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Of Counsel:
HON. JOSEPH T. DOYLE
Retired President Judge
Commonwealth Court of Pennsylvania

August 23, 2010

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

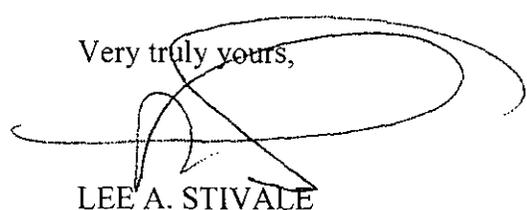
RE: Guntram Weissenberger, et al. v. PECO Energy
PUC Docket No. C-2010-2182281

Dear Ms. Chiavetta:

Enclosed is an original and three (3) copies of the response to Preliminary Objections to the First Amended Complaint. Also, one additional copy of the Response is provided for the Commission's filing office to date stamp and return to counsel for the Complainants in the self-addressed stamped envelope also enclosed.

Thank you for your assistance.

Very truly yours,



LEE A. STIVALE

LAS/mtf
Enclosures

cc: Ward Smith, Esquire (w/enclosures)
Client (w/enclosures)

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

PA P.U.C.
SECRETARY'S BUREAU

GUNTRAM WEISSENBERGER, GEN. PARTNER	:	
PANONIA ASSOCIATES, L.P., ET AL.	:	
Complainants	:	
v.	:	Docket No: C-2010-2182281
	:	
PECO ENERGY COMPANY	:	
Defendant	:	

REPLY TO PRELIMINARY OBJECTIONS TO SECOND AMENDED COMPLAINT

The Complainants, by their attorneys Joseph T. Doyle, Esquire, Lee A. Stivale, Esquire and Paul J. Toner, Esquire and the law firm of Vincent B. Mancini & Associates, hereby file this reply to preliminary objection¹ in the nature of the level of specificity².

Introduction: The Complainants filed an amended complaint, a copy of which is attached to this Reply as Exhibit "A" ("First Amended Complaint"). The First Amended Complaint contains more than seventy (70) paragraphs of factual pleading supporting two legal claims styled in Declaratory Judgment and in Contract.

¹ The Commission's Rules of Administrative Practice and Procedure permit the filing of preliminary objections. 52 Pa. Code § 5.101. Commission procedure regarding the disposition of preliminary objections is similar to that utilized in Pennsylvania civil practice. Equitable Small Transportation Interveners v. Equitable Gas Company, 1994 Pa. PUC LEXIS 69, Docket No. C-00935435 (July 18, 1994).

A preliminary objection seeking dismissal of a complaint, in whole or in part, will be granted only where relief is clearly warranted and free from doubt. Interstate Traveller Services, Inc. v. Pa. Dept. of Environmental Resources, 486 Pa. 536, 406 A.2d 1020 (1979). The motion will be granted only if the moving party prevails as a matter of law. Rok v. Flaherty, 106 Pa. Cmwlth. 570, 527 A.2d 211 (1987). Any doubt must be resolved in favor of the non-moving party. Dept. of Auditor General, et al. v. State Employees' Retirement System, et al., 836 A.2d 1053 (Pa. Cmwlth. 2003).

² Preliminary objections in the nature of a motion for a more specific pleading raise the sole question of whether the pleading is sufficiently clear to enable the defendant to prepare a defense. Paz v. Dept of Corr., 135 Pa. Cmwlth. 162, 580 A.2d 452 (1990). Further, in pleading its case, the complaint need not cite evidence but only those facts necessary for the defendant to prepare a defense. Dept of Transp. v. Bethlehem Steel Corp., 33 Pa. Cmwlth. 1, 380 A.2d 1308 (1977).

1. Admitted.

2. It is admitted that PECO filed Preliminary Objections to the Complaint and that a true and correct copy of which is attached to the current objections. However, the qualification of counsel for PECO that there is a “mismatch” between liability issues set for the in the complaint is denied.

The First Amended Complaint is a written document and the summarization of the pleaded facts and claims is denied.

3. The assertions of PECO are denied. The First Amended Complaint sets forth with great detail the several legal claims and the factual predicate to each claim. The Complainants pleads no less than eleven (11) pages of facts contained in more than seventy numbered paragraphs. The Complainants assert two legal claims as follows:

Count I - Declaratory Judgment. The Complainants asserts that based upon the pleaded facts, that as a matter of law, Complainant is not a “Ratepayer” under Section 1533 of the public Utility Code (“Code) 66 Pa. C.S. §1521. (Complaint at ¶¶ 66-72).

Count II – Breach of Contract. In summary, to the extent that Complainants are deemed to be Ratepayers, Complainants assert that PECO did not properly charge electric rates, properly assess late fees, and failed to properly bill according to its tariff. (Complaint at ¶¶ 73-75). Further, Complainants claim that, aside from tariff issues, PECO improperly allocated monies received from Defendant Conserve for electric service arrearages at properties owned by Complainant as well as from unrelated third party properties. (Complaint at ¶¶ 73-74, 76).

3. Denied. The characterizations of PECO are denied. The claims are plead with sufficient specificity to place PECO on reasonable notice on each of the factual and legal issues in this matter.

Pursuant to Pa. R.C.P. No. 1019(a), a complaint shall state, “[t]he material facts on which a cause of action ... is based ... in a concise and summary form.” This Rule is satisfied if the allegations in a pleading contain averments of all facts the plaintiff must eventually prove in order to recover, and the averments are sufficiently specific to enable the adverse party to prepare a defense. Commonwealth ex rel. Pappert v. TAP Pharm. Prods., Inc., 868 A.2d 624 (Pa.Cmwltth.2005). Pa. R.C.P. No. 1028(a)(3) permits a preliminary objection based on insufficient specificity of a pleading. To determine if a pleading is sufficiently specific, a court must ascertain whether the facts alleged are sufficiently specific to enable a defendant to prepare his defense. Foster v. Peat Marwick Main & Co., 138 Pa. Cmwltth. 147, 587 A.2d 382 (1991), *aff'd*, 544 Pa. 387, 676 A.2d 652 (1996). Yacoub v. Lehigh Valley Med. Assocs., 805 A.2d 579 (Pa. Super.2002).

Interestingly, PECO had sufficient notice, awareness and understanding of each of the asserted claims to enable it to file preliminary objections with the Delaware County Court of Common Pleas and request bifurcation based upon primacy of jurisdiction.

4. Denied. The Complaints have plead and placed PECO on notice by their very specific allegations concerning the failure of PECO to properly issued bills, assess late fees and utilize the proper utility rate³. These allegations must be read in conjunction with the entirety

³ See Complaint ¶¶ 75. and 76.

75. Upon belief, the claims against the Complainants for electric services at the Properties are in error and do not accurately reflect the proper amounts due and owing PECO when:

- a) PECO applied the improper tariffs overcharging the Complainants for electric utility services; and,

of the factual background plead in this matter; and specifically, that Complainants were not a “customer” of PECO and never consented to an application being made on their behalf to authorize PECO to establish a utility contract with Complainants. (Complaint ¶¶ 68 (s), (t) (aa) – (cc); and 72).

The Complainants plead they never were in privity of contract with PECO and never established a “customer” relationship with PECO. The Complainants plead that Conserve, rather than the Complainants, established an independent customer relationship with PECO and that all bills and agreements were made between Conserve and PECO to the exclusion of the Complainants. (Complaint ¶27).

In this matter, PECO’s superior knowledge and understanding of the bills and charges assessed to the “customer” which information has not been provided to Complainants. The Complainants will require discovery to determine the billing rates and charges assessed. One area of billing and payment involves the receipt by PECO of many hundreds of thousands of dollars from Conserve on account of numerous properties owned by unrelated third parties as well as the Complainants. The Complainants reasonably believe and assert that they have not been treated equitably in the allocation of those Conserve payments. (Complaint ¶¶75-77).

-
- b) All late delinquencies, including late fees, are attributable solely to the failure of ConServe to remit payment to PECO pursuant to their bi-lateral agreement; and,
 - c) PECO violated its tariffs by failing to bill the Complainants and notify Complainants of the accrued arrearages; and,
 - d) PECO violated its tariffs when it failed to bill the accounts at insufficient Intervals.

76. PECO did not equitably allocate payments from Conserve between the Properties owned by Complainants and unrelated third-party properties thereby artificially increasing the burden of the Complainants.

The Complainants should reasonably be allowed to pursue these important claims through discovery of the PECO billing practices and that PECO using its superior knowledge and information should be required to file and answer.

5. Denied. The PECO tariff is a public record. R.C.P. 1019 provides in pertinent part: “In pleading an official document or official act, it is sufficient to identify it by reference and aver that the documents issued or the act done in compliance with law.”

6. Denied. This matter involves the legal claim by Complainants that they were not the “customers” of PECO when the application of Conserve established the exclusive relationship between Conserve and PECO; and further that Complainants were not provided with periodic billings and notices of default and that they have not been treated equitably in the allocation of those payments. (Complaint ¶¶27; 58-65).

Complainants incorporate by reference their response in paragraph four (4) above.

7. – 9. Denied. Complainants incorporate by reference their response in paragraph four (4) above. PECO, after the fact, claims Complainants are the “customer”; yet, pursuant to its tariff never billed the Complainants; never afforded Complainants opportunity to address arrearages accruing for months to years.

PECO is vested with all of the billing information as well as the information concerning the application of the payments in gross received from Conserve. PECO has superior knowledge and understanding of the bills and charges assessed to the “customer” which information has not been provided to Complainants. The Complainants will require discovery to determine the billing rates and charges assessed.

10. Denied. This matter was bifurcated and is pending before two tribunals: this Commission and the Court of Common Pleas of Delaware County. This Commission is properly

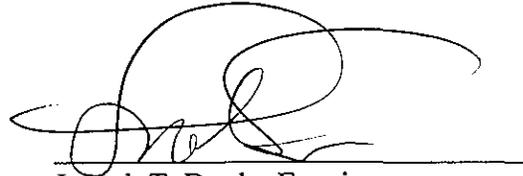
vested with jurisdiction, as plead, to hear and determine the liability aspects of each of the two plead claims involving Declaratory Judgment and Breach of Contract.

11. Denied. PECO has been well apprised by the pleading of the factual and legal issues involved. The Complainants provided PECO with eleven pages of factual averments surrounding PECO's actions in this matter. PECO certainly understands the factual and legal issues to assert its defense and proceed to discovery.

12. Denied. Complainants incorporate their responses to paragraphs four (4) and seven through nine (9) above.

WHEREFORE, Complainants respectfully request that this Honorable Commission issue an Order overruling the Objections.

Respectfully submitted:

A handwritten signature in black ink, appearing to be 'J. Doyle', written over a horizontal line.

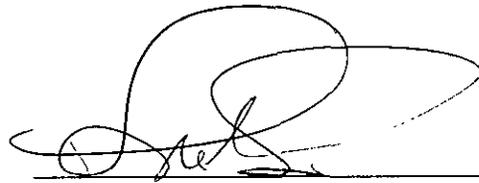
Joseph T. Doyle, Esquire
Lee A. Stivale, Esquire
Paul J. Toner, Esquire
Counsel for Complainants

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PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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Defendant	:	

VERIFICATION

I, Lee A. Stivale, Esquire, hereby declare that I am an attorney representing the Complainants; that as such I am authorized to make this verification on its behalf; that the facts set forth in the foregoing Pleadings are true to the best of my knowledge, information and belief, and that I make this verification subject to penalties of 18 Pa. C.S. § 4904 pertaining to false statement authorities.



LEE A. STIVALE, ESQUIRE

Date: August 23, 2010

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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CERTIFICATE OF SERVICE

I, Lee A. Stivale, Esquire, hereby certify that I have this day served a true and correct copy of the foregoing document upon the parties listed below by overnight delivery (Federal Express) properly addressed and postage prepaid to

Ward Smith, Esquire
Legal Department
Exelon Corporation
2301 Market Street
Philadelphia, PA 19103

Law Offices of Vincent B. Mancini & Associates

By: 

LEE A. STIVALE, ESQUIRE
Attorney for Complainants

Date: August 23, 2010

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