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April 5, 2010

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

**Re: Gary Muhlberger v. PECO Energy Company
PUC Docket No. C-2010-2156182**

Dear Mr. McNulty:

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

<u> </u>	Answer (E-filed and 1 original)
<u> </u>	Motion for Continuance (e-filed and 1 original)
<u> X </u>	Motion for Judgment on the Pleadings (E-filed and 1 original)
<u> </u>	Preliminary Objection (E-filed and 1 original)
<u> </u>	Exceptions (E-filed and 1 original)
<u> </u>	Reply Exceptions (E-filed and 1 original)
<u> </u>	Brief (E-filed and 1 original)
<u> </u>	Reply Brief (E-filed and 1 original)

I have enclosed a Certificate of Service showing that a copy of the above document was served on the interested parties. Thank you for your time and attention on this matter.

Very truly yours,



Tishkia Williams
Counsel for PECO Energy Company

TW/ads
Enc.

Scheduling Recommendation CALL OF THE DOCKET NON-CALL OF THE DOCKET

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

GARY MUHLBERGER :
 :
v. : **DOCKET NO. C-2010-2156182**
 :
PECO ENERGY COMPANY :

NOTICE TO PLEAD

Pursuant to 52 Pa. Code §§ 5.101 and 5.62(c), you are hereby notified that, if you do not file a written response denying or correcting the enclosed New Matter within 20 days from service of this notice, the facts set forth by PECO Energy Company in the New Matter may be deemed to be true, thereby requiring no other proof. All pleadings, such as a Reply to Preliminary Objection and Reply to New Matter, must be filed with the Secretary of the Pennsylvania Public Utility Commission, with a copy served to counsel for PECO Energy Company, Tishekia Williams, and where applicable, the Administrative Law Judge presiding over the issue.

File with:
James J. McNulty, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, Second Floor
Harrisburg, PA 17120

With a copy to:
Tishekia Williams, Esq.
PECO Energy Company
2301 Market Street, S-23
Philadelphia, PA 19103

Dated at Philadelphia, PA, April 5, 2010



Tishekia Williams
Counsel for PECO Energy Company
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**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

GARY MUHLBERGER	:	
	:	
v.	:	DOCKET NO. C-2010-2156182
	:	
PECO ENERGY COMPANY	:	

**PECO ENERGY COMPANY'S MOTION FOR JUDGMENT ON THE
PLEADINGS & TO JOIN AN INDESPENSIBLE PARTY**

Respondent, PECO Energy Company ("PECO"), pursuant to 52 Pa. Code § 5.102 respectfully petitions this Honorable Commission to dismiss Complainant's claims that he was wrongfully switched to an alternative energy supplier as untimely.

1. Complainant filed a Pennsylvania Public Utility Commission formal complaint on January 29, 2010.

2. PECO Energy was served the above-mentioned formal Complaint on February 4, 2010.

3. Pursuant to 52 Pa. Code § 5.101(b), PECO simultaneously filed an Answer, New Matter, and Notice to Plead to the Complaint on February 24, 2010.

4. According to 52 Pa. Code § 5.63, Complainant had twenty days from the filing date of PECO's New Matter to respond.

5. 35 days have passed and Complainant has not responded to the New Matter. Pursuant to Commission 52 Pa. Code § 5.63, the facts stated in the New Matter may be deemed admitted.

6. The claim should be dismissed because it seeks relief beyond the expiration of the applicable statute of limitations.

7. Pennsylvania Public Utility Commission regulations state that any actions for recovery of any penalty or forfeiture, or any prosecution on account of a matter within the Code must be brought within three years.¹

8. Complainant alleges that PECO improperly switched Complainant's EGS to Commerce Energy, Inc. ("Commerce").²

9. Although Complainant alleges that the switch occurred "during the period beginning at least on January 1, 2007," PECO Energy records establish that Complainant was switched to an alternate EGS effective May 1, 2003.³

10. Since Complainant has not responded to the New Matter, he has admitted that the switch occurred outside the limitations period.

11. Complainant received electric supply from Commerce Energy, formerly Electric America, from May 2003 until September 30, 2008. PECO Energy avers that Complainant's bill plainly identify Commerce Energy charges for at least 4-years. Therefore, Complainant knew or should have known that his bill included charges from Commerce Energy.

12. The Commission should dismiss the claim as it is untimely due to the three-year limitations period.

¹ 66 Pa. C.S. § 3314; See New Matter.

² Complaint, para. 4.4; See New Matter.

³ See Exhibit 2, Complainant's supplier history; See New Matter.

**PECO ENERGY COMPANY FUTURE MOVES TO JOIN
COMMERCE ENERGY, INC. AS AN INDISPENSIBLE PARTY**

Respondent, PECO Energy Company (“PECO”), pursuant to 52 Pa. Code § 5.103 respectfully petitions this Honorable Commission to join Commerce Energy, Inc. as an indispensable party in the above-captioned matter, and in support thereof, aver as follows:

1. On January 29, 2010, Complainant filed a formal complaint against PECO alleging that PECO improperly changed Complainant’s electric provider to Commerce Energy which led to a drastic increase in Complainant’s rates.

2. The disputed rates are charged and established by Commerce Energy, Inc., not PECO Energy. Therefore, any possible refund of rates or finding of improper rates relates to Commerce Energy and not PECO Energy.

3. Commerce Energy is an Electric Generation Supplier (“EGS”) licensed by the Commission to operate at all time relevant to this proceeding under License No. A-110117 (and A-1148524) and is thus subject to the jurisdiction of this Commission.

4. The Electricity Generation Customer Choice and Competition Act (“Act”), 66 Pa.C.S. §2801-15, was enacted in 1996. The Act provided Pennsylvanians the opportunity to purchase electricity from alternative electric suppliers.⁴

5. Pursuant to the Act and subsequent Pennsylvania Utility Commission (“PUC”) orders, PECO Energy filed an Application for Approval of its Restructuring Plan. PECO Energy and other interested parties reached a joint settlement agreement

⁴ See 66 Pa. C.S. §§ 2801-12 (Act); see also Pennsylvania Utility Commission, *What Is Electric Choice?* (available at <http://www.puc.state.pa.us/utilitychoice/whatis.aspx?ut=ec>).

approved by the PUC (“Restructuring Settlement”) setting forth the Company’s course of action to comply with the Act and related PUC orders.⁵

6. Under the Restructuring Settlement, PECO was required to satisfy the Market Share Threshold (“MST”). The MST stipulated that a fixed percentage of customers within the relevant service territory would transition to purchasing electricity from alternative EGS. Failure to meet the MST required PECO Energy to notify randomly selected customers that they would begin purchasing electricity from an EGS unless they affirmatively “opted out.”⁶

7. PECO Energy mailed such a notice in 2003 to Complainant stating that Electric America, the predecessor to Commerce, would be the Complainant’s EGS unless he opted out. He did not opt out.⁷ PECO Energy accordingly switched Complainant’s EGS to Electric America effective May 1, 2003.

8. Complainant received electric supply from Commerce Energy, formerly Electric America, from May 2003 until September 30, 2008, when Complainant was switched back to PECO Energy at his request. PECO Energy avers that prior to this period; Complainant received notice of his supplier’s name and charges through his PECO bills.

⁵ See *Petition for Approval of PECO Energy Company's Market Share Threshold Bidding/Assignment Process; Petition for Approval of "The Better Choice" Plan to Meet PECO Energy Company's Market Share Threshold Requirements*, 2003 Pa. PUC LEXIS 7; 222 P.U.R.4th 361, dockets P-00021984; P-00021992 (Order adopted by the Commission on February 6, 2003).

⁶ See *id.* at *3-4.

⁷ See Exhibit 3, BCS Report no. 2433986 (“according to [Commerce] records, [Complainant] never opted out.”).

9. In Pennsylvania, “an indispensable party is one whose rights are so directly connected with and affected by litigation that he must be a party of record to protect such rights, and his absence renders any order or decree of court null and void for want of jurisdiction.” *Columbia Gas Transmission Corp. v. Diamond Fuel Co.*, 464 Pa. 377, 379 (Pa. 1975); *City of Philadelphia, et al v. Commonwealth of Pennsylvania, et al*, 575 Pa. 542 (Pa. 2003); *Barren v. Dubas*, 295 Pa. Super. 443, 445 (Pa. Super Ct. 1982). Failure to join an indispensable party goes absolutely to the court’s jurisdiction and, if not raised by the parties, should be raised *sua sponte*. *Posel v. Redevelopment Authority of Philadelphia*, 72 Pa. Commw. 115, 121 (Pa. Commw. Ct. 1983).

10. The Pennsylvania Supreme Court has established that “the basic inquiry in determining whether a party is indispensable concerns whether justice can be done in the absence of a third party In order to make the analysis, however, one must refer to the nature of the claim and the relief sought.” *Cry, Inc. v. Mill Service, Inc.*, 536 Pa. 462, 486-69 (Pa. 1994). Adopting the criteria articulated in *Mechanicsburg Area School District v. Kline*, 494 Pa. 476, 481 (Pa. 1981) the court’s test for determining indispensability involved “at least” the following considerations:

1. Do absent parties have a right or interest related to the claim?
2. If so, what is the nature of that right or interest?
3. Is that right or interest essential to the merits of the issue?
4. Can justice be afforded without violating the due process rights of absent parties?

11. In regards to the first factor, Commerce Energy has a right or interest to the claim. All of Complainant’s allegations of overcharging relate to Commerce Energy charges. Complainant alleges his rates doubled after his supplier was switched from

PECO Energy to Commerce Energy, and that he was overcharged for the years of 2007 and 2008, years when Commerce Energy was his service provider.⁸

12. With respect to the second consideration of the test, Commerce Energy has at stake the possible obligation to refund payments received and/or to compromise charges in dispute. Also, Complainant's allegations of violations of Commission rules may subject Commerce Energy to enforcement action against which it would be entitled to defend itself and/or avail itself of the opportunity to settle.

13. With respect to the third consideration of the test, Commerce Energy's interest is essential to the merits of the case because much of the Complaint focuses on Commerce's supplier charges prior to October 2008, which PECO Energy cannot answer as it was not at that time Complainant's EGS.⁹ PECO Energy cannot answer for Commerce, a separate and distinct company. The relief sought by Complainant necessarily involves Commerce Energy. As mere billing agent, PECO Energy has no authority to adjust Commerce Energy's rates.

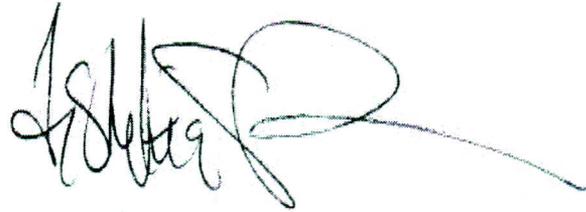
14. In regards to the fourth consideration, not joining Commerce Energy, when its actions and policies are so central to the Complaint, would violate its due process rights. Commerce Energy was the supplier of energy to Complainant during the time period in question, and it is Commerce Energy's rates that the Complainant has issue with. Complainant's allegations go directly to Commerce Energy's rates and supply practices, and any adjudication concerning business practices of Commerce Energy without its presence would violate its due process rights.

⁸ Complaint paras. 4.6 and 4.17.

⁹ *E.g.*, Complaint paras. 4.3 (comparing 2007 and 2008 bills); 4.6 (bill was "more than double" in 2008).

WHEREFORE, PECO request that the Honorable Commission dismiss Complainant's claims that he was wrongfully switched to an alternative energy supplier and Join Commerce Energy, Inc. as an Indispensible Party in this proceeding.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'Tishekia Williams', with a large, stylized flourish extending to the right.

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