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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION MAY 13 2010

LINDA BERKERY

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PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

v.

DOCKET NO. C-2010-2170223

PECO ENERGY COMPANY

PECO ENERGY COMPANY'S
MOTION TO JOIN AN INDESPENSIBLE 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 or about April 12, 2010, Complainant filed a formal complaint against PECO alleging that her bill contained \$10,000.00 in "bogus" charges "from a gas company in California"

2. PECO avers that Complainant's balance contains unpaid supplier charges of \$8,649.98 from Commerce Energy. Complainant received alternative supply from Commerce Energy. Complainant had an alternative gas supplier from June, 2005 to July, 2008, and an alternative electric supplier from August, 2003 to October, 2004. Commerce Energy is located at 600 Anton Boulevard, Suite 2000, Costa Mesa, CA 92626

3. Complainant is disputing the charges billed by Commerce Energy. Therefore, any possible refund of rates or finding of improper rates relates to Commerce Energy and not PECO Energy.

4. 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.

5. 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.¹

6. 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 approved by the PUC (“Restructuring Settlement”) setting forth the Company’s course of action to comply with the Act and related PUC orders.²

7. PECO Energy avers Complainant received notice of her supplier’s name and charges through her PECO bills, consistent with PUC orders. See copy of Complainant’s bill attached as Exhibit 4.

8. 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).

¹ 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>).

² 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).

9. 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?

10. In regards to the first factor, Commerce Energy has a right or interest to the claim. Complainant’s allegations of improper charging relate to Commerce Energy charges. Complainant alleges that her bill contains “\$10,000 in bogus charges from a gas company in California.”

11. 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.

12. 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.³ 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.

13. 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.

WHEREFORE, PECO request that the Honorable Commission join Commerce Energy, Inc. as an Indispensible Party in this proceeding.

Respectfully Submitted,



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³ E.g., Complaint paras. 4.3 (comparing 2007 and 2008 bills); 4.6 (bill was "more than double" in 2008).

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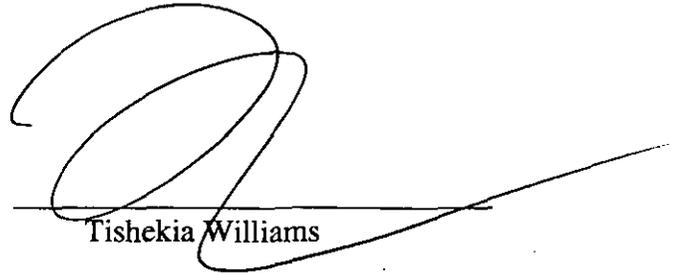
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VERIFICATION

I, Tishekia Williams, hereby declare that I am counsel for PECO Energy Company; that as such I am authorized to make this verification on its behalf; that the facts set forth in the foregoing Pleading are true to the best of my knowledge, information and belief, and that I make this verification subject to the penalties of 18 Pa. C.S. § 4904 pertaining to false statements to authorities.

Date: May 13, 2010



Tishekia Williams

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