms Control, Inc. v. Altus Group, Inc.*, 574 A.2d 618, 624 (Pa. Super. Ct. 1990). Provided that “the parties have agreed upon the essential terms of an

agreement,” a Pennsylvania court will enforce such an agreement “even when the parties have failed to execute a written agreement.” *Krebs*, 893 A.2d at 783.

10. Significantly, a Pennsylvania court has no discretion in such circumstances: “Where a settlement agreement contains all of the requisites for a valid contract, a court *must* enforce the terms of the agreement.” *Mastroni-Mucker v. Allstate Ins. Co.*, 976 A.2d 510, 518 (Pa. Super. Ct. 2009) (emphasis added).

11. Settlement negotiations between the parties were conducted during a meeting between counsel at PECO’s offices on or about July 30, 2009. Following that meeting, and during the month of August 2009, settlement offers and counteroffers were circulated between counsel.

12. During the course of a telephone conference between counsel on August 13, 2009, the parties orally agreed to a resolution of this matter. The next day, on August 14, 2009, PECO’s counsel forwarded a proposed written agreement that “capture[d] what [counsel] discussed” the prior day. PECO’s written proposal contained, *inter alia*, the following essential settlement terms: (1) PECO would remove the existing deposit charge of \$84,295.00 from Old York’s account; (2) Old York would pay PECO a net total amount of \$3,731.69 in late fees; (3) Old York would enroll in the EFT program for a minimum of 18 months; and (4) Old York would receive a bill issued by PECO twenty days in advance of the automatic debit from Old York’s account for monthly services rendered. A copy of the August 14, 2009, 2:46 p.m. e-mail from PECO’s counsel to counsel for Old York and the accompanying written settlement proposal from PECO are attached together hereto as Exhibit “A.”

13. Less than one hour later that same day, at approximately 3:25 p.m. on August 14, 2009, counsel for Old York reached PECO’s counsel by telephone and informed him that while

Old York agreed to the basic terms of the proposed agreement, lead counsel for Old York had not yet had the opportunity to conduct a careful review of the entire proposal and that Old York's intention was to propose at least one modification to the details of the settlement document. A copy of the August 14, 2009, 3:24 p.m. e-mail referencing the telephone call between counsel for the parties is attached hereto as Exhibit "B."

14. Shortly thereafter, PECO's counsel informed the Honorable Ky Van Nguyen as follows: "Earlier today, the parties reached settlement in the above-captioned proceeding. The parties are finalizing a few details in the settlement document and expect to execute it either late today or early next week, after which PECO will file a Certificate of Satisfaction in this matter." Thus, by PECO's own admission, an agreement as to all essential terms had been reached by the parties, and all that remained to be resolved were "a few details in the settlement document." A copy of the August 14, 2009 e-mail sent by PECO's counsel to the Honorable Ky Van Nguyen providing notification of the settlement is attached hereto as Exhibit "C."

15. In the days and weeks following the August 14, 2009 settlement, counsel for the parties traded e-mails and telephone calls in an effort to resolve the remaining details of the parties' agreement and to formalize all such details in a written document to be executed by their principals. While Old York and PECO were unable to finalize the details concerning Old York's participation in the EFT program, such as whether the invoices would be based on "actual usage" and what PECO intended by the use of the phrase "normal programmatic basis," the parties *did* agree that, *inter alia*, Old York would participate in the EFT program and make the necessary arrangements to allow for the automatic debit of the invoiced amounts due to PECO for monthly service.

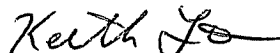
16. Old York's commitment to participate in the EFT program provided the essential basis of the bargain from PECO's perspective because, provided that sufficient funds were placed into Old York's account in advance of the automatic debit, it guaranteed a timely monthly payment by Old York. Obtaining such a commitment from Old York effectively eliminated the source of this dispute: the allegations made by PECO that Old York consistently made late payments on its account, which in turn resulted in PECO's imposition of a deposit charge. The details of the EFT program, while perhaps important from PECO's own administrative or internal procedural perspective, did *not* form the basis of the parties' bargain and were neither material nor necessary to the resolution of the instant dispute.

17. Therefore, for the reasons stated above, the Commission should enter an order memorializing the following terms of the parties' August 14, 2009 settlement: (1) PECO shall remove the existing deposit charge of \$84,295.00 from Old York's account; (2) Old York shall pay PECO a net total amount of \$3,731.69 in late fees; (3) Old York shall enroll in the EFT program for a minimum of 18 months; and (4) Old York shall receive a bill issued by PECO twenty days in advance of the automatic debit from Old York's account for monthly services rendered. The Commission should also retain jurisdiction over this matter to ensure the parties' compliance with their respective obligations under this settlement.

WHEREFORE, complainant Old York LLC respectfully requests that the Commission enter an order providing that: (1) PECO shall remove the existing deposit charge of \$84,295.00 from Old York's account; (2) Old York shall pay PECO a net total amount of \$3,731.69 in late fees; (3) Old York shall enroll in the EFT program for a minimum of 18 months; (4) Old York shall receive a bill issued by PECO twenty days in advance of the automatic debit from Old York's account for monthly services rendered; and (5) the Commission shall retain jurisdiction over this matter to ensure the parties' compliance with their respective obligations under this settlement.

Respectfully submitted,

Dated: October 23, 2009



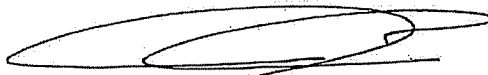
A. Grant Phelan
Keith Lorenze
KLEHR, HARRISON, HARVEY,
BRANZBURG & ELLERS LLP
260 South Broad Street
Philadelphia, Pennsylvania 19102
(215) 568-6060

Attorneys for Complainant
Old York LLC

VERIFICATION

I, Jeffrey J. Cohen, hereby verify that I am the President of Old York SPV MGR Corp., that I am authorized to make this verification on behalf of Old York LLC, that I have reviewed the Motion of Complainant Old York LLC to Enforce Settlement Agreement, and that the facts set forth therein are true and correct to the best of my personal knowledge or information and belief. I understand that this verification is made subject to the penalties of 18 Pa. C.S.A. § 4904, relating to unsworn falsifications to authorities.

Dated: 10/22/09



Jeffrey J. Cohen

EXHIBIT "A"

Keith Lorenze - Old York Settlement_v1.DOC

From: <ward.smith@exeloncorp.com>
To: <KLorenze@klehr.com>
Date: 8/14/2009 2:46 PM
Subject: Old York Settlement_v1.DOC
Attachments: Old York Settlement_v1.DOC

<<Old York Settlement_v1.DOC>> Keith: I think the attached captures what we discussed. Please take a quick look and give me any comments. I'd like to have this fully resolved before I email the ALJ telling him we've settled.

W

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Settlement and Release
Old York, LLC v. PECO Energy Company
Pennsylvania Public Utilities Commission
Docket No. C-2009-2086070

PECO Energy Company ("PECO") and Old York, LLC ("Old York") (together, the "Parties"), hereby agree to the following settlement and release. For valuable consideration exchanged, and intending to be legally bound, the Parties agree as follows:

(1) PECO will remove from the Old York bill for electric service the existing charge for a deposit in the amount of \$84,295.00.

(2) The Old York account for electric service currently has \$11,150.51 in accumulated late payment charges, and a pending credit of \$1,843.56 representing imputed interest on the deposit which PECO assessed against the account, but is now removing from the account. PECO will apply the \$1,843.56 deposit interest credit to the Old York account. In addition, PECO will provide Old York with a credit, or at PECO's option a reversal of late payment charges, of \$5,575.26. It is intended that the combined effect of these two transactions will be that Old York will pay a net total of \$3,731.69 beyond the amounts billed to it for electric utility service.

(3) Within 30 days of execution of this agreement, Old York will enroll in PECO's electronic funds transfer ("EFT") program so that its bills for electric service will be paid via automatic electronic transfer from its bank account. Old York will remain enrolled in the EFT program for a minimum of 18 months.

(4) If Old York withdraws from or cancels its participation in PECO's EFT program prior to the 18 month timeline set forth above, PECO will impose a two-month deposit requirement on the Old York account. Old York agrees that, if the deposit is imposed due to it withdrawing or canceling participation in PECO's EFT program, Old York will pay the imposed deposit amount and will not challenge imposition of that deposit amount.

(5) The Parties recognize that Old York wishes to have sufficient notice to make certain that it has funds in its account to cover any electronic fund transfer. PECO's normal billing/EFT sequence is for a bill to be issued to the customer with payment due 20 days later, including a statement on the face of the bill that a defined amount of funds will be withdrawn from the customer account on a specified date approximately 20 days after issuance of the bill. Old York's participation in the EFT program will be on that normal programmatic basis, as applied by PECO to all of its customers from time-to-time. No special procedure will be applied to the Old York account for additional notices.

(6) The Parties intend to resolve the deposit issues raised in this docket, but not to address any other issues between the parties. Therefore, the application of all other PECO procedures for billing, deposits, and payments, as set forth in the Commission's regulations or PECO's Tariff and as adopted from time-to-time, are not altered by this Agreement.

(7) Contemporaneously with its execution of this Settlement and Release, Old York shall sign a Withdrawal of its Complaint in this docket. PECO will file that Withdrawal form with the Commission.

(8) The Parties agree that this Settlement and Release resolve all claims between them that were raised, or that could have been raised, with respect to the deposit charged by PECO to the Old York account in the summer of 2008 and which is addressed in Old York's complaint in this docket. The Parties hereby therefore forever release each other of all claims with respect to those charges and any related issues that were raised or which could have been raised in Old York's complaint.

Agreed to this _____ day of August, 2009.

Ward L. Smith
Assistant General Counsel
Exelon Business Services Company
Counsel for PECO Energy

Keith Lorenze
Klehr, Harrison, Harvey,
Branzburg & Ellers, LLP
Counsel for Old York, LLC

August ____, 2009

EXHIBIT "B"

Keith Lorenze - RE: Old York Settlement_v1.DOC

From: <ward.smith@exeloncorp.com>
To: <KLorenze@klehr.com>
Date: 8/14/2009 3:24 PM
Subject: RE: Old York Settlement_v1.DOC

Please call me.

W

-----Original Message-----

From: Keith Lorenze [mailto:KLorenze@klehr.com]
Sent: Friday, August 14, 2009 3:20 PM
To: Smith, Ward L.:(BSC)
Subject: RE: Old York Settlement_v1.DOC

I will have at least one change to this document. I cannot execute this on behalf of Old York; Grant has just instructed me not to and that he will review and do so.

>>> <ward.smith@exeloncorp.com> 8/14/2009 3:12 PM >>>

Keith:

I messed up the description of the withdrawal procedure in paragraph 7. It should say:

(7) Upon execution of this Settlement and Release, PECO shall file a Certificate of Satisfaction with the Commission. Within 2 business days thereafter, Old York shall file a letter with the Commission stating that it agrees with that the matter has been satisfied and that its Complaint should be withdrawn.

Here's the document that I would then file:

<<Old York Certificate of Satisfaction_v1.DOC>>

W

-----Original Message-----

From: Smith, Ward L.:(BSC)
Sent: Friday, August 14, 2009 2:44 PM
To: 'Keith Lorenze'
Subject: Old York Settlement_v1.DOC

<< File: Old York Settlement_v1.DOC >> Keith: I think the attached captures what we discussed. Please take a quick look and give me any comments. I'd like to have this fully resolved before I email the ALJ telling him we've settled.

W

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EXHIBIT "C"

From: <ward.smith@exeloncorp.com>
To: <knguyen@state.pa.us>
CC: <KLorenze@klehr.com>, <KTATAR@klehr.com>
Date: 8/14/2009 3:39 PM
Subject: Old York LLC v. PECO Energy Company, C-2009-2086070

Dear Administrative Law Judge Nguyen:

Earlier today, the parties reached settlement in the above-captioned proceeding. The parties are finalizing a few details in the settlement document and expect to execute it either late today or early next week, after which PECO will file a Certificate of Satisfaction in this matter. Consequently, PECO requests that it not be required to file its Answer to Old York, LLCs Motion for Summary Judgment, which would otherwise be due today. I am authorized to state that Keith Lorenze, counsel for Old York, LLC, supports this request.

Ward Smith

-----Original Message-----

From: Nguyen, Ky [mailto:knguyen@state.pa.us]
Sent: Tuesday, August 04, 2009 9:10 AM
To: Smith, Ward L.:(BSC)
Cc: KLorenze@klehr.com; KTATAR@klehr.com
Subject: RE: Old York LLC v. PECO Energy Company, C-2009-2086070

Your request for a 10-day extension in which to file an answer to Old York's Motion for Summary Judgment is granted.

-----Original Message-----

From: ward.smith@exeloncorp.com [mailto:ward.smith@exeloncorp.com]
Sent: Monday, August 03, 2009 10:03 AM
To: Nguyen, Ky
Cc: KLorenze@klehr.com; KTATAR@klehr.com
Subject: Old York LLC v. PECO Energy Company, C-2009-2086070

Dear ALJ Nguyen:

Attached please find a letter from PECO requesting a 10-day continuance to Answer Old York LLC's Motion for Summary Judgment, due to ongoing settlement discussions. I am authorized to say that Mr. Lorenze, on behalf of Old York LLC, supports this request.

Ward Smith

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