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February 9, 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

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 Supplemental and Amended Answer to PECO's Petition Requesting a Declaratory Judgment 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 Supplemental and Amended Answer on the following persons in the manner specified:

Via First Class Mail and/or Email

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Dated: February 9, 2010



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 :

**SUPPLEMENTAL AND AMENDED ANSWER
OF THE CITY OF PHILADELPHIA
TO PECO'S PETITION
REQUESTING A DECLARATORY ORDER**

Pursuant to 52 Pa. Code § 59.1 to 59.3 and Prehearing Order #2, the City of Philadelphia (“City”) submits this amended answer (“Amended Answer”) to supplement the City’s response to the Petition for Declaratory Order (“Petition”) filed by PECO Energy Company (“PECO”).

Specifically, the City is adding the following paragraphs to update factual circumstances and supplement the Answer (“Answer”) by the City and Wireless Philadelphia, d/b/a Digital Impact Group (“DIG”) (collectively, the “Wireless Entities”), which was filed on July 14, 2009:

IX SUPPLEMENTAL NEW MATTER (AS OF FEBRUARY 2010)

43. The City has exercised an option to purchase the wireless internet nodes, antennas and gateway devices (collectively, “WINs”) (together with other network assets) from Network Acquisition Company (“NAC”), the current owner of the wireless network serving Philadelphia.

44. The City’s purchase remains subject to the negotiation and execution of an asset purchase agreement with NAC, the approval of the Philadelphia City Council of certain aspects of the transaction, and the consent of certain third parties such as lessors of real property to NAC. It is anticipated that the transaction will be completed by mid-April 2010.

45. In its Petition, PECO takes positions interpreting the rate treatment of the WINs under PECO's tariff. For example, PECO has argued that street lights with a WIN are no longer devoted to outdoor lighting and, therefore, are not eligible for service under Rate SLP.¹ The City believes that PECO will continue to make this argument in this proceeding and anticipates that PECO will raise this same argument in future proceedings.² Therefore, this proceeding is likely to impact PECO's future interpretations of rate treatment for the WINs.

46. Following the City's purchase of the WINs from NAC, the City should be treated as a single customer and PECO should not be permitted to collect separate fixed distribution charges for both WINs and streetlights. The City will be a single customer with a single point of delivery³ for both the street light and the WIN. In the Answer, the Wireless Entities argued that there was no justification for additional fixed distribution charges related to the WINs. (The responses in the Answer to Paragraphs 1 through 42 of the Petition are incorporated herein by reference as if more fully set forth herein.) Under these circumstances (WINs being owned by the City), there is even less justification for additional fixed distribution charges merely because the WINs are attached to street lights. Fixed distribution charges recover "costs caused by the

¹ See PECO Petition, at ¶¶ 13 to 15, 18.

² See, e.g., *Office Of Disciplinary Counsel v. Kiesewetter*, 585 Pa. 477, 889 A.2d 47 (2005) (discussion of collateral estoppel, or issue preclusion, which can be asserted either offensively to foreclose the defendant from litigating an issue or the defendant has previously litigated unsuccessfully or defensively to prevent a plaintiff from asserting a claim the plaintiff has previously litigated and lost against another defendant.); *R/S Financial Corporation v. Kovalchick*, 552 Pa. 584, 716 A.2d 1228, 1230 (Pa. 1998) (discussion of *res judicata*, or claim preclusion, which prohibits parties involved in prior, concluded litigation from subsequently asserting claims in a later action that were raised, or could have been raised, in the previous adjudication.).

³ 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).

presence of the customer on the system.”⁴ Because the City is the only customer and only one delivery point, there are no additional fixed distribution costs caused by the presence of the City’s WINs on the City’s street lights.

47. The City avers that it is unreasonable to switch the City-owned street lights from Rate SL-P to Rate GS because City-owned WINs are attached to the City-owned street lights. The City further avers that, following the City’s purchase of the WINs from NAC, Rate SL-P should apply to street lights with WINs because (a) Rate SL-P provides for subsidiary or ancillary uses; and (b) the WINs are a valid ancillary or subsidiary use of the street light. The responses in the Answer to Paragraphs 1 through 42 of the Petition are incorporated herein by reference as if more fully set forth herein.

48. The City avers that Rate GS requires meters.⁵ Rate GS explicitly requires (a) a metering installation and (b) a demand determination based on “metered monthly kilowatt-hours.” The street lights and the WINs are unmetered. Therefore, after the City purchases the WINs from NAC, Rate GS should not apply to the street lights and/or the WINs. The responses in the Answer to Paragraphs 1 through 42 of the Petition are incorporated herein by reference as if more fully set forth herein.

⁴ PECO’s Tariff Electric Pa.P.U.C. No. 3, Fifth Revised Page No. 7 (Definitions).

⁵ *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.

CONCLUSION

WHEREFORE, in addition to the relief requested in the Answer filed on July 14, 2009, the City seeks a declaration from the Commission that following the City's purchase of the WINs (and other network related assets) from NAC: (a) Rate SL-P is applicable to both the street lights and the WINs following the City's purchase of the WINs (and network related assets) from NAC; (b) the City should be treated as a single customer and PECO should not be permitted to collect separate fixed distribution charges for both WINs and streetlights and should be limited to a single fixed distribution charge for each streetlight with a WIN. If, however, Rate SL-P does not apply to both facilities, then the City seeks a declaration that the application of Rate GS is not just and reasonable because the streetlights and WINs are unmetered. Alternatively, if Rate GS is deemed to apply to each streetlights with a WIN, it should be declared that the application of Rate GS is only just and reasonable if PECO is prohibited from collecting separate fixed distribution charges for both WINs and streetlights.

Respectfully submitted,



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Attorneys for the City of Philadelphia and
Wireless Philadelphia t/d/a Digital Impact Group

Date: February 9, 2010

Verification

I, Allan R. Frank, hereby state that the facts set forth in the foregoing Amended Answer for the above-captioned matter are true and correct (or are true and correct to the best of my knowledge, information and belief) and that I expect to be able to prove the same at a hearing held in this matter. I understand that the statements herein are made subject to the penalties of 18 Pa. C.S. § 4904, relating to unsworn falsification to authorities.



Allan R. Frank, Chief Technology Officer
City of Philadelphia