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November 4, 2010

VIA FEDERAL EXPRESS

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

Re: Ellington Condominium Association v. Trigen-Philadelphia Energy Corporation
Docket No. C-2009-2092612

Dear Secretary Chiavetta:

Enclosed are an original and ten (10) copies of **Trigen-Philadelphia Energy Corporation's Reply Brief to Administrative Law Judge Cynthia Williams Fordham** and Certificate of Service in the above-referenced matter. Kindly date-stamp the extra copies and return them to me in the self-addressed, stamped envelope provided. Thank you for your cooperation.

Very truly yours,

Barnett Satinsky

BS:cs
Enclosures
cc: All parties listed on Certificate of Service (w/enclosure) (via Federal Express)
Administrative Law Judge Cynthia Williams Fordham (w/enclosure) (via Federal Express)
Lawrence W. Plitch, Esq. (via email, w/enclosure)
Mr. Michael J. Smedley (via email, w/enclosure)
Christine Soares, Esquire (via email, w/enclosure)

COMMONWEALTH OF PENNSYLVANIA
BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Ellington Condominium Association, Complainant	:	
v.	:	Docket No. C-2009-2092612
Trigen-Philadelphia Energy Corporation, Respondent	:	

**TRIGEN-PHILADELPHIA ENERGY CORPORATION'S
REPLY BRIEF TO
ADMINISTRATIVE LAW JUDGE CYNTHIA WILLIAMS FORDHAM**

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November 4, 2010

I. INTRODUCTION

Complainant Ellington Condominium Association's ("Ellington") Main Brief is replete with mischaracterizations of the Record in numerous material respects. Rather than address the evidence presented, Ellington resorts to rhetoric, unfounded supposition and hyperbole in an effort to justify its baseless Complaint. It is often said that if you don't have the facts, argue the law; and if you don't have the law, argue the facts. In this case, Ellington has neither, and appeals instead to emotion.

The misstatements start right in the opening paragraph. First, Ellington argues that its usage should not be billed because the "costs and fees [are] likely to exceed the amount in dispute." If Ellington is referring to attorneys' fees, Ellington is the party who chose not to pay its bills, and then ignored the Administrative Law Judge's Order (which Ellington's counsel had not opposed) to pay the finance charge associated with the undisputed portion of the bills. This resulted in Trigen-Philadelphia Energy Corporation ("Trigen") having to file a Motion for Sanctions and having to use time intended for the case in chief having to pursue its Motion, which was granted. In a similar vein, after Ellington stipulated to Christopher Hastings' qualification as an expert, it then spent considerable time trying to attack his expertise. If the proceedings were elongated and meandered, Trigen is the party which has the most to complain of, not Ellington.

On the other hand, if Ellington is arguing that the finance charges are a steep price to pay for not paying one's bills, the finance charge is a proper part of Trigen's tariff, of which Ellington was well-aware. If it did not want to incur those charges, even while disputing the underlying bills, it could have paid the bills on time, reserving the right to challenge the bills. Again, Ellington chose not to follow this course, just as it chose not to approach its unit owners

about an increased budget or special assessment to pay for its energy usage. *See* Trigen's Main Brief at pp. 10-11. If Ellington merely overlooked the financial consequences to it of not paying their bills in a timely manner, it has no one to blame but itself.

Second, Ellington again challenges Mr. Hastings standing as an expert — to which Ellington stipulated, on the record, following *voir dire*. Given the testimony of Gilbert Schonour, it was entirely appropriate for Trigen to call Mr. Hastings as a rebuttal expert witness. Ellington was apprised in advance of the second hearing day that Mr. Hastings would be called, his biographical and professional information was given to Ellington in advance of hearing and Ellington raised no objection whatsoever to Mr. Hastings testifying.

Rather than attack his substantive testimony, Ellington tries — again — to attack his credentials for the same spurious reasons it belatedly raised at hearing and which the ALJ found untimely (N.T. 285:1-3). This included his state of residence and his alleged inability to testify competently about design work because he carries a New Hampshire engineering license and his office is located in Boston, Massachusetts. None of this is relevant to this proceeding. Given his worldwide client base, the fact that chillers (and the engineering principles that drive them) do not vary from state to state and, most importantly, the fact that Ellington accepted him as an expert witness in steam generation and steam heating and cooling systems (N.T. 254:20-21; 259:10), it defies logic why Ellington continues down this path.

Third, and more to the point of this proceeding, Ellington contends, incredibly at this point in this case, that there is not "any morsel of evidence to suggest that its meters are accurate despite its own emails and actions to the contrary." Ellington conveniently ignores the testimony of Messrs. Ripanti, Batterman and Torres, who uniformly testified that the meters were not inaccurate, as demonstrated by two different meters, built on two different technologies, each

being read at least two different ways. Ellington conveniently ignores the metering data presented as exhibits. Most incredibly, however, Ellington ignores the testimony of its own expert witness, Mr. Schonour, who testified: "I don't believe the meters are reading inaccurately. I think they are calibrating properly; I think they are good meters; I think the meters are reading accurately." *See* Trigen's Main Brief at p. 12.

The six lines of Ellington's opening paragraph in its Main Brief are indicative of the weakness in its overall argument. For ease of comprehension, Trigen will respond to Ellington's arguments by topic.

II. THE METERS AND THE COMMUNICATIONS LINKS

As noted earlier, there are two meters at Ellington which are used to measure the consumption of steam used for cooling purposes. The meters are built on two different technologies. Each meter was read at least two different ways for the months in question: either by the Telog method, the Totalizer method or manual readings. *See* Trigen's Main Brief at pp. 16-17 and 24. In the month of July, when the communications link with Trigen's office was not functioning for a period of time, instead of a Totalizer reading, a manual reading was taken in addition to the Telog reading. Thus, for every relevant time period, there were a total of four separate readings taken (two methods on each of two meters), which corroborated the accuracy of the readings.

Ellington tries to argue that there was some import to an email reference to the effect that at the same time the communications link was down, there was a corresponding need for certain Trigen locations to have a pressure correction applied to them because they were reading "zero consumption." Ellington fails to acknowledge that its building was not one of the locations

which required pressure correction, because the particular device in issue had nothing to do with Ellington's readings. *See* testimony of Stefan Batterman, N.T. 312:18-19. This testimony was unchallenged and unrebutted.

Ellington also suggests that the high meter readings resulted from Trigen tampering with its own meters. As discussed in Trigen's Main Brief at pp. 23-25, Trigen was not on the premises of Ellington to have altered meter readings during the discrete time periods corresponding to the higher readings which Ellington is challenging. As to Ellington's latest contention, that Trigen manipulated the registrations remotely, this is flatly contradicted by Mr. Batterman. As he testified, by design there is no way to move the Totalizer values forward, even if one were inclined to do so. (N.T. 309:17 to 310:9). Other than counsel's baseless speculation, there simply is nothing to support a claim that Trigen intentionally tampered with Ellington's meters to drive up reported consumption.

III. RESPONSE TO THE COMMUNICATIONS ISSUE AND IDENTIFICATION OF THE MECHANICAL PROBLEMS

Ellington tries to make it appear that its General Manager, Ms. Clifton, was the one who identified a usage issue and brought it to the attention of Trigen. The transcript describes a very different set of circumstances.

Trigen, as a responsible utility, followed its normal process of having three separate individuals review the draft bill before it was issued. When that occurred, Trigen saw the unusual usage pattern and sent the metering department out to investigate. It was Trigen which first noticed Ellington's high consumption, not vice versa. Ellington disingenuously tries to fault Trigen for having done its job and to shift responsibility away from Ellington for properly maintaining and operating its own systems.

When Trigen performed its investigation, it realized that there were two factors leading to the apparent consumption. First was the fact that when the meters were read manually, the date of the reading was left as the intended reading date (July 14) rather than reflecting that the manual reading was taken on July 21. This inadvertent error resulted in an extra week's consumption being included in the July bill, and one fewer week's consumption being reflected in the August bill. Using the Telog data, Trigen was able to capture electronic readings for both Ellington meters showing what the consumption was for the correct 4-week period. Thus, as shown on Respondent's Exhibit 23, the actual consumption for June 12 to July 14 was 3,612.8 Mlbs. (rather than the 4,078.9 to which Ms. Clifton and Mr. Schonour have testified), and the consumption for July 14 to August 8 was 2274 Mlbs. (rather than the 1807.9 to which Ms. Clifton and Mr. Schonour have testified). *See and compare* Ellington's Main Brief at p. 9 and Respondent's Exhibits 22 and 23.

The second factor leading to the high consumption remained a puzzle at the time. However, from further investigation and examination of Ellington's maintenance records, Messrs. Ripanti, Scanlan, Batterman and Hastings testified that it now is apparent that the second reason for the high consumption had nothing to do with Trigen's meters or meter-reading capability, and everything to do with Ellington's internal systems. Foremost among the issues was Ellington's use of two chillers, rather than one chiller, and two chilled water pumps, rather than one chilled water pump, during the periods in question. Other contributing factors were the building occupancy (which was lower in 2006 and 2007) and cooling degree days (which were higher in the comparable billing months in 2006 and 2007). Respondent's Exhibits 22 and 23.

Ellington's analysis of its consumption fails to take into consideration the correction which was made by Trigen for the "extra week" attributed to the July billing period rather than

the August billing period. As testified by Mr. Ripanti (N.T. 194:11 to 196:17; 207:13 to 208:5; 213:13-21; Respondent's Exhibits 22 and 23), while the consumption for the July billing period was higher than prior years, it was not as high as Ellington contends. Likewise, although Ellington did not contest the bill for the August billing period, that consumption was higher by a week than Ms. Clifton and Mr. Schonour recognize in their testimony, and also was higher than consumption in the prior two years.

At various points in its Main Brief Ellington underscores that a particular event which they claim occurred late in **September** 2008 could not have affected the billings in issue. That is not the point. What is to the point is that according to the records prepared by Ellington's mechanical contractor at the time (and contrary to Ellington's internal chiller logs[1]), it is clear that during some portion of the August billing period, centered around **July** 24, Ellington could not run either of its two chillers while the system was taken out of service for repairs (N.T. 203:20-25; Respondent's Exhibit 20 at sheet 13). Coupled with the adjustment for the "extra" week which belonged in the August billing period, it is apparent that August consumption also was significantly higher than in prior years; yet Ellington paid that bill without complaint.

Although this case has evolved since the initial analysis in September 2008, Ellington continues to cling to the notion that it can succeed by focusing on the defective steam traps between the two Ellington meters, and argues that they could not have been the primary source of the higher consumption. Ellington's Main Brief at pp. 17-18. However, as Messrs Ripanti, Scanlan and Batterman all testified, the traps which were tested and repaired after the summer of 2008 were not the most significant traps where the greatest amount of leakage would have been

[1] Although Ellington contends in its Proposed Finding of Fact 31 that the system was "continually monitored," that claim seems highly unlikely given the fact that Ellington had a single building engineer and its logs were not maintained on the weekends (N.T. 207:1-6, Respondent's Exhibit 20).

most likely. Those traps were located downstream of Meter #3, on the chillers themselves, and were never tested by Ellington. *See* Trigen's Main Brief at p. 22.

Throughout the entire peak cooling season in 2008, Ellington customarily ran two chillers (and two chilled water pumps) rather than only one, as it had in the past. In at least two other shorter time frames (one in September 2009 and one in July 2010) it again ran two chillers (N.T. 215:24 to 216:23; 219:2 to 221:4; Respondent's Exhibits 34 and 38). Each time they did this, there was a direct correlation to a rise in steam consumption. The information was available for all to see. The fact that Mr. Schonour chose not to open his eyes and look at this information does not mean the events did not occur.

IV. ELLINGTON'S ATTACKS ON TRIGEN'S EXPERT WERE MISPLACED AND TOTALLY UNJUSTIFIED

As noted earlier, having failed to anticipate that Trigen would not allow Mr. Schonour's testimony to go unchallenged, and having failed to demonstrate anything substantively wrong with his testimony, Ellington proceeds to direct wild, pot shots at him, hoping that one of its stray bullets finds its way to the mark. Not only do they miss the bull's eye; they don't even hit the target.

As presented earlier, Ellington's suggestion that Mr. Hastings residency and place of work outside of Pennsylvania have anything to do with this case is entirely irrelevant. This is not a medical malpractice case where the standard of care in a particular community is germane. Chilled water systems don't run differently in Boston than they do in Philadelphia.

Equally misplaced was Ellington's attempt to intimidate Mr. Hastings by suggesting that his testifying about how absorption chillers operate, and what the records on this particular

system reveal, constituted the unauthorized practice of engineering because his primary engineering license is held in the state of his residence, New Hampshire.

Next, Ellington tries to attack Mr. Hastings credibility based on the fact that he has done work for Trigen previously. As Mr. Hastings testified, most of the work he has performed for Trigen and its affiliates already is completed (N.T. 274:7-21), and none of the work for this client involved testifying (N.T. 274:11-15); all of it involved substantive project work. To that point, Mr. Hastings clearly is not a "professional witness," never having been called on to testify as an expert previously (N.T. 271:18-25).

The suggestion that Mr. Hastings' testimony somehow has been "bought" pales in comparison to the money being thrown at Mr. Schonour by Ellington. Mr. Schonour received $6,000 with a promise for more at a later date. *See* Trigen's Main Brief at p. 11. In sharp contrast, Mr. Hastings arrangement was to work on an hourly basis with a $3,500 cap. Contrary to Ellington's Proposed Finding of Fact 52, Mr. Hastings did not receive, and there was no testimony that he received, any type of "retainer." He estimated how many hours the engagement would consume, and he was paid for that time at his normal hourly rate (N.T. 283-3-17). In contrast to Mr. Schonour, who negotiated a fee level based on his product, there were no preconditions to Mr. Hastings's engagement (N.T. 114:18 to 115:12).

Ellington then proceeds to argue that Mr. Hastings was not given access to the relevant documents in this case, and therefore was in no position to opine on Ellington's system. Once again, Ellington ignores the Record. As Mr. Hastings testified, he was given, and he reviewed, binders of all the engineering documents as well as the transcript and relevant exhibits from the first day's hearing in this case. (N.T. 278:1 to 283:8).

As to Ellington's contention that Mr. Hastings could not draw conclusions without having examined Ellington's system first-hand, one is reminded that Mr. Schonour examined the system, yet he drew several incorrect conclusions about how the system worked (some of which he later acknowledged when testifying). Further, although Mr. Schonour had access to all the same documents as did Mr. Hastings, Schonour conveniently ignored relevant information which they offered.

Ellington misrepresents the Record when it contends that Mr. Hastings was not informed about what Ellington describes as "the significant computer problems suffered by Trigen at the time period covered by the July Invoice and the September Invoice." It cites N.T. p. 302, lines 23-25 and p. 303, lines 1-8. Yet here was the actual colloquy on the Record:

> Q. And do you recall receiving anything from Trigen concerning any computer glitches or any collection in data problems during the time period in question?
>
> A. Nothing **other than what we have been describing relative to the adjustment that needed to be made.**
>
> Q. Nothing related to IT or computer issues and not able to access Telog data?
>
> A. **That was what was stated that they couldn't access the Telog data.**

(emphasis added) N.T. 302:23-25 to 303:5.

In its Proposed Finding of Fact 56, Ellington is critical of Mr. Hastings's "not having been provided any information concerning the calibration of the Trigen steam meters used at Ellington." There was no need for him to review calibration reports, given Mr. Schonour's admission that the meters were operating properly. A rebuttal witness need not rebut a fact which already has been conceded by the witness whose testimony he is rebutting.

The fact is that Mr. Schonour's testimony and report were so grossly erroneous that Mr. Hastings needed little time to identify a host of inaccuracies and dispose of Schonour's unsupported — and unsupportable — conclusions. Mr. Schonour's sole explanation for Ellington's higher consumption readings was his folksy tale about a problem two decades ago in Delaware where he found a data entry error which perpetuated an ongoing miscalculation of a customer's bills. However, he acknowledged that he found no evidence of such a problem here, and that he did not know Trigen's software system well enough to be able to evaluate it (N.T. 151:21-25). Thus, this was nothing more than rank speculation on his part. The contrast between Mr. Hastings's methods and Mr. Schonour's can best be captured by their respective approaches towards the ability of Ellington's two 250-Ton chillers to consume the amount of steam reported. Schonour claimed "[t]here is no history of any kind to suggest that they *could* generate a 2,000 pound a month peak" (emphasis added) (N.T. 134:20-21). Hastings, in addition to relying on his own contrary experience, checked the manufacturer's literature, which revealed that the reported consumption was only about 75% of what the two chillers were capable of consuming (N.T. 141:22 to 142:6; 260:11 to 261:3; 263:6 to 264:14).

V. ELLINGTON'S FAILURE TO PROVE A *PRIMA FACIE* CASE OR TO MEET ITS BURDEN OF PROOF

Ellington makes the unsupported conclusion that the threshold for making a *prima facie* case is low. Accordingly, Ellington suggests that it has met its *prima facie* case merely by demonstrating that "the July Invoice and the September Invoice were each significantly different from the normal pattern of Ellington's usage." The well-settled precedent established by the Pennsylvania Commonwealth Court and the Commission does not support such a limited showing. Ellington has failed to show that during the time in question: (1) the number of

occupants had not changed; (2) the potential for energy use was low; and (3) the prior billing history showed no abnormalities. *Waldron v. Phila. Elec. Co.*, 54 Pa. P.U.C. 98 (1980); *see also Milkie v. Pa. P.U.C.*, 768 A.2d 1217, 1220 (Pa. Commw. Ct. 2001); *Owzar v. UGI Utils.*, C-2010-2156070, 2010 Pa. PUC LEXIS 205, at *6 (Initial Decision by ALJ David A. Salapa, July 13, 2010), *aff'd by Commission* (Sept. 17, 2010). The evidence is undisputed that building occupancy changed markedly, Ellington was operating more steam driven mechanical equipment in 2008 than in 2007 and there were variations in cooling degree days from year to year and during particular billing periods. Although Ellington is permitted to prove its *prima facie* case by circumstantial evidence, merely demonstrating that the July Invoice and the September Invoice were higher than invoices in prior years, without more, is not enough for Ellington to meet its burden.

Even if we were to accept, *arguendo*, that Ellington had met the threshold for a *prima facie* case, it has not proven by a preponderance of the evidence that the amounts it was invoiced for steam consumption during the months in question were erroneous. Despite Ellington's focus in its main brief on the burden shifting, the burden of proof always remains with Ellington. *Milkie*, 768 A.2d at 1220; *see also Owzar*, 2010 Pa. PUC LEXIS 205, at *7 ("[T]he 'burden of proof' never shifts. It always remains with the Complainant.").

Here, Trigen not only presented evidence that the meters had been checked and were accurate, but also presented expert testimony offering several plausible explanations for how the increased usage could have been caused by having two chillers running at once. Ellington's argument that Trigen's evidence primarily consisted of testimony that the meters were accurate is disingenuous. After all, even Ellington's own expert agreed to that fact. To the contrary, there was considerable testimony and overwhelming evidence that the higher consumption in 2008

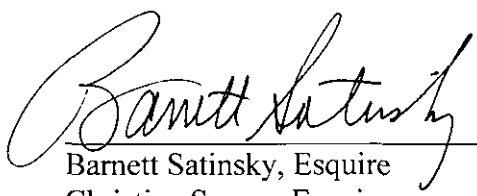
was a result of a series of factors, including the operation of more steam driven mechanical equipment, greater building occupancy, a greater number of cooling degree days and Ellington's ongoing problems with its own mechanical systems. Ellington's mere attempts to establish a *prima facie* case, on the other hand, fell far short of the mark.

Regarding Ellington's request for attorneys' fees and costs, it cites no authority, and such recovery would not be warranted in this case in any event. Ellington's actions unnecessarily protracted this case, and its failure to adhere to a properly entered Order (to which its counsel had consented) could have warranted contempt proceedings. If any party would be entitled to attorneys fees in this case, it would be Trigen, rather than Ellington.

VI. CONCLUSION

For the reasons set forth in Trigen's Main Brief and this Reply Brief, and based on the Record of this case and applicable legal standards under the Pennsylvania Public Utility Code, the Complaint of Ellington Condominium Association must be dismissed.

Respectfully submitted,



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November 4, 2010

COMMONWEALTH OF PENNSYLVANIA
BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Ellington Condominium Association	:	
	:	
v.	:	**Docket No: C-2009-2092612**
	:	
Trigen-Philadelphia Energy Corporation	:	

CERTIFICATE OF SERVICE

I hereby certify that I have on this day served a true copy of **Trigen-Philadelphia Energy Corporation's Reply Brief to Administrative Law Judge Cynthia Williams Fordham** upon the participants listed below, in accordance with the requirements of 52 Pa. Code § 1.54 via Federal Express mail, postage prepaid:

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