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January 25, 2010

**Via Electronic Filing**James McNulty, Secretary  
PA Public Utility Commission  
PO Box 3265  
Harrisburg, PA 17105-3265

Re: Petition of PECO Energy Company Requesting a Declaratory Order to Terminate a Controversy or Remove Uncertainty Regarding Application of PECO's Rate Schedule GS for Public Utility Service Provided to Wireless Philadelphia  
Docket No. P-2009-2109629

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Dear Secretary McNulty:

On behalf of the City of Philadelphia and Wireless Philadelphia t/d/b/a Digital Impact Group enclosed please find the original Prehearing Memorandum along with the electronic filing confirmation page with regard to the above-referenced matter. Copies have been served in accordance with the attached Certificate of Service.

Sincerely,



Carl R. Shultz

Enclosure

cc: Hon. Angela T. Jones, ALJ (w/enc)  
Certificate of Service w/enc. (w/enc)

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Petition of PECO Energy Company Requesting :  
A Declaratory Order To Terminate a Controversy :  
Or Remove Uncertainty Regarding : Docket No. P-2009-2109629  
Application of PECO's Rate Schedule GS :  
For Public Utility Service Provided :  
To Wireless Philadelphia :

**CERTIFICATE OF SERVICE**

I hereby certify and affirm that I have this day served a copy of the foregoing Prehearing Memorandum on the following persons in the manner specified:

**Via First Class Mail and/or Email**

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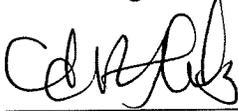
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Dated: January 25, 2010

  
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Carl R. Shultz, Esq.

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Petition Of PECO Energy Company :  
Requesting A Declaratory Order To : Docket No. P-2009-2109629  
Terminate A Controversy Or Remove :  
Uncertainty Regarding Application Of :  
PECO's Rate Schedule GS For Public :  
Utility Service Provided To Wireless :  
Philadelphia :

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**PREHEARING MEMORANDUM OF  
THE CITY OF PHILADELPHIA AND DIG**

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The City of Philadelphia (“City”) and Wireless Philadelphia, t/d/a Digital Impact Group (“DIG”) (collectively, the “Wireless Entities”) submit this pre-hearing memorandum in the above-captioned proceeding.

**I. HISTORY OF THE PROCEEDING**

A. Procedural History

This proceeding was commenced by PECO Energy Company (“PECO”) on May 22, 2009. PECO filed the subject Petition seeking declaratory relief. On July 13, 2009, the Wireless Entities filed an Answer to PECO’s Petition. In their answer, the Wireless Entities sought affirmative relief and requested a hearing. On August 3, 2009, PECO filed a Reply.

On August 3, 2009, PECO also filed a Motion for Judgment on the Pleadings (“Motion”). The Wireless Entities filed an answer to PECO’s Motion. In PECO’s Pre-Hearing Memorandum, PECO withdrew its Motion. PECO Pre-Hearing Memorandum, p. 3.

The parties have engaged in settlement discussions. The parties did not engage in discovery during the pendency of PECO’s Motion because said Motion, if granted, would have

made those discovery efforts meaningless and wasted the time and resources spent engaging in discovery

B. Updated Factual Circumstances

The City has agreed to purchase the wireless internet nodes, antennas and gateway devices (collectively, “WINs”) from Network Acquisition Company (“NAC”), the current owner of the wireless network serving Philadelphia. The WINs are connected to City-owned street lights. Both the streetlights and the WINs receive unmetered electricity from PECO.

The City’s purchase remains subject to the approval of City Council. It is expected that the transaction will be completed by late Winter or early Spring.

Given this significant change in facts and circumstances, the ALJ should require PECO to amend or supplement the Petition to reflect these updated factual circumstances; and permit the City to respond to such amendment or supplement. *See* 52 Pa. Code §§ 5.91 to 5.94.

**II. PRESENTLY IDENTIFIED ISSUES**

A. Issues Raised by Pleadings

Broadly speaking, the pleading raise two primary sets of issues. However, PECO’s Pre-Hearing Memorandum ignores the second set of issues.

First, PECO Petition raises the amount of outstanding balance (if any) owed by DIG to PECO. As noted in PECO’ Petition, PECO’s seeks clarification on the DIG’s legal obligation to “pay the full tariff rate” as applied by PECO. PECO’s Petition, at pp. 1-2, 25. In response, the Wireless Entities contend that PECO did not satisfy PECO’s duty to assist the selection of the most advantageous rate application.<sup>1</sup> They further contend that, rather than assisting the DIG to

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<sup>1</sup> Tariff Electric Pa.P.U.C. No. 3, Fifth Revised Page No. 18 (Rules and Regulations), at ¶ 11.2.

select the above-described simple, just and reasonable rate application, PECO presented only complex, unjust and unreasonable rate applications to DIG when the service was first initiated.

To this end, the Wireless Entities contend that rate applications – as presented and applied by PECO – were not, and are not reasonable, just or consistent with PECO’s Tariff. The Wireless Entities contend that PECO wrongly interpreted Rate SL-P to exclude the WINs. They also contend that application of Rate GS to the WINs is unlawful, unjust and unreasonable because the WINs do not satisfy the explicit requirements of Rate GS for a “metering installation”<sup>2</sup> and/or a demand determination using “metered monthly kilowatt-hours.”<sup>3</sup> PECO has also been using manufacturer’s ratings, which are not authorized under Rate GS.

Simply put, PECO has incorrectly applied its Tariff to the WINs, and was improperly charging DIG for service to the WINs. Moreover, even if the Commission agrees with PECO that the metering requirements of Rate GS are being correctly applied by PECO, the Wireless Entities submit that Rate GS results in an unjust and unreasonable rate as applied because PECO seeks to collect a separate fixed distribution charge for each WIN pursuant to its GS rate.

Second, PECO’s Petition raises the issue of the appropriate rate treatment of the WINs on a going forward basis. As noted in PECO’s Petition, electric service continues to be used by the WINs. PECO Petition, at pp. 1-2, 23. Thus, it is reasonable to read the Petition as seeking a declaration by the Commission that PECO can use against DIG (a) in future proceedings and/or (b) as to future billed amounts. Thus, the on-going rate treatment of the WINs is a vitally important part of this proceeding as commenced by PECO. Moreover, it should also be noted that the on-going rate treatment is needed to prevent the repetition of similar litigation before this Commission.

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<sup>2</sup> Tariff Electric Pa. P.U.C. No. 3, Nineteenth Revised Page No. 45 (Rate GS), at Availability Section.

<sup>3</sup> *Id.* Tariff Electric Pa. P.U.C. No. 3, Nineteenth Revised Page No. 45 (Rate GS), at Determination of Demand Section.

The change in ownership in the WINs improves the likelihood that the Wireless Entities will prevail in this proceeding. Following the City's purchase of the WINs from NAC, the City should be treated as a single customer with a single fixed distribution charge for each streetlight with a WIN. The City will be a single customer with a single point of delivery (base of each street light). This constitutes a single delivery point,<sup>4</sup> and each streetlight is already subject to a fixed distribution charge. Under these circumstances, there is no justification for additional fixed distribution charges merely because the WINs are attached to streetlights. Fixed distribution charges recover "costs caused by the presence of the customer on the system."<sup>5</sup> Because the City is the only customer, there are no additional fixed distribution costs caused by the presence of the City's WINs on the City's street lights.

The City further contends that it is unreasonable to switch the City-owned streetlights from Rate SL-P to Rate GS because the City-owned WINs were attached to said streetlights. The City continues to contend that Rate SL-P should apply to streetlights with WINs because (a) Rate SL-P provides for subsidiary or ancillary uses; and (b) the WINs are a valid ancillary or subsidiary use. The City also continues to contend that Rate GS requires meters.<sup>6</sup> Therefore, Rate GS should not apply to the streetlights and/or the WINs.

#### B. Affirmative Relief

Nothing would be gained by forcing the Wireless Entities to file a complaint against PECO raising the issues that were already raised in this proceeding. PECO's Petition seeks to impose an obligation on DIG to "pay the full tariff rate" as applied by PECO. PECO's Petition,

<sup>4</sup> See PECO's Tariff Electric Pa. P.U.C. No. 3, Thirteenth Revised Page No. 10, at Rule 2.2 (Single-Point Delivery); PECO's Tariff Electric Pa.P.U.C. No. 3, Fifth Revised Page No. 11, at Rule 3.3 (Point of Delivery).

<sup>5</sup> PECO's Tariff Electric Pa.P.U.C. No. 3, Fifth Revised Page No. 7 (Definitions).

<sup>6</sup> See, e.g., PECO's Tariff Electric Pa. P.U.C. No. 3, Nineteenth Revised Page No. 45 (Rate GS), at Availability Section and Metering Section, PECO's Tariff Electric Pa. P.U.C. No. 3, Fourteenth Revised Page No. 46 (Rate GS), at Metering Section.

at pp. 1-2, 25. In response, the Wireless Entities raised challenges as to whether (or not) those full tariff rates were just and reasonable<sup>7</sup> as applied to DIG. They are entitled to such affirmative relief in their answer.

PECO has cited no legal authority to support its contention that there is a “blanket” prohibition on challenges to PECO’s tariff rates in an answer to a Petition. To the contrary, the Commission’s regulations allow respondents, such as the Wireless Entities, to raise any form of affirmative relief. 52 Pa. Code § 5.62.

If PECO desires to limit the issues raised in this proceeding, there are other methods to do so. It is simply not appropriate or reasonable, at this time, to preclude the affirmative relief requested by the Wireless Entities.

### **III. PROPOSED WITNESSES AND SUBJECT MATTER OF TESTIMONY**

#### **A. City**

At this time, the City expects to present the testimony of its Chief Technology Officer, Allan Frank. The purpose of this testimony will be to address the issues identified above. The City has not determined if it will call any other City employees.

Also, it should be noted that the City is exploring the retention of an outside expert, but has not finalized any agreement given the hope that this matter will be resolved amicably. If this matter is to be actively litigated, the City will need a reasonable time to finalize expert retention prior to the presentation of testimony.

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<sup>7</sup> 66 Pa. C.S.A. § 1301 (“Every rate made, demanded, or received by any public utility, or by any two or more public utilities jointly, shall be just and reasonable”).

The City reserves the right to amend this witness list as may be necessary depending on the course of the proceeding and will provide the Presiding Officer as well as the other parties in this matter reasonable notice if such amendment becomes necessary.

B. DIG

At this time, DIG expects to present the testimony of its Chief Executive Officer, Greg Goldman. The purpose of this testimony will be to address the issues identified above. DIG has not determined if it will call anyone else (expert or factual).

DIG reserves the right to amend this witness list as may be necessary depending on the course of the proceeding and will provide the Presiding Officer as well as the other parties in this matter reasonable notice if such amendment becomes necessary.

**IV. PROCEDURAL SCHEDULE**

PECO has sought expedited treatment of its Petition so that a final Commission Order would be entered at the end of March 2010. The Wireless Entities do not support this request because there is not an immediate need for expedited treatment. PECO's current request for a "rocket docket" for this proceeding is dispelled by the fact that neither party has expressed facts warranting urgency since this proceeding was reassigned to the OALJ in August 2009.

Simply put, PECO's Petition does not state a need for expedited treatment, and no such circumstances exist at this time. Here, the pending sale of the assets to the City does not create a need for urgency. The facts that existed prior to the sale will remain the same. The sale will only change the going-forward facts, which are important to the on-going treatment of the WINs by PECO. But, the pending sale makes it reasonable to have discovery end after said sale is

complete. This will enable the parties to have a full and complete basis on which to analyze the going-forward treatment of the WINs.

The Wireless Entities propose the following more normal procedural schedule:

January 26, 2010	Prehearing Conference
February 15, 2010	Deadline for Revised Petition from PECO
May 14, 2010 <sup>8</sup>	PECO Direct Testimony Due
June 14, 2010	Other Parties Direct Testimony Due
June 30, 2010	PECO Rebuttal Testimony
July 7 and 8, 2010	Hearings
August 9, 2010	Main Briefs (All Parties)
September 9, 2010	Reply Briefs (All Parties)
October 31, 2010	Recommended Decision

The Wireless Entities will work with the parties to implement a procedural schedule that enables timely resolution of this petition.

## V. DISCOVERY SCHEDULE AND PROTECTIVE ORDER

### A. Discovery Schedule

PECO has sought expedited treatment of discovery in this proceeding. The Wireless Entities do not support this request because, as noted above, there is not an immediate need for expedited treatment. Moreover, the facts in this proceeding span a period of six years (2005 to 2010). It will be difficult for the Wireless Entities, and PECO, to search records covering six years in the shortened discovery response times being requested by PECO. Therefore, the standard discovery response times would appear to be more appropriate.

### B. Protective Order

PECO has also sought a protective order in this proceeding. The Wireless Entities support the entry of a Protective Order.

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<sup>8</sup> This date is set to allow time for discovery, if necessary, after the completion of the City's purchase of the WINs.

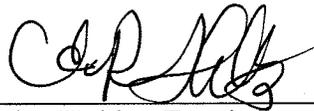
## VI. SETTLEMENT

The Wireless Entities have been actively involved in attempts to settle the issues raised by this proceeding. They expect to continue settlement discussions with PECO and are optimistic that this proceeding can be settled if given an reasonable amount of time (prior to the submission of testimony).

## VII. CONCLUSION

WHEREFORE, for the reasons stated above, the Wireless Entities request that the Administrative Law Judge use a normal procedural and discovery schedule and issue the proposed Protective Order.

Respectfully submitted,



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Date: January 25, 2010