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April 8, 2010

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

Re: Carolina B. Harris v. PECO Energy Co.
No. C-2009-2101597

Dear Mr. McNulty:

Enclosed please find for filing the original and nine (9) copies of the Brief of Complainant, Carolina B. Harris, in the above-referenced matter.

Thank you for your consideration of this matter.

Very truly yours,

SWARTZ CAMPBELL LLC

John P. McBlain

JPM/lk
Enclosures

cc: Honorable Marlane R. Chestnut [w/2 enclosures]
Michael Swerling, Esquire [w/2 enclosures]

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**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

C-2009-2101597

CAROLINA B. HARRIS

v.

PECO ENERGY COMPANY

BRIEF OF COMPLAINANT

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I. HISTORY OF THE PROCEEDING

On June 20, 2006, Complainant, Carolina B. Harris (hereinafter, "Harris"), filed a formal complaint with the Pennsylvania Public Utilities Commission (hereinafter, "PUC") alleging disputes relating to the billing account balances for the residential gas and electric service supplied by Respondent, PECO Energy Company (hereinafter, "Peco") which complaint was docketed at No. C-20066521. The parties appeared for a hearing on that complaint on October 25, 2006 before Administrative Law Judge Ky Van Nguyen. Harris was not represented by counsel in that matter. Prior to the beginning of the hearing, the parties negotiated a settlement of the complaint and therefore the hearing did not proceed but, rather, a statement was placed on the record that an agreement had been reached.

Following that scheduled hearing a dispute arose as to one of the terms of the settlement agreement, namely, the amount of the account balance. Peco complied with some of the terms of the settlement agreement for a number of months but then disavowed the settlement agreement.

Without counsel, Harris filed another formal complaint with the PUC seeking to enforce the settlement agreement that was docketed at No. C-20077884. A hearing on that complaint began before Administrative Law Judge Angela T. Jones on February 4, 2008 but was adjourned without conclusion. Harris eventually withdrew that formal complaint when she sought action by the Pennsylvania Attorney General's Office relating to the same matters.

As the matter in dispute was still not resolved, Harris filed another formal complaint with the PUC in 2009 docketed at No. C-2009-2101597, once again seeking to

resolve the billing dispute by asking for the enforcement of the settlement from the October 25, 2006 proceeding.¹

A hearing on the formal complaint at No. C-2009-2101597 was conducted before Administrative Law Judge Marlane R. Chestnut on March 2, 2010.

II. STATEMENT OF THE CASE

Harris is a customer of Peco for residential gas and electric service at the address known as 604 Rose Street, Yeadon, Delaware County, Pennsylvania. Harris has maintained service at that residence since at least 2003. Harris had accounts with Peco for other residences in Delaware County, including 922 Yeadon Avenue, Yeadon, PA and for an address on Wildwood Avenue in East Lansdowne, PA. When service was terminated at the Yeadon Avenue and Wildwood Avenue addresses, the account balances were eventually transferred to the Rose Street account. Harris has also been behind on payments and involved in previous billing disputes with Peco. The result of these account balance transfers, delinquent payments and billing disputes has been the creation of a “Bird’s Nest” of a billing account, requiring the assistance of accountants, lawyers and senior regulatory assessors to decipher.

Harris is not an accountant, lawyer and/or senior regulatory assessor. Harris asserted that she had not been credited with payments made on the accounts or that account balances were incorrect when “transferred in” to her Rose Street account. When her account disputes with Peco reached the most acute point, her electric service was shut off by Peco in April, 2006. She instituted a formal complaint against Peco thereafter and was without electric service until October 25, 2006. On that date, Harris appeared for the

¹ When filing the complaint that is the subject of these proceedings, Harris was again not represented by counsel. The narrative Harris used in her complaint, placed in the context of these proceedings, reveals that she was/is seeking to enforce the terms of the settlement agreement.

hearing on her formal complaint. Harris negotiated with Peco's counsel and Ms. Renee Tarpley, a senior regulatory assessor for Peco. The parties all agreed that they reached a settlement agreement to resolve the formal complaint against Peco.

The parties went before ALJ Ky Van Nguyen. Harris believes that the settlement reached with Peco included the following terms:

- Immediate reinstatement of her electric service;
- Peco would credit her with a deposit of \$398;
- Peco would credit her account with payments made on the account while the service was shut off and that Harris would pay \$40 per month on the account balance; and,
- The account balance would be \$2,789.72.

See, Transcript, 3/2/10, pp. 169-173. (hereinafter, references to the transcript of 3/2/10 will be cited as T. p. ____). When the parties went "on the record" with ALJ Nguyen it was Ms. Tarpley from Peco who attempted to state the terms of the settlement agreement to the court. Unfortunately, Ms. Tarpley's recitation of the terms of the agreement were inclusive of the first three items stated above but failed to note for the record the agreement on the account balance. Ms. Harris was not represented by counsel at the time of the hearing. She had no concept of any significance attached to stating the terms of the settlement "on the record". T. p.182. Harris was not asked by the ALJ whether or not she agreed with the terms of the settlement as stated and/or whether the recitation was complete.²

² It may be understandable that Harris was not as attentive to what was being said since she no doubt felt great relief at learning that her electric service, discontinued for six months, was about to be turned back on and her dispute ended; although, obviously, those short few moments before the ALJ were perhaps the most important time in the complaint process.

Following the October 25, 2006 hearing, Peco sent correspondence to Harris attempting to state the terms of the settlement agreement for the eventual purposes of filing a certificate of satisfaction. Peco agreed there was a settlement. Harris agreed there was a settlement. What thereafter arose was a dispute about one of the terms of the settlement; *namely*, the amount of the account balance. As Harris testified, the agreed upon balance was to be \$2,789.72. Peco has not offered any specific testimony that they agreed upon a different account balance at the time of the October 25, 2006 hearing. Instead, Peco asserts that Ms. Tarpley prepared a document subsequent to the hearing seeking to summarize the account status or history (Respondent Exhibit 2). Therein, Peco stated the account balance as \$3,602.45, a difference of \$812.73.

Subsequent to the hearing of October 25, 2006, Harris received from Peco the spreadsheets introduced as Exhibits R-2 and R-6. Eventually, Harris noted that a payment of \$1,164.66 made on April 10, 2004 (relating to an account balance for 922 Yeadon Avenue) had been “re-charged” by Peco on an unknown date as shown on R-6 (page 1 of 2) under the column marked “Calculation”. Harris now believes that this discrepancy by Peco was the root problem that affected the dispute on the account balances, causing the filing of the formal complaint after the service shutoff in 2006.

Because Peco disavowed the settlement, Harris was charged a late fee on the (higher) account balance from the period after the 2006 hearing and until the present, excluding any time a formal complaint was pending. As stated at the March 2, 2010 hearing by the undersigned counsel (and as calculated from the account statements generated by Peco)³ it is believed that the total late fees in question are \$917.87. Ms.

³ Peco has asserted that it does not retain the “monthly billing images” of the actual bills or invoices sent to the customer so the only record that exists is the “account statements” generated by Peco. Of course, if

Tarpley from Peco agreed that had Peco not disavowed the settlement, these charges would not have been imposed on the entire account balance. T p. 299.

III. SUMMARY OF THE ARGUMENT

The PUC is authorized to investigate complaints regarding payment disputes between a public utility and its customers. Peco is bound by its tariffs that require its billings to be based upon the amount of use and the time interval of its delivery; it is inherent that such billings be accurate.

Harris and Peco reached a binding settlement agreement at the time of the October 25, 2006 hearing relating to Harris' billing dispute and formal complaint. Harris' testimony and the documents presented indicate there was a good faith basis for the dispute regarding the account balance; it is illogical to believe there would have been a settlement without addressing the account balance dispute. The failure to state the agreed upon account balance on the record does not affect the validity of the verbal agreement reached by Harris and Peco. The PUC has the ability to enforce or modify one of its orders. The settlement, including the terms of the account balance presented by Harris, should be enforced.

If the settlement agreement is enforced as existent since the 2006 hearing then the late fees imposed by Peco on the account balance would not have been charged. The late fees should be removed.

IV. LEGAL ARGUMENT

A. Peco's Responsibility and the PUC's Authority

Peco is bound by its approved tariffs for electric and gas service that billing must

there is an incorrect entry or a "re-charge" the only method to dispute same would be a comparison to a prior billing statement, as Harris has done here.

only be for service based upon the amount of use and the time interval of its delivery. See, Supplement No. 65 to Tariff Electric Pa. P.U.C. No. 3, Sixth Revised Page No. 23, Superseding Fifth Revised Page No. 23, Effective September 30, 2005; and, Supplement No. 53 to Gas-Pa. P.U.C. No. 2, First Revised Page No. 23, Superseding Original Page No. 23. Inherent in that authority is that those billings must be accurate and correct.

The PUC has the authority to investigate complaints regarding payment disputes between a public utility and its customer. 66 Pa.C.S.A. §1405. The PUC has the authority, as in the case of complaints, to amend or rescind any order after notice and opportunity to be heard. Tranter v. Pennsylvania Public Utility Commission, 288 A.2d 837 (Pa. Cmwlth. 1972). The ALJ is free to enter the relief sought by Harris herein, including the enforcement of a settlement agreement even though that agreement was reached in a prior proceeding and/or that there were other proceedings relating to the parties' billing disputes. 66 Pa.C.S.A. §703(g). Also, See, Popowsky v. Pennsylvania Public Utility Commission, 805 A.2d 60 (Pa. Cmwlth. 2002), *appeal denied*, 577 Pa.704, 847 A.2d 60 and, ARIPPA v. Pennsylvania Public Utility Commission, 792 A.2d 636 (Pa. Cmwlth. 2002).

B. Enforceability of Settlement Agreement

The Pennsylvania Superior Court succinctly stated the law in our Commonwealth relating to settlement agreements and disputes relating to their terms in the matter of McDonnell v. Ford Motor Company:

It is well-established that the enforceability of settlement agreements is determined according to principles of contract law. Century Inn, Inc. v. Century Inn Realty, Inc., 358 Pa. Super. 53, 58, 516 A.2d 765, 767 (1986). Our court will enforce the settlement if all of the material terms of the bargain are agreed upon. Id. Moreover,

If parties agree upon essential terms and intend them to be binding, “a contract is formed even though they intend to adopt a formal document with additional terms at a later date.”...

Johnston v. Johnston, 346 Pa.Super. 427, 431, 499 A.2d 1074, 1076 (1985) (Additional citations omitted). A settlement will not be set aside absent a clear showing of fraud, duress or mutual mistake. Rago v. Nace, 313 Pa.Super. 575, 578, 460 A.2d 337, 339 (1983). However, it is equally true that an evidentiary hearing into the existence and binding effect of the settlement agreement is the appropriate procedure to be followed in matters of contested settlement agreements. Limer v. Country Belle Cooperative Farmers, 220 Pa. Super. 171, 172-174, 286 A.2d 669, 670 (1971).

434 Pa.Super. 439, 445-446, 643 A.2d 1102, 1105-1106 (1994).

Here, both parties agree that they reached a settlement of Ms. Harris’ formal complaint filed in 2006 relating to the dispute of her account balance. Both parties agreed there was a settlement and went before the ALJ to advise of same. Ms. Harris contends that the parties agreed the account balance would be set at \$2,789.72. Although that amount was not articulated by Peco’s representative “on the record” it does not mean that there was not an agreement reached on same. While Peco may no doubt argue that their failure to state same on the record should be dispositive of the issue, this court can understand why Ms. Harris, unrepresented by counsel and relieved that her electricity would be turned back on, would not immediately seek to correct the record. Indeed, the ALJ did not ask Harris on the record whether or not the terms of the settlement were accurate and correct – Ms. Harris believed that the ALJ was simply being advised of the settlement. T. p.182. It is illogical that the parties would not reach an agreement on the account balance, since that discrepancy was at the heart of the “Bird’s Nest” problem with the account. When testifying in this matter, Peco’s witness Ms. Tarpley does not dispute Ms. Harris’ testimony and statements about the account balance. T. p. 260.

Harris has presented sufficient evidence for this court to recognize and enforce the settlement agreement reached October 25, 2006, including the necessary revision to Harris' account balance. This court should exercise its authority and order Peco to abide by the terms of the settlement agreement, including the modification of Harris' account balance by deducting \$812.73 – the difference between \$3,602.45 and \$2,789.72.

If the court enforces the settlement agreement then Peco would not have been entitled to charge late fees on the entire account balance after it disavowed the settlement. Harris calculates those late fees as \$917.87.

V. CONCLUSION

The parties reached a valid, binding and enforceable settlement agreement relating to Harris' billing disputes on October 25, 2006. In addition to the uncontested terms, this court should enforce the calculation of the account balance at \$2,789.72 in conformity with Ms. Harris' testimony. If the settlement is enforced, this court should strike the late fees charged in the amount of \$917.87. In all, Harris seeks this court to order Peco to reduce her account balance by \$1,730.60.

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VI. PROPOSED FINDINGS OF FACT

1. Complainant, Carolina B. Harris (hereinafter, "Harris") filed a formal complaint docketed at C-20066521 against Respondent, PECO Energy Company (hereinafter, "Peco") which sought to resolve billing disputes relating to her residential gas and electric service for the account at 604 Rose Street, Yeadon, PA. Record, PUC No. C-20066521.
2. That account became confused to Harris because of account balance transfers from other properties/previous accounts maintained by Harris; late or delinquent payments; and/or incorrect charges or credits made by Peco. T. p.168
3. Prior to a scheduled hearing on Harris' formal complaint, the parties negotiated a settlement agreement on the formal complaint. T. p. 169.
4. The parties appeared before Administrative Law Judge Nguyen on October 25, 2006 to advise that a settlement had been reached. Peco witness Renee Tarpley stated several of the terms of the agreement on the record but apparently not all of the terms of the agreement. Record, PUC No. C-20066521.
5. The terms of the settlement agreement were as follows:
 - Peco would refund a \$398 deposit;
 - Peco would credit any payments made by Harris while electric service was shut off and allow Harris to pay \$40 per month towards the balance;
 - Electric service would be immediately reinstated; and,
 - The account balance would be set at \$2,789.72

T. pp. 169-173.

6. Following the hearing, Harris and Peco did not contest the terms of the settlement except that Peco contested the adjustment of the balance and eventually disavowed the settlement. (Harris and Tarpley testimony, generally).
7. Harris' testimony regarding the terms of the settlement is credible and accepted.
8. Peco's witness, Renee Tarpley, does not specifically dispute Harris' testimony regarding the account balance settlement. T. p. 260.
9. The difference in the account balance, subtracting the agreed-upon balance from Peco's account, is \$812.73.
10. Harris was charged \$917.87 in late fees by Peco that she would not have otherwise been charged had Peco honored the settlement agreement.

VII. PROPOSED CONCLUSIONS OF LAW

1. The parties reached a binding settlement agreement in No. C-20066521 on October 25, 2006, the terms of which are stated in Finding of Fact #5.
2. The Commission may enforce the terms of that settlement agreement on the parties and it is proper to do so in this matter.
3. It is proper and within the Commission's authority to strike the late fees charged by Peco as stated in Finding of Fact #10.

VIII. PROPOSED ORDERING PARAGRAPHS

To the extent that it has not already done so, Peco is ordered to revise its account records for Complainant to reflect the following:

1. Complainant shall be refunded/credited with a deposit in the amount of \$398.00;
2. Complainant shall pay \$40 per month on the account balance until such time as the balance is satisfied;
3. Peco shall reinstate the electric service;
4. The account balance as of October 25, 2006 was \$2,789.72; and,
5. Late fees in the amount of \$917.87 shall be credited to Complainant's account.

Respectfully submitted:


John P. McBlain
Attorney for Carolina B. Harris

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing document upon the parties, listed below, in accordance with the requirements of §1.54 relating to service by a party).

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Exelon Business Service Company
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P.O. Box 8699
Philadelphia, PA 19101-8699

Marlane R. Chestnut
Administrative Law Judge
Commonwealth of Pennsylvania
Pennsylvania Public Utility Commission
801 Market Street, Suite 4063
Philadelphia, PA 19107

DATE: 4/8/10



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