

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

SHIRLEY TUMELTY WHITE	:	
	:	
v.	:	DOCKET NO. C-2010-2189848
	:	
PECO ENERGY COMPANY	:	

PRELIMINARY OBJECTION OF RESPONDENT,
PECO ENERGY COMPANY

Respondent, PECO Energy Company ("PECO"), pursuant to 52 Pa. Code §5.101(6), respectfully petitions this Honorable Commission to dismiss the instant complaint inasmuch as Complainant is disputing PECO's proposed electric rate increase for pendency of a prior proceeding.

1. On or about July 7, 2010, Complainant filed a formal complaint against PECO Energy alleging that PECO provided inadequate information regarding its A/C Saver program and disputing the proposed electric rate increase. In opposition of the proposed rate change, Complainant submitted a copy of her testimony provided during the June 2010 public input hearings at for PECO's electric rate case at docket number R-2010-2161575.
2. On July 26, 2010, PECO was served with a formal complaint at docket number C-2010-2189848. In this complaint, Complainant is disputing PECO's proposed rate increase.
3. In conjunction with this preliminary objection, PECO is simultaneously filing an Answer and New Matter in response to the formal complaint.
4. PECO avers that complaint's rate dispute is barred by the doctrine of lis pendens.

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5. Commission regulations, 52 Pa. Code § 5.101(a)(6), permit a party to file a preliminary objection based on the pendency of a prior proceeding.

6. In interpreting its regulations, the Commission is not bound by the Rules of Civil Procedure, but may use them as guidance. *Pa. PUC v. Metropolitan Edison Company*, 54 Pa. P.U.C. 57 (1980); *Pa. PUC v. Harold Williams*, 53 Pa. P.U.C. 552 (1979).

7. In construing Rule 1028(a)(6), related to pendency of a prior proceeding, the Pennsylvania Superior Court has said:

“In order to plead successfully the defense of *lis pendens*,... it must be shown that the prior case is the same, the parties are the same, and the relief requested is the same.

Penox Technologies, Inc. v. Foster Medical Corp., 376 Pa. Super. 450, 546 A.2d 114, 115 (Pa. Super. 1988).

8. The purpose of the *lis pendens* defense is to protect a defendant from harassment by having to defend several suits on the same cause of action at the same time. *Id.*

9. Once the defense is raised, a court may dismiss or stay the subsequent proceedings. *Penox*, 546 A.2d at 115.

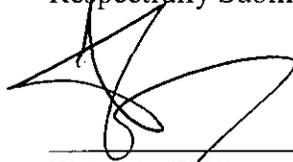
10. The three-pronged identity test must be applied strictly when a party is seeking dismissal under the doctrine of prior pending action. *Id.* Alternatively, if the identity test is not strictly met but the action involves a set of circumstances where the litigation of two suits would create a duplication of effort on the part of the parties, waste judicial resources and “create the unseemly spectacle of a race to judgment,” the trial court may stay the later-filed action. 562 A.2d at 905.

11. In the instant case, the identity of the issues, parties and relief is sufficiently the same. By her own admission, Complainant has submitted the same testimony presented in the

prior proceeding at docket number R-2010-2161575. That is, the Commission has heard and considered Complainant's arguments. Indeed, Complainant had an opportunity to formally join the proceeding. PECO should not be forced to incur the time and expense of presenting witnesses and testimony on the appropriateness of the rates because Complainant failed to timely join the rate proceeding. As evidenced by her participation, Complainant knew of the proceeding and has been given an opportunity to protest. Indeed, Complainant has submitted her testimony. Permitting Complainant to file a separate suit potentially subjects PECO to continuous litigation by opening the doors for any individual to have a separate rate proceedings, creating tremendous waste of resources for the Commission and PECO Energy.

WHEREFORE, PECO Energy Company respectfully requests that your Honorable Commission dismiss Complainant's rate dispute, or in the alternative stay the claim.

Respectfully Submitted,



Tishekia Williams
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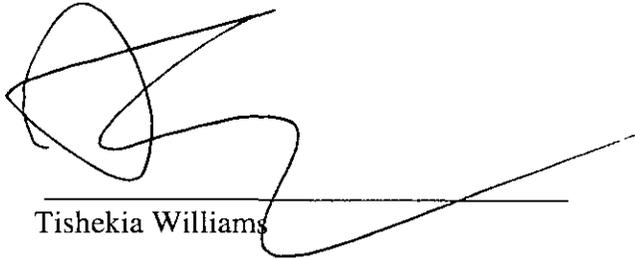
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VERIFICATION

I, Tishekia Williams, hereby declare that I am an attorney representing 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: August 16, 2010



Tishekia Williams

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**BEFORE THE
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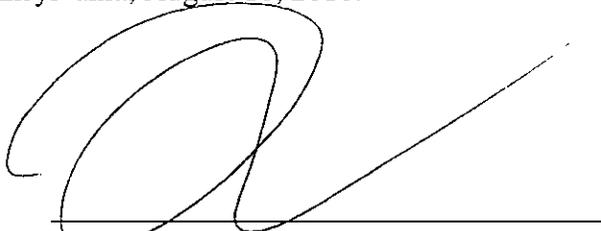
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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of PECO Energy Company's Motion to Dismiss in the above matter upon all interested parties by mailing a copy thereof, properly addressed and postage prepaid to:

Shirley Tumelity White
660 Chatham Lane
Blue Bell, PA 19422

Dated at Philadelphia, Pennsylvania, August 16, 2010.



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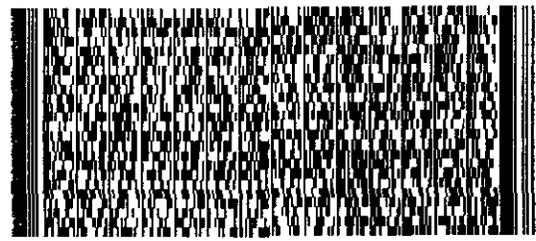
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Public Utilities Commission
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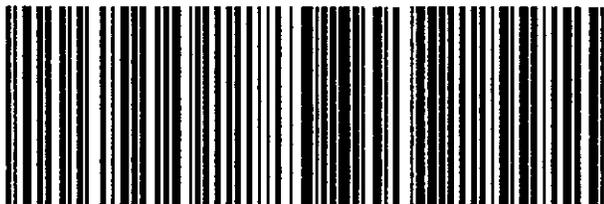
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